

# *Fordham International Law Journal*

---

*Volume 7, Issue 1*

1983

*Article 1*

---

## The Harmonization of European Products Liability Law

William Boger\*

\*

Copyright ©1983 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The Harmonization of European Products Liability Law

William Boger

## **Abstract**

In this Note, the history and reasons for proposing the Draft Directive are briefly discussed. The existing products liability laws in France, the Federal Republic of Germany and the United Kingdom are examined. The proposed Directive is analyzed in detail, and the effects of its adoption on the existing national systems are evaluated. Finally, the various systems of law are applied in a hypothetical product liability case.

# THE HARMONIZATION OF EUROPEAN PRODUCTS LIABILITY LAW

*William Boger\**

## INTRODUCTION

“Products liability” is liability for personal injury or property damage caused by a product during use or consumption.<sup>1</sup> Under modern concepts of products liability there are three theories an injured party can assert against the producer or seller of a defective product: negligence, breach of contract (breach of warranty) and strict tort liability.<sup>2</sup> The distinction between contract and tort can be of great significance in determining possible defendants, standing to sue, burden of proof, and measure of damages. In contrast to other nations which have approached the products liability area through contract law obligations, the United States has favored a tort law approach<sup>3</sup> based on a duty not to injure the user of a product.<sup>4</sup>

---

\* LL.M. candidate, Georgetown University Law Center; Legal intern at the Commission of the European Economic Community; B.A. 1979, Ohio State University; J.D. 1982, University of Toledo College of Law. The author would like to thank Ute Heckman and Philip Bruno for their assistance in the preparation of this Article.

1. N. REICH, CONSUMER LEGISLATION IN THE E.C. COUNTRIES 93 (1980).

2. Orban, *Products Liability: A Comparative Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT’L & COMP. L. 342, 344-45 (1978).

3. *Id.* at 345.

4. *Id.* “Strict liability” in product cases basically means that negligence on the part of the seller of a defective product need not be proved by the injured plaintiff.” Orban, *supra* note 2, at 345. “Two . . . theories have been used in the United States . . . to determine liability: warranty (contract) and tort.” *Id.* In an action based on warranty, the plaintiff must show that the warranty existed, that it was breached, and that it was the proximate cause of the injury. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 3.1, at 429 (2d ed. 1974). In contrast, other countries mandate that the plaintiff must be in privity of contract with the seller, show that the product was not of “merchantable quality” or was defective, and prove that it caused the injury. *See, e.g.*, Orban, *supra* note 2, at 345 (discussion of United States and West German contract actions). “Strict tort liability” . . . means that the claimant must prove . . . product was in a defective condition when it left the seller’s control and . . . the defect caused the plaintiff’s injury while . . . being used for the purpose intended.” *Id.* In the United States, the liability is strict but not absolute in nature. The mere occurrence of injury will not always impose liability upon the seller of the product. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This type of strict liability is not liability without fault, rather it relieves the plaintiff of the burden of proving that the seller of the product was negligent. *Id.* This is not a procedural shifting of the burden of proof, as it is in countries such as West Germany, but rather a principle of substantive law. *See* Orban, *supra* note 2, at 345-46.

The United States has been the world leader in imposing liability on manufacturers of defective products.<sup>5</sup> Greater liability for manufacturers is slowly developing abroad, notably by European nations through national laws, and through uniform legislation proposed by the European Economic Community<sup>6</sup> (Community or EEC). The Community has proposed a Directive<sup>7</sup> approximating the various national products liability laws of the member states.<sup>8</sup> The major emphasis of the proposed Directive is the imposition of strict liability on producers and distributors of defective products.<sup>9</sup>

In part I of this Article, the history and reasons for proposing the Draft Directive are briefly discussed. The existing products liability laws in France, the Federal Republic of Germany and the United Kingdom are examined in part II. In part III, the proposed Directive is analyzed in detail, and the effects of its adoption on the existing national systems are evaluated. Finally, in part IV, the various systems of law are applied in a hypothetical product liability case.

## I. BACKGROUND

Several organizations have developed proposals in efforts to coordinate European and international developments in products liability law.<sup>10</sup> The Hague Convention on Private International Law adopted an International Convention on conflicts of laws in

---

5. Product liability is essentially an American invention, although its origins can be traced to the English case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842).

6. Phillips, *Products Liability Synopsis*, 28 DRAKE L. REV. 318 (1978).

7. A directive is binding upon each member state as to the result to be achieved, but it leaves to national legislation the choice of form and methods used to implement the obligation. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 189, para. 3, 298 U.N.T.S. 79 [hereinafter cited as EEC Treaty].

8. See 19 O.J. Eur. Comm. (No. C 241) 9 (1976) [hereinafter cited as Annex II]; General Secretariat, Council of Eur., Interim Report to the Permanent Representatives Committee annex (July 13, 1981) [hereinafter cited as Annex I].

9. Annex I, *supra* note 8, art. 1. Article 1 states that "the producer shall be liable for damage caused by a defect in his product." *Id.* For a discussion of who may be deemed a producer under the Draft Directive, see *infra* note 184 and accompanying text.

10. See Hanotiau, *The Council of Europe Convention on Product Liability*, 8 GA. J. INT'L & COMP. L. 325 (1978); Orban, *supra* note 2, at 342; Reese, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMP. L. 311 (1978).

ucts liability cases.<sup>11</sup> In 1974, the Council of Europe<sup>12</sup> completed a Draft Convention on products liability identical in many respects to the proposed EEC Directive.<sup>13</sup> The major difference is that the Convention proposed by the Council of Europe applies only in personal injury cases; the Community's proposal applies in property damage cases as well.<sup>14</sup>

The Commission of the European Communities,<sup>15</sup> fearing the distorting effects in competition that diverse laws could cause, adopted the Proposal for a Directive (Proposed Directive or Directive) in July 1976 to harmonize the national systems. The Commission submitted the Directive to the Council of Ministers<sup>16</sup> on September 9, 1976. In accordance with article 100 of the Treaty of

---

11. Hague Convention on the Law Applicable to Production Liability, Oct. 21, 1972, 11 I.L.M. 1283 (1972) [hereinafter cited as Hague Convention]. See also Reese, *supra* note 10, at 311 (discussing the Hague Convention). The conference sponsored by the governments of the 28 member states dealt with private international law issues. By 1973, it had prepared a Convention that primarily dealt with conflicts of laws questions rather than substantive issues regarding liability resulting from product manufacture and use. Orban, *supra* note 2, at 374.

12. The Council of Europe was founded in 1949 by 10 European nations, principally for military and economic purposes. COUNCIL EUR. STAT., reprinted in 87 U.N.T.S. 103 (1951). See Hanotiau, *supra* note 10, at 326.

13. See Orban, *supra* note 2, at 376 (discussing the EEC Directive).

14. *Id.*

15. The Commission consists of 14 members, who are appointed through mutual agreement among the member states. EEC Treaty, *supra* note 7, art. 157. Two are appointed from the United Kingdom, France, West Germany, and Italy, and one from each of the other countries. COMM. OF THE EUR. COMMUNITIES, THE INSTITUTIONS OF THE EUROPEAN COMMUNITY, EUROPEAN FILE 1 (1982) [hereinafter cited as EUROPEAN FILE]. Each Commissioner acts independently of the Council and his respective national government. EEC Treaty, *supra* note 7, art. 157. The Commission acts as the guardian of the treaties, and has the power to take any organization or individual violating a treaty provision or Community legislation before the European Court of Justice. EUROPEAN FILE, *supra*, at 2. The Commission alone has the power to initiate legislative proposals, and acts as the advocate of the Community's interests in the meetings of the Council. *Id.* It is divided into 20 Directorates-General, and each Commissioner is responsible for one or more areas of Community activity. *Id.*; see also COMM. OF THE EUR. COMMUNITIES, THE INSTITUTIONS OF THE EUROPEAN COMMUNITY, WORKING TOGETHER 29 (1982) [hereinafter cited as WORKING TOGETHER]. See generally EEC Treaty, *supra* note 7, arts. 155-163.

16. Although the Council is the primary legislative body for the EEC, it is not identical to a national government or cabinet. The Council is made up of the representatives of the governments of the member states. See EEC Treaty, *supra* note 7, art. 146. Each government sends one of its Ministers to the meetings in Brussels, depending upon the subject to be discussed. For instance, if the problem has to do with agriculture, the national Ministers for Agriculture meet and become the Council. Generally, when the Council is composed of the

Rome,<sup>17</sup> the Council submitted this Proposal to the European Parliament.<sup>18</sup> The Legal Affairs Committee, in conjunction with the Committees on Economic and Monetary Affairs, Environment and Public Health and Consumer Protection, examined the Proposal.<sup>19</sup> The full Parliament's opinion,<sup>20</sup> along with that of the Economic and Social Committee,<sup>21</sup> were submitted to the Commission, which made certain amendments to its Proposal.<sup>22</sup> The amended Proposal was submitted to the Council at the end of 1979, and its Working Party on Economic Questions began to examine the proposal in January of 1980.<sup>23</sup> The Working Party has held eleven meetings to date during which the substance of the amended Proposal has undergone significant change.<sup>24</sup>

---

respective Foreign Ministers, it has overall control over Community affairs. The Presidency of the Council rotates among member governments at six month intervals. *Id.* Decisions are made in the Council by a system of weighted majority voting. *Id.* art. 148. In practice, however, most decisions are made by consensus to preserve political unity. *See generally id.* arts. 145-154.

17. *Id.* art. 100. Article 100 states: "The Assembly and the Economic and Social Committee shall be consulted concerning any directives whose implementation in one or more of the Member States would involve amendment of legislative positions." *Id.*

18. Since 1979, the European Parliament has consisted of 434 members elected through direct elections in each of the member states. EUROPEAN FILE, *supra* note 15, at 4. The representatives do not sit in national sections; they are instead divided into Community level political parties, the largest of which is the Socialists, followed closely by the Christian Democrats. *Id.*; WORKING TOGETHER, *supra* note 15, at 21-22. *See generally* EEC Treaty, *supra* note 7, arts. 131-144 (describing the European Parliament).

19. The Parliament monitors the work of the Commission on a regular basis through the meetings of its various committees on each sector of the economy. EUROPEAN FILE, *supra* note 15, at 5. The appropriate Commissioner or his representative must appear before the committee to respond to written or oral questions regarding decisions taken by the Commission, and proposals referred to the Council. *Id.*; WORKING TOGETHER, *supra* note 15, at 23.

20. O.J. EUR. COMM. (No. C 127) 61 (1979).

21. O.J. EUR. COMM. (No. C 114) 15 (1978). The Economic and Social Committee consists of 156 expert representatives chosen from the various sectors of economic and social life. EEC Treaty, *supra* note 7, art. 193; EUROPEAN FILE, *supra* note 15, at 5. It must be consulted before decisions are taken on a large number of subjects, and may submit opinions on its own initiative. The members are chosen from lists supplied by the member states, and are grouped into three broad categories: employers, trade unions, and independents. EUROPEAN FILE, *supra* note 15, at 5. They serve for four years in their personal capacity, and are not bound to act on orders from their respective governments. EEC Treaty, *supra* note 7, art. 194. The work is carried out in sections that deal with one or more specialized fields. *Id.* art. 197. *See generally id.* arts. 193-198 (describing the Economic and Social Committee).

22. *See infra* note 192.

23. *See infra* note 28.

24. Compare Annex II, *supra* note 8 (original text) with Annex I, *supra* note 8 (present draft).

The procedures for the passage of Community legislation have been completed,<sup>25</sup> and the final decision of the Council of Ministers on the effective date of the Directive is awaited. A Council decision involves political compromise among competing national interests. This process has been hampered in part by the technical differences between the civil and common law systems in the EEC.<sup>26</sup> In addition, there remain differences of opinion as to whether certain substantive provisions should be included in the Directive.<sup>27</sup> The points at issue raise questions going to the very quality of the Directive.<sup>28</sup> A general question is whether harmonization should be used in its strict sense as a "maximum scope" solution,<sup>29</sup> or should set forth a "minimum scope" beyond which member states would remain free to set standards more favorable to consumers.

Three fundamental unresolved questions are: (1) should the producer of a defective product be held liable even if scientific and technical knowledge at the time the product was developed were inadequate for discovery of the defect (development risk)?; (2) should the producer's total liability be limited?; (3) should the producer be liable for personal injury only, or for property damage as well?<sup>30</sup> A Memorandum circulated in October 1982<sup>31</sup> established

---

25. Under its powers enumerated in article 155, EEC Treaty, *supra* note 7, art. 155, the Commission makes a proposal for a regulation, directive or decision. *See id.* art. 189. The Assembly, *id.* art. 137, and the Economic and Social Committee, *id.* art. 193, then give their opinions, and the amended proposal is then sent to the Council for approval, after which the proposed legislation becomes law. *See generally* D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE E.C. 107-69 (1976).

26. The civil system of law is based on written codes divided into sections covering certain areas of law such as commercial or civil law. *See generally* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY para. 63, at 79 (2d ed. 1978). *Stare decisis* does not generally form the basis of the law, as it does in common law countries. *Id.* para. 101, at 123-24. The role of the judge is not to make law, but rather to apply the law as written in the codes to the particular situation. *Id.* para. 70, at 87. However, where the written code does not adequately cover the problem in question, as in products liability, a body of jurisprudence does tend to form through judge made interpretations of the code sections. *Id.* para. 95, at 114-15.

27. General Secretariat, Council of Eur., Interim Report to the Permanent Representatives Committee 2 (July 13, 1981).

28. *Id.*

29. In essence, this is the principle of binding all member states without affording any scope for derogation. *Id.*

30. *Id.*

31. General Secretariat, Council of Eur., Memorandum to the Permanent Representatives Committee (Oct. 19, 1982).

the groundwork for compromise. The Memorandum indicated that the member states agreed that a system of strict liability for defective products should be instituted in all states, and that producer liability should not be limited.<sup>32</sup> Further, the member states agreed that each has the power to derogate from the principle of liability for development risks for certain product sectors, but only a state that recognizes liability for such risks can limit a producer's liability.<sup>33</sup>

The present Draft Directive imposes strict liability on the producer of a defective article for bodily injury and material damage caused by the defect.<sup>34</sup> An article is defective if it does not conform to the reasonable expectations of the consumer regarding safety.<sup>35</sup> A "producer" is the manufacturer of a final product, component part or raw material, or a dealer importing from a nonmember country or representing himself as a producer.<sup>36</sup> The plaintiff must show that the object was defective at the time the injury occurred, and that the defect caused the injury or damage.<sup>37</sup> There are limitations on producer liability for mass personal injury claims arising from one defect<sup>38</sup> and for property damage.<sup>39</sup> Further, the plaintiff must commence his action against the producer within a prescribed time after the discovery of the defect,<sup>40</sup> and the producer may avoid liability through a number of defenses.<sup>41</sup>

## II. NATIONAL PRODUCTS LIABILITY LAWS

The Draft Directive is intended to provide greater uniformity in products liability law in Europe by harmonizing relevant national laws.<sup>42</sup> Since the national laws will be effective until the Directive is implemented, and will exist to some extent even after

---

32. *Id.* at 1.

