US AND EUROPEAN PRODUCT LIABILITY APPLIED TO THE AIRCRAFT INDUSTRY

by

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A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of
MASTER OF LAWS (LL.M.)

August 1992

Institute of Comparative Law
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CANADA

OUTLINE

ABSTRACT

One of the most important legal issues international aircraft manufacturers have to deal with is product liability for aeroplanes and equipments. Due to the economic importance of passenger claims in some countries, the legal regime the manufacturers are submitted to, may even become a decisive competitive advantage.

In order to find out to what extent the major Western legal systems respond differently to the needs of consumer protection, we submit four major national legislations to a detailed analysis working out the most striking particularities. We have a special look at the EEC harmonization attempts in this field and we oppose the European standards to the current legal situation in the US.

The results are refined by an exploration of aviation related jurisprudence and legislation.
Our study reveals that many differences remain between European and US product liability standards despite apparent approximation of the regimes. The availability of numerous defenses and the less extensive practice with regard to the award of damages lead generally to a more manufacturer-friendly situation in Europe.

However, the resulting competitive advantage of European aircraft manufacturers might be compensated by rules of private international law allowing for "forum shopping"which often leads European aircraft manufacturers before US jurisdictions.

RESUME

Une des questions les plus cruciales pour les constructeurs aéronautiques est le problème de leur responsabilité civile produit. En raison de l'importance économique des réclamations des victimes d'aéronefs et d'équipements défectueux, le régime juridique auquel se trouve soumis le constructeur aéronautique peut avoir une influence certaine sur sa compétitivité commerciale.

Afin de montrer les réponses apportées par les différents systèmes juridiques occidentaux au problème de la protection des consommateurs, nous ferons l'analyse de la législation nationale de quatre pays, mettant ainsi en évidence les particularités de chacune. Puis nous examinerons particulièrement les efforts d'harmonisation menés dans ce domaine par la Communauté Européenne. Nous effectuerons une comparaison de la nouvelle réglementation européenne avec la situation juridique actuelle aux USA.

Les résultats de cette analyse nous permettront d'examiner plus précisément la jurisprudence et la réglementation dans le secteur de l'aéronautique. Notre étude nous montrera que de nombreuses disparités demeurent entre le régime européen et le régime américain malgré les similitudes apparentes des deux systèmes. La possibilité d'invoquer de nombreuses causes exonératoires et la maîtrise dans certaines limites des indemnités allouées aux victimes rendent le régime européen de la responsabilité civile pour les produits défectueux moins sévère à l'égard du constructeur aéronautique que le régime américain.

Cependant, l'avantage en matière de compétitivité commerciale résultant du régime européen pour les constructeurs européens est très largement compensé par le fait que le droit international privé permet le "forum shopping" qui conduit bien souvent les constructeurs européens devant les juridictions américaines.

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INTRODUCTION

There is ample room for debate over what ground ought to be covered in a thesis on product liability. There are certainly few legal fields which are as broad as the law governing liability of manufacturers for damage caused by defective products. The con- lerations which have guided us have been partly pragmatic or dictated by requirements of space and partly a reflection of our analysis of what seemed us to be the essential elements to be presented and compared in order to deliver a concise but representative picture of this legal field. Therefore, we do not pretend to cover all legal questions which could or do arise in today's litigation but we attempt to deal with all important aspects in a clear manner.

Product liability is in the center of attention of modern industry. In fact, product liability plays a major role on both sides of the Atlantic in manufacturing and even in certain financial operations. Due to the extent of liability consequences, the whole manufacturing process tends to be influenced by the law. Product liability must be taken into consideration when conceiving a product, when designing it, when choosing a sub-constractor, etc. Product liability extends often beyond the mere sales operation and creates marketing duties. This legal field determines not only the manufacturer's behaviour but becomes an important cost factor. Product risks, potentially creating damages, need to be covered by insurance. The more the product is potentially dangerous, the more the premiums will weigh on the profit margins of the manufacturer. Product liability applied strictly becomes, thus, a means of deterrence, encouraging manufacturers to improve the product's characteristics and safety. Potentially dangerous products are more and more constructed in the framework of so-called "product integrity programs".

However, product liability, when applied excessively can become a factor hindering innovation and progress. Indeed, it may lead to situations where manufacturers avoid the

application of new proceedings or materials and prefer to rely on experienced know-how. The law can consequently harm competitiveness of industries in the international framework.

Product liability is an extremely complex legal matter in all states we are going to examine. This is partly due to the fact that this legal field is the outcome of a long lasting legal evolution. In all states, even in those traditionally based on written (statutory) law, product liability regimes have been most often derived by jurisprudence from different legal foundations such as tort, delict or even contractual warranty. Today, product liability forms in most legal systems independent bodies of rules which tend to be enhenced continiously by the courts. The relatively uncontrolled evolution of the systems in the different examined countries, the United States, the United Kingdom (England), Germany and France, often influenced by political considerations, such as consumer protection, leads to a situation where industry and legal doctrine are urging for clarification and more legal certainty. On both sides of the Atlantic we observe tendencies towards harmonization and reformulation of the legal regimes. The US law, after periods of inflation of product liability claims and often excessive practice, tends to be more moderate. In Europe, the European Economic Community has introduced legislation harmonizing to some extent the Member states' particular national laws under strict liability considerations. We will present these legal tendencies and expose their impact on the industry.

The practical application to the aircraft manufacturing sector seems us to be the most suitable one in order to expose the different legal theories, the systematical differences and the impact of recent legal trends. We will show, by means of comparison (where possible), the legal situation aircraft manufacturers have to face on both sides of the Atlantic. We will show that aircraft product liability presents numerous particularities penalizing, to some extent, US manufacturers.

Part I of this thesis will deal with the product liability system in the United States, its legal foundations, conditions of liability, defenses and procedural rules. In Part II we will attempt to present, in a similar manner, the laws of England, Germany and France. We will particularly focus on the EEC harmonization directive and its legal effects in these three Member states. These Three countries have been chosen because they seem us to be representive of two systems of law in force in the Western world, the Romano-Germanic family and the Common Law family. In fact, French and German laws present two different approaches of the Romano-Germanic system which is united today by the same view that a primordial role should be attributed to legislation. Whereas the Common Law is essentially a judge made answer on a case by case basis to basically the same legal questions. Historically, English and American law have the same sources. In their evolution, both systems have however evolved in different manners, so that it seems to be justified to subject them both to our analysis. The EEC integration of the UK might contribute to further differences between both Common Law systems in the future.

The application of the product liability laws to aircraft manufacturers will help us to illustrate the practical relevance of product liability. Part III is devoted to this industrial sector and its particularities.

PART I : UNITED STATES PRODUCT LIABILITY LAW

CHAPTER I. EVOLUTION AND ADOPTION OF STRICT PRODUCT LIABILITY LAW

I. INTRODUCTION

The field of product liability has grown to enormous proportions in the United States. Today it is certainly the most litigated area of liability law. In the U.S.A. the civil liability of suppliers of products is based upon the local law of the fifty states and product liability law is the peculiar creation of each sovereign state. Due to conflicting positions of courts in the different states (and sometimes even within one single state), as well as frequent overruling of decisions made only a few years before, the system of product liability in the United States has become extremely complex.

However, the will to create a more uniform product liability law emerged from the apparent need of consistency between the different states and from the awareness that producers in interstate and international trade must not be submitted to too broadly different standards in product liability. This attempt to uniform product liability law found its concrete expression at the national level by the adoption of the so-called Restatement of Torts (1) and the introduction of the Uniform Commercial Code. (2) The Restatement of Torts is often cited as authority by courts and the Uniform

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1 The different "Restatements" published by the American Law Institute constitute a summary of views by the most eminent American lawyers of the way existing national and international law should be applied. As such, it has no legislative or other legal force unless specifically adopted by legislation or applied by courts. The US courts, however, place considerable weight on its analysis; this is why the Restatements may be attributed a status of quasi-legal source. See I. Awford, Developments in Aviation Product Liability, London, Lloyds of London Press Ltd. 1985, p. 13.

2 Replacing the prior Uniform Sales Act.

Commercial Code has been enacted by every US state except Louisiana.

We will limit our study of product liability law in the United States to those concepts and laws which are common to most states. There are essentially three theories under which liability is imposed on the suppliers of products in the U.S.:

- negligence;
- breach of express or implied warranties; and
- strict liability in tort.

II. NEGLIGENCE

A. GENERALITIES

The traditional common law concept of negligence is fully applicable to product liability litigation in the United States. Negligence has been defined as a conduct which fails to conform to the standards of ordinary care which a "reasonable man" would exercise under like circumstances. (3) At the end of the nineteenth century, there were no general remedies for the purchaser of a defective or dangerous product. In the absence of an express warranty in the contract of sale or fraud, the very old rule of "*Caveat emptor*" (let the buyer beware) governed the commercial relationship between the seller and the buyer of the product. (4) It was consequently most often the buyer or consumer who had to bear the risk of the product.

The manufacturer was equally protected by a second legal principle. Before the end of the 19th century, the English so-called **"rule of non liability"**, based upon the case of *'Winterbottom v. Wright'*, of 1842 (114, EngRep at 405), was adopted by American law, according to which, a manufacturer or vendor was not liable to persons not in contractual privity

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3 Black's Law Dictionary 835 (5th ed. 1979).

4 See S. Madden, "Product Liability", West Publishing Co., St Paul, Minn. 1988, p.6.

with regard to negligence in the manufacture or sale of the product. Exceptions were admitted only in the case of fraud and of certain "imminently dangerous goods".

The first case in the U.S.A. establishing that a manufacturer could be sued not only by a person in contractual privity but also in tort, was the very famous decision of the New York Court of Appeal in *'McPherson v. Buick Motor Co'* which held that the manufacturer of any product capable of serious harm if incaustiously made, owed a duty not only to the immediate purchaser but to all person who might come into contact with it.(5) The new element of this ruling was that it created negligence liability for the manufacturer of the product without privity. It would influence many future product liability decisions.

The essential element of negligence was now the breach of a duty of care. But in practice, it is not easy for a plaintiff to prove that a manufacturer was negligent during the manufacturing process. Some courts have tried to overcome this difficulty by using the doctrine of *"res ipsa loquitur"*.

B. "Res ipsa loquitur"

The doctrine of *"res ipsa loquitur"* ("the thing speaks for itself") creates a presumption of negligence in certain circumstances. When there is an accident which ordinarily doesn't occur unless caused by negligence, other causes are eliminated, and the burden of the proof is shifted onto the defendant who must establish now that no negligence on his part has occurred.(6) The Ninth Circuit Court of Appeal has explicitly stated in *'Ashland v. Ling-Temco-Vought Inc'* the three elements necessary to successfully invoke this doctrine:

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5 217 NY 382 111 N.E. 1050 (1916).

6 Restatement Second of Torts #328 D (1965).

1. the happening of any injury - producing event of a kind that ordinarily does not occur in the absence of someone's negligence;
2. the event must be caused by an agency or instrumentality within the exclusive control of the defendant;
3. the event must not have been due to any action, or contribution, on the part of the plaintiff. (7)

Despite these criteria the procedural impact of this doctrine is still subject to some uncertainties and varies according to the kind of product involved. (8)

However, the doctrine of '*res ipsa loquitur*' offers little help to the plaintiff when other causes of the injury are of the same degree of probability, when, e.g., improper maintenance or use of tools concur with the hypothesis of bad manufacturing. In this case negligence must be established by other means of evidence which is often difficult or even impossible for the victim.

C. NEGLIGENCE PER SE

The doctrine of negligence *per se* holds that the violation of a statute or regulation protecting certain classes of persons, when resulting in harm to a plaintiff who is in the class of person intended to be protected by the statute or regulation, will be considered as negligence as a matter of law. (9) This doctrine of negligence *per se* is recognized in many jurisdictions of the United States e.g.,

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7 711 F.2d 1431 (9th Circuit) 1983.

8 This doctrine has been used in cases of exploding soda bottles and of other products packed in sealed containers. See "International product liability law", H.D. Tebbens, Sijthoff & Noordhof International Publishers, 1979, p.17.

9 See "Aviation Litigation", W. Turley, Mc Graw Hill Book Co. New York, 1987, p.39.

in the failure to comply with statutory standards for the protection of consumers established on food, drugs, inflammables or other similar products. In that case, the ordinary negligence defenses, such as contributory negligence, are not available. In this way one can affirm that *negligence per se* comes to some extent close to strict liability.

III. WARRANTY

A. GENERALITIES

Warranty is defined as a statement or representation made by the seller of goods, contemporaneously with and as part of the contract of sale, through collateral expression of object of sale, having reference to character, quality or title of goods and by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them. (10)

Historically, a seller could be held liable only if he had given an express warranty. But, in 1906, the Uniform Sales Act recognized alongside with express warranties made by sellers of goods relating to their qualities, the existence of implied warranties arising out of the sale by merchants and relating to merchantability of the goods or to their fitness for a particular purpose. (11) In case of breach of these warranties, the rights and duties of a buyer depended on numerous conditions and circumstances. But once breach was established, the vendor was to be held liable without any showing of fault on his part. Originally, the remedies for breach of express or implied warranty were only open to persons in contractual privity with the vendor.

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10 See Black's Law Dictionary, 5th ed. 1983.

11 The Act constituted an unofficial codification of sales law and was adopted by some 36 states, see H.D. Tebbens, "International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability", Sijthoff & Noordhoof International Publishers, 1979, p.17.

B. EXPRESS WARRANTY

For many years, privity remained an actual obstacle to the express warranty action brought by the injured purchaser against the remote manufacturer. While in negligence, the elimination of the privity barrier was influenced by the decision in '*McPherson v. Buick Motor Co*' (11a), it was not until 1932 that the Supreme Court of Washington, in the case of '*Baxter v. Ford Motor Co*' (11b), eliminated the privity barrier in express warranty action. The Court held that a manufacturer could be sued in cases when he had represented a quality (e.g. safety) of his product by advertisement addressed to the general public, on which the claimant relied when he bought the product from a dealer.

Express warranty may be either written or oral. It reached particular importance in cases concerning radio and television commercials or labels affixed to products or their containers. (12) The Uniform Commercial Code has confirmed the latitude that courts have taken in appreciating the seller's statement. In Section 2-313, it provides that "affirmations of fact or promise", or "description" that are "made part of the basis of the bargain can create an express warranty".

The breach of express warranty does not require any showing of fault and is not limited to dangerous products as held in the decision in '*Randy Knitwear v. American Cynamid Co.*'. (13) In this case, the Court observed that, since the basis of liability turns not upon the character of the product but upon the representation of it which was given, no

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11a 217 NY 382, 111 NE 1050 (1916).

11b 179 Wash 123, 35 P 2d 1090.

12 See H.D. Tebbens, op. cit. (fn. 11), p.17.

13 11 NY 2d 5, 226 NYS 2d 363, 181 NE 2d 399 (1962). A remote commercial buyer recovered economic loss against the manufacturer of textile fabrics labelled "will not shrink".

distinction should be made on the basis of the type of injury suffered or the type of products involved.

This warranty has since evolved into strict liability for misrepresentation and it furnishes a specific part of the present strict product liability in tort, in addition to the breach of implied warranty which is the other wider sales law remedy.

c. IMPLIED WARRANTY

An implied warranty arises through an operation of law rather than by the agreements between parties. It is an implied promise that something which is sold will be merchantable and fit for the purpose for which it is sold. (14) The concept of implied warranty is more difficult than that of express warranty since it is attached to the sale without regard to express statements by the seller.

Until World War I, these implied warranties were subject to the rule of privity of contract. The American courts then began to eliminate this obstacle in order to protect the consumer rather the buyer of mass products (generally, food). During the next fifty years, the courts worked at what has been called "the fall of the citadel of privity". (15) The "Citadel of Privity" was taken in two of its dimensions:
- "vertical privity", i.e. contracting with the nearest supplier of the product in the commercial chain was considered by the courts as no longer necessary in order to succeed in a warranty action.
- "horizontal privity", namely that no consumer could recover in a warranty action from a manufacturer unless he had purchased personally the product concerned, was abolished as a criterion for successful warranty action.

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14 Black's Law Dictionary, 5th ed. 1983.

15 See, W. Prosser, "The Assault", Yale L.J. 1960, p. 1099.

The origin of the notion of implied warranty running with the goods from the manufacturer to the ultimate consumer can be found in the decision in '*Coca Cola Bottling Works v. Lyons.*'. (16)

However, this new legal construction was established by a landmark decision in this respect, which in addition to settling the litigation in question, provided for a solution with regard to another inconvenience of implied warranty. Indeed, the negative aspect of that implied warranty was that sellers could modify or even exclude it easily which could however only be reasonable in transactions between commercial parties of equal bargaining power, but which must be regarded as against the general policy of consumer protection. (17)

The mentioned landmark decision providing a solution to this question was delivered in 1960 by the Supreme Court of New Jersey in '*Henningsen v. Bloomfield Motors Inc*'. (18) The Court held that a purchaser of a new car and his wife could sue the dealer with an implied warranty action in spite of a disclaimer contained in the uniform warranty certificate given by the dealer to the purchaser. The Court considered that "*the attempted disclaimer of an implied warranty of merchantability and of the obligation arising therefrom is so inimical to the public good as to compel an adjudication of its validity*". The Court decided also that the warranty liability should be extended to the dealer (vertical privity) and could be invoked by the injured wife (horizontal privity). Thus, in addition to the disclaimer clauses problem, this decision also settled an important issue in U.S. consumer protection policy.

In summary, one may note that express warranty arises where the seller makes to the buyer a material or substantive promise or insurance concerning the quality, performance or safety of a product. The implied warranty of merchantability

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16 145 Miss. 876, 111 So 305 (1927).

17 See H.D. Tebbens, op. cit. (fn. 11), p. 19.

18 32 NJ 358, 161 A2d 69 (1960).

and fitness for a particular product does not require any explicit seller statement concerning the product, but arises when, at the time of sale the seller is fully aware of any "particular purpose for which the goods are required" (19), and when the buyer is relying upon the seller's skill or expertise in the selection of goods. After the fulfillment of those two conditions, which don't need to be stated, there is an implied warranty that goods are "fit" for the buyer's purpose. (20)

IV. STRICT LIABILITY

Claims for negligence and claims under warranties have often failed to achieve consumer protection purposes and the courts have, thus, developed a new concept of liability known as **strict liability in tort**. One of the most important arguments in favour of a strict liability regime is that the manufacturer is in a better position to spread the risk of product-caused injuries than the injured persons. (21)

The decision which gave birth to the doctrine of strict liability was delivered in '*Greenman v. Yuba Power Pr. Inc*'. (22) Some lawyers have described the decision as "an imaginative synthesis of negligence and warranty". (23) In this case, the plaintiff had brought an action agains the manufacturer for negligence and breach of warranty. The manufacturer defended himself with the argument that the warranty claim was barred since notice of the breach had not been given within reasonable time. The Court held that it was

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19 Uniform Commercial Code #2 -315.

20 See S. Madden, op. cit. supra (fn. 4), vol 1.

21 This argument was advanced as early as 1944 by Justice Traynor of the Supreme Court of California in the decision of "*Escola v. Coca Cola Bottling Co.*" , 24 Cal. 2d 453, 462, 150 p 2d 436, 441 (1944).

22 59 Cal. 2d 57, 377, p. 2d 897 27 (1963).

23 See I. Awford, op. cit. (fn. 1), p.13.

not necessary for the plaintiff to establish an express warranty and that the plaintiff had a valid cause of action under a strict liability theory. The definition of strict liability in tort was given in the following terms:

> *"a manufacturer is strictly liable in tort when an articles 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 California Supreme Court pronounced the defendant liable neither on the basis of negligence, nor of express or implied warranty but on the ground of strict liability. Under this new liability theory, the plaintiff does not have to prove negligence and there is no question of privity involved.

The Court defined three elements which must be proved in order to apply the theory:

a) Existence of a defect;
b) that this defect existed at the time the product left the manufacturer's control; and
c) that the defect caused the injury.

Several years after *'Greenman'*, most of the American states had followed and changed the standard of liability which they continued to impose on manufacturers from warranty to strict liability in tort. (24)

The rapid evolution of the basis of product liability from strict warranty to strict liability in tort was stimulated by the adoption of the Second Restatement of Torts in 1965. Section 402 A provides that:

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24 See, W. Prosser, "Law of Torts", 4th ed. 1971, p.654.

"Special liability of seller of product for physical harm to user or consumer:
(1) One who sells any product for physical harm to user or consumer 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) This rule 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 from or entered in to any contractual relationship.

Today the rule of 402 A has been widely adopted by the case law of the great majority of American states. Courts are basing their decisions upon it to enlarge the scope of strict product liability doctrine, applying this doctrine to a large range of potential defendants, from the actual manufacturer to any seller whether the product is new or used.

However, it should be emphasized that existing strict liability in the U.S. is not equivalent to a "genuine strict liability rule" which without exception or justification would make a manufacturer liable for all injuries caused by his product - thereby becoming a virtual insurer. The victim can recover only if it establishes a defect.

V. CONCLUSION: WHEN TO PLEAD WHAT ?

One question which arises from the development of strict liability is: why are the negligence and the breach of warranty theories still needed? Basically, each theory focuses on a different concept: *defect* for strict liability, *culpable conduct* for negligence and "*unmerchantibility*" or "*unfitness* for the purpose" for breach of warranty. Those concepts overlap and intermingle in most cases. Defect implies unmerchantibility and raises the issue of the manufacturer's

negligence. Strict liability has overtones of fault but shifted from the fault of the manufacturer to the "fault of the product" itself. Breach of warranty and strict liability are similar theories in that both do not require proof of negligence. However, important differences remain between both concepts, in particular with respect to privity (in situations where there is no privity between the defendant and the victim, the breach of warranty action might be unavailable in some cases).

While product liability actions in the United States today are predominantly brought under strict liability, there are occasions where negligence and warranty should be preferred by the plaintiff (25): it is best to act under negligence when the case involves a negligent repair or installation of the product. In such cases, the fault is caused by the work done and not inherent to the product. Also, when the plaintiff cannot prove a defect without using the doctrine of '*res ipsa loquitur*', it is often better to claim under both negligence and strict liability rather than strict liability alone since the doctrine is more effective in negligence. However, the inconvenience of proceeding in this way is that the defendant may be able to use the defence of contributory negligence which would not be available in claims based only on strict liability. (26)

The utility of express warranty is to give a remedy resulting from additional claimed qualities of a product which it would normally not be required to possess under strict liability. (27) Where there has been reliance on advertising of the product's qualities, recovery under express warranty

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25 See: R.M.S. Gibson, "Product liability in the United States and England: the differences and why", Anglo-American Law Rev., 1974, p.493.

26 idem.

27 E.g. "*Lane v. C.A. Swanson & Sons*", 130 Cal. App. 2d 210, 278 p.2d 723 (1955), (canned chicken claimed to be boneless);"*Simpson v. America Oil Co*" 217 N.C. 542, 8 S.E. 2d 813 (1940), (insecticide claimed to be safe for inside use).

might be possible. (28) The theory of warranty may remain an important remedy where other doctrines are unavailable, e.g. where solely economic loss is suffered. (29) Strict liability, on the other hand, is a more advantageous remedy when products lack qualities which should be inherent as far as they are in the stream of the market (exploding soda bottle, car's steering wheel coming off, etc). (30) As far as it concerns negligence, it is generally accepted that negligence actions will provide for a basis for recovery of punitive damages, provided the requisite reprehensible conduct is proven. Whereas, at least theoretically, the concept of strict liability in tort, which is fundamentally based on the product's defectiveness and not on a concept of manufacturer's fault, is in principle incompatible with the concept of punitive damages. However, some courts have rejected this argument and punitive damages can be recovered under both causes of action.(30 bis)

The various theories of liability contribute to create uncertainty because different jurisdictions often recognize varying combinations of them. Ths uncertainty has created many difficulties and today, nearly all of the commentators are urging the adoption of a single cause of action.

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28 E.g. "*Pritchard v. Ligget & Myers Tobacco Co.*", 295 F. 2d 292 (3d cir. 1961), (smoking "Chersterfields" advertised as absolutely harmless).

29 This topic is to be discussed in some detail, see infra.

30 See, R.M.S. Gibson, op. cit. (fn. 25), p.503.

CHAPTER II. CONDITIONS OF LIABILITY

I. DAMAGES GIVING RISE TO LIABILITY

In product liability litigation the plaintiff may recover three categories of damages from the manufacturer or seller of a defective product: (1) for personal injury; (2) for property damage; and (3) for economic loss.

A. PERSONAL INJURY

The generally recognized rule in all states is to place the injured party in the same situation as it was before. Therefore, recovery includes pain and suffering, loss of past and prospective earnings and costs of medical treatment. (31) It also permits the award of damages for emotional distress or mental anguish associated with the plaintiff's product-related injury. However, there are important differences which exist from jurisdiction to jurisdiction as to the type of physical harm, or anticipation of future harm, plaintiffs must prove in order to receive compensation for non-physical damage. In many jurisdictions a plaintiff claiming compensation for mental anguish must show contemporaneous physical injury or at least impact. (32)

The Restatement Second of Torts appears to agree with this view, as it denies recovery in the absence of actual physical injury and damages and provides that, where the activity results in emotional disturbance alone *"without bodily harm or other compensable damage"*, the actor is not liable for such emotional disturbance. (33)

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30 bis See L.R. Frumer, M.I. Friedman, "Products Liability", Vol. 3, Matthew Bender, N.Y. 1988, at para. 8.0.2.

31 See W.P. Richmond, "Product Liability in Europe, United States", at p. 121, in publications of the Conference on Product Liability in Europe, Sept. 1975.

32 See S. Madden, op. cit. (fn. 4), p.329.

33 Rest. Sec. of Torts, Section 436 A.

B. PROPERTY DAMAGES

Recovery for damages to property in a product liability action is generally governed by the general principles applicable to all tort actions. When the property is totally destroyed, plaintiffs will ordinarily be entitled to damages as measured by the difference between the value of the property before the damaging event and after the harm occurred, or the reasonable cost of repair and the loss of use. (34)

Damage to property is not always easily distinguishable from pure economic loss, for instance, when a defective part of a machinery causes damage to other parts of the same machinery. Some courts encompass damage to the product itself within the definition of property damages, other courts relegate such damages to the category of economic loss and deny compensation.

C. ECONOMIC LOSS

As we have seen, it might be difficult to draw the line between that which constitutes an economic loss and the notion of property damages. This is an important question since in the United States, the prevailing rule is that consumers may not recover purely economic loss in the absence of personal injury or property damages. However, there is a controversy in this matter which began with two landmark cases of *"Santor v. Karagheusian Inc."* and *"Seely v. White Motor Co."* (35) The *'Santor'* decision adopted the view that the tort doctrine should not be limited to cases of personal injury, but should apply equally when the damage from the defective product occurred to the product itself or to the possessor of the property. On the contrary, the *'Seely'* decision stated that

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34 Rest. Sec. of Torts, Section 928.

35 *"Santor v. Karagheusian Inc."*, 44 N.J.52, 207 A2d 305(1965); *"Seely v. White Motor Co."*, 63 Cal 2d9, 403 P 2d 145, 45 Cal. Rptn 17 (1965).

the strict liability in tort theory should never be applied to recover purely economic loss as the failure of a product to perform to a party's expectations is a concept belonging to contract and not to tort law.
Divergent opinions in the various states render uncertain the recoverability of purely economic loss: some courts allow compensation for pure economic loss under a strict liability in tort and others do not. (36)

D. PUNITIVE DAMAGES

Punitive damages are one of the most controversial and troublesome aspects of the current product liability litigation. (37) The concept of punitive damages is vague and uncertain. Its meaning can vary from state to state or even from court to court. The primary functions of the doctrine of punitive damages are generally to punish the defendant as well as deterring him and others from similar wrongdoing in the future.

