The Law Commission

Working Paper No 64

The Scottish Law Commission

Memorandum No 20

Liability for Defective Products

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This joint document, completed for publication on 3 June 1975, is circulated for comment and criticism only; it does not represent the final views of either Law Commission.

They would be grateful for comment and criticism before 1 January 1976. Correspondence should be addressed to

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THE LAW COMMISSION

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AND

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LIABILITY FOR DEFECTIVE PRODUCTS

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PART I - INTRODUCTION

Terms of reference

1. On 2 November 1971 in exercise of powers under section 3(1)(e) of the Law Commissions Act 1965 the Lord Chancellor asked the Law Commission and the Lord Advocate asked the Scottish Law Commission

> "to consider whether the existing law governing compensation for personal injury, damage to property or any other loss caused by defective products is adequate, and to recommend what improvements, if any, in the law are needed to ensure that additional remedies are provided and against whom such remedies should be available."

The two Commissions set up a Joint Working Party; the names of its members are set out in Appendix A. They have been of the greatest help to us in preparing this document, a task that has involved not only a careful study of the present law of England and Scotland but also an appraisal of the recent and rapid developments in legal thinking on this topic on the Continent of Europe. We wish to record our gratitude to them for the expert advice and assistance that they have given.

The Pearson Commission

2. On 19 December 1972 the then Prime Minister said in the House of Commons[1] that "It is the Government's view that a wide-ranging inquiry is required into the basis on which compensation should be recovered", and he announced the

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1. Hansard, vol. 848, col. 1119.

setting up of a Royal Commission under the chairmanship of Lord Pearson with terms of reference that include the following:-

> "To consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person ... (c) through the manufacture, supply or use of goods or services ... having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise."

3. Our terms of reference and those of the Royal Commission overlap. The Royal Commission is considering the provision of compensation for death or personal injury caused by defective products and also for death or personal injury sustained in other situations, such as in accidents at work or on the roads; they would be free to recommend that some claims, including perhaps "products" claims, should be made not against individual defendants but against an insurance fund or against the State itself. Our own terms of reference are narrower in that they are only concerned with liability for defective products but they are, at the same time, wider in that they cover compensation for "damage to property or any other loss" as well as for death or personal injury. They seem to assume the broad framework of party and party litigation by which civil claims are tried at present and this is the context in which we shall examine the questions referred to us.

The Council of Europe

4. The Royal Commission is not the only body apart from ourselves to be considering liability for defective products. The Council of Europe and the Commission of the European Communities are engaged in similar studies, each of which could eventually lead to changes in the present law of the

United Kingdom. The Council of Europe was formed in 1949 and its membership includes the United Kingdom and seventeen other European countries. In 1970[2] the Council of Europe decided that a Committee of Experts on the Liability of Producers should be set up whose task should be to make proposals for the harmonisation of the laws of member states in respect of the liability of producers. A committee was duly formed, comprising experts from various member states including the United Kingdom, and a number of meetings have been held at Strasbourg, the first being in November 1972. As a result of these meetings a draft convention on the liability of producers has been prepared and is almost ready for submission. A copy of the draft in its present form, together with a draft explanatory report, is reproduced at the end of this consultative document as Appendix B, and it will be described, for convenience, as the Strasbourg draft convention. If it is approved by the Committee of Ministers with or without alterations, it will be open for signature by member states as a European convention. If it is approved in its present form and the government of the United Kingdom accede to it - which they are not bound to do - they will be undertaking thereby[3] to make such changes in the law of the United Kingdom as may be needed to give effect to the provisions of the Strasbourg convention.

The E.E.C.

5. Work is being done at the Commission of the European Communities in Brussels on a directive on the liability of producers for defective products. Copies of the first preliminary draft directive and an explanatory memorandum,

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2. At the 192nd meeting of Ministers' Deputies.

3. By Art. 1.

each dated August 1974, are attached to this consultative document as Appendix C and are, for convenience, described collectively as the E.E.C. draft directive. Discussion of this draft has now begun between E.E.C. officials and representatives of the governments of the member states of the E.E.C. including the United Kingdom. The arguments in the E.E.C. draft directive are not, at this stage, necessarily accepted by the Commission of the European Communities or by the governments of member states, but it is important that the reader should understand what they are. The central point is that the national laws of the countries within the E.E.C. are not consistent on liability for defective products. The laws of some countries provide remedies for injured persons that are not available in other countries, and this may impose differing burdens on producers in different countries. This, it is argued, distorts competition between producers in different countries within the E.E.C., as the producer who bears a lighter burden of legal responsibility for defects in his products can produce them more cheaply than the producer who has a heavier burden; the latter has to provide, by insurance or otherwise, against third party claims for which the former would not, by the law of his country, be liable. It is contended, in the E.E.C. draft directive, that the operation of the common market requires the removal of this obstacle to the free movement of goods across frontiers within the common market and also requires the provision of equal protection to all consumers within the common market. By Article 100 of the Treaty of Rome the Council of Ministers, which consists of representatives, one from each member state, "shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."
If the Commission were to propose the directive to the Council in its present form and if it were then to be issued by the

unanimous decision of the Council, it would require far-reaching changes in the present law of England and Scotland to be made by legislation.

The purpose of consultation

6. In the paragraphs that follow we shall examine the various ways in which the present law of liability for defective products might be changed, referring the reader at every convenient point to the provisions of the Strasbourg draft convention and of the E.E.C. draft directive. We shall put the arguments for and against such changes as are considered in as full and fair a way as we can. Our primary concern is to stimulate discussion and to obtain comments and factual information. We shall consult as widely as possible amongst lawyers, consumers, manufacturers, importers, exporters, retailers, distributors, wholesalers, insurers and all other persons who might be affected by changes in this area of the law. The comments and information thus obtained will be used by the two Law Commissions in carrying out the work requested of them by the Lord Chancellor and the Lord Advocate,[4] and, unless the individual contributor objects, copies of each contribution will also be transmitted to the Royal Commission. In addition, the same contributions will, unless the individual contributor objects, be made available to all those concerned in advising or representing Her Majesty's Government in connection with the subject matter of this consultative document.

Liability for defective products

7. Liability for defective products is not treated in the standard text-books on English and on Scots law as being

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4. Under the terms of reference set out in para. 1, above.

a subject in its own right. Such liability may be based on contract or on tort or delict, and may result in claims for loss, injury or damage falling into four main categories:-

(a) Personal injury or death,
(b) Damage to property not being damage to the defective product,
(c) Damage to the defective product and
(d) Pure economic loss.

One occurrence may of course give rise to more than one kind of claim. For example, a car with defective steering may run into a pole that carries electricity to a factory, causing (a) injury to a passenger, (b) damage to the pole, (c) damage to the car and (d) loss of production in the factory; however, the social and economic considerations relevant to the compensation of the person suffering the injury, damage or loss may not be the same for (b) as for (a), nor for (c) as for (b), nor for (d) as for (c). Each kind will be considered in detail later but something more must be said of each by way of introduction.

Personal injury

8. Personal injury, not resulting in death, may cause pecuniary loss, such as loss of wages, as well as non-pecuniary losses such as pain, suffering and loss of amenity. Where death results a dependant's claim under English law is for pecuniary loss alone[5] whereas under Scots law there may also be a claim for non-pecuniary loss (solatium) in such circumstances. The case of Daniels and Daniels v. R. White & Sons Ltd. and Tarbard[6] (whatever may be thought of the actual decision)

5. Under the Fatal Accidents Acts 1846 to 1959.

6. [1938] 4 All E.R. 258.

illustrates the present state of English law in a fact situation involving personal injuries caused by a defective product, although it should be noted that the case was one in which negligence on the part of the manufacturer was not established.

The facts: Mr. Daniels purchased some lemonade from Mrs. Tarbard which had been manufactured and bottled by R. White and Sons Ltd. The lemonade contained carbolic acid which had been introduced into the bottle in some unexplained way. Mr. and Mrs. Daniels both drank it and were made ill by the carbolic acid.

The decision: The claims against R. White and Sons Ltd. by Mr. and Mrs. Daniels were dismissed because they failed to prove that the presence of carbolic acid in the lemonade was due to negligence on the manufacturer's part. Mr. Daniels' claim against Mrs. Tarbard for damages for breach of contract was successful. Mrs. Daniels had no claim for damages against Mrs. Tarbard as she had not purchased the lemonade and was therefore not a contracting party. Mrs. Daniels thus recovered no compensation for injuries for either defendant.

Despite the recognition by Scots law that a third party may in certain circumstances be entitled to enforce a contract where the object of the parties was to advance the interests of the third party, it is thought that the foregoing fact situation

would lead to the same result under Scots law.[7]

Damage to property

9. The losses that result from physical damage to property are of two kinds. There is the loss which is directly attributable to the physical damage to property, that is to say the cost of making good the physical damage or of obtaining a replacement. There is also the loss that may result from the physical damage to the property if the property has a commercial use, such as the loss of fares suffered by the cab-owner when his vehicle is damaged and off the road; this second kind of loss is generally described as 'economic loss'. We shall cover both kinds of loss in our consideration of claims arising out of damage to property. However we shall deal separately with the situation in which the property damaged is the defective product itself. A typical property damage claim, in which property other than the defective product was damaged, came before the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof) on 26 November 1968.[8]

The facts: The claimant's chickens were inoculated by a veterinary surgeon with a vaccine that he had purchased from the manufacturers. The vaccine was defective

7. As a result of certain decisions of the House of Lords during the 19th and early 20th centuries, this area of Scots law (jus quaesitum tertio) is in a state of some confusion, particularly where there has been defective performance.

8. B.G.H.Z. 51.91; N.J.W. 1969, 269. See R.H. Mankiewicz, "Products Liability - A Judicial Breakthrough in West Germany" (1970) 19 I.C.L.Q. 99.

in that it contained viruses which the claimant could prove were active in the vaccine when it was delivered by the manufacturers. The chickens died as a result. The claimant was unable to prove that the manufacturers had been negligent in any particular respect.

The decision: The court held the manufacturers to be liable, as there was uncertainty with respect to the possible causes of the defect within the manufacturers' sphere of responsibility and one of the possible causes would imply negligence on the manufacturers' part. The burden was on the manufacturers to prove that the product's defect had occurred without fault on their part, and as they had failed to prove what the cause was they were liable.

Damage to the defective product

10. Situations may arise in which the damage caused to property is damage to the product itself; this may result in economic loss as well if the defective product has a commercial use, for example, if the cab-owner cannot ply for hire as his vehicle has become damaged because of a defect in its manufacture. An example in which there was no economic loss is to be found in the facts of Young & Marten Ltd. v. McManus Childs Ltd.[9] although the decision of the House of Lords in that case was on points that do

9. [1969] 1 A.C. 454.

not concern us in the present context.

The facts: Certain roof tiles were made and marketed by a manufacturer who was not a party to the proceedings. They appeared to be sound but had a defect as a result of which they began to disintegrate after being exposed to the weather for a year. They had been used in the roofing of new houses which were purchased by members of the public. When the tiles disintegrated the houses had to be re-roofed.

The decision: The courts did not have to decide whether the manufacturers were liable to the individual house-purchasers as the claims did not proceed in this way but Lord Pearce made the following comment in his speech :

> "I see great difficulty in extending to an ultimate consumer a right to sue the manufacturer in tort in respect of goods which create no peril or accident but simply result in substandard work under a contract which is unknown to the original manufacturer."10

Whilst English law has not produced a conclusive decision on the point we think it is reasonably clear that the individual householder would not have succeeded if he had claimed the cost of

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10. [1969] 1 A.C. 454, 469.

re-roofing his house from the manufacturer of the defective tiles. In Scots law the position of an individual householder in such circumstances might be stronger.

Pure economic loss

11. Under the heading of 'pure economic loss' we shall consider economic losses that are brought about by a defective product where there has been no physical damage to the claimant's property. An illustrative fact situation is to be found in the decision by the Court of Appeals of New York in Randy Knitwear Inc. v. American Cyanamid Company.[11]

The facts: American Cyanamid Company manufactured and marketed a chemical resin called 'Cyanamid' for use by textile manufacturers to prevent fabrics from shrinking. Randy Knitwear Inc. purchased fabric that had been so treated from certain textile manufacturers and made the fabric up into garments that they sold. It turned out that the resin was not effective to prevent shrinkage and Randy Knitwear were faced with many claims by dissatisfied customers. Their profits fell appreciably and they claimed to be indemnified by the manufacturers of the resin, in respect of their lost profits.

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11. 181 N.E.2d 399 (1962) New York.

The decision: The claim succeeded, although this was not simply because the resin was defective but because American Cyanamid had represented that fabrics treated for shrinkage by 'Cyanamid' would not shrink.[12] But for the representation the claim might have failed under the law of New York.

Points for consideration

12. We have described four different fact situations in order to illustrate the four kinds of damage that may flow from the marketing of a defective product. They also contain sign-posts for fresh directions that the law might take, if the law of liability for defective products were to be changed. The following points will be considered in detail in the pages that follow, but it is convenient to cover them very briefly now in the context of the four cases just cited.

(a) If it were proposed to give wider rights to compensation for injury caused by defective products this would not necessarily mean providing further or better remedies in tort or delict against the producer, although this might usually seem the more appropriate course. For Mrs. Daniels an additional remedy might be provided by allowing her to sue the retailer, Mrs. Tarbard, for breach of the contract of sale made between Mrs. Tarbard and Mr. Daniels, or, under Scots law, by a statutory development of the principle of jus quaesitum tertio.

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12. See the leading judgment of Fuld J., 181 N.E.2d 399, 404: "Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved. (Emphasis has been added.)

(b) A claim in respect of a defective product might have a better chance of success if the burden of proof were made easier for the claimant to discharge. The chicken vaccine case shows a development of this kind in German law.

(c) The word 'defective' has different shades of meaning in relation to products, depending on the injury or damage that is occasioned by the defect. In the lemonade case and in the chicken vaccine case 'defective' could be translated as 'unsafe'. In the roof tile case and the Cyanamid case however it would appear to mean 'unmerchantable' or 'unfit for the purpose for which it was required' or some other such wider phrase in which lack of safety would not be a necessary ingredient.

(d) There are difficulties in providing remedies in tort or delict against the producer where the defect in the product has caused no physical injury or damage. These arise from the fact that the courts of England[13] and Scotland,[14] basing themselves on principles of remoteness or broad considerations of legal policy, appear not to recognise a duty of care to prevent economic loss, and a claimant cannot

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13. S.C.M. (United Kingdom) Ltd. v. W.J. Whittall and Son Ltd. [1971] 1 Q.B. 337; Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. [1973]1 Q.B. 27; cf. Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd. (1974) 40 D.L.R. (3d) 530, a decision of the Supreme Court of Canada. See C.J. Miller, "Manufacturers' Liability: a Canadian Decision" (1975) 119 S.J. 58.

14. Dynamco Ltd. v. Holland & Hannen & Cubitts (Scotland) Ltd. 1971 S.C. 257.

usually recover for economic loss except where it stems from physical damage.

(e) The person suffering the injury, damage to property or other loss might be given the right to sue the manufacturer for breach of the contract made by the manufacturer with the distributor or retailer.

Misrepresentation

13. There is a further point to be made at this stage, which is highlighted by the decision in the Cyanamid case. A legal distinction can be drawn between a product that is inherently defective and one that is only defective in the context of the representations made about it. If the producer represents that his car is capable of speeds in excess of 100 m.p.h. and the representation turns out to be false the product is not, in ordinary parlance, defective. The legal remedy of the person who relies on the representation is in respect of the misrepresentation or mis-statement rather than any 'defect'. The line is not an easy one to draw but it is not our intention in this paper to consider losses caused by misrepresentation or mis-statement.

14. The scheme of this paper is as follows:-

Part	II	An examination of the present law of England and Scotland
Part	III	The areas of possible reform
Part	IV	Personal injuries
Part	V	Damage to property
Part	VI	Damage to the defective product
Part	VII	Pure economic loss
Part	VIII	Contract
Part	IX	Lapse of time
Part	X	A summary of the problems and their possible solutions.

It must be emphasised that none of the suggestions that may be made for possible changes in the law represent concluded views. This is a consultative document, and at this stage our primary concern is to stimulate discussion and the expression of views by all who may be affected by reforms of this part of the law.

PART II - THE PRESENT LAW

General observations

15. Under the existing law compensation for injury, loss or damage caused by defective products may be available at common law or by statute. In England the remedies at common law that do not depend on contract lie in the tort of negligence. In Scotland corresponding rights give rise to liability under the law of delict. There are also in both countries rights and remedies in contract, and there are statutes that imply terms into certain contracts. A statutory remedy is also provided by section 3(1) of the Consumer Protection Act 1961. Each head of liability[15] will be considered in turn.

Tort: delict

16. It was the majority decision of the House of Lords in the Scottish case of Donoghue v. Stevenson[16] that established the liability of the manufacturer of defective products in the tort of negligence in English law. In Scotland, historically, duties in delict and in contract were separate, and the existence or non-existence of a contractual relationship did not exclude the possibility that a duty was owed in delict. As a result of certain decisions and dicta in Scottish cases during a period prior to 1932, some doubts in this regard had arisen and the main effect in Scotland of Donoghue v. Stevenson was to remove these doubts. The assumed facts on which the legal ruling was based were that Mrs. Donoghue had visited a café in Paisley with a friend who had purchased a bottle of ginger-beer for her. After drinking some of it

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15. That is to say negligence or delict, contract and statute.
16. [1932] A.C. 562, 1932 S.C.(H.L.) 31.

Mrs. Donoghue had discovered a snail in the bottle which she had not previously seen because of the opacity of the glass bottle, and she had been made ill. She claimed damages from Mr. Stevenson who was the manufacturer of the ginger-beer in question and she claimed that he had injured her by his negligence in putting his product on the market when it was likely to cause harm. The question was whether the manufacturer owed any duty of care to the ultimate consumer with whom he was in no contractual relationship.

17. After a series of appeals the point came before the House of Lords who decided, by a majority, that the pursuer's case was sound in law, if she could prove the facts which she averred. The decision is generally regarded as authority for the following proposition, which is taken from the headnote of the report in Appeal Cases:-

> "...the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health."

In his speech Lord Atkin described the legal duty of care in terms that have been quoted in many cases since:-

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected

> by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[17]

18. The decision in Donoghue v. Stevenson and, in particular, the speech made in that case by Lord Atkin confirmed the right of the injured consumer to sue the manufacturers of defective products in tort or delict and today all manufacturers, not just the manufacturers of "food, medicine or the like," are liable to the consumer for injury or physical damage caused by defects in their products, provided that the following requirements are satisfied in each case:-

(a) the defect in the product must be one that may result in "injury to the consumer's life or property";[18]

(b) the defect must have existed at the time the manufacturer parted with possession of it;[19]

(c) the defect must not be one that the manufacturer could reasonably have expected the consumer or some third party to notice and correct before it could do harm;[20]

(d) the existence of the defect must be attributable to lack of reasonable care on the part of the manufacturer.[21]

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17. [1932] A.C. 562, 580, 1932 S.C.(H.L.) 31, 44.

18. From the speech of Lord Atkin, [1932] A.C. 562, 599.

19. Evans v. Triplex Safety Glass Co.Ltd. [1936] 1 All E.R. 283.

20. See Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85.

21. The defendant must be careful but need not be infallible. See Daniels v. White [1938] 4 All E.R. 258.

19. In cases where liability for injury, loss or damage caused by a defective product is in issue it will usually be the manufacturer of the defective product who is sued in tort or delict, but he is not necessarily the only person who may be so sued. The defect may have been caused entirely by the negligence of some person other than the manufacturer, or again the liability in tort or delict may rest on the manufacturer and on someone else as well such as the retailer. In Fisher v. Harrods Ltd.,[22] Mrs. Fisher was awarded damages against Harrods when she was injured by a bottle of cleaning-fluid that her husband had purchased for her. It was held that Harrods had been negligent in selling an untested product that they had obtained from an unreliable source. The manufacturers of the product might also have been liable, but they were not sued.

20. Although the law on the point cannot be stated with absolute certainty it seems probable that in England and Wales an action will not lie in tort in respect of a defective product unless the defect is likely to cause injury to the person or damage to other property. If the product has a defect that makes it inefficient or useless or causes it to fall to pieces the consumer probably cannot recover damages in tort from the manufacturer in respect of his losses even though he may be able to prove a lack of reasonable care on the manufacturer's part.[23] He may however be able to recover damages for breach of contract from the person who supplied him with the product.[24] In Scotland, on the other hand, there seems to be no reason in principle why the consumer's claim should be restricted in this way.

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22. [1966] 1 Lloyd's Rep. 500.
23. See para. 10, above.
24. See para. 21, below.

Contract

21. Contracts of sale or hire-purchase. Most products reach consumers by way of purchase from a retailer or a contract of hire-purchase made with a retailer or finance company. The buyer under a contract of sale of goods or the hirer under a hire-purchase agreement - but no-one other than the buyer or hirer - has important rights in respect of the nature and quality of the goods, and as a result of recent changes in the law[25] these rights cannot be excluded in consumer contracts.[26] The rights take the form of implied terms as to correspondence with description or sample,[27] merchantable quality[28] and fitness for purpose.[29] The implied terms as to merchantable quality and fitness for purpose are contractual obligations and it is no defence for a retailer or finance company to show that a breach occurred without negligence.[30] There is however, no obligation to supply goods fit for a particular purpose unless the purpose was made known, expressly or by implication, to the seller, nor where the buyer did not rely (or it was unreasonable for him to rely) on the seller's skill or judgment. Damages for breach of the implied terms extend to personal injuries or damage to property, defects in the goods supplied themselves (including loss of bargain) and economic loss where recoverable under the ordinary rules of remoteness of damage in contract.

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25. By the Supply of Goods (Implied Terms) Act 1973.

26. Sale of Goods Act 1893, s.55, as amended; Supply of Goods (Implied Terms) Act 1973, s.12.

27. Sale of Goods Act 1893, ss.13 and 15; Supply of Goods (Implied Terms) Act 1973, ss.9 and 11.

28. Sale of Goods Act 1893, s.14(2); Supply of Goods (Implied Terms) Act 1973, s.10(2).

29. Sale of Goods Act 1893, s.14(3); Supply of Goods (Implied Terms) Act 1973, s.10(3).

30. Frost v. Aylesbury Dairy Co.Ltd. [1905] 1 K.B. 608.

22. Contracts of hire. Contracts of hire are not subject to the same statutory provisions as contracts of sale or hire-purchase, but by the common law of both jurisdictions a person whose business is the hiring out of chattels or movables is under a duty to ensure that they are at least as fit for the purpose for which they are hired out as reasonable skill and care can make them. There is English authority that parties can contract on terms which release the supplier from this duty,[31] and the same contractual freedom exists in Scotland.[32]

23. Collateral contracts. The customer may be induced to enter into the main contract of sale, hire or hire-purchase by assurances that are given to him and relate to the quality of the product that is to be the subject of the main contract. In England if the assurance can be construed as an express warranty then it will bind the person who made it provided that the customer can show that he has accepted it and has given consideration for it, for example by entering into the main contract.[33] This last requirement, consideration, would not be essential in Scotland, where it would be sufficient if the assurance were proved to amount to an offer which could be and had been accepted by the customer. In this way the manufacturer may be contractually liable to a customer by English law for breach of an express warranty that induced the customer to buy the product from the retailer and a similar result might be reached in Scots law, though on somewhat different grounds.

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31. Astley Industrial Trust Ltd. v. Grimley [1963] 1 W.L.R. 584.

32. J.J.Gow, The Mercantile and Industrial Law of Scotland (1964) pp.242-7; cf. D.M. Walker, Principles of Scottish Private Law (1970), p.692.

33. Carlill v. Carbolic Smoke Ball Co. [1892] 2 Q.B. 484; Shanklin Pier Ltd. v. Detel Products Ltd. [1951] 2 K.B. 854; Wells (Merstham) Ltd. v. Buckland Sand and Silica Ltd. [1965] 2 Q.B. 170.

Statute

24. Consumer Protection Act 1961. Section 1 of this Act empowers the Secretary of State by regulation to impose standards as to the composition and content of goods and tc require that they be accompanied by warnings or instructions. Regulations have been made in relation to heating appliances, oil heaters, stands for carry-cots, nightdresses, toys and the colour coding of wires on electrical appliances. Section 2 makes it an offence for anyone to sell goods that do not comply with the regulations and section 3(1) provides that a breach of regulations is to be actionable as a breach of a statutory duty "by any person who may be affected by the contravention".

PART III - THE AREAS OF POSSIBLE REFORM

25. Having described the boundaries set on liability for defective products by the present law, we propose, in the rest of this paper, to consider whether the remedies provided by the existing law are adequate and, if not, how the law might be improved.