33. *Id.*

34. Annex I, *supra* note 8, arts. 1, 1A.

35. *Id.* art. 4.

36. *Id.* art. 2.

37. *Id.* art. 2A.

38. *Id.* art. 7.

39. *Id.*

40. *Id.* art. 8/9.

41. *Id.* art. 5.

42. Annex II, *supra* note 8, preamble paras. 3-5.



the Directive takes effect,<sup>43</sup> it is important to understand the basic elements of the various national systems. Thus, the products liability laws of France, the Federal Republic of Germany, and the United Kingdom will briefly be examined.

### A. France

As in many countries with civil codes written before the industrial age, there is no specific provision in French law for a manufacturer's product liability.<sup>44</sup> Courts have generally filled in the gaps through extrapolation and interpretation of Code sections detailing the duties of a seller.<sup>45</sup> The *responsabilité civile* of a producer is governed by general rules of contract and tort, which are relatively few in number.<sup>46</sup> French product liability has evolved primarily in contract, although the significance of *délictuel* (tort) remedies has increased markedly in the last few years.<sup>47</sup>

In principle, only a person in privity of contract can sue a seller in contract, and a person in privity cannot sue in tort.<sup>48</sup> The seller is considered a guarantor against "hidden defects"<sup>49</sup> but is not liable for "apparent defects" that the buyer could have discovered himself.<sup>50</sup> A product with a hidden defect may cause damage either to the purchaser or to a third party not in privity. In the first case the vendor's warranty is applicable;<sup>51</sup> in the second, the general rules of tort liability must be followed.<sup>52</sup> The Code provides a limitation period for bringing a personal injury action against the

---

43. See *id.* art. 11. All rights arising from national law on contractual obligations remain unaffected by the Directive. *Id.*

44. The French Civil Code was written in 1804 during the Napoleonic era. Sarrailhé, *France* in 1 *PRODUCT LIABILITY—A MANUAL OF PRACTICE IN SELECTED NATIONS* para. 1.11, at 1 (H. Stucki & P. Altenburger eds. 1981) [hereinafter cited as *MANUAL, France*].

45. *Id.* paras. 1.11-.12, at 1.

46. Only nine articles of the Civil Code deal with contracts, *CODE CIVIL* [C. CIV.] arts. 1641-1649 (83e ed. Petits Codes Dalloz 1984) (Fr.), and three with torts, C. CIV. arts. 1382-1384 (Fr.).

47. See H. TEBBENS, *INTERNATIONAL PRODUCT LIABILITY* 83 (1979).

48. See Orban, *supra* note 2, at 347. This rule prevents parties to an action from relying on liability for tort when there is privity of contract and vice versa. This rule, however, does not apply in the event of a criminal offense. See A. EUR. D'ETUDES JURIDIQUES ET FISCALES, *PRODUCT LIABILITY IN EUROPE* 56 (1975) [hereinafter cited as A. EUR.].

49. C. CIV. art. 1641 (Fr.) (hidden defects).

50. *Id.* art. 1642 (apparent defects).

51. See A. EUR., *supra* note 48, at 56.

52. See, e.g., C. CIV. art. 1382 (Fr.).

seller. This period is subject to judicial discretion depending on the nature of the defect and the customs of the place where the sale occurred.<sup>53</sup>

Article 1643 of the Civil Code permits the seller to exclude liability through his contract with the buyer.<sup>54</sup> In practice, however, this principle has been so qualified by jurisprudence that the possibility of such a clause being effective has been greatly diminished.<sup>55</sup>

An implied warranty against hidden defects that would render the item unusable for the purpose intended is imposed against the seller, and contract liability arises from the breach of this duty owed to the buyer.<sup>56</sup> This principle has been extended to include the warnings and instructions given for products potentially dangerous to the buyer.<sup>57</sup> This extension arises from a presumption of bad faith on the part of the producer that is essentially irrebuttable.<sup>58</sup>

Articles 1382-1384 of the Civil Code<sup>59</sup> govern tort law. The scope of tort remedies in products liability cases is limited due to the jurisprudential adaptation of contractual remedies to meet situations where the parties are not in privity.<sup>60</sup> Mere users of a product and those injured by a product used by another must bring actions in tort<sup>61</sup> or more specifically, under article 1384,<sup>62</sup> which imposes liability for damage caused by a thing under the defendant's control.<sup>63</sup> Only those not in privity of contract with the seller can sue in tort,<sup>64</sup> and those in privity do not include family members or guests of the buyer.<sup>65</sup> Thus, mere users and those injured by a product used by another must sue in tort.<sup>66</sup> However, as in contract remedies, both suppliers and manufacturers are potential defendants.<sup>67</sup>

53. *Id.* art. 1648. This is a relatively short period for nonprofessional (noncommercial) sellers, but is longer for professionals. It starts when the defect manifests itself to the buyer, and courts tend to give favor to the claimant. See H. TEBBENS, *supra* note 47, at 86, 95-96.

54. C. CIV. art. 1643 (Fr.).

55. See Orban, *supra* note 2, at 346-47.

56. C. CIV. art. 1641 (Fr.).

57. See Orban, *supra* note 2, at 349.

58. See Annex I, *supra* note 8, art. 11.

59. C. CIV. arts. 1382-1384 (delicts and quasi-delicts) (Fr.).

60. H. TEBBENS, *supra* note 47, at 90.

61. *E.g.*, C. CIV. art. 1382 (Fr.).

62. *Id.* art. 1384.

63. *Id.*

64. See Orban, *supra* note 2, at 347.

65. *Id.* at 348.

66. H. TEBBENS, *supra* note 47, at 90.

67. C. CIV. art. 1382 (Fr.).

Under general tort rules the manufacturer's "fault" lies in putting a defective product into circulation, and no showing of negligence is required.<sup>68</sup> The plaintiff has a greater burden when proceeding against an intermediate supplier rather than the actual manufacturer.<sup>69</sup> In such case, the plaintiff must trace the defective condition to a fault in storage, transport or other negligent act in distribution to establish his *prima facie* case.<sup>70</sup> A seller's failure to provide adequate product information is an increasingly important area of general tort liability.<sup>71</sup> With respect to chemicals and drugs, courts have held manufacturers to stringent duties of warning or instruction in the safe use of a product.<sup>72</sup>

Courts have been progressive in presuming "fault" and imposing liability where the defendant was found to be in control of the object causing the injury.<sup>73</sup> The keeper of the product (guardian) is liable for the damage it causes unless he proves that the damage was due to another person or was a *force majeure*.<sup>74</sup> The scope of the term guardian is broad, and may include an innocent retailer.<sup>75</sup> However, this problem is mitigated somewhat by allowing an end supplier to seek indemnity from his immediate vendor through a third party procedure.<sup>76</sup> In addition, certain French courts have held that the manufacturer is the guardian of the "structure" of the product which in effect creates a form of strict liability.<sup>77</sup>

One distinction between tort and contract law can be seen in the limitation period under which a plaintiff can bring an action

---

68. H. TEBBENS, *supra* note 47, at 91.

69. *Id.*; see generally MANUAL, *France*, *supra* note 44, at 47-49.

70. H. TEBBENS, *supra* note 47, at 91.

71. *See id.*

72. *Id.* at 91-92.

73. *See* C. CIV. art. 1384 (Fr.). *See also* Orban, *supra* note 2, at 349.

74. Article 1384(1) of the French Civil Code has been construed to involve a presumption of liability which assigns the keeper of the object the risk of unexplained accidents. *See* H. TEBBENS, *supra* note 47, at 92.

75. *Id.*; see also MANUAL, *France*, *supra* note 44, at 41, 47-49.

76. H. TEBBENS, *supra* note 47, at 92.

77. Orban, *supra* note 2, at 349. The courts' argument is that while the manufacturer relinquishes control over the behavior of his product when he puts it into commerce, the internal flaw causing the damage suggests an insufficient control over its structure. Therefore, he is held liable as the guardian of the structure. For example, producers of bottled beverages are held liable for defects causing the bottle to explode or to contain foreign objects. *See* H. TEBBENS, *supra* note 47, at 93. In effect the bottler, rather than the bottle manufacturer, is held liable. *Id.*

against the seller. In contrast to the judicially determined "brief period" for a contract action, in tort there is a thirty year statute of limitations.<sup>78</sup> However, for civil tort actions stemming from a criminal offense, the claim must be brought within three years for "delicts" and one year for "contraventions."<sup>79</sup> The courts generally interpret these reductions in the thirty year period narrowly. Practically, plaintiffs seldom wait very long to bring a suit, due to the necessity of gathering evidence and technical data promptly.<sup>80</sup>

Another distinction between tort and contract actions involves the measure of damages. In tort, full compensation is given so that the plaintiff can be placed as nearly as possible in the same position as before the damage occurred.<sup>81</sup> In contrast, contract remedies are limited to such damages as are foreseeable to the defendant at the time the contract was concluded.<sup>82</sup> However, for "professional sellers," a higher standard applies and they must fully compensate the plaintiff.<sup>83</sup>

Of course, manufacturers and sellers have certain defenses to these claims. In contract, the manufacturer can claim misuse of the product by the plaintiff, or that the defect was manifest (vice apparent). Where plaintiffs are professional buyers or experts, the manufacturer can claim that the buyer should have discovered the defect through his expertise in the field.<sup>84</sup> In tort, the manufacturer can claim contributory negligence or assumption of the risk by the purchaser.<sup>85</sup> Assumption of the risk is a complete bar to recovery, while contributory negligence distributes the liability and the amount of damages recoverable according to the fault attributed to each party.<sup>86</sup>

---

78. C. CIV. art. 2262 (Fr.).

79. See H. TEBBENS, *supra* note 47, at 95. For criminal aspects of products liability, see MANUAL, *France, supra* note 44, at 37-39.

80. See H. TEBBENS, *supra* note 47, at 96.

81. See *id.* Courts often conclude that the manufacturer acted in bad faith, which opens the door to full recovery. *Bus. Am.*, Nov. 16, 1981, at 8, col. 3, para. 2.

82. C. CIV. art. 1150 (Fr.). See also H. TEBBENS, *supra* note 47, at 96.

83. See H. TEBBENS, *supra* note 47, at 96.

84. C. CIV. art. 1645 (Fr.).

85. See generally MANUAL, *France, supra* note 44, at 50-51 (producer's defenses).

86. N. REICH, *supra* note 1, at 104. Although this appears to be comparative negligence under United States law, European authorities refer to it as contributory negligence. See *id.* at 103-04; MANUAL, *France, supra* note 44, para. 5.22, at 50-51.

### B. *Federal Republic of Germany*

With the exception of strict liability imposed on drug manufacturers, there are no special rules regulating a producer's liability in the Federal Republic of Germany.<sup>87</sup> The courts tend to avoid the term "products liability" and instead use "producer's liability" because liability is not connected to the defective product itself, but to the individual whose negligence caused the injury.<sup>88</sup> The basis for general liability is found in the West German Civil Code<sup>89</sup> (BGB) and the Commercial Code (HGB). The BGB regulates producers' liability to the general public, whereas the HGB applies to contracts between merchants. A number of BGB provisions have been interpreted and developed into a body of tort and contract jurisprudence,<sup>90</sup> and although the distinction is made between tort and contract theories similar to that made under French law, it is important to note that a plaintiff may sue in both tort and contract even where the parties are in privity.<sup>91</sup> However, the rules under which the plaintiff seeks a remedy may affect the burden of proof and the amount of damages recoverable.<sup>92</sup> In practice, plaintiffs bring a claim in contract where possible, and if not, proceed under a tort theory.

Contract liability derives from articles 459-460 of the BGB, which set forth the liabilities imposed for the sale of defective goods.<sup>93</sup> A duty is imposed on the seller to guarantee the fitness of the product for normal use, or for the use contemplated according to the contract terms.<sup>94</sup> Damages other than rescission or price reduction are recoverable only where there is fraud or misrepresentation of the quality of that particular chattel.<sup>95</sup> There is also a

---

87. Von Braunschweig, *Federal Republic of Germany*, in 1 *PRODUCT LIABILITY—A MANUAL OF PRACTICE IN SELECTED NATIONS* para. 1.14 at 6 (H. Stucki & P. Altenburger eds. 1981) [hereinafter cited as *MANUAL, W. Ger.*].

88. *Id.*, para. 1.14, at 6.

89. For the general liability in contracts, see *BÜRGERLICHES GESETZBUCH* [BGB] §§ 242, 276, 286, 459-480II (*W. Ger.*). For torts, see BGB §§ 249-292, 433, 823-831 (*W. Ger.*).

90. Orban, *supra* note 2, at 351. See BGB §§ 276, 278, 459-460, 480II, 563, 823, 831 (*W. Ger.*).

91. See Orban, *supra* note 2, at 351.

92. *Id.* at 353.

93. See BGB §§ 459-460 (*W. Ger.*).

94. *Id.* § 459.

95. *Id.* §§ 463, 480II. The courts have been liberal in construing special qualities from either advertising or conduct by the manufacturer. Orban, *supra* note 2, at 353.

requirement of privity of contract between the buyer and seller. This requirement has served to limit contract actions for a producer's liability. The plaintiff's burden has been made even heavier by the ability of the manufacturer to exclude liability through contract disclaimers and provisions.<sup>96</sup>

As an alternative to liability arising from warranty against defects the courts have developed the concept of "positive breach of contract." This has been achieved by analogizing the duties of a debtor to his creditor under articles 242, 276 and 286 of the BGB with the duty of the seller to exercise care not to sell defective goods.<sup>97</sup> Unfortunately, the courts have not required sellers to inspect for hidden defects. Therefore a mere dealer is not under a duty to thoroughly inspect goods sold to the ultimate consumer.<sup>98</sup> This loophole has further limited the effectiveness of the contract rules for potential producer's liability plaintiffs.

Due to the limited usefulness of the code's contract provisions for producer's liability, tort law has become the major basis for such actions in West Germany. There is imposed a general duty not to create a danger to others.<sup>99</sup> This concept presumes fault should harm arise from a person's actions. The plaintiff has the burden of proving negligence or intentional misconduct.<sup>100</sup> Under the tort rules, the scope of a producer's liability is determined by the type of defect that caused the plaintiff's injury. The various ways in which products can be defective are classified according to the origins of the defect.<sup>101</sup> Different classification schemes exist, but in general they can be divided into three categories: production flaws, design defects and failure to give adequate information or warnings.