The origin of punitive damages in anglo-saxon jurisprudence can be seen in the early English common law (38); in the US, they became firmly established early in the life of the colonies. There are essentially three reasons that are supposed to be at the origin of punitive damages (39). First, the rule developed because of the refusal by some early courts to grant new trials when excessive damages were awarded in cases involving some form of malice and fraud. Secondly,

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36 See, "Recovery for Economic Loss under Product Liability Theory: From the beginning through the current trend", C. Bellehumeur, Marq. Law Rev. 1987, p.320.

37 See L.S. Kreindler, "Punitive Damages in Aviation Litigation - an Essay, in 8 Cumberland Law Rev., p. 607 (1978).

38 "*Huckle v. Money*", 95 Eng. REP. 768 (KB) 1763.

39 See Cole, "Can damages properly be punitive ?", in 1941 John Marshall L. Q., p. 477; see also : Walter and Plain, "Punitive Damages : a critical analysis", in 1965 Marquet L.R., p. 369.

the doctrine arose because of other early courts' failure to recognize certain injuries (e.g. mental anguish) as a proper measurement of damages. Thirdly, product damages became a vehicle to reimburse the plaintiff for damages not otherwise legally compensable (e.g. litigation expenses).
However, today it is the general rule in English law that punitive damages should <u>not</u> be awarded regardless of how outrageous the defendant's conduct was. The House of Lords has limited this form of award to three very restricted and exceptional situations:

1) where such damages are expressly authorized by statute;
2) where there has been oppressive, arbitrary or unconstitutional action by servants of the government; and
3) where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.(39 bis)

In the U.S., while there are now many who maintain that punitive damages have outlived their usefulness and should be abolished, the doctrine has notwithstanding been adopted by the Restatement Sec. of Torts in section 908 which provides that

> *"punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause, and the wealth of the defendant"*

Although punitive damages were until now relatively rare in the field of product liability, courts are granting more and more this type of "reparation". At present, punitive damages may be awarded in product liability cases based either on negligence, or on warranty, or on strict liability. However, in many state jurisdictions in the U.S., courts have held that punitive damages are prohibited in wrongful death actions, including product liability death actions. This is because courts have interpreted wrongful death acts as

statutory creations providing for only those damages or remedies enumerated. Courts have also had a fear that

> *"The frequently violent and dramatic circumstances of accidents that lead to wrongful death actions not only would pose a danger of extreme awards, but might also increase the temptation for a jury to award the punitive damages even when concrete elements of fraudulous or intentional wrongdoing are absent."* (39 ter)

This tendency towards the practice of punitive damages has been strengthened by the long awaited and recent decision of March 1991 rendered by the U.S. Supreme Court in re "*Pacific Mutual Life Insurance v. Harlip*" on the constitutionality of punitive damages. The court held in this decision that the common low practice of assessing punitive damages in certain cases cannot be "per se unconstitutional". (40)

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39 bis See House of Lords in "*Rookes v. Barnard*" (1964), A 1129.

39 ter See in re "Paris Air Crash" 622 F 2d 1315 (9th cir., 1980)

40 111 S.Ct. 1032 (1991).

II. DEFECTIVE PRODUCT

A. NOTION OF PRODUCT

The definition of the "product" has caused some difficulty. Originally a "product" was only a chattel. But, for the purpose of allowing recovery under product liability doctrine, courts have increasingly regarded houses and rental apartments as products. (41) The notion of product generally includes the merchandise's container. On some subject matter such as electricity, courts differ; some are holding that the supply of electricity is only a service and others are holding that it must be considered to be a product. (42)

Rather than that to follow a dictionary definition of "product", courts which have embraced the strict liability doctrine, prefer to adopt an extensive interpretation of "product" which will serve "*the policy reasons underlying the strict products liability concept*" (43). The question of what is a product for purposes of strict liability has arisen with respect to aircraft repairs. The majority view is to refuse to impose strict liability on those who merely provide repairs, the minority view holding that repairers are "sellers" within the meaning of the Restatement of Torts, and thus imposing a strict liability standard on them.

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41 See in general: "Product Liability in a Nutshell", 2d ed. D.W. Noel & J.J. Philipps, St. Paul Minn. West Pub. Co. 1981.

42 See e.g. "*Ransome v. Wisconsin Elec. Power Co.*", 275 N.W. 2d 641 (Wis 1979).

43 "*Kanetto v. Hilo Coast Processing*", 65 Haw. 447, 654 P. 2d 343 (1982).

B. NOTION OF DEFECT

1. The notion

It is commonly admitted that a defect must be proved, must have existed at the time the product left the defendant's control, and must have caused the injury. However there is no authoritative definition of the notion of defect. (44) Regarding strict liability, in its Sect. 402 A, the Restatement Sec. of Torts speaks of "*a defective condition unreasonably dangerous to the user*". Immediately after the publication of the Restatement Second of Tort, this test of "unreasonable danger" seems to have been generally adopted by the courts as inseparable from the definition of defect. Nevertheless, the interpretation of the quite vague requirement of section 402 A has been the cause of considerable problem for American courts because it sounds like negligence and therefore might induce a court to impose liability only when a defendant-seller is somehow to blame for the extent of the risk created by his product. This would be contrary to the logic of strict product liability which some courts present as a device to relieve a victim from the burden of proof of a fault on the part of the manufacturer. (45)

In order to avoid confusion, courts generally give an instruction which corresponds to the comment of section 402A, which states: "*The article sold must be dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the knowledge common to the community as to its characteristics*".

This seems to suggest another test to clarify the notion of "unreasonable danger", which has been called the "consumer expectation test". According to this approach it is to be used

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44 See generally: H.D. Tebbens, op. cit. (fn. 11); see also: "La responsabilité des fabricants en droit américain", R.R. Craft, RFDA 1981, p.21.

45 One of the leading case is "*Cronin v. J.B.E. Olsen Inc.*" 8 Cal 3d 121, 501 P.2d. 1153, (1972).

in order to exclude products whose "danger" is generally known e.g. that frequent consumption of alcohol (although perfectly made) may be harmful to one's health. Therefore, products accompanied by an adequate warning or direction for use are not "unreasonably dangerous", but here, of course, it may not always be clear how far extends the duty to warn on the part of the seller. (46)

2. Defect Categories

A "defect" may arise at any point in the creation and marketing of a product. It may arise in the design, the manufacturing process, the operating instructions, the advertising or other marketing of the product, or it might be consequence of the failure to give sufficient warning of possible hazards. (47)
Under Sect. 402 A there are three types of defects: "manufacturing defects", "design defects" and "warning defects". So called "manufacturing flaws" may equally give rise to liability.

a. Manufacturing Defect

A "manufacturing defect" occurs when the product does not meet the manufacturer's own specification. For example, there would be a manufacturing defect when an airplane manufacturer improperly installs a wing and it detaches in flight. (48)

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46 See H.D. Tebbens, op. cit. (fn. 7), p.24.

47 See, W. Turley, "Aviation Litigation", McGraw Hill Book Co. 1985, p.16.

48 Note that a cause of action based on strict liability does not replace a cause of action based on negligence. If the plaintiff can show that the defendant failed to exercise reasonable or ordinary care, he can also recover under negligence theory. Under strict liability the plaintiff needs only to show that the product was defective when it left the hands of the defendant.

b. Design Defect

A "design defect" does not involve a malfunction. On the contrary, the product reached the user in the condition intended by the manufacturer. A design defect occurs when the product, as designed, is unreasonably dangerous to the user or consumer. (49) An example of a design defect would be when an airplane manufacturer installs a wing that would not withstand certain changes in altitude, where an alternative design would function properly. (50)

c. Failure to warn of defect or marketing defect

Early decisions, holding manufacturers liable on the basis of failure to warn or so-called "marketing defects", required negligence on the part of the manufacturers in the failure to provide adequate warnings. But later, several jurisdictions started to admit that an inadequate warning may be considered a type of design defect with no requirement of negligence.

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49 A typical instruction to a jury on the issue of a design defect is: " - *Do you find from the preponderance of the evidence that at the time the product in question was manufactured by the manufacturer, the product was defectively designed ? By the term 'defectively designed' as used in the issue, is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.*", in re "*Turner v. General Motors Corp.*", 584 SW 2d 844, 847 (Tex) 1979, quoted in S.G. Night, "Product Liability: Component Part Manufacturers' Liability for Design and Warning Defects" in Journal of Air Law and Commerce, 1988, p. 215.

50 A common and controversial type of defect involves liability for enhanced injuries. This situation, also known as crashworthiness, arises where the product did not cause an accident but, because of defective design, the plaintiff incurred enhanced injuries. See infra Part III.

Sect. 402 A of the Restatement Second of Torts, comment j states: *"in order to prevent the product from being unreasonably dangerous, the seller may be required to give instruction or warning on the container, as to its use."* Comment k. states that:

> *"such a product properly prepared and accompanied by proper direction and warning is not defective nor it unreasonably dangerous. The test established by the Restatement of Torts in order to determine whether instructions and warnings were necessary is called the 'consumer expectation test'."*

When there is a latent defect unknown to the consumer or when the hazard is known to the consumer but such that the consumer would not reasonably expect to encounter it, the manufacturer has a duty to give adequate warnings and instructions.

This test of the Restatement of Torts has been rejected by a number of courts which, instead, have adopted the "risk-utility-test" which requires only a determination of whether the instructions and warnings are sufficient to make the product safe, taking into consideration the utility of the product and the risk involved in its use. (51)

CHAPTER III. : THE PARTIES

The fact that product liability law has reached such importance may be explained by the courts' will to abandon the doctrine of privity of contract which appeared to be in contravention with consumer protection. The circle of potential plaintiffs is then increased and almost everybody who is injured by a defective product can sue almost anybody who is connected with the manufacturing and/or distribution of the product. (52)

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51 See S.G. Night, op. cit. supra (fn. 49).

52 See, D. Owles, "Development of Product Liability in the USA", Lloyds Press Ltd., London 1978, p.50.

I. THE PLAINTIFF

The Restatement Second of Torts refers to the liability towards a "user or consumer". Comments on the Restatement stated that the notion of *"consumer includes not only those who in fact consume the product, but also those who prepare it for consumption (...)"*. The notion of *"Consumption includes all ultimate uses for which the product is intended (...)"*. Further comments define "user" as including *"those who are passively enjoying the benefit of the product (...) as well as those who are utilizing it for the purposes of doing work upon it"*.

The drafters of Section 402 A of the Restatement of Torts have omitted to express an opinion as to the application of the strict liability remedy to "harm to persons other than users or consumers". At first, therefore, it was uncertain whether simple bystanders might recover for injury suffered. (53) A leading case has since established the right of a bystander to recover under strict liability in tort. In the decision of *"Elmore v. American Motors Corp."* (54) recovery was allowed to the driver of a vehicle struck by another car which was owned by one defendant to whom it had been sold by the second defendant. The court held that - if the direct purchaser is protected by product liability law who had chosen himself the product, the vendor and even the manufacturer - the simple bystander, being unable to exercise such a control, should not be placed in a weaker position than the buyer. The person not having influence on the product or its choice must, in the eyes of the court, be at least as well protected as the purchaser.

Following this decision, a number of courts has approved recovery by bystanders under a strict tort liability theory, which is consistent with the policy of consumer protection and

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53 See S. Madden, op. cit. (fn. 4), p.67, vol.1.

54 70 Cal 2d 578, 75 Cal. Rptn.652, 451 p.2d. 84 (1969).

theory of loss distribution. (55) In addition, courts have interpreted the phrase "ultimate consumer or user" of Sect. 402 A of the Restatement of Tort as *including* persons who are themselves *commercial* purchasers and are injured in handling the product for resale. For instance, a New Jersey court held that the commercial buyer of a chemical product causing fire could invoke strict liability against its seller, and was not precluded from relying on contractual defenses. (56)

Originally, in common law, actions in tort were considered as personal to the injured party and did not survive its death. A third party, beneficiary of the deceased was barred from bringing an action. Today, this rule has been changed by statute in every U.S. jurisdiction. Most so-called "wrongful death statutes" create a new cause of action in favor of the deceased's personal representatives or certain persons designated by statute. Some states also provide for "survival" of the cause of action vested in the deceased at the moment of his death. (57)

II. THE DEFENDANT

The basic limitation to the rule that almost everybody who is connected with the distribution of a defective product can be sued is that the plaintiff must show a commercial connection between the defendant and the product. (58) Usually the concerned person might be manufacturer, distributor or retailer.

Comment (f) to the section 402 A of the Restatement of Torts limits responsibility to those engaged in business. Private sale between people not selling professionally is not

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55 See S. Madden, op. cit. (fn. 4), p.68, vol.1.

56 *"Monsanto Co. v. Alden Leeds Inc."*, 130 NJ Super 245, 326 A2d 90 (1974).

57 See: W.P. Richmond, op. cit. (fn. 37), p. 123.

58 See: D. Owles, op. cit. (fn. 52), p.46.

covered by the scope of product liability because the product has not been *"put into in the stream of commerce"*. But there is no need of a "sale" in the close sense of the word in order to apply product liability law. It is generally sufficient to make the product available to the public, whether by the mean of a sale, or a lease, or even a gift is indifferent. (59)

Recently, the Wisconsin Supreme Court has enlarged the number of potential defendants stating that sect. 402 A applies equally to the sellers of used products whereas it had been generally considered that product liability claims could not be brought against sellers of used products but only against those who have made a new product to the public for the first time. So, even when the defective condition causing harm to the consumer of the used product arises out of the original manufacturing process and when the other elements requisite for liability under sect. 402 A are present, (one of the requisite element being that the seller of the used product be in the business of selling), a claim for product liability may be brought. (60)
However, concerning sellers of used aircraft, the majority of jurisdictions addressing the issue has determined that the strict liability doctrine does not apply. (61)

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59 In one case a supplier was held liable for injuries caused by free samples given away at a fair, see, D. Owles, op. cit. (fn. 52), p.46.

60 '*Nelson v. Nelson Hardware Inc.*", 467 N.W. 2d. 518 (Wis.) 1991.

61 See L.S. Kreindler, "Aviation Accident Law", Matthew Bender, New York 1990, Chapter 7 para. 7.04. [3]. See also L. Frumer et M. Friedman, in "Product Liability", Matthew Bender, New York 1987, Chapt. 3 para. 3.03.

CHAPTER IV. : DEFENSES

Courts in various jurisdictions have contributed to render product liability in tort law more complex and to some extent more uncertain by allowing different defenses. (62) In fact, there are quite a number of means of defense which can be used by defendants that one should look at now:

I. MISUSE OF PRODUCT

It is generally agreed that the plaintiff in a product liability action must prove that the product was being used in a normal and anticipated manner. (63) It has been held as a general principle that a manufacturer or seller is entitled to expect a normal use of his product and at least until he has reason to know that it is likely to be used in an abnormal manner, is not responsible for an injury caused by plaintiff's misuse. (64)

Therefore at present, most jurisdictions allow misuse to be asserted as an effective defense, if the use of the product by the consumer is not one that the manufacturer could have reasonably foreseen. However, this is not a general rule since some states still refuse to recognized the misuse defense. (65)

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62 See, "Product liability tort reform: the case for federal action", O. L. Reed & J.L. Watkins, Nebraska Law Rev. 1984, p 390.

63 See S. Madden op. cit. (fn. 4), p. 19, vol. 2.

64 See e.g.: *"Navarro v. G. Koch & Sons Inc."*, 211 N.J. Super. 558, 512 A2d 507 (1986).

65 Such as Pennsylvania.

II. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

Historically seen, contributory negligence and assumption of risk, both operated to bar recovery by the plaintiff. Assumption of risk can be defined as being the voluntary acceptance of a known and appreciated danger; contributory negligence is a conduct involving an unreasonable risk of harm. (66)

A. CONTRIBUTORY NEGLIGENCE

According to the traditional doctrine of contributory negligence, a manufacturer, even though acting negligently, is not to be held liable to a buyer or user who has by his own negligent conduct contributed to the injury complained of. Barring the plaintiff completely from recovery despite defendant's negligence has been criticized as unfair and unduly harsh. As a consequence a new theoretical approach has been introduced, namely the "comparative negligence doctrine".(67) "Comparative negligence" abandons the 'all-or-nothing' approach of classical contributory negligence and instead adopts a process of allocating appropriate damages by comparing plaintiff's fault to that of the defendant.(68) This doctrine is, in some states, the result of legislation and in others the result of judicial decision. (69) It distinguishes generally "pure" comparative fault to "modified" comparative fault.

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66 See D. Owles, op. cit. (fn. 52) at p. 70.

67 See: A.M. Clark, "Product Liability", London, Sweet & Maxwell, 1989, p. 198.

68 See G.H. Khouri, "The liability of aircraft manufacturers: a study of the present system and a proposal for a new approach", Doctoral Thesis McGill, 1980, p. 156.

69 See: A.D. Trine, "Product Liability - Meeting the defences", in Trial Nov. 1985, at p. 24.

In some jurisdictions a so-called "pure" comparative fault is employed which means that negligence on the part of the plaintiff can reduce his award of damages by the percentage of contribution of his fault; and this even if that contribution of the victim is higher than the contribution of the defendant. Other jurisdictions use the system of "modified" comparative fault, by which only contributory negligence which is less or equal to the defendant's does not wholly bar recovery.

In most of the states a system of comparative fault has been adopted. The mixture of this system with strict liability principles has caused considerable uncertainty. First the courts are widely divided on the question whether to apply this concept to strict liability cases at all. Secondly, when the concept is applied, it is used under various formulas which lead to confusion. (70)

B. ASSUMPTION OF RISK

Assumption of risk is a concept closely related to contributory negligence, but in contrast to it, it is a complete bar to recovery in a product liability claim both in negligence and strict liability.
Actually, the precise applicability of the assumption of risk defence is uncertain since it has been defined in very different ways. For example, states differ on whether assumption of risk should be viewed objectively or subjectively. These differences in states' approaches mean that the defendant will, depending on where the cases arises, have to face a different burden of proof. Thus, depending on the accessible forum, the assumption of risk defense might be either very easy and effective or be nearly unavailable. (71)

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70 See: O.L. Reed and J.L. Watkins, op. cit. (fn. 62), at p. 417.

71 See: O.L. Reed and J.L. Watkins, op. cit. (fn. 62), at p. 413.

III. STATE OF THE ART DEFENSE

The term "State of the Art", equivalent to the European notion of development risks, usually refers to three types of evidence: first a manufacturer can prove that he has complied with prevailing industry practices and standards; secondly the "State of the Art" defense can be the evidence that there was no feasibility of a safer design; lastly the term can be used to mean scientific indiscoverability of the defect. (72)

The current state of the law in the United States seems to be that "State of the Art" defense is irrelevant in a strict liability claim. The leading case illustrating this view is *"Beshada v. Johns-Manville Products Corp."* in which the defendant argued that it was unreasonable to impose a duty to warn against unknowable risks. The Court conceded that in negligence cases failure to warn of an unknown risk is not unreasonable. However, in strict liability action the reasonability of the manufacturer's conduct was not at issue. Rather, the Court focused on the safety of the product without an adequate warning. (73) The court concluded that since consumers could not protect themselves without an adequate warning

> *"...the basic policies behind strict liability required the defendant's State of the Art Defense to be stricken".*

Some commentators have noticed the apparent illogicality of the "Beshada case" which seems to require a warning of what could not have been known. Some also criticized the decision as imposing absolute liability on manufacturers. (74) But others retort that the apparent "illogicality" can be explained by the "logic" of strict liability which is to focus upon the product rather than the conduct of the manufacturer.

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72 See: A.M. Clark, op. cit. (fn. 68), at p. 156.

73 *"Beshada v. Johns-Manville Products Corp."*, 90 N.G. 191, 204, 447 A 2d 539, 546 (1982).

74 See: "Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects", in Geo. L. J. 1983 at p. 1635.

An absolute liability is not imposed, as the manufacturer is liable only for *unreasonable* danger. (75) The only point on which all commentators agree is that the "Beshada decision" caused a major difficulty which is the availability of insurance coverage against unknowable risk. (76)

IV. BINDING LEGISLATIVE STANDARDS, GOVERNMENT APPROVALS AND GOVERNMENT CONTRACTORS

Compliance with governmental or legislative standards or regulations may be introduced as a defense against the argument that the defendant-manufacturer has been negligent in the manufacturing or marketing of his product or that the product is defective or unreasonably dangerous. (77)

A governmental licence or approval of the manufacturing and marketing of a product (e.g. certification of the aircraft by the FAA) have been used by defendants as a shield against liability. But courts have never admitted that this could be a complete defense to a plaintiff's claims. For example, in a claim for a faulty design it was held that neither a FAA approval of the general model of the aircraft, nor FAA approval of the airworthiness of the particular aircraft in question could be admitted as defense. The court held that even though a manufacturer complies with applicable FAA safety regulations, a jury can still determine that such compliance is insufficient to absolve the aircraft manufacturer of its duty of due care in design. (78)

The "government contractor" defense must be distinguished from the "governmental legislative standards" and "government approval" defenses. The two latter defenses were judicially

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75 See supra; and see A.M. Clark, op. cit. (fn. 68), at p. 180.

76 See infra Part III.

77 See: W.P. Richmond, (fn. 31), at p. 121.

78 See e.g.: "*Wilson v. Piper Aircraft Corp.*", 282 Or. 411, 579 P. 2d 1287 (1978).

created in order to expand the traditional defenses. On July 27, 1988, the United States Supreme Court, in *"Boyle v. United Technologies Corp."*, adopted what will now be definitively known as the "Government Contractor Defence". It is a relatively narrow defense and applies only when there is proof that the Government considered the "design feature in question". In the "Boyle" decision the Court stated:

> *"Liability for design defects in military equipment cannot be imposed, pursuant to state law when:*
>
> *1. The United States approved reasonably precise specifications;*
>
> *2. The equipment conformed to those specifications; and*
>
> *3. The supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."* (79)

The government contractor defense now appears limited to suits by military personnel arising from design defects in an "instrumentality of war". (80) The defense does not apply to manufacturing flaws and it is not clear whether it applies to products which are commercially available.

V. DISCLAIMERS

Many manufacturers and sellers attempt to limit their liability by providing a limited express warranty and attempting to exclude all other implied warranties. In general such disclaimers will be given effect but there are a number of restrictions in the use of disclaimer clauses. First, they must be conspicuous and cannot be hidden in fine print in act. (81) Second, the disclaimer must be specific and not unconscionable. That means that there should not be a gross disparity in the bargaining position of the parties which

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79 *"Boyle v. United Technologies Corp."*, 108 SCT 2510, 101 L. ed. 2d 442 (1988).

80 See W. Turley, op. cit. (fn. 9), at p. 78.

81 UCC para. 2 - 316 (2).

would alter the fairness of the disclaimer clause. Third, enforcement of the disclaimers must not be against public policy. (82) Finally, the disclaimer must not be a contract of adhesion that has been forced on an unwilling purchaser who had no other choice.

Many courts, however, draw a distinction between ordinary individual consumers and larger professional purchasers. In these jurisdictions it has usually been held that all disclaimers are effective between large commercial entities with equal bargaining power but void, as a matter of public policy, when used with individual consumers. (83)

Chapter V. : BURDEN OF PROOF

As a general rule the plaintiff has the burden to prove each of the elements necessary to establish liability on the part of the defendant, e.g. negligence, proximated causation, defective condition, or the unreasonably dangerous nature of the "defect". The defendant currently bears the burden of proof for defenses.

In a product liability action based upon negligence, the plaintiff may frequently be confronted with problems of proof that may make recovery difficult or even impossible. Where the product-related accident is of a nature "that it ordinarily would not occur in the absence of negligence", the plaintiff may invoke the *theory of "res ipsa loquitur"*, by the means of which he does not have to bear the burden of proof. (84)

In strict tort liability, the plaintiff must show at a minimum, that the product was defective or unreasonably

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82 See: G.P. Coie, "The present state of the law in the United States from the standpoint of industry", in Internationales Wirtschaftsrecht - Product Liability in Air Space Transportation, Cologne 1977, at p. 117.

83 See "*Hennigsen v. Bloomfield Motors Inc.*", cit. supra. Disclaimer was void.

84 See supra.

dangerous and that the defect caused the damage. The plaintiff does not have to prove a fault on the part of the defendant. If there was no defect the plaintiff is not entitled to recover.

CHAPTER VI. : PROCEDURAL RULES

I. JURISDICTION AND CONFLICT OF LAW

A. FORUM

1. Generalities

The most common forum is that of the injured plaintiff's residence. However, in product liability cases where the defendant is often in a different State from the plaintiff's place of residence, the latter may have a choice of jurisdiction. The defendant who is faced with an unfavorable forum chosen by the plaintiff may seek to move the suit. (85) Often, the first decision each party must make, is whether the case should be brought to a State or Federal court. As a general rule, when there is diversity of citizenship among the parties of the litigation, and when the matter in controversy exceeds 10.000 $, the only competent jurisdictions are the Federal Courts (Rule of diversity of citizenship).
The Federal courts are courts of limited jurisdiction whereas States' courts have general jurisdiction. (86) There is a presumption that a Federal court does not have subject matter jurisdiction. Therefore the party seeking to invoke jurisdiction of the Federal court has the burden to establish that this court is competent. (87)

Whether a case is brought in a State or in a Federal court, the plaintiff must decide which location (US State) the

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85 See W. Turley, op. cit. (fn. 9), at p. 378.

86 See W. Freedman, "Product Liability Actions by Foreign Plaintiffs in the United States", Deventer, 1989, at p. 31.

87 See "*McNutt v. General Motor Acceptance Corp.*", 298 US 178 (1935).

case should be brought in and the defendant must decide whether to accept it or not. The most important factor in this decision is, of course, the substantive law that the chosen court will apply. To entertain suit, a U.S. court must have, first, personal jurisdiction over the parties and secondly subject matter jurisdiction over the litigation.

2. Personal Jurisdiction

The constitutional doctrine of *'due process'* limits the power of a State court to assert 'in personam' jurisdiction over a non-resident defendant (88) which means that its decisional power is not given in cases related to citizens of other States. The strictness of the rule, has, however, been limited by the *doctrine of minimum contacts* established in the decision of "*International Shoe Co. v. Washington*". (89) Under this rule a non-resident defendant could be subjected to State jurisdiction if he had certain "minimum contacts". (90) This doctrine replaced the prior "*long arm statutes*" which

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88 'Due process of law' means: Law in its regular course of administration through courts of justice. Black's Law Dictionary, fifth edition, St. Paul, Min. 1983.

89 326 US 310, 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

90 The concept of'minimum contacts' allows courts to exercise jurisdiction over entities which benefit from contacts with the forum. In "*International shoe*" and following cases, the court determined that the defendant must purposefully have entered the forum State at some time or have invoked the benefit of protection of the forum state's law. Only a defendant having sufficient contacts with the forum will be subject to the jurisdiction and judgments of its courts. See, S.W. Brice, "Forum shopping in int'l air law litigation: Disturbing the plaintiff's choice of an American Forum", in Boston College Int'l & Comp. Law Rev., 1984 at p.60.

existed in some States and conferred to the courts jurisdiction 'in personam' in some concretely enumerated cases. After the decision of the Supreme Court in "*International Shoe*" the "long arm statutes" in many State jurisdictions were redrafted in order to include the new minimum contacts criteria. (91)

3. Subject Matter Jurisdiction

As we have seen earlier, a federal court has only limited jurisdiction. In order to hear a case, the court must have subject matter jurisdiction on this case. This term refers to court's competence to hear and determine cases of the general class to which proceedings in question belong. (92)

Once a court has 'in personam jurisdiction' and 'subject matter jurisdiction' the courts may still decline jurisdiction on the basis of the doctrine of *'forum non conveniens'*.