Tort: delict

26. In tort or delict, the only remedy provided by the present law is the action for damages based on failure to take reasonable care, and the burden of proof on all the relevant issues lies on the person bringing the action. Even where a failure to take reasonable care is proved, there are some heads of claim, in particular claims in respect of pure economic loss, which are generally irrecoverable under the present law of England and of Scotland. There are several ways in which the existing remedy might be reshaped but the two main ones with which this paper will be concerned are -

(a) by altering the rules on burden of proof but retaining failure to take reasonable care as the basis of liability and

(b) by introducing strict liability for defective products, that is to say liability for breach of statutory duty whether or not there has been a failure to take reasonable care.

Another possible way might be by providing that losses in respect of damage to the product itself or pure economic loss should be recoverable wherever the loss is the reasonably foreseeable consequence of a failure to exercise reasonable care. However, if such a change were to be made in the

present law it could not conveniently be confined to claims in respect of defective products; if a factory owner suffered pure economic loss as a result of a power failure it would be anomalous if a change in the law enabled him to recover compensation from the negligent producer of a defective electric cable but left him without remedy against someone who interrupted the supply of power by negligently cutting the cable. Changes in this part of the law of tort or delict ought, in our view, to be considered in a wider context than that provided by our present terms of reference. They will therefore not be canvassed in this consultative document.

Contract

27. As for contract, we have already mentioned consumer contracts and the restrictions on exemption clauses that were introduced by the Supply of Goods (Implied Terms) Act 1973.[34] Further work is being done on exemption clauses in the law of contract under Item II of the Law Commission's First Programme and under Paragraph 12 of the Scottish Law Commission's First Programme and it would be undesirable for the two Law Commissions to attempt to do the same work twice. We intend therefore to narrow the scope of the present study to matters on which the Law Commissions are not already actively engaged, but in order that the reader may appreciate what is, as a consequence, being omitted the history and progress of the work of the two Law Commissions on exemption clauses is summarised in the paragraphs that follow.

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34. In para. 21, above.

28. In June 1966 the two Law Commissions set up a joint Working Party with the following terms of reference:-

> "To consider what restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or restricting liability for negligence or any other liability that would otherwise be incurred having regard in particular to the protection of consumers of goods and users of services."

29. In view of the important questions relating to consumer protection to which attention was drawn in the Final Report of the Committee on Consumer Protection (the Molony Committee Report),[35] priority was given by the Working Party to consideration of the problems of exemption clauses in contracts of sale of goods. This resulted in the publication in 1968 of a consultative document "Provisional Proposals Relating to Amendments to Sections 12-15 of the Sale of Goods Act 1893 and Contracting Out of the Conditions and Warranties Implied by Those Sections".[36] This was followed by a report by the two Law Commissions on "Exemption Clauses in Contracts: First Report: Amendments to the Sale of Goods Act 1893".[37] This was published in 1969 and the recommendations made in it were included in the Supply of Goods (Implied Terms) Act 1973, which also included analogous provisions in relation to contracts of hire-purchase and the redemption of trading stamps.

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35. (1962) Cmnd. 1781.

36. Law Commission Working Paper No. 18 and Scottish Law Commission Memorandum No. 7.

37. Law Com. No. 24; Scot. Law Com. No. 12.

30. The consultative document and the report that followed it were concerned with exemption clauses in contracts of sale. There were two other important areas of consumer protection within the terms of reference given in June 1966.[38] One was "the freedom to rely upon contractual provisions exempting from or restricting liability for negligence" and the other was the freedom to contract out of "liability that would otherwise be incurred" in contracts other than contracts of sale, for example contracts for the supply of services. These topics were covered in a consultative document that was published in 1971[39] and will be made the subject of a report which should be published in 1975. We have therefore decided to omit them from further consideration in the present study.

31. One other important matter that has a bearing on the protection of consumers was canvassed in the consultative document published in 1968. In paragraphs 32 to 41 the Law Commissions considered the subject of "Third Party Beneficiaries of Contracts and Warranties". They posed the question whether contractual remedies against the retailer should be confined to the purchaser and asked whether they might not, in some cases, be extended to other persons, such as members of the purchaser's family. The result of such a change might be to give Mrs.Daniels a right to sue Mrs.Tarbard, the seller of the lemonade in the situation that arose in Daniels v. White.[40]

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38. Set out in para. 28, above.

39. Law Commission Working Paper No. 39 and Scottish Law Commission Memorandum No. 15.

40. [1938] 4 All E.R. 258. See para. 8, above.

32. After the consultation that followed the publication of this consultative document the two Law Commissions decided not to pursue this line of law reform under the terms of reference given in June 1966. Their conclusion[41] was that before introducing so fundamental a change in the law further studies were needed "of the whole range of contractual and delictual problems involved in reforming the law relating to products liability". They expressed the hope "that products liability in all its legal implications will be made a subject of a separate study". We are now engaged, under our present terms of reference, on just such study.

33. We have therefore decided to devote a whole section[42] to the difficulties caused in the law of liability for defective products by the requirement of English law that only a party to a contract may sue on it, and by the somewhat limited recognition in certain Scottish decisions of jus quaesitum tertio, to which we have already referred.[43] However, we shall not be considering other controversial features of the present law of contract, such as the English doctrine of consideration or the adequacy of damages as a remedy for breach of contract, as these need to be looked at in a wider context than the sale or supply of defective products.

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41. Exemption Clauses in Contracts: First Report (Law Com. No. 24, Scot. Law Com. No. 12), para. 63.

42. Part VIII.

43. Paras. 8 and 12(a), above.

PART IV - PERSONAL INJURY

34. In this Part we shall consider liability in tort or delict to persons sustaining personal injuries by reason of defective products. On the present law, the liability of the manufacturer depends upon the proof by the injured person of a failure by the manufacturer to exercise reasonable care in the manufacture of his product. Various attitudes could be taken to the present law including:-

(a) that there are gaps in the present law which should be supplemented by the introduction of a principle of strict liability;

(b) that no system of strict liability should be introduced, but that changes should be made in the present rules concerning the burden of proof; and

(c) that the present law is in general satisfactory and requires no change.

The question at issue

35. Our concern is with defective products. Without attempting for the present to define this expression, we have in mind products which contain defects which are either inherent in them because of their design or which arise by reason of an error or neglect in the process of manufacture, so that the products do not match up to their intended design. The question at issue is whether the incidence of loss occasioned by a product with either design or manufacturing defects should lie where it falls or be transferred to the person who manufactured the product. At present, the law does not require such a transfer unless fault on the part of the

manufacturer or his servants can be established. Where fault can be established, this transfer may be justified as follows: a person who, through failure to take reasonable care, puts upon the market a product which, by reason either of a design defect or of a manufacturing defect, presents dangers to the public, should shoulder the loss rather than the person who suffered the injury or damage. It may be true that in some cases the moral responsibility of the manufacturer may be slight and unrelated to the quantum of damages, but as between two persons, one of whom is slightly at fault and the other free of fault, it seems right that the person at fault should stand the loss. The question, therefore, is not whether the fault theory is unsound as a reason for this transfer of the incidence of loss; it is simply whether the fault principle is adequate in situations where a person has suffered loss by reason of manufacturing or design defects in a product or whether it should be supplemented either by a system of strict liability or by rules changing the burden of proof.

Arguments for strict liability

36. When we refer to a system of strict liability we intend provisionally to refer to a system in which a person who is injured by a defective product can recover compensation from the manufacturer without having to establish that the defect was attributable to any fault on the part of the manufacturer so long as he can prove that it was the defect that caused the injury. The arguments which may be advanced in favour of supplementing the existing principle of fault liability with a system of strict liability include the following:-

(a) manufacturers may be said to have a moral responsibility for the quality of their products, a responsibility which flows both from the fact that they may have made claims for those products by advertisement and from

the fact that they stand to gain by their manufacture and distribution. They owe a moral duty to those who purchase direct from them; towards such purchasers the law also provides a strict legal duty, that the goods should be of merchantable quality. But manufacturers must also envisage the use or consumption of their goods by persons who stand in no contractual relationship to them; to such people they also are a moral duty and it is therefore arguable that the law should, here also, provide a strict legal duty;

(b) it is inevitable that in production, particularly in mass production, some products will be defective. It is unreasonable that the risk of these defects should be borne by the injured person and that compensation should depend upon proving a failure by the manufacturer to exercise reasonable care; it is sometimes fortuitous whether proof is possible or not. It would, it is said, be more reasonable for the manufacturer to assume the risk. The cost of providing for the extra claims - whether by insurance or otherwise - could be passed on in the price charged to the buying public, in the same way as the manufacturer recovers, in the price of the product, the cost of advertising it or of improving its quality. This, it may be said, would be a more convenient way of insuring the person affected than leaving him to take out his own insurance against personal injury;

(c) the existing system is open to the objection that it requires the claimant to establish lack of reasonable care on the part of the manufacturer or those for whom he must answer. This burden of proof can be particularly difficult to discharge in products liability cases where the injured person is extraneous to the process of production and may have difficulty in establishing by technical and other evidence that there was a design defect or negligence on the part of an employee. He may, indeed, find it impracticable to discover in which of the manufacturer's factories or units the product was manufactured. If the injured person can establish that the product was defective when it left the manufacturer, it may seem inequitable to require him in addition to discharge the burden of proving fault on the part of the manufacturer;

(d) most people believe that the primary responsibility for defects in products rests upon the manufacturer rather than upon the retailer.[44] It is argued by some, in support of a régime of strict liability, that the law should follow and support the natural expectations of ordinary people;

(e) there is the "deterrent" argument that the imposition of strict liability on manufacturers for defects in their products might cause manufacturers to maintain high standards of

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44. See the Final Report of the Molony Committee on Consumer Protection (1962), Cmnd. 1781, paras. 400-401 and the results of a survey conducted on behalf of the Consumers' Association in March 1974, in Which? January, 1975.

quality control because a lowering of those standards would be uneconomic;

(f) where, in mass production, manufacturers find it more profitable to allow defects than to improve their standards of quality control, it may be argued that as between themselves and the injured person, the consequences of a defect should be borne by the manufacturer; and

(g) legal costs might be saved in two ways by the imposition of strict liability on the manufacturer. First, the injured person would be able to sue the manufacturer direct in circumstances in which he must at present sue the retailer who then passes the loss up the chain of distribution to the manufacturer.[45] Second, the cost of the trial would sometimes be reduced as the court would not have to spend time on the issue of whether the manufacturer had exercised reasonable care.[46]

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45. Cf. Kasler v. Slavouski [1928] 1 K.B. 78, in which there were four successive indemnities of the retailer's liability to his customer who had contracted fur dermatitis.

46. In Wright v. Dunlop Rubber Co. Ltd. and Imperial Chemical Industries Ltd. (1971) XI K.I.R. 311, the court of trial spent the greater part of a seven-week hearing investigating the state of scientific knowledge in 1945 of the carcinogenic potential of a certain product.

37. The terms of the Strasbourg draft convention and of the E.E.C. draft directive suggest that the trend in Europe is towards imposing strict liability on manufacturers, at least where defects in their products lead to personal injuries, and thereby providing the injured person with rights of redress that are, in theory at least, an improvement on the rights provided by our present laws. For a fuller appreciation of the objectives of the Strasbourg draft convention and of the E.E.C. draft directive, the reader is invited to study Appendices B and C.

Arguments against strict liability

38. There are, however, certain objections which may be advanced against the introduction of strict liability:-

(a) the system of fault liability was developed on the basis of a moral approach, which had been accepted in many well-known authorities, including Donogue v. Stevenson. It may be argued that the imposition of strict liability lacks an adequate moral justification;

(b) a system of strict liability might discourage the development of new products. If, whatever care he took in matters of design and production, a manufacturer were to be held liable for every accident consequential to the use or consumption of his products, whether or not the accident was reasonably foreseeable, it would be a distinct discouragement of innovation. If the boundaries of liability were unmapped by the test of reasonable foresight of harm, the scope of liability would be quite unpredictable and a manufacturer might not be able to insure against the risk, or be able to do so only at prohibitive rates. In this situation the manufacturer would

either abandon the project and the community as a whole would be deprived of the benefits of his intended developments, potentially a serious matter in the field of foodstuffs and pharmaceutical products, or the manufacturer's costs would be increased, since the cost of the product would necessarily reflect the cost of insurance or of self-insurance;

(c) the assertion that, in many cases, it is difficult to establish fault on the part of the manufacturer may have been overstated. One requirement of the present law is that a defect must have existed in the product at the time when the manufacturer parted with it.[47] In the case of a design defect there is generally no difficulty in proving that the defect arose whilst the product was under the manufacturer's control; liability usually turns on whether the design was sound in the state of technical knowledge that existed at the time the product was put on the market. If the manufacturer has taken all reasonable care having regard to the state of technical knowledge existing at that time, he will not ordinarily be liable for injuries caused by the defects which were only revealed by subsequent development or research, except perhaps where it could be shown that he has failed to act reasonably on learning of the defect, for example, by recalling the product or by issuing appropriate warnings about it. In the case of the manufacturing defect it may be, on the present law, that the proof of a manufacturing defect raises such a strong inference of failure

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47. Para. 18, above.

to take reasonable care that an injured person who can prove that a defect in the product caused the injury is bound to succeed. Certainly there are few reported cases since Daniels v. White,[48] which was decided in 1938, in which an injured person has proved the existence of a manufacturing defect but has failed to prove a lack of reasonable care on the part of the manufacturer. In Steer v. Durable Rubber Manufacturing Co. Ltd.[49] the plaintiff was injured when a hot-water bottle burst within three months of its purchase and the court inferred negligence on the part of the manufacturers although the accident was apparently the first of its kind in the defendants' experience. It may be that proof of a manufacturing defect is nowadays so likely to lead to a finding that the manufacturer or his employees, servants or agents, failed to take reasonable care, that the duty on the manufacturer is as near to being strict as makes no difference. We should be most interested to know whether our readers, particularly those who are practitioners, think that this is so;

(d) if it is assumed that there may still be difficulty in proving lack of reasonable care where the existence of a manufacturing defect has been established, a change in the law could presumably result in an increased number of claims. This in turn might in some cases have serious economic consequences with effect, for example,

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48. The lemonade case, [1938] 4 All E.R. 258. See para. 8, above.

49. The Times, 20 November 1958.

on the cost of insurance and on the level of prices for certain products. This argument would apply particularly if the manufacturer's liability for damage to property and for economic loss were to be increased in scope since even a single claim might involve very large sums. Similar considerations might however also apply to some claims for personal injury, particularly where there has been an occurrence in the nature of a catastrophe involving multiple claims. It should be borne in mind that a manufacturing defect may in certain circumstances manifest itself in a whole run of products, for example natural products such as cereals or fish contaminated by poisonous or injurious substances derived from soil or water, or improperly manufactured materials causing disastrous failure in ships, aircraft, power stations and the like. Such events might, if the fault principle were departed from, result in financial disaster to a careful manufacturer, since we are told that such risks could in practice not all be fully covered by insurance, and in some cases it might not be possible to underwrite such risks at all, except at prohibitive rates;

(e) it may be that while liability is based on fault the careful manufacturer, whose quality control standards are high, receives more favourable treatment from insurers than the manufacturer whose standards are lower, but that this advantage would be lost if strict liability were introduced; manufacturers might thus have less incentive to impose and require

their employees to maintain strict quality control standards;

(f) the removal of the fault principle might open the door to a large number of spurious claims which a manufacturer might find hard to resist since he is further removed in the chain of supply from the injured person and might have great difficulty in tracing the evidence to meet such claims. In these circumstances it may often be impossible for a manufacturer or producer to test the credibility of the story told by the claimant and his witnesses except by reference to the methods of production and quality control. It will usually be easier to prove that all reasonable care was taken to prevent an article being produced with a defect than to prove that the article could not have left the hands of the producer or manufacturer in such a condition.

Burden of proof

39. These arguments for and against the introduction of a system of strict liability suggest that it may be appropriate to examine the merits of an intermediate position, the retention of the existing substantive law by an alteration of the rules relating to the burden of proof. As was stated in paragraph 18, the injured person will not succeed in a claim against the manufacturer unless it is established not only that he was injured by a defect in the product but also that

(a) the defect in the product was likely to cause physical injury;

(b) the defect existed at the time the product left the manufacturer;

(c) the defect was not one that the manufacturer could reasonably have expected that the injured person or some third person would have corrected before it could cause injury; and

(d) the defect was created by a lack of reasonable care on the part of the manufacturer.

40. It is for the injured person to prove, on the balance of probabilities, that these conditions of liability exist in his case. This does not mean, however, that it is necessary in every case for him to adduce specific evidence to establish each of them, because in practice the circumstances of the accident may persuade the court that it is rather for the manufacturer to exculpate himself than for the injured person to establish liability. The weight of the burden of proof varies greatly from one case to another depending on the facts.

41. There is no hardship in requiring the injured person to prove (a). The circumstances of the accident and the condition of the product are matters known to him which on their own resolve the matter. Proof of the manufacturer's lack of care - (d) - raises more complicated considerations, however. It is true that in theory (d) presents a problem in every case in so far as the plaintiff has no direct knowledge of the manufacturing process or the relevant system of quality control. In practice, however, the existence of a defect in a product in the hands of the plaintiff raises a strong presumption of negligence on the part of the manufacturer. The best example is the presence of noxious foreign matter in a sealed container of food or drink, or a foreign substance in clothing

packaged at the factory. In such a case the court usually accepts that a lack of care is established at the outset by the presence of the foreign matter in the product where it has no business to be if, in the ordinary course of things, proper care is exercised in manufacture. It will then be for the manufacturer to rebut the inference of carelessness on his part. Not every case, however, raises such a presumption. Suppose, for instance, that a steel strut in a car's suspension collapses and causes an accident. It might not be enough, in such a case, for the injured person to show merely that the strut had collapsed. He would probably have to adduce expert evidence as well to show either that there was a defect in the manufacturer's design of the strut, or that the collapse was due to a manufacturing defect. In the latter case he might also have to adduce expert evidence to meet the defence that the defect was in a component that had been made by someone other than the manufacturer of the car and that the defect was one which the manufacturer of the car could not reasonably have discovered. Similar complications arise in cases of injury caused by pharmaceutical preparations in which the injured person will usually need expert evidence on his side to counter the argument of the manufacturer that all reasonable care was taken having regard to the state of scientific knowledge at the time of production.[50]

42. There is something to be said for making the burden of proof easier for the injured person in respect of (d) but leaving the manufacturer's failure to take reasonable care as the basis of liability. The burden of proving (d) might be eased by introducing a rule that the proof of a defect in the manufacturer's product raised a presumption of lack of care on the manufacturer's part. Provided that the injured person

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50. See footnote 46, above.

were able to discharge the burden of proving (b) - that the defect existed before it left the manufacturer's control - this would put the manufacturer in the position of having to satisfy the court that the defect was not attributable to a failure to take reasonable care. This is what happened in the chicken vaccine case[51] and the German court ruled that the manufacturer could not avoid liability except by showing how the defect did in fact arise and by showing that the cause of the defect was something other than a failure to take reasonable care. This in itself seems just and it may be that something along these lines could be achieved by giving greater precision by statute to the doctrine of res ipsa loquitur so that a presumption of lack of reasonable care on the part of the manufacturer was always raised by proof of the defect, not, as at present, in isolated cases only, for example, where a consumer breaks a tooth on a stone in the middle of a bun.[52] It is for consideration whether this would so improve the remedy at present available to the injured person that no other change in the law would be needed.

43. An easing of the burden of proving lack of reasonable care on the manufacturer's part - (d)[53] - would still leave difficulties of proof, in certain cases, in relation to (b) and (c). In the case of food or drink sold in a sealed container the requirements (b) and (c) are easily satisfied. Where, however, the product requires a pre-delivery inspection,

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51. B.G.H.Z. 51.91; N.J.W. 1969, 269: see para. 9, above.

52. Chapronière v. Mason (1905) 21 T.L.R. 633; cf. Steer v. Durable Rubber Manufacturing Co. Ltd., The Times, 20 November 1958.

53. The references to (b), (c) and (d) are to sub-paragraphs of para. 39, above.

as in the case of a new car, or where work has to be done on the product by a third party to suit the place of installation, proof by the injured person of (b) and (c) is much more difficult. Let us say that P buys a new windscreen for his car and it shatters within days of having been fitted by the garage, causing him to be injured. He may be able to prove, in general terms, that the windscreen was defective but may be unable to prove that the defect arose in the course of manufacture as it might have arisen in the course of being fitted to the car. To make it a rule that the presence of a defect in the product raised a presumption of lack of reasonable care on the part of the manufacturer would not assist P as long as the manufacturer could show that the defect could as easily have arisen after it had left his control. P would lose his case against the manufacturer because of his inability to prove (b).[54]

44. The percentage of cases that would be decided differently if the rules on burden of proof were altered might be small and this is a point on which we would welcome views, particularly from practitioners. If, however, the hardship caused to the injured person by the present rules is more than trivial it would be worth considering a provision that the manufacturer of a defective product should be deemed to be liable for failing to exercise reasonable care unless he were to prove that the defect arose <u>after</u> it had left his control or that it arose whilst within his control but without lack of reasonable care on his part. This would treat the liability of the manufacturer for defects in his products in much the same way as the liability of the highway authority to pedestrians for the dangerous state of their highways[55]

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54. Cf. <u>Evans</u> v. <u>Triplex Safety Glass Co. Ltd.</u> [1936] 1 All E.R. 283.

55. Section 1 of the Highways (Miscellaneous Provisions) Act 1961; <u>Griffiths</u> v. <u>Liverpool Cpn.</u> [1967] 1 Q.B. 374.

and the liability of the carrier to passengers involved in an air crash.[56] The result of changing the burden of proof would be to retain the settled principle of duty to take reasonable care but at the same time to go some distance to meet one of the principal arguments for the imposition of strict liability, the difficulty which may be experienced by a person injured by a defective product in establishing that there was fault on the part of the manufacturer. Later we shall consider how the rules on burden of proof might be applied if strict liability were introduced.[57]

45. There are no doubt other things to be said both for and against holding manufacturers strictly liable for defective products and for and against altering the burden of proof in products liability cases. It should not be supposed that we adopt all or any of the arguments set out above as being wholly persuasive. Their purpose is rather to elicit comments. In particular, we should be glad to receive comments on the two preliminary and very important questions:-

(a) whether the present law should be changed at all, and if so

(b) whether the changes should be confined to the rules on burden of proof and, if so, on what issues, or should involve the introduction of strict liability.

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56. Carriage by Air Act, 1961, Sched.1, Arts. 17 and 20 (the Warsaw Convention, as amended).

57. Para. 82, below.

A scheme of strict liability

46. The boundaries of strict liability for defective products - other than liability in contract - are at present set by the provisions of the Consumer Protection Act 1961.[58] If new remedies were to be provided on the basis of strict liability it would be necessary to decide where the new boundaries should be drawn. A remedy in respect of defective products that exposed manufacturers to claims against which they could not insure and which forced them out of business, would be a drastic one, which would in many instances be of benefit neither to the injured person nor to the general public. We shall therefore outline the social and economic implications of new remedies as well as the legal difficulties when considering what seem to us to be the seven crucial questions:-

(a) Who should be liable?

(b) How should "defect" be defined?

(c) To what products should any new remedy apply?

(d) Who should be entitled to sue?

(e) What defences should be allowed?

(f) Should the liability be limited by a prescribed maximum? and

(g) What should be the rules on burden of proof?

47. We do not suggest that the points that we shall make in relation to each question are the only points or that we are convinced of their validity, but they should at least be

58. See para. 24, above.

useful as a basis for discussion. After dealing in this way with claims for personal injury we shall move on to the other three categories - damage to property,[59] damage to the product[60] and economic loss.[61]

WHO SHOULD BE LIABLE?

48. So far we have mentioned the manufacturer of the defective product as being the person on whom strict liability might be imposed. The Strasbourg draft convention and the E.E.C. draft directive each use the word "producer" instead of "manufacturer" which may in some contexts invite a different interpretation. For example, the word "producer" may be used more readily in relation to certain natural products. On the other hand it is not sufficiently precise to deal with every situation. Presumably if a garage were to rebuild a wrecked car for resale the garage would be a "producer" of the rebuilt car, whereas if only the wheels were changed it would not. Without a more detailed definition it may be difficult to say where the line should be drawn in any particular fact situation but for present purposes the word "producer" seems to answer well; we shall use it in preference to "manufacturer" throughout the remaining paragraphs.

49. The arguments in favour of strict liability for defective products seem to point to the producer as the person on whom the liability should be imposed. We propose to take this as a starting point, but there are other persons in the chain of production and distribution who might be required to undertake either by themselves or along with others the burden of strict liability.

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59. In Part V.

60. In Part VI.

61. In Part VII.

The American Restatement

50. In America, the Restatement (Second) of Torts, which was promulgated by the American Law Institute in 1965, contains the following provision:-

> "402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

This provision would impose strict liability upon the producer, the retailer and everyone else in the chain of distribution who sells.