Production defects are miscarriages in the production process, which result in isolated items leaving the factory in a defective condition.<sup>102</sup> These articles do not measure up to the manufacturer's own quality standards, and in essence are an inevitable by-product

---

96. As long as the manufacturer offers to repair or replace a defective product, he can exclude all other liability, including negligence, except as regards to third parties. BGB § 459 (W. Ger.); Orban, *supra* note 2, at 353.

97. See Orban, *supra* note 2, at 353.

98. H. TEBBENS, *supra* note 47, at 68 n.11.

99. BGB § 823I (W. Ger.).

100. Orban, *supra* note 2, at 353-54.

101. H. TEBBENS, *supra* note 47, at 7.

102. These are called escapee (*ausreiszer*) defecting products. *Id.*

of mass production methods. Design defects are not isolated mistakes; rather the product corresponds exactly to the design intended by the manufacturer but an inherent defect built into the product makes it unsafe for normal use.<sup>103</sup>

Both production and design defects relate to the technical production of goods. The manufacturer, however, also has a responsibility to ensure that his products are used safely and as intended. He must include directions for their use, and warnings against certain hazards of misuse or nonintended use.<sup>104</sup> The West German drug classification system has developed a distinction between inherently unsafe products and products with a "development defect."<sup>105</sup> The first category includes things such as vaccines; they can cause isolated instances of harm, but the benefits gained from their use outweigh the risks involved. The second class does not have scientifically discoverable defects at the time that they were put into circulation, but later prove to have harmful effects.<sup>106</sup> Strict liability is imposed on manufacturer for the second class of defects.<sup>107</sup>

As noted above, manufacturing defects, design defects, and failure to adequately warn or inform a consumer are all bases for imposing liability upon a manufacturer.<sup>108</sup> For example, in the *Fowl Pest* case,<sup>109</sup> the court reversed the old rule permitting the manufacturer to avoid liability if he could show due care in selecting and supervising his employees. Once the plaintiff proves the defect, the manufacturer is presumed to be at fault unless he can show otherwise.<sup>110</sup> This reversal of the burden of proof by the courts was due to a recognition that plaintiffs are not generally in a position to know about the intricacies of the production process.

---

103. *See id.* at 8.

104. *Id.*

105. *See id.* at 9.

106. *Id.*

107. Revised Pharmaceutical Law, Aug. 24, 1976, Bundesgesetzblatt, Teil I [BGBl] I 2445 (W. Ger.).

108. Orban, *supra* note 2, at 354.

109. Judgment of Nov. 26, 1968, Bundesgerichtshof, Gr. Sen. Z. [BCHZ], W. Ger. 51 (1969). A vaccine manufacturer whose product was insufficiently immunized and which was administered by a veterinarian to the plaintiff's chickens, later caused fowl pest disease resulting in U.S.\$100,000 in damages. *Id.* at 91.

110. *See* H. TEBBENS, *supra* note 47, at 77. The burden of proof is shifted to the producer and he bears the risk of unclarified defects. *Id.*

This reversal, however, is not as ominous for the manufacturer as one might think; in contrast to the irrebuttable presumption under French law, the manufacturer can avoid liability under West German law by identifying the cause of the defect, and showing that he could not reasonably have been expected to guard against it.<sup>111</sup>

Differences between actions in tort and contract appear clearly in the areas of statute of limitations and damages. For actions based on breach of warranty or positive breach of contract, the statutory limitation period is six months.<sup>112</sup> The West German Supreme Court has made a distinction between damage stemming directly from a defective product<sup>113</sup> and those flowing from the failure to adequately warn the consumer or where injury is caused indirectly. For the latter category, a limitation period of thirty years applies for tort actions.<sup>114</sup> The limitation period is three years, commencing from the time the plaintiff gains all the knowledge necessary to enable him to bring the action.<sup>115</sup> In any event, the action must be brought within thirty years from the time the tort was committed.<sup>116</sup> Contract and tort also diverge with respect to damages recoverable for purely commercial losses. Damages recoverable in contract extend to property damage and personal injury only where a duty to protect against such injury is presumed, whereas for tort actions, the reverse is true.<sup>117</sup> Section 823(1) specifies that the protected interests are life, human body, health and property, and that economic loss consequential to physical damage is recoverable.<sup>118</sup> However, pecuniary losses are not regarded as consequential, and thus they are not recoverable. The major element of recovery in tort that does not exist in contract is nonpecuniary loss in connection with personal injury and death.<sup>119</sup> The court has discretion to reduce damages for contributory fault, and if plaintiff's damage is chiefly caused by his own conduct, the claim may be dismissed altogether.<sup>120</sup>

---

111. See Orban, *supra* note 2, at 354. This is called "pin-pointing." *Id.*

112. BGB § 477(1) (W. Ger.).

113. See H. TEBBENS, *supra* note 47, at 81. This is subject to BGB § 477(1) (W. Ger.).

114. See BGB § 195 (W. Ger.). This differentiation is controversial, and has become a subject of debate among German legal scholars. See MANUAL, *W. Ger.*, *supra* note 87, para. 1.262.2 & n.20, at 15.

115. BGB § 852 (W. Ger.).

116. See H. TEBBENS, *supra* note 47, at 81.

117. *Id.* at 81-82.

118. BGB § 823(1) (W. Ger.).

119. *Id.* § 847(1).

120. *Id.* § 254.



### C. *United Kingdom*

Although the entities comprising the United Kingdom—England, Wales, Scotland and Northern Ireland, are one political unit, each is not necessarily governed by the same laws. The English system operates only within England and Wales, and is derived from the common law and statutes.<sup>121</sup> Northern Ireland has a similar system, but Scotland has its own law which is founded on the Roman Civil law as influenced by the common law.<sup>122</sup> With this caveat in mind, it will be assumed for the general purposes of this Article that the law of products liability is the same, in most respects, throughout the United Kingdom. Consequently, this Article will discuss English law.

Manufacturer's liability for defective products has not developed as far in England as it has in the United States, despite the similarities between the two common law systems. The reasons for this are not entirely clear, although some commentators have speculated that one cause is the generally negative attitude toward contingent fees in the United Kingdom and throughout Europe. In any event, the term "products liability" is not used; rather, claims proceed under the headings "sale of goods" and "negligence."<sup>123</sup> Compensation for injury or loss caused by defective products is governed by a combination of statutory and common law remedies.<sup>124</sup>

Aside from liability created by statute, there is a clear distinction in English law between claims in tort and in contract.<sup>125</sup> In tort, the defendant's liability depends on whether or not the plaintiff can show that a duty of care existed between them, and that breach of that duty occurred.<sup>126</sup> In contract, liability depends on whether there has been a breach of the terms of a contract between the parties.<sup>127</sup>

---

121. See Dodson, *United Kingdom*, in 2 *PRODUCT LIABILITY—A MANUAL OF PRACTICE IN SELECTED NATIONS* para. 1.111, at 1 (H. Stucki & P. Altenburger eds. 1981) [hereinafter cited as *MANUAL, U.K.*].

122. *Id.*

123. See H. TEBBENS, *supra* note 47, at 45. See also *MANUAL, U.K.*, *supra* note 121, para. 1.21, at 3.

124. *MANUAL, U.K.*, *supra* note 121, para. 1.23, at 4.

125. *Id.* para. 1.31, at 6.

126. *Id.*

127. *Id.*

This distinction is clearly shown, by illustration, in the case of *Daniels v. R. White & Sons, Ltd.*<sup>128</sup> Mr. Daniels purchased lemonade from Tarbard, which had been bottled by White.<sup>129</sup> The bottle contained carbolic acid and both Mr. and Mrs. Daniels became ill after drinking it.<sup>130</sup> The plaintiffs brought suit against both the seller (Tarbard) and the bottler (White). The tort claims against the latter were dismissed because, although a duty of care existed, negligence by the bottler could not be proven.<sup>131</sup> Mr. Daniels' claim against Tarbard was successful on the basis of a breach of an implied duty of care imposed by Sales of Goods Act of 1893;<sup>132</sup> Mrs. Daniels, however, could not recover because only the husband was in privity of contract with Tarbard.<sup>133</sup>

For a long time English law favored the seller over the buyer through the doctrine of *caveat emptor*, and the reluctance of the courts to interfere in contract agreements.<sup>134</sup> Further, the doctrine of privity of contract prevented plaintiffs who had not directly purchased the product from bringing suit.<sup>135</sup> The buyer was aided somewhat in this area by the enactment of the Sale of Goods Act of 1979<sup>136</sup> (SGA). Under the 1979 Act, the buyer proceeds under a theory of breach of express or implied warranty.<sup>137</sup> In 1973, Parliament modified the SGA, 1893, by passing the *Supply of Goods (Implied Terms) Act of 1973*,<sup>138</sup> which modified certain provisions of the 1893 Act, but still permitted the seller to exclude his liability through favorable terms in nonconsumer contracts and allowed the buyer no cause of action where implied or express guarantees were not involved.<sup>139</sup>

---

128. [1938] 4 All E.R. 258 (K.B.).

129. *Id.* at 259.

130. *Id.* at 260.

131. *Id.* at 262-63.

132. 56 & 57 Vict., ch. 76. *See infra* note 136.

133. *Daniels*, [1938] 4 All E.R. 258, 258-59 (K.B.).

134. *See* Orban, *supra* note 2, at 359.

135. *Id.* at 360. *See also supra* text accompanying notes 128-33 (discussing *Daniels*).

136. Sale of Goods Act, 1979, ch. 54. This Act replaced the Sales of Goods Act, 1893, 56 & 57 Vict., ch. 71, which had been substantially amended between 1954 and 1974. *See* 41 HALSBURY'S LAWS OF ENGLAND para. 605, at 558-59 (Lord Hailsham 4th ed. 1983). These amendments were consolidated in the 1979 Act. *Id.* The 1979 Act applies to all contracts for the sale of goods made on or after January 1, 1894. *Id.*

137. Sale of Goods Act, 1979, ch. 54, § 14.

138. Supply of Goods (Implied Terms) Act, 1973, ch. 13.

139. Unfair Contract Terms Act, 1977, ch. 50, §§ 3, 31. *See also* Orban, *supra* note 2, at 360 (discussing the various Acts). The changes included: (a) prohibiting the exclusion or

Even with these reforms, direct privity of contract remains as the major obstacle to recovery by the plaintiff in any negligence action. Family members, guests and bystanders have no remedy in contract in the absence of privity, and must proceed in tort.<sup>140</sup> The burden imposed on the plaintiff by this requirement has made recovery in contract very difficult for a large class of possible plaintiffs, which explains the rise in the number of tort actions.<sup>141</sup>

The liability of a particular defendant in tort arises from the common law. Any injured party may bring suit against the seller, supplier or manufacturer of a defective product. Although actions in tort can be based on misrepresentation as well as negligence, only the negligence theory appears to have any practical importance for products liability.<sup>142</sup>

As previously noted, the plaintiff must first establish that the defendant owes a duty of care. One who manufactures and sells an article owes a duty to take reasonable care in its design and manufacture.<sup>143</sup> The duty of reasonable care is owed not only to the

---

restriction by contract or notice of liability for negligence where death or personal injury occurred; (b) permitting the exclusion or restriction by contract or notice of negligence liability for other than death or personal injury, but only if it satisfied the test of reasonableness; (c) the 1973 Act now applied to all contracts for supply of goods, not merely for sales contracts, but also for barter, exchange, work and materials contracts. *See id.* The Sale of Goods Act of 1979 incorporated the terms of the 1973 Act at section 55. Sale of Goods Act, 1979, ch. 54, § 55 & notes, sched. 1.11 & notes. *See also* Supply of Goods (Implied Terms) Act, 1973, ch. 13, § 4, *as amended by* Unfair Contract Terms Act, 1977, ch. 50, §§ 3, 31.

140. *See* Orban, *supra* note 2, at 360.

141. *See, e.g., supra* text accompanying notes 128-33. *See also* Orban, *supra* note 2, at 361 (discussing *Daniels*).

142. The Misrepresentation Act, 1967, ch. 7, confers a right of action for damages upon the person who has been induced to enter into a sales contract by an innocent but negligent misrepresentation. *Id.* Since misrepresentations about products are mostly made by manufacturers in their advertisements, and retailers induce consumers to contract, it does not add much to the plaintiff's rights under products liability law. N. REICH, *supra* note 1, at 49.

143. *See* *Lambert v. Lewis*, [1980] 1 All E.R. 978 (C.A.), *rev'd*, [1981] 1 All E.R. 1185 (H.L.). In *Lambert*, the plaintiffs (two injured and two killed) were driving in their car and were struck by a trailer previously attached to a land Rover driven by one of the defendants. The trailer became unhitched, in part due to a design defect. *Id.* Plaintiffs alleged negligence on the part of the owner of the land Rover, his driver, the supplier of the couplings to the land Rover, and the manufacturer. *Id.* The trial court found the coupling to be unsafe for its intended purpose, but found that the owner was contributorily negligent in failing to notice that the handle was missing. The court awarded the plaintiffs U.K.£45,000, apportioned 75% to the manufacturer and 25% to the owner, and plaintiff's claim against the supplier was dismissed. *Id.* On appeal, the judgment was affirmed. *Id.* at 981. The court stated that the manufacturer was negligent, and should have foreseen that the handle holding the coupling together could become detached since it faced the ground, and was to be driven over rutted farmland. *Id.* at 983. *See also infra* text accompanying notes 154, 156.

ultimate user, but to all persons who might reasonably be expected to be affected by the product. This includes retailers who handle the article and strangers injured by its use.<sup>144</sup> The duty owed is not to cause injury to the consumer's person or his property.<sup>145</sup>

Manufacturer's liability does not arise unless the article is sold in such form as it was intended to reach the ultimate user, without any reasonable likelihood that intermediate examination by a dealer would have revealed the danger,<sup>146</sup> and the article is put to its intended use by the consumer.<sup>147</sup> Further, the manufacturer will not be held liable if the user had knowledge in fact of the existence of the defect.<sup>148</sup> The duty of care extends to manufacturers of the product in question, as well as those who for consideration assemble or repair the goods.<sup>149</sup> Thus, a retailer may be held liable if he performs some work on the product other than mere distribution.<sup>150</sup> This includes all checks that a retailer of the article could be assumed or reasonably be expected to make.<sup>151</sup>

In tort actions the plaintiff must establish that: (a) the defect was due to defendant's negligence; (b) the defect existed while the article was in defendant's control; and, (c) the defect was the proximate cause of the injury or loss.<sup>152</sup> Except in the case of ultra-hazardous products, the doctrine of *res ipsa loquitur* creates a rebuttable presumption of negligence. Negligence is often inferred from the existence of defects in the article taken along with the surrounding circumstances.<sup>153</sup>

---

144. 34 HALSBURY'S LAWS OF ENGLAND para. 37, at 32-33 nn.13-14 (Lord Hailsham 4th ed. 1980) [hereinafter cited as HALSBURY'S LAWS]. See also *Barnett v. H.J. Packer & Co.*, [1940] 3 All E.R. 575 (K.B.); *Stennett v. Hancock & Peters*, [1939] 2 All E.R. 578 (K.B.) (passerby injury caused by defective repair of motor lorry).