4. The forum non conveniens

The doctrine of *'forum non conveniens'* is an equitable device on the basis of which a court, possessing jurisdiction over a cause of action, may nevertheless choose not to exercise because of the existence of a more appropriate forum. This doctrine reflects the need of the courts to protect the judicial system from potentially abusive "forum shopping" by plaintiffs. (93) Courts have frequently applied this doctrine to actions involving aliens, non-residents, foreign corporations and suits touching upon the internal affairs of a foreign corporations. (94)

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91 See S. Madden, op. cit. (fn. 4) at p. 222 (Vol. II).

92 See Black's Law Dictionary, 5th edition.

93 See: E.L.Barnett, "The Doctrine of Forum Non Conveniens", Cal.L.R. p.380 (1947).

94 See, Braucher, "The Inconvenient Federal Forum", in Harvard L.R., p.908 (1947).

The landmark case was decided in 1947 by the U.S. Supreme Court in the decision of *"Gulf Oil Corp. v. Gilbert"* (95) in which the power of courts to decline to exercise jurisdiction was established the first time. Procedurally, it was up to the defendant to raise the question of *'forum non conveniens'* and to prove the existence of a more convenient forum. But the court itself is equally able to raise the objection on its own motion, even on appeal. (96)

The United States Supreme Court established a test to be applied in determining whether an action should be dismissed on the ground of *'forum non conveniens'*. The factors considered in this test include those affecting both the private interests of the litigants and the public interests of the forum. (97)

> *"Private interests include: (1) accessibility of proofs; (2) availability of witness and the cost of obtaining them; (3) possibility of viewing the premises; (4) ease and expenses of trial; (5) enforceability of any judgement rendered; and (6) the possibility of impeding third parties.*
>
> *The public interests to be considered are (1) court congestion; (2) unfamiliarities of foreign law applied to the forum."*

A practical problem arises when a plaintiff has chosen a forum to take advantage of its substantive law, while an analysis of public and private interests would suggest another forum whose law is more favorable for the defendant. The U.S. Supreme Court addressed this issue in its **"Reyno"** case. (98) The claim was brought in the U.S. to take advantage of strict liability law in contrast to Scottish requirements of negligence. When the defendant moved for dismissal on the ground of *forum non conveniens,* the plaintiff argued that it

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95 330 US, 501, 507 (1947).

96 See: E.L. Barnett, op. cit. (fn. 93), p. 385.

97 *"Gulf Oil Corp. v. Gilbert"*, see supra.

98 *"Piper Aircraft Co. v. Reyno"*,454 US 235, 255-56 (1981).

would be inappropriate because of Scotland's less favorable liability standards. The Supreme Court rejected this argument as insufficient to defeat a *forum non conveniens* motion. The "Reyno" has since then been interpreted as a means of excluding foreign plaintiffs from suing U.S. defendant in a U.S. forum. (99)

B. CHOICE OF LAW

In the earlier case law concerning actions for recovery of product damages distinct choice of law rules were used whether the claim was under contract-warranty, express or implied, or based on tort-negligence. (100) But the choice of law rules became more flexible and the proper classification of a claim as contract or tort became less important. The test of 'grouping of contact' was used as a choice of law tool, i.e. the courts had to research which state showed the closest connection with the case as a whole. (101) Several cases decided that this 'contact' approach included the place where the product was to be used and where the defendant knew it would be used. But it follows from the use of this test that several contacts with different states can be found. E.g. in aircrash cases, difficulties exist since contacts are sometimes dispersed over many states.

During the sixties, the test evolved into another one called 'weighting of interests'. This approach takes into account the content and purposes of the potentially applicable rules to the particular case. Since the forum state's substantive law is ordinarily among those potentially applicable, that state is prima facie "interested" (lex fori rule). But this rule applies unless another state has a

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99 See: W. Freedman, "Foreign Plaintiffs in Product Liability Action - The Defence of forum non conveniens", in Quorum Books - New York, London 1988, p.9.

100 See: H.D. Tebbens, op.cit. (fn. 7), p.278.

101 idem.

stronger interest or a more significant relationship with the case. (102)

The case law has elaborated at least four hypotheses where a state is showing "interest" towards the case:

1. A state is interested in giving compensation to all those who are injured or suffered property damages within its border. (103)

2. A state is interested in affording financial protection to its own residents when they are victims of product accident, i.e. the state is the place of residence or domicile of the injured plaintiff. (104)

3. A state is interested in defining the term as to liability on which products may be distributed within its border. The state is the place of distribution. (105)

4. A state is interested in defining the standards of liability for defective manufacture made within its border. The state is the place of manufacture. (106)

However, the question is now to determine which state is the "most interested". A general answer is not possible but it has been suggested that the state in which a product was distributed and caused injury to a local resident, whether the

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102 Restatement Second of Torts.

103 See: e.g. "*George v. Douglas Aircraft Co.*", 332 F 2d 73 (2d cir. 1964), first case analyzing the interests involved in product liability.

104 See: e.g."*Kasel v. Remington Arms Co.*", 24 Cal. app. 3d 711, 101 Cal Rptr 314 (1972).

105 See: e.g. "Mc *Grossin v. Hicks Chevrolet Inc.*", 248 A2d 917 Cal app. (1969)

106 See: e.g. In Re Paris air crash of March 3rd, 1974, DC-10 case, 399 F Supp 732 (Cal 1975).

forum is within or outside that state and whether another state would have a more or less favorable law, has a major '*interest*' in having its law applied. (107) However, a court in front of which a case has been brought, might even decide to apply its own law disregarding other possible legal regimes.

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107 See: H.D. Tebbens, op. cit. (fn. 11), p.279.

II. PRESCRIPTION RULES (Statutes of Limitation)

State jurisdictions in the U.S. have adopted different limitation of action and prescription rules. The limitation period for personal injury actions is usually of rather short time; two or three years in most jurisdictions. On the other hand, the limitation period for a breach of warranty is usually longer. In many jurisdictions it is not clear whether a plaintiff may avoid the application of the personal injury prescription rule by basing its action on breach of warranty. (108)

There are differences in states' approaches to the matter of the beginning of the statutory period. The possible statutory dates for the commencement of the limitation period include: date of injury, date of sale, date of actual and reasonably possible discovery by the plaintiff of his injury, date of actual or reasonably possible discovery of the causal connection between the defective product and the harm suffered; date of actual or reasonably possible discovery of the identity of the potential defendant. (109)

As a general rule, American courts adopt the date of injury as the starting point. But there is no strict uniformity in the approaches of the various state courts: the rather severe "date of injury" rule is the most commonly adhered to. But courts tend to mitigate its effects in cases where injury is gradual or is manifested only at a significantly later date. (110)
When the action is one of warranty, the cause of action starts when the breach of contract occurs, which is generally when the sale is made. (111)

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108 See: W.P. Richmond, op. cit. (fn. 31), p.124

109 See: A.M. Clark, op. cit. (fn. 68), p.207.

110 Idem.

111 See: W.P. Richard, op. cit. (fn. 31) p. 124.

CONCLUSION

The extreme growth of product liability litigation, of damages awarded to claimants and of premiums charged by product liability insurers to manufacturers and suppliers has led to a crisis in American product liability law. Indeed, manufacturers have been facing inflated insurance costs, which increased sales prices, and in some cases they have even been unable to obtain liability insurance, thereby creating a danger for injured purchasers of not being compensated. (112) Many experts are preoccupied with what has been called *"the product liability mess"*. (113) A United States senator went as far as to say that: *"Product liability problems are affecting both the nation's productivity and its ability to compete with exports."* (114)

In late 1975, the United States Government established the 'Interagency Task Force' on product liability, to investigate the cause of the crisis. It emerged that the cause of the adverse effects of product liability vary and also the means to avoid them. The excesses of the doctrine of strict liability in tort was put into accusation, but more generally, the principal cause of the product liability crisis is the tort litigation system which "had become filled with uncertainties creating a lottery for both insurance rates makers and injured parties". (115)

Quite recently, as reaction to the excessiveness of product liability law, the courts have made a significant turn back towards a limitation on plaintiffs' rights to recover in tort for product-related injuries. The beginning of what have

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112 See, A.M. Clark, Product Liability, op. cit. (fn. 68) p.19.

113 See, R. Neely, "The Product Liability Mess - How Business Can Be Rescued From the Politics of States Courts", The Free Press, New York, London 1988.

114 Quoted in Forsight International Journal of Insurance and Risk Management, Sept. 1981.

115 Briefing Report of the Task Force, cit. supra.

been qualified the "*quiet revolution*" can be found in the early and mid 1980's. This new trend favouring to some extent the defendants is illustrated by an increasing percentage of published opinions and courts decisions. (116)

In nearly every significant area of product liability litigation in recent years, courts have become more demanding on plaintiffs who seek to prove that a manufacturing defect originating with the defendant, caused their injuries. Perhaps the most striking example is a recent decision by the Ohio Supreme Court. (117) A plaintiff attempted to show that an original defect in the automobile manufactured and sold by the defendant caused a fire that destroyed the automobile and the plaintiff's home. It was inconceivable five or ten years ago, on the fact of the case, that a state high court would have refused to allow the case to reach the jury. However this is what the court decided to do: stating that the fire might have been caused by other sources not specifically excluded by the plaintiff, the court concluded that "*it is the plaintiff's burden to respond with evidence which will permit the jury to go beyond speculation and render a judgement in accordance with law. Manufacturers are not the insurers of their products.*" (118)

As a result of this "crisis" in the tort litigation system, manufacturers and insurers have urged state legislatures to enact product liability reform measures. Many states have adopted new product liability legislation designed to reform the common law system, but these reforms have not, until now, led to more certainty in the field, since it should not be subjected to a state by state development because of the national effects of product liability law, required by a

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116 See, J.A. Henderson Jr. & T. Eisenberg, "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change", in UCLA Law Rev. 1990, p.475.

117 "*State farm fire & Casualty Co. v. Chrysler Corp.*", 37 Ohio St. 3d 1, 523. N.E. 2d 489 (1988).

118 Emphasize added.

national system of product manufacturing, distribution and sales. (119) With every new session of Congress, legislation is introduced in order to reform product liability law in the United States. In 1991, e.g., three "reform bills" have been presented. They provide for improvements with regard to the situation of product manufacturers, encouraging alternative dispute mechanisms, limiting punitive damages and holding plaintiffs' attorneys liable for frivolous professional liability actions. As in past years, as in the case of past efforts at legislative tort reform, the bills are likely to rest in committee at least until reintroduced in some future session of Congress in the same or similar form. (120)

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119 See dissenting opinion: F.J. Vandall, "Strict Liability, Legal and Economical Analysis", Quorum Books, N.Y. London 1989.

120 Lloyd's Aviation Law, of August 1st, 1991.

PART II: EUROPEAN PRODUCT LIABILITY LAW

Most European States have little specific legislation in the product liability field and surprisingly, product liability has been developed in Europe largely on a case by case approach much like in the common law manner, relying on some general rules governing contractual or extra-contractual liability established in Civil Codes.

Several different approaches have been adopted in order to improve the position of the injured consumer in product liability cases. For example French courts have established a strict liability regime through its case law by placing an irrebuttable presumption of fault on the manufacturer of the product. West Germany has shifted the burden of proof of negligence to the defendant manufacturer. Britain increasingly applied the theory of *"res ipsa loquitur"* to relieve the plaintiff of the difficulty of proving that a manufacturer acted negligently. In contrast, Italy has kept the traditional requirement that the plaintiff must prove a defendant's negligence as an element in a tort action. (121)

Many commentators have recognized that the diversity of approaches in the product liability litigation in European countries have created several undesirable consequences. Consumer protection law is generally inadequate and varies from state to state. The differences in law may equally impede the free movement of goods in intra-EEC trade and distort competition in EEC countries because industries in various member-states face different standards and requirements related to product liability.

The need for harmonization of European national product liability laws has led to legal action by the EEC, to the adoption of a Directive on product liability, by the Council

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121 See J.R. Maddox, "Product Liability in Europe - Towards a Regime of Strict Liability", in Journal of World Trade Law, 1985 p.508.

of Ministers on July 25, 1985. (122) According to article 19 of this Directive, implementation of the Directive, giving effect to its legal provisions in the different member-states must have taken place within three years of its notification to member states, i.e. by July 1988.

Before examining the EEC Directive as such, and for a better understanding of its context and problems, it is necessary to present the basis for product liability in the national laws of France, Britain and West Germany.

CAPTER I. : BASIS FOR PRODUCT LIABILITY IN NATIONAL LAWS

I. FRANCE

A. INTRODUCTION

French courts have established an impressive structure of legal protection for consumers on the basis of few provisions of the 'Code Civil' (CC). Thus, despite the generally recognized doctrine of legislative supremacy, the French courts have developed a judge-made product liability law.

B. PRODUCT LIABILITY REMEDIES

Under the French system, an irrebuttable presumption is used both in contract and tort law, to create strict liability for the professional vendor.

1. Contractual remedies

Case law, through the means of a broad interpretation of article 1641 CC, holding that a seller must warrant the buyer against "hidden defect", gives a specific remedy to victims of defective products. But the theory of "hidden defect" is not the only remedy available since, today, the general

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122 EEC Directive (Council) 85/374, of July 25, 1985, on Product Liability, OJEC of 7/8/1985, No L 210/29.

contractual remedy is equally capable of achieving the same result in matter of compensation.

a. Warranty against "hidden defect" (vice caché)

Obviously the key question is what constitutes a "hidden defect". Case law has defined the notion of "defect" in a very broad manner. Not only manufacturing or production flaws are covered but also inadequate design or construction or other elements which make the product unsafe or unfit for its intended use. An important decision of 1954, followed by several others, established the general principle, on the basis of art. 1645 CC, that a professional vendor who sells a defective product to a consumer is irrebutably presumed to have acted in bad faith and is therefore liable, even though he can prove that he could not have known or could not be reasonable be expected to know of the defect. (123)

Despite its undeniable effectiveness, the action for "hidden defect" has certain limitations which sometimes prevent victims from being compensated. Procedurally, art. 1648 CC gives only a short-time limit for action to be brought in court. Although the Code Civil does not lay down an explicit limit, courts usually define the "*bref délai*" as only a few months from the discovery of the defect. Furthermore, in order for the action to succeed plaintiffs have to prove not only the existence of the defect but also the fact that the defect was "hidden" for the buyer and that it existed before the delivery of the product. (124)

In order to avoid these quite restrictive requirements of the action based on "hidden defect", victims sometimes choose to base their action on general contractual liability.

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123 Cass. CIV 1954 JCP 55 II 8565; see equally P. Malinvaud, "La responsabilité civile du fabricant dans les Etats-membres du Marché Commun", Colloque Fac. Droit Sc. Po. ex Marseille, 1974.

124 G. Viney, in Comparative Product Liability, UK Comparative Law Series, Vol. VI, 1986, p. 77.

b. General contractual liability

If a defect, hidden or not, comes to the knowledge of the buyer after delivery, general principles of contractual law may impose liability on the seller. By this means the victim can avoid the conditions based specifically on the "hidden defect" jurisdiction, mentioned above, in particular the short prescription imposed by art. 1648 CC.

The general liability for products is today widely defined as shown by a judgment by the French Cour de Cassation of 1978 which confirmed unambiguously that the manufacturer or seller "*has the duty to deliver an effective product appropriate for the user's needs.*" (125) Pursuant to this jurisprudence it is the consumer's need which determines in a merely unpredictable manner the "effectiveness" of the product.

More recent reported decisions seem to have softened this duty by holding that the product must "*be appropriate for its prescribed use*" which makes the criteria of "effectiveness" much more objective. (126)

The general contractual liability is not only useful to avoid the restrictive procedural principles of the "hidden defect" action but also to cover products which are perfectly made but cause damage because of inadequate information concerning their characteristics or use. The duty to give advice and information is not linked only to dangerous products. Any object needing care when used because of the damage it may cause, its complexity or the possible impact of external forces on its ingredients or its characteristics create a duty to inform. Administrative regulations have intervened in some areas in order to spell out and reinforce this duty to provide information especially in relation with food products. (127)

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125 1er civ. 22 nov. 1978, JCP 1979 II 19139.

126 Com. 15 janv. 1980, JCP 1980 IV, p. 125; Com. 15 juin 1983, D 1984 IR p. 175.

127 See. G. Viney, op. cit. (fn. 124).

Despite the fact that the Cour de Cassation has suggested that this duty to inform is not absolute and in principle nothing but a duty to do "one's best", courts have been particularly strict where the product was completely new and where the consumer was a layman with no special knowledge. They applied the same principle even when the consumer had professional skills, but in an area different from that of the product manufacturer. However, in this case the producer would not be liable if the missing warning was one of which a qualified buyer should normally be aware. As a consequence of the evolution of the French courts' case law, two statutory modifications have been introduced into the French law concerning the consumers' security. (128) These are consecrations of the consumers' rights to safe products, but they only provide for obligations concerning prevention of damages, creating commissions of security for consumers, and rules to respect when a product must be taken out of the market. These statutes have a continuation in the EEC Directive on Product Liability.

By developing the general action based on contract and the special rules of "hidden defect", courts have, though, achieved protection of the buyers of products against damage caused by defective production or acts of negligence on the manufacturer's side.

c. Extension beyond parties in privity

In theory all these contract-based actions can be exercised only where there are direct contractual relations between producer, seller and ultimate consumer. Since these relations are rare in modern industrial society, because of the distribution system, courts tried to avoid or circumvent the restrictive privity rule (129) which would, in a realistic

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128 Loi No. 7823 of Jan. 10, 1978 (so-called "Loi Scrivener"), and Loi No. 83660 of July 21, 1983 (so-called "Loi Lalumière").

129 See in general: H.,L.,J. Mazeaud and F. Chabas, "Traité", tome III, premier vol., 6e édition no. 2190.

situation bar the final consumer from suing the manufacturer as other contractual links intervene (consumer-retailer, retailer-wholesaler, -manufacturer). In order to protect more efficiently the final consumers' rights and interests the Courts created the so-called "action directe".

This action is available in case of "hidden defect" but also for general contractual liability. The ultimate purchaser of the product has the same rights as if he had a direct contract with the manufacturer. There are several theoretical explanations or this direct action, i.e. that *"the warranty runs with the good"*, or that the right of action is tacitly contained in the respective sale and resale agreement.
But so far none of these theoretical explanations has been adopted explicitly by the courts which have never tried to justify theoretically their pragmatical creation of the "action directe". (130)

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130 See H.D. Tebbens, op. cit. (fn. 11), p. 83.

2. Delict remedies

a. General Delict Remedy

In French law, the scope of delict remedies for product damages is generally narrower than in other legal systems. This is due to the apparent preference the courts gave in general to contractual actions. Instead of having recourse to delictual provisions, the courts preferred to enhance the contractual regime. This evident prerogative of contractual responsibility found a clear manifestation in the Cour de Cassation decision of April 6, 1927 where the Court stated the incompatibility of parallel actions in tort and in contract (*Règle du non-cummul des responsabilités contractuelles et délictuelles*). (131) Consequently, in French law the plaintiff is barred from using tort action when the contractual action has been invoked.

However, there are still important circumstances where the delict action might be a necessary recourse, particularly where the victims are mere users (and not buyers) of a product and persons injured by a product being used by another (bystanders).

Action in delict is formally based on art. 1382 CC which requires the plaintiff to prove negligence on the manufacturer's part or that of one of his employees. But French courts have created an irrebuttable presumption of fault on the part of the defendant so that actually, finding

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131 Cour de Cass., 6 April 1927, D. 1927, I, 111; and 9 March 1970, Bull Civ, I, no. 87.
Before 1927 a part of the doctrine and of the jurisprudence was in favor of a possible cummulation of both actions, as one was based on elements of "droit commun", the other on the contractual link of privity. The delictual responsibility was seen as "d'ordre public", whereas the contractual responsibility was viewed as "ex pactum".
The other opinion argued that the specific provisions established by the legislator intended to derogate the droit commun provisions of delict and consequently that the victim could not at the same time invoke the privity of contract and delict.
The Cour de Cassation set an end to this dispute.

of negligence is often based on the same ground as would be used to justify the imposition of contractual liability. Indeed, the Cour de Cassation has, on many occasions, held that the mere fact of putting a defective product into circulation provides a sufficient basis for the liability of the manufacturer to a third party, (by reference to art. 1382 CC). Thus, the "hidden defect" is also a remedy for third parties. But, this principle is strictly limited to manufacturers and does not apply to sellers who are not equally the manufacturers. (132) Inadequate information given can equally lead to the contractual liability of the manufacturer to the buyer or to his delictual liability to third parties. (133)

b. Liability for "things under control"

By reference to article 1384 al. 1 CC., a manufacturer might be held to have kept control over the product when it has been delivered, and may as such be liable automatically for damage to third parties caused by some internal property of the product. This concept of liability as "gardien" has been transformed by courts into a general device for the introduction of risk liability in those areas of modern society where dangerous objects cause accidents. A distinction is made between "garde de la structure" (control over the internal dynamism) (134) and the "garde du comportement" (control over the external impact or behavior). This means that manufacturers are held liable for damages caused by an

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132 Civ. 26 avr. 1983, Bull Civ III, No. 90, p. 71.

133 See G. Viney, op. cit. supra (fn. 124).

134 This was decided in the famous so called "arrêt oxygène liquide" (exploding oxygen bottle), Cass. Civ. 2, 10 juin 1960, D. 1960, p. 609. The same result has been defended in the case of an exploding battery, Cass. Civ. 12 nov. 1975, JCP 1976 II 18479.

internal or inherent flaw which suggests an insufficient control of its structure although it is the buyer who actually exercises material control over the thing and its behavior at the moment of the incident. (135)

C. CONDITIONS OF LIABILITY

There are no specific rules fixing the "dommage réparable" when it is caused by a product. Consequently, the general rules have to be applied. It should be noted, as far as the attributable damages are concerned, the French legal practice is generous compared to the other European juridical systems. French courts grant compensation for "dommage moral" and non pecuniary loss i.e. damages caused by physical and mental suffering, loss of enjoyment of life, precium doloris, etc. may be repaired. (136) The Cour de Cassation has granted compensation for loss of opportunity and loss of prospective earnings. There is theoretically no limit to the damages which may be awarded with the exception, in particular cases, where there is a clause in the contract setting such a limit. (This will, however, not be valid when "hidden defect/vice caché" is involved). (137)

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135 See in general: Mazeaud, cit. supra (fn. 129), No. 173-207.

136 See generally: "International Encyclopedia of Comparative Law" XI, Chap. 9, McGregor.

137 See supra.

D. DEFENSES

1. Exemption and limitation clauses

In the area of delictual liability, there is a general and traditional barrier on all exemption clauses. (138) All contractual limitation of liability asserted by manufacturers against non-buyers, victims of defective products are void. In the area of contractual liability, case law accepts in principle that clauses limiting liability may be valid. However, courts have created special rules to refuse to give effect to certain types of clauses. This is, e.g., the case of the professional seller, who is presumed by the courts to be in bad faith, and consequently submitted to article 1150 CC. prohibiting all limitation of reparation in case of intentional wrongdoing. (139) However, where both parts are professionals in the same field of activity, the limitation clause will be accepted. (140) Being originally case-law, these principles have been confirmed by different laws and regulations. (141)

2. Development Risks

Although there have not been many cases concerning this matter, the French courts seem to admit development risks as a defence available to the manufacturer. (142) However, many

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138 See: H.L. Mazeaud et F. Chabas, op. sup. supra (fn. 129), 2583.

139 See G. Viney, op. cit. (fn 124), p. 82.

140 Cass. 3ème, 30 Oct. 1978; Cass. Com. 6 Nov. 1978, JCP 79 II 19179. and see equally: G. Viney, "Traité de Droit Civil IV - Les obligations, La responsabilité", LGDJ Paris 1982, at p. 848.

141 Loi 10 janvier 1978, so-called "Loi Scrivener", décret du 24 mars 1978.

142 See J. Revel, "La Prévention des Accidents Domestiques: Vers un Régime Spécifique de la Responsabilité du Fait du Produit?", D.S. 1984, Chr. p 69.

authors reject the possibility for manufacturers to use the "development risk" defense against a product liability action and consider that manufacturers of products have to bear the burden of such risks. (143)

3. The fault of the victim

The question whether or not the victim's fault in case of damage caused by a product can be used as a defense by the manufacturer is not absolutely clear. Certain courts apparently consider that the victim's contribution can exonerate the manufacturer from its liability totally or partially, whether the fault is the only cause or one of the causes of the damage. (144)
But the law of July 21, 1983, which has been enacted in order to establish a special system of producers' liability for unsafe industrial products, reads in its art. 1:

> *"Products and services must, when used normally and under conditions reasonably foreseeable by a professional, be as safe as may legitimately be expected and not injure anyone."*

It is therefore suggested that only a high degree of contributory negligence on the victim's part will leave the producer free of liability.

4. "Force Majeure" and Act of God

Under French law, "force majeure" has been developed as a cause of exoneration in the domain of contractual obligation. Exceptions to this rule are very rare (144 bis). The relevant

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143 Consult e.g. Ghestin, "La Directive Communautaire du 25 juillet 1985 sur la Responsabilite du Fait du Produit Defectueux", D.S. 1986, p. 146; See dissenting, J. Revel, op. cit. (fn. 142).

144 J.Revel, op. cit supra (fn. 142), p. 71.

144 bis One of the only exceptions is the contract of transport of persons (contrat de transport de personnes). See G. Viney, "Traité de Droit Civil", LGDJ, Paris 1982, p. 478.

provisions are articles 1147 seq. CC. The principles have been extended by the jurisprudence to the law of delict. The main criterion is the unforeseeability of the cause of the damage. This criterion has been interpreted restrictively by the courts (145) so that unforeseeability is only recognized in cases where the cause of the damage lies "outside of the sphere" of the person who has caused the damage. Furthermore this event must be "irresistible" (146), which means that the event was unavoidable at the moment when the damage occurred. (147)

E. PROCEDURAL RULES: JURISDICTION AND CONFLICT OF LAW

1. Jurisdiction

In Europe, the "*Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*" (Brussels Convention 1968) (148) separates rules on jurisdiction applied to Common Market litigation from all other proceedings with an international character. This convention abolishes the so-called "*exorbitant fora*" rules with regard to defendants domiciliated within the EEC and establishes uniformed jurisdiction rules. (149) Pursuant to art. 2 Convention

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145 Cass. Civ. 10 oct.1972, D. 1973, p. 378; Cass. Crim. 18 Dec. 1978, JCP 1980, p. 19261; Cass Civ. 2e, 23 mai 1973, Bull Civ. II, No. 173. Cass Civ. 21 mai 1979, JCP 1979 IV, p. 248.

146 Cass Civ. 10 oct 1972, D 1973, p. 378.

147 See generally: G. Viney, op. cit. supra (fn. 140).

148 Brussels Convention of 27 Sept., 1968, in force since Febr. 1, 1973, OJEC 1972 L 299-32. See, C.M. Radtke & Lamy, Veron, Ribeyre, "Problèmes pratiques soulevés par l'application de la Convention de Bruxelles du 27 Septembre 1968", in Gaz. Pal. 14 sept. 1989, p.460.

149 Every individual State has its own so called exorbitant national rules governing the jurisdiction of its courts.

"(...) Persons domiciliated in the territory of a Contracting State shall irrespective of their nationality be sued in the court of that State".