Enterprise liability

51. In the State of California strict liability for defective products has developed further and faster than in most other States in America. The notion that the liability

should depend on sale was rejected in Greenman v. Yuba Power Products Inc.[62] in 1963. This was a case in which a man was injured in his home workshop when using a power drill that his wife had purchased and given him as a Christmas present. The Supreme Court held the manufacturer liable and Traynor J. said:-

> "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being... the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."

52. In subsequent decisions in California persons other than the actual producer have been held strictly liable for injuries caused by defective products, including:-

(a) the retail seller[63]

(b) the middleman who buys from the producer and sells to the retailer[64]

(c) the person who supplies a product on hire[65]

(d) financing institutions.[66]

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62. 377 P.2d 897 (1963) Cal.

63. Vandermark v. Ford Motor Co., 391 P.2d 168 (1964) Cal.

64. Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965) Cal.

65. Price v. Shell Oil Co., 466 P.2d 722 (1970) Cal.

66. Connor v. Great Western Savings & Loan Association 447 P.2d 609 (1969) Cal.

53. The imposition of strict liability in tort or delict on the retailer was explained by Traynor C.J. in Vandermark v. Ford[63] in the following way:-

> "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff."

By the same reasoning strict liability was later extended to the other members of the "producing and marketing enterprise" mentioned in paragraph 52. The effect of such an extension is to give the injured person a wide range of persons to sue. One or some of the members of the "producing and marketing enterprise" may be insolvent or abroad or uninsured and the injured person's chances of having his claim satisfied are increased as the number of persons liable to him is increased. His position is thus improved by spreading the burden of strict liability very widely.

Channelling

54. Whilst the injured consumer benefits from having a wide range of persons strictly liable to him, the other consumers, who make up the general public, suffer. The reason for this is that each and every person in the "producing and marketing enterprise" has to insure or indemnify himself against third party claims. The cost of providing insurance for each is thus likely to be greater than the cost of insuring one person alone. In theory the cost should remain the same, as there would be no increase in the risk against which the various persons would insure and, if effective cover could be provided for all persons in the enterprise under a single policy, the increase might be slight. It might be possible to cover those

significantly concerned in the production by means of a single policy taken out in the name of the final producer but it would not be possible to provide cover in such a policy for persons who were unknown to the producer. If, therefore, strict liability in tort or delict were to be imposed not only on producers but also on retailers and wholesalers they would generally have to arrange their own insurance cover. This would add to the cost of the product because although the various insurance policies would only cover the one risk there would be an increase in the premiums, in aggregate, to take account of (a) the extra administration costs and (b) more important, the extra litigation costs that would be incurred if the injured person were able to bring his claim against four or five persons in the chain of distribution and production, instead of against just one. If liability were channelled to a single person in the enterprise, these additional costs would be saved. This is the "channelling" argument and further reference will be made to it later in this paper.[67]

55. There are several examples of "channelling" in the present law. Perhaps the most extreme example is provided by the Nuclear Installations Act 1965 under which the licensee of a nuclear site is strictly liable for injuries resulting from a nuclear occurrence, up to a limit of £5,000,000. Section 12 of the Act, as amended by the Nuclear Installations Act 1969, provides that, with certain exceptions, "no other liability shall be incurred by any person in respect of that injury or damage"; it also provides that the person strictly liable under the Act should have no right to an indemnity or contribution from any other person except where that other person has previously agreed in writing to incur liability in respect of that damage or has caused the damage "with intent to cause injury or damage." Thus, if a nuclear occurrence at a licensed site were caused by a defect in a

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67. See paras. 62(c), 70,74,75 and 126, below.

product made and supplied to the licensee, section 12 would normally protect the producer against proceedings by the injured person and also against proceedings by the licensee for an indemnity or contribution towards the sum for which the licensee might be liable. A less extreme form of "channelling" is to be found in the Carriage by Air Act 1961 which channels liability for injury and damage resulting from an air crash on to the "carrier". It is less extreme in that although statutory liability is channelled to one person, the carrier, it does not qualify the right of the carrier to claim an indemnity or contribution from others and it does not prevent the injured person from taking proceedings against any person on whom liability may rest at common law, such as the manufacturer of the aeroplane.

56. Under the existing laws of England and of Scotland a producer who is liable for injuries caused by a defect in his product may, in some circumstances, have a right to claim an indemnity or a contribution from other parties. For example, if the defect in the finished product were traced to a component that had been made by someone else, that other person might be liable, by the terms of the contract of supply, to indemnify the producer of the finished product against the injured person's claim, or might be liable to share the loss with him if each were liable to the injured person under the law of tort or delict.[68] Neither the Strasbourg draft convention nor the E.E.C. draft directive adopt the extreme form of channelling that is to be found in the Nuclear Installations Acts 1965 and 1969. The producer of a defective product is required by each to assume the burden of strict liability but his right to an indemnity or contribution from third parties is unaffected; indeed it is, by the Strasbourg draft convention, expressly

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68. Law Reform (Married Women and Tortfeasors) Act 1935, s.6; Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s.3.

preserved.[69] We should like to know whether readers agree with this approach.

57. Although the Strasbourg draft convention and the E.E.C. draft directive each purport to channel claims in respect of defective products to the producer, rights against other persons are preserved.[70] Thus the injured purchaser of a defective product would be enabled by each to claim damages from the producer on the basis of strict liability as well as from the retailer or hire-purchase company for breach of contract. Proponents of an extreme form of "channelling" might argue that, as a corollary to imposing strict liability on the producer, claims should no longer be made against non-producers later in the chain of distribution, such as retailers and hire-purchase companies, and that these persons should be released from their contractual liability for defective products under the present law.[71] This would mean depriving the customer of a remedy under the present law which is valuable to him for at least two reasons:-

(a) The retailer may sometimes be easier to find and may be more likely to satisfy a judgment than the producer, for example, if the producer lacks financial means[72] or is protected by some upper limit of damages.

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69. Art. 9.

70. Strasbourg draft convention, Art. 11; E.E.C. draft directive Arts. 4 and 8.

71. See para. 21, above.

72. Cf. Fisher v. Harrods Ltd. [1966] 1 Lloyd's Rep. 500. See para. 19, above.

(b) If the customer has not paid the price he may be able to withhold the money in part satisfaction of a claim for damages against the retailer. He would not be able to do this if his remedy in damages lay against the producer alone.

We should be interested to receive opinions on whether an imposition of strict liability on producers, if desirable at all, should involve a removal of liability from others. Other possible schemes are modified channelling which preserves existing rights and duties and a total rejection of channelling in favour of enterprise liability on the Californian model.

58. If a régime of strict liability in tort or delict for defective products were to be imposed on anyone at all it could take the form of:-

(a) the imposition of strict liability on producers, coupled with the elimination of the liability of others; or

(b) the imposition of strict liability on the final producer along with the retention of existing forms of liability on others (E.E.C. draft directive); or

(c) the imposition of strict liability not only on the producer of the finished product but also in some circumstances on producers of components, on importers (or 'first distributors'[73]) of foreign products and to a very limited extent

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73. See paras. 61-62, below.

on retailers, along with the retention of existing forms of liability on others (Strasbourg draft convention); or

(d) the imposition of strict liability on everyone in the chain of production and distribution (enterprise liability).

The fact that we have chosen these four models is not to say that there are no others or that others might not be invented. However, (a) and (d) seem to represent the extremes and (b) and (c) each offer intermediate positions that can command some support. The Strasbourg provisions on the question who should be liable are somewhat intricate and need further comment.

59. The Strasbourg draft convention resembles the E.E.C. draft directive in that it channels strict liability to the producer[74] without prejudice to such other remedies as the injured person may already have against the producer and others under existing law.[75] However, it goes further than the E.E.C. draft directive in that it places the same burden of strict liability on any person who presents a product as his own by causing his name, trademark or other distinguishing feature to appear on it.[76]

60. Under the Strasbourg draft convention the strict liability of the producer may be imposed in some circumstances on any person in the chain of distribution, who has failed, within a reasonable time, to disclose on request the identity of the producer or of the person who supplied him with the

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74. Art. 3.1.

75. Art. 11.

76. Art. 3.2., and para. 46 of the draft explanatory report.

product.[77] This provision is intended to make the non-producer co-operate in channelling liability back to the producer and thus to strengthen rather than to detract from the channelling principle. The device might be of particular value if there were to be no liability on the first distributor of a product within a particular country or jurisdiction.[78]

Importers

61. Where a product is acquired directly by a purchaser from a foreign manufacturer, without the intervention of an intermediate party, there may be a contractual claim.[79] Where the right of action rests on tort or delict, an action would lie against the foreign producer in an English or Scottish court, if the tort or delict was committed within the jurisdiction of that court.[80] Under the E.E.C. Convention on Jurisdiction and the Reciprocal Enforcement of Civil and Commercial Judgments which has not yet been acceded to by the United Kingdom, actions in tort or delict may be brought in the courts of the place where the "damaging event" has occurred.[81]

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77. Art. 3.3.

78. See paras. 61-62, below.

79. Although the foreign manufacturer may stipulate that the proper law of the contract should be the law of his country, the protection afforded by the Sale of Goods Act 1893, as amended by the Supply of Goods (Implied Terms) Act 1973, cannot be excluded where the proper law of the contract would, but for the express stipulation, be the law of England or Scotland: Sale of Goods Act 1893, s.55A.

80. R.S.C., O.11; Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, s.1.

81. Art. 5(3).

There is a further proposal in Article 3 of the Strasbourg draft convention that an importer of a product should be deemed to be a producer and thus should incur the same liability as the actual producer. The theory on which this proposal is based recognises that in some circumstances it may be inconvenient or difficult to raise proceedings against a foreign producer, or to obtain satisfaction of a judgment obtained against him, and that the injured person should not have to cope with such difficulties. Neither the Strasbourg draft convention nor the draft explanatory report annexed thereto attempts to define what is meant by an importer; it appears that this task is to be left to the national legislature.

62. If strict liability in tort or delict were to be imposed on importers - in the terms proposed by the Strasbourg draft convention - a number of problems could arise:-

(a) The term "importer" has been given a variety of meanings in different contexts, which suggests that there would be dangers in using such terminology. It might be better to impose liability on the "first distributor", that is to say the person who first put the product into circulation within the country or jurisdiction in which the tort or delict arose.

(b) Should the jurisdictions of the courts of England and Wales and of Scotland be treated as separate or as one for the purposes of such a provision? It might be said that since the distributor in England of goods manufactured in Scotland is not normally regarded as an importer, and vice versa, the provisions should only operate where the product is manufactured abroad, that is to say outside the United

Kingdom. On the other hand if, as it appears, the object is to make it more convenient and easy for the injured person to raise proceedings and to obtain satisfaction of any judgment by allowing him to raise proceedings in his own courts, there may be a case for selecting as the person liable the first distributor in that particular law district.

(c) It would be contrary to the "channelling" principle to impose strict liability on the first distributor of a defective product where the injured person could without great difficulty obtain redress from the foreign producer. For example, a judgment obtained against a foreign producer may be enforced against assets which the producer has within the jurisdiction of the court of judgment. If therefore an American producer, with assets in London, were to export a defective product from America to England where it caused an accident, the injured person would be able to sue the American producer in England and obtain the satisfaction of his judgment in England. Furthermore, arrangements for the reciprocal enforcement of judgments outside the E.E.C. have been made by treaty and by statute.[82]

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82. See Orders in Council made under the Administration of Justice Act 1920, ss.13-14, such as Hong Kong, S.R. & O. 1922 No. 353, and the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Yet the Strasbourg draft convention seems to contemplate that there should be a primary liability on the importer, or first distributor, of a foreign product even where the injured person can obtain redress from the foreign producer without great difficulty. It may be argued that this is undesirable as the first distributor's costs of providing against claims in respect of foreign products may be added to the price of the product even where the injured person has a satisfactory remedy against the producer himself.

(d) When the United Kingdom accedes to the E.E.C. Convention on Jurisdiction and the Reciprocal Enforcement of Civil and Commercial Judgments, judgments obtained in England and Wales or in Scotland will be enforceable against producers in other member countries within the E.E.C. It might then be argued that the obligation on the first distributor of a foreign product should only apply to products made outside the E.E.C.

(e) Should such a distributor's liability continue after the product has left the country or jurisdiction in which it has been distributed, or should liability cease as soon as the product is removed from that country or jurisdiction? If the latter solution were preferred, the first distributor in the next country or jurisdiction would incur liability, assuming that a similar rule prevailed there.

(f) Should there be special rules to cater for the situation where the country or jurisdiction in which the imported product is finally purchased by a consumer, is not the country or jurisdiction in which the injury occurs? It may be, for example, that, while on holiday in Switzerland, a person habitually resident in the United Kingdom buys a product which is not of Swiss origin and brings it home to the United Kingdom. There a third party sustains injury in consequence of a defect in the product. No special problems would appear to arise if the product was originally manufactured in the United Kingdom. Problems, however, would arise where the product was manufactured in a third country. It may be suggested, therefore, to meet this case, that the definition of "distributor" should contain no intrinsic territorial limitation. It is true that the United Kingdom could not effectively legislate in the case envisaged above to impose liability upon the Swiss distributor of the product. If, however, the country of purchase had been a member state of the European Communities, say France, the injured third party would be entitled to sue the French distributor under Article 5(3) of the E.E.C. Convention on Jurisdiction and the Reciprocal Enforcement of Civil and Commercial Judgments when it is acceded to by the United Kingdom and any ensuing judgment would be enforceable against the distributor in France.

(g) Should there be a special rule where a person sustains injury in a country or jurisdiction in which he himself is not habitually resident? For example, a French visitor to Scotland might bring a defective article with him which had been imported into France, and might sustain injury in Scotland. Perhaps the problems raised here and in the preceding subparagraph are best resolved by international agreement; we tend to think that a special rule should not be created merely in the context of products liability.

We should welcome views on whether there should be some kind of additional liability on the first distributor of foreign products, and if so, what scope it should have. None of the features of the Strasbourg draft convention mentioned in paragraphs 59 to 62 are to be found in the E.E.C. draft directive. We should like to know what readers think of them.

HOW SHOULD "DEFECT" BE DEFINED?

63. For the purposes of strict liability for personal injuries a product may be said to be defective if it is dangerous or unsafe in the hands of the reasonable man. The danger or lack of safety may derive from a defect in the manufacture or in the design of the article produced. It may on the other hand derive from a defect in the instructions or warnings with which the product is or ought to be accompanied when made available to the public. Although the Restatement (Second) of Torts refers in section 402A to products "in a defective condition unreasonably dangerous..."[83] the Supreme Court of the State of California has rejected the words "unreasonably dangerous'

83. See para. 50, above.

as requiring the injured person to shoulder an additional burden of proof that had no place in a tort of strict liability.[84] It is provided by Article 2(c) of the Strasbourg draft convention that "a product has a 'defect' when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product." The E.E.C. draft directive provides[85] that "an article shall be deemed to be defective if it is unfit for the use for which it is intended by the producer" which may in certain circumstances be wider than is necessary for the purpose of providing for the consumer's safety; the intention appears to be to give the consumer a remedy in respect of safe but shoddy goods. We will return to this later[86] but for the rest of the Part on personal injuries we will take a "defect" as being something which makes the product unsafe or dangerous in the hands of the reasonable man.[87]

TO WHAT PRODUCTS SHOULD STRICT LIABILITY APPLY?

64. When is a product not a product? Both the Strasbourg draft convention and the E.E.C. draft directive treat the product's life as starting when it is put into circulation by its producer. Neither the draft convention nor the draft directive provide for injuries sustained before the product is

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84. Cronin v. J.B.E. Olson Corp. 501 P.2d 1153 (1972) Cal.

85. In Art. 3.

86. In paras. 100-108, below.

87. Cf. Walker v. Bletchley Flettons Ltd. [1937] 1 All E.R. 170, 175 per du Parcq J.: "... a piece of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur"; slightly modified by Lord Reid in John Summers & Sons Ltd. v. Frost [1955] A.C. 740, 765-766.

put into circulation, for example on the explosion of a product in the course of production in the factory. This seems sensible. The duties of safety that employers and factory owners owe to people employed in the processes of production are already provided for in a comprehensive way by common law and by statute and we therefore propose to confine our attention to products which have been put into circulation, that is to say products which have left the possession of the producer. The Strasbourg draft convention provides that a "product" indicates "... all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable"[88] and the E.E.C. draft directive seems to apply to "an article manufactured by industrial methods or ... an agricultural product".[89] Factory-made finished products that are movable are clearly within either definition and these are the kinds of products with which those who advocate strict liability are particularly concerned. There are however some categories of product that need special consideration and we have selected the five which cover the areas in which producers might be hardest hit by the imposition of strict liability. To take some examples, catastrophic consequences might result from the use of pharmaceuticals, natural products (including human blood), nuclear materials and so on, due to a defect in the product for which the producer might be held strictly liable, while large multiple claims could arise from aircraft, shipping, oil-rig, road and rail accidents caused by a defect in a finished product or in one of its components. In these areas, or some of them, the cost of insuring against the consequences of a catastrophe might be so high that the producer who wished to develop a new product might form a small and expendable company as the nominal producer so that if, despite the exercise of reasonable care, the product had a defect that caused a catastrophe, the claims would all be directed at the small and expendable company. This possibility

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88. Art. 2(a).

89. Art. 1.

must be borne in mind. Special systems have been provided, usually by international agreement, for some of the areas where the risk of multiple claims is very great and we shall advert to some of these when examining the five categories of product for which special provision might be made. The special provision might take the form of a complete exclusion from strict liability, maximum limits on the extent of liability, guarantee funds of different kinds or exceptional methods of channelling. The five categories are:-

(a) Immovables

(b) Natural products

(c) Pharmaceuticals

(d) Components

(e) Products used within a régime that channels liability for injury caused by the defective product to someone other than the producer.

(a) Immovables

65. An "immovable" is usually taken to mean something that is so securely fixed to the land as to be part of it. Objects that rest by their own weight are regarded as movable, as are objects which are attached to the land by a temporary connection. The dividing line is not an easy one to draw in particular cases such as lifts, cranes, oil-rigs or swing-bridges. Moreover a product such as a brick may start off as a movable, become immovable when used in a building and become movable again when the building is demolished. There are difficulties in applying a régime of strict liability for defective products to buildings, the most important being that of identifying the "producer". Should it be the architect, or the main contractor, or each and every person working in the construction, including architect

main contractor and subcontractors? Another problem, related to the first, would be the burden of insuring against defects in buildings if the producer - for example the main contractor - had to maintain adequate cover against claims arising out of defects at any time during the life of the building. The Law Commission reported on civil liability for defective premises in England in 1970[90] and considered these and related problems; as a result of their recommendations the Defective Premises Act 1972 was passed. The position in Scotland, on the other hand, is regulated by common law. In this paper we are only concerned with products that are movable as produced. Liability for a movable product may, by the Strasbourg convention, continue even after the product has been incorporated into an immovable one. Readers may however feel that strict liability for a product should cease once the product has become immovable. We shall consider later whether components should be excluded from any scheme of strict liability that may be introduced in respect of defective products. If strict liability were not to be imposed on the producer who supplied brakes to a car manufacturer, it ought, presumably, not to be imposed on the producer who supplied tiles to a builder. Comments would be welcomed.

(b) Natural products

66. Agricultural products are treated in the Strasbourg draft convention and in the E.E.C. draft directive in the same way as industrial products. If the primary aim is to provide better protection for the consumer then there is some logic in this, although the problem of definition may be formidable. It may be, however, that certain produce and materials which might fall into this category, such as fish and some agricultural and horticultural produce, call for special treatment. It is a characteristic of these kinds of natural products that they soon deteriorate from the state in which

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90. Law Com. No. 40.

they are fit for human consumption into a state in which they are unfit and, in a sense, "defective". They are treated, carried and stored by many people who are outside the control of the original producer before they reach the ultimate consumer. It would, in some cases, be almost impossible to say at what stage the product became defective. The original producer might find claims in respect of perishable goods hard to resist, if strict liability were to apply to all natural products, particularly if he had the burden of proving that the product did not become defective until after it had left his control.[91] Furthermore there may, in such cases, be more than usual potentiality for catastrophe and multiple claims if the producer were to be liable even where he had taken reasonable care. For example, crops of cereals or vegetables might be contaminated by lead in the soil, or fish might be affected by mercury in the water, with disastrous consequences, involving large multiple claims. Organic fertilisers, such as bone meal, might carry anthrax with similar consequences. Products such as tobacco, alcoholic drinks and certain drugs, which might be classified as "natural products" unless that phrase were narrowly defined, might involve inherent dangers which could give rise to claims on a large scale. Readers may be able to think of other kinds of products that may require exceptional treatment. Perhaps livestock should be excluded altogether from the definition of product. Perhaps human blood or organs should also be excluded, although a case could be made for imposing strict liability on, for example, a hospital for injuries caused to the ultimate recipient by a disease or deficiency in the blood or organ of which the hospital was unaware. Comments are invited.

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91. See para. 82, below.

(c) Pharmaceuticals

67. It is sometimes suggested that pharmaceuticals, particularly at the development stage, should be treated as a special case. On this we would appreciate comment, particularly from those familiar with the processes, risks and costs involved. It is a matter to which we shall return when considering special defences.[92]

(d) Components

68. The producer of the final product may incorporate into its structure component parts or elements that have been supplied to him by other producers. For example:-

(a) X produces a new drug that is a mixture of other drugs, one of which was produced and supplied by Y. Due to a dangerous property in the drug produced by Y the mixture produced by X causes Z to be injured;

(b) Y produces contaminated groundnuts and sells them to X who uses them to make food which poisons Z;[93]

(c) X produces a car in which he has incorporated a braking system produced and supplied by Y. The brakes are defective and Z, a pedestrian, is injured.

69. On the present state of the law Z would in each case be entitled to recover damages from Y if he could prove a

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92. See para. 77, below.

93. Cf. Hardwick Game Farm case [1969] 2 A.C. 31.

failure on his part to take reasonable care but would not recover damages from X if the defect in the component was not reasonably discoverable by him. If strict liability were to be imposed on the final producer, X, should it be imposed on Y, the producer of the defective component as well? The Strasbourg draft convention answers the question affirmatively and provides[94] that the producer of a defective component may sometimes be liable jointly with the producer of the finished product into which the component has been incorporated. There are, however, two possible objections to such an extension of strict liability.

70. The first objection is that it runs contrary to the principle of "channelling" as it means adding unnecessarily to the number of persons who must insure against strict liability claims. This seems to have been the policy reason behind the majority decision of the Court of Appeals of New York in Goldberg v. Kollsman Instrument Corp.[95] It was there held by the majority of judges that the producers of an aircraft that crashed were strictly liable in tort to a passenger but that the case against the producers of the defective altimeter should be dismissed. Desmond C.J. referred to the decision in the power-drill case[96] and said:-

> "The California court said that the purpose of such a holding is to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves and that implicit in putting such articles on the market are representations that they will safely do the

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94. In Arts. 2(b) and 3.4.

95. 191 N.E.2d 81 (1963) New York.

96. Greenman v. Yuba Power Products Inc. 377 P.2d 897 (1963) Cal. para. 51, above.

> job for which they were built. However, for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft."

It should be noted that the dissenting opinion of three judges[97] was that "... any claim in respect of an airplane accident that is grounded in strict enterprise liability should be fixed on the airline or none at all."

71. The second objection is that the definition of "defective" is easier to express in terms of the final product. So far as the component is concerned the question of whether it is defective will depend not only on the use to which it is put by the reasonable consumer but on the use to which it is put by the manufacturer of the final product. The difficulty that this may lead to is illustrated by the facts of Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.[98]

> The defendants designed and installed equipment in the plaintiffs' factory for storing heavy wax that had to be liquified under heat for the plaintiffs' manufacturing process. They used plastic material for the pipes which turned out to be unsuitable. The plastic pipes melted and fractured and there was a fire that caused about £150,000 worth of damage. The defendants were held liable for breach of contract although they were not the producers of the pipe.

72. The producers of the piping were not sued. Should they be held strictly liable for the fire although they could not reasonably have foreseen that the piping would be used

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97. Burke, Van Voorhis and Scileppi JJ.

98. [1970] 1 Q.B. 447.

in such an installation? If the answer to this is "Yes" then it means putting a heavier burden on the manufacturer of the rudimentary component than on the maker of the final product, since he will have to insure against a wider range of risks. The more basic the component (such as the nut and bolt) the greater the range of dangers and the higher the insurance premium, both in absolute terms and in relation to the value of the product. It would mean that component manufacturers would either have to raise the price of their products, perhaps to an uneconomic level, to provide for a wide range of substantial claims or else run the risk of being uninsured and facing a claim that might put them out of business. The Strasbourg draft convention seeks to meet the difficulty by providing in Article 3.4 that it should be a defence for the maker of the defective component to prove that the defect resulted from the design or specification required by the makers of the product into which the component was incorporated.