145. See *infra* text accompanying notes 156-57.

146. See *Donoghue v. Stephenson*, 1932 A.C. 562.

147. See, e.g., *Grant v. Australian Knitting Mills*, 1936 A.C. 85 (P.C. 1935).

148. *Id.*

149. See *Stennett*, [1939] 2 All E.R. 578 (K.B.) (repair of motor lorry).

150. An example would be a motor dealer selling a car which he has reconditioned. See *Herschtal v. Stewart & Ardern, Ltd.*, [1940] 1 K.B. 155 (1939).

151. A car dealer must check the steering of a used car. *Andrews v. Hopkins*, [1957] 1 Q.B. 229 (1956).

152. Orban, *supra* note 2, at 364.

153. HALSBURY'S LAWS, *supra* note 144, para. 40, at 35 & nn.1-3.

The most liberal illustration of this principle appeared in the case of *Grant v. Australian Knitting Mills*.<sup>154</sup> In that case, the plaintiff sued the retailer and manufacturer of undergarments sold in a sealed bag, alleging that he had contracted dermatitis from chemicals contained in the garments due to the manufacturer's negligence. The manufacturer was held liable even though the plaintiff did not show how the chemicals got into the garments, and even though the manufacturer introduced evidence that the claimant's reaction had been the first in over a million articles sold.<sup>155</sup>

*Grant* can be contrasted with the case of *Donoghue v. Stevenson*,<sup>156</sup> decided by the House of Lords in 1932. There the plaintiff suffered injury after drinking ginger beer from a bottle containing the remains of a snail. The bottle had been purchased by a friend and then given to the plaintiff. The House of Lords ruled that persons not in privity of contract have a cause of action against the manufacturer under a negligence theory, since a duty of care is owed to persons who may come into contact with the product.<sup>157</sup> Despite the manufacturer's duty of care, the plaintiff still must show that negligence occurred while the product was in the care of the manufacturer. In *Donoghue*, the plaintiffs were unable to do so.

Contract and tort actions under English law are related in that the injured buyer is entitled to sue the seller simultaneously for negligence and breach of warranty if he can show that the seller breached a duty of care owed independently of contractual obligations.<sup>158</sup> Therefore, concurrence of actions is possible under the English system, contrary to French law. For example, the duty to give adequate warning arises in contract because the buyer has relied on the seller to warn him of any dangers inherent in the use of the product, and in tort because the seller is required to warn customers of possible hazards associated with the product.<sup>159</sup>

Disclaimers limiting a seller's liability are usually invalid except in warranties.<sup>160</sup> The SGA limits the use of such disclaimers for

---

154. 1936 A.C. 85 (P.C. 1935).

155. Orban, *supra* note 2, at 361.

156. 1932 A.C. 562.

157. *Id.* at 578-99. See also H. TEBBENS, *supra* note 47, at 50; Orban, *supra* note 2, at 362.

158. See H. TEBBENS, *supra* note 47, at 53.

159. *Id.*

160. See *id.* at 54.

consumer sales, whereas in nonconsumer sales, enforceability depends on the circumstances.<sup>161</sup> Courts have enforced disclaimers encompassing negligence where the language of the disclaimers was ambiguous.<sup>162</sup> The Law Commission, and the Scottish Law Commission,<sup>163</sup> made several recommendations for reform in this area, including a proposal that limitations on negligence liability should be subject to a test of reasonableness.<sup>164</sup> In the Unfair Contract Terms Act of 1977,<sup>165</sup> exemptions from liability for personal injury or death through contract disclaimers are prohibited altogether. Additionally, a supplier cannot limit or exclude tort liability toward third persons.<sup>166</sup>

Rules regarding the statute of limitations are not divided into tort or contract areas, but depend on whether property damage, personal injury or death has occurred.<sup>167</sup> These rules are flexible, and a court may set aside a defense based on the statute of limitations if it would be fair to the parties.<sup>168</sup>

The most significant difference between contract and tort actions is that full damages, including pure economic loss, are recoverable in contract but not in tort.<sup>169</sup> Economic loss is deemed a foreseeable risk as between contracting parties, so that "loss of the bargain" underlies the warranty of merchantability.<sup>170</sup> In contrast, the parties are foreign to each other in most negligence actions. Moreover, the affected pecuniary interests of the plaintiff are not readily apparent to the defendant, and thus are too remote to be

---

161. *Id.* The 1973 Act was incorporated in the Sale of Goods Act of 1979 at section 55. *See* Sale of Goods Act, 1979, ch. 54, § 55 & notes, sched. 1.11 & notes.

162. *See* H. TEBBENS, *supra* note 47, at 54.

163. *See* LIABILITY FOR DEFECTIVE PRODUCTS, CMD. No. 6831 (1977).

164. *Id.*

165. 1977, ch. 50. This Act was incorporated into the 1979 Act at section 55. *See* Sale of Goods Act, 1979, ch. 54, Section 55 & notes, sched. 1.11 & notes.

166. H. TEBBENS, *supra* note 47, at 54.

167. For contract actions, the relevant period of limitations is six years for damages to property. Limitation Act, 1939, 2 & 3 Geo. 6, ch. 21, § 2(1)(a). Where personal injuries are claimed, however, a three year period of limitations applies. Limitation Act, 1975, ch. 54, § 1(2A)(1), (4). In tort actions, the period is also six years from the event which caused the damage, Limitation Act, 1939, 2 & 3 Geo. 6, ch. 21, § 2(1)(a), unless the claim involves personal injury, in which case the period is reduced to three years, Limitation Act, 1975, ch. 54, § 1(2A)(1), (4). The courts may, nevertheless, extend these periods if it would be equitable to do so. *Id.*, § 1(2D).

168. *See* H. TEBBENS, *supra* note 47, at 55.

169. *Id.* *See also* Orban, *supra* note 2, at 364.

170. *See* H. TEBBENS, *supra* note 47, at 55.

recoverable.<sup>171</sup> Foreseeable damages to person or property, medical expenses, lost earnings, and awards for pain and suffering are all recoverable in tort.<sup>172</sup>

### III. THE DRAFT DIRECTIVE

The Community's proposed Directive on products liability, conceived as a uniform approximation of the laws of the member states, was necessary because the differing national laws restricted the free movement of goods, and provided uneven consumer protection.<sup>173</sup> The member states have not yet agreed on certain provisions in the Directive. These include the treatment of development risks and compulsory insurance against such risks, and the possibility of a limitation on producer liability.

In 1982, American observers felt that passage of the Directive was imminent because the President of the Council was a staunch supporter of the legislation.<sup>174</sup> However, the Community remained divided on the question, and with the shift of the Presidency to the French, the impetus for quick passage was reduced. Continental Europe in general favored compulsory insurance for manufacturers to protect against development risks, but this was strongly opposed by the United Kingdom, which felt that it would greatly increase their industrial costs.<sup>175</sup> Further, a number of countries opposed setting a financial limit for strict liability claims.<sup>176</sup>

These two points have made passage of the Directive in the near future unlikely. Nevertheless, due to the inexorable trend in Europe toward stricter accountability for manufacturers of defective products, some form of the Directive will eventually take effect.

---

171. See *id.* See also *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1972] 3 W.L.R. 502 (C.A.).

172. Orban, *supra* note 2, at 364. Under the law of Scotland, unlike the law of England, a claim is allowed for *solatium* (moral damages) in case of fatal accidents. H. TEBBENS, *supra* note 47, at 56.

173. See Annex II, *supra* note 8, preamble.

174. Banham, *Common Market Considering Product Legislation*, J. Com., Sept. 1, 1983, at 4C, col. 1.

175. *Id.*

176. *Id.*

### A. *Scope of Liability*

Article 1 of the Directive states that producers shall be liable for damage caused by defects in their products, irrespective of fault.<sup>177</sup> In this concept of strict liability, no distinction is made between contractual and tort liability. Thus, the contract-tort distinctions prevalent in most national products liability systems lose all meaning under the Directive.<sup>178</sup> Consequently, the Directive was drafted in terms designed to accommodate both contract and tort theories in a single form of liability.<sup>179</sup> These terms define the categories of persons who are responsible for product defects and the persons who can act as claimants, what constitutes a "defect," and what constitutes a "product."<sup>180</sup>

The Proposed Directive restricts liability for defective products to the "producer" only, with certain exceptions.<sup>181</sup> The producer is defined in article 2 as the manufacturer of a finished product, the producer of any raw material, or the maker of a component part.<sup>182</sup> Generally, this definition does not apply to distributors, wholesalers or retailers in the chain of supply.<sup>183</sup> Persons other than the manufacturer of a product may be held liable if they hold themselves out as producers by putting a name, trademark or other distinguishing feature on the product.<sup>184</sup> Any importer of a defective product is

177. Compare Annex I, *supra* note 8 with Annex II, *supra* note 8 (changes in article 1). The European Parliament suggested that development risks be excluded from the Directive. The Commission, however, could not accept this. The Commission retained its version. See Annex II, *supra* note 8. The idea has created such controversy that the working group in the Council deleted it from the 1981 version of the Directive. See Annex I, *supra* note 8.

178. See Wautier, *European Attempts on Harmonizing Laws Related to Product Liability*, in 1 *PRODUCT LIABILITY—A MANUAL OF PRACTICE IN SELECTED NATIONS* para. 1.311 at 22 (H. Stucki & P. Altenburger eds. 1981) [hereinafter cited as *MANUAL, Eur.*].

179. The Proposed Directive does not distinguish between contract and tort liability. Rather, liability is predicated on the introduction of a defective product, regardless of fault. See Annex II, *supra* note 8, preamble para. 6; Annex I, *supra* note 8, art. 1.

180. See, e.g., Annex I, *supra* note 8, arts. 1A, 2, 4.

181. See Annex I, *supra* note 8, art. 2.

182. Annex I, *supra* note 8, art. 2, para. 1. The Draft Directive does not define what is meant by a "component part." This will necessitate interpretation by the national courts and the European Court of Justice under the referral procedures of article 177 of the EEC Treaty. EEC Treaty, *supra* note 7, art. 177.

183. See *MANUAL, Eur.*, *supra* note 178, para. 1.411, at 24. This is in contrast to some national law systems which at times do not allow direct actions against the manufacturer unless privity of contract exists. *Id.* The Proposed Directive makes no mention of possible defendants other than the manufacturer. Annex I, *supra* note 8, art. 2.

184. Annex I, *supra* note 8, art. 2, para. 1. This provision was to apply to mail order firms, which have products specially made for mass consumption by unspecified manufactur-



deemed a producer under the Directive, whether it is an independent distributor or a branch of a foreign manufacturer.<sup>185</sup> A supplier may be held to be a producer where the original producer cannot be readily identified, unless the supplier informs the claimant of the real producer's identity within a reasonable time.<sup>186</sup>

"Product" is defined in article 1A to include all movables,<sup>187</sup> even if incorporated into an immovable.<sup>188</sup> Under the original draft,<sup>189</sup> this article was part of article 1, and included agricultural products.<sup>190</sup> The 1981 version<sup>191</sup> changed this in response to protests from agricultural interests.<sup>192</sup>

Immovables were excluded from the Directive because they were covered under special rules in all member states' national laws. These rules were too deeply ingrained to be changed by Community legislation.<sup>193</sup> The exclusion makes sense because immovable structures remain in one country, and it is logical to subject them to that country's national laws. On the other hand, movables are freely transported throughout the Community, and should be regulated by Community law.

Unlike certain national products liability laws that preclude contract actions unless the parties are in privity,<sup>194</sup> the Directive makes the producer liable to anyone who suffers damage from the

ers in accordance with precise instructions, then sell them under their own name. COMM. OF THE EUR. COMMUNITIES, BULLETIN OF THE EUROPEAN COMMUNITIES, PRODUCT LIABILITY, point 8, at 15 (Supp. 11/76, 1976) [hereinafter cited as MEMORANDUM].

185. Annex I, *supra* note 8, art. 2, para. 2. The liability of the importer does not cancel out the liability of the foreign manufacturer, who remains jointly and severally liable toward the victim under the various product liability laws of the member states. MANUAL, *Eur.*, *supra* note 178, at 42.

186. Annex I, *supra* note 8, art. 2, para. 3.

187. Annex I, *supra* note 8, art. 1A. This does not, however, include primary products. *Id.*

188. *Id.*

189. Annex II, *supra* note 8.

190. MEMORANDUM, *supra* note 184, point 3, at 14.

191. ANNEX I, *supra* note 8.

192. Comm. of the Eur. Communities, Amendment of the Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products 2, Com(79) 415 Final [Sept. 26, 1979] [hereinafter cited as Amendment]. The farmer would bear a heavy burden of liability because goods are often inherently perishable and frequently a defect will be caused by a third party, such as the fertilizer or pesticide producer. MANUAL, *Eur.*, *supra* note 178, at 63.

193. See MEMORANDUM, *supra* note 184, point 3, at 14.

194. See *supra* text accompanying notes 121-41, 156-86.

defective product.<sup>195</sup> Whether the injured person was the owner of the property is immaterial. A purchaser, a consumer, or any bystander who suffers damage solely as the result of the product being put into circulation has standing to sue.<sup>196</sup> "Damage" is defined in article 6 to include death, personal injury, and damage to property other than to the defective product itself<sup>197</sup> when the item is used mainly for private use or consumption.<sup>198</sup> National provisions relating to nonmaterial damages such as incidental and consequential damages remain unaffected by this provision.