However, there are special situations where a defendant may be sued in a court other than that of his domicile. Concerning product liability claims, section 3 of art. 5 Convention is particularly relevant since it provides that in matters involving tort, delict or quasi-delict it is allowed to sue a defendant in the courts of the place where the harmful event occurred.
When the product liability action involve a non-EEC defendant, the jurisdictional rules of the Convention do not apply and the claim is governed by the exorbitant national jurisdictional basis available in the individual States.

In France the rule is the following: A French citizen may sue in a French court even if there is no connection between the cause of action and the court. Jurisdiction rests on the basis of the plaintiff's nationality pursuant to art. 14 and 15 of the French CC. (150)

2. Conflict of Law

The doctrine of "lex loci delicti" has been adopted explicitly by the French Cour de Cassation in its landmark decision in "*Lautour c. Guiraud*" (1948). (151) Although there are very few product liability cases involving choice of law questions, an old aviation product liability case is reported in the legal literature (152). In that case involving the crash of a California-made helicopter in a French airport and causing the death of its French pilot, the court held that the law of the place where the wrong was committed, in this

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150 Y. Loussouarn et P. Bourel, "Droit International Privé", Précis Dalloz 1988, p. 715.

151 Cass. Civ. 25 mai 1948.

152 H.D. Tebbens, op. cit. (fn. 11); and: Trib civ. Versailles, 12 mars 1957, RFDA p. 216.

case California, would apply. After stating this principle the court said that, if a defect in the helicopter could be imputed to the manufacturer his liability would have to be judged by reference to the law of California. However, in casu the court did not find any imputable design defect and dismissed consequently the action and the case did not provide actual application of the law of California pursuant to the lex delicti criteria.

When there is no privity of contract between the victim and the defendant, French private international law is governed by the Convention of The Hague of October 21, 1972. The regulation concerning conflict of laws follows from articles 4, 5, 6, and 7 of the Convention which establishes that in the choice of the applicable law, no single contract should be determinative and that the applicable law should always be reasonably foreseeable by the manufacturer. The Treaty designated two principal "connecting factors" in order to establish the applicable law : 1) location of the injury and 2) residence of the victim, one of which would be the place of applicable law when coincidental with other factors. (153)

Conclusion

The trend in French product liability law is clear: by developing principles of liability, the courts, more or less effectively backed by statutes, have increased the level of protection for victims of injury or loss caused by defective products to a very high degree. In fact, often it is close to strict liability regimes despite the very different legal background and theoretical approach. Of all the European countries French legislation is likely to be affected least by

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153 W.W. Park, "International Product Liability Litigation : Choosing the Applicable Law", p.844, in International Lawyer 1978.

the EEC Directive: although for defective products in France there is no strict liability in the true sense of the word, the way in which the Civil Code has been interpreted by the courts has led, in practice, to very close solutions already today.

II. GERMANY

A. INTRODUCTION

Like the French Civil Code, the German Civil Code, the Bürgerliches Gesetzbuch of 1900 (BGB), and the Commercial Code, the Handelsgesetzbuch of 1897 (HGB) base liability generally on fault. (149) With one major exception concerning drugs, Germany has not developed any particular legislation on product liability. (150) Instead, it was the Federal Court (Bundesgerichtshof, BGH) which has created new liability concepts by interpreting the basic principles stipulated in the Codes. General contract law provides the consumer with weaker protection than delict law, but the inequality of remedies is improved by the fact that the plaintiff may sue in contract and in delict simultaneously. Contrary to French law the German law does not know the so-called principle of "non-cumul" of contractual and delict based actions. (151)

B. PRODUCT LIABILITY REMEDIES

1. Contractual Remedies

The German law imposes on the seller an objective warranty for non-defectiveness and a guaranty for the existence of the promised qualities and characteristics of the product, art. 459 BGB. When such a defect exists, the buyer may rescind the contract (Wandelung) or ask for reduction of the purchase price (Minderung). In the case of standardized merchandise the buyer may also ask for another non-defective product, art. 480 BGB. These rights are completely independent from any fault on the part of the seller, and can be alleged

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149 See: J.R. Maddox, "Product Liability in Europe, Towards a regime of Strict Liability", in Journal of World Trade Law 1985, p. 508.

150 See this particular law: Act of the Revision of the Law Relating to Pharmaceutical Products of August 24, 1978.

151 See above.

by the buyer unless the defect was known to him at the moment of the purchase.

However, some duties of the seller have no statutory basis. Case-law developed by the BGH has established that generally the manufacturer is under the duty to protect and not to cause damage to the person and property of the buyer. These unwritten contractual duties exist in principle only vis-a-vis the buyer, but the German Court has extended them to third persons close to the buyer such as family members or employees. (152) Compared with the warranty established by statutes under art. 459 BGB the liability for breach of contractual duty of care presupposes fault on the side of the seller.

The notion of strict contractual liability is not unknown in German law. Strict liability may arise under art. 459 II BGB with art. 433 BGB when a seller has warranted expressly the existence of certain product characteristics and these characteristics are missing. In that case the seller has *willingly* increased the scope of his warranty beyond his legal warranty obligations. The seller must have warranted the existence of certain characteristics in such a way that the buyer may reasonably understand that the seller is intending to cover the buyer's damage in case of absence of such characteristics (Gerantiehaftung). This liability for breach of contractual warranty of quality and performance (zugesicherte Eigenschaft) is strict and, thus, independent from any fault on the part of the seller. (153) Courts have accepted the existence of such a far- reaching warranty only in exceptional cases. There is no general acceptance of tacit warranties, e.g. general allegations made only in advertisements are not sufficient for the assumption of this kind of warranty. (154)

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152 See O. de Lousanoff, K.P. Moessle, "German Products Liability Law and the Impact of EEC Council Directive", in The International Lawyer 1988, p. 669.

153 See H.D. Tebbens, op. cit. (fn. 11) p. 59. See also O. de Lousanoff and K.P. Moessle, op. cit (fn. 152) p. 687.

154 BGH judgment of June 21, 1967, BGHZ 48, 118.

2. Delict Remedies

As a general rule, the action in delict presupposes proof of fault. Art. 823 I BGB creates liability for any willful or negligent act causing illegal damage to life, body, health, freedom, property or certain other rights of another person. (155) Furthermore, art. 823 II BGB creates liability in case of infringement of a statutory provision intended for the protection of others (Schutzgesetz). E.g., the non-application of statutory safety standards for technical or mechanical equipment may be such an infringement giving rise to a delictual action in German law.

An additional and broader basis of product liability can be found in art. 826 BGB dealing with damages intentionally caused by conduct "contra bonus mores". The mere likelihood that damages will be caused is enough to lead to liability: e.g. when a manufacturer continues production and marketing of a product although he knows that some damaging events have already occurred suggesting the existence of a defect in the design or construction. (156)

Furthermore one should be aware of the weakness of contractual actions based on contractual warranties. In fact, Art. 477 I stipulates such a short prescription period that in almost all difficult factual or legal question this period hinders effective realization of the claim: in all cases concerning moveables 6 months, concerning real estate 1 year.

155 Art. 823 I BGB has a limited scope since it enumerates limitatively the kind of damage which may lead to liability. This is fundamentally different from the French law, where in 1382 CC is stipulated generally that any damage caused by another person must be repaired.
The "certain other rights" must not be understood as general clause, but as inclusion of certain rights, recognized by the courts as being of the same value and degree as "life, property, health" etc. The courts generally protect with reference to this formulae the possession, the name, the honor, the marriage and commercial business. See in particular Palandt, Thomas, art. 823, annotation 6 a-g.

156 See H.D. Tebbens, p. 67, op. cit. (fn.7).

The requirements of art. 823 BGB have led to difficulties for victims of defective products to recover damages. When the plaintiff could not prove that the manufacturer had committed a specific negligent act or omission causing the defect, his case would have failed. This is due to a large extent to the formulation of Art. 831. This article allows the manufacturer to escape liability if he proves, first, that he had taken all proper care in selecting and supervising the worker or employee through whose fault the product has become defective, or second, that his production process and procedures were up to date and supervised systematically and carefully. This much criticized rule was inserted into the German Code enacted in 1900, in order to protect the expansion of infant industries. (157) However, such a broad protection of the manufacturer who in almost all cases of modern production procedures based on work-sharing or delegation will be able to refer to the provisions of art. 831 and consequently in almost no case be liable for his product defects seems to be inequitable today. In response to this observation a decision by the Bundesgerichtshof of November 26, 1968 has given a new scope to the basic liability rules of Art. 823 and has prevented easy reliance by manufacturers on Art. 831. (158)

This so-called "Fowl-pest" case (Hühnerpest-Fall) brought a revolutionary change in German product liability law. The case involved a virus vaccine manufacturer whose vaccine was administered by a vetenary surgeon to the chickens of the plaintiff, a poultry farmer. The vaccine being defective, a great number of the chickens died. The evidence did not reveal whether the defect in the vaccine was due to the fault of a particular employee or to an inadequate production system which would constitute a fault of the manufacturer. In previous cases the German Supreme Court had systematically

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157 See in particular: H. Seiler, Die deliktische Gehilfenhaftung aus historischer Sicht, Juristenzeitung 1967, p. 525.

158 BGHZ 51, 91; see equally R.H. Mankiewicz, Product Liability - a judicial breakthrough in West-Germany, the decision of the Bundesgerichtshof of November 26, 1968, in International and Comparative Law Quarterly 1970, p. 99.

refused to grant a "direct action" based on the existence of an implied contractual warranty between the manufacturer and the last buyer. (159) Consequently the Court has rejected the argument of the plaintiff in his claim against the manufacturer on this ground. However, after noting that

> *"the vaccine (...) was defective and had caused the sickness of the plaintiffs chickens,"*

the Court stated that:

> *"although as previously stated, the rules of the law of contract do not apply one must start with the premise that the defendant is at fault. (...)*
> *If somebody uses an industrial product and suffers damage with respect to one of the rights specified in Art. 823 I BGB, because the product has been produced defectively, then it is for the manufacturer to elucidate the events which caused the defect and to establish that they did not involve any fault on his part."* (160)

The result of this ruling is to shift the burden of proof to the manufacturer. The latter has now to prove that he is not in fault. The Court has based his decision on the fact that the plaintiff can generally not have access to essential evidences which are possessed only by the producer. The rule of the "Fowl-Pest Case" has considerably reduced the scope of Art. 831 I BGB since the manufacturer is obliged to explain the causation of the defect. Having showed this causation he is allowed to prove that it was not linked to any fault of his own or of his employees or agents, and eventually that the negligent employee or agent had been selected or supervised with all due care. If the cause of the defect remains unknown or doubtful in any respect, the manufacturer cannot escape from liability. Moreover, even if he can explain the cause he may escape from liability only by proving that the defect was

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159 Until then a part of the doctrine and some appeal courts had proposed to deal with such cases on the bases of an alleged tacit protective effect for the third person flowing from the contract between buyer and manufacturer (Vertrag mit Schutzwirkung für Dritte). Others had proposed a quasi-contractual particular link between manufacturer and victim despite the non-existence of an explicit contract. This concept was based on confidence or "social contact" etc. The BGH rejected both approaches.

160 R.H. Mankiewicz, translation in Neue Juristische Wochenschrift 1969 at 274.

due to force majeure or due to an act of a third party, or that he is not liable for his employees' fault because they have been carefully chosen and supervised. The manufacturer has consequently the complete burden of proof for his innocence.

3. Statutory exception: The German Drug Act (Arzneimittelgesetz)

In 1976 the West German Parliament enacted a new law responding to a growing public demand concerning damages caused by drugs. (161) This statute has established the first unequivocal case of non-fault liability in German Law. The mere fact that the use of a drug caused damage suffices to hold the producing enterprise responsible. The particular circumstances of production of the drug or the fact that the enterprise was using or not its own substances or materials provided by other suppliers has absolutely no importance. Whoever assumes the function of either producing or supplying patients with medicine is liable for all injuries they may lead to. (162) This exceptional regime, due to famous drug accidents in Germany, has, however, not been extended to other legal fields.

C. CONDITIONS OF LIABILITY

1. Damage Giving Rise to Liability

Damage recoverable under contract law and in tort differ as far as it concerns purely commercial loss. (Primärer Vermögensschaden). Whereas the contractual remedies encompass the recovery of economic loss alongside with property damage and personal injury, under delict law mere economic loss cannot be recovered in German law since Art. 823 I BGB

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161 BGBl. 1976 I1 2445 (Federal Official Journal).

162 See Spiros Simitis, Product Liability: the West-German Approach, in Comparative Product Liability, p. 99 seq., ed. by C.J. Miller, United Kingdom Comparative Law Series Vol. 6, British Institute of International and Comparative Law, 1986.

specifies the protected interests: life, human body, property and any other (protected) rights. (163) Liability under a "protective law" (Art. 823 II BGB) is more flexible than the exhaustive list of Art. 823 I BGB since it depends on the scope of this "protective law". When the scope is large or not clearly limited, business purchasers might take advantage of it and eventually recover pure economic loss in tort from a manufacturer in the absence of privity of contract. (164) Economic loss is also recoverable when the damage was caused by an act or in a manner which is unconceivable with recognized moral standards within the meaning of Art. 826 BGB. Reparation can equally be required in case of economic loss following physical damage (in the sense of Art. 823) under Art. 842 BGB.

Concerning pain and suffering, particular remedies are provided for in Art. 847 BGB if the plaintiff has a cause of action based on Art. 823 I or II BGB. (165) This is a personal right of action of the victim; it cannot be transferred or inherited.

2. Defective Product, Notion of Defect

In order to define the duties of the manufacturer one distinguishes between design defects, manufacturing/quality control defects and instruction defects. The manufacturer is obliged to design its product or have it designed in such a way that an average user will be able to use it without any unnecessary risk. A defect in design (Konstruktionsfehler, Entwicklungsfehler) exists when *"during the design and the testing phase, a mistake is committed that results in a*

163 For the scope of Art. 823 I BGB see above at fn. 155; Compare BGH of May 14, 1974, in NJW 1974, 1503.

164 See H.D. Tebbens, op. cit. supra (fn. 11) p. 82, see also W. Rosener and E. Jahn, in "Product Liability in Europe Conference - Germany", p. 69, Kluwer 1975.

165 See in particular: K. Sommerland, "Pretrial and Prehearing Procedures in Major Commercial Product Liability Litigation in Germany", in International Business Lawyer, Jan. 1990, p. 19 seq.

product having a characteristic that later causes harm." (166) The design is considered defective when the defect was avoidable and under existing scientific and technical knowledge. The extent and standard of the duty of care of the manufacturer depends on various factors such as the type of "average" user of his product, the conditions of use and specific damage emanating from the product. (167) The standards for the manufacturer's duty of care may be specified by administrative law provisions; this is e.g. the case in the field of aircraft-manufacturing.

As far as it concerns manufacturing and quality control defects (Fabrikationsfehler), the manufacturer has also the duty to avoid any deviation of its product from his own specification. The scope of necessary measures depends on the product and the *state of the art* of quality control in a given industry. (168) The general rule is that the greater the risk, the more careful and precise the precautions in producing, planning and controlling must be. (169)

Furthermore, there is an obligation to inform and to warn on the part of the manufacturer. An "instruction defect" or failure to warn exists when, first, the directions for use are incomplete or inadequate, second, the use of the product involves certain dangers or when the user may be exposed to side-effects and no adequate warnings are given. The instructions must be correct, precise and understandable to the average user. The user must also be informed about the risks linked to the use of the product including normal and

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166 O. de Lousanoff and K.P. Moessle, op. cit. supra (fn. 152) p. 674.

167 See generally N. Reich, "L'Introduction de la Directive en RFA", in Colloque des 6 et 7 Novembre 1986 "Sécurité des Consommateurs et Responsabilité du fait des Produits Défectueux", LGDJ 1987.

168 See Von Huelsen, "Product Liability in Doing Business in Germany", sec. 38.02, B. Ruester (ed.) 1986.

169 O. de Lousanoff, op. cit. supra (fn. 152) p. 675.

foreseeable abuse. The manufacturer has to take precautions that the warning reaches the actual user. (170)

German Law considers that once a product has been brought into circulation, its manufacturer has a duty of post-marketing surveillance (Produktbeobachtungspflicht). The manufacturer must observe its product for hidden qualities and dangerous consequences of its use. The obligation to keep a product under observation can lead to a further obligation to instruct and possibly, to a duty to recall the defective product and to eliminate the hazard created by its use. (171)

In an important decision the German Federal Supreme Court (BGH) has enhanced the post-marketing duty to observe the product which normally is restricted to the manufacturer's own products. Pursuant to this decision it may even be extended to a product's performance if it is combined with other manufacturers' products. (172) This decision concerned motorbike component parts. The Court held that the motorbike manufacturer is obliged not only to observe the market for component parts, but if necessary to warn against the use of such parts with his product.
The Court creates, thus, the far-reaching duty to actively observe the spare-part market, to study the impact of used spare-parts on the safety of its own product and to provide the user, by adequate means, with sufficient warning. This goes far beyond current product liability obligations.

D. BURDEN OF PROOF

The development of the German severe product liability regime has been achieved by procedural means, namely, as we have seen (173), the shifting of the burden of proof from the injured party to the manufacturer. The plaintiff has still to

170 H. Kötz, "Deliktsrecht", Frankfurt/Main, 1983, p. 210.

171 K. Sommerland, op. cit. (fn. 165) p. 23.

172 Judgment of Dec. 12, 1986, BGH in NJW 1987, 1009.

173 See supra.

prove that the injury was caused by a defect in the defendant's product. However, the burden of proof is alleviated by the admissibility of circumstantial evidences (Beweisanzeichen, Anscheinsbeweis), e.g. when the circumstances of the occurrence of an accident show that the product was defective, such circumstantial evidence will be sufficient proof. Likewise, proof is sufficient in a case where it is commonly accepted that the accident would not have happened without the product's deficiency. The defendant can still show that the accident may also have been caused by an atypical event, or an alternative causation. Then, the presumption created by the circumstantial evidence is rebutted and the burden of going forward and eventually the burden of proof is again placed upon the plaintiff. (174)

German Product Liability remains, thus, a system of liability based on fault and is not a system of strict liability in the true sense of the word. The jurisprudential shift of the burden of proof improves the position of the plaintiff but leaves some effective means of defense to the defendant. However, in practice it will rarely be possible to the manufacturer to prove in a conclusive way the inexistence of any fault, omission or negligence in his "sphere of business organization". (175) So, the defendant manufacturer has to prove that he did not act negligently, i.e. that he did not breach the duty of care and that in spite of the defect he was not at fault. Not only must he must prove that he did not commit any fault but also that all his employees involved have been selected and supervised in such a way that individual mistakes are not possible. (176)
Such a proof is evidently very difficult. This is the reason why some authors characterize the German system of product liability as "close-to-strict liability". (177)

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174 O. de Lousanoff et K. Moessle, op. cit. (fn. 152), p. 678.

175 See H. Kötz, op. cit. supra (fn. 170), p. 203.

176 W. Rosener and E. Jahn, op. cit (fn. 164), p. 76.

177 O. de Lousanoff and E. Moessle, op. cit supra (fn. 152), p. 676; and W. Lorenz, "Some Comparative Aspects of the

E. DEFENDANTS

1. Manufacturer of Finished Products and Component Parts

The answer to the question whether a manufacturer is liable for defects of the finished product or of component parts thereof derives from a case by case analysis of the respective duties of care on the part of manufacturers of components and finished goods.

The manufacturer of the finished product is liable for defects of his product as a whole. (178) Liability may also arise from defective component parts, if they have been constructed in accordance with the manufacturer's plans and directions, if the component parts were not carefully selected, or if the parts were not cautiously tested or monitored before integration into the finished product. (179) However, courts have not drawn with absolute certainty the dividing line between the manufacturer who is responsible for the design and manufacturing of the finished product as a whole and the mere assembler who combines parts produced by another company into a finished product. The German Supreme Court in a decision in 1978 dealing with the manufacturing of derricks, held that the company who assembles, slidely modifies and completes prefabricated units, designed and manufactured by a renowned producer was subject only to a reduced duty of care, even if acting as a "quasi-manufacturer". (180)

European Unification of the Law of Products' Liability", in Cornell Law Review 1975, p. 1005.

178 Cf. BGH, judgment of Mai 14, 1985, in NJW 1985, 2420.

179 See BGH judgment of Janary 18, 1983, BGHZ 86, 256.

180 BGH judgment of June 14, 1977, in BetriebsBerater 1977, 1117.

2. Dealer and Importer

As a general rule, a dealer is not subject to product liability in delict under German law. A dealer has normally no legal obligation to control or to test products with regard to manufacturing defects. However, certain categories of dealers, such as dealers with special expertise (e.g. franchise car dealers) may have to inspect the products to be sold more carefully. In cases where specific circumstances indicate potential defects, e.g. if the same type of product has already caused damage, or if there are indications that the product may have been damaged during transportation, dealers have the duty to take some adequate precautions.

The courts respond generally to the problem of delimitation of the duties of dealers on a case by case basis. As far as it concerns dealer-importers, they may be subject to a duty of care similar to that of the German manufacturer, since the imported product may have been manufactured in a country with safety standards different from those required under German law. This jurisprudence is justified by the German courts with regard to the difficulty to reach foreign producers of defective products in countries outside the EEC or North America. (181) However, the German Supreme Court held that importers selling products manufactured in EEC Member States will be treated like ordinary dealers selling goods produced in Germany. (182) Nevertheless, a careful analysis of this decision concerning a French bicycle with a defective design could suggest that even importers of EEC products may have to examine the imported goods to some extent. The exact scope of an importer's duty to care was expressly left open by the Court. More recently, the German Federal Supreme Court, once again confirmed that an importer of EEC manufactured goods is generally not liable for design, manufacturing or quality control defects. (183)

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181 O. de Lousanoff and K.P. Moessle, op. cit. (fn. 152) p. 681.

182 BGH judgment of Dec. 12, 1979, in NJW 1980, 1219.

183 BGH judgment of Dec. 12, 1986, in NJW 1987, 1009

F. DEFENSES

1. Development Risks

Under German Law manufacturers are not liable for one category of design defects, the so-called development risks, i.e. dangers inherent to the product that considering the "state of art" prevailing at the time the product was designed, tested and put into circulation were undetectable and unavoidable. For example, side effects of pharmaceuticals (184) or cosmetics are sometimes, in spite of intensive testing, technically or scientifically not detectable. (185)

2. "Run-aways" (Ausreisser)

A manufacturer can be discharged from its liability if he can prove that he had fulfilled all his duties, but despite his efforts a defect occurred. A single *exceptional* defect may, thus, be regarded as an unavoidable "Ausreisser" which could not be discovered despite all necessary controls being taken. (186)

3. Disclaimers

Product liability under the law of delict cannot be disclaimed with regard to users or consumers of the product. To a limited extent, however, courts recognize that the manufacturer may disclaim his liability with regard to his direct professional buyer if that person is a merchant.

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184 Before the 1976 German Drug Act, imposing a strict liability regime upon drug manufacturers.

185 BGH judgment of Febr. 13, 1975, BGHZ 64,30 (1975) Tranquilizer for pregnant women led to birth defects in a great number of cases.

186 O. de Lousanoff and K. P. Moessle, op. cit. (fn. 152), p. 675.
See equally: Palandt, Kommentar zum Bürgerlichen Gesetzbuch, comment by Thomas, Art. 823, 16 D dd.

Warnings attached to the product or the packaging never have the effect of valid limitation or disclaimer of liability. There is nevertheless one exception under the legal concept of "acting at one's own risk". Art. 254 in connection with Art. 823 BGB allows the producer who had warned in an adequate form, to be exempted in cases where the victim has voluntarily created or contributed to the creation of the danger. If and to what extent the responsibility of the victim has to be shared with the manufacturer is up to the courts' appreciation. (187)

In German contract law disclaimers as means to avoid liability are generally possible but liability restrictions are not enforceable if they violate principles of good faith or if they are not sufficiently clear. Moreover the possibility to incorporate restriction in standard business conditions (Allgemeine Geschäftsbedingungen) is very limited by consumer protection law. (188)

G. PROCEDURAL RULES

1. Forum

In German Civil Procedure Law (Zivilprozessordnung, ZPO) the local jurisdiction of the courts depends on the domicile of the defendant. In product liability cases, additionally, the forum delicti can be chosen, Art. 32 ZPO. However, a contractual relation between the plaintiff and the defendant may result in the claim being characterized as one of contract rather than delict, thereby eliminating the forum delicti as an independent basis for jurisdiction.

Claimants which are EEC residents must bring their action before the courts of the Member country in which the damaging event occurred, as provided by Art. 5 of the "Convention on

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187 See BGH in BGHZ 34, 355 at p. 363.

188 K. Sommerland, op. cit. supra (fn. 165) p. 23.
See the 1976 law: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) BGBl. III 402.

Jurisdiction and Enforcement in Civil and Commercial Matters of Sept. 27, 1968". (188a) The European Court of Justice held that Art. 5 refers to the place where the damaging event occurred (accident caused by defective product) and where this event originally was caused (where the defective product was manufactured). (189) German courts follow this interpretation of the ECJ.

2. Choice of Law

As a rule, German courts will apply either the law of the State where the accident occurred or where it was caused originally whichever is more favorable to the injured parties. (190) The Hague Convention on the Law applicable to product liability of October 21, 1972 has not been ratified by the Federal Republic of Germany.

3. Prescription rules

The prescription in product liability claims in delict becomes effective after 3 years, Art. 852 BGB. The prescription period begins to run as soon as the injured person becomes aware of the damage **and** can identify the person liable.
As far as it concerns contractual claims, a merchant buyer is precluded from invoking contractual claims unless the delivered products are immediately examined and any discoverable defects immediately reported (without reproachable delay) to the seller: Art. 377 German Commercial Code (HGB). The limitation period for the non-commercial buyer's contractual rights is six months starting from

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188a See supra (fn. 148).

189 Bien c. Mines de Potasse d'Alsace S.A., 1976 Journal of the European Communities 1735.

190 BGH, judgment of June 23, 1964, in NJW 1964, 2012; see the comments of the Max-Planck-Institut 1985 "Gewerblicher Rechtsschutz und Urherberrecht", Internationaler Teil (GRUR INT.) p. 104.

delivery. It elapses even when the defects of the goods delivered could not have been discovered before the end of six month, Art. 477 BGB.

Conclusion

In any event, despite its severe character, German product liability is not a strict liability regime. We have to note the added burden of proof which will generally be placed on the manufacturer and imposes on him difficult (but not rebuttable) charges as to causation and fault. As a general rule, product liability law in Germany remained, before the implementation of the EEC-Directive, based on fault, with the main statutory exception of the Drug Act which provides strict liability for drug manufacturers.

III. GREAT BRITAIN

A. INTRODUCTION

Product liability in Great Britain, despite its relative similarity with the US law with regard to the basic concepts, has not gained comparable proportions and importance. Several legal and even sociological reasons have been advanced in order to explain this difference. The most relevant is certainly the difference of attitude of the public and the legal profession between the United Kingdom and in the United States. One may equally mention the inexistence of so-called "contingency fees". This system existing currently in the United States, whereby plaintiff's attorneys collect a substantial percentage (sometimes up to 50 % of the global award!) of the reparation awarded in successful actions, is supposed to be one major reason for the inflation in liability actions. It is however prohibited in European countries. (190a) Another important difference between the two legal systems is the inexistence of a jury for cases of civil litigation. In Great Britain (apart from Northern Ireland) juries are only admitted in criminal cases. Juries are viewed in the United States as one contributory element for excessively high damages awards. These reasons, which may be completed by others such as the better social and national health-care system in the United Kingdom, have contributed to a legal evolution which is very different from the United States.