73. The E.E.C. draft directive differs from the Strasbourg draft convention on this point and only imposes strict liability for defects on the person by whom the article is produced and marketed in the form in which it is intended to be used,[99] so that the suppliers of "semi-finished and intermediate"[100] products are excluded. If strict liability were to be introduced at all a choice would have to be made between confining it to the producer of the final product, as provided by the E.E.C. draft directive, and extending it to producers of defective components, as provided by the Strasbourg draft convention.

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99. Art. 2.

100. These words are taken from the explanatory notes relevant to Art. 2.

(e) Products used within a régime that channels liability for injury caused by the defective product to someone other than the producer

74. As we mentioned earlier,[101] the general effect of the Nuclear Installations Act 1965 is to channel liability for the consequences of a nuclear occurrence to the licensee of the nuclear site, to the exclusion of others. The producer of a defective product that causes a nuclear occurrence is thus exempted from liability under the Act or at common law. It would seem contrary to the policy of the Nuclear Installations Act 1965 to impose additional liability on a producer, in respect of claims for which he cannot be liable under the present law even where he has caused the nuclear occurrence by a failure to take reasonable care. The Strasbourg draft convention does not apply to nuclear damage,[102] but the E.E.C. draft directive is silent on the point.

75. Separate consideration should also be given to the liability of persons who produce aircraft, ships and other means of public transport. The Carriage by Air Act 1961 places liability for death or injury resulting from an air crash on the carrier unless he can prove "... that he and his servants or agents have taken all necessary steps to avoid the damage or that it was impossible for him or them to take such measures."[103] There is no systematic channelling of liability in the case of shipping accidents but the shipowner's liability is, in some circumstances, limited by statute.[104] There are

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101. In para. 55, above.

102. Art. 9(b).

103. Art. 20, Warsaw Convention, as amended.

104. Merchant Shipping Act 1894, ss.503, 504; Carriage of Goods by Sea Act 1924, Sched., Art. IV.

no systems of channelling in force that apply to the carriage of persons on land,[105] although it may be argued that there should be. Those who produce aircraft, ships, trains and other means of public transport have a duty at common law to use reasonable care in their designs and manufacturing processes but are not otherwise liable for accidents involving their product. It may be said that injured passengers ought to be provided with additional rights of redress, but the imposition of strict liability on the producer of the aircraft, ship or train is not the only, nor necessarily the best, course. It might be more convenient and, for the purposes of insurance, cheaper to channel strict liability for the consequences of an accident to the carrier or operator.[106] Comments are invited on these problems and on any other class of product that we have not mentioned specifically but which seems to merit exclusion from a régime of strict liability on producers.

WHO SHOULD BE ENTITLED TO SUE?

76. In the context of personal injury claims the question who should be entitled to sue is probably the easiest to answer. It is suggested that any injured person, whether he be the user of the product or a bystander, should be entitled to the benefit of any new strict liability for defective products that may be introduced. This is wider than section 402A of the American Restatement (Second) of Torts,[107] which is limited

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105. Except for the Carriage by Railway Act 1972, which, in a carriage by rail covered by international documents, channels liability for injury or death in some circumstances to the railway.

106. See the dissenting judgments in Goldberg's case, para. 70, above.

107. See para. 50, above.

to the user and the consumer, but in many States claims by bystanders have succeeded.[108] Neither the Strasbourg draft convention nor the E.E.C. draft directive limits the class of person who can sue, nor does the Consumer Protection Act 1961.[109]

WHAT DEFENCES SHOULD BE ALLOWED?

(a) Development risks

77. Should the producer ever be entitled to defeat a claim by proving that he took all reasonable care to see that the product had no defect? If such a defence were to be provided in all cases then the basis of the liability could not fairly be called strict - it would be liability in negligence but with a reversed onus of proof. It is however possible, and perhaps desirable, to maintain a régime of strict liability for isolated defects of manufacture - such as the one hot-water bottle in a million that has a flaw that makes it unsafe - but to make different provision for other cases, for example by allowing the producer to defeat a claim in respect of a "design defect"[110] by proof that the designer exercised reasonable care having regard to all the circumstances of which he ought reasonably to have known. Such a defence would be of particular importance to industries engaged in the development of new products, such as pharmaceuticals.[111] It may be argued on their

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108. See Elmore v. American Motors Corp. 451 P.2d 84 (1969) Cal. and Piercefield v. Remington Arms Co. 133 N.W.2d 129 (1965) Mich.

109. See para. 24, above.

110. See para. 35, above for the contrast between "design defects" and "manufacturing defects".

111. See Harvey Teff, "Products Liability in the Pharmaceutical Industry at Common Law" (1974) 20 McGill Law Journal, pp. 102-123.

behalf that there are risks in new products that cannot be foreseen however careful the producer is, and that these are inevitable risks which the public must accept. The consumer interest in having new products put on the market at acceptable prices had to be balanced against the consumer interest in seeing that the victims of defective products receive compensation for their injuries. Neither the Strasbourg draft convention nor the E.E.C. draft directive provide for "development risks" by a special defence. Comments are invited.

(b) Contributory negligence

78. Where the injured person is wholly or partly to blame for his injuries the present law of "contributory negligence" provides that his claim in tort or delict may be dismissed or reduced as may be just, having regard to all the circumstances of the particular case.[112] It would seem reasonable that this defence should continue to be available whether or not the liability of the producer were to be strict.

(c) Assumption of risk and "contracting out"

79. Cases may arise in which the injured person has deliberately and knowingly exposed himself to the danger of a particular product's defect, for example by driving a new car which is known to have no effective braking system. Our provisional view is that the doctrine of 'assumption of risk' should apply to claims for injuries caused by defective products to the extent that it applies to other strict liability claims in respect of injury. This brings us to the related problem of "contracting out". As between buyer and seller the Supply of Goods (Implied Terms) Act 1973 limits the seller's right to exclude or limit his liability for defects in the products sold.[113]

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112. Law Reform (Contributory Negligence) Act 1945,s. 1(1).

113. See para. 21, above.

As between the producer and the ultimate purchaser however, a contract may have been made by the offer and acceptance of a manufacturer's guarantee, the terms of which might in the present state of the law exclude or limit the producer's liability in tort or delict. The 1973 Act would not apply to such a contract. If strict liability for defective products were to be imposed on producers, should "contracting out" be permitted? It is prohibited by the Strasbourg draft convention[114] and by the E.E.C. draft directive[115] but it may be thought that such a prohibition is too extreme to work justly in every case. It may be argued that the avoidance of "contracting out" should depend in each case on the nature of the product, the circumstances in which it is produced and the scope of the exemption from liability. "Contracting out" in respect of damage to property or economic losses would appear to be generally less objectionable than in respect of death or personal injury. Comments are invited.

SHOULD THE AMOUNT OF LIABILITY BE LIMITED?

80. An injured person whose claim in tort or delict succeeds at common law is entitled to damages in respect of pecuniary losses, such as loss of wages, past, present and future, and also non-pecuniary losses for pain, suffering and loss of amenity. The basis of the assessment is to restore him, so far as an award of money can do so, to the position he would have been in had he not been injured. The pecuniary losses down to the date of the award can be worked out with some exactness but the award for future pecuniary losses and for non-pecuniary losses are necessarily harder to assess. If a producer were to be made strictly liable for injuries caused by defective products the question would arise whether the injured

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114. Art. 8.

115. Art. 8.

person should be entitled to the same damages as at common law, or whether an award based on strict liability should be limited to some smaller sum. The E.E.C. draft directive confines the producer's strict liability to pecuniary losses.[116] Another possibility would be for the producer's strict liability to be determined according to the degree of injury, with a fixed scale compensating the pecuniary loss, although the scale might require to be adjusted having regard to the pre-accident earnings of the injured person. The justification for a limitation of this kind might be that liability regardless of fault should provide a minimum "floor" of compensation to cover essential needs, but compensation over and above this should depend on proof of fault. Such a scheme would probably impose a lighter burden on the producer than a scheme that made him liable for pecuniary losses without limit, even in the absence of fault. Comments on the merits of limitations of either kind would be welcomed.

81. Another possibility might be to fix a financial limit beyond which the producer should not be strictly liable although he would, unless provision were made to the contrary, remain liable at common law on proof of a failure to take reasonable care. The E.E.C. draft directive makes provision for limits of this nature[117] although no figures for the limit have yet been specified. The provision of a financial ceiling to strict liability is no doubt intended to protect the producer from having to meet claims arising out of a catastrophe[118] beyond the limit for which he can obtain insurance. The Strasbourg draft convention draws no distinction between

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116. Art. 4.

117. Art. 5.

118. In the memorandum to the E.E.C. draft directive (in Appendix C) references are made to the aircraft disaster in Paris on 3 March 1974 and to the injuries caused by the drug thalidomide.

pecuniary and non-pecuniary losses, and gives Contracting States the right, if they wish, to lay down financial limits to the producer's liability; the limits must not be less than 200,000 DM (about £36,000) for each person suffering injury or death nor less than 30 million DM (nearly £5½ million) for all damage caused by identical products having the same defect.[11] In cases of single claims arising from personal injury or death, awards in England and Scotland seldom exceed £75,000 for pecuniary and non-pecuniary losses together. Claims for property damage may of course involve much larger sums, as the Harbutt's "Plasticine" case shows,[120] and so also may multiple claims for personal injury. The importance of setting a limit on the amount of liability will be considered in greater detail in the Part on damage to property,[121] although cases of catastrophe and multiple claims for personal injury and death may cause similar problems.

WHAT SHOULD BE THE RULES ON BURDEN OF PROOF?

82. Removing the burden of proving negligence by introducing strict liability still leaves the burden of proving that the defect existed when the product left the producer's possession.[12] To hold the producer liable for defects created thereafter by other persons would be introducing something far beyond the idea of "strict liability" that has taken hold in the United States of America and beyond the provisions of the Strasbourg draft convention. If the producer is only to be liable for defects arising in his products before they leave his possession then the question arises whether the injured person should have the burden of proving that the product was defective when

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119. See Annex 2 in Appendix B.

120. See para. 71, above.

121. At para. 92, below.

122. Cf. para. 43, above.

it left the producer's possession or whether the producer should have the burden of proving that the defect arose afterwards. The placing of the burden of proof would be of particular importance in the case of perishable products.[123] The E.E.C. draft directive gives no clear answer but the Strasbourg draft convention places the burden of proof on this issue on the producer.[124] Views are invited.

Summary

83. We invite readers to consider the problems implicit in the introduction of strict liability for injuries caused by defective products, by asking themselves the following questions:-

(a) Is there any need for a change in the present law?

(b) If there is, should strict liability be introduced or is no more needed than a change in the rules on burden of proof?

(c) If strict liability is to be introduced,

(i) Who should be liable? The main choices are between;

(a) making everyone in the marketing enterprise strictly liable

(b) making the producer and perhaps others strictly liable but preserving the injured person's rights under existing law against other people; and

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123. See para. 66, above.

124. Art. 5.

(c) making the producer strictly liable and exonerating everyone else.

(ii) Should the producer's rights against third parties be preserved?

(iii) How should "defect" be defined?

(iv) To what products should strict liability not apply? Should special provision be made for movables incorporated into immovables, natural products, pharmaceuticals, components, nuclear damage or means of transport such as aircraft and ships?

(v) Who should be entitled to sue?

(vi) What defences should be provided? In particular should it be a defence to an allegation of "design defect" that all reasonable care was taken by the producer having regard to the scientific knowledge available at the date of production?

(vii) Who should have the burden of proving when the defect in the product came into existence?

PART V - DAMAGE TO PROPERTY

Personal injury and property damage compared

84. In Part IV we considered whether producers should be held strictly liable for personal injuries caused by defects in their products. We now turn to strict liability for damage to property. We include, in this Part, strict liability for the cost of replacing or reinstating damaged property and strict liability for economic loss resulting from physical damage to property, for example, loss of profits.[125] However, strict liability for property damage where the property affected is the defective product itself is not considered in this Part, but in Part VI. The Strasbourg draft convention is confined to personal injuries so we shall not refer to it again in the paragraphs that follow. The E.E.C. draft directive applies to pecuniary losses resulting from property damage, save that "damage shall not include the defective article."[126]

85. There are two general points to be made about extending strict liability for defective products to cover property damage. The first is that the 'social' considerations[127] that strengthen the argument for strict liability in relation to personal injuries have less force when applied to property damage. People tend in general not to insure themselves against the consequences of personal injury whereas they do tend to insure themselves against damage to their property. There is therefore a stronger case for letting

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125. See para. 9, above.

126. Art. 4.

127. See in particular para. 36, above.

the loss caused by property damage fall on the person suffering it, except where he can prove that it has been brought about by the producer's negligence. The second general point also concerns insurance. It is usually more expensive to insure against third party claims for property damage than against third party claims for personal injury: cover against third party claims for economic losses, such as loss of profits resulting from damage to property can be prohibitively expensive; it is usual for only limited cover to be provided. The distinctions between the different heads of damage may be seen from the facts of Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd.[128]

> The defendants produced a chemical called boron tribromide which they sold and supplied to the plaintiffs in glass ampoules to each of which they had affixed a label containing the warning "Harmful vapour". A physicist working in the plaintiffs' laboratory dropped an ampoule whilst trying to wash the label off it and caused an explosion that killed him and damaged the factory. The plaintiffs claimed that it would cost £75,000 to repair the factory and that the loss of production whilst the repairs were being done would result in losses of a further £300,000. The producers of the chemical were thus faced with a claim in respect of the cost of repairing the factory, and also in respect of the economic losses due to loss of production. The trial judge held the defendants liable in negligence and also for breach of contract. An appeal by the defendants was allowed, by consent, and judgment was entered for the plaintiffs on the issue of negligence only, limited to 80% of the damages.

86. If it seems right that, in some situations at least, strict liability should apply to property damage as well as to personal injuries, it is necessary to consider what those

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128. [1971] 1 Q.B. 88.

situations should be. We shall not reconsider the definition of a "producer" nor what products should be excluded, what defences would be provided nor where the burden of proof should lie, since in these respects no different considerations seem to apply to property damage from those that we have considered in connection with strict liability for personal injuries. The following matters, however, clearly call for further consideration if strict liability is to apply to property damage claims:-

(a) the different kinds of property damage;

(b) the definition of "defective";

(c) the person who should be entitled to sue;

(d) the provision of a limit on the sum for which the producer should be liable.

The different kinds of property damage

87. We have already commented[129] on the difference between (a) the cost of replacing or reinstating the property damaged and (b) the economic loss, such as loss of profits, resulting from the physical damage to the property. It is for consideration whether strict liability should apply to the cost of replacing or reinstating the damaged property but not to economic loss. It could be said, in favour of such a distinction, that redress would be provided thereby for the ordinary member of the public whose personal belongings were damaged in the accident, without in most cases adding very greatly to the burden of liability on the producer or to the cost of the product. Even less would be added if strict liability for property damage were confined to the cost of replacing or reinstating personal belongings only, so that the

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129. In para. 9 and paras. 84-5, above.

cost of replacing or reinstating property such as buildings or works of art were excluded. Comments are invited.

The definition of "defective"

88. In the last Part[130] we opted for the narrower meaning of "defective" i.e. dangerous or unsafe, and products that cause physical damage to other property will be classified in this Part as defective if they are dangerous or unsafe, but not otherwise. The chemical product that damaged the factory in the Vacwell case[131] would obviously come within this narrow definition, as would the chicken vaccine that killed the chickens with its active virus.[132] On the other hand the defective roof tiles[133] might be outside the definition. The problems inherent in applying strict liability in tort or delict to defective but not dangerous articles such as roof tiles will be considered in the next Part.[134]

The person who should be entitled to sue

89. We suggested in the last Part that the right to sue should be conferred on all persons physically injured by a defective product.[135] Should all persons who have suffered physical damage to their property have the same right to sue? We mentioned that property damage claims can be very heavy where the property damaged is used for business

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130. Para. 63, above.

131. Para. 85, above.

132. Para. 9, above.

133. Para. 10, above.

134. Paras. 100-108, below.

135. Para. 76, above.

purposes.[136] Companies that are engaged in business usually insure themselves against losses due to damage to their buildings[137] and it might be suggested that producers should be liable for property damage inflicted on private consumers by defective products, but not for property damage sustained by commercial organisations. A distinction of this kind was suggested by one judge in the Californian case of Seely v. White Motor Co.[138] The facts were as follows:-

> Mr. Seely carried on business as a haulier and he purchased a truck that had been produced by White Motor Co. When using it in his business he found that it bounced violently so he used it less and less, and suffered economic losses in the form of loss of business. Eventually he was involved in an accident; the truck was damaged but he was unhurt. It was found as a fact that the accident was not attributable to a defect in the truck. It was however also found as a fact that the White Motor Co. had given a manufacturer's warranty that they had broken by producing a truck that bounced violently. The majority of judges held that the claim for economic losses succeeded as a claim for breach of warranty, but failed as a claim in tort. Peters J. gave a dissenting judgment in which he upheld the result on the grounds, not of the manufacturer's guarantee, but of the strict liability on the producer for defects in his products.

90. Peters J. said that the purpose of the strict liability rule adopted in the power-drill case[139] was to protect people who could not protect themselves and that

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136. Para. 85, above.

137. The greater part of the plaintiffs' loss in the Harbutt's "Plasticine" case was covered by their own insurance. See para. 71, above.

138. 403 P.2d 145 (1965) Cal.

139. Greenman v. Yuba Power Products, Inc. 377 P.2d 897 (1963) Cal., para. 51, above.

different considerations should apply " ... within the world of commerce, where parties generally bargain on a somewhat equal plane and may be presumed to be familiar with the legal problems involved when defective goods are purchased." A distinction of this kind is drawn in the Supply of Goods (Implied Terms) Act 1973 and greater protection is given to the purchaser in a consumer sale than to the purchaser who buys in the course of a business.[140]

91. The distinction drawn by Peters J. was not adopted by any of the other judges and although it may be attractive in theory it is difficult to apply in practice. Peters J. said[141] of Mr. Seely:-

> "Although this is a close case, I would find that plaintiff was an ordinary consumer insofar as the purchase involved here was concerned, even though he bought the truck for use in his business. Plaintiff was an owner-driver of a single truck he used for hauling and not a fleet-owner who bought trucks regularly in the course of his business."

It is for consideration whether strict liability claims for physical damage to property should only be made by "ordinary consumers" and if so how such a class of persons should be defined. Mr. Seely's purchase would, incidentally, not have qualified as a consumer transaction for the purposes of the Supply of Goods (Implied Terms) Act 1973 as he bought the vehicle for use in his business.

Should the amount of liability be limited?

92. The case for setting a financial ceiling on the amount of the producer's liability must now be considered. The capacity of the insurance market is finite and it is argued by

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140. See s.55 of the Sale of Goods Act 1893, as amended by s.4 of the Supply of Goods (Implied Terms) Act 1973.

141. 403 P.2d 145 (1965) Cal.

some that the liability of the producer should not exceed the sums for which insurance cover is reasonably available. Moreover as long as the amount of liability is kept to a moderate figure the cost of insurance to the producer and, indirectly, to the buying public will not be too onerous. These economic arguments have been reflected in other areas of the law. For example,

(a) By the Merchant Shipping Act 1894,[142] the liability of shipowners, charterers and others is, in the absence of actual fault or privity, limited to an overall maximum, calculated by reference to the tonnage of the ship, "on any distinct occasion". If a ship is sunk and the losses incurred by passengers and cargo-owners exceed the maximum, the amount representing the maximum has to be shared out between the claimants.[143]

(b) An overall maximum is likewise set on the liability "in respect of any one occurrence" of the licensee of a nuclear site; however, where the losses exceed the global limit the satisfaction of claims in excess of the limit is to be provided for by Parliament.[144]

(c) The liability of carriers of goods is limited by various statutes,[145] the limit usually being set by reference to the weight of the goods carried.

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142. Section 503, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act 1958.

143. Ibid., s.504.

144. Nuclear Installations Act 1965, ss. 16-18.

145. Carriage by Air Act 1961, Sched. 1, Art.22; Carriage of Goods by Road Act 1965, Sched., Art. 23; Carriage of Goods by Sea Act 1924, Sched., Art. IV, para. 5(a).

(d) The liability of carriers of passengers by air is limited to a set sum in respect of each passenger,[146] but there is no global limit on claims arising out of a single air crash.

It is for consideration whether any and, if so, which of these models might be adapted to limit the liability of the producer. The global limit in respect of any one occurrence is appropriate to the catastrophe such as the sinking ship or the nuclear explosion, but it would be of no relevance to the non-catastrophe, and of minimal relevance where the catastrophe involved a multitude of "occurrences" as, for example, with poisonous cattlefeed that is supplied to different animals at different times by different farmers. If the global limit is rejected limits might instead be set at so much for each individual defective product or at so many times the value of the product. This would however not cope satisfactorily with the catastrophe in which many people suffered in the same occurrence, for example, in an explosion of a single chemical product. The model adopted by the E.E.C. draft directive[147] is similar to the limit set on the liability of the carrier of passengers and goods by air.[148] It provides for a limit (as yet unspecified) for "every loss", which is related to each claim but not, in the present draft, to each occurrence. The draft appears to contemplate two limits, one for personal injury claims and one for the rest. If therefore strict liability for defective products were to be introduced subject to financial limits a number of questions would have

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146. Carriage by Air Act 1961, Sched. 1, Art. 22.

147. Art. 5.

148. Carriage by Air Act 1961, Sched. 1, Art. 22.

to be answered. Should the limits apply to all claims? or just property damage? or be set at different figures for different kinds of damage? What kind of limits should be applied? Global limits or limits per claim or both? Should they be set by reference to units of production? to the value of the product? to each occurrence? or to each loss? Opinions are invited on these different questions and on the factors which should determine the figure that would be appropriate if strict, but limited, liability were to be introduced.

Summary

93. The main questions raised in this Part are:-

(a) Should a producer be held strictly liable for damage to property (other than to the product itself) caused by a defect in his product?

(b) If so, should the remedy cover all property damage or only some?

(c) Should the remedy be available to all, or only to the ordinary consumer?

(d) Should a statutory limit be set on liability?

PART VI - DAMAGE TO THE DEFECTIVE PRODUCT

94. The question to be examined in this Part is short but difficult. Assuming that strict liability for defective products were imposed on producers and were to apply in some circumstances to property damage caused by the defect, should a claim be allowed where the property damage sustained is to the defective product itself? The E.E.C. draft directive appears to exclude such claims.[149] We have taken the facts of two decided cases to illustrate the difficulty, the first case being one in which the defect made the product unsafe, the second being one in which it did not.

Defect making the product unsafe: Henningsen's case

95. The facts that were before the Supreme Court of New Jersey in Henningsen v. Bloomfield Motors Inc. and Chrysler Corporation[150] in 1960 included the following:-

> Mr. Henningsen purchased a new car from Bloomfield Motors and gave it to his wife. The car had been manufactured by Chryslers. The steering went out of control as Mrs. Henningsen was driving the car within a week of delivery, and the car hit a brick wall. Mrs. Henningsen was injured and the car was a total loss. Mrs. Henningsen was awarded damages against both defendants for her injuries, and Mr. Henningsen was awarded damages against both defendants for the replacement value of the car.

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149. Art. 4.

150. 161 A.2d 69 (1960) New Jersey.

Defect not making the product unsafe: Santor's case

96. The facts of Henningsen's case are to be contrasted with the facts of Santor v. A. & M. Karagheusian Inc.,[151] which came before the Supreme Court of New Jersey in 1965.

> Mr. Santor had contracted with a retailer for the supply and fitting of a carpet made by the defendants. The carpet was laid and soon afterwards unusual lines appeared in it. He discovered that the retailer had gone out of business and sued the defendants instead, alleging that they were strictly liable in tort for the defects in the carpet. Francis J. gave the judgment of the court and it was held that the claim succeeded even though the only damage to property was to the product itself. Mr. Santor was awarded the difference between what he had paid for the carpet and what it was worth, which is what he would probably have recovered from the retailer had he been sued. Francis J. said:-
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> "If the article is defective, i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists."

97. In fact, in Santor's case, the producer had not just made and marketed a shoddy carpet, he had marketed the carpet as Grade I, which it plainly was not. The judgment of Francis J. was criticised in Seely v. White Motor Co.[152]

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151. 207 A.2d 305 (1965) New Jersey.

152. 403 P.2d 145 (1965) Cal. For the facts see para. 89, above.

although not the result at which the court had arrived: Traynor C.J. said:-

> "It was only because the defendant in that case marketed the rug as Grade I that the court was justified in holding that the rug was defective. Had the manufacturer not so described the rug, but sold it 'as is' or sold it disclaiming any guarantee of quality, there would have been no basis for recovery in that case .... A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."