Although the liability imposed on the producer is strict, it is not absolute.<sup>199</sup> The plaintiff is required to prove that damage occurred, that a product was defective, and that the defect caused the damage.<sup>200</sup> However, the plaintiff does not have to prove the producer's negligence.<sup>201</sup> The Directive will naturally entail major revisions in certain substantive provisions of national laws in the United Kingdom and the Federal Republic of Germany, and to a lesser extent in France as well.<sup>202</sup>

Under the Directive, a producer is liable for a product that was defective at the time it was put into circulation.<sup>203</sup> The victim does not bear the burden of proof, rather, the producer must show that the defect did not exist at that time.<sup>204</sup> This provision is comparable to the rebuttable presumption of fault imposed on manufacturers by West German courts.<sup>205</sup> This difficult burden is qualified

---

195. MEMORANDUM, *supra* note 184, point 4, at 14.

196. See MANUAL, *Eur.*, *supra* note 178, at 23; MEMORANDUM, *supra* note 184, point 4, at 14.

197. Annex I, *supra* note 8, art. 6. Under national law the plaintiff retains any right he may have against the vendor for damage to the product itself. MANUAL, *Eur.*, *supra* note 178, at 24.

198. Annex I, *supra* note 8, art. 6(b)(ii). This provision does not include any items used mainly for business purposes. *See id.*

199. *See infra* text accompanying notes 257-316.

200. Annex I, *supra* note 8, art. 2A.

201. This is in direct contrast to the system existing in the United Kingdom, *see supra* text accompanying notes 121-72, and West Germany, *see supra* text accompanying notes 87-120.

202. France is singled out because it is said to have the most stringent laws in effect compared to other European nations. *See* MANUAL, *France*, *supra* note 44, at 1.

203. *See* Annex I, *supra* note 8, art. 5(b).

204. *See* MANUAL, *Eur.*, *supra* note 178, at 56.

205. *See supra* text accompanying notes 89-100, 104-10.

by language<sup>206</sup> that invites the court to take into account the complexity of the proof involved.<sup>207</sup>

The text of the present Draft Directive excludes any regulation of the burden of proof derived from the civil law or the law of civil procedure of the member states.<sup>208</sup> The formulation of procedural burdens of proof depends on the national laws of each member state.<sup>209</sup> This provision was necessary in view of the extreme differences in procedure between common law and civil law systems.<sup>210</sup>

The Directive includes provisions for joint and several responsibility where two or more persons are responsible for the same damage.<sup>211</sup> This allows the plaintiff to sue the person in the production chain most able to pay.<sup>212</sup> Further, the plaintiff is freed from the need to initiate separate proceedings against each party for its portion of the damage.<sup>213</sup> This contrasts with the United Kingdom's and West Germany's contract law, which provide that an action can be brought only against the immediate seller by a party in direct privity of contract.<sup>214</sup> The European Parliament proposed that each party held liable should retain the right to take action against the others for its losses.<sup>215</sup> The Commission agreed, and this right of recourse was included in the 1981 text.<sup>216</sup> It must be noted that this provision does not mean that each liable party retains a right to obtain compensation from the other liable parties under the Directive as a matter of law. Instead, the availability of recourse depends on the national law of the member state in question.<sup>217</sup>

---

206. The language referred to, "having regard to all the circumstances," was included at the request of the European Parliament. Report on the Proposal from the Commission of the European Communities to the Council for a Directive Relating to the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1979-1980 EUR. PARL. DOC. (No. 71) 8 (1979) [hereinafter cited as Working Paper].

207. MANUAL, *Eur.*, *supra* note 178, at 56.

208. Working Paper, *supra* note 206, at 16, para. 17.

209. See MEMORANDUM, *supra* note 184, point 14, at 16.

210. For a discussion of these differences, see R. SCHLESINGER, *COMPARATIVE LAW* 222-489 (4th ed. 1980).

211. Annex I, *supra* note 8, art. 3.

212. MEMORANDUM, *supra* note 184, point 12, at 15.

213. *Id.*

214. See *supra* text accompanying notes 87-98 (W. Ger.), 128-39 (U.K.).

215. See Working Paper, *supra* note 206, at 7.

216. See Annex I, *supra* note 8, art. 3.

217. See MEMORANDUM, *supra* note 184, point 12, at 15. "Claims for contribution . . . are governed by the laws of the individual Member State." *Id.*

In the United Kingdom, when a distributor is sued and it appears that fault can be traced to the producer or another distributor, the defendant can bring in that other supplier as a third party defendant.<sup>218</sup> Nevertheless, the claim of the plaintiff against the original defendant must be tried first because only when liability on the part of that supplier is established do his rights against third parties arise.<sup>219</sup> Under West German law, a distributor facing a claim from a user may have a corresponding claim against the producer. The judgement in the first case is not binding in a subsequent litigation between the producer and the distributor, so he risks losing twice.<sup>220</sup> Section 72 of the Code of Civil Procedure gives him the right to file a third party notice upon his supplier. Upon such filing, the producer may join the litigation, but he is not obligated to do so.<sup>221</sup> A producer not joining the case cannot challenge the facts in the first case if the distributor decides to bring an action against him later.<sup>222</sup> A producer joining the litigation does not become a co-defendant, and there is no joint and several liability imposed.<sup>223</sup> In France, the original defendant may bring claims against another distributor or producer either by waiting for the first decision and then filing an independent recourse claim, or by serving notice on that supplier and making him party to the first suit.<sup>224</sup> Liability may be either joint or several.<sup>225</sup>

### B. *The "Defect"*

Article 4 of the Draft Directive states that a product is defective when, being used for the purpose for which it was intended, it does not provide the safety which a person is entitled to expect under the circumstances.<sup>226</sup> Since the Directive is intended to protect the consumer's person and personal property in private use, its definition of defect is based on the notion of "safety" rather than of

---

218. See MANUAL, *U.K.*, *supra* note 121, at 42.

219. *Id.*

220. See MANUAL, *W. Ger.*, *supra* note 87, para. 4.23, at 40.

221. See *id.* at 40-41, para. 4.231.

222. *Id.* at 41, para. 4.232.

223. See *id.*

224. See MANUAL, *France*, *supra* note 44, para. 4.21, at 47.

225. See *id.* para. 4.24, at 48-49.

226. See Annex I, *supra* note 8, art. 4. See also MEMORANDUM, *supra* note 184, point 13, at 15.

fitness for its intended use.<sup>227</sup> A product will be considered defective if it differs from what is considered normal under the circumstances.<sup>228</sup> Thus the harmful effects of a product do not constitute a "defect" unless they were not normally to be expected.<sup>229</sup>

The measure of safety a product must provide is judged according to objective criteria in the circumstances of each case.<sup>230</sup> Accordingly, a product is not defective merely because it wears out through use.<sup>231</sup> No one can reasonably expect the same degree of safety from an old product as from a new one; therefore, the buyer of a used product accepts greater risks. Correspondingly, the appearance of an improved version of a product does not render the previous version "defective."<sup>232</sup>

Generally, there are four types of recognized defects: design defects, misleading information, manufacturing defects, and development risks.<sup>233</sup> The producer is liable for each type of defect.<sup>234</sup>

Liability for design and manufacturing defects arises from the production process and can readily be traced to the manufacturer in question.<sup>235</sup> Defects arising from misleading or incomplete information are more complicated and raise a number of issues that require special attention.<sup>236</sup> Such defects include incorrect or incomplete warnings and directions for use, as well as the absence of details in packaging and in labeling.<sup>237</sup> At times, even the issuance of a proper warning will not eliminate liability.<sup>238</sup> The manufacturer remains bound to ensure as far as possible that any avoidable

---

227. See MEMORANDUM, *supra* note 184, point 13.

228. See MANUAL, *Eur.*, *supra* note 178, para. 2.431 at 49. A serum that cures cancer may be highly toxic, but if properly prepared and accompanied by appropriate warnings, it is not defective. *Id.* at 49 n.66.

229. See *id.* para. 2.431, at 49-50.

230. MEMORANDUM, *supra* note 184, point 13, at 15. In effect this means that court interpretation is necessary, and it is impossible to determine in advance the whole range of protection the consumer can expect. *Id.*; see MANUAL, *Eur.* *supra* note 178, at 50.

231. MEMORANDUM, *supra* note 184, point 13, at 15.

232. See *id.*

233. See *supra* text accompanying notes 73-91. Development risks are defects that could not have been identified as such given the level of scientific and technical knowledge at the time they were put into circulation.

234. MANUAL, *Eur.*, *supra* note 178, para. 2.432, at 50.

235. See *id.* para. 2.433, at 50.

236. See *id.*

237. *Id.*

238. *Id.*

dangers presented by the product are eliminated. Unavoidable dangers must be specifically pointed out to the end user.<sup>239</sup>

Although products must normally be used for their intended purposes, a producer may be held liable for damages resulting from foreseeable misuse.<sup>240</sup> For example, a manufacturer of pharmaceutical products that resemble and are packaged as candy is liable for damages resulting from consumption of the product by a child, because the consumption was foreseeable.<sup>241</sup> Unlike certain provisions of national law which allow a producer to escape liability in cases of product misuse or assumption of the risk by the consumer,<sup>242</sup> the Directive does not provide complete relief. Nevertheless, the Directive leaves it up to national law to determine the extent to which the producer's liability can be reduced through the buyer's contributory negligence.<sup>243</sup>

In the original version of the Draft Directive,<sup>244</sup> "development risks" were to be borne by the producer.<sup>245</sup> This has become the most controversial provision in the Directive, and its inclusion in the final draft remains in doubt.<sup>246</sup> If it is included, a producer will be liable for a defective product he put into circulation, even if the defect is detectable only through subsequent scientific progress and discovery.<sup>247</sup> Only West Germany has a like provision, and that applies only to drug manufacturers.<sup>248</sup>

In general, the definition of "defect" contained in the Directive is at variance with its definition under member states' laws. For example, under French law, fault attaches only if the product is unfit for its intended use,<sup>249</sup> and only if the unfitness is hidden,<sup>250</sup>

---

239. See *id.* at 50-51 & n.71. For example, the manufacturer cannot avoid liability by warning that paint on a certain toy is toxic and should not be put in children's mouths. He has a duty not to use toxic paint in the first instance. *Id.*

240. See *id.* n.73.

241. *Id.*

242. See *supra* text accompanying notes 83-86.

243. See Annex I, *supra* note 8, art. 5A, para. 2. See also MEMORANDUM, *supra* note 184, point 16, at 16.

244. See Annex II, *supra* note 8, art. 1.

245. See *id.*

246. See, e.g., REYMONT ASSOCS., IMPACT OF PRODUCT LIABILITY ON INTERNATIONAL TRADE 15 (1980); 24 BEUC NEWS 3 (May 1983); 3636 EUROPE 15 (June 24, 1983); 3203 EUROPE 13 (Sept. 10, 1981).

247. See MANUAL, *Eur.*, *supra* note 178, at 52 n.76.

248. See *supra* note 107 and accompanying text.

249. C. civ. art. 1641 (Fr.).

250. See *supra* text accompanying notes 34-41.

whereas under the Directive the main concern is "safety" and the product's intended use is immaterial.<sup>251</sup> Under West German law, a defect exists if the product in question is not of merchantable quality;<sup>252</sup> this is also different from the Directive's standard. Additionally, use of safety features that were "state of the art" when the product was put into circulation provides a complete defense.<sup>253</sup> The Directive's provision for development risks would negate this aspect of West German law.<sup>254</sup> Similarly, in England, a product is defective only if it is unfit for the particular purpose intended,<sup>255</sup> and there is no provision for development risk liability.<sup>256</sup>

### C. *The Producer's Defenses*

Under the Directive, a producer's liability, while strict, is not absolute. A number of defenses function to either exclude or limit liability to a user for damage caused by a defective product.<sup>257</sup> For example, article 5 provides that liability does not attach if the producer proves that it did not put the product in question into circulation,<sup>258</sup> or that in light of the surrounding circumstances, it was not defective when put into circulation.<sup>259</sup> According to the Commission, liability for the producer should arise only when he places the defective product into the stream of commerce of his own free will.<sup>260</sup> The producer is not liable where the defect arises after the product has been put into circulation or when put into circulation against the producer's will, such as by theft.<sup>261</sup> Nevertheless, if

---

251. See MEMORANDUM, *supra* note 184, point 13, at 15.

252. See Orban, *supra* note 2, at 352. See also BGB § 463 (W. Ger.). If a producer warrants the quality of a product, he will be responsible for its quality or performance independent of any negligence. See MANUAL, *W. Ger.*, *supra* note 87, para. 1.221, at 7.

253. Orban, *supra* note 2, at 352.

254. See *supra* text accompanying note 87.

255. See Orban, *supra* note 2, at 364.

256. If all else failed, the producer could plead that he acted in accordance with the generally accepted standards of technology. See, e.g., *Graham v. Co-op. Wholesale Soc'y Ltd.*, [1957] 1 W.L.R. 511 (Q.B.). This "state of the art" defense is still available under English law, although eroded somewhat by the courts. See MANUAL, *U.K.*, *supra* note 121, para. 5.23, at 46.

257. See generally MANUAL, *Eur.*, *supra* note 178, at 64-77.

258. Annex I, *supra* note 8, art. 5(a).

259. *Id.* art. 5(b).

260. See MEMORANDUM, *supra* note 184, point 14, at 16.

261. *Id.*

the loss or theft was due to the producer's error or negligence, liability may attach.<sup>262</sup>

The producer has the burden of proving these defenses.<sup>263</sup> After the plaintiff shows defect, damage and causation,<sup>264</sup> the producer may rebut the prima facie case by proving that the product was not defective when it was put into circulation.<sup>265</sup> The Directive adds the qualifying language "having regard to all the circumstances," to this provision, which will allow courts to alleviate the producer's burden of proof, but the burden will still be difficult. It was the Commission's opinion that a manufacturer should bear liability in the absence of proof of innocence,<sup>266</sup> but otherwise, the national rules regarding procedural law will remain unaffected by the Directive.<sup>267</sup> The Commission reasoned that this burden would not be too onerous for the manufacturer because it had access to the production information; placing the burden on the plaintiff would be tantamount to not allowing any recovery where complex techniques and processes existed.<sup>268</sup>

Another way for the producer to avoid liability is to show that the product was not manufactured for sale or other commercial purpose.<sup>269</sup> This provision was added to emphasize that items produced for private purposes, such as for research projects, were not included under the Directive.<sup>270</sup>

One loophole exists in the Directive as presently drafted. The producer may escape liability if he can show that the product was made in "accordance with binding legislative, statutory, or administrative standards."<sup>271</sup> The potential for abuse under this provision is theoretically great due to the differences in the various national laws regarding the scope and content of such standards. However, although a product is defective if it is not in compliance with safety requirements established by national laws, it is not necessarily with-

---

262. *Id.* See also MANUAL, *Eur.*, *supra* note 178, at 65 (discussing the producer's liability).