190a One may conclude from this fact that the cost risk in case of unsuccessful action causes hesitancy on the part of European plaintiffs and reduces considerably the number of actions which are effectively brought to court. Contingency fee solutions have at least the advantage to limit the risk a plaintiff has to face. Its disadvantage is evidently the inflation of cases and of the awards requested by "too diligent" attorneys. See S.F. Leibmann, "European Community Product Liability", in Law and Policy in International Business, 1986, p. 795.

In England a manufacturer may be liable for damage suffered by a person through the use of his product in either contract or in tort:

B. PRODUCT LIABILITY REMEDIES

1. Contractual Remedies

The most significant statute governing the law of contract in the UK is the Sale of Goods Act of 1979. (191) Sect. 2 (1) of the Act states that

> *"a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property of goods for the money consideration called the price."*

Sect. 14 (2) of the Act provides:

> *"Where the seller sells goods in the course of his business there is an implied condition that the goods supplied are merchantable quality except that there is no such condition,*
> *a. as regard defects specifically drawn to the buyer's attention before the contract was made;*
> *b. if the buyer examines the goods before the contract is made as regards defects which that examination ought to reveal."*

"Merchantable quality" has been defined in the case of *Wrenn v. Holt 1903* (192) as "reasonable for the purposes for which such goods are commonly bought". Thus, the important aspect of liability in contract is that it is *strict*. The seller has an obligation to perform his duty towards his buyer i.e. to supply a good of merchantable quality.
As a general rule, a contract cannot give rights or impose obligations on any person except the parties of it. The "doctrine of privity" is a serious obstacle to recovery by contractual remedies between the seller and users or consumers other than the actual buyer. In the case of the so-called "horizontal privity" there are two aspects of this rule. The

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191 Sale of Goods Act of 1979. This Act must be distinguished from the 1893 Sales Act replaced by the 1979 Act.

192 "Wrenn v. Holt", 1903, in which beer bought by the plaintiff from the defendant's beer house contained arsenic.

first one is that only someone who is a party to the contract can claim under it. Consequently the buyer's spouse, children, servants or guests can usually not recover under contract. (193)

Secondly, only someone who is in privity to the contract can be sued under it. In sales of goods cases, this is generally the retailer, if he is insolvent, the purchaser has no more remedy in contract. Consequently he has only an action in negligence against the manufacturer. In contrast with American and French and, to some extent, German law, English law does not permit a third purchaser to rely on the warranty "running with the good" and to claim damages from the manufacturer by way of "action directe". (194)
Thus, the English law of contract is inherently limited in its scope. It covers the parties to the contract, but it neither protects nor imposes legal liability on anyone else.

2. Tort Remedies

When the person injured by a defective product is a third party, the manufacturer might be sued on the basis of the law of tort. A tort may be defined as "a civil injury or wrong for which the appropriate remedy is an action for damages". (195) In general, it is based on the concept of a defendant being at fault, although there are areas of strict liability where this criteria is not required.

The tort of negligence consists of a breach of a duty to take care owed to a person who has suffered damage. The damage must have been reasonably foreseeable and not too remote. The origin of modern negligence law is the product liability case

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193 H.D. Tebbens, op. cit. supra (fn. 11) p. 47; and R. Nelson-Jones and P. Steward, "Product Liability", the new law under the Consumer Protection Act of 1987, p. 19.

194 See H.D. Tebbens, op. cit. (fn. 11) p. 48.

195 R. Nelson Jones and P. Steward op. cit. supra (fn. 193), p. 19.

of "*Donoghue v. Stevenson*" of 1932. (196) The following fundamental principle was first enunciated in this case:

> "*(...) a manufacturer of products which he sells in such a form that he intends to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.*"

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196 1932 AC 562.

This rule has been further extended to a wide variety of other defendants: repairers, assemblers, installers, importers and distributors, retailers, hirers and suppliers. (197) It soon became clear that the principle of *Donoghue v. Stevenson* comprises all kinds of products including immoveables and moveables and all types of "defects" (negligent design or construction, marketing defects). The duty of care is owed not only to ultimate users or consumers but also to others affected by the product. Generally the range of protected persons is limited to those within the foreseeable scope of the product's harmful effects, i.e. by principle of proximate causation. (198)

This liability is based on negligence and the burden of proof is on the part of the plaintiff. It is not sufficient that the victim produces as only proof that a damage was caused by a defective product produced by the defendant. He must also prove that the defendant was negligent in such a way that it caused the damage. Later the judges realized that the proof of negligence which had to be produced by the plaintiff was sometimes too heavy and started to admit this proof by the means of presumption using the concept of "*res ipsa loquitur*". When the notion of "*res ipsa loquitur*" (199) is invoked the plaintiff is relieved from part of the burden of proof as breach of a duty of care and no specific act of negligence need to be shown. (200) It is commonly said by authors defending the existing remedy of negligence in England that

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197 See in general: A.M. Clark, op. cit. (fn. 68), p. 49; and R.M.S. Gibson, "Product Liability in the US and England: The Difference and Why", in Anglo-American Law Review 1974, p. 505.

198 See in general: R. Nelson Jones and P. Steward, op. cit (fn. 193), p. 23; and H.D. Tebbens, op. cit. supra (fn. 11), p. 51.

199 See above.

200 See A. Paines, Product Liability in Europe, England Conference on Product Liability in Europe, 25-27 Sept. 1975, Associations Européennes d'Etudes Juridiques et Fiscales, Kluwer, Harrap London, 1975, p. 106/107; and see also J.R. Maddox, "Product Liability in Europe", Towards a regime of strict Liability, Journal of World Trade Law 1985, p. 508.

the doctrine of "*res ipsa loquitur*" would provide the English consumer with the same protection as does strict liability in the US. However, this is not entirely true as the concept of strict liability tends to be a much more effective protection for the US plaintiff in a number of circumstances: e.g., in the U.S., contributory negligence is not applicable as a defense under strict liability whereas it can protect a manufacturer in the doctrine of *res ipsa loquitur* and might leave the plaintiff without a remedy in tort. (201)

A famous European drug case may serve as illustration. As were several European states, England was affected by the *Thalidomide* drug tragedy in the late 1960ies, in which pregnant women taking the drug as a sedative gave birth to deformed infants. (202)
The drug was a well tested product whose injurious qualities affected only the second generation and not the person actually taking the product, it met the "state of the art" at this time. The "Thalidomide" cases could only be brought in negligence. But these were the first cases in which a plaintiff was seeking recovery for injuries suffered while not yet born. Thus, the unresolved issue was whether there was a duty owed to a foetus. Even assuming this duty authors wondered if it could reasonably be alleged that a duty had been breached. It must be understood that the manufacturer had subjected the drug to all the standard tests before marketing it. It was, thus, easily argued that the defendant had not been negligent and furthermore it was hard to pretend that it was foreseeable to the makers of a well tested drug that such injuries would result. Only in strict liability, where just the product and not the behavior of the manufacturer needs to

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201 See R.M.S. Gibson, op. cit. (fn. 197), p. 509.
In some cases victims were compensated but a rate of less than 1 pound per day for life. In contrast, in the first American case a Thalidomide child received over 300.000 pounds in damages. Subsequent cases in the US have followed this decision. See The Times (London) of March 24, 1973.

202 See Page, Knightly and Porter, "Our Thalidomide Children: A Cause for National Shame", The Sunday Times (London), Sept. 24, 1972, at p. 16, 17.

be considered, victims could have been compensated in such a case. (203)

Since then, England has nevertheless moved towards strict liability in limited areas. The Consumer Protection Act 1978 establishes safety standards for a variety of consumer goods, breach of which constitutes liability under strict liability. Furthermore, two different commissions, the Law Commission in 1977, and the Pearson Commission in 1978 have both recommended the adoption of a strict liability scheme. (204) The implementation of the EEC directive in national law through the Consumer Protection Act 1987, has finally made law this proposal for change of English product liability law imposing strict liability on the manufacturer.

3. Cumulation of tort and contractual actions

In English law, concurrence of both actions, in contract and in tort is possible as a general rule. If a product-related damage has been suffered by a purchaser he is entitled to sue the seller in negligence in addition to his warranty remedy when he can show that the defendant has breached a duty to care owed to him independently from his contractual obligations. (205) This is different from French law where the concurrence of both actions is strictly prohibited.

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203 As we have seen before, this has been the case in the Federal Republic of Germany, in response to these tragic cases.

204 See A.M. Clark, op. cit. (fn. 68), p. 49.

205 See J.H. Jolowicz, "L'Introduction de la Directive au Royaume Uni", in Sécurité des Consommateurs et Responsabilité du Fait des Produits Défectueux - Colloque 6/7 Novembre 1986, LGDJ 1987.

4. Breach of Statutory Duty

Liability may also arise from breach of a statutory duty. As an example, the Civil Aviation Authority (CAA) prescribes minimum standards concerning the design, construction, material and workmanship used in manufacturing aircraft (British Civil Airworthiness Requirements), the breach of which while not providing an automatic entitlement to compensation, may have considerable value in establishing proof of negligence.

C. CONDITIONS OF LIABILITY

1. Damage giving rise to liability

The main type of damage due to a defective product that gives rise to an action in negligence is personal injury or death. In general it is not possible to recover for pure economic loss not linked directly with personal injury. But when a personal injury has occurred, the assessment of damages takes into account direct financial loss such as expenses of medical treatment, loss of prospective earnings and pain and suffering. (206)

In contract, traditionally economic loss is regarded as being within the expectation of the contracting parties and, consequently, is compensable.

For all kinds of reparations there is no statutory limitation to the amount of damages recoverable in product liability cases, nor is there any judicial obligation on the plaintiff to mitigate the scope of the damage occurred. (207) Damages to the defective product itself are recoverable only if the defect damages or poses a threat of damage to person or property, other than the defective item itself. (207 a)

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206 So e.g. "*Muir Head v. Industrial Tank Specialities Ltd.*", 1986 QB, 507, where such far-reaching damages have been attributed.

207 See A. Paines, op. cit. (fn. 200), p. 109.

207 a See A.M. Clark op.cit. (fn. 68), p.130.

2. Defective Product

English common law does not know any legal definition of the notion of defect. But actually whether or not the product is defective is only of minor importance since in English Law liability is based on negligence, the proof of a defect being made often by presumption. Similar to the legal situation we observe in the other countries subject of our study, product defects in English law are usually divided into three categories: design defects, manufacturing defects, marketing defects. (208)

The main characteristic of a design defect is that the defect exists although the product was correctly manufactured. Either the product should not have been manufactured at all, as in the Thalidomide case, or sufficient safety devices have been lacking, or its component materials are not strong enough, or a combination of constituent factors leads to an adverse result. (209)

In case of manufacturing defects, the product was not produced as intended. Typical problems include wrongly assembled machinery and unintended incorporation of foreign bodies or impurities. (210) A marketing defect is defined in

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208 See e.g. R. Nelson Jones and P. Steward, op. cit. (fn. 193), p. 23.

209 The significance of design defects was recognized by Lord Denning in "*Williams v. Trimm Rock Quarries Ltd.*" 1965, a case in which the manufacturer of a new type of drilling machine was held liable when the machine killed the employee who was operating it. Lord Denning said: "Further before sending a machine like this out for demonstration and putting it on the market, the toolmakers should have guarded against the possibility of its rising up and toppling over, and should have investigated those possible sources of danger." Quoted in R. Nelson Jones and P. Steward, op. cit. (fn. 193), p. 23.

210 "*Barnett v. H.&G. Pack & Co. Ltd.*" 1940 : Wire protuding from a sweet.

English law as a failure to provide adequate warnings or instructions. Warnings are needed when the product is dangerous, but the danger is hidden as with explosive or inflammable substances, or where the product is inherently hazardous to health. (211)

D. DEFENSES

1. Intermediate Examination

A specific defense arising out of Lord Atkin's dictum in "*Donoghue v. Stevenson*" is that the defendant reasonably expected that there would be an intermediate examination capable of discovering a defect. (212) One statement of this rule is that the manufacturer owes no duty of care where he has good reason to anticipate or where it is probable that subsequent user will have knowledge or will make an inspection of the article which should disclose any defect. (213) For example in "*Holms v. Ashford*" 1956, the manufacturers of a hair dye were not held liable on the ground that they had warned the hairdresser of its potential danger, but the latter failed to test it and did not warn the plaintiff who contracted dermatitis. (214)

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211 E.g. "*Fisher v. Harrods Ltd.*" 1966, a jewellry cleaning fluid that caused injury on coming into contact with the plaintiffs eyes.

212 See R.M.S. Gibson, op. cit. (fn. 197), p. 493.

213 "*Shield v. Hobbs Manufacturing Co.*" 1962, 34 DLR (2nd), 307."*Zeppa v. Coca Cola Ltd.*" 1968, 3 ALL ER 217.

214 Reported in R. Nelson Jones and P. Steward, op. cit. (fn. 197), p. 25.

2. Binding Legislative Standards

Theoratically at least, an English judge can hold a producer responsible for negligence even when this producer did not do anything else than conforming to legislative standards. Practically however this might happen only in very exceptional cases. Most of the time judges, if they feel it equitable, will find other ways English law offers to condemn producers e.g. by the way of a breach of his duty to inform or to warn. (214 a)

3. Disclaimers

With regard to contractual liability, the enforceability of clauses excluding or limiting the manufacturer's liability is dependant on the circumstances in the particular case and the appreciation by the judge. Under the Supply of Goods Act 1973 the clause excluding the seller's liability is enforceable only to such extent that it is fair and reasonable in the circumstances of the case and if the contract relates to a consumer sale (i.e. if the goods are bought for private use or consumption) any exclusion or limitation of liability is void. (215)

4. Contributory negligence

When there is contributory negligence on the part of the person who is injured, the damages recoverable by him will be reduced to "such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility

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214 a See Jolowicz op cit. (fn.205) p.134.

215 See A. Paines, op. cit. (fn. 200), p. 103.

for the damages", (216) e.g. when the danger was so clear that there can be no cause for complaint. (217)
The fault or negligence of a third party can also be used as a defense by the manufacturer and free him from all liability.

5. State of the Art Defense

As a general rule in English law, there can be no liability where the danger is scientifically undiscoverable or unknowable since the duty is to take only "reasonable care". On the other hand the producer must keep up to date with recent and generally accepted knowledge. (218)

6. Act of God

"Force Majeure" in the sense of an "Act of God" or other circumstances which are entirely beyond the control of the manufacturer can be used as a defense in English product liability claims. "Act of God" is defined as

> *"caused directly by natural causes without human intervention in circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility"* (218a)

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216 Lord Atkin, reported A. Paines, op. cit. supra (fn. 200), p. 104.

217 In *"Crow v. Barford"*, 1963, the plaintiff was using a motor mower with a large opening for grass ejection. He put his foot in the opening and was injured by the rotation blades. It was hold that the manufacturer had not negligently designed the mower. Reported in R. Nelson and P. Steward, op. cit. (fn. 197),p. 26.

218 See generally A.M. Clark, op. cit. (fn. 68), p. 81, see also S. Whittaker, "The EEC Directive on Product Liability", in Yearbook of European Law 1985 No. 5,p. 257.

(218a) *"Tennent v. Earl of Glasgow"* (1864)

D. PROCEDURAL RULES

1. Jurisdiction and Conflict of Law

a. Rules of Jurisdiction

On January 1st, 1987 the Civil Jurisdiction and Judgment Act became effective and implemented the 'Brussels Conventions on Jurisdiction in Civil and Commercial Matters' equally in the United Kingdom. It establishes rules for jurisdiction and enforcement for judgments in contracting states, i.e. states which signed the original 1968 Convention or the 1978 Accession Convention. (219)

As we have seen above, when a product liability action involves a non-EEC defendant, the jurisdictional rules of the Convention do not apply and the claim is governed by the law of individual states.

In England courts assume generally jurisdiction over a defendant in a civil action only if he is served with the writ in England and Wales (220) or if he submits himself deliberately to the jurisdiction of the English courts. (221) There are, however, some exceptions, handled by the courts in a restrictive manner: under certain conditions the English courts will take jurisdiction in cases in which the writ (or legal assignment) is served outside England or Wales when the action is based on a tort committed entirely within the jurisdiction. If the plaintiff has suffered damages in

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219 The contracting states to the 1968 Convention are Belgium, FRG, France, Italy and The Netherlands, and the signatories of the Accession Convention are Denmark, the Republic of Ireland and the United Kingdom.

220 A writ is a formal order of 'brevia in cursu' on behalf of the Queen by which all actions are commenced. It is a formal requirement for the action by which the defendant is invited to defend himself against the plaintiffs demand. See R. David, J.E.C. Brierley, "Major Legal Systems in the World Today", p. 315.

221 See H.D. Tebbens, op. cit (fn. 11), p. 284.

England but one other constituent element of the tort causing that damage has been committed outside the jurisdiction, the courts would, however deny their competence, as they do not regard England, in that case, as "*locus delicti*". (222)

b. Conflict of Law

There is no specific case law or statute dealing directly with conflict of law questions in the field of product liability. Therefore, the general principles of choice of law in tort are applicable. The choice of law rule in tort was laid down in the case of "*Phillips v. Eyre*". As a general rule, a plaintiff seeking to recover on a foreign tort would have to satify two conditions: first, that the wrong would have been actionable under English law (the *lex fori*) if commited in England; and secondly, that the act was not justifiable by the law of the place where it was done (the *lex loci delicti*) (223) The second part of this rule has more recently been modified by the House of Lords in "*Chaplin v. Boys*". It will no longer be sufficient for the plaintiff to show merely that the act is not justifiable under the *lex loci delicti*. He must go further and show that it grounds civil liability under that law. Therefore the effect of this requirement of "double actionability" is that the plaintiff in a product liability action may well not benefit from a *lex loci delicti* and be pejudiced by a less favourable "lex fori".(223 bis)

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222 See as example: "*George Monroe Ltd. v. American Cyanamid and Chemical Corp.*" 1944, 1KB 432.

223 1869 LR 6 QB, 1, 28-29.

223 bis 1971 AC 356.

2. Prescription Rules

In English law the statutory limitation period is generally 6 years for actions in contract or in tort. However, this period is shortened to three years when personal injury is concerned. In calculating the limitation period, time does not start to run until the cause of action accrues. So, in a claim in negligence, the period would not commence until the plaintiff had suffered the damage or loss. A cause of action in contract would accrue at the moment of breach and this in principle is when the defective goods are delivered. (223 ter)

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223 ter See C.J. Miller and P.A Lovell, "Product Liability", Butterworths, London 1977, p. 296.

CONCLUSION

Within its three years' time limit, the EEC Directive of July 25, 1985 has been implemented in the United Kingdom by the Consumer Protection Act 1987. The Act supplements rather than replaces the existing English law of product liability which remains in force. Therefore it is of eminent importance when dealing with English tort cases never to forget the continuing existence of the legal product liability action in unwritten or written tort law.

CHAPTER II. : THE EEC DIRECTIVE OF JULY 25, 1985

I. INTRODUCTION

As we have seen before, considerable differences exist between EEC Member States' domestic product liability law provisions. European consumers are subjected to very different degrees of protection under the laws applicable in each of the European countries. Furthermore, the existing systems may even cause to some extent distortion in competition and consequently impede free trade within the EEC.

The necessity of harmonization of the European product liability laws has been recognized and several reforms were proposed. In 1973, the "Hague Convention on the Law Applicable to Product Liability" was signed. (224) This convention concerned conflicts of law arising from product liability actions. (225) Later, another Convention, known as the "Strasbourg Convention" was proposed for signature in 1977 concerning liability for defective products which cause

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224 "Hague Convention on the Law applicable to Product Liability", 11 International Legal Materials (ILM) 1283.

225 For a general presentation of the Convention's regulatory contents, see: Reese, "Further Comments on the Hague Convention on the Law Applicable to Product Liability", in Georgia Journal of International and Comparative Law 1978, p. 311.

personal injury or death (but not damage to property). (226) Then, due to the relative ineffectiveness of this convention-based harmonization attempt, the Commission of the European Communities began to draft proposals for a Product Liability Directive to be addressed to all Member States of the EEC. The preambles to the different proposals underline three major reasons for harmonization of law in this legal field in the Member States:

1. to eliminate distortions in competition;
2. to promote the free movement of goods;
3. to provide equal and adequate protection to the consumer. (227)

After long-lasting and very controversial debates, the European Product Liability Directive was eventually adopted on July 25, 1985. (228) A directive is a particular legislative instrument created by the EEC Treaty art. 189 (229) by which the EEC organs act and which is not directly applicable as such in the different Member States (as a Regulation would be) but binds the Governments with respect to the purposes laid down in its provisions. The Member States are free to select the way to reach the objectives of the Directive, i.e. they have to implement the Directive in their national laws but form and means can vary from one State to the other. Occasionally existing national law will already correspond to the purposes of the Directive. If not, implementing legislation will have to be passed.

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226 "European Convention on Product Liability in Regard to Personal Injury and Death", January 27, 1977, 16 ILM 7.

227 See amendment of the proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 22 OJEC, C. 271,3 (1979).

228 28 OJEC, L 210, 29 (1985).

229 "Treaty of Rome founding the European Economic Community", of March 25, 1957. See in particular its art. 189, providing for four different legal instruments addressed to Member States and/or individuals.

As for the product liability Directive, art. 19, granted the Member States a period of 3 years to adapt their national legislation to the European standard. Since the Directive was notified to the Member States on July 30, 1985, all Member States should have implemented the Directive in their national laws by August 1st, 1988. To date (1991), only the United Kingdom, Belgium, Greece, Italy, Luxemburg, Denmark, Germany and the Netherlands have done so. Before looking at the concrete implementation of the Directive in French, German and British law one should expose the different most important provisions of the European legal text.

II. THE PRINCIPLE OF LIABILITY OF THE 'PRODUCER' IRRESPECTIVE OF FAULT

The Directive establishes in its art. 1 the principle of liability of the producer *"for a damage caused by a defect of his product"*. The drafters of the Directive have seen the liability without fault as the sole means of adequately solving the problem, *"peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production"*. *(230)* Therefore, the condition of liability is the simple defect of the product leading to a damage and not at all the producer's fault. The victim is required to prove the damage, the defect and the causal link but never a fault on the part of the manufacturer (art. 4 of the Directive). The similarity with the American strict liability system is certain and some commentators have warned that this Directive would bring all kind of excesses in the European product liability system very much like what the Americans are currently facing since the early eighties. (231) However, it has been recognized that the product liability crisis in the US is not due to the strict product liability

230 Second consideration of the Directive.
All Directives begin with "considerations" in the form of "whereas" recitals exposing the rationale and spirit of their provisions; these "considerations" are fundamental for interpretation.

231 See G. Davrat, "Responsabilité du fait des produits prétendus défectueux: le précédent américain et les méprises communautaires", in Gaz Pal 1988, p. 456.

system as such but to a combination of many factors, most of which are not present in Europe. (232)

Furthermore, the notion of liability without fault is not new in Europe. All EEC Member States have liberalized in one way or the other their tort/delict and contract laws in the last years in order to facilitate the award of damages to victims of defective products.

However, one must admit that it is in some way paracoxical that at the time when Europe is adopting a liability system without fault, close to strict liability, the United States are considering to restore, at least in some areas, fault as the basis for product liability. (233)

II. CONDITIONS OF LIABILITY

A. DAMAGES GIVING RISE TO LIABILITY

The Directive does not cover all kinds of damages. Art. 9 of the Directive indicates what types of harm are included within the notion of 'damage' for the purposes of liability under the Directive. According to this article, the Directive covers only damages caused "by death or bodily injury". Since the Directive does not give more indications, what should be considered as damages "caused by death or bodily injury" must be decided by national laws. (244) National laws will determine if moral damages are in the scope of the nationally implemented Directive and under which conditions they can be compensated.

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232 See S.F. Leibman, "The European Community's Product Liability Directive: is the US experience applicable ?", in Law and Policy in International Business 1986, p. 795.

233 See S.F. Leibmann, op. cit. (fn. 232).

244 See J.L. Fagnart, "La Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits", in Cahier de Droit Européen 1988, p. 35.

The Directive covers also damages caused to goods under the conditions that the goods are

> *"(1.) of a type ordinarily intended for private use or consumption, and*
> *(2.) were used by the injured person mainly for his own private use or consumption." (245)*

However, the compensation for damages caused to goods is limited in two different aspects. First the Directive excludes claims for damages of less than the value of 500 European Currency Units (ECU), and secondly, damages caused to the defective product itself are not compensable.

B. NOTION OF DEFECTIVE PRODUCT

1. Notion of Product

According to Art. 2 of the Directive, the term 'product' means all moveables, natural or industrial, whether raw or manufactured, even though incorporated into another moveable or into an immovable. This definition clearly shows that the scope of the Directive includes all products except immovables which in most countries, are already subject to a special system of liability.

Services are outside the scope of the Directive and immaterial moveable goods, such as computer software, are not expressly addressed. In order to know if this kind of widespread product is in the scope of this European legal instrument, it will be necessary to look at the definition supplied by national laws, which may cause certain divergences with regard to the scope of European harmonized product liability. (246) The Directive excludes expressly primary agricultural products and includes electricity.

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245 See art. 9 b of the Directive.

246 See Van Dorsselaere, "La Responsabilité du Fait du Produit Défectueux: Application de la Directive Communautaire à la matière informatique", in G.P., No. 350, January 9, 1989.

2. Notion of Defectiveness

The notion of defectiveness is an important aspect of the Directive's system. In its Art. 6 al. 1 it states that "*a product is defective when it does not provide the safety which a person is entitled to expect*". The safety of the product must be considered with reference to the circumstances such as the presentation of the product, the reasonably expected use, the time when the product was put into circulation.

Although, at first sight this notion of defectiveness does not seem to be different from that of US law as interpreted in 'Comment i' of section 402 a of the above presented Restatement of Tort (247), it has been clearly shown that the concept of defectiveness in the Directive avoids certain abuses denounced with regard to American Law. First, the notion of 'defect' is objective since it does not refer to the safety which the victim or a specific consumer is entitled to expect but to the public at large. The notion is also relative because 'safety' must be considered with regard to certain circumstances. Therefore, in determining product's safety, it will be necessary to take into account any improper use or wrong maintenance of the product by the victim. (248)

The reference to the fact that a product may not be considered 'defective' for the sole reason that a better product has been subsequently put into circulation (Art. 6 al. 2) is very important. Thus, the drafters of the Directive have explained that e.g. an automobile manufactured in the 1960ies is not defective merely because seat-belts were not incorporated into it at the time of manufacturing, although this would certainly be the case, if it were a new car put into circulation today. (249)

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247 See supra.

248 See F. Albanese, in "Comparative Product Liability - UK" in Comparative Law Series Vol. 6, p. 15.

249 Example reported in J.L. Fagnart, op. cit. supra (fn. 244), p. 3.

IV. THE PARTIES

A. PLAINTIFFS

The Directive does not contain any provision specifying persons entitled to sue. In the absence of such a definition one may conclude that according to the wording of its Art. 1 any injured person, whether party to a contract or not and whether user of the product or bystander can benefit from the liability system of the Directive. The plaintiff's position may be even reinforced by the supplementary recourse to other national actions which was explicitly left open by the Directive. Art. 13 makes it possible for the injured person to decide whether to take action either under the strict liability system prescribed by EEC law, or under other existing liability systems, such as delict, tort, contractual liability which may exist. Consequently, the position of the plaintiff under the Directive can be regarded as extremely advantageous and liberal.

B. DEFENDANTS

The Directive enumerates different potential defendants which must be distinguished.

1. Definition of Producer

The definition of 'producer' in the Directive is very broad, it enlarges the common notion of producer in order to include other persons.