98. The views expressed in these three American cases- Henningsen's case, Santor's case and Seely's case - agree on one matter that the producer of a defective product should be strictly liable for physical damage to the defective product itself where the defect has made the product unsafe. This seems to be accepted in all States in America in which strict liability for defective products has been accepted. However there is a clear division of opinion in America about strict liability for products that are safe but shoddy. The Supreme Court of New Jersey favours bringing them within the producer's strict liability in tort or delict: the Supreme Court of California favours keeping them out.

99. The test for strict liability in tort or delict propounded by Francis J. in Santor's case would classify a product as "defective" if it were "not reasonably fit for the ordinary purposes for which such articles are sold and used". This is very similar to the test provided by the Sale of Goods Act 1893 for determining whether goods supplied by a retailer are of merchantable quality.

Section 62(1A)[153] provides:-

> "Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly."

The division of opinion in America can be restated, on the basis of this definition, as separating those who hold that the producer should only be strictly liable for goods that are defective in the narrow sense of being unsafe, and those who hold that he should be strictly liable for goods that are defective in the broad sense of being unmerchantable, whether safe or not. When, in the paragraphs that follow, we refer to a product as being "unmerchantable" we mean that it is defective in the broad sense and that it does not meet the standard laid down by section 62(1A) of the Sale of Goods Act 1893.

The claim in tort or delict for safe but shoddy goods

100. It is important to keep in mind the distinction between claims in tort or delict and claims in contract. So far as unmerchantable goods are concerned the consumer has in the present state of English law no remedy in tort against either the retailer or the producer if the goods are safe, although the same may not be true of an action based on delict in Scotland.[154] There are, however, remedies

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153. This subsection was added to the Sale of Goods Act 1893 by section 7(2) of the Supply of Goods (Implied Terms) Act 1973.

154. See para. 10, above.

for breach of contract. If the consumer buys them from a retailer or acquires them on hire-purchase terms from a finance company he will usually have a remedy for breach of contract if the goods are not of merchantable quality. The circumstances in which the consumer has no such remedy are:-

(a) where he has got what he bargained for and

(b) where although there has been a breach of contract he has no remedy because he is not a party to the contract.

101. We shall consider first the situation in which the customer has got what he bargained for. The supply of shoddy goods under a consumer transaction does not necessarily involve a breach of contract. The Supply of Goods (Implied Terms) Act 1973 protects the purchaser under a consumer sale and the hirer under a consumer hire-purchase agreement from signing away his contractual rights in respect of unmerchantable goods,[155] but he still has no remedy in respect of defects specifically drawn to his attention before the contract was made[156] nor, if he examines the goods before the contract, in respect of defects which that examination ought to have revealed.[157] In these circumstances the purchaser of unmerchantable goods has no remedy in contract against the retailer or, as the case may be, the finance company, for defects in the goods. As we explained earlier,[158] it is not

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155. See para. 21, above.

156. Sale of Goods Act 1893, s.14(2)(a); Supply of Goods (Implied Terms) Act 1973, s.10(2)(a).

157. Sale of Goods Act 1893, s.14(2)(b); Supply of Goods (Implied Terms) Act 1973, s.10(2)(b).

158. See paras. 27-33, above.

our intention to reopen in this paper the scope and content of the consumer's rights in contract against the retailer or finance company with whom he has made his bargain.

102. Sometimes the consumer or user of unmerchantable goods is unable to sue for breach of contract as he is not a party to the contract under which the goods have been supplied. It is at least arguable that the person who has broken his contract by supplying shoddy goods - and it may be the producer who has broken his contract with the distributor, or the retailer who has broken his contract with the purchaser - should be liable in damages to the ultimate consumer who suffers the loss. These arguments will be considered later, in Part VIII.

103. If we leave the problems of the non-contracting consumer on one side for the moment, and return to the situation of the purchaser who has been supplied under a contract with safe but unmerchantable goods, two questions have to be considered:-

(a) Should the purchaser of shoddy goods have a remedy in tort or delict against the producer as well as a remedy in contract against the retailer or finance company?

(b) Should the same purchaser have a remedy in tort or delict against the producer where there has been no breach of contract by the retailer or finance company?

104. The argument in favour of holding the producer strictly liable in tort or delict for safe but unmerchantable goods is that propounded by Francis J. in Santor's case,[159]

159. See para. 96, above; 207 A.2d 305 (1965) New Jersey.

that as the producer is the "father of the transaction" he ought to guarantee that his products are reasonably fit for the ordinary purposes for which such articles are sold and used. The arguments against holding the producer strictly liable in such circumstances vary depending on whether the purchaser has or has not a remedy in contract against the retailer or finance company from whom he acquired the goods.

Where the purchaser has a remedy in contract

105. It may be said that where the purchaser already has a remedy in contract against the person from whom he acquired the goods the provision of an additional remedy against the producer is unnecessary and may lead to an increase in the price of the product to cover the cost of providing against additional claims. On the other hand the increase may in most cases be so slight as to be negligible, as the retailer, if liable, is under the present law usually entitled to claim a full indemnity from the producer, directly or indirectly, as a term of the contract under which the goods are supplied to him.[160] A more serious difficulty is that the unmerchantable goods may, if the Sale of Goods Act definition is invoked,[161] only fall below the standard of merchantable quality because of the way in which they are described by the retailer. In Santor's case the producer had marketed the carpet as Grade I; let us however, assume that he had not done so but that the retailer had, on his own initiative, described the carpet as being Grade I. He, the retailer, would be liable, and rightly so, for selling a carpet of unmerchantable quality, but it might appear unjust to hold the producer

160. Cf. Kasler v. Slavouski [1928] 1 K.B. 78.

161. Section 62(1A); see para. 99, above.

liable in tort for the 'over-selling' of his product by the retailer. There is also the matter of the price. The quality that the purchaser is entitled to expect must be related, to some extent, to the price that he pays. It would be odd if he could complain to the producer that the carpet that he purchased as a 'cheap' carpet did not have the attributes of one for which he would expect to pay more. If, on the other hand, he has been overcharged by the retailer, why should this give him a remedy against the producer?

106. There are arguments for and against giving the purchaser an additional remedy against the producer when he already has one against the retailer or finance company with whom he was in contract. It is a question on which we know that stong views are held on both sides. We look forward to hearing them.

Where the purchaser has no remedy in contract

107. We now come to the second question. Should the purchaser be provided with a remedy against the producer for safe but shoddy goods where he had no remedy in contract against the person who sold them to him? The circumstances in which he has no such contractual remedy are, since the passing of the Supply of Goods (Implied Terms) Act 1973, few and far between and they are circumstances in which it can usually be said that the purchaser has got what he bargained for.[162] This too is a matter on which comments are invited.

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162. See paras. 21 and 101, above.

The non-purchaser

108. We have been considering the arguments for and against giving the purchaser a right to sue the producer for safe but shoddy goods. The ultimate consumer who suffers the loss may not be the purchaser but someone else, say the purchaser's wife or daughter. Her interests ought also to be considered. If it is decided that no remedy should be given to the purchaser then it would seem to follow that the ultimate consumer should have no better right. If on the other hand it is decided that the purchaser should have a remedy against the producer in tort or delict then it would seem to follow that the ultimate consumer should also have a remedy, even though not a purchaser.

Summary

109. The subject matter of this Part has been whether a producer should be held strictly liable in tort or delict where the complaint is of physical damage to or defects in the product itself, and the questions raised include the following:-

(a) Should a product be classified as "defective" if it is unsafe or dangerous, but not otherwise? If so, is there any reason why the producer's liability for damage to the product should be different from his liability for damage to other property?

(b) Should a wider definition of "defective" be adopted, such as "unmerchantable"? If so, where the goods are safe but unmerchantable,

(i) Should the purchaser have the right to sue the producer in tort or delict

when he already has a right in contract against the retailer?

(ii) Should he have such a right against the producer where he has no right in contract against the retailer?

(iii) What rights, if any, in tort or delict should the non-purchaser have?

PART VII - PURE ECONOMIC LOSS

110. The duty of care imposed on producers by Donoghue v. Stevenson[163] is to take reasonable care to prevent "injury to the consumer's life or property"[164] and we have already considered whether the producer of a defective product should be made strictly liable for injuries or damage to property caused by the defect in his product. We now turn to compensation for pure economic loss where there has been no injury to the claimant's person nor damage to his property. This is not excluded by the E.E.C. draft directive although a claim in respect of damage to the product is apparently excluded by Article 4.

111. From the fact that the duty on producers under the present law is to take care to prevent injury to life or property, it might be concluded that a person who suffers economic loss but no injury can never have a claim. This may be an oversimplification. There is some authority[165] for the proposition that a person whose person or property is imperilled by a dangerously defective product may recover compensation from the producer for economic losses incurred in neutralising the danger. As Lord Denning M.R. said in Dutton v. Bognor Regis Urban District Council[166] of the duty of the producer:-

> "If he makes it negligently, with a latent defect (so that it breaks to pieces and

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163. [1932] A.C. 562; 1932 S.C.(H.L.) 31. See para. 16, above.

164. Paras. 17 and 18, above.

165. See the judgment of Widgery J. in Weller & Co. v. Foot and Mouth Disease Research Institute [1966] 1 Q.B. 569, and cases there cited. For a recent exposition of the problems in this area of the law see Waddams, "The Strict Liability of Suppliers of Goods", (1974) 37 M.L.R. 154-174.

166. [1972] 1 Q.B. 373 at p. 396.

> injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair."

112. Although the matter is not free from doubt it may therefore be the present law that a producer who negligently produces an article that has a dangerous defect may be liable to the ultimate consumer for economic losses incurred by that person in neutralising the danger. These might, in the case of a commercially useful product, include in certain circumstances not only the cost of repair but the loss of profits incurred while repairs were being carried out.[167] There seems to be little or no judicial support in English decisions for making economic loss recoverable where the negligence of the producer results in a defect that does not make the product dangerous. As Stamp L.J. said in Dutton v. Bognor Regis Urban District Council:-[168]

> "I may be liable to one who purchases in the market a bottle of ginger beer which I carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water."

As we explained earlier,[169] we do not think it appropriate to consider in this paper whether "economic loss" ought always to be recoverable when it is the reasonably foreseeable consequence of a failure to take reasonable care. This

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167. Cf. Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd. (1974) 40 D.L.R. (3d) 530, a decision of the Supreme Court of Canada.

168. [1972] 1 Q.B. 373 at p. 414.

169. At para. 26, above.

question needs to be examined in a wider context than liability for defective products.

113. This brings us back to the definition of defective. If strict liability were to be introduced and if a product were to be classified as defective only if it were unsafe and likely to cause an accident, then arguably the producer of an unsafe product should be strictly liable for economic losses incurred by the consumer or user in preventing the accident from happening. But to allow economic losses caused by a dangerously defective product to be recovered by some is not to say they should be recovered by all. In Weller & Co. v. Foot and Mouth Disease Research Institute[170] Widgery J. held that even if the plaintiffs, who were auctioneers, could prove that the defendants had negligently caused an outbreak of foot and mouth disease and, as a result, the closing of the cattle market, this did not entitle them to compensation by the defendants for the loss of commissions that they would otherwise have made out of cattle auctions. He also held[171] that the claim would have failed even if the liability on the defendants for the escape of the virus were held to be strict. He explained that unless the line were drawn so as to include claims by those whose person or property was in danger but to exclude the rest, the number and size of the claims for economic loss might be endless. He said[172]

> "In an agricultural community the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that

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170. [1966] 1 Q.B. 569.

171. Ibid., at p.588.

172. Ibid., at p.577.

> area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable times; transport contractors who make their living by the transport of animals are out of work: dairymen may go short of milk and sellers of cattle feed suffer loss of business."

114. It is extremely difficult to draw a precise line between the economic loss that should be recoverable and the economic loss that should not, even on the present state of the law.[173] In the area of liability for defective products however it may be easier than most. The present law would seem to be that economic loss arising out of a defect in a product that has been made negligently is recoverable, if recoverable at all, by the person whose person or property was put in peril by the defect. This might seem a convenient way of drawing the line if the liability of producers were to be made strict. Comments are invited.

115. Such a dividing line would not be appropriate if the wider definition of "defective" was preferred so that the producer was strictly liable in tort or delict for unmerchantable goods that caused no peril at all. Perhaps in the case of goods that were safe but unmerchantable the line might be redrawn so as to include the consumer or user of the product but to exclude everyone else.

116. If the producer were to be held strictly liable in tort or delict for products that were unmerchantable although

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173. "How are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision but we can always say on which side of it any particular case falls." S.C.M. (United Kingdom) Ltd. v. W.J. Whittall & Son Ltd. [1971] 1 Q.B. 337, 346, per Lord Denning M.R.

safe and if pure economic loss were to be allowed as the basis of a claim against the producer, claims would lie on the following facts:-

(a) X buys a computer from Y that has been manufactured by Z. He explains to Y that he needs it for use in his business. The computer has a defect which causes economic losses to X in his business.

(b) X buys a typewriter for his daughter from Y: it has been manufactured by Z. X explains to Y that his daughter needs it so that she can do copy typing at home. The typewriter has a defect and his daughter is unable to earn money as a copy typist.

117. On the present state of the law it seems that no claim can be made by X against the producer of the computer, nor by X's daughter against the producer of the typewriter, even where negligence on the producer's part can be proved. It would therefore be a radical change in the law if the producer were to be held strictly liable in each case whether negligent or not. The objections to such a change are substantially the same as the objection to allowing the recovery of compensation in tort or delict where the product is safe and the only damage sustained is to the defective product itself.[174] There is the additional difficulty that in each of the examples given the liability of the retailer Y, in respect of the economic losses - assuming that the privity difficulty in the typewriter case could be surmounted[175] - would depend on what losses he ought reasonably to have foreseen having regard to the circumstances of which he knew or ought to have known at the time of sale.

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174. See paras. 100-108, above.

175. See paras. 128-132, below.

These circumstances would not, in the ordinary way, be within the contemplation of the producer, Z, and it might seem unfair to impose strict liability on him for losses that were not within his reasonable comtemplation just because they were brought to the notice of the retailer, Y. It might seem even more unfair to hold him strictly liable for losses which were not even within the reasonable contemplation of the retailer. Comments are invited.

Summary

118. The central problem in this Part as in Part VI is whether the producer should be strictly liable for a defective product if it is defective in the broad sense of being of unmerchantable quality or only where the defect makes it unsafe or dangerous. If the latter is preferred then the question is whether producers should be strictly liable for pure economic loss where the loss is incurred in neutralising the danger caused by the defect. If the former is preferred the question is broadly whether the claims for pure economic loss should be treated in the same way as claims in respect of damage to the product itself.

PART VIII - CONTRACT

A. English Law

119. So far we have been considering the possible ambit of a new remedy that does not depend upon proof by the consumer of a breach of contract by the person sued. There are however situations in which a breach of contract can be proved against the person sued but the consumer cannot rely on it for a cause of action.

The privity problem

120. The law of England provides that only a party to a contract may sue for breach of it: this is what is meant by the requirement of "privity". In the case of Daniels v. White[176] it meant that Mrs. Daniels was not able to sue Mrs. Tarbard for breach of contract although her husband was, and that Mr. Daniels was unable to sue Whites for breach of contract although they had broken their contract with Mrs. Tarbard by supplying her with poisonous lemonade for sale to the public. Further remedies might be provided for the consumer by dispensing with the requirement of privity, a requirement which has, in America, been divided, in this context, into "vertical privity" and "horizontal privity".[177] If the manufactured product is thought of as descending a chain of distribution from the producer to the middleman and on to the retailer who sells to the public, "vertical privity" is the privity which each of these persons has with his predecessor and

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176. [1938] 4 All E.R. 258. See para. 8, above.

177. See P.N. Legh-Jones, "Products Liability: Consumer Protection in America" (1969) C.L.J. 54 at pp. 56-57.

successor, and "horizontal privity" is the ensuing privity of contract between the retailer and the first domestic consumer who buys from him, and then between that consumer and any sub-consumer, if such there be. The requirements of privity, "vertical" and "horizontal", might be relaxed in the following ways:-

(a) Vertical privity. It might be provided that the purchaser should have the same right to sue the producer as the person to whom the producer sold and delivered the product, thus extending privity vertically. In the sale between producer and retailer or distributor a term will usually be implied that the product is of merchantable quality so Mr. Daniels would be able to sue Whites on the facts of Daniels v. White for breach of their contract with Mrs. Tarbard.

(b) Horizontal privity. It might be provided that the non-purchaser should have the same remedy against the retailer as the purchaser, thereby extending privity horizontally. Thus where the purchaser had a right to damages for breach of contract the consumer would have an equivalent right. Mrs. Daniels would then be able to sue Mrs. Tarbard on the facts of Daniels v. White for breach of Mrs. Tarbard's contract with Mrs. Daniels.

121. There is a third possibility which would involve a relaxation of the privity requirement horizontally and vertically. It might be provided that the consumer should have a remedy against the producer for breach of his contract with the person to whom he sold and delivered the product although the consumer himself was not in contract with anyone.

122. There are two general points to be made about relaxing the requirement of privity of contract in cases concerning defective products. The first is that it would mean separating contracts for the supply of goods from other contracts, such as contracts for the supply of services, which are outside the scope of this paper. It would also mean upsetting a fundamental rule of the English law of contract that "consideration must move from the promisee". It may be thought that an attack on the basic requirements of the present law of contract would be better considered in a wider context than that set by our present terms of reference.

123. The second point is that unless the idea of a new remedy in tort is rejected the provision of additional remedies in contract will involve an overlap, with perhaps different rules on damages. Almost any of the changes in the present law that were considered in Part IV would provide Mr. and Mrs. Daniels with a right to be compensated by Whites in respect of their injuries. It is for consideration whether additional remedies in contract would be needed if changes in the present law of tort or delict were made.

124. It may be thought that additional remedies for injury to person or property belong properly to the law of tort[178] and that the main aim of any new remedy in contract should be to provide for the sort of claims that do not fit easily into the law of tort, that is to say those in which the loss flows not from a dangerous defect in the product but from a defect that means that the product does not match the consumer's "economic expectations".[179] We shall therefore take the facts of the

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178. See Traynor J. in Greenman v. Yuba Products Inc. 377 P.2d 897 (1963) Cal. para. 51, above.

179. See para. 97, above.

defective carpet case[180] to illustrate vertical privity, and the hypothetical case of the defective typewriter[181] to illustrate horizontal privity.

Vertical privity: a "leapfrog" action

125. On the facts of the "carpet" case the purchaser had a remedy in law against the retailer but the retailer was no longer within the jurisdiction of the court and was probably insolvent. He therefore sued the producer of the carpet. The producer had given no warranty to the purchaser but he gave a warranty to the retailer that the carpet was Grade I quality. If the purchaser had recovered a judgment against the retailer, the retailer would have been able to claim an indemnity from the producer or the distributor for breach of the warranty. In Seely's case[182] Traynor C.J. said that the purchaser ought on such facts to be able to sue the producer direct and if this were made possible by English law it would certainly prevent circuity of action; it would achieve in one action the same result which must now be achieved by two.

126. French law[183] allows the purchaser to "leapfrog" the dealer and to sue any person in the chain of distribution, going back to the producer, against whom a breach of contract can be proved. It is for consideration whether it would be better to limit the "leapfrog" action to proceedings against the producer rather than to allow the purchaser to sue each and every member of the producing and marketing chain. The arguments for and against "channelling"[184] are relevant here.

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180. See para. 96, above. Santor v. A. & M. Karagheusian Inc. 207 A.2d 305 (1965) New Jersey.

181. See para. 116, above.

182. Seely v. White Motor Co. 403 P.2d 145 (1965) Cal. See para. 97, above.

183. Where it is known as "action directe".

184. See paras. 54-60.

127. It may be said that the purchaser who sued the producer for breach of contract would have great difficulty in making out a case of breach of contract, as he would not have first hand knowledge of the terms of the producer's contract with the distributor or, as the case may be, with the retailer. If the claim were in respect of personal injuries this difficulty could be overcome by making an application to the court for discovery of documents before starting proceedings,[185] but this would not be appropriate in anything but a very large claim. Consideration should be given to another possibility concerning the burden of proof. The general rule is that the person who brings an action for breach of contract must prove the terms of the contract and prove that they were broken. It might be provided that, for the purposes of a "leapfrog" action, the producer should be assumed to have broken the terms of his contract with his distributor, or retailer, once a breach were proved of the retailer's contract with the purchaser.[186] The producer would then have the burden of proving that he had not broken his contract, or that there was an exemption clause in his contract of supply on which he was entitled to rely.[187]

Horizontal privity

128. In an earlier consultative document[188] we included a section on "Third Party Beneficiaries of Conditions and Warranties" and examined the contractual remedy provided in almost every State in America by Section 2-318 of the

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185. Administration of Justice Act 1970, s.31; R.S.C., O.24 r.7A.

186. The argument for requiring proof of breach of the retailer's contract is considered at paras. 105-107, above.

187. Subject to the "reasonableness" test under section 55(4) of the Sale of Goods Act 1893.

188. Law Commission Working Paper No. 18 and Scottish Law Commission Memorandum No. 7. See para. 31, above.

Uniform Commercial Code. The official text reads as follows:-

> "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

This is Alternative A in the official text: there are also two variants which it is not necessary to consider for the purposes of the present study.

129. We explained that the requirement of privity produced some apparently unjust results, for example[189]

> "A man buys a hot-water bottle for his wife from a chemist and it bursts and scalds her.[190] ...The husband is able to claim under s.14 of the Sale of Goods Act for medical expenses incurred thereby, but any claim by the wife (against the chemist or manufacturer) would depend on her being able to prove negligence."

We concluded the section by inviting views on the following questions:-

> "If the seller's obligations are to be extended to third party beneficiaries, should the relief to be granted -
>
> (a) be limited to cases of personal injury? or
>
> (b) cover damage to property as well? or
>
> (c) cover all financial loss?"

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189. Ibid., para.33, Example C.

190. Priest v. Last [1903] 2 K.B. 148.

As we said in our report[191] the process of consultation disclosed widespread interest. Commentators specifically concerned with the consumer interest expressed wholehearted support for the proposed extension of the seller's obligations. Those expressing the viewpoint of insurers had doubt about the wisdom of adding to the insurance burden on the retailing section of commerce. Most lawyers urged that an extension of the seller's obligations should be deferred until the liability of the producer in tort or delict had been re-examined.

130. A remedy that was limited to personal injury and property damage would be very like the remedy in tort that the law of the State of California allows the injured party to bring against the retailer.[192] The only difference is that if it were founded in contract the retailer would not be liable for dangerous defects that he had made known to the buyer, or which the buyer ought reasonably to have discovered.[193] The remedy in tort would thus give better protection to the consumer than the proposed extension of horizontal privity. If the remedy in tort is for this reason to be preferred, the basic questions to which we return are those that were examined in Part IV: (a) Should strict liability be introduced in respect of defective products? (b) If so, should the liability be channelled to the producer or should it rest on everyone in the enterprise, including the retailer?

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191. Law Com. No. 24, Scot. Law Com. No. 12, para. 63.

192. Vandermark v. Ford Motor Co. 391 P.2d 168 (1964) Cal. See para. 53, above.

193. See para. 101, above.

131. If horizontal privity were to be extended to cover "all financial loss" this would provide a remedy against the retailer in the hypothetical case of the defective typewriter.[194] This would be of particular value to the consumer if the producer's strict liability in tort were to be confined to products with defects that made them dangerous.

132. In the typewriter case the loss sustained by the user of the defective product was loss of earnings which the retailer could reasonably have foreseen. The loss is only irrecoverable because the typewriter was purchased as a gift for the daughter; if it had been purchased by the father as agent for his daughter she would have been able to sue. If the loss had been in the form of money expended in putting the typewriter into working order the father would have been entitled to sue for an equivalent sum as representing the measure of his damage under the Sale of Goods Act.[195] It is therefore only the 'commercial' losses for which there is no present remedy, that is to say the money that the daughter might otherwise have made out of the commercial exploitation of her present. It is for consideration whether this very small area of unprotected loss would justify the imposition on retailers of liability for injuries and property damage as well. We would welcome views on this and on any other solution that might be devised to this particular problem.

133. If the non-purchaser were to be given the same contractual rights against the retailer as the purchaser and and if the purchaser were enabled to sue the producer direct, by a "leapfrog" action in contract, a case could be made for giving the non-purchaser remedies in

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194. Para. 116(b), above.

195. Section 51(3). Cf. Mason v. Burningham [1949] 2 K.B. 545.

contract not only against the retailer but also against those higher up the chain of distribution, including the producer. Mrs. Daniels would be enabled thereby to sue Whites for breaking their contract with Mrs. Tarbard by supplying her with unmerchantable lemonade.[196] Comments are invited on all these possible changes in the law.

Summary

134. The three questions raised in this Part are

(a) Should the purchaser be enabled to "leap-frog" the retailer and to sue others in the chain of distribution for breaches of their respective contracts?

(b) Should the non-purchaser be given the right to sue the retailer for breach of his contract with the purchaser?