263. See Annex I, *supra* note 8, art. 5.

264. See *id.* art. 2A.

265. See MANUAL, *Eur.*, *supra* note 178, at 65.

266. See MEMORANDUM, *supra* note 184, point 14, at 16.

267. See *id.*

268. See Working Paper, *supra* note 206, at 18-19.

269. Annex I, *supra* note 8, art. 5(c).

270. See Amendment, *supra* note 192, at 5.

271. Annex I, *supra* note 8, art. 5(d).



out defect merely because those standards are followed.<sup>272</sup> The producer still has a duty to weigh the seriousness and likelihood of damage that might be caused by the product, even if it conforms to the legislative standards.<sup>273</sup> In any event, a defect, as classified under the Directive,<sup>274</sup> cannot be defeated by more permissive national legislation. Although the Directive leaves form and method of implementation to the various national laws, the substantive provisions of the Directive will bind all member states.<sup>275</sup>

The original Draft Directive<sup>276</sup> did not provide for a defense of contributory negligence because the principle is accepted in all the member states.<sup>277</sup> Under the current version of the Directive,<sup>278</sup> the defense is available but its effect will be decided according to national law.<sup>279</sup> When damage is caused jointly by a product defect and either a *force majeure* or a third party, the Directive again leaves it to national law to determine the producer's liability.<sup>280</sup>

Under certain systems of national law,<sup>281</sup> liability may be excluded by the manufacturer in certain situations through the use of contract disclaimers. The Directive allows no exclusion or limitation of either contract or tort liability by the producer.<sup>282</sup> There are no express exceptions to this rule; thus no disclaimer clause is a defense to liability.<sup>283</sup> Article 7 of the Directive provides for monetary limits on recovery when a producer is held liable. This article has been subject to nearly as much controversy as that covering development risks, and is therefore unlikely to be included in the Directive's final version.<sup>284</sup>

The Directive provides for strict liability in article 1, and it was the Commission's view that liability without limit would im-

---

272. See MANUAL, *Eur.*, *supra* note 178, at 53.

273. *Id.*

274. See *supra* text accompanying notes 227-39.

275. EEC Treaty, *supra* note 7, art. 189.

276. See Annex II, *supra* note 8.

277. See MEMORANDUM, *supra* note 184, point 16, at 16.

278. Annex I, *supra* note 8, art. 5A.

279. *Id.*

280. See MANUAL, *Eur.*, *supra* note 178, at 67.

281. See *supra* text accompanying notes 44-58, 139-55. See also Orban, *supra* note 2, at 352. All liability can be excluded by contract terms. See *supra* text accompanying notes 87-120 (West German law).

282. Annex I, *supra* note 8, art. 10.

283. See MANUAL, *Eur.*, *supra* note 178, at 71. See also MEMORANDUM, *supra* note 184, point 29, at 19.

284. See *supra* text accompanying notes 26-33.

pose intolerable costs on producers.<sup>285</sup> Manufacturers might delay development of new products and thus retard the Community's economic progress.<sup>286</sup> Unlimited liability would make risk assessment nearly impossible, and this would lead to very high interest rates and uninsurable risks.<sup>287</sup> The Directive sets forth fixed amounts of compensation that cannot be altered by national laws.<sup>288</sup> The Council has the power to revise the amounts in question at periodic intervals in accordance with economic and monetary movement within the Community.<sup>289</sup>

The present draft of the Directive provides for a liability limit of twenty five million European Units of Account (EUA) for all personal injuries caused by identical articles with the same defect.<sup>290</sup> This is an overall limit, and no further limitation is imposed on recovery in individual cases. This relatively high limit reflects the paramount concern of the Commission that the entire range of damages that can be suffered by an individual should be covered by the Directive.<sup>291</sup> Claims for damage to individuals are more frequent than mass claims, but the latter are also covered by the overall limit. Where the same defect occurs in various products of the same type, and the products damage a large number of consumers, hundreds of personal injury suits could be subject to the twenty five million EUA limit.<sup>292</sup> However, for "major disasters," such as the Thalidomide affair,<sup>293</sup> the Directive makes provision for the use of public funds to compensate victims.<sup>294</sup>

The limits for property damage are much lower than for personal injury,<sup>295</sup> since widespread damage leading to mass claims

---

285. See MEMORANDUM, *supra* note 184, point 22, at 17.

286. *Id.*

287. *Id.*

288. See MANUAL, *Eur.*, *supra* note 178, at 73.

289. See Annex I, *supra* note 8, art. 7.

290. Annex I, *supra* note 8, art. 7, para. 1.

291. See MEMORANDUM, *supra* note 184, point 24, at 18.

292. *Id.*

293. Thalidomide was a sedative drug given to expectant mothers which resulted in the birth of thousands of deformed children in West Germany and throughout the Community. This resulted in the formulation of a revised West German drug law in 1976. See *supra* note 107 and accompanying text. See also O'Keefe & Czeniek, *A Study of the Drug Laws of the Federal Republic of Germany*, 32 FOOD DRUG COSMETIC L.J. 488 (1977).

294. *Id.*

295. See Annex I, *supra* note 8, art. 7.

seldom affects property.<sup>296</sup> The Directive makes a distinction between damage to movable<sup>297</sup> and immovable<sup>298</sup> property. The lower limit imposed for movables represents an average value for personal assets not used for professional purposes.<sup>299</sup> The limit for immovable property is significantly higher, yet it is relatively modest in comparison to the values typically involved.<sup>300</sup> The Commission justifies this limit by reasoning that most immovable property is insured by the owner against destruction or damage.<sup>301</sup>

These recovery limitations do not differ greatly from national laws already in effect in most of the member states.<sup>302</sup> The overall limit of twenty five million EUA for personal injury plaintiffs in effect sets up unlimited recovery amounts. This may encourage more plaintiffs to bring actions, especially because they do not have to prove producer negligence. An increasing number of suits may have the effect of forcing the courts, traditionally reluctant to provide awards on the same scale as United States courts, to award larger recoveries to products liability plaintiffs.

As another way to limit producer's liability, the Directive provides time limitations for plaintiffs to bring suit.<sup>303</sup> The producer's liability is extinguished if suit is not filed within ten years from the end of the calendar year in which the product was put into circulation.<sup>304</sup> A limit on the time to bring suit was considered a corollary to the imposition of liability for development risks.<sup>305</sup> The producer is liable for defects discovered within a certain period of time, but unlimited exposure would be an inordinately high risk to insure against.<sup>306</sup>

---

296. MEMORANDUM, *supra* note 184, point 25, at 18.

297. European Units of Account (EUA) are used to fix the amount of recoveries. See Annex I, *supra* note 8, art. 7. An EUA is the sum of specified quantities of the national currency of each member state. See MEMORANDUM, *supra* note 184, point 26, at 18; J. WALMSLEY, A DICTIONARY OF INTERNATIONAL FINANCE 90 (1979). The limit for movable property is set at EUA15,000. Annex I, *supra* note 8, art. 7.

298. The limit for immovable property is set at EUA50,000. Annex I, *supra* note 8, art. 7.

299. *Id.* See also MEMORANDUM, *supra* note 184, point 25, at 18.

300. See MANUAL, *Eur.*, *supra* note 178, at 74.

301. *Id.*

302. See *supra* note 28.

303. Annex I, *supra* note 8, art. 8/9.

304. *Id.*

305. See MEMORANDUM, *supra* note 184, point 28, at 19.

306. *Id.*

A limitation period of three years applies to proceedings for the payment of compensation.<sup>307</sup> This period begins to run on the day the injured person became aware or should have become aware of the defect, the damage and the identity of the producer.<sup>308</sup> National laws concerning suspension or interruption of this period are not affected by the Directive.<sup>309</sup> In the interest of fairness to both the producer and the plaintiff, the plaintiff has a limited time to bring suit when all the facts are known to him, since products and methods can change and evidence may disappear if too long a time passes.<sup>310</sup>

Statutes of limitation are included in almost all national laws on products liability.<sup>311</sup> For example, under West German law there is a three year statute of limitations for torts, running from the time of injury or when the defendant is identified.<sup>312</sup> Therefore, the limitation provided in the Directive, although different in length, is not a new idea in most of the member states.

Articles 12 to 15 are essentially self-explanatory, and need not be examined in detail here.<sup>313</sup> Article 11 provides that the Directive shall not affect the rights of a plaintiff under national laws governing contractual or extracontractual rules not provided for in the Directive.<sup>314</sup> The Directive applies only to the producer's strict liability toward the victim.<sup>315</sup> Consequently, the relationship between producers *inter se*, and between producers and distributors, are left to the various national laws.<sup>316</sup>

It is evident from the previous discussion that the proposed Directive does not cover all applications of liability for defective products that may exist under other systems of law. It does not apply to liability of distributors, wholesalers and retailers; to the right of recourse producers have as between themselves or against third parties; or to products not manufactured for economic

---

307. Annex I, *supra* note 8, art. 8/9(b).

308. *Id.*

309. *Id.* para. 4.

310. See MEMORANDUM, *supra* note 184, point 27, at 18.

311. See *supra* text accompanying notes 78-80, 112-16, 167-68.

312. BGB § 191 (W. Ger.).

313. See Annex I, *supra* note 8, arts. 12-15.

314. See *id.* art. 11; MEMORANDUM, *supra* note 184, point 30, at 19.

315. MANUAL, *Eur.*, *supra* note 178, at 78.

316. *Id.*

gain.<sup>317</sup> Moreover, the producer's liability is limited by time, the amount recoverable and the type of damage.<sup>318</sup>

On the whole, the various national laws provide a wider variety of remedies than are available under the Directive. Claims under national law are not necessarily restricted to the producer, the limitation periods may be longer and the amounts to which the victims may be entitled can in theory be unlimited.<sup>319</sup> Nevertheless, recovery is more limited under the national laws due to the application of the negligence standard.

#### IV. CONSEQUENCES FOR UNITED STATES MANUFACTURERS

Since the expansion of products liability remedies in the 1970's, manufacturers and retailers in the United States have been exposed to private lawsuits based on product-related injury in increasing numbers.<sup>320</sup> The courts have eased the evidentiary burdens on plaintiffs; consequently, suits and awards increased dramatically.<sup>321</sup> The European nations have become increasingly strict in holding both foreign and domestic manufacturers liable for damages caused by their products.<sup>322</sup> The Proposed Directive is part of this trend. The Directive's strict liability provisions impose a more rigorous standard for liability than is currently imposed by United States courts. United States exporters and firms with manufacturing subsidiaries in Europe may find themselves subject to greater numbers of products liability suits and correspondingly greater recoveries by plaintiffs.

Although United States exporters to the Common Market can already be held liable for defective products through national laws, some of these standards are stricter than others. The Draft Directive will impose a uniform standard of liability on all member states for certain aspects of products liability. This overarching structure will be complemented by the national laws. Consequently, the victim of a defective product will have a choice of proceeding under

---

317. See MEMORANDUM, *supra* note 184, point 14, at 16.

318. See Annex I, *supra* note 8, arts. 6, 7, 8/9.

319. See MANUAL, *Eur.*, *supra* note 178, para. 1.411, at 24.

320. See REYMONT ASSOCS., *supra* note 246, abstract.

321. *Id.*

322. *Id.*

the Directive, under national law,<sup>323</sup> or both. This choice will depend on the way in which each law can be applied in conformity with conflicts of laws rules.<sup>324</sup>

In a hypothetical case, the plaintiff has purchased a new car for personal use from a retailer selling the defendant's (a United States manufacturer) car, which is distributed in Country X of the EEC. On the way home, the car's brakes fail, and the plaintiff, attempting to avoid another car, crashes into a third party's house. The car buyer suffers serious personal injuries, and the house is extensively damaged. The defective brake was an aberration, and no similar cases of brake failure have been reported.

Generally, in the case of injury caused in a foreign country by an exported United States product, those potentially liable include: the retailer in the foreign country, the foreign importer (which may be an independent business entity or a subsidiary of a United States manufacturer), and the United States manufacturer.<sup>325</sup> Foreign courts seldom have difficulty in obtaining personal jurisdiction over a United States defendant in a products liability case because most foreign countries have criteria for personal jurisdiction similar to those in the United States. These include the domicile of the defendant, or the place where the accident occurred.<sup>326</sup> In addition, some countries such as France and West Germany exercise personal jurisdiction on the basis of the nationality of any party to the suit.<sup>327</sup> In the case to be examined, it will be assumed that both subject matter and personal jurisdiction are proper, and that both the car owner and the house owner wish to sue the United States manufacturer directly since he has the greatest ability to pay damages.

#### A. France

Under French law the first thing to be determined is whether the plaintiffs must sue in contract or tort.<sup>328</sup> The car buyer must sue

---

323. See MANUAL, *Eur.*, *supra* note 178, at 29.

324. *Id.* at 30.

325. *BUS. AM.*, Nov. 16, 1981, at 7.

326. *Id.*

327. The better known of these is article 14 of the French Civil Code, which provides that an alien, even if he is not in France, can be brought before a French court if the plaintiff is of French nationality. C. civ. art. 14 (Fr.).

328. See *supra* note 48 and accompanying text.

in contract because he is in privity with the manufacturer, while the house owner, who is not in privity, can sue only in tort.<sup>329</sup> Both may sue the immediate seller of the defective car. French law, however, allows direct action against the manufacturer both in tort and contract, even if the plaintiff had no direct contact with him.<sup>330</sup>

The manufacturer is liable if the plaintiff can prove that the defect was hidden.<sup>331</sup> In this case, the defect was in the car's brakes, which suddenly failed while he was driving home. There is no indication that the problem manifested itself prior to that time, and thus a nonprofessional buyer would not have been likely to discover it by inspection in the car showroom. Therefore, the defect can be said to have been hidden. The other elements of the car buyer's prima facie case are that the defect rendered the product unfit for its intended use, that its use by the plaintiff was normal, that the defect existed at a time when the product was in defendant's control, and that the defective product proximately caused the injury.<sup>332</sup>

Under these facts it should not be hard for the car buyer to prove his prima facie case because brake failure clearly makes a car unfit for its intended use, driving the car home was a normal use, and the defective brakes led to the car hitting the house and causing injury. Additionally, if the plaintiff can show that the defect existed while in defendant's control, French law presumes fault on the part of a professional seller.<sup>333</sup> Since this presumption is generally irrefutable, liability will attach to either the retailer or the manufacturer.<sup>334</sup> This system is not really a strict liability scheme. The

---

329. See *supra* note 60 and accompanying text.

330. See Orban, *supra* note 2, at 348. Article 1645 of the Civil Code presupposes privity between the buyer and seller. C. civ. art. 1645 (Fr.). However, even if the buyer gets a product from an intermediate seller, he can sue the manufacturer directly since doing otherwise would result in duplicate litigation. Therefore, the buyer can sue the manufacturer directly as if there is privity of contract between them. A. EUR., *supra* note 48, at 56. Usually, the buyer will go against the manufacturer alone since he has greater financial resources. *Id.* at 57.