The person mainly liable is the manufacturer of the finished product or of component parts and the producer of certain raw materials (Art. 3 al. 1). The Directive defines the producer in a very broad manner when it stipulates in its Art. 2 al. 1 that a producer is "*any person who, by putting his name, his trademark, or another distinctive feature on the product, presents itself as its producer*". To some extent, the Directive adopts a combination of subjective and objective criteria defining the potential defendant. This approach goes beyond the different national standards.

2. Importer

In order to enlarge the number of potential defendants and to respond to situations where the victim is unable to claim against the producer in the Community, or to identify it, the importer of a product is encompassed in the notion of 'producer'. Art. 3 al. 2 states that "*any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer*".

3. Supplier

Subsidiary liability is borne by the supplier of the product where the producer of the product cannot be identified unless the supplier informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply in the case of an imported product if this product does not indicate the identity of the importer even if the name of the producer outside the EEC is indicated.

This subsidiary liability is expression of the drafters' will to protect the victim in the most efficient way which may, in certain circumstances, only be possible by including the distributor or seller in the line of potential defendants, when the producer or importer cannot be reached. This unconventional and innovative measure shall encourage the distributor or seller, facing liability consequences, to reveal the origin of the product so that the plaintiff can sue the "true" responsible, the producer or the importer. This measure gives a guarantee to the plaintiff to have at least one person to sue.

In all cases where several persons are held liable, they are jointly liable. Each of them has a recourse action against the other. This is made explicit by Art. 5 of the Directive "... *without prejudice to the provisions of national law concerning the rights of contribution or recourse*".

V. DEFENSES

On the one hand, Art. 7 of the EEC Directive enumerating six different defenses gives some means to the producer in order to evade liability; on the other hand Art. 12 excludes explicitly the possibility for producers to insert disclaimer clauses in contracts. The application of defenses is consequently very well circumscribed and limited.

A. "PUT INTO CIRCULATION"

The producer is liable only if he has put the product into circulation. Since the Directive has not defined the exact notion of "putting into circulation", authors agree to consider that this term is to be seen in a broader manner than the 'mere delivery' of the product to the distributor. (250) One may, for example, rise the question whether a product "is put into circulation" when this product is used, on behalf of the producer, by a third person who has to test it. It seems that in this case, since the producer has not lost control on his product, this delivery of the product to a third person cannot be considered as "putting it into circulation". (251) However there are cases where the producer of an aircraft has

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250 See J.L. Fagnart, op. cit. supra (fn. 244), p. 45 and P. Thieffry, P. Van Doorn, S. Lowe, "Strict Product Liability in the EEC: Implementation, Practice and Impact on US Manufacturers of Directive 85/374", in Tort and Insurance Law Journal 1989, p. 73.

251 Rapport Explicatif du Comité d'Experts de la Convention de Strasbourg, No. 43; This issue might be of particular importance in aviation cases, where the produced aircraft has to be tested for certification by multiple interior and exterior experts.

been held liable after the crash of his aircraft which was submitted to tests by a test center. (252)

It appears, consequently, that the element of 'putting into circulation' must be interpreted in a very broad manner. Only in exceptional cases, where the product remains effectively in the scope of control of the producer, or where he loses control against his will (theft, loss, etc.) the reference to the element 'putting into circulation' may free the defendant.

B. NON EXISTENCE OF THE DEFECT AT THE MOMENT WHERE THE PRODUCT WAS PUT INTO CIRCULATION

The producer is not liable if he proves that "*having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time where the product was put into circulation by him or that this defect came into being afterwards*" (Art. 7 b). Actually, this defense is more systematically a reversal of the burden of proof than a real defense. The producer has to prove that the defect appeared after he put the product into circulation. This can be justified by the fact that the producer is in a better position to furnish this proof than the victim of the damage who has no access to the production facilities and the processes used for the production.

C. NON-EXISTENCE OF ECONOMIC AIM

The producer is not liable if he proves that the product was "*neither manufactured by him for sale or any form of distribution for economic purposes nor manufactured by him in the course of his business*". Practically, this defense may only have a very small importance, as 'non-lucrative' production is quite rare in the industrial environment.

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252 Reported in Vernimmen et Krämer, "La Responsabilité du Fait des Produits en Europe", Agence Européenne d'Information, 1977, p. 163.

D. BINDING LEGISLATIVE STANDARDS

The producer is not liable if he proves that "*the defect is due to compliance with mandatory regulations issued by public authorities*". This 'classical' defense to be found in most of the existing legal systems, is justified with regard to the exterior constraint not allowing the manufacturer to conceive 'a better product', a fact often found in the context of so-called 'Government contracts' in the field of public services or armament.

E. STATE OF THE ART

The "State of the Art" defense, or 'development risk' is the most controversial aspect of the new European Product Liability System. The issue was whether producers should be held liable for defects that were not yet discernable when the product was put into circulation, because of the state of scientific and technological knowledge at that time. Some experts have argued that liability for these development risks is logical in the context of the new EEC liability regime: if a manufacturer's conduct is not an issue, it should make no difference whether conceivably he could have predicted and avoided the defect. (253)
Others, from a practice point of view, argue that high costs of ensuring unforeseeable risks might inhibit innovation. (254)

The solution adopted by the EEC Directive is a kind of compromise between both positions. Art. 7 e of the Directive states that a "*producer shall not be liable if he proves that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as*

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253 See Bourgoignie, "Where we stand on Product Liability", BEUC News Febr. 1984, p. 7.

254 Comp. e.g. S.F. Leibman, op. cit. supra (fn. 233); p. 95, see also S. Whittaker, "The EEC Directive on Product Liability", in Yearbook of European Law 1985, p. 233.

to enable the existence of the defect to be discovered." It is important to notice that the criterion is not the producer's actual scientific or technical capability to control quality of his product but the general state of scientific or technical knowledge at the time when the product was put into circulation. It is, thus, an objective criteria. (255)
A product does not become 'defective' by the mere fact that the safety requests have been increased during the period of the product utilization. Otherwise, producers would be discouraged to proceed in product development and introduction of new procedures because improvements would render their own original products 'defective'. (256)

But it is important to notice that the 'State of the Art' defense is **not** equally available to all victims within the EEC. Due to disagreement between member states, the compromise the negotiating parties have reached, allows the member states to chose individually whether or not to keep the 'State of the Art' available as a defense in the implementation laws, Art 15 b. Thus, each European country may provide through national legislation that a producer will be liable even if he can prove that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered. (257) In practice the problem of development risks mainly concerns the pharmaceutical and chemical industries. (258)

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255 J.L. Fagnart, op. cit. supra (fn. 244), p. 47.

256 See H.C. Taschner, "La Future Responsabilité du Fait des Produits Défectueux dans la Communauté Européenne", in Revue du Marché Commun, 1986, p. 257.

257 But pursuant to Art. 15 it is not excluded that the Commission decides to repeal this defense generally for all member states after submission of a report to the Council about the effects of the application of Art. 7 e on consumer protection and the functioning of the Common Market.

258 For the concrete application of this discretionary question in the different countries of the EEC, see infra.

F. DEFENSE AVAILABLE TO MANUFACTURERS OF COMPONENT PARTS

Art. 7 f establishes that "*in the case of a manufacturer of component parts this manufacturer is not liable if he proves that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.*" Actually, it seems that this defense is nothing but the application of the principle that a producer is not liable for a defect which did not exist at the moment of 'putting into circulation' of the product if one considers the moment of delivery of the part by the component part manufacturer to the final assembler as the moment of 'putting into circulation'.

In its legal function, this provision is very similar to the above presented defense based on mandatory regulations issued by public authorities. Equally in this case, the supplier of a part will be protected, to a certain extent, against liability flowing from circumstances where he acted without control and influence on the whole final product or where he acted on the basis of specifications issued by the assembling final producer. The manufacturer, being nothing but an 'instrument' of the final assembler must, consequently, be spared from the undistinguished 'close to strict liability regime'.

G. DISCLAIMER CLAUSES

Art. 12 of the EEC Directive excludes some aspects of freedom of contract in the field of product liability. The producer can neither limit, nor exclude his potential liability in the contract by means of contractual disclaimer clauses. This is of particular importance with regard to clauses commonly accepted in some national laws especially in relations between professionals active in the same professional field.

H. CONTRIBUTORY NEGLIGENCE OF THE VICTIM

The contributory negligence of the victim can be equally a cause for reducing or disallowing compensation. This defense provided by the EEC Directive is somehow classical and can be found in nearly all legal systems.

VI. BURDEN OF PROOF

The Directive maintains the classic apportionment of the burden of proof. Indeed, Art. 4 specifically states that the victim is required to prove the facts giving rise to liability. Consequently he has to show his damage, the defect of the product and the causal link between the two. This rule is of major importance and protects industry against unjustified claims.

During the elaboration of the wording of the Directive, the consumers' associations tried to obtain a reversal of burden of proof as regard to the causal connection between the damage and the defect. The contrasting arguments put forward were the following: in the event of damage caused by drugs it is extremely difficult and sometimes even impossible to produce the evidence that is required by the Directive. This would equally be the case with every more complex industrial production in mechanics, automotive or other industrial procedures.
The opponents argued that adopting a system including reversal of burden of proof might have resulted in a situation where every accident would be declared a case of product damage and damages being claimed and obtained when producers fail to prove that there was no causal link. (259)

The Directive's drafters have adopted the latter opinion, however mitigating its impact. So, as far as it concerns the origin of the defect, it is the producer who has to bear the

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259 See H.C. Taschner, op. cit. (fn. 256), p. 257.

burden of proof that the defect did not exist when the product was put into circulation, since he is in a better position to produce such kind of evidence. In this way the EEC drafters tried to balance both, the manufacturers' and the consumers' interests.

VII. LIMITATION OF LIABILITY

A. LIMITATION OF THE AMOUNT OF DAMAGES

In principle, the producer's liability is unlimited. However, the Directive allows the Member States in its Art. 16 al. 1 to provide

> *"that a producer's total liability for damages resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU".*

This option seems to be the counterpart of a "package deal" relating to the issue of development risks: Germany would not have approved the adoption of the Directive if its legal principle of objective liability could not have found a counterpart in the limitation of the producer's liability. (260) This provision limiting the liability of the producer is subject to review and possible repeal in 1995 (Art. 16 al. 2). The effect of such a limitation of reparation is of eminent importance in the context of insurance law. Unlimited risks are evidently insurable only with difficulty. (261)

B. LIMITATION OF LIABILITY IN TIME AND PRESCRIPTION

To protect the producer, particularly in regard to the apportionment of the burden of proof, in the event of dispute about the origin of a defect (Art. 7b) and the possible inclusion of liability for development risks, the Directive

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260 See J. Ghestin, "La Directive Communautaire du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux", Dalloz Sirey 135, 1986, 141.

261 See infra.

lays down that liability expires ten years after the product was put into circulation (Art. 11). If judicial proceedings are pending liability does not expire but runs until a final decision on the case has been taken.

Concerning prescription, Art. 10 provides a three years limitation period in which the victim of a defective product must bring the case to court. This period starts to run when the injured party becomes aware of the prerequisites for taking legal action or should reasonably have become aware of them.

CHAPTER III. : IMPACT OF THE EEC DIRECTIVE ON NATIONAL LAWS

I. INTRODUCTION

Although the main goal of the drafters of the EEC Directive was to harmonize product liability laws in the various EEC member states, the actual wording of this legal instrument did not lead to an absolute harmonization of national regimes. First, despite the generally constraining aspect for EEC member states, some of the Directive's provisions leave space for national particularities and are referring to national laws. This is the case with some definitions which can be formulated by the respective national legislator. (262) Second, and this is of eminent importance, the Directive does not affect any existing rules of the law of contractual or non-contractual liability in force at the moment when the Directive has been notified to the member states. Thus, it becomes possible that in one state two or more product liability regimes coexist which, to some extent, impedes the complete harmonization in the EEC. Third, due to the fact that member states could not agree on three basic aspects of the Directive, it allows for three options. They are the inclusion or not of unprocessed agricultural products into the scope of the national law implementing the new regime (Art. 15 para. I a); the development risk defense (Art.7e); and a ceiling of liability of 70 millions ECU for damage resulting from a death or personal injury and caused by identical items having the same defect (Art. 16 I). (263) As these differences between the EEC countries persist, we must have a close look at the different legal implementations in the legislation of the member states.

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262 As an example: the notion of "non-material" damage (Art 9 of the Directive).

263 European Currency Unit, based on a basket of European currencies, conversion indicated by a public conversion table issued by the EEC Commission.

II. FRANCE

Up to now, France has not implemented the EEC Directive. The French Republic is the very last EEC state not having translated the EEC law into national law. Two differentdraft bills have been put forward but none of them has been enacted. Before studying these drafts, one must examine, from an EEC point of view, the legal situation in case of non-implementation of a Directive in a given country.

A. CONSEQUENCES OF NON-IMPLEMENTATION OF A DIRECTIVE

According to Art. 19 of the EEC Directive :

> *"member states shall bring into force not later than three years from the date of notification of the Directive, the laws, regulations and administrative provisions necessary to comply with this Directive ..."* .

A member state which would not respect a Directive's provisions can be sued by the EEC Commission (Art. 169) before the European Court of Justice (ECJ). The Court will not be able to directly sanction the member State for failure to perform its obligations under EEC law and to oblige it to do so. Therefore, and in order to guarantee equal application of EEC law in all EEC states, the Court has developed a theory allowing private individuals, under certain circumstances to invoke before their national courts the EEC Treaty and secondary EEC law. This so-called theory of "direct effect of EEC law" was first applied only to certain particular provisions of the Treaty of Rome. Whether a provision has direct effect or not depends on the nature and contents of that concrete provision which must impose clear and unconditional obligations to member states in order to be directly applicable. (264) This finding of the Court was confirmed and refined several times. We have to mention the

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264 This matter was decided the first in the case "Grad v. Finanzamt Traustein", of Oct. 6, 1970, ECR 1971, 838, in respect of decisions, and in the case "Sace v. Italian Ministry of Finance" in respect of Directives, Dec. 17, 1970, ECR 1970, p. 1213.

famous "Van Duyn" case. (265) The later "Ratti case" and "Becker case" were concerned more specifically with situations where private individuals, in proceedings before national courts, relied on provisions of directives which had not been implemented by the concerned member states. (266)

One may wonder if this ECJ jurisprudence means that a person in France who has suffered a damage which occurred after July 30, 1988 (Directive's deadline for national implementation) and caused by a defective product can rely on this theory of "direct applicability" and consequently may sue the producer on the basis of the Directive before a French court. The ECJ gave a negative answer to that kind of question in the "Marshall case" (267) where it stated that directives which have not been implemented have no "horizontal effects", i.e. that private individuals cannot rely upon them against other individuals. Indeed, the European Court of Justice has only recognized a "vertical effect" to directives which are directly applicable to member states but no effects in the legal relations between individuals. In the "Marshall case", the Court held that

> *"according to Art. 189 of the EEC Treaty, the binding nature of a directive, which constitutes the basis for the possibility for relying on the directive before a national court exists only in relation to each member state to which it is addressed. It follows that a directive may not in itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person."*

The "Marshall case" has, thus, clarified the scope of applicability ratione personae of the EEC directives. The Court justifies this dictum in the following manner:

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265 ECJ of Dec. 4, 1974, Report 1974, p. 1348.

266 "Publico Ministerio v. Ratti", April 5, 1979, ECR 1979, p. 1637; "Ursula Becker v. Finanzamt Münster Innenstadt", of Jan. 19, 1982, ECR 1982, p. 69.

267 ECJ, "Marshall Case", Febr. 26, 1986, ECR 1986, p. 749.

"It must be pointed out where a person involved in legalproceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the later is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."

Under these conditions European directives may be relied upon against member states not only when acting as a "public authority", but also when acting like an individual. The General Advocate of the Court, Sir Gordon Slynn, in his conclusions on the "Marshall case" specified that

" (T)he word "state" must have a large meaning and applies to all state's organs (...). State should be considered as an individual entity." (268)

B. CONSEQUENCES FOR STATE-OWNED MANUFACTURING ACTIVITIES

The "Marshall case" has permitted the ECJ to enlarge the sphere of direct effect of directives to all situations where the state is acting by means of organs. The question is now, to what extent the production activity of state-owned or state-run firms can be considered as an action of the state itself. One may imagine the concrete problem in respect of the state-owned aircraft manufacturer Société Nationale Aérospatiale in France, SNECMA (engines) or Sextant Avionique (equipments).

The European Court of Justice has never had the opportunity to deal with this question in the context of the direct applicability of directives. However, the Court's jurisprudence might give some indications permitting to presume the Court's position in this concrete case. There is in particular the debate concerning the application of Art. 90 of the EEC Treaty (public enterprises). In 1980 the Commission had issued a directive concerning the transparency of the financial relations between states and their public

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268 Quoted in P. Drancourt, "L'effet direct de la directive européenne sur la responsabilité du fait des produits défectueux en droit français", Gazette du Palais, 14 sept. 1989, p. 464.

enterprises. In the cases the Court had to deal with, the question was to elucidate the definition and the status of those enterprises in order to clarify the scope of application of the mentioned directive. (269) The ECJ, in the different decided cases, interpreted the term "public enterprise" in a very broad manner, including all entities on which public authorities can exercise directly or indirectly dominant influence based on property, financial participation or regulations governing the enterprise. (270)

Consequently, the detention of a majority of the capital or voting rights, or of a majority of the seats in the supervisory board or even the public control of the activity can be regarded as elements qualifying the entity as "public" in the sense of the Community law. The French mixed capital societies, the state monopolies and the French national societies must, thus, be regarded as public in the sense of the EEC jurisprudence.

A look at the French domestic law shows us that the legal regime applicable in France is not entirely compatible with this finding. The French law distinguishes between 4 different categories of enterprises each of them having different relations with the state authorities. Only a part of them are considered as public in the sense of the French law and thus submitted to the administrative law with regard to their relations with individuals. (271) From the French domestic point of view, the relation between individuals and a state owned manufacturer or bank might consequently be "horizontal" and not "vertical". The EEC Directive could therefore not be applied in this context.

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269 See e.g. the case "Commission v. Italian Republic", of June 16, 1987, ECR 1988, 1026. Here the Italian government held the position that the notion of "public enterprises" does not include entities without legal personality.

270 See especially the Directive of June 25, 1980, in OJEC L 195 of June 29, 1980.

271 See especially G. Vedel, P. Delvolvé, "Droit Administratif", PUF, Paris, 1982, at p. 1013 seq.

The difference between French domestic and EEC law must be decided on the bases of priority. The French Conseil d'Etat (272), traditionally, did not accept the priority of EEC law when in collision with French law. So, in 1978, the Conseil d'Etat has decided that Government or Parliament are the only competent authorities to implement a directive into national law and that, therefore, private citizens cannot invoke before judicial authorities a directive unless it has been implemented by the competent authorities. (273) The Conseil d'Etat showed clearly that, in its opinion, French law had priority when colliding with EEC law and that for this reason the direct application of directives was excluded in France.

The ECJ did never accept this position and insisted on the supremacy of EEC law in order to guarantee the harmonious evolution of law in the entire EEC. (274) In cases where provisions of Community law were declared to be directly applicable, the supremacy question was decided implicitly, supremacy being inherent in any provision being directly applicable. Even the French Court had finally to accept this general principle.

We can therefore conclude that the EEC view of "public enterprise" would prevail in a case where a French court would have to decide whether or not the Directive on product liability can deploy direct effect in the relation between an individual and a state-owned or state-controlled enterprise. The mere fact that the state exercises financial or *de facto* control might suffice to qualify the relation as "vertical" and thus submitted to the theory of "direct effect". So, even without implementation in France the Directive on Product liability might be of importance with regard to the various

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272 The Conseil d'Etat is the French supreme court in administrative matters.

273 See Conseil d'Etat of Dec. 22, 1978, "Ministère de l'Intérieur c. Cohn-Bendit", Rec. p. 524.

274 See as example of the constant jurisprudence of the ECJ: ECJ "Costa v. ENEL" July 15, 1964, in ECR 1964, p. 1141; "Simmenthal" March 9, 1978, ECR 1978, 629.

"national" societies. It is, however, up to the ECJ to decide this in concrete cases.

C. FRENCH DRAFT BILLS CONCERNING PRODUCT LIABILITY

As we have seen before, France did not yet implement the EEC Directive. Nevertheless, there are a number of legal drafts which have been brought to Parliament, the study of which allows us to show, in rough lines, what the contents of a future legal regime in France might be.
France is one of two member states of the EEC which intends to implement the Directive by modifying its national Civil Code. (275) In order to simplify the French legal regime of product liability, the authors of two unsuccessful draft bills have chosen to eliminate the existing liability regime and to replace it by new provisions although Art. 13 of the Directive allows, in theory, both regimes to co-exist. This was decided in order to avoid excessive multiplication of claims which could be harmful for manufacturers since it would be difficult to measure the scope of their potential product liability. Consequently, the last project states that classical rules governing product liability, such as warranty for hidden defects in contractual matters, liability for "garde de la chose", will not any more be applicable to product liability cases. (276)

Before studying the choices made by the drafters concerning the options left to the different member states, we will examine the main features of the last draft bill, which is still under examination in the legislative bodies.

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275 The Netherlands have also incorporated provisions of the Directive into the new Civil Code.

276 Project of law, as presented by P. Arpaillange, Minister of Justice of the French Republic, JO Ass Nat 1395.

1. Main features of the French draft bill

The new liability regime is, in conformity with the EEC Directive, a liability without fault. Art. 1386-1 CC, this liability is mandatory, since disclaimer clauses are prohibited, Art. 1386-14 CC, except for goods which are not used by victims for their private needs. As far as it concerns the possible defendants, the French draft is even going farther than the Directive encompassing within the notion of "manufacturer", professional suppliers whether or not the producer is identified, Art. 1386-19 (277); therefore, it advantages the victims providing them with an even greater number of potential defendants. The draft of law makes additions to the Directive by defining the notion of "putting into circulation of a product" as the rime when the producer has voluntarily relinquished control thereof, Art. 1386-4.

The new liability regime will be applicable to all kinds of goods. However, the project of law excludes immovables which keep their own specific product liability regime. The French draft bill, contrary to the Directive's provisions does not admit a lower threshold for damage to property which seems logical since no other liability regime - in contrast to other countries - will be maintained and such a threshold would mean that a number of victims could never be compensated when their damage is under 500 ECU, which might be inequitable.

Liability of producers is limited to ten years, Art. 1386-15 CC, which is a shorter limit than that originally provided for by French law. (278) The limitation of three years in which proceedings should be brought to court constitutes a more precise limit than the "bref delai" of the French Code Civil, whose imprecision was at the origin of long debate and controversy.

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277 This article reads: "Seller, lessor or any other supplier acting as a professional is liable as would be a producer.

278 See supra.

2. Optional implementation: development risk defense, agricultural products, limitation of damages

Following the other member states, the very controversial defense concerning development risks has been adopted by the drafters of the draft bill as an exonerating circumstance for producers, Art 1386-10 (4).

As far as it concerns the inclusion of primary agricultural products in the scope of the law, the French drafters have encompassed them in the category of products governed by this new liability regime.
Lastly, the draft bill does not provide for an upper limit on liability for damage caused by identical items with the same defect, since it is viewed as not conform to French law tradition. (279)

Conclusion

In conclusion we can note that the French Republic is the only European state which did not yet adopt the EEC product liability regime. This situation might, in case of actions brought against state-owned companies, lead to direct application of the EEC legal regime where the ECJ holds it necessary. Otherwise, the legal draft bills allow us to note that the future rules of EEC product liability will entirely replace the today valid domestic system developed by the courts. This evolution will bring more legal certainty especially with regard to procedural questions. Regarding the material regime as such, it will probably not modify the position of French consumers, as the EEC regime has largely been influenced by French doctrine.

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279 See P. Arpaillange, art. cit supra (fn. 276).

III. GERMANY

The Product Liability Directive has been implemented in German Law not without extensive debate and considerable delay. (280) The finally adopted law, the "Produkthaftungs Gesetz" (ProdHaftG) of November 1989 (281) brings a number of changes to the German product liability regime.

However, we have to note that the German law, unlike the French law, ignores a rule of "non-cumul" of actions. As sect. 15 II of the ProdHaftG stipulates, the existing delictual product liability as developed by the courts (282) will remain entirely in force. The German plaintiff may, consequently, base his claim on 4 different legal grounds: European-wide harmonized product liability as expressed in the ProdHaftG; delictual product liability based on Art. 823 I and II BGB; strict liability for certain particular products (drugs); and finally contractual liability where the parties have convened. In this context it is important to examine the new aspects, the implementation of European law brought to the German legal order.

Generally, the adoption of the Directive by the European Commission gave rise to criticism by the German Government and the doctrine, considering it as "a step backwards" or "aiming in the wrong direction", endangering the Supreme Court's carefully established balance between industry's and consumers' interests.(283) In fact, a careful study of the new law does not confirm this apprehension as the new norms go

(280) The first Produkthaftungs Gesetz issued by the German Government and voted by Parliament was held unconstitutional and void by the German Constitutional Court (Bundesverfassungsgericht) and had to be reformulated.

(281) ProdukthaftungsGesetz of November 15, 1989, entered into force on January 1st, 1990; Bundestagsdrucksache 11/2447.

(282) See above.

(283) For the debate, see generally: N. Reich, "L'introduction de la Directive en R.F.A.", in "Sécuritédes consommateurs et responsabilité du fait des produits défectueux", Colloque of September 6 and 7, 1986, Paris 1987, at p. 149.

only in some minor points beyond the prior existing German product liability regime; in others they are far less protective than traditional German delict law as developed by the courts.

A. DAMAGES GIVING RISE TO LIABILITY

Art. 823 I BGB does not provide for a general protection of all goods which might be injured or destroyed. (284) Only physical integrity, life, health and property of the victim (commercial and industrial user and consumer as well) are covered by this provision. Sect. 1 al. I 1 of the ProdHaftG, on the contrary, offers a broader scope of protection: in case of physical harm, everybody (consumer, industrial user and even third parties) is subject to protection. For all other material (but not physical) harm to things *intended to private use*, only private consumers (or injured third parties) may claim damages. This goes beyond the limited enumeration of the BGB.

However, pursuant to the ProdHaftG, the destroyed or damaged "thing" must be a good different from the defective, damage causing product itself. Pursuant to the legislative commentary by the German Ministry of Justice (285) spare parts or other essential or accessory parts of the product (which can be taken away or not) cannot be regarded as "another thing", and their destruction can consequently not give rise to reparation. (286)

With the legal intention to limit claims based on damage or destruction of mere property (things), the German legislator has introduced a lower threshold for admissibility

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(284) See above.

(285) See Bundestags Drucksache 11/2447 at p. 13. See equally Graf von Westphalen, "Das neue Produkthaftungsgesetz", in Neue Juristische Wochenschrift 1990, at p. 84.

(286) The official comment underlines that the "other thing" must be "generally be perceived by the public opinion as different from the defective product".

of actions. This level is at 1,125 DM, and consequently in conformity with Art. 9 b of the Community Directive.

Both last-mentioned provisions tend to limit the scope of this strict liability regime, in such a manner that its application will, de facto, be close to the existing German delictual regime.

B. MAJOR DIFFERENCES BETWEEN THE DELICTUAL AND THE NEW STATUTORY REGIMES

One could believe that the EEC strict liability must go beyond a delict-based approach. In fact, the extensions brought to the German delict regime by the courts lead, in most cases and with regard to the concrete result, to a very consumer protective situation which is close to the new EEC-wide legal situation. Only when we look at particular legal questions, such as post-marketing duties, construction and design defects, supplier's responsibility or at the question of burden of proof, we have to recognize certain important differences.