(c) Should the non-purchaser be given the same contractual rights under (a) as the purchaser?

Our provisional view is that, if additional remedies are needed for the ultimate purchaser or user of defective products, they would be more conveniently provided by imposing fresh statutory obligations on the producer than by altering the rules of the law of contract.

B. Scots Law

135. Although the concepts and terminology of Scots law in regard to the matters dealt with in the preceding

196. See paras. 8 and 120, above.

paragraphs of this part of the paper differ in certain respects from those of English law, very similar problems of legal policy are presented. As we have already pointed out the circumstances in which a third party to a contract can sue upon it under Scots law are somewhat limited,[197] and we think that such circumstances are not often likely to arise in questions of liability for defective products. If a contractual rather than a delictual solution were to be suggested to overcome such difficulties the questions which may arise in the context of Scots law appear to be:-

(a) Should a title to sue for breach of contract be conferred on third parties who have suffered injury as a result of a defect in a product?

(b) If so, should such title to sue be conferred on third parties generally or should such a title to sue be confined to certain specified third parties e.g. the immediate family and guests of the contracting party?

(c) Should

(i) the eventual purchaser, or

(ii) third parties such as those mentioned in (b) above be given a title to sue for breach of contract persons higher in the chain of circulation and distribution, for example by means of a form of leapfrog?

(d) If a title to sue were to be conferred on such third parties, or any of them, should this be done by conferring on them a direct statutory title to sue or by allowing some form of statutory extension and adaptation of the principle of jus quaesitum tertio?

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197. See paras. 8 and 12(a), above.

PART IX - LAPSE OF TIME

Limitation and Prescription

136. The law of England provides limitation periods for the bringing of legal proceedings. The general rule is that once the relevant period had expired it is too late for the injured person to sue. The law of Scotland normally treats lapse of time as a basis for the negative prescription which extinguishes the right as well as the remedy, but certain limitation periods have been introduced into the law of Scotland by statute, of which one example is the special limitation applicable to actions for damages for personal injuries and death. Lapse of time is, in such circumstances, a defence to an action.[198] We have found it convenient to deal with limitation and prescription in a separate Part in order to cover lapse of time in relation to claims for all kinds of injury or loss whether founded on tort or delict or on breach of statutory duty or on contract.

Personal injury or death

137. The laws of both England and Scotland provide that a person sustaining personal injuries must start proceedings within a specified time of sustaining the injury.[199] The limitation provisions in both systems of law have been amended several times since they were introduced in 1954

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198. See paras. 77-79 above, for our consideration of other defences.

199. The relevant provisions are contained for England and Wales in the Law Reform (Limitation of Actions, etc.) Act 1954, the Limitation Act 1963 and the Law Reform (Miscellaneous Provisions) Act 1971. The Scottish provisions have now been consolidated (with some minor amendments) in Part II of the Prescription and Limitation (Scotland) Act 1973. There is also in Scots law a long negative prescription which extinguishes claims for damages for personal injuries after a period of 20 years running from the date when the claim becomes enforceable.

and are somewhat complex. They have caused many practical difficulties of interpretation, but the main elements may be summarised thus. The normal limitation period is three years from the date of the injury. Where, however, the injured person is justifiably ignorant of material facts of a decisive character, the date from which time runs is postponed until he has obtained or ought to have obtained knowledge of those facts.[200] If the injured person dies before his action is time-barred his executors and dependants have a further three years from the date of death in which to bring proceedings. Further amendments to the rules of limitation under English law have recently been proposed by the Lord Chancellor's Law Reform Committee,[201] the most significant of which are:-

(a) that ignorance of matters of law should not postpone the running of time, and that the "worthwhile cause of action test" should not, therefore, be accepted; and

(b) that the courts should have a discretion to override a defence of limitation notwithstanding that the plaintiff has not sued within three years of his date of knowledge.

Reform of the Scots law relating to limitation is also under consideration, and the Scottish Law Commission propose during further consideration of their programme subject Prescription and Limitation of Actions to review, amongst other matters, the limitation provisions which presently apply to actions for damages in respect of personal injuries and death.

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200. This attempt to summarise briefly the statutory formulae is necessarily incomplete and must be read subject to the relative statutory provisions and their interpretation.

201. Twentieth Report (1974), Cmnd. 5630.

138. The normal limitation period of three years in the case of personal injuries applies whether the claim is made at common law or by statute and whether it is founded on tort or delict or on contract.[202]

Other claims

139. Where the claim for loss or damage does not include a claim in respect of personal injury or death the general rule, under English law, is that the claim is time-barred after six years, whether it is made at common law or by statute[203] and whether it is founded on tort or contract.[204] In Scotland the five years' negative prescription applies to an obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation[205] and to an obligation arising from, or by reason of any breach of, a contract or promise,[206] except where, in either case, the obligation is to make reparation in respect of personal injuries.[207]

Defective products

140. The limitation and prescription provisions in the laws of England and Scotland, to which we have made reference, apply whether or not the liability of the person sued is strict. In view of the risks of error and oversight by legal advisers and by others, including trade unions

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202. Limitation Act 1939, s.2(1), as amended; Prescription and Limitation (Scotland) Act 1973, s.17.

203. Unless the statute provides otherwise.

204. Limitation Act 1939, s.2(1).

205. Prescription and Limitation (Scotland) Act 1973, ss.6 and 11 and Sched. 1,1(d).

206. Ibid., ss.6 and 11 and Sched. 1,1(g).

207. Ibid., ss.6 and 11 and Sched. 1,2(g).

acting for claimants and claimants themselves, it seems undesirable to have a proliferation of time limits differing according to the precise grounds of action in particular cases. It might therefore be thought appropriate that, unless special time limits can be justified, claims arising from liability for defective products should be subject to the same time limits as other claims of damages, whether they are based on failure to take reasonable care upon some form of strict liability.

Duration of the producer's obligation

141. The Strasbourg draft convention and the E.E.C. draft directive each contain a time limit of a different character. They each provide that the liability of the producer should come to an end when a specified time has elapsed after the product has been put into circulation. The Strasbourg draft convention provides for a prescriptive period of ten years;[208] and the E.E.C. draft directive is as yet silent on the exact period.[209] By these provisions if a bottle of ginger beer containing a snail[210] were produced and marketed by Mr. Stevenson and were not drunk by Mr. Donoghue until after the prescribed period had elapsed, say eleven years later, she would have no right to sue Mr. Stevenson under the Strasbourg draft convention nor under the E.E.C. draft directive, although her remedy at common law, if fault could be established, would not be barred until three years had elapsed from the date of her injuries.

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208. Art. 7.

209. Art. 6.

210. On the facts of Donoghue v. Stevenson [1932] A.C. 562, 1932 S.C.(H.L.) 31. See para. 16, above.

142. We believe that these proposals in the Strasbourg draft convention and in the E.E.C. draft directive are supported on two grounds. First it is said that since products cannot be expected to last indefinitely the producer's liability should not last longer than the product's normal life-span. The second argument is that it is thought to be easier and cheaper to arrange insurance cover for claims in respect of a product if a time limit can be set on the duration of the liability. In relation to the Strasbourg draft convention and the E.E.C. draft directive, however, the time limit may be criticised on at least two grounds. The first is that an arbitrary time limit of universal application cannot be justified as taking the life-span of the particular product into account, since it draws no distinction between, say, a punnet of fresh strawberries and a new motor-car. The second is that it prevents the bringing of proceedings after the end of the prescribed period, even though the injury may have been sustained before the time limit expired. This could work unfairly on a person who was injured shortly before the time limit ran out, but could not trace the producer in time to start proceedings within the prescribed period: the injured person would, of course, be unlikely to know when the period was about to run out as he would not, in most cases, know on what date the producer had put his product into circulation.

143. We should welcome views on the application of limitation periods to claims in respect of defective products, and in particular on the provision of a period after which the liability of the producer should be at an end, as proposed in the Strasbourg draft convention and the E.E.C. draft directive.

PART X - SUMMARY

144. We were invited by the Lord Chancellor and by the Lord Advocate to consider the existing law governing compensation for injury, damage to property and any other loss caused by defective products and to recommend what improvements, if any, were needed in the law to ensure that additional remedies were provided. Our purpose in this paper had therefore been to canvass all the possible ways in which the existing law might be changed to provide additional remedies, within the present framework of party and party litigation. In our discussions we have borne in mind that the Royal Commission under Lord Pearson has terms of reference which overlap our remit[211] and that both the Council of Europe[212] and the Commission of the European Communities[213] are engaged in studies of liability for defective products which could lead in the relatively near future to changes in the present law of the United Kingdom.

145. We should welcome comments on our analysis of the considerations relevant to the reform of this part of the law, and on any difficulties or possible solutions that may seem to have been overlooked. We are in particular anxious to learn from readers their reactions to the following questions:-

TORT: DELICT

(a) Are the remedies provided under the existing law adequate? (paras. 34-38)

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211. See paras. 1-3, above.

212. See para. 4, above and the text of the draft convention at Appendix B.

213. See para. 5, above and the text of the draft directive at Appendix C.

(b) If not, would adequate remedies be provided simply by altering the rules on burden of proof in cases founded on failure to take reasonable care? (paras. 39-44)

(c) If not, should some persons in some circumstances be strictly liable for defective products although they may not have acted in breach of contract? (paras. 34-38, 45-46)

(d) If the answer to (c) is "Yes", then we invite readers to consider the following questions under the following subheadings:-

A. Personal injuries

(i) Who should be liable? Should liability be imposed on everyone in the producing and marketing enterprise including the producer and the retailer, or should liability be channelled? If it should be channelled should liability rest on the producer alone, or should the producer's liability be assumed in some cases by the retailer or first distributor? Should the injured person's other remedies and the producer's rights of contribution or indemnity be preserved? (paras. 48-62)

(ii) How should defect be defined? Should a product be classed as defective if it is not reasonably fit for the ordinary purposes for which such articles are sold and used, or only if it is dangerous or unsafe? (para.63)

(iii) To what products should strict liability apply? (paras. 64-75). In particular should some or all of the following be excluded?

(aa) Movables incorporated into immovables? (para. 65)
(bb) Natural products, if so which? (para. 66)
(cc) Human blood? (para. 66)
(dd) Pharmaceuticals? (para. 67)
(ee) Components? (paras. 68-73)
(ff) Products causing a nuclear occurrence? (para. 74)
(dd) Aircraft? (para. 75)
(ee) Ships or other means of transport? (para. 75)

(iv) Who should be entitled to sue? (para. 76)

(v) What defences should be allowed? In particular

(aa) Should a special defence be provided for "development risks" (para. 77)
(bb) Should the rules on contributory negligence and assumption of risk apply differently in respect of claims arising out of defective products from claims arising in other ways? (paras. 78-79)
(cc) Should the producer be able to contract out of liability? (para. 79)

(vi) Should liability be limited to pecuniary losses? or to "essential needs"? (para. 80)

(vii) Should a financial limit be set upon the amount recoverable on the basis of strict liability? If so, how should the limit be fixed?

(viii) What should be the rules on burden of proof? (para. 82)

B. Damage to Property

(i) Who should be liable? Should liability for property damage be imposed on producers in the same way and to the same extent as liability for injury to the person? (paras. 84-87) If different principles should be applied;

(ii) How should defect be defined? (para. 88)

(iii) To what products should strict liability apply? (paras. 64-75)

(iv) Who should be entitled to sue? In particular should compensation for damage to property be limited to claims by private individuals rather than commercial organisations? If so should it be further limited to personal belongings? (paras. 89-91)

(v) What defences should be allowed? Should they be the same as in claims for personal injuries? (paras. 78-80, 86)

(vi) Should the amount of liability be limited? If so, how? (para. 92)

(vii) What should be the rules on burden of proof? Should they be the same as in claims for personal injuries (paras. 82, 86)

C. Damage to the Defective Product

(i) Who should be liable? Should liability for damage to the product be imposed on producers in the same way and to the same extent as liability for damage to other property? (paras. 94-109) If different principles should be applied;

(ii) How should the defect be defined? (paras. 95-99)

(iii) To what products should strict liability apply? (paras. 64-75)

(iv) Who should be entitled to sue? (paras. 89-91, 105-108)

(v) What defences should be allowed? Should they be the same as in other kinds of property damage? (paras. 78-80, 86)

(vi) Should the amount of liability be limited? If so how? (para. 92)

(vii) What should be the rules on burden of proof? Should they be the same as in other kinds of property damage? (paras. 82, 86)

D. Pure Economic Loss

(i) Who should be liable? Should liability for pure ecomonic loss be imposed on producers in the same way and to the same extent as liability for damage to property? (paras. 110-117). If different principles should be applied;

(ii) How should defect be defined? (paras. 111-113, 116-117)

(iii) To what products should strict liability apply? (paras. 64-75)

(iv) Who should be entitled to sue? (paras. 113-115)

(v) What defences should be allowed? (paras. 78-80, 86)

(vi) Should the amount of liability be limited? If so how? (para. 92)

(vii) What should be the rules on burden of proof? (paras. 82, 86)

CONTRACT

England

(i) Our provisional view is that, if additional remedies are needed for the ultimate purchaser or user of defective products, they would be more conveniently provided by imposing fresh statutory obligations on the producer than by altering the rules of the law of contract (para. 134)

(ii) If this provisional view is not accepted, should the rules of contract be varied in any of the ways canvassed in Part VIII? We should be particularly interested in views on whether

(a) the producer should be liable in contract to the ultimate purchaser or other users, and if so to whom and to what extent (paras. 125-133, 135)

(b) the retailer should be liable to persons with whom he has no contractual relationship and, if so, to whom and to what extent (paras. 128-132, 135).

Scotland

Should any additional remedy that may be provided in the Scots law of contract be created by conferring a statutory title to sue or by a statutory extension or adaptation of the principle jus quaesitum tertio? (para. 135)

LAPSE OF TIME

(i) Should claims arising from liability for defective products be subject to the same time limit as other claims of damages? (paras. 136-140)

(ii) Should a time limit be set on the liability of the producer, calculated from the time that the product is put into circulation? (paras. 141-143)

APPENDIX A

MEMBERSHIP OF THE JOINT WORKING PARTY

Chairman:	Mr. Aubrey L. Diamond	(Law Commission)
	The Hon. Lord Hunter	(Scottish Law Commission)
	Mr. M. Abrahams	(Law Commission) until December 1972
	Mr. R.J. Ayling	(Department of Trade) from July 1974
	Mr. R. Bland	(Scottish Office) from July 1974
	Mr. J.A.E. Davies	(Law Commission)
	Mr. R.G. Greene	(Law Commission) until June 1973
	Mr. P.N. Legh-Jones	(Barrister)
	Mr. H.R.M. Macdonald	(Scottish Law Commission)
	Mr. M.W. Parkington	(Law Commission)
	Mr. T.N. Risk	(Solicitor, Glasgow)
	Mr. M.J. Rogers	(Chief Executive, Common Market Secretariat, Lloyd's
	Mr. T.D. Salmon	(Department of Trade) from July 1974
	Mr. P.K.J. Thompson	(Law Commission) from July 1974
Secretary:	Mr. R.C. Allcock	(Law Commission) until July 1973
	Miss J. Richardson	(Law Commission) from July 1973

APPENDIX B

STRASBOURG DRAFT CONVENTION

DRAFT EUROPEAN CONVENTION ON PRODUCTS LIABILITY IN REGARD TO PERSONAL INJURY AND DEATH

Preamble

The member States of the Council of Europe, signatories of this Convention,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Considering the development of case law in the majority of member States extending liability of producers prompted by a desire to protect consumers taking into account the new production techniques and marketing and sales methods;

Desiring to ensure better protection of the public and at the same time to take producers' legitimate interests into account;

Considering that a priority should be given to compensation for personal injury and death;

Aware of the importance of introducing special rules on the liability of producers at European level,

Have agreed as follows:

Article 1

1. Each Contracting State shall make its national law conform with the provisions of this Convention not later than the date of the entry into force of the Convention in respect of that State.

2. Each Contracting State shall communicate to the Secretary General of the Council of Europe, not later than the date of the entry into force of the Convention in respect of that State, any text adopted or a statement of the contents of the existing law which it relies on to implement the Convention.

Article 2

For the purpose of this Convention:

a. the expression "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;

b. the expression "producer" indicates the manufacturers of finished products or of component parts and the producers of natural products;

c. a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product;

d. a product has been "put into circulation" when the producer has delivered it to another person.

Article 3

1. The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.

2. The importer of a product and any person who has presente a product as his product by causing his name, trademark or othe distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such.

3. When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be deemed to be a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product.

4. In the case of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product and the producer incorporating that produc shall be liable. However, if the former proves that the defect results from the design or the specification of the latter, he shall not be liable under this Convention.

5. Where several persons are liable under this Convention for the same damage, each shall be liable in full (in solidum).

DRAFT CONVENTION

Article 4

1. If the injured person or the person suffering damage has by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.

2. The same shall apply if an employee of the injured person or of the person suffering damage has, in the scope of his employment, contributed to the damage by his fault.

Article 5

1. A producer shall not be liable under this Convention if he proves:

a. that the product has not been put into circulation by him; 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.

2. The liability of a 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.

Article 6

Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer.

Article 7

The right to compensation under this Convention against a producer shall be extinguished if an action is not brought within 10 years from the date on which the producer put into circulation the individual product which caused the damage.

Article 8

The liability of the producer under this Convention cannot be excluded or limited by any exemption or exoneration clause.

Article 9

This Convention shall not apply to:

a. the liability of producers inter se and their rights of recourse against third parties;

b. nuclear damage.

Article 10

Contracting States shall not adopt rules derogating from this Convention, even if these rules are more favourable to the victim.

Article 11

This Convention shall not affect any rights which a person suffering damage may have according to the ordinary rules of the law of contractual and extra-contractual liability including any rules concerning the duties of a seller who sells goods in the course of his business.

Article 12

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of deposit of the [third] instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or acceptance.

Article 13

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite non-member States to accede.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect on the first day of the month following the expiration of six months after the date of its deposit.

Article 14

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 16 of this Convention.

Article 15

1. No reservation shall be made to the provisions of this Convention except those mentioned in the Annex to this Convention.

2. The Contracting State which has made one of the reservations mentioned in the Annex to this Convention may withdraw it by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective the first day of the month following the date of its receipt.

Article 16

1. Any Contracting State may, insofar as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect on the first day of the month following the expiration of six months after the date of receipt by the Secretary General of such notification.

Article 17

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance or accession;

c. any date of entry into force of this Convention in accordance with Article 12 thereof;

d. any reservations made in pursuance of the provisions of Article 15, paragraph 1;

e. withdrawal of any reservations carried out in pursuance of the provisions of Article 15, paragraph 2;

f. any communication received in pursuance of the provisions of Article 1, paragraph 2, Article 14, paragraphs 2 and 3;

g. any notification received in pursuance of the provisions of Article 16 and the date on which denunciation takes effect.

In witness whereof, the undersigned being duly authorised thereto, have signed this Convention.

Done ..... in English and French, both texts being equally authoritative, in a single copy, which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory and acceding States.

A N N E X

Each of the Contracting States may declare, at the moment of signature or at the moment of the deposit of its instrument of ratification, acceptance or accession, that it reserves the right:

1. to apply its ordinary law in place of the provisions of Article 4, insofar as such law provides that compensation may be reduced or disallowed only in case of gross negligence or intentional conduct by the injured person or the person suffering damage;

2. to limit, by provisions of its national law, the amount of compensation to be paid by a producer under this national law in compliance with the present Convention. However, this limit shall not be less than:

   a. 200,000 DM, or an equivalent sum in another currency, for each deceased person or person suffering personal injury;

   b. 30,000,000 DM, or an equivalent sum in another currency, for all damage caused by identical products having the same defect.

STRASBOURG DRAFT CONVENTION

DRAFT EXPLANATORY REPORT

Introduction

1. Industrial development and technological progress have increasingly involved cases of producers' liability and the growth of inter-State commercial trade has resulted in the problem of producers' liability acquiring in certain cases, an international aspect.

2. The position in the majority of member States being characterised, on the one hand, by the absence of any specific legislation, and, on the other hand, by a tendency in judicial decisions to impose greater liability on producers, the Committee of Ministers of the Council of Europe, on the proposal of the European Committee on Legal Co-operation (CCJ) set up in 1970 a Committee of Experts to propose measures with a view to harmonising the substantive law of the member States in the area of producers' liability.

Canada, Finland, Japan, Spain and the United States of America have been invited to send observers to the Committee' meetings. The International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference of Private International Law, the Commission of the European Communities, the International Chamber of Commerce, the European Committee of Insurers, the International Organisation of the Consumers' Unions, the International Organisation of Commerce and the Union of Industries of the European Communities have participated in the work as observers.

Furthermore, COGECA (General Committee on Agricultural Co-operation of the European Economic Community) AECMA (the European Association of Aerospace Manufacturers) and the European Council of Federations of Chemical Industry (CEFIC) and the Committee of European Foundry Associations have submitted written observations.

3. Between 1972 and 1975 the Committee of Experts held 7 meetings in the course of which it produced the text of the Convention.

4. At the outset, the Committee of Experts, on the basis of a comparative study produced by UNIDROIT, proceeded to have an exchange of views on the legal position in the different States relating to Producers' liability.

It took particular note of the following:

a. there was an absence, in all countries, of special rules governing the liability of producers;

b. case-law solutions, in some jurisdictions, being based on the general principles of legal liability had recourse to fiction to ensure the better protection of consumers and were highly complex;

c. there was an almost general trend towards stricter liability of producers apparently caused by a desire to protect consumers from the effects of new techniques and marketing and sales methods;

d. it was important to introduce special rules on the liability of producers worked out at European level, since the question of products liability could no longer be confined within national frontiers.

5. In the light of these considerations, the Committee discussed the specific questions involved in the tentative harmonisation of national laws, and was guided not only by the desire to ensure better protection of the public, but also by the advisability of taking producers' interests into account, particularly in respect of legal certainty. The Committee stressed the need to achieve a fair balance between the various interests.

6. Two preliminary questions needed to be settled by the Committee:

a. the question whether it should establish a special unitary system of producers' liability instead of attempting to unify each of the regimes existing in most States, namely, the systems of contractual and non-contractual liability, or better still, deal with non-contractual liability only and exclude from its scope contractual liability;

b. the question whether the notion of fault ought to remain the basis of producers' liability or whether it ought to be replaced by some other concept.

7. Concerning the question mentioned in 6(a) above, it was stressed, on the one hand, that the distinction between contractual and non-contractual liability was a relative one as it differed according to the law of each State and, on the

other hand, it was a doubtful dichotomy because of the difficulty in certain States of establishing any clear and precise distinction.

8. The Committee first of all excluded the possibility of harmonising each of the two systems of liability separately by reason of the virtually insuperable problems which would arise in any attempt to harmonise the rules governing contractual liability (it would in fact entail an incursion into the field of the law of contracts). The discussion was therefore limited to the following two possibilities:

a. to exclude from the field of application of the proposed instrument the whole sphere of contracts, by following possibly, the Hague Convention on the Law Applicable to Products Liability which, in Article 1, second paragraph states: "Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability inter se"; or

b. to establish a set of rules governing liability without reference to the existence of a contract between the person liable and the person suffering damage.

9. The Committee was in favour of the solution indicated under (b) above, which in its opinion was the only one capable of ensuring equal protection for all consumers (whether purchasers or other users) and of generating the legal certainty demanded not only by the persons suffering damage but also by the producers. Indeed, from the point of view of legislative policy, it might be difficult to justify discriminatory treatment of the consumer who had purchased a product as distinct from other consumers.

10. Concerning the question mentioned in 6(b) above (the legal basis of the system of liability) the majority of the Committee agreed that the notion of "fault" - whether the burden of proof lay with the person suffering damage or with the producer - no longer constituted a satisfactory basis for the system of products' liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks, which the consumer could not be expected to accept.

11. In view of the changes in doctrine and practice that had already become manifest in certain States, the Committee declared itself in favour of a system of "strict" (i.e. proof of the producer's fault is not required) liability, to which, however, certain contours would be established.

12. Some experts felt that the most appropriate basis for a system of strict liability on the part of producers should be the notion of "dangerous product" which system would, possibly, include a list of products considered dangerous. This solution would have the advantage of indicating clearly the reason for the existence of a system of strict liability in respect of damage caused by products, namely the "risk" inherent in them.

A contrary view, however, suggested that the notion of "dangerous product" was equivocal and unsatisfactory because of the difficulty of deciding at the outset what products were dangerous, some products being dangerous by their very nature and others being likely to become so if defective, or if incorrectly used. The most serious damage was often caused by products which were not originally thought to be dangerous. In regard to the suggested list of dangerous products to which the uniform rules would apply, the opinion was advanced that such a list would necessarily be arbitrary and incomplete.