331. See *supra* note 49 and accompanying text. Article 1645 of the Civil Code has been extended to make a manufacturer or supplier liable when his product contains a hidden defect, and the professional vendor is presumed to have known of such defect. See A. EUR., *supra* note 48, at 56.

332. See Orban, *supra* note 2, at 348.

333. See A. EUR., *supra* note 48, at 56.

334. See *supra* note 73-77 and accompanying text.

plaintiff must prove that a hidden defect existed, not merely that the product was nonconforming.<sup>335</sup> He must start his case within the period of a *bref delai*, but in the case of a consumer, no contract clause in the sale can limit or exclude the seller's liability.<sup>336</sup>

The car buyer's case is made even stronger by the fact that the normal manufacturer's defenses of misuse, manifest defect, or that an expert buyer should have discovered the defect, are not available on the facts of this case. Possible damages would include those foreseeable to the defendant, and if he is deemed a professional seller, for essentially all foreseeable and nonforeseeable damages incurred by the buyer.<sup>337</sup> Here it is foreseeable that brake failure would cause property damage and personal injury so all of these damages are recoverable. In addition, the producer may be liable for consequential damages such as lost income.<sup>338</sup>

As to the house owner, since he is not in privity of contract with the seller, his only recourse is through tort law.<sup>339</sup> Under tort theory, "fault" lies in putting into circulation a defective product which causes damage, and no showing of a specific act of negligence is required.<sup>340</sup> The plaintiff must show that the defect was

---

335. See A. EUR., *supra* note 48, at 57.

336. *Id.*

337. This includes personal injury expenses such as medical treatment, incapacity, and loss of prospective earnings. In principle, the amount is unlimited, but it must be in line with the amount of damage. See *id.* at 64.

338. *Id.*

339. Where the victim has no connection with the supplier or manufacturer, he must base his action on tort law. C. civ. art. 1382 (Fr.). See also A. EUR., *supra* note 48, at 60. Victims have tried to escape the strict rules and burden of proof of tort law by invoking the strict liability of the guardian of the product principle. Under this theory, when it is difficult or even impossible to prove a hidden defect or fault, it may be possible to base the action on the guardian principle. When the victim is not the immediate purchaser, he may sue the purchaser on the basis of article 1384 of the Civil Code. C. civ. art. 1384, para. 1 (Fr.). The victim then need only prove that the buyer was the guardian of the product. This is easier than proving a hidden defect or fault. The buyer may then be unable to recover from the manufacturer or supplier for the damages he paid to the third party. This is unacceptable since the damage was actually caused by the producer and not the buyer. This principle has not been ruled out by the *Cour de Cassation* since it has accepted the principle that control over the product can be divided into having one person as the guardian of the behavior of the product, and the other as the guardian of the structure. The manufacturer would be considered the guardian of the structure of the product which causes damage, and he would then have strict liability and the consumer would be given adequate protection. The manufacturer can be exonerated if he can prove a *force majeure*. This particular application of article 1384 is not ruled out by the courts and it is supported by an important trend in legal thinking. See A. EUR., *supra* note 48, at 63.

340. See *supra* note 68 and accompanying text.



hidden, and that it existed while under defendant's control.<sup>341</sup> The plaintiff is aided by the presumption that a professional seller knows of any defect and is therefore negligent in putting it on the market.<sup>342</sup> Once again, this presumption is generally irrebuttable.<sup>343</sup> The manufacturer might argue that the car buyer was contributorily negligent in running into the house, and thereby reduce his liability to the house owner. This defense, however, clearly is not persuasive on the stated facts. Therefore it is likely that the house owner can recover property damages from either the car buyer, the supplier or the manufacturer.

### B. *Federal Republic of Germany*

In contrast to French law, the plaintiffs' prospects of recovery under West German law are much poorer. The plaintiffs may sue both in tort and contract simultaneously even if one has a contractual relationship with the defendant,<sup>344</sup> but the consequences of the burden of proof and recovery will be different under each theory. Under contract theory the plaintiff must be in direct privity of contract with the defendant to bring suit.<sup>345</sup> Thus neither plaintiff could sue the manufacturer directly as in France.<sup>346</sup> Further, since the plaintiff must sue the retailer only, and retailers are not liable for hidden defects, the chances of recovery for a defect like sudden brake failure are not good.<sup>347</sup> Although the seller, under the concept of "positive breach,"<sup>348</sup> has a duty not to sell a defective product, the courts have not required dealers to inspect for hidden defects.<sup>349</sup> Here, neither the car buyer nor the house owner has good prospects for recovery under contract theory.

Under the West German tort system, no privity is required but the plaintiff must show either negligence or intentional misconduct on the part of the manufacturer.<sup>350</sup> Defects are classified depending

---

341. See Orban, *supra* note 2, at 348.

342. Neither a lack of privity of contract with the victim, nor impossibility of detecting the defect will exonerate the manufacturer. See A. EUR., *supra* note 48, at 61.

343. See Orban, *supra* note 2, at 348.

344. See *supra* note 91 and accompanying text.

345. See Orban, *supra* note 2, at 352.

346. *Id.*

347. *Id.*

348. See *supra* note 97 and accompanying text.

349. See *supra* note 98 and accompanying text.

350. See *supra* note 100 and accompanying text.

on their origin in the manufacturing process.<sup>351</sup> This in turn affects the burden of proof and the extent of potential liability. For production defects (flaws in single items), as opposed to mass design defects, the defendant's burden of proving a defense is lighter. For example, once the plaintiff proves that the defect existed, the manufacturer is presumed to be at fault.<sup>352</sup> However, unlike the irrebuttable presumption in French law, the manufacturer can usually overcome this presumption by identifying the cause of the defect and showing that he could not guard against it.<sup>353</sup> In the present case, the manufacturer could avoid liability by showing that he had properly trained and equipped his employees, that a certain employee installed the brake improperly, and that reasonable post production tests could not have revealed the defect. Thus, even under the tort system, it will be difficult for the plaintiffs to recover.

In summary, the privity contract requirements and the difficulty in proving the manufacturer's negligence will most likely result in a judgment in favor of the manufacturer in this case. Presumption of the manufacturer's fault is rebuttable in most cases by the "pin-pointing" defense. Further, since mere dealers are not liable for hidden defects,<sup>354</sup> recovery against the immediate seller is unlikely as well.

### C. *United Kingdom*

Despite the reforms in United Kingdom law that have taken place over the last few years, a manufacturer still has a distinct advantage over an injured party in a products liability action.<sup>355</sup> For instance, only parties in direct privity of contract with the defendant can sue in contract, whereas other parties must rely on negligence principles.<sup>356</sup> Possible defendants include any supplier or manufacturer in the production chain, but in contract, only defendants in privity with the plaintiff can be sued.<sup>357</sup> In the present

---

351. See generally MANUAL, *W. Ger.*, *supra* note 87, at 16-29.

352. See *supra* note 92 and accompanying text.

353. See *supra* note 110 and accompanying text.

354. See Orban, *supra* note 2, at 352.

355. See generally *supra* notes 121-72 and accompanying text.

356. See *supra* note 140 and accompanying text.

357. See Orban, *supra* note 2, at 364.

case, only the car buyer and immediate seller are in privity. To reach the manufacturer, an action in tort for negligence must be undertaken. The house owner is merely a bystander, and has no cause of action against either possible defendant under contract law; he must also rely on tort principles.

The car buyer has a statutory right to bring suit against the seller-retailer for breach of express or implied warranty of fitness under the 1979 Act.<sup>358</sup> Since the brake failure was a breach of fitness for the car's intended purpose and was the proximate cause of the injuries sustained by the plaintiff, the prima facie case against the car seller can be established. Although the seller may escape liability through disclaimers, this is limited to sales to professional buyers, and a nonprofessional consumer like the buyer in this case can not contract to forego his claim.<sup>359</sup>

The car buyer is not in direct privity of contract with the manufacturer, so he must resort to tort to bring a claim against the United States firm.<sup>360</sup> Both plaintiffs in the present case can bring actions since the United Kingdom's tort law does not distinguish between the user (car buyer) and a bystander (house owner). The manufacturer owes a duty of care to all those who may come into contact with the product.<sup>361</sup> Both plaintiffs must show that the defect was due to defendant's negligence, that the defect existed while the product was in defendant's control and that the defective product was the proximate cause of the injury of damage.<sup>362</sup> The plaintiffs' chances of recovery will depend on their ability to gather the necessary information to establish their prima facie case, and often this burden will be difficult.

The plaintiffs may be aided somewhat by the doctrine of *ipsa loquitur*, which establishes a rebuttable presumption that the manufacturer is negligent if his product causes damage.<sup>363</sup> In the present case, the plaintiffs would also be aided by the assumption that defective brakes necessarily show either a production flaw or

---

358. Sale of Goods Act, 1979, ch. 54. See also *supra* notes 135-36 and accompanying text (discussing the Sale of Goods Act).

359. MANUAL, U.K., *supra* note 121, at 33.

360. After the *Donoghue* case, 1932 A.C. 562, the United Kingdom's law imposed a duty on the manufacturer for any party coming into contact with his products. 1932 A.C. at 599. See also *supra* note 156 and accompanying text (discussing *Donoghue*).

361. See HALSBURY'S LAWS, *supra* note 144, paras. 37-41, at 32-35.

362. See *supra* note 152 and accompanying text.

363. See HALSBURY'S LAWS, *supra* note 144, para. 40, at 35.

negligent assembly of the product, especially if the retailer is a mere distributor of the product and could not be expected to have discovered the defect.<sup>364</sup> This presumption, however, has been shown to be rebuttable by cases such as *Donoghue v. Stephenson*.<sup>365</sup> However, under the more liberal analysis in *Grant v. Australian Knitting Mills*,<sup>366</sup> the car buyer might obtain recovery. Therefore, it appears that the car buyer has his best chance of recovery under the warranty principles of the 1979 Act against the retailer. Both plaintiffs will have to rely on a negligence theory to succeed against the United States manufacturer, with a correspondingly lesser chance of recovery due to the heavy burden of proof they must bear.

#### D. Community Law (Draft Directive)

An immediate consequence of a suit under the Draft Directive is that the distinction between tort and contract actions is eliminated.<sup>367</sup> For the United States manufacturer to fall within the scope of the Directive, he must be deemed a "producer." A producer is generally the manufacturer of a finished product, or the maker of a component part.<sup>368</sup> The facts in this case state that the manufacturer is represented by a subsidiary in an unspecified country of the EEC. This subsidiary either assembles the product, or is a maker of component parts, or both. In any event, it would be considered a producer under the Directive. In addition, even if it only distributes the product that caused the injury, the Directive specifically states that any importer of a defective product is deemed a producer regardless of whether it is an independent distributor or a branch of a foreign manufacturer.<sup>369</sup>

Next, it is necessary to show that the article in question is a "product" under the Directive. A product is defined as any movable.<sup>370</sup> A new car would obviously fit this category, and falls within the scope of the Directive. Further, unlike the privity of contract provisions contained in some national laws, the Directive provides that any person injured by a defective product can bring

---

364. See *Stennett v. Hancock & Peters*, [1939] 2 All E.R. 578 (K.B.).

365. 1936 A.C. 85 (P.C. 1935). See *supra* text accompanying note 156.

366. 1936 A.C. 85 (P.C. 1935). See *supra* text accompanying note 154.

367. See *supra* text accompanying note 178.

368. See *supra* note 181 and accompanying text.

369. See *supra* note 185 and accompanying text.

370. See *supra* note 187 and accompanying text.

an action against the producer.<sup>371</sup> This includes users and bystanders injured solely by the product being put into circulation<sup>372</sup> when the item is used mainly for private consumption.<sup>373</sup> Accordingly, both the car buyer and the house owner are possible claimants under the Directive. It is important to note that the cause of action is limited to personal injury and damage to property, other than that to the defective product.<sup>374</sup> Therefore, the car buyer can bring suit only for personal injuries suffered in the crash, and not for the loss of the car.<sup>375</sup>

The plaintiffs do not have to show negligence on the part of the manufacturer, but they still must prove the existence of the defect, the extent of damage and the causal relationship between the two.<sup>376</sup> The Directive, as opposed to national law systems, is not concerned with the concept of fitness for intended use as a definition of defect. Rather, the standard used by the Directive is lack of expected safety.<sup>377</sup> Since a consumer expects that the brakes on a car will work properly, and since it is not considered normal for brakes to fail under the circumstances,<sup>378</sup> the defect can be shown easily in the present case by the plaintiffs.

The plaintiffs will be able to prove their prima facie case against the manufacturer largely due to the strict liability standard imposed on the producer. The manufacturer, in order to avoid liability, must prove that the defect did not exist at the time it left his control.<sup>379</sup> In the present case this will be very difficult because the retailer cannot be charged with causing the brake failure since he is not in the business of installing and adjusting brakes in new cars, and there aren't any other intermediaries involved. Secondly, it will be almost impossible for the manufacturer to show that no defects could possibly have happened at any stage of the production process. Nevertheless, even if the producer cannot completely escape liability, the Directive provides for certain limits on the plaintiffs' recovery.