1. Post marketing duties

Pursuant to the traditional delictual legal regime, the post-marketing duties of the producer go far beyond mere commercialization or contractual warranty periods. (287) On the contrary, they are merely unlimited and emerge every time when there is reason enough to act.(288) This is considerably different under the new ProdHaftG. Sect.1 al.II Nr. 5 provides explicitly for a limitation of the duty to observe a product "to the period of the production of the product", which means in the concrete case that after the end of a series production and/or introduction of a new improved product, there is no manufacturer's duty to care about the safety of a manufactured good he brought into circulation in a prior period.

(287) See BGH in Betriebs Berater 1981, 1045 at 1046.

(288) See BGH in Neue Juristische Wochenschrift 1987, 1009, concerning a Honda vehicle.

2. Design and manufacturing defects

With regard to design defects as such, the German delictual liability and the new ProdHaftG do not show important differences. Art 823 BGB normally covers such defects as the existence of dangers inherent to the product and leading to the defect and the damage "indicate" that the manufacturer did not apply sufficient knowledge when designing the product. (289) Sect. 1 al. II Nr. 5 of the new law aims at the same objective when it stipulates that design defects give "always" rise to liability.

A major difference can, however, be found with regard to manufacturing defects. The delictual regime, as mentioned above, (290) sticks to the fault that occurred with regard to the supervision or organization of the manufacturing process of the product. In this field the BGH went quite far when he declared that manufacturing defects give normally rise to liability consequences, and when he applied very severe standards with regard to the defendant's discharge concerning its duty to care. (291) But at least theoretically, the defendant could discharge himself with reference to Art. 831 I sentence 2 when he succeeded to prove that the defect resulted from the act of a well chosen and sufficiently supervised employee.

In the strict liability regime of the ProduHaftG there is no space for such a defense. Consequently the EEC Directive strengthens, to some extent, the plaintiff's position with regard to manufacturing defects as it eliminates the manufacturer's reference to the employee's act.

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(289) See Graf von Westphalen, op. cit. supra (fn. 285), at p. 86.

(290) See above.

(291) See BGH in Neue Juristische Wochenschrift, 1975, at p. 1827.

3. Supplier's liability

In the field of supplier's liability, the ProdHaftG does not bring fundamental new aspects but it clarifies the supplier's position and the liability with regard to him. The delict law has recognized the fact that the manufacturer of the supplied product can discharge himself when he has acted in conformity with specifications given by the final assembler. (292) However, this is only the case when the supplier had reasonably not to have a doubt about the correctness of the specifications. (293) If there was any such doubt there would at least be the duty to verify or to communicate with the author of the specifications.

The new ProdHaftG avoids all subjective elements, such as a "reasonable doubt" which would be difficult to be proved by the plaintiff. In conformity with Art. 7 (f) of the Directive the German law simply stipulates that where the product has been manufactured in conformity with specifications, it is the final assembler, and not the part supplier, who will be held liable.

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(292) See supra.

(293) See BGH in Neue Juristische Wochenschrift 1968, 247, case concerning a magnetic switch being apparently unapt to fulfill the specified task.

C. THE BURDEN OF PROOF

Of more importance is finally the difference between both regimes with regard to the burden of proof. Since the famous "Fowl-Pest" case (294) German courts shift, in product liability cases, the burden of proof with regard to the fault and those facts in the manufacturer's sphere from the plaintiff to the defendant. This went very far in favour of the plaintiff.

The ProdHaftG, being indifferent with regard to the fault of the manufacturer, has not adopted a similar pro-plaintiff position. Art. 1 IV ProdHaftG stipulates that the plaintiff carries the burden of proof for the defect, the damage and the causality between both. The general rules of proof are applicable. (295) This relative disadvantage of the plaintiff must be regarded as the result of an attempt not to unilaterally disadvantage the industrial manufacturer who, with or without a fault, would have to prove the inexistence of a defect, of causality or of a damage, which, indeed, would be a very heavy burden.

D. THE OPTIONAL IMPLEMENTATION: DEVELOPMENT RISK DEFENSE, AGRICULTURAL PRODUCTS, LIMITATION OF DAMAGES

The EEC Directive allowed for a certain number of options for the national governments when implementing it into domestic law. These options concern in particular the development risk defense, the exclusion of primary agricultural products and the limitation of liability to 70 million ECU. (296) The German legislator took this opportunity to limit the scope of the new law as far as permissible.

Consequently, Sect. 1 al. II No. 5 allows for a development risk defense when the defect was not detectable

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(294) See BGHZ 51, 92, 102.

(295) See Bundestags Drucksache 11/2447 at p. 16.

(296) See art. 15 of the Directive.

with respect of "generally accessible principles of science and technology".(297)
Section 2 ProduktHaftG excludes explicitly agricultural products "as long as they have not been submitted to any transformation", which means that the actual primary state of the product has been modified. (298)

Sect. 10 of the ProdHaftG, finally, provides for an upper limitation of liability at the level of 160 million DM for personal damages. This limitation concerns all cases based on the same defect of a product.

Conclusion

In conclusion we can note that the ProdHaftG as consequence of the European product liability Directive of 1985 does not profoundly modify the German Law in place. Despite its dogmatically different approach, strict liability instead of a delictual regime, the practical result is very close to the prior and still valid delict regime. In some points it brings clarification, in some points it improves the plaintiff's, in some items the defendant's position. But in a global evaluation, the result will be the same in most of the possible product liability cases.

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(297) There is a considerable difference with regard to the applied standard in the delictual context where the courts require generally the "newest standard of science and technology, internationally seen", compare Bundestags Drucksache 11/2447 at p. 15; and BGH in Betriebs Berater 1981, at p. 1045.

(298) See Bundestags Drucksache 11/2447 at p. 17, quoting the example of milk transformed to condensated cream.

IV. UNITED KINGDOM

The provisions of the Directive have been incorporated into the United Kingdom's domestic law by Part I. of the Consumer Protection Act of 1987 which came into force on March 1st, 1988. The act supplements rather than replaces the existing law on product liability based on two main areas of law: contract and tort. (299)

A. MAJOR DIFFERENCES BETWEEN TRADITIONAL REGIMES AND THE NEW STATUTORY REGIME

1. Nature of the new liability regime

The main effect of the Act is to create for the victim of a defective product an additional statutory cause of action simply by showing that the product was defective and that it caused injury. With this new cause of action the plaintiff finds himself in a better situation than under the preexisting legal regime as he no longer needs to prove negligence or breach of contract. However, he still has to prove that the product was defective and equally the causation i.e. that the defect caused the damage. (300) The new law grants the benefits of strict or "close-to-strict liability" to victims even though they are not privy to any contract.

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299 See generally R. Nelson-Jones, op. cit. (fn. 193). See also A. M. Clark, op. cit. (fn. 197). See equally C. Islam, "Les effets de la Directive Communautaire sur l'introduction d'une instance au Royaume-Uni", Revue du Marché Commun, No. 325, p. 176; and J. Ricatte, "Introduction dans les droits nationaux de la Directive du Conseil CEE (85/374) responsabilité du fait des produits: l'exemple du Royaume-Uni vu de la France", in Gazette du Palais, 1987, p. 752.

300 See e.g. M. Brooke, "Meeting the EEC Directive: Great Britain", in International Bar Association, Springtime in Paris: Product Liability in Bloom, May 1990.

2. Damages giving rise to liability

According to sect. 5 of the Act, damages giving rise to liability are death, personal injury, or any loss of or damage to any property (including land). This general principle of liability expressed in sect. 5 (1) is then subjected to a number of qualifications which in particular have the effect of excluding from recovery damages to the defective product itself, and damage to a product caused by a defective component part and damage to commercial property. Damage to private property is recoverable under the new regime only if it exceeds 275 £.

It is clear that pure economic loss is entirely outwith the new scheme of liability. When the harm is death or personal injury, liability under the Act will coexist with current, mainly negligence-based remedies. Purely economic loss, such as loss of profits, remains recoverable, if at all, only outside the new rules, in contract, as we have seen above. (301) Damage of 275 £ or more caused to personal property will be recoverable under the Act while damage caused to commercial property will be actionable only outside the regime of the 1987 Act. (302) Damage to the defective product itself is recoverable only under the common law rules, and even then only if the defect damages or presents a threat of damage to persons or property other than the defective item itself. (303)

3. Defendants

Persons other than the producer of a product may incur liability under the new regime. The act achieves this in two ways. First, in sect. 1, by giving an extended definition to the notion of "producer":

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301 See above Part II. Chapter I. III. B.

302 See A.M. Clark, op. cit. (fn. 197), p. 130.

303 See supra.

> *"a.the person who manufactured it [the product];*
> *b.in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it.*
> *c. in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (e.g.in relation to agricultural produce), the person who carried out that process."*

Secondly, by establishing in sect. 2 the range of persons who may be liable. There are three categories of potential defendants: the manufacturer of the product, the person who, by putting his name on the product holds himself out to be the producer, and the person who in the course of business imports the product into an EEC member state from outside the EEC. This will give to the victims of a defective product a new action which was not previously available in domestic law. Thus, a new form of liability is imposed on own-branders and EEC-importers.

Furthermore, the notion of producer may also include the supplier of a component part (sect. 2 (3)). With more precision than the Directive, the Act gives a definition of "supply" in sect. 46 encompassing a large range of persons. The definition includes all persons

> *"doing any of the following, whether as principal or agent that is to say,*
> *a. selling, hiring out or lending the goods;*
> *b. entering into a hire-purchase agreement to furnish the goods;*
> *c. the performance of any contract for work and materials;*
> *d. providing the goods for any consideration other than money;*
> *e. providing the goods in or in connection with the performance of any statutory function;*
> *f. giving the goods as a prize or otherwise making a gift of the goods and, in relation to gas or water those references shall be construed as including references to providing the service by which the gas or water is made available for use."*

This legal definition gives a very far-reaching scope to the new liability regime which, on the one hand, goes beyond the preexisting law as it enhances largely the group of

potential defendants. It is including especially organizations or persons performing only financial operations in the context of a sale. Even agents which might often be dependant small subcontractors are reached by these provisions and may, thus, be exposed to liability claims. (304) On the other hand, it goes equally beyond the EEC Directive since it includes explicitly all "considerations" besides money, including non-pecuniary exchanges, gifts and even statutory obligations. (305)

4. Defenses

In sect. 4 (1) the Act establishes a defense which is not, at least theoretically, available as such in Common Law. As we have seen above, a binding British standard does not, in all cases, give the plaintiff the guarantee to be exonerated from product liability. (306) This section reads:

> *"It shall be a defense for him to show that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation."*

Consequently, the British judge is not any longer able, when stating on the ground of the new regime, to reject the defendant's defense as long as he refers to binding standards flowing from EEC norms.

The defense of sect. 4 b. according to which a producer may escape from liability if he proves that he did not, at any time, supply the product to another is unknown in Common Law. This defense will apply e.g. where the wrong producer is sued and also where goods have been stolen from the producer before

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304 See A.M. Clark, op. cit. (fn. 197).

305 It is foreign to roman-law based legal regimes to treat gifts in the same manner as pecuniary sales, as the donnor should benefit from a less severe treatment than the person having reached an advantage (pecuniary or not) in exchange.

306 See supra.

being put into circulation since here there is no "supply" of the goods in terms of sect. 46 of the 1987 Act. (307)

Sect. 4 (1) c. of the Act gives a defense to a producer when the following conditions are satisfied:

> *"That the only supply of the product to another proceeded against was otherwise in the course of a business of that person; and that sect. 2 (2) above does not apply to that person, or apply to him by virtue only of things done otherwise than with a view to profit."* (308)

Two elements need to be satisfied: the Act only exempts products which were supplied other than in the course of a business *and*, where the supplier is the producer, own-brander or importer into the EEC or supplied the goods other than with the view to profit. Thus, a person who sells his lawn-mower to his neighbor can use this defense to avoid potential liability under the act as a supplier since the good was supplied other than in the course of his business and he is not the producer. (309)

Another type of defense is introduced by the Act. Where a component part is made to the order of the manufacturer of the finished product and it is then used by him for a purpose for which it was not designed, the component producer is not liable. This is a new form of defense for producers of component parts which is strongly criticized by some British lawyers since it may allow the defense to be argued by component producer even where his product, considered independently, does not meet legitimate expectations of safety. (310)

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307 See "Implementation of the EC Directive on Product Liability - an Explanatory and Consultative Date", DTI of Nov. 1985, No. 56.

308 For sect. 2 (2) and see above.

309 See A.M. Clarke, op. cit (fn. 197) p. 191.

310 R. Nelson Jones and P. Steward, op. cit. (fn. 193), p. 35 and following.

One has to note here, that the British legislator has largely used the possibility granted by the Directive to introduce defenses. In this manner it mitigates the somewhat severe standard and extent of the EEC regime - which comes in this way close to the traditional Common Law standards.

5. Prescription rules

In conformity with the Directive's articles 10 and 11 the Act provides for two prescription periods: three years after knowledge and ten years after putting the product into circulation. (sect. 11 A of the 1987 Act). These provisions are considerably different from the six years period applied in Common law.

The British Act defines in a very precise manner the notion of "knowledge". The person has only "knowledge" of the defect when he knows the following facts:

> *"a. such facts about the damage caused by the defect as would lead a reasonable person who has suffered such damage to consider it sufficiently serious to justify its instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and*
> *b. that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and*
> *c. the identity of the defendant."*(311)

In this way the prescription period might be much longer than one might believe when merely regarding sect. 11 A. The Act provides, in this way, for a consumer-friendly prescription approach.

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311 Limitation Act 1980, sect. 14 (1) a., as inserted by sched. 1 para. 3 Consumer Protection Act 1987.

B. THE OPTIONAL IMPLEMENTATIONS: DEVELOPMENT RISK DEFENSE, AGRICULTURAL PRODUCTS, LIMITATION OF DAMAGES

- development risk

The Consumer Protection Act 1987 covers development risks, although it does not exactly follow the Directive and is, consequently, source of controversial debate in the United Kingdom. It provides that

> *"the producer shall not be liable if he proves that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control."* (312)

Consumer protection groups have immediately attacked the Act because of the way it defines the state of the art criterion which implies that a defense will succeed if the producer proves that he had simply used practices that were generally applied in the relevant industry while under the Directive it should succeed only if the producer had applied the highest standards of scientific and technical knowledge. (313) It is, thus, up to the courts to consider what might have been discovered by a "reasonable" manufacturer of products. It seems that this is simply a return to a negligence standard of liability, with a reversal of the burden of proof since the producer must establish the elements supporting the defense. Rather than asking the plaintiff as traditional tort law based on negligence does, the new rule will be read as asking the producer to disprove fault. (314) This legal provision different from the EEC Directive might, if leading to differences in the practical case, be brought to the ECJ jurisdiction.

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312 See in comparison article 7 e of the Directive: *"that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."*

313 P. Thieffry, P. van Doorn, S. Lowe, op. cit. (fn. 250), p. 78.

314 See M. Brooke, op. cit. (fn. 300), p. D-3.

- agricultural products

United Kingdom did not include primary agricultural products within the scope of its new statute. They are submitted to different legal rules.

- limitation of damages

Unlike the German law but similar to the French project of law, the Act does not provide for a financial limitation on the producers' liability for damage caused by identical items with the same defect. This is in line with the Common Law tradition to leave it to the judge to determine the equitable reparation bearable by a defendant and based on the comparison of precedents.

Conclusion

The law implementing the EEC Directive in national British law is not, according to the opinion of most of the authors, an ideal solution, which would considerably improve the plaintiff's position, enabling him to succeed more easily in his action for reparation in a product liability case. Instead, it must be considered in conjunction with contract and the traditional torts. In some cases it enables claimants to recover damages when they could not have done so before. In many it adds to their range of remedies. But in others it does not really facilitate their access to compensation. This new regime does not introduce the era of "automatic" product liability compensation which had been expected by consumer protection groups.

CONCLUSION OF PART II

As we have seen above, the evolution of the American Strict Product Liability regime has led to a crisis in product liability law. It is very unlikely that the new no-fault liability system is going to generate the same situation in Europe. Indeed, many features of strict product liability law in the United States do not exist in Europe, even in Common Law Member states (United Kingdom - except Scotland - and Ireland). A major factor, as far as the amount of damages awarded in personal injury actions in the US is concerned, is obviously the determination of damages by juries, generally unknown in civil law countries. Contingency fees and punitive damages are equally not existing and even in England they have never been awarded in an action concerning a defective product. The other reasons why a liability crisis is unlikely in Europe, in spite of the new liability regime, is the existance of mandatory public health insurance systems providing basic coverage to victims of accidents.

Furthermore, strict product liability in Europe is much more limited with regard to its scope: non-material damages remain to be obtained under the applicable national regime of the European states and prescription periods are short, often shorter than in the original national legal regimes.

In contrast to US product liability, the major objective behind the adoption of strict product liability in the EEC was not only consumer protection but the desire to harmonize conditions of competition between manufacturers marketing their products within the EEC. But, today, we can already note that this attempt has partly failed: the European Directive super-imposes its no-fault liability system upon the national pre-existing liabilities which differed largely from one state to the other. However, this legal proceeding did not directly affect or eliminate the latter, as the European law allows the States to maintain their national traditional regimes. The today's state of law is consequently somehow in contradiction with its initial objective as there remain standards or defenses which are not harmonized.

Furthermore, on many points, the Directive refers directly to the national laws of the Member states, or allows a Member state to diverge when implementing the Directive. Consequently the complete harmonization of product liability law in Europe is far from being achieved. Future will show if these national persisting differences will encourage "forum shopping" or similar plaintiff behaviour as currently observed in the US.

PART III : PRODUCT LIABILITY APPLIED TO AIRCRAFT LITIGATION

In the United States and in Europe legal principles governing the rights and liabilities of manufacturers of aircraft are essentially the same as those governing other types of product liability litigation. Manufacturers of commercial aircraft and aircraft component parts are, in most cases, subject to the same types of potential liability as manufacturers of non-aviation products. Purchasers and users of commercial aircraft generally have the same choice of remedies as are available to the purchasers of other types of products. There remain, however, some specifities, we have to elucidate in the following.

In sharp contrast with what is the situation in the USA - where the law of aircraft product liability is essentially based on case law - in European countries, most of the claims related to aircraft product liability are settled out of court. However, this does not preclude us to compare the present situation of the aircraft manufacturer in product liability matters in the considered legal systems.

In the following chapters, we will study the more specific application of the general product liability regimes to the aircraft manufacturer, first in the United States and then in Europe. On this basis we will attempt to compare (as far as comparable) the situation of the manufacturers which might be sued on both sides of the Atlantic.

CHAPTER I. : AIRCRAFT MANUFACTURER LIABILITY IN THE UNITED STATES

Although aircraft manufacturers in the United States may be liable for the same violations of duties as manufacturers in general, there are, however, some special or unusual applications of product liability principles in the field of commercial aviation. First we will look at the application of general product liability actions (negligence, warranty and strict liability) before turning to specific applications of those principles in the field of aviation; then we will study the available defenses, the potential defendants and the scope of recoverable damages in aircraft litigation.

I. APPLICATION OF GENERAL ACTIONS IN AIRCRAFT-RELATED CASES

A. LIABILITY FOR NEGLIGENCE

As to negligence, an aircraft manufacturer may be liable for negligently manufacturing or designing his aircraft. He may also be liable for failure to warn users of his aircraft with regard to dangerous characteristics.

1. Negligence in manufacturing

A manufacturer of an aircraft or a component part in the United States is under a duty to exercise due care in the manufacturing of his product. This includes proper material selection, proper constructing, assembling and suitable and adequate care in inspecting and testing. The question as to whether a manufacturer of an aircraft has actually respected the required standard of care is usually resolved by comparing his conduct to what an ordinary prudent manufacturer of aircraft would have done under the same situation. (315) It is established that prime aircraft manufacturers are under a duty of care not only to products made by them but also with

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(315) See "*North West Airlines Inc. v. Glenn L. Martin Co.*", 224 F 2d (6th circuit, 1955).

respect to component parts, incorporated into their aircraft but produced by other manufacturers. This, however, does not relieve component part manufacturers of their own duty to employ a high degree of care and caution in making their products. In several cases of aviation product liability, manufacturers of aircraft or component parts were found in breach of this duty. The high level of care required by the courts may be illustrated by the following cases.

Whereas it was not surprising that the courts in "*Beech Aircraft Corp. v. Harvey*" held the defendant liable for having negligently welded wings to the craft during construction and where as a result, a fatigue crack had developed causing one wing to "fold up" (316), the sanction in "*Braniff Airways Inc. v. Curtiss Wright Corp.*", concerning an invisible cylinder defect in an engine gives testimony of high level negligence standards.

2. Negligence in design

In several aviation accident cases, an aircraft manufacturer's liability has been established on the basis of his negligence in the design of an aircraft or component part. As illustration may be quoted the case "*Manos v. TWA*", where the court found that the manufacturer was negligent in designing a thrust reverser which could develop substantial forward thrust during a malfunction. (317) In "*Nesselrode v. Beech Executive Aircraft Corp.*" the manufacturer was held liable for unreasonably dangerous design of critical flight components which allowed for incorrect reverse installation of two parts which looked identical but served opposite functions. (318)

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(316) 558 p 2d 879 (1976).

(317) 324 F Supp 470, 11 Av Cas (CCH) 1971.

(318) 707 SW 2d 371, 20 Av Cas (CCH) 1986.

3. Failure to warn

A manufacturer may also be liable for failure to warn users of his aircraft of known dangerous characteristics. (319) Cases involving "warning claims" typically involve a design defect claim as well. In "*Nesselrode v. Beech Executive Aircraft*", quoted above, the manufacturer was also condemned for failure to warn of the identical design of the two opposite functioning flight components.

A warning which is not *adequate* may also subject the manufacturer to liability. Thus, in the case of "*Erickson Air-Crane Co. v. United Technologies Corp.*" the manufacturer was held liable for erroneous maintenance advice which allegedly caused the crash of a helicopter. (320)

The duty to warn continues after the aircraft is sold. Aircraft manufacturers are continually experiencing new facts about their airplanes. They frequently issue "service bulletins" or "service letters" to their purchasers, long after the airplanes have been sold. The manufacturer's continuing duty to keep owners informed about characteristics of the airplanes is illustrated by "*De Vito v. United Airlines Inc.*" which shows how a manufacturer's continuing duty may be more than a simple duty to warn, but may extend to a duty to make changes in aircraft in the interest of safety. (321)

Courts attach particular importance to proper and sufficient instruction to the user of the aircraft. Because of the particular complexity of airplanes and their equipment detailed information is required from the aircraft

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(319) See generally: J.E. Link, "Placards, warnings and operation manuals: an aircraft manufacturer's duty to warn", in Journal of Airlaw and Commerce 1989, p. 265.

(320) 303 Or, 735 P 2d 614, 20 Av Cas (CCH) 1987.

(321) 98 F Supp 88 (EDNY) 1951, and see also "*Walton v. Avco Corp.*", 21 Av Cas (CCH) 18, 340 (Pa Sup Ct) 1989.

manufacturer. This is why aircraft manufacturers are required today to take extensive steps to describe graphically to pilots, maintenance workers, engineers, etc. the functioning of the aircraft. (322)

4. Use of "res ipsa loquitur"

Ordinarily, the doctrine of "res ipsa loquitur", i.e. equivalent to a presumption of negligence, will not be available against an aircraft manufacturer, simply because the aircraft manufacturer is not in exclusive control of the airplane at the time of the accident. However the drawing of natural inferences from certain accidents may, in fact, be indistinguishable from the application of "res ipsa loquitur". (323) Thus, in the case of "*North American aviation v. Hughes*" the decedent, a jet pilot, picked up a brand new jet aircraft from the plant of the defendant manufacturer. On taking off, the airplane started smoking and crashed at the end of the runway. No specific evidence was offered as to the cause of the crash. The plaintiff alleged that the basic facts gave rise to an inference that there was a defect in the airplane that caused it to crash. The court stated

> *"that there appears substantial evidence to support an appellee's theory that the crash was due to mechanical defect which developed while the machine was still in the air. "*

According to L.S. Kreindler it is difficult to explain or justify the court's finding on the basis other than a practical application of the doctrine of "res ipsa loquitur". (324)

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(322) See e.g. "*Bailey v. Airodyne Inc.*", 90 Wis 2d 859, 279 Nw 2d 508 (Wis Ct App) 1979.

(323) See L.S. Kreindler, "Aviation Accident Law", Mathew Bender 1990, Chapter 7 para 7.2.[5].

(324) See also "*Becker v. American Airlines*", 200 F. Supp 839 (SDNY) 1961 and "*Moore v. Douglas Aircraft Co.*", 282 A. 2d 625 (Del Sup Ct) 1971.

B. BREACH OF WARRANTY

A manufacturer of an airplane or component part may be liable to an injured person for breach of warranty. Warranty remedies play a relatively minor role in litigation involving commercial aircraft. Indeed, first, with the advent of strict product liability the importance of the warranty theory is greatly diminished. Second, express warranties are usually quite limited, both in scope and duration. express warranty is usually linked to the repair or replacement of defective component parts and only if the defect is discovered within a relatively short period of time. If e.g. a commercial airliner crashes because of a defect of critical bolt, the aircraft owner's remedy under the typically applied aircraft warranty would be limited to the replacement of the bold provided that the failure occurred within the valid warranty period (which is apparently not in the interest of the aircraft owner). (325) Third, causes of action based upon breach of express and implied warranties are often time bared before the appearance of the defect. This occurs because warranty statutes of limitation usually begin to run from the date of the sale of the product rather than from the date of the injury.

Consequently, typical aircraft warranties may be quite valuable to the aircraft owner in terms of normal use, operation, and maintenance of the aircraft, but they are often quite useless as legal remedies when a product results in major loss. However, in some instances warranty remedies can be useful in a product liability case, especially in a case where a loss has occurred while the product was still relatively new and there had been no contractual disclaimer of warranty rights. Furthermore, an action based on breach of warranty has the advantage of permitting recovery of pure economic losses, such as lost profits which are in general not recoverable under strict liability regimes.

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(325) See F.A. Silane, "Liabilities as between manufacturers and users of aircraft" in Litigating the Aviation Case, ABA Tort and Insurance Practice Section, May 1987, p. 24.

C. STRICT LIABILITY IN TORT

The doctrine of strict liability has found many applications in aviation litigation. As we have seen above the strict liability doctrine is centered around the concept of defectiveness of the product involved. In order for a strict liability claim to succeed a plaintiff must establish that the aircraft or its component part was defective and unreasonably dangerous and that there was a causal relationship between the defect and the damage suffered. On the one hand, some jurisdictions have shown willingness to liberalize these elements in expanding the scope and the application of this doctrine. This is particularly the case with the so-called doctrine of *"crashworthiness"*. On the other hand, some courts have tried to limit the application of strict liability doctrine to private consumers.

1. Doctrine of crashworthiness

With ever increasing frequency, the proposition was being advanced that an aircraft manufacturer must not only design a "safe aircraft to fly" but also must design a "safe aircraft to crash". (326) The doctrine of crashworthiness was first recognized and developed in automobile cases. This is a judicial theory, also called "*the second accident doctrine*" which has expanded product liability law and according to which the manufacturer may be held liable even though the defect did not cause the accident. This doctrine allows the occupant of an aircraft to recover from a manufacturer for injuries sustained when a defective product enhanced but did not as such cause the injuries. In a crashworthiness case, liability encompasses only those injuries sustained over and above what could have occurred absent a design defect. One commentator brought the following justification for its application:

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(326) "*Bruce v. Martin Marietta Corp.*", 544 F2d 442 (10th Cir. 1976); "*Williams v. Cessna Aircraft Corp.*", 376 F.Supp. 603 (ND Miss. 1974); "*McGee v. Cessna Aircraft Corp.*", 82 Cal. App. 3d 1005, 147 Cal. Rptr 674 (1978).

"Airplane crashes involving commercial airlines occur every year and 85 - 90 % of these crashes occur during take-off or landing. During those times the airplane is at an extremely low altitude and is moving at a relatively slow speed. Because of these characteristics, passengers can survive the impact of a crash that occurs during take-off or landing. People are often killed or injured, however, because the plane was not crashworthy." (327)

A number of situations might be considered under theory of crashworthiness by plaintiffs' lawyers:

- lack of or improper use of occupant restraint;
- fire after impact;
- seat collapse;
- inadequate airframe structure;
- inadequate instrument panel/control and panel crushability;
- inadequate emergency exits;
- loose objects and inadequate baggage restraint. (328)

This doctrine is nevertheless very controversial since it is almost impossible for an aircraft designer to foresee every possible contingency. According to aircraft manufacturers' lawyers

"(t)he net effect of applying the crashworthiness doctrine in aviation cases is that aircraft manufacturers are becoming insurers for an indeterminate class of people who may be injured by their design choices. There is simply no way for every possible contingency. Aircraft design always requires compromise whether one is considering performance or crashworthiness."(329)

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(327) See D.E. Marcy, "The Crashworthiness Doctrine and the Allocation of Risk in Commercial Aviation" in South Cal. Law Review 1979, p. 1181.

(328) J.J. Asselta, "Product Liability Litigation - Past, Presnt and Future", Lawfirm Mendes & Mount, N.Y., 1990, (unpublished).

(329) See M. Carotenuto, "Aircraft Builders Council", Inc Law Rep., presented by Mendes & Mount, N.Y., Fall 1990, p. 34, (unpublished).

2. Application of strict product liability in commercial aircraft litigation

In the last few years, there has been a lot of litigation over the issue of whether strict tort liability is available to large commercial plaintiffs such as airlines who may have suffered damage from defective aircraft. (330) Some cases have held that strict tort liability should not apply in litigation between large commercial entities. (331) The issue underlined in these cases, however, although not always stated as such, was whether the commercial plaintiff is a true "consumer" entitled to assert a strict tort liability cause of action. Since "*Kaiser Stell Corp. v. Westinghouse Elec. Corp.*" (332) it is however recognized that strict product liability does not apply as between parties who:

- deal in a commercial setting,
- from positions of relatively equal economic strength,
- bargain the specification of the product,
- negotiate concerning the risk of loss from defects in it.

This decision became the basis for a later decision by the United States Court of Appeals in "*SAS v. United Aircraft Corp.*" in which the Court held that strict liability did not apply to corporate entities who bargained from positions of relatively equal bargaining strength. The basis for the affirmance was, essentially, that the fundamental policy to be promoted by the doctrine of strict product liability is to protect otherwise defenseless victims from damage resulting from product's defects.

The Court concluded that SAS was a large commercial entity, that it had the expertise and personnel to inspect the engines in question for defects and that it also had bargained with United concerning the risk of loss. Therefore, under these

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(330) See generally: F.A. Silane, op. cit. supra (fn. 325).

(331) See e.g.: "*Tokyo Marine and Fire Insurance Co. v. McDonnell Douglas Corp.*" 617 F 2d 936 (2nd Cir) 1980. "*Scandinavian Airline System v. United Aircraft Corp.*", 601 F 2d 425 (9th Cir 1979).

(332) 55 Cal. App. 3d 737, 127 Cal. Rptr 838 (1976).

circumstances, there was no policy reason why the doctrine of strict tort liability should apply to SAS.

The SAS decision has been quoted and relied upon in several subsequent decisions (333), despite its quite questionable foundation. (334)

In contrast to the SAS decision, the United States Court of Appeals took an entirely different approach to the application of strict tort liability in commercial settings in the case of "*Steiner Aero AB v. Page Airmotive Inc.*". (335) The court recognized that, although the plaintiff was a expert in the field of aviation, generally there was no evidence to establish the plaintiff's specific expertise with regard to the manufacturer of aircraft engines which would preclude it from being a "consumer" entitled to the benefit of a strict liability cause of action.

The law has now evolved to the point where commercial aircraft operators may argue with a reasonable chance of success that strict tort liability should apply when the type of damage which occurred was, first, not covered by the plaintiff's contractual agreement with the manufacturer, and second, was such that the plaintiff had neither the skill nor the expertise to avoid the type of harm which resulted. (336) However, today, the law, determined by the two presented streams of jurisdiction is not so clear that a commercial plaintiff can be secure in relying solely on a strict tort liability cause of action.

Indeed, since the doctrine of strict liability was initially developed to protect the "average consumer" who was

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(333) See e.g. "*Varig Airlines v. Boeing Corp.*", 641 F 2d 746 (9th Cir, 1981).

(334) F.A. Silane, op. cit. (fn. 325), p. 24, objects this decision by showing that the presumed elements taken into consideration by the involved corporations did not correspond to the reality.

(335) 499 F 2d 709 (10th Cir 1974).

(336) See F.A. Silane, op. cit. (fn. 325), p. 27.

not in a position to distribute the risk of loss resulting from a defective product, it seems somehow unjustified to allow a corporate airline to use a strict liability action against the manufacturer with all the advantages, such an action presents for the plaintiff.

II. SPECIFIC AVIATION DAMAGES

The damages arising from aviation accidents encompass the entire range of damages in tort law, as presented in Part I. of this study. Almost uniformly recovery will be sought for wrongful death damages, personal injuries, property damage and economic loss. The recovery for each of these types of loss will be governed, in most cases, by state law.

A. WRONGFUL DEATH CLAIMS

The low survival rate in aviation crashes has resulted in a predominance of wrongful death litigation. Most of such cases are governed by State statutory and even constitutional provisions, although federal, international, or foreign law can be invoked in some instances. (337)

The specific categories of loss which may be recoverable as damages in an aviation wrongful death case are the following:

1. Pecuniary damages

Almost every U.S. jurisdiction will permit recovery of strictly financial losses in aircraft-related cases. (339) Important variables will be taken into account in determining the amount of recoverable pecuniary damages and will explain the disparate results which may be obtained in different circumstances. These variables are e.g. the source and amount of the evaluated decedent's future income, the decedent's health and life expectancy, the relationship between the decedent and the beneficiary, etc. (339)

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(337) E.g. "The Death on the High Seas Act" provides remedy for death on international waters following aircraft failure, App E.

(338) E.g. "*McEloy v. Cessna Aircraft Co.*", 506 F Supp 1211, 1219 (WD Pa 1981); "*Shu-Tao Lin v. McDonnell Douglas Corp*", 574 F Supp 1407, 1410 - 11 (SDNY 1983).

(339) See W. Turley, op. cit. supra (fn. 9), p. 180.

2. Non-pecuniary damages

The intangible losses come under many names but actually there are two identifiable categories: loss of society and companionship and grief and mental anguish. The trend is toward increased acceptance and recognition of these elements of recovery, however, it seems that it is a very controversial issue. (340)

B. PERSONAL INJURY AND SURVIVAL CLAIMS

Aviation crashes may result in injuries and damages to the decedent in addition to those suffered by the survivors. This type of claims will permit recovery of certain losses suffered by the decedent's estate. Recovery of these losses will depend on the provisions of the respective State's survival statute. A survival statute, unlike a wrongful death statute, does not create a new cause of action but merely preserves any action the decedent may have had before his death. This will typically include the decedent's pain and suffering between the time of injury and the moment of death, loss of earnings, medical expenses, etc. (341) Other elements of recovery will vary depending upon the jurisdiction. For example, some jurisdictions will permit recovery for the decedent's potential mental anguish during that period between injury and death. Most states have, however, not yet recognized that element of loss. (342)

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(340) See e.g. "*Mc Candless v. Beech Aircraft Corp.*", 779 F 2d 220 (5th Cir 1985); "*Lux v. McDonnell Douglas Corp.*", 608 F Supp 98 (ND III 1984).

(341) See e.g. "*Wetzel v. McDonnell Douglas*", 491 Supp 1288, 1290 (ED Pa 1980); the fact that the period between aircrash and death is brief will not by itself preclude recovery for the decedent's pain and suffering, see in re "Aircrash disaster near Chicago", on May 25, 1979, 507 F Supp 21, 24 (ND III 1980).

(342) See e.g.: "*Bedwood v. Madalin*", 600 SW 2d 773, 775 (Tex 1981).

C. DAMAGES UNIQUE TO AVIATION CRASH CASES

While most damages arising from aircrash cases are the same as those in other types of personal injury and wrongful death litigations, some damages are particularly prevalent and even unique to aviation accident cases, for instance, pre impact fear and mental anguish (period of time between the realization of trouble in the air and the moment of impact with the ground); post impact traumatic stress (long term emotional trauma); bystander's shock and mental anguish (psychological harm caused to bystanders because of an aircrash); rescuer injury (mental anguish suffered while rescuing survivors. (343)

D. PUNITIVE DAMAGES

In spite of the fact that many commentators in the field of aviation litigation have made several arguments against allowing punitive damages against aircraft manufacturers, they have however been awarded. (344) As we have seen, punitive damages are generally awarded over and above full compensation of plaintiff's injury. In an aviation product context, punitive damages are usually sought when one or more of the following claims are present: fraud, knowing violation of an established safety standard, inadequate testing or manufacturing procedures, failure to warn customers of known dangers, post-marketing failure to remedy or warn of dangers once they become known. (345) Very few courts will require

(343) See for more development: W. Turley, op. cit. supra (fn. 9), p. 186.

(344) See E.S. Carsey, "The Case Against Punitive Damages: An Annotated Argumentative Outline", 11 Forum, p. 57, 1976. A jury award of 20,000,000 $US by a California court in a litigation against a general aviation aircraft manufacturer is well known in the aviation industry; for more details see: S.C. Kenney, "Punitive Damages in Aviation Cases: solving the Insurance Coverage Dilemma", in Journal of Air Law and Commerce 1983, p. 753.

(345) See W.S. Allen, "Controlling the Growth of Punitive Damages in Product Liability Cases",(unpublished paper presented to Airlaw and Commerce Symposion, Southern Methodist University, 1985.

that the defendant has a specific intent to cause harm before allowing punitive damages. As long as it is established that the defendant had knowledge of a particular defect sufficient to place him at fault in some sense, the majority of jurisdictions will permit recovery of punitive damages under a strict liability theory without any findings of negligence. (346)

Aircraft manufacturers have successfully reduced or avoided punitive damages awards by showing evidence of warnings issued to users after design defects have been discovered. In "*Kritser v. Beech Aircraft Corp.*" the plaintiff contented that the crash of a twin engine plane resulted from a defectively designed fuel tank. Beech had learned of the problem before the crash, and after consulting with the FAA, the company issued a flight manual supplement, warning owners of the existence of the defect and advising against certain manoeuvres. The court held that the warning issued by Beech showed the level of good faith required to avoid punitive damages instruction. (347)

Compliance with Government regulations can also be a key factor in establishing good faith. (348) In contrast, compliance with industry standards will not in itself mitigate the manufacturer's liability for punitive damages. (349)

In the US, the jury system and the recognition of numerous other forms of damages produce awards for personal injury and death which are generally higher than in any other national jurisdiction. Since in the US jury practice ordinary citizens assess the damages, they tend to be, particularly in the aviation context where injury and death occur often in form of "air crash catastropies", more emotional than

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(346) See e.g. "*Piper Aircraft Corp. v. Coulter*", 17 Av. Cas. (CCH) 18163 Fla Dis Ct App (1983).

(347) 479 F 2d 1089 (5th Cir 1973).

(348) See e.g. "*Fergusson v. Cessna Aircraft Co.*", 124 Ariz 47, 643 P. 2d 1017 (C App 1981).

(349) See e.g. "*Maxey v. Freightliner Corp.*", 665 F 2d 1367 (5th Cir 1982).

professional judges would probably be. (349a) The most 'generous' juries and therefore the most appreciated courts seem to be located in New York City, Chicago, at Miami and more recently, at Houston (Tex.).

III. POTENTIAL DEFENDANTS

Due to the complexity involved in the manufacture of an aircraft, many persons might expect to be defendants in an aircrash litigation case. The majority of US aviation accident cases involve strict liability claims against the manufacturer of the aircraft and a supplier of the aircraft component parts, but other potential defendants might be in some instances manufacturer or supplier of accessory items not incorporated in the aircraft.

A. COMPONENT PART MANUFACTURER

Aircraft manufacturers are responsible for defects in the component part they incorporate to the same extent as the manufacturer and supplier of such part. In the case of "*King v. Douglas Aircraft Co.*", the Florida Court of Appeal held that an assembler of aircraft should be considered manufacturer of the component parts he includes in the finally delivered aircraft. (350) But where a defect can be traced back to the component part manufacturer, that manufacturer may also be subject to liability. In the case of "*Robinson v. Parker-Hannifin Corp.*", a jury apportioned damages between manufacturer of a vacuum pump and manufacturer of the

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(349a) See L. Kreindler, op. cit. (fn. 323), para 20.05 [2].

(350) 159 So 2d 108 (Fla Ct App 1964); see equally "*Boeing v. Brown*", 291 F 2d 310 (9th Cir 1961).

aircraft. (351) In another aviation case a component part manufacturer could escape from liability showing that he reasonably relied on specifications of the helicopter manufacturer with established reputation. (352)

B. LIABILITY OF ACCESSORY SUPPLIERS

The safe operation of aircraft requires the use of accessories such as navigational charts, which cannot properly be considered component parts of the aircraft. Other accessories such as crash helmets, parachutes, flotation devices serve as crashworthiness aids. Defects in such accessories are actionable in the US on the same basis as defects in the aircraft or in a component part. In "*Saloomy v. Jeppesen*" the court held the defendant strictly liable for death resulting from a defective aeronautical chart. The manufacturer of the chart had gathered information from the FAA and graphically displayed it on a mass produced chart sold to the aviation public. The court stated that

> *"defendant's position is that its navigational charts provide no more than a service (...). The mass production and marketing of these charts requires Jeppesen to bear the cost of accidents that are proximately caused by the defects in the charts."*(352)

C. LIABILITY OF OTHER PERSONS

Apart from the actual manufacturers of the aircraft, of supply parts and accessories, other persons might be defendants in aircraft liability litigations. There are especially the sellers, the repairers and, under certain circumstances, even the lessor who might be liable for damages occurred.

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(351) 4 Ohio Misc 2d, 477 NE 2d 781 (1982).

(352) "*Orion Ins. Co. v. United Technologies Corp.*", 475 F Supp 607 (ED Pa 1980).

(352) 707 F 2d 671 (1983).

As we have seen in Part I., professional sellers of goods in the US may be liable under strict product liability because of the mere fact that they have made available the good to the public. Thus, aircraft sellers may be liable at the same level as "manufacturers" for putting a defective aircraft "into circulation". The sellers liability will however rarely be in question as the major part of commercial aircraft are sold directly by the manufacturers to the users. Only in general aviation, a real "market" of new aircraft exists.

This result must however be differentiated, as the majority of jurisdictions seems to have decided that the strict liability regime does not apply to sellers of used aircraft. (353) This seems to be defendable as, often, the seller may neither have the expertise and nor the capacity to inspect and check an aircraft used by third persons in unknown conditions, as the manufacturer would.

As far as it concerns repairers of aircraft, the majority view is to refuse to impose strict liability to those who merely provide repairs. (354)

Today, most of airlines resort to leasing operations in order to finance or adapt their needs with regard to their equipment and fleet. In the last years there have been observed increasing efforts to hold lessors liable at the place of the manufacturers and operating airlines. These attempts were based on the argument of negligence as a supplier of goods or under a theory of strict product liability particularly where no other "deep pocket" was available. However, with regard to this liability in the US, it has been distinguished between two different types of lessors.

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(353) See e.g. "*Portnoy v. Cessna Aircraft Co.*", 17 Av Cas (CCH) (WD) Wash 1982; see also "*Nelson v. Nelson Hardware Inc.*" 467 N.W. 2d, 518 (Wis. 1991).

(354) See e.g. "*Winans v. Rockwell Int. Corp.*", 705 F 2d 1449 (5th Cir 1983).

The first type is the so-called "financial lessor" who has normally no operational control of the aircraft and who merely gives the right to use the aircraft for payment of specified rentals over an agreed period of time. Fundamentally, this kind of operation is a financial construct allowing the airline to use an aircraft as if it were its own but without carrying the heavy burden of its acquisition. The owner, often a pool of banks or specialized leasing corporations (GPA, ONYX, etc.) does not, normally, intervene in the concrete operation.

On the other hand, the airline industry currently uses the so-called "operational leasing" where one airline or a specialized organization rents an aircraft to another airline, in order to allow short-term or medium term operations for a specific period of time. Here, the logic behind the operation is not a financial one, but an "operational" one.
The question is, if both legal regimes can be treated in the same manner as far as it concerns liability of the owner, i.e. if the bank behind the financial construct or the airline renting on a short-term basis must be treated in the same manner.
US courts distinguish both forms of leasing and protect the financier. The inequity of holding a pure finance lessor of an aircraft liable if not in operational control has been explicitly recognized under sect. 504 of the Federal Aviation Act, where finance lessors under leases of 30 days or more are specifically exempted from liability for accidents caused by their aircraft. The intention of the statute was to encourage financing of aircraft by eliminating the uncertainty of potential liability for doing so. (354a)

The operational lessor, on the other hand, remains entirely responsible for the aircraft. This is especially the

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(354a) See. C. Payson Coleman, "Aircraft hull, liability and repossession insurance: issues for the financier/lessor", in Air Finance Journal, Febr. 1990, p. 8.

case in so-called "wet-leasing agreements" where the aircraft is leased to another airline with the necessary crew and staff. Here, the operation of the aircraft remains controlled, to a large extent, by the lessor. This is why his responsibility is rarely contested.

II. DEFENSES AVAILABLE TO AIRCRAFT MANUFACTURERS

As we have already exposed the different defenses available to US manufacturers in general, we are now going to focus on defenses more specifically available and used by aircraft manufacturers.

A. DISCLAIMERS OF LIABILITY

Contractual disclaimers of liability in aircraft purchase agreements as currently applied by the airframe manufacturers, have been subject to extensive litigation in recent years. If contractual limitations of liability, contained in aircraft sale agreements do not have any effect on third party passengers or bystanders, they are however enforceable when negotiated in commercial settings. Courts have enforced contractual disclaimers against all theories of liability, including negligence and strict liability. (355) The current trend is to interpret such disclaimers broadly. For example in "*Tokyo Marine and Fire Insurance Co. v. McDonnell Douglas Corp.*" (356) where the case included a DC-8 aircraft takeoff accident allegedly caused by an in-flight spoiler deployment, plaintiff argued that the management learned of the potential danger of an in-flight incident of that kind after the aircraft was sold and delivered and that the manufacturer failed to warn the aircraft operator. Plaintiff added that, because the manufacturer's duty to warn was not contemplated by the purchase agreement and was not covered by the

(355) See e.g. "*Delta Airlines v. McDonnell Douglas Corp.*", 503 F 2d 239 (5th Cir 1974).

(356) 617 F 2d 936 (2nd Cir 1980).

manufacturer's disclaimer of liability clause, the manufacturer was entirely exposed to product liability. However the court disagreed and extended the disclaimer in contract relating to the purchase and sale of the aircraft to include breach of a duty unrelated to the aircraft itself and arising after the aircraft was sold and delivered.

B. CONTRIBUTORY AND COMPARATIVE NEGLIGENCE, ASSUMPTION OF RISK AND MISUSE OF THE PRODUCT

General rules of comparative and contributory negligence are applicable to claims of product liability against manufacturers of aircraft and component parts. There are several cases in which the defense of contributory negligence was successfully established and consequently relieved the aircraft manufacturer of liability. For example, flying an airplane in bad weather condition was considered contributory negligence. (357) In other aviation product liability cases, it was held that negligence of purchaser of aircraft in inspection during its manufacturing process in the manufacturer's plant was not considered a contributory negligence that would alleviate manufacturer's liability. (358)

If a number of jurisdictions in the United States used to hold that contributory negligence is not a defense to an action in strict liability while assumption of risk and misuse are, the trend, however, appears to be to consider all three categories as defenses in strict liability as well as in negligence actions. (359) These three defenses have often been invoked in aviation product liability. For example a misuse of product in some unforeseeable manner was recognized as a partial defense in "*Duncan v. Cessna Aircraft Co.*". (360)

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(357) "*Prashker v. Beech Aircraft Corp.*", 258 F 2d 602 (1960).

(358) "*North West Airlines Inc. v. Glenn L. Martin Co.*", 224 F 2d 120 (1955).

(359) See supra Part I.

(360) 18 Av. Cas. (CCH) 17. 467 (Tex 1983).

As far as it concerns comparative fault, we have seen above, many States have applied this principle to strict liability cases since its social utility and deterrent value have been recognized. For example, in "*Moorehead v. Mitsubishi Aircraft International*" the court applying comparative negligence principles remanded the case for apportionment of the pilot's negligence after concluding that the trial court erred in one of its findings with regard to the pilot's negligence, the pilot having been found 60 % responsible for the accident, this shared negligence not being taken into account in the judgment. (361) In another case this clear legal position has been confirmed. In "*Mergen v. Piper Aircraft*" where a pilot proceeded to take-off in zero visibility conditions without radio contact and radar guidance, the court attributed 20 % of liability to the pilot and relieved partially the manufacturer. (362)

These cases show that in aviation cases the behavior of the victim (pilot, owner, etc.) can be invoked as a defense by the manufacturer when there is reasonable indication that the victim acted negligently, or used the aircraft in a manner not corresponding to the requirements.

C. "STATE OF THE ART"

As we have seen above, under negligence theories, compliance with the state of the art may be a defense for manufacturers of defective products in general and for manufacturers of aircraft in particular. As far as it concerns strict liability, after some controversy, majority of jurisdictions permit the introduction of state of the art evidence in strict liability cases. But we have to note that, under strict liability, the state of the art evidence does not completely relieve the manufacturer from liability. (363)

(361) 828 F 2d 278 (5th Cir 1987).

(362) 524 So. 2d Av. Cas. (CCH) 17, 814 (La. Court of Appeal 1988).

(363) See supra Part I.

A much discussed aviation case in this area is "*Bruce v. Martin Marietta Corp.*" (364) In that case, a 1952 Martin 404 plane having struck trees on a mountain in 1976, seats in the passenger cabin broke loose from their floor attachments and were thrown forward blocking the exit. A fire then developed killing 32 of the 40 persons on board. The plaintiff alleged that the uncrashworthiness of the aircraft was a design defect rendering the manufacturer strictly liable. In particular plaintiffs relied on evidence that the airline's seats in use at the time of trial (1976) would not have torn loose from the floor and blocked the exit. The court employed the "ordinary consumer expectation test" (365) of defectiveness and held that the state of the art at the time of manufacture determined the expectation of the ordinary consumer and in this specific case there was no evidence that an ordinary consumer would expect a 1952 model aircraft to have the same safety features as a 1970 model.

The "Bruce" decision has been criticized as an aberrant application of the "ordinary consumer expectation test". (366) Later, in another aviation case, the state of the art was confirmed as a valid defense by a California appellate court in "*McLaughlin v. Sikorsky Aircraft*" imputing to the manufacturer or a helicopter only that knowledge which existed at the time of production. (367)

However, as we have seen above, although some jurisdictions admit evidence of the state of the art, none of them considers the state of the art a complete defense for aircraft manufacturers.

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(364) 544 F 2d 442 (10th Cir 1976).

(365) See supra Part I.

(366) See W. Turley, op. cit. supra (fn. 9), p. 81.

(367) 148 Cal. App. 3d 207, 195 Cal Rptr 764 (1983).

D. COMPLIANCE WITH STATUTORY REGULATIONS

As we have seen above, compliance with statutory regulations may be introduced as a defense by a manufacturer of aircraft. However, compliance with the regulations does not seem to be a complete defense in itself in the aviation field. Much will depend on the evidence, whether the attitude of the court is liberal or conservative, and the cause of action. (368)

In case of a strict liability claim, since the conduct or fault of the manufacturer is not in issue, the considerations of compliance with safety regulations are unlikely to be relevant, except in the task of showing that the product was not defective. As an illustration by case law of the admission of compliance as a defense one may mention the case of "*Wilson v. Piper Aircraft Co.*" where the court decided that compliance with FAA regulations was not a complete defense but since the design and construction of aircraft was so heavily regulated, it was relevant to consider that FAA had approved the engine design. Balancing all the factors, the court ruled in favour of the manufacturer. (369)

V. CONCLUSION AND COMMENT

Compared with the ordinary product liability case, aviation accidents are more spectacular, and the consequential damage to persons and property is usually more severe, resulting in more substantial liability exposure. However, there are still several basic and effective legal defenses to product liability claims brought against aircraft manufacturers in the US. Most obvious is the defense that the aircraft was not defective. It is still the law that if any defect is found, it must have been the proximate cause of the accident. The aircraft must have been in the same condition at

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(368) See I. Awford, op. cit. supra (fn. 1), p. 64.

(369) 282 Or. 61, 577 P 2d 1322 (1978).

the time of the accident as it was when it left the manufacturer's control, and was not, at that precise time, unreasonably dangerous. The aircraft must also have been used in the manner intended to be used.

Nevertheless, as some commentators have argued, the real problem of the aircraft manufacturers in the United States lies in a sometimes illogical application of the rules of product liability and an extension of some theories to satisfy an immediate social demand which is the socially satisfactory compensation of the victim. The so-called theory of "crashworthiness" is certainly the best example of this sometimes abusive extension of generally recognized and applied product liability law. (369a)

On this basis we have to conclude, that aircraft manufacturers facing claims for reparation brought to US courts are exposed to a legal regime and financial consequences which are often more severe than those applied to average products. As they are heavy and difficult to foresee they create problems with regard to insurance coverage.

(369a) See e.g. D.M. Haskell, "The aircraft manufacturer's liability for design and punitive damages - the insurance policy and the public policy", in Journal of Airlaw and Commerce, 1974, p. 593.

CHAPTER II.: AVIATION PRODUCT LIABILITY IN EUROPE

In contrast with the situation in the US, in Europe there is no specific or unusual application of product liability principles in the field of commercial aviation. Aircraft manufacturers may be liable under the same principles as manufacturers in general, although in Europe insurance companies, often encouraged by their clients (manufacturers), prefer to settle aircraft litigation out of court. (370)
This particular behavior of the insurance companies in Europe leads to a situation where only very few aircraft cases reach the courts and are, consequently, available for legal analysis. Therefore it seems impossible to establish, in a reliable manner, a particular "aircraft product liability law" in Europe which would be distinct from general product liability, as it is possible and necessary in the United States. It is, however, interesting to study, on a more theoretical basis, the legal situation of European aircraft manufacturers especially after the introduction of the European Communities' Directive on Product Liability as this legal measure might change the liability environment of the aircraft manufacturers.

In the following we will attempt to develop, on the model of our analysis of the legal situation in the United States, the liability regime a European aircraft producer has to face. This process will allow us, in a second step, to compare, as far as possible, the situation for aircraft manufacturers on both sides of the Atlantic. First, we will look at the different available causes of action against aircraft producers in Europe; then, we will have a closer look at the scope and particular legal principles applied to damages; finally we will extract the rules applicable to defendants and defenses.

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(370) F. Garnault, "Aviation Accident Litigation in Europe, and Other Manufacturer-sentive Jurisdiction", in Report of Colloque "Product Integrity Programme Airbus", Toulouse 1978 (unpublished).

I. CAUSES OF ACTION AGAINST AIRCRAFT MANUFACTURERS

A. THE LEGAL REGIME

First of all, one should notice that, with the introduction of the new EEC Directive regime, victims of defective aircraft have now an unprecedented range of causes of action in most of the EEC member