13. Some experts thought that the basis of the system of products liability should be a defect in the product. This solution would have the advantage of indicating that the manufacturer would not be liable for all damage caused by his product but only for that resulting from a defect, which was almost always the real cause of damage.

Other experts felt that this would be too restrictive as there might be cases where a product without any defect caused damage by reason of its dangerous properties, not to mention damage caused for unknown reasons.

14. In an effort to reach a compromise, a solution was proposed which retained both concepts: "the specific dangerous qualities of the product" and "the defect" of the product. Criticism was levelled at the phrase "specific danagerous qualities of the product". Several experts pointed out the difficulty of defining the exact scope of these words, a difficulty amply illustrated, moreover, by the complex problems encountered in certain countries where the attempt had been made to arrive at a valid legal definition of "danger" as a basis for responsibility.

15. In conclusion, the Committee decided to consider the notion of "defect" as the basis of liability which is defined in Article 2, paragraph (c) as the absence of safety which a person is entitled to expect.

Article 2, paragraph (c) introduces, as it were, the legal concept of "defect" which can be different from the meaning usually given to the word (see paragraphs 32 to 42 hereafter).

The principle at the basis of the liability retained by the Committee is as follows: the producer must pay compensation for damages resulting in death or personal injuries caused by a defect in his product. The injured person must prove the damage, the defect and the causal link between the defect and the damage, while the producer can successfully defend himself by proving in particular that the defect did not exist when the product was put into circulation or, put positively, that the defect arose after the product was put into circulation - or also that the product was not put into circulation by him. The victim's own fault may completely or partially reduce liability when all the circumstances are taken into account.

16. One expert felt that a regime of absolute liability was not acceptable in the field of producers' liability. He maintained that a reversal of the burden of proof obliging the producer to prove the absence of fault would be effective protection for the consumer in the great majority of cases. It would represent considerable progress for systems of liability based on fault and would have the advantage of encouraging producers to improve the quality-control of their products. However, he added in cases where quality-control was carried out by machines, the producer should not be able to exonerate himself by proving that the failure of the machine was not due to any fault of his. In addition, a special solution should be sought in the case of "development risks".

17. Contrary to the opinions of this expert, several experts pointed out that, in its present form, the system established by the Committee was not one of absolute liability but a mixed system. A system which merely introduced a reversal of the burden of proof would not represent any appreciable improvement on the current situation in a number of countries and, in any event, would not meet the public's demands. Such a system would be unfavourable to consumers in that, as a result of the reversal of the burden of proof, they would find themselves disputing the internal operation of the firm in question.

18. The Committee decided to limit the Convention only to damage causing death or personal injuries.

It in fact considered that, owing to a lack of time, it was not possible to make a thorough study of questions relating to damage caused to goods which, in some respects, raised different problems (for example, it was not certain that the definition of "defect" given in sub-paragraph (c) of Article 2 could be applied to material damage).

Furthermore, certain experts considered that a Convention which introduced a system of strict liability could be more easily ratified by States if it was limited only to damage causing death or personal injuries.

The Committee considered that the matter relating to damage caused to goods could, with useful purpose, be dealt with in a separate instrument, for example by means of an additional Protocol.

19. The draft Convention does not deal with the problem of compulsory insurance.

The Committee in effect felt that it would be extremely difficult to have a uniform system of insurance, considering the variety of products, the number of producers, the different geographical situations and the varied financial characteristics of enterprises. In practice, there would be the additional difficulty of ensuring that all producers have taken out insurance when it is remembered that, in general, enterprises do not need any prior administrative authorisation to commence their activities. (It is only in the administration of such authorisation that one can effectively ensure that insurance exists, as is instanced in the case of automobile insurance, where such insurance is required before registration of the vehicle).

The Committee felt that it was not necessary under the Convention, to make insurance compulsory in order to make producers insure their civil liability.

Commentary on the Provisions of the draft Convention

Article 1

20. This Article fixes the obligations of the Contracting States. In it they undertake to make their national law conform to the provisions of the Convention. (See however Article 11). Each State shall be free to decide by which method this result will be achieved.

Article 2

21. This Article contains the definitions of the terms used in the draft Convention.

22. Paragraph (a) defines the term "product".

The Committee agreed that the Convention should not cover immovables (such as buildings), liability in respect of this being governed by special rules in most States.

23. On the other hand, movables incorporated into another movable or into an immovable are included in the arrangements for liability laid down in the Convention.

Some members would have preferred the Convention to apply only to movables which did not lose their individuality when incorporated into immovables. This suggestion, however, was not accepted by the Committee.

In fact the Committee considered that the reason for the exclusion of immovables - viz. the existence, in several countries, of a liability system specific to immovables - could not be invoked as, in these countries, the special rules relating to liability applied to the manufacturer of an immovable in its entirety and not to the producers of component parts.

24. The exclusion of immovables from the field of application of the Convention does not prevent States from applying the system provided by the Convention to this property, if they so wish.

25. There was discussion on whether waste should be considered as a "product" and accordingly, be subject to the provisions of the Convention.

The Committee took the view that waste could be considered as a product when used in a subsequent production process.

26. Paragraph (b) defines the term "producer" that is the person who is considered as primarily liable. Paragraphs 2 and 3 of Article 3, however, indicate certain other persons who are equally liable on the same basis as the producer even though they are not real "producers" who have participated in the making of the product.

27. In formulating this definition, the Committee was obliged to choose between two conflicting proposals. The first emphasised the need to guarantee to the victim maximum protection by having a fairly wide choice of persons against whom he could bring an action (manufacturers of finished products, suppliers and others including repairers and warehousemen who constitute the commercial chain of products' production and distribution, persons mentioned in Article 3 of the Hague Convention). The other suggested that a single person should

be selected namely the real "producer", i.e. the party who has put the product into the state in which it is offered to the public.

28. Finally, the Committee decided that the real "producer" should be the person to be liable under the Convention. It felt that it was in fact undesirable and economically wasteful as a matter of legislative policy, to impose strict liability on a large number of persons, some of whom play a secondary part in the production process. The application of the Convention to these persons would, moreover, have the disadvantage of inappropriately interfering in contractual relations between these persons and the buyer.

29. Nevertheless, Article 3 extends liability to certain other persons who are to be considered either as having the same liability as producers (importers and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product) or subsidiary obligation (suppliers of a product). The Committee wished, in fact, to tighten the system of liability so that no loop-hole would remain due to the fact:

a. that the producer was a foreigner and did not have a place of business in the country of the victim;

b. that the name that appears on the product is not that of the real manufacturer, who often has insufficient financial standing to offer an adequate guarantee to the victim, but is the name of a large store;

c. that the product is "anonymous" i.e. it does not indicate any name of either the manufacturer or the distributor.

30. Although the Committee was aware of the problem, it did not consider it to be desirable to deal in the Convention with the problems created by bankrupt producers.

31. It is worth noting that paragraph 4 of Article 3 supplements the term "producer" by establishing the liability of the producer of the component part when a defect in this part caused the damage (see paragraph 47 below).

32. Paragraph (c) defines the term "defect", a concept which is at the heart of the system of liability established by the draft Convention.

33. In the early stages of its deliberations the Committee attempted to define the idea of "defect" by indicating in a positive way the causes of the defect. Thus, it considered that there would be a defect when the product was unsuitable for the purpose for which it was designed. Other examples of defects were also put forward in this definition. (In particular, a defect, it was suggested, could arise from either the design or the manufacture; it could also arise from the storage, packing, labelling of the product or from any mis-description of the product or from a failure to give adequate notice of its qualities, its characteristics or its methods of use).

This definition was not retained as it did not cover all cases of liability for products, in particular in the case of a product that, although it achieves the result for which it was made, nevertheless causes damage (for example, a contraceptive pill which is suitable for birth control but causes injury).

34. Accordingly, the Committee formulated a definition of "defect" taking as the basic elements "safety" and legitimate expectancy.

This, however, does not involve the "safety" or the "expectancy" of any particular person. The use of the words "a person" and "entitled" clearly shows that a product's safety must be assessed according to an objective criterion. The words "a person" do not imply any expectation on the part of a victim or a given consumer. The word "entitled" is more general than the word "legally" (entitled); in other words, mere observance of statutory rules and rules imposed by authorities do not preclude liability.

The Committee did not wish to use the term "reasonable". Such expression in French ("raisonnablement") could diminish the consumer's rights, since it could include considering economic factors and assessing expediency which ought not to be taken into account in determining the safety of a product.

35. In determining whether a defect exists it will be necessary, consequently, to take account of all the circumstances, for example, whether the consumer has, for his part, used the product more or less correctly. (If his actions amount to fault, it will be governed by Article 4). The Committee did not, of course, wish to enumerate all these circumstances, but it did expressly indicate one, namely, the presentation of the product so that in all the States the notion of "defect" would cover the directions for use or incorrect or incomplete warnings. As it is, the legislation or judicial decisions of

some States consider that only "intrinsic" defects are real defects and hold that directions, or incomplete or incorrect warnings do not amount to "intrinsic" defects.

The expression "presentation of the product" ought to be interpreted as including not only warnings or directions which are incorrect or incomplete, but also the absence of directions for use or warnings.

36. The question was posed as to whether it would not be expedient to stipulate the time at which the safety of a product must be determined. It was suggested that the safe nature of the product must be judged at the time the product was put into circulation and not at the time when the damage occurred.

The Committee was against including any stipulation of this kind in paragraph (b) since it would implicitly admit as an exception "development risks". Moreover, the definition of "defect" in paragraph (b) gave the judge a sufficient margin of appreciation to enable him to take the time factor into account.

37. In this matter, the Committee agreed to distinguish "development risks" from other situations in which the "time factor" played a part and which were taken into consideration by the definition of "defect".

It is, for example, obvious that if a person buys a refrigerator in 1975 which was manufactured in 1948 and which lacks certain safety factors of models made in 1975 (for example a door which may be opened from inside) this person is not entitled to expect the same safety factors as would be provided by a refrigerator manufactured in 1975.

38. On the other hand, the Committee decided not to consider "development risks" as an exception to the application of the Convention.

39. Some experts maintained that "development risks" (i.e. damage that was unforeseeable and unavoidable in the state of scientific knowledge at the time when the product was put into circulation) should be a ground for exclusion of liability in the case of technically advanced products. Any stipulation to the contrary might discourage scientific research and the marketing of new products.

40. Against this opinion it was argued that such an exception would make the Convention nugatory since it would reintroduce into the system of liability established by the Convention, the possibility for the producer to prove the absence

of any fault on his part. Exclusion of liability in cases of "development risk" would also invite the use of the consumer as a "guinea pig".

41. In conclusion the Committee considered that the problem was one of social policy, the main question being whether such risks should be borne by the consumer or the producer and/or, in whole or in part, by the community.

The Committee considered that, as insurance made it possible to spread risk over a large number of products, producers' liability, even for development risks, should not be a serious obstacle to planning and putting into circulation new and useful products.

The Committee therefore decided that development risk should not constitute an exception to producers' liability.

42. Paragraph (d) defines the term "put into circulation".

This definition made it possible to make a distinction between the two systems of liability devolving on a producer who is liable as "keeper of the product" until it is put into circulation and liable under the "products liability" system after it has been put into circulation.

Article 3

43. This Article sets out the principle of liability on which the draft Convention is based. It is up to the injured party to establish the damage, the defect and the causal link between damage and defect, whereas the producer would be able to free himself of liability in particular by proving that the defect did not exist at the time when the product was put into circulation (see sub-paragraph (b) of paragraph 1 of Article 5).

44. One expert stated that so far as his country was concerned, it would be difficult to accept such a principle since, according to the ordinary rule under which the plaintiff had to furnish proof of his grounds for taking legal action, it was incumbent upon the plaintiff to prove that the defect existed at the time the product was put into circulation by the producer. A solution placing such a burden of proof on the injured party would be desirable because it would not only conform to general principles of law in most countries, but would also have the effect of deterring parties from instituting ill-founded legal proceedings.

45. The Committee was against such a proposal since it would be difficult, if not impossible, for an injured party - who in many cases would have received the product from another con-

sumer or who had not himself used the product - to prove the existence of a defect when the product was put into circulation. The present wording of sub-paragraph (b) of paragraph 1, Article 5, enabled a judge to reach his own conclusions after comparing the different probabilities revealed by the circumstances of a given case or in the light of experience. If necessary this problem could be satisfactorily settled by expert investigation and report.

46. Paragraphs 2 and 3 indicate the other persons who are liable under the Convention; such persons' liability may be primary (when they are treated like the producer) or subsidiary (see paragraph 29 above).

The use of the expression in paragraph 2 "who has presented a product as his product" indicates that the basis of liability in this case is the fact that, by inducing the user to believe that he is the producer, the person who has placed his name on the product in such a way that this product appears to be his, takes it upon himself to ensure the safety of the user.

A further advantage of the said expression is that it excludes from the field of application of the Convention persons whose names appear on the product, either as a means of advertisement (for example a garage whose name appears on a car) or because the law so requires (in one State, for example, retailers must put their names on products), without however, having the intention to appear as the "producer". This term also excludes the person who grants a licence.

47. Under paragraph 4, producers of a component part are liable when a defect caused or contributed to the damage.

As a result the victim will have in this case a choice of action against either the producer of the component part (paragraph 4) or the producer of the finished product (Article 3, paragraph 1, combined with paragraph (b) of Article 2) or both at the same time (under paragraph 5 of Article 3).

However under the Convention when the producer of a component part produces it according to the design or specification provided by another producer, the producer of the component part will not be liable for a defect resulting therefrom. The Committee in fact considered that as the producer of the component part had no influence either on the design or on the specifications he should not be answerable for the resulting damage. Of course this producer could be liable for his fault if for example he had knowledge of the defect when he manufactured the product.

48. Paragraph 5 establishes joint liability when, by virtue of paragraph 1 of Article 3 (combined with paragraph (b) of Article 2) or paragraph 2, 3 and 4 of this Article, several persons are liable for the same damage under the Convention.

49. Article 3 does not define damage, leaving it to national law to stipulate the heads of damage (for example pain and suffering etc) which can be claimed under the Convention and the measure of damages. The Committee was aware that this solution might give rise to undesirable "forum shopping", but it believed that this disadvantage was acceptable in view of the fact that any attempt to harmonise national law on this subject would raise considerable difficulty which might jeopardise the success of the Convention.

50. Under the Convention the extent of liability may not be limited.

However, taking into account the fact that in certain States where strict liability has been introduced the amount of compensation has always been limited, the Committee, in order to facilitate the ratification of the Convention by the greatest possible number of States, permitted the reservation (No.2) contained in the Annex to the Convention.

This reservation allows States to limit the compensation awarded to each person and the compensation awarded for a series of damage caused by identical products having the same defect subject to the condition that these limits shall not be less than the amounts set out in the reservation itself.

It should be noted that these limits apply to each producer so that if the same defective product is manufactured by two different producers but not in the case of co-producers, each will be liable up to the maximum limit provided for under the reservation. However, if, according to Article 3, several persons are liable in solidum for the same product the maximum limit will apply to such liability.

It should also be noted that the reservation is drafted so that States in particular may either:

a. limit liability for all products without distinction or for certain products only, either for each person or for a series of damage or for both; or

b. limit liability for development risks only, either for all products without distinction, or for certain products only.

51. The term "person" as used in paragraphs 2 and 5 of Article 3 include not only natural persons but also legal persons.

COMMENTARY ON ARTICLES 3, 4 AND 5

Article 4

52. This Article concerns the extent to which an injured person was responsible for causing the damage. The use of the terms "injured person" and "person suffering damage" was intended to make clear that it was permissible to take into consideration not only the fault of the injured person but also where this is relevant according to national systems of law, the fault of the person seeking compensation e.g. following the death of the injured person.

The words "having regard to all the circumstances" were included in the text of paragraph 1 in order to enable the judge to assess the relative importance of the fault in relation to the defect shown by the product.

Taking into account the fact that certain States intend to introduce in a general manner in the law relating to extra-contractual liability, the principle that compensation may only be reduced or disallowed in cases of the victim's gross negligence or intentional conduct, the Committee drafted a reservation (Reservation No. 1 contained in the Annex to the Convention) providing that these States may derogate from the provisions of Article 4 so as to preserve their national law.

53. Paragraph 2 deals only with the question of the fault of employees of the injured person or of the person suffering damage, it being understood that the expression "in the scope of his employment" must be interpreted as including any activity which a person might be called upon to perform in a subordinate position, whether permanent or temporary.

It was, however, agreed that it would be possible to settle under national law problems relating to fault and intervention of a person, object or animal for whom or for which the injured person was responsible under the said legislation. The Committee, however, considered that these problems had either already been resolved satisfactorily under ordinary law or did not arise with regard to the liability of producers.

Article 5

54. This Article enumerates the circumstances which exclude the producer from liability, apart from the victim's own fault which is dealt with in Article 4.

55. Sub-heading (a) of paragraph 1 is intended to enable the producer to establish that he is not liable by proving that he has not put the defective product into circulation, for example, the product was put into circulation by a person who

stole it. Such a provision is fully justified since, the basis for liability being a defect in the product, it is only fair that the producer should be given the opportunity of deciding himself when a product is fit for consumption.

56. Some experts would have liked to see the phrase "or that he had made appropriate efforts to have it withdrawn" added to paragraph (a).

The Committee was against such an exclusion which, on the one hand, would reintroduce fault into the Convention's system of liability and, on the other hand, since it was phrased in general terms, would deprive the Convention of part of its substance.

57. Sub-heading (b) of paragraph 1 enables the producer to establish that he is not liable by proving that the defect was not attributable to him. The evidence may either show that the defect did not exist at the time when the product was put into circulation ("preuve negative") or that after the product was put into circulation a third party created the defect ("preuve positive").

58. Paragraph 2 deals with the case where the damage is caused partly by the defect in the product and partly by the act of a third party. In this case liability should rest entirely on the producer since he may in any event proceed to recover his loss against the third party.

59. The Committee did not think that it was necessary to make special provision in the case where:

a. the intervention of a third party or employee or "force majeure" occurred before a product was put into circulation;

b. the intervention of a third party or "force majeure" occurred after the product was put into circulation and is the sole cause of the defect;

c. the intervention of a third party or the "force majeure", although the product has a defect, is the sole cause of the damage.

In fact, the Committee felt that in the case envisaged in (a) above, liability should rest entirely on the producer; in the case envisaged in (b) above, Article 5, paragraph 1 (b) already provides a defence, and in the case envisaged in (c) above, the chain of causation between the defect and the damage is broken.

COMMENTARY ON ARTICLES 5, 6 AND 7

60. In the case where "force majeure" (or "cas fortuit") as understood by the ordinary law of the different States relating to liability, in conjunction with a defect in the product contributed to the damage, the Committee decided not to make any specific provision in the Convention having regard to the small number of cases of liability on account of the products themselves in which the problem might arise, and to the difficulty of finding a definition of "force majeure" acceptable to all States. Consequently, these problems will be determined by the internal law of each State.

Articles 6 and 7

61. These Articles deal with the time within which the action may be brought.

In order to avoid forum shopping, which would prevail in the absence of a provision in the Convention, and the possibility for which arises because of the existence of different limitation periods due to some States applying lex fori while others apply lex causae, there was general agreement in the Committee that this question should not be left to national law.

62. The Committee decided on two time-limits. The first is a three years' limit (see Article 6). For the better administration of justice and avoidance of abuses, proceedings for the recovery of damages are to be barred unless taken within 3 years of the day on which the claimant became aware, or should reasonably have been aware, of the damage, the defect and the identity of the producer.

The Committee thought it expedient to lay down three conditions (awareness of the damage, of the defect and of the producer's identity) in order to protect the victim in all possible eventualities; a person is often aware of the damage and the producer's identity without realising until long after the damage occurred that it was due to a defect.

63. The second time-limit (See Article 7) of 10 years is intended to preserve a balance between consumers' and producers' interests.

As the producer's liability under the Convention is increased it is important that the producer should not be held liable for damage resulting from a cause which manifests itself after a period of 10 years. A fixed time-limit has the additional advantage of facilitating insurance and amortisation.

The question arose whether a 10-year limit is appropriate to a wide range of different products, some of which are expected to last more than 10 years (e.g. machinery) and others to be consumed in a shorter period (e.g. foodstuffs).

Though alive to the complexity of the problem, the Committee considered 10 years an acceptable period in view of the need to fix some limit (10 years being a fair average) and the desirability of affording producers some security.

64. It should be noted that where there are several producers there may be different starting dates under Article 7, action thus becoming barred at different times.

Another point to consider is that, whereas the period provided for in Article 6 can be suspended or interrupted (being a period of limitation of action), the fixed period laid down in Article 7 cannot be.

Article 8

65. This Article concerns clauses limiting or exonerating the producer's liability.

The Committee was in general agreement that in relation to personal injuries, the producer ought not to have the power to limit or avoid his liability by means of a contractual clause.

66. The problems which arise because of directions for use and incorrect and incomplete warnings (or because of their absence) are dealt with in the definition given to the word "defect" (see paragraph 35 above).

Article 9

67. The Convention does not apply to certain matters which are expressly set out in this Article.

The fact that the rights of recourse which may be used on the basis of paragraph 5 of Article 3 (liability of producers inter se) and paragraph 2 of Article 5 (rights of recourse between producers and third parties having contributed to the damage) are not dealt with by the Convention allows national legislators to adopt special rules on the subject if necessary. The Committee in fact did not wish to adopt rules in a very complicated field where contractual relations between different producers are very important.

68. The Committee excluded nuclear damage as it did not wish to interfere with international Conventions concluded in this matter or with specific national laws adopted by States concerning civil liability for nuclear damage.

COMMENTARY ON ARTICLES 7 TO 17

Article 10

69. Although Article 1 of the Convention, insofar as it requires States to make their laws conform with the provisions of the Convention, already presents States from ratifying the Convention while adopting different rules for matters dealt with by the Convention (either expressly or impliedly), the Committee considered that it was appropriate to repeat this principle in a separate Article. Owing to the existence in other Conventions (see for example Article 13 of the European Convention on civil liability for damage caused by motor vehicles) of provisions allowing more favourable rules for the victims, any silence of this Convention in the matter might have misled States into believing that such a possibility would be open to them after ratifying this Convention. The Committee, taking into account the fact that the Convention attempts to achieve a fair balance between the interests of consumers and those of producers, considered it appropriate to indicate clearly, that States may not ratify the Convention and make rules which are more favourable for victims.

Article 11

70. This Article was adopted by the Committee to make it clear that the Convention merely introduces a supplementary right of action against the producer but is not intended to modify the ordinary law of tortious liability, which remains in full force. Accordingly, in the event of damage caused by a product, the injured person may take action either under the system established by the Convention, or on the ground of fault or, depending on the case in question and on systems of municipal law, under the terms of the contract. Municipal law will be able to regulate the relationship between these different systems of liability as well as any incompatibility between them.

71. The Article also points out that the Convention does not impose any duties on States in regard to rules concerning the duties of the seller who sells goods in the course of his business. This precision was considered necessary as, in certain States, the question was raised whether or not this law was part of the ordinary law of contractual liability.

Articles 12 to 17

72. These Articles - which contain the final provisions - have been drawn up on models approved by the Committee of Ministers of the Council of Europe for the European Conventions and Agreements formulated within the framework of that organisation.

73. The Convention does not contain any transitory provisions to determine whether the rules relating to liability adopted in internal law on the basis of the Convention apply only to damage caused by products put into circulation after the entry into force of the Convention or if they also govern damage caused by products put into circulation prior to its entry into force. Consequently this problem should be determined by national legislators.

APPENDIX C

E.E.C. DRAFT DIRECTIVE

Memorandum
on the approximation of the laws of Member States relating to product liability

I. The present situation

1. The products of industry in modern industrial countries are technically complicated and specialised to an ever-increasing extent. So far as possible, they are produced by machine. They therefore involve the risk of defects more than the simple hand-made products of past eras. These defects may take various forms. The following main groups can be distinguished.

   (a) Defects may result from inadequate design of the product (design defects). The product is not fit for the purpose it is intended to serve. For example, the aircraft disaster in Paris on 3 March 1974 is probably attributable to the inadequate locking mechanism of the baggage door of the aeroplane which crashed. This opened after take-off and brought the aircraft down.

   (b) Defects may result from defective manufacture of a single item in an otherwise perfect production run. Despite careful checks, to which the individual manufactured parts are subjected during the course of manufacture and before they are put on the market, the defects remain undiscovered (manufacturing defects). Material weaknesses that are impossible to avoid and that can only be discovered at a disproportionately high cost (X-ray examination of the steel) also fall into this category. For example, the fracture of the fork of a bicycle wheel caused a weakness in the processed steel which makes the cyclist crash.

   (c) When viewed in the light of the stage reached in science and technology, the defectiveness of a product may only emerge when a product, generally regarded as being free from defects at the time of manufacture has subsequently shown to be the cause of damage because of further developments in scientific and technical knowledge (development losses). For example, with certain reservations relating to questions of fact, one could cite here the physical damage caused through the

use of thalidomide (in Germany called 'Contergan') to children whose mothers took sedatives containing thalidomide during pregnancy.