---

371. See *supra* note 195 and accompanying text.

372. See *supra* note 196 and accompanying text.

373. See *supra* note 198 and accompanying text.

374. Annex I, *supra* note 8, art. 6.

375. See *id.*

376. See *supra* note 200 and accompanying text.

377. See *supra* note 227 and accompanying text.

378. See *supra* notes 228-29 and accompanying text.

379. See *supra* note 204 and accompanying text.

The limit imposed for personal injuries is set at a total of twenty five million EUA's.<sup>380</sup> Since there is no separate limit for individual claims, the car owner is theoretically entitled to unlimited compensation.<sup>381</sup> In practice, this will not be the case, as has aptly been demonstrated by the relatively low awards (by United States standards) given by European courts.<sup>382</sup> Damages to the car cannot be recovered under the Directive, and the buyer must therefore seek further redress under the applicable national law. The home owner is in a different position. Under the Directive, damages to immovable property, such as a house, are limited to EUA 50,000.<sup>383</sup> If his damages are greater than this, he may wish to seek recovery under his own national law, which may provide a higher recovery than the Directive. Otherwise, he must rely on his insurance coverage to make up the difference.<sup>384</sup>

The preceding discussion of a relatively simple products liability action was intended as a general overview of the situation as it exists in Europe, and not as an in-depth analysis of the various national statutes and case law in this area. However, some aspects of national law clearly will be changed by the Draft Directive and manufacturers in both the United States and Europe are troubled by this prospect.<sup>385</sup> This stems from the fact that recovery under the Directive will be easier than under most current European national laws. A strict liability standard will generate an increased number of products liability cases, and presumably more awards. It remains to be seen whether this will translate into higher award amounts and progressively higher insurance rates for manufacturers. The European Committee of Insurances is of the opinion that strict

---

380. See *supra* note 290 and accompanying text.

381. See MEMORANDUM, *supra* note 184, point 24, at 18.

382. See generally MANUAL, France, *supra* note 44, at 8-9.

383. See *supra* note 298 and accompanying text.

384. See *supra* note 301 and accompanying text.

385. Bodine, *Industry May Face Product Suits Abroad*, Nat'l L.J., Mar. 16, 1981, at 3, col. 1. The European Council of Chemical Manufacturers (CEFIC) believes that contrary to the Commission's opinion, the Directive is not economically balanced between consumers and producers. 3636 EUROPE 15 (June 24, 1983). From their standpoint, this is evident by the Commission's proposal of including "development risks" in the Directive. *Id.* Further, leaving the limitation of liability to the discretion of the member states is not an objective corollary to a strict liability standard. *Id.* In addition, a text which enables states to introduce stricter rules than those provided for in the Directive, and allows various other derogations from the terms of the Directive, does not comply with the basic objectives of the Directive to unify products liability laws. *Id.*

liability will not add appreciably to insurance costs for manufacturers.<sup>386</sup> However, industry groups disagree,<sup>387</sup> and point out that contrary to its goal of uniformity in national laws, the exceptions and derogations permitted to the Directive's provisions will lead to varied interpretations of its standards by the national courts.<sup>388</sup> This in turn will lead to a confusion of standards in the Directive's application that will leave manufacturers no better off than they were with the variety of national laws. Whatever the truth of this argument, it is safe to say that should the Draft Directive take effect, manufacturers who do business in Europe will be exposed to a greater risk of being held liable for their defective products than they do under current national laws.

### CONCLUSION

The trend worldwide in products liability law has been toward stricter accountability for manufacturers of defective products. European laws, especially the old civil codes, did not contain express provisions for products liability. The courts therefore stretched the general code provisions to encompass defective products cases. Some nations were more willing to extend protection to consumers than others, and the Commission of the European Communities, fearing the distorting effects on competition that diverse laws could cause, proposed a Directive to harmonize the national systems.

This Directive pleased consumer groups, but ran into heavy opposition from industrial concerns. The controversy over development risks and liability limits has delayed the formulation of a final version of the Directive. Although the Directive will probably not be implemented in its present form, some legislation will pass that will impose strict liability upon manufacturers of defective products.

The consequences for manufacturers that do business in the Common Market are apparent. No longer will a producer be able to hide behind the privity requirements of German and English law to avoid liability. The number and scope of lawsuits is almost certain to rise. As the manufacturers' risks increase, there will be a natural reluctance to put new products that may even remotely

---

386. Working Paper, *supra* note 206, at 43.

387. *See id.*

388. *Id.*

endanger consumers into circulation. This will be especially true if liability for development risks is imposed by the Directive, and the "state of the art" defense is not allowed. These proposals come at a time when the Community is slowly losing the race to develop new products to the United States and Japan, and member states' unemployment is on the rise. In effect this new Directive may help to make products safer for consumers at the expense of inhibiting economic development in Europe.

The argument can be made that in reality economic progress and competition will be enhanced by the Directive. As diverse national laws are harmonized, producers will find it less costly to produce items, since they will not be required to tailor their products to different national standards. Foreign manufacturers would benefit from this by making their products fit one Community standard, rather than conforming to different national requirements. Further, the liability ceilings would enable them to reliably insure themselves to appropriate limits, and thus keep costs down.

Unfortunately, this argument loses its force in light of the Directive's numerous derogations and exceptions to its terms. National laws are unfettered in many areas, and the potential for diverse national programs is great even if the Directive takes effect. For example, plaintiffs retain their rights under national laws for contractual or extra-contractual liability not specifically covered by the Directive. Moreover, the leeway given to national courts in interpreting the Directive may lead to nonuniform application. The ability of plaintiffs to bring actions under both national and European laws may lead to even more confusion than already exists due to the diversity of national rules concerning products liability. In conclusion, the social importance of greater consumer protection is likely to prevail over the protests of industry, and some form of the Directive will go into effect, at least with the provisions for strict liability intact.

If even a limited Directive takes effect, however, the Commission will have taken a large step toward mitigating the distorting effects on competition by diverse national products liability laws.



### Annex I

(General Secretariat, Council of Eur., Interim Report to the Permanent Representatives Committee annex (July 13, 1981))

#### *Article 1*

The producer shall be liable for damage caused by a defect in his product.

#### *Article 1a*

For the purpose of this Directive "product" means all movables, with the exception of primary agricultural products even though incorporated into another movable or into an immovable. "Primary agricultural products" means the products of the soil, of stockfarming and fisheries, excluding products which have undergone initial processing. "Product" includes electricity.

#### *Article 2*

1. The term "producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trademark, or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the European Community a product for resale or a similar purpose shall be deemed to be a producer within the meaning of this directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

#### *Article 2a*

The injured person is required to prove the damage, the defect and the causal relationship between defect and damage.

### *Article 3*

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of the national law concerning the right of recourse.

### *Article 4*

A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.\*

### *Article 5*

The producer shall not be liable under this Directive if he proves:

- (a) that he did not put the product into circulation; or
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards;
- (c) that the product was neither manufactured by him for sale or any other form of distribution for economic purposes nor manufactured or distributed by him in the course of his business; or
- (d) that the product was made in accordance with binding legislative, statutory or administrative standards;
- (e) that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;
- (f) in the case of a manufacturer of a component, that the defect may be attributed to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

---

\* A recital is to be inserted stating that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

*Article 5a*

1. Without prejudice to the provisions of national law concerning the right of appeal, the liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.

2. The provisions of national law shall establish whether and to what extent the liability of the producer is reduced when the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is liable.

*Article 6*

For the purpose of Article 1 "damage" means:

- (a) damage caused by death or by personal injuries;
- (b) damage to or destruction of any item of property other than the defective product itself where the item of property
  - (i) is of a type ordinarily acquired for private use or consumption, and
  - (ii) was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

*Article 7*

The total liability of the producer provided for in this Directive for all personal injuries caused by identical articles having the same defect shall be limited to a maximum amount. Upon the adoption of this Directive this amount shall be fixed at 25 million European Units of Account (EUA).

The said amount includes the compensation payable under the second paragraph of Article 6.

The liability of the producer provided for in this Directive in respect of damage to property shall be limited per capita

- in the case of movable property to 15,000 EUA, and
- in the case of immovable property to 50,000 EUA.

The European Unit of Account (EUA) is as defined by Article 10 of the Financial Regulation of 21 December 1977.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

The Council shall, on a report from the Commission, examine every three years the amounts specified in this Article. Where necessary, the Council shall, acting by qualified majority on a proposal from the Commission, revise or cancel the amount specified in paragraph 1 of this Article or revise the amounts specified in paragraph 3, taking into consideration economic and monetary movement in the Community.

#### *Article 8/9*

Member States shall provide in their legislation that:

- (a) the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of ten years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer;
- (b) a limitation period of three years shall apply to proceedings for the recovery of damages as provided in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

For the application of paragraph (b), the laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

#### *Article 10*

The liability of the producer arising from this Directive may not be excluded or limited by clause limiting his liability or exempting him from liability.

#### *Article 11*

This Directive shall not affect any rights which a person suffering damage may have according to the ordinary rules of the law of contractual or extracontractual liability.

### *Article 12*

This Directive does not apply to injury or damage arising from nuclear accidents and covered by international Conventions ratified by the Member States of the Community.

#### *Article 12a*

1. Each Member State may:

- (a) by way of derogation from Article 5, provide in its legislation that the producer shall be liable even if he proves that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.
- (b) by way of derogation from Article 6, provide in its legislation that within the meaning of Article 1 of this Directive "damage" also means damage to or destruction of any item of property other than the defective product itself where the item of property
  - (i) is of a type ordinarily acquired for private use or consumption; and
  - (ii) was used by the injured person mainly for his own private use or consumption.

2. A Member State which avails itself of the possibility provided for in paragraph 1(b) may provide in its legislation that the liability of the producer arising from this Directive shall be limited to a maximum amount of .....  
(detailed rules still to be defined).

#### *Article 12b*

This Directive does not apply to products put into circulation before the date on which the provisions referred to in Article 13 enter into force.

### *Article 13*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within three years of its notification and shall forthwith inform the Commission thereof.

*Article 14*

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.

*Article 14a*

Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit the appropriate proposals to it.

*Article 15*

This Directive is addressed to the Member States.

Annex II

(19 O.J. EUR. COMM. (No. C 241) 9-12 (1976))

Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

*(Submitted by the Commission to the Council on  
9 September 1976)*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in the common market; whereas rules on liability which vary in severity lead to differing costs for industry in the various Member States and in particular for producers in different Member States who are in competition with one another;

Whereas approximation is also necessary because the free movement of goods within the common market may be influenced by divergencies in laws; whereas Decisions as to where goods are sold should be based on economic and not legal considerations;

Whereas, lastly, approximation is necessary because the consumer is protected against damage caused to his health and property by a defective product either in differing degrees or in most cases not at all, according to the conditions which govern the liability of the producer under the individual laws of Member States; whereas to this extent therefore a common market for consumers does not as yet exist;

Whereas an equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes on the injured party almost insurmountable difficulties of proof or does not cover the important causes of damage;

Whereas liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects;

Whereas liability cannot be excluded for those products which at the time when the producer put them into circulation could not have been regarded as defective according to the state of science and technology (development risks), since otherwise the consumer would be subjected without protection to the risk that the defectiveness of a product is discovered only during use;

Whereas liability should extend only to movables; whereas in the interest of the consumer it nevertheless should cover all types of movables, including therefore agricultural produce and craft products; whereas it should also apply to movables which are used in the construction of buildings or are installed in buildings;

Whereas the protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product or component part or any raw material supplied by them was defective; whereas for the same reason liability should extend to persons who market a product bearing their name, trademark or other distinguishing feature, to dealers who do not reveal the identity of producers known only to them, and to importers of products manufactured outside the European Community;

Whereas where several persons are liable, the protection of the consumer requires that the injured person should be able to sue each one for full compensation for the damage, but any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be governed by the laws of the individual Member States;

Whereas to protect the person and property of the consumer, it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect;

Whereas the producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances;

Whereas in order to protect both the health and the private property of the consumer, damage to property is included as damage for which compensation is payable in addition to compensation for death and personal injury, whereas compensation for damage to



property should nevertheless be limited to goods which are not used for commercial purposes;

Whereas compensation for damage caused in the business sector remains to be governed by the laws of the individual States;

Whereas the assessment of whether there exists a causal connection between the defect and the damage in any particular case is left to the law of each Member State;

Whereas since the liability of the producer is made independent of fault, it is necessary to limit the amount of liability; whereas unlimited liability means that the risk of damage cannot be calculated and can be insured against only at high cost;

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for; whereas the stipulated limit of 25 million European units of account covers most of the mass claims and provides in individual cases, which in practice are the most important, for unlimited liability; whereas in the case of the extremely rare mass claims which together exceed this sum and may therefore be classed as major disasters, there might be under certain circumstances assistance from the public;

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particular case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based on an estimated average of private assets in a typical case; whereas since this private property includes movable and immovable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;

Whereas the limitation of compensation for damages to property to damage to or destruction of private assets avoids the danger that this liability becomes limitless; whereas it is therefore not necessary

to provide for an overall limit in addition to the limits to liability in individual cases;

Whereas by Decision No 3289/75/ECSC of 18 December 1975 <sup>(1)</sup> the Commission, with the assent of the Council, defined a European unit of account which reflects the average variation in value of the currencies of the Member States of the Community;

Whereas the movement recorded in the economic and monetary situation in the Community justifies a periodical review of the ceilings fixed by the Directive;

Whereas a uniform period of limitation for the bringing of action for compensation in respect of the damage caused is in the interest both of consumers and of industry; whereas it appeared appropriate to provide for a three-year period;

Whereas since products age in the course of time, higher safety standards are developed and the state of science and technology progresses, it would be unreasonable to make the producer liable for an unlimited period for the defectiveness of his products; whereas therefore the liability should be limited to a reasonable length of time; whereas this period of time cannot be restricted or interrupted under laws of the Member States, whereas this is without prejudice to claims pending at law;

Whereas to achieve balanced and adequate protection of consumers no derogation as regards the liability of the producer should be permitted;

Whereas under the laws of the Member States an injured party may have a claim for damages based on grounds other than that provided for in this Directive; whereas since these provisions also serve to attain the objective of an adequate protection of consumers, they remain unaffected;

Whereas since liability for nuclear damage is already subject in all Member States to adequate special rules, it has been possible to exclude damages of this type from the scope of the Directive,

---

<sup>(1)</sup> OJ No I. 327, 19. 12. 1975, p. 4.

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.

The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific technological development at the time when he put the article into circulation.

*Article 2*

'Producer' means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer.

Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the article.

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

*Article 3*

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.

*Article 4*

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

*Article 5*

The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.

*Article 6*

For the purpose of Article I 'damage' means:

- (a) death or personal injuries;
- (b) damage to or destruction of any item of property other than the defective article itself where the item of property:
  - (i) is of a type ordinarily acquired for private use or consumption; and
  - (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

*Article 7*

The total liability of the producer provided for in this Directive for all personal injuries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).

The liability of the producer provided for by this Directive in respect of damage to property shall be limited per capita:

- in the case of movable property to 15,000 EUA, and
- in the case of immovable property to 50,000 EUA.

The European unit of account (EUA) is as defined by Commission Decision No 3289/75/ECSC of 18 December 1975.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amounts specified in

EUA in this Article, having regard to economic and monetary movement in the Community.

#### *Article 8*

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damages, the defect and the identity of the producer.

The laws of Member States regulating suspension or interruption of the period shall not be affected by this Directive.

#### *Article 9*

The liability of a producer shall be extinguished upon the expiry of 10 years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

#### *Article 10*

Liability as provided for in this Directive may not be excluded or limited.

#### *Article 11*

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this Directive shall not be affected.

#### *Article 12*

This Directive does not apply to injury or damage arising from nuclear accidents.

*Article 13*

Member States shall bring into force the provisions necessary to comply with this Directive within 18 months and shall forthwith inform the Commission thereof.

*Article 14*

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this Directive.

*Article 15*

This Directive is addressed to the Member States.

---