The special problems of these cases again lie, as distinct from those of previous eras, in the possible extent of the damages which such defects can cause to the health or financial position of the user. For example, 50 million US-dollars in the case of the above mentioned aircraft disaster, 110 million DM compensation in the Contergan case. These losses bear no relation to the value of the article used or the benefits sought by the user.

2. The legal position of a person who has suffered damages as a result of defects in an article differs in the various Member States of the European Community.

In principle, all Member States proceed on the traditional basis that it is only possible to bring a claim against the producer or seller of an article which has caused damages (product liability) if the damage has occurred as a result of the negligence of such persons. Such negligence could only be founded on knowledge of the defect which caused the damage when the article was put on the market and acceptance of the possible consequences of such damage, or in culpable ignorance, that the producer negligently failed to discover a recognizable defect.

Certain legal systems (those of Denmark, Germany until 1965, Italy and Holland) require the injured party, again following the traditional approach, to prove fault on the part of the producer. Other legal systems (those of Belgium, Germany since 1965, Great Britain, Ireland), to some extent in varying ways, presume negligence on the part of the manufacturer when damage occurs. They nevertheless allow the producer to rebut this presumption by proving the exercise of care. Lastly, two Member States (France and probably Luxembourg) do not admit proof to counter the presumption of negligence, which ultimately means liability irrespective of fault. Under these legal systems the injured party has only to prove that the loss was caused by the defectiveness of the product.

In all Member States, the courts and academic opinion generally have tended towards establishing stricter criteria of liability, towards holding the producer responsible.

The present practice of producers in states where liability has traditionally depended on negligence is to compensate loss or damage which result from the defectiveness of the product itself by effecting repairs or providing replacements, under the condition that the injured party purchased the article. Minor loss or damage to the user's health or financial position caused by the defectiveness of the product are generally made good at the firm's expense so as not to jeopardize its reputation. Cases involving more extensive loss or damage like the aircraft disaster in Paris or the 'Contergan' case lead to lengthy disputes because of the high level of damages involved.

Consumer organisations in the Member States are pressing for an improvement in the legal position of the consumer to protect him from the risks of modern industrial products.

II. The effects on the common market of this legal situation and the need to approximate the laws governing product liability

The differing legal position of users in the various Member States who have suffered damage directly affects the establishment and functioning of the common market in three ways (Article 100 of the EEC Treaty). It means that consumer protection not only varies considerably as between Member States but is also largely inadequate. It adversely affects competition because of the different costs borne in the various Member States and it impedes free movement of goods within the common market.

1. (a) Protection of the consumer, in particular protection of his health, safety and his right to compensation for loss or damage suffered, varies considerably within the European Communities because of differences between the laws of Member States. To a large extent it does not even exist.

Where the injured party is required to prove negligence on the part of the manufacturer with regard to a defect in an article used which has resulted in damage, as e.g. in Italy and Holland, he is, in fact, without protection. As an individual he is confronted by large undertakings which allow him no insight into their production processes, from the planning stage to the stage

of the finished article. Lacking access to the production areas in which the defect arose, and in most cases, without technical knowledge, it is impossible for him to prove the reason for the defect which caused the loss or damage and the producer's negligence therein.

But also the rebuttable presumption of negligence on the part of the producer (as for example in Belgium or Germany) does not, in the majority of cases, improve the position of the consumer, since so far as manufacturing defects are concerned, defects are often involved which are virtually or absolutely impossible to detect even if every care is exercised. Where this is in fact the case, the producer can rebut the presumption of negligence by proving the exercise of care (number and quality of checks carried out) and can thus escape liability.

In countries where these rules apply, the loss is felt by the consumer as an event of force majeure.

However, where the manufacturer is liable irrespective of fault, as in France, and where it is sufficient, in order to found liability, to prove that the damage was caused by a material defect, the loss is transferred back to the producer. In this case, the producer guarantees the health and undiminished financial position of the consumer in the event that the latter suffers loss or damage because of a defect in an article produced by the manufacturer. Thus, consumers in countries where these rules apply are in an incomparably better position by comparison with those in the other Member States.

Consumer protection which varies in extent because of differing national law is, however, incompatible with a common market in the sense of an internal market with equal protection for all consumers. These differing laws must therefore be approximated.

(b) Such an approximation would have to result in effective consumer protection adequate to meet the needs of a modern industrial society. In the process of production, distribution and use, the consumer bears the greatest risk of damage since he is directly exposed to the danger inherent in a possibly defective article. At the same time he depends on the products of modern industry to raise his standard of living. He should not, however, have to bear the consequences of inadequate technical development of a product or the

fact that material defects, despite careful preparation, are unavoidable. The conditions, particularly of an economic nature, on which the existing laws of certain Member States are based, stem from the nineteenth century and have changed so fundamentally because of the development of industry in all the countries of the European Communities that these laws no longer satisfy the requirement of a fair apportionment of losses in this field.

At the same time, producers and dealers make their living from the manufacture and sale of products. The producer is both able and required to keep the possibility of a defect as slight as possible by exercising the greatest possible care. If it is impossible for him to avoid a manufacturing defect despite careful checks, it does not seem unfair that he should also bear the burden of the consequences of unavoidable defects in order to protect the consumer. From the economic standpoint, the manufacturer has it in his power to pass on losses he incurs through his being held liable by raising the price to all users of non-defective products from the same production run.

2. The differences between the national laws governing the liability of the manufacturer and the dealer also adversely affect competition within the common market by imposing unequal burdens on the industry and trade of certain Member States by comparison with competitors in other Member States.

If the producer and dealer are held liable irrespective of any fault, as in France, and if the consumer's loss is thus transferred back to the producer, damages paid by him form part of the total manufacturing cost of products which he markets. The producer will endeavour to take account of this cost element when calculating prices for the whole of his production so that, where possible, a share is borne by all consumers, including purchasers of non-defective products. Thus, from an economic standpoint, the manufacturer need not be held liable only for damage which has already occurred. If the producer is already subject to strict liability at the start of production, he will either take account of a possible claim, from the outset by adjusting his prices accordingly or by taking out an insurance. The premiums for this have the same effect as any other cost element. Liability insurance of this sort is therefore available in those countries in which liability is more severe (France and, outside the European

Communities, the USA). Since, even as a general rule - extreme losses like the above-mentioned aircraft disaster in Paris (50 million US-dollars) or the 'Contergan' case in Germany (110 million DM) can be disregarded here - damages are considerable, premiums are correspondingly high (100,000 US-dollars are paid annually under one insurance contract for motor vehicles in one country). Thus, as a general rule, these costs must not be ignored but taken into account.

Where a producer in a Member State is unable to avoid such costs he is in a worse competitive position by comparison with competitors in other Member States who are not under such a strict obligation to pay damages and who can therefore manufacture their competing products more cheaply. During the last few years, the 'Patronat Français' (Confederation of French Industry) has repeatedly pointed out that French industry for these reasons occupies an adverse competitive position by comparison with German industry.

For the establishment and functioning of the common market, therefore, all manufacturers operating within the common market should be under the same competitive conditions also with regard to product liability. Differing costs which result in unequal competitive conditions must be eliminated. However, this can only be done by approximating the criteria of liability, the differing nature of which causes these unequal costs.

3. (a) Lastly, the differences between the laws which govern the liability of the producers for defects in products manufactured by him or that of the dealer for products distributed by him adversely affect the unimpeded movement of goods across frontiers within the common market. This applies both to the position of the final consumer and, in the production process, to the position of the manufacturer of the end product vis-à-vis sub-contractors who manufacture in other Member States.

The buyer's decision to purchase an article is influenced by many factors. One of the most important is certainly the quality of the article in relation to its price. However, the factors which influence the buyer's decision also include his protection from damage which can be covered by the concept of "guarantee". By this the buyer understands in the first place, protection from financial loss. He needs an assurance that the

transaction which has been agreed, the value of which is expressed in the amount of the purchase price will not turn out to his disadvantage because the goods are defective. In addition, however, he will also expect the article purchased not to cause damages to his health or financial position. Differing "guarantees", in the sense of widely differing degrees of liability for defects in the article purchased and the possible consequences thereof are, however, from an economic standpoint, on a par with the quality of the goods. They can therefore put products in a favourable or unfavourable position according to whether the latter are sold accompanied by extensive or inadequate legal protection. In any event, this applies when products are offered for sale subject to different legal conditions.

Differences between the national laws which govern liability can also exert a strong influence on free movement of goods as far as trade between a producer of individual parts, e.g. batteries for motor vehicles, and the manufacturer of the end product is concerned, when the production process is split up into separate parts, something that is developing more and more within the common market between manufacturers of semi-finished products in the various Member States. When deciding from which sub-contractor to obtain semi-finished products, the manufacturer of the end product will also be guided by a consideration of the extent to which the sub-contractor is liable to him for damage. He will favour those who are exposed to the greatest liability while those who are not liable to an equivalent extent could be discriminated against. This can result in trading relationships which are economically unjustifiable insofar as they are caused by differences in the rules governing liability in individual states.

For these reasons it is is necessary to remove these obstacles to the free movement of goods across frontiers within the common market by ensuring that the quality of the goods alone, assessed on the basis of economic criteria, is the deciding factor for the final consumer or manufacturer of the end product in his decision whether or not to purchase, through affording the purchaser of the product equal protection in law irrespective of the Member State concerned. Once unjustified differences in law which do not exist in national markets and which, therefore, do not affect their development are eliminated, products from the

various Member States in a particular field compete on the basis of economic criteria only. The obstacles which apply to products from Member States without strict criteria of liability and which therefore inadequately protect buyers and consumers are then eliminated. An essential feature of the common market is that free movement of goods, developing only in accordance with economic conditions, is secured and safeguarded.

All the above-mentioned objectives can be achieved by means of a directive which approximates the differences between the laws of Member States by laying down rules which protect the interests of consumers, remove distortions of competition within the Community and dismantle obstacles to the free movement of goods.

III. Basic principles underlying the substantive rules

1. Nature of liability

(a) The basic principle underlying the substantive rules could be the following consideration: in an industrial era, the problem of liability for defective products should not rest with the disappointment of the final purchaser of the product at having paid too much for an article which is unfit for use. The problem is rather the question of who should bear the risk of damages caused by the defectiveness of an article which adversely affects the health or financial position of the user. It is therefore not a question of tracing back claims in respect of liability which arise out of the contract of sale of the final purchaser, first against the seller, then against his seller, and so on back to the manufacturer of the product, by following back the chain of contracts. In such endeavours it has always been a matter for doubt as to who, in addition to the final purchaser, should be entitled to damages, that is to say, who should be protected under the contract of sale. Liability ought rather to be founded on the obligation to take responsibility for the risk to which every user is exposed and which is inherent in any article because of its possible defectiveness. However, the relations between the parties involved arising out of the contract of sale would bear no relevance to this. Consequently, liability ought no longer to be regarded as having any connection with the contracts of sale that have been concluded, which must simply be regarded as technical instruments for the purpose of distributing products.

MEMORANDUM

If every user is exposed to the risk of damages, the producer should be liable to the person who has suffered the damage. In founding liability, therefore, one should take as a basis the occurrence of the damage and not the contractual relations between the parties involved.

The concept of the defectiveness of the articles should accordingly derive from the objective criterion of whether the article was fit to serve the purpose ascribed to it by the producer. In this connection, any special use that the purchaser wanted to make of it by agreement with the seller would be irrelevant. By determining defectiveness objectively the number of cases for which the producer should be held liable could be reduced. This would also have the advantage of being susceptible of investigation and would therefore be more suited to the needs of movements of goods across frontiers within the common market. This should in no way exclude the possibility of a user, as final purchaser, bringing claims against his seller or even against the producer on the basis either of other national laws which are not affected by the Community measure on approximation, or of special agreements e.g. "contracts of guarantee" (in this connection cf. Paragraph 7, below).

(b) If the obligation of the producer to assume responsibility for the risk of damages caused by the defectiveness of his product is decided upon as the basis of liability, any negligence on his part in relation to such defectiveness would cease to be relevant. Thus it would make no difference what kind of latent defect were involved in an individual case (design or manufacturing defects). Liability would similarly extend to development losses.

The present inadequacy of the legal position of the consumer lies in the very fact that the principle of negligence is adhered to. However, in view of the situation which has been described, the principle of negligence is no longer sufficient to solve the problem of product liability. On the contrary, it is seen as a welcome excuse for passing on the risk of damages resulting from material defects to the consumer who is using the defective product at the time the damage occurs.

(c) Agricultural products, particularly processed products like for example ground corn, should not be

excluded. From the consumer's point of view, the interests involved are the same as with industrial products.

(d) This solution corresponds to the law in France where liability does not depend on the notion of fault. In Great Britain developments are tending in the same direction. The other Member States would have to introduce the stricter criteria of liability laid down in the directive. This would be made easier by the fact that, as has already been mentioned, a trend towards such stricter liability has been developing in all those Member States both in the practice of the courts and in academic opinion generally.

Although the alternative of continuing to found liability on the principle of negligence, which still applies in the majority of Member States, would also meet the need for harmonisation of the legal position, it would not, however, sufficiently protect the consumer and would signify a retreat from the general development of the law.

2. The person entitled to bring a claim

The person entitled to bring a claim would be the injured party. In the light of what has been said, whether or not the injured party purchased the article which caused the damage would be of no consequence. Further, his relationship to the purchaser would be irrelevant. The sole determining factor would be the fact that he was using the article. Persons who, in addition to the purchaser, suffer damage as a result of the same event, should also be entitled to claim.

It is uncertain whether it should be laid down that the injured party must have been lawfully entitled to use the defective article (no liability to an injured thief?). Because of the difficulty of determining the illegality of the use, such an exclusion would cause difficulty in determining where the line should be drawn. Further, it should be pointed out that such illegality bears upon the relationship between the owner of the article and the user and is therefore irrelevant to the producer and his position in law.

The only requirement for enforcement of a claim based on liability would be the existence of a casual link between the defectiveness of the article and the damage. The injured party would have to prove such causal link.

3. The person against whom the claim would be brought

The claim would be brought against the producer. In determining the identity of the producer, the end product of the manufacturing process should be taken into consideration. Thus the producer would be the person who manufactured the end product and put it into circulation in the form in which it was intended ultimately to be used. Putting the article into circulation should be regarded as delivering it to the dealer as initial buyer.

The question arises of whether a sub-contractor to a producer should also be liable to the manufacturer of an end product in the same way as the producer is liable to the user. This would lead to an accumulation of liability and thus to expensive measures being taken which - in a similar cumulative fashion - would unnecessarily increase the price of the end product. Such an accumulation of liability is not necessary to achieve the objective. From the consumer's point of view, the supplier is only an "aid" to the manufacturer. The difference between supply by a legally independent sub-contractor and own manufacture in the producer's works is regarded as an organisational matter only. Legal consequences relating to the question of liability should not be drawn from it. The separate interests of the producer and his sub-contractors should be resolved on a contractual basis in accordance with existing laws.

The seller, whose responsibility is to distribute the product, should also be excluded from liability. His function is to pass the goods on in an unchanged state. It, therefore, does not seem fair that he should bear any risk. Where he is liable under the laws of certain Member States, this is simply to supply the connecting link in the contractual chain between the producer and the injured party when a claim in respect of liability is based on breach of contractual obligations. In any event, under such laws, where a seller is found guilty, he can then turn to the person who precedes him in the chain until the loss is transferred back to the producer, provided that none of the guarantee claims is time barred.

Since however, on the basis of the principles developed above, liability is founded not on a contractual basis, but the damage and the cause of the damage are directly linked,bringing in the trader would be an unnecessary detour.

4. Extent of liability

(a) Compensation would cover only damages caused by the defect to the health or financial position of the injured party. Diminution in value because of defectiveness of the article itself should be compensated in accordance with the statutory or agreed rules governing the contract of sale.

Only pecuniary damages should be compensated. To bring in non-pecuniary damages would unduly broaden the extent of liability.

(b) In order to keep the producer's liability for payment of damages within reasonable and calculable limits having regard to the fact that such causal liability does not depend on negligence, consideration could be given to limiting liability to maximum amounts as it is the case with liability arising from accidents on the highway. Here, a distinction should be drawn between physical and material damages. Compensation for physical damages should be considerably higher than those for material damages. By limiting liability in this way it could be made insurable.

If, however, liability were limited in this way, each case of damage should be a separate ground of liability for payment of compensation.

5. Duration of liability

Industrial products deteriorate with use. After a certain time it is very difficult to distinguish between original defectiveness and defects which have arisen through use. This consideration, which has, in general, resulted in short limitation periods for the enforcement of claims for damages under the law of purchase and sale, should also result in limiting the duration of product liability. Since the same interests are involved it would seem appropriate to adopt the thinking which has developed in the law of purchase and sale.

It could be laid down that the period should commence when the article is first used. Only by using the article is it possible to establish whether it is defective. Since, however, there are extreme differences between products, provision should be made not for a fixed but for a variable period, the length of which could be left to the discretion of the court in individual cases. Experience in the law of sales has

shown that variable periods, appropriate to the potential for establishing the material defects, produce more equitable results than fixed periods.

However, to avoid the producer's being under liability for an unduly long period, one could consider laying down an additional limitation period beginning, objectively, when the article is first put into circulation (when it is sold to the initial purchaser). Without such limitation, the producer would be exposed to liability for an unduly long period.

6. Exoneration

Since the directive provides for liability based on causation and not on fault, considerations such as negligence on the grounds of inadequate organisation of work or inadequate supervision are irrelevant. In order, however, to remove any doubt as to the non-applicability of national laws which would exonerate the producer from product liability and pass this on to persons working for him, an appropriate provision should be included in the directive.

7. Relationship to other claims

Holding the producer liable for his products does not exclude the possibility of the injured party enforcing other claims against him, in certain circumstances based on other grounds, where such claims are valid under national law. Such claims might arise by virtue of contractual relations especially under a contract of sale, but also under the national law of tort. They remain unaffected by the liability for which provision is made here. The producer as seller and the consumer as buyer should still be at liberty to have their relations governed by contract, in addition to the existence of liability for damages caused by the defectiveness of the product. This applies, in particular, to liability in respect of the article purchased per se to which, as stated above in paragraph 4(a), product liability shall not extend. In practice, such claims will scarcely arise since, as a general rule, they presuppose negligence on the part of the producer which, as indicated above, it is scarcely possible to prove even if it exists.

It must simply be made clear that liability for the defectiveness of products is mandatory. Thus it may not be excluded or limited contractually by the parties concerned.

FIRST PRELIMINARY DRAFT DIRECTIVE

Article 1

The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault to any person who suffers damage as a result of defects in such article.

Article 2

"Producer" means any person by whom the defective article is manufactured and put into circulation in the form in which it is intended to be used.

Article 3

An article shall be deemed to be defective if it is unfit for the use for which it is intended by the producer.

Article 4

Damage shall not include the defective article. Contractual claims of the purchaser of the article shall remain unaffected.

Compensation of non-pecuniary damage shall be excluded.

Article 5

The producer's liability for payment of damages shall be limited to:

- ... units of account in the case of physical damage;
- ... units of account in the other cases.

Every loss shall be a separate ground of liability for payment of damages.

Article 6

Claims for damages must be brought within a reasonable period. This period shall commence when the article is first used.

Notwithstanding such period, claims may no longer be brought after ... years from the date on which the article is put into circulation by the producer.

Article 7

The producer shall not be exempted from liability to the injured party by proof of fault of a person working for him.

Article 8

Liability as defined in Article 1 shall be mandatory. It may not be excluded or restricted by contract.

Claims of the injured party against the producer or the seller based on other legal grounds shall remain unaffected.

Article 9

Member States shall within a period of eighteen months amend their laws insofar as they are inconsistent with the provisions laid down in Articles 1 to 8.

EXPLANATORY NOTES

The thinking underlying the proposed rules has been explained in Section III of the Memorandum "Basic principles underlying the substantive rules".* Reference is made to this Section. The explanations below deal only with individual points.

Explanatory Note on Article 1

Article 1 lays down the principle of product liability, namely liability irrespective of fault. It appears necessary to state this expressly in the text.

Liability is to be borne by the producer. Article 2 defines the notion of "producer". The producer shall be liable to any injured party. This liability, which may thus be qualified as tortious, is given without any consideration of contractual relations which may exist between the manufacturer and the injured party.

The producer is to be liable for defects in an article produced by industrial methods or in an agricultural product. "Production by industrial method" means large quantity production. Manufacture of individual items is excluded. Since such manufacture requires special care, the principle of liability with fault is sufficient. Agricultural products are on a par with products manufactured by industrial methods. The concept "agricultural product" is to be interpreted broadly. Animal products also count as agricultural products manufactured by a producer.

Article 3 defines the notion of a defect.

Thus liability depends solely on the causal connection between the defect and the damage. More detailed provisions regarding the nature and amount of damages are contained in Articles 5 and 6.

Explanatory Note on Article 2

Article 2 defines the notion of "producer". This concept shall be based not only on manufacturing but also on putting into circulation the article in "the form in which it is intended to be used". An article is deemed to have been put into circulation when it has finally passed out of the control of the producer, that is, in general, when it is delivered to the initial purchaser.

The concept of "use" means the ultimate use or mode of consumption which the article is intended to serve in the hands of the final consumer. Semi-finished and intermediate products are thus

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*See pp. 160-165, above.

excluded. A sub-contractor is therefore not a producer. Only the person who puts the end product of a manufacturing process on the market is responsible for it.

On the other hand, only the "producer", as thus defined, of a product which is ready for use, may determine the use which it is to serve. Any use contrary to what is laid down is at the risk of whoever makes improper use of the article.

Explanatory Note on Article 3

Article 3 defines defectiveness. This depends solely on a comparison between the purpose assigned to the article and the fitness of the article for that purpose. Should this comparison, which is to be undertaken objectively, produce a negative result, the article is defective and the defectiveness may give rise to liability for loss or damage resulting therefrom.

Explanatory Note on Article 4

Liability for the defective article itself is excluded from the rules and remains a matter of the contractual relations between the parties. Such liability should continue to be governed by the law of purchase and sale. Financial loss suffered by the purchaser of a defective article through his having paid an excessive price can be compensated according to traditional rules. This is made clear in the first sentence of paragraph 1.

On the other hand, with the exception of non-pecuniary damage which, if taken into account, would unduly broaden its extent, liability is to cover any damage, that is physical and material damage and loss of profits.

Explanatory Note on Article 5

Both the extent and duration of the producer's liability for payment of damages should be limited in order that it may be made calculable and thus insurable. Provision is made for limiting duration in Article 5, and for limiting extent in Article 6.

Article 5 draws a distinction between physical and material loss or damage.

Since, in the field of consumer protection, adverse effects to health are more serious than pecuniary losses, liability for payment of damages in respect of physical damage should be fixed at a higher level than that for material damage. Discussion should be undertaken concerning the ratio between the two, and ultimately on the amounts to be fixed.

EXPLANATORY NOTES

Paragraph 2 makes it clear that the limits of liability for payment of damages are not to be taken in a global sense.

Explanatory Note on Article 6

Article 6, which provides for a temporal limit to liability, follows the French practice of a "reasonable", i.e. flexible period. A rigid period could hardly do justice to the wide range of cases. The question of the period to be regarded as "reasonable" in a particular case should be left to the courts.

Commencement of the period cannot depend on the time of purchase by the consumer. The injured party can use the article without having been the purchaser. It should therefore be objectively determined as the first occasion on which the article is used. This will show whether the article is fit for the use for which it was intended by the producer. As a general rule the article will first be used by the final purchaser.

Since every article deteriorates with use according to its nature so that after a certain period it is no longer possible to distinguish between original defectiveness and subsequent deterioration, the producer should be free from liability after a general limitation period. How long this period should be needs to be discussed.

Explanatory Note on Article 7

The liability, irrespective of fault, of the producer, who is in a position on account of his financial situation to make good the damage which has occurred, should not, in fact, be diminished or excluded by its being presumed, without an express provision to the contrary, that it is displaced though fault on the part of an impecunious person working for the producer. The laws of certain Member States provide for this possibility of exoneration.

Article 7 is intended to obviate this.

Explanatory Note on Article 8

Under the laws of several Member States, tortious liability may be excluded as far as negligence is concerned. In order to protect the consumer, whose position is relatively weak by comparison with that of the producer, Article 8 provides that the liability defined in Article 1 is binding, i.e. it may neither be excluded nor restricted. In the absence of such a provision, product liability would depend on the judgment of the producer.

Paragraph 2 makes it clear that claims in respect of product liability do not preclude other claims. Where the injured party is able to enforce claims for damages pursuant to other individual national laws this should continue to be so.

Explanatory Note on Article 9

This is a provision contained in every directive.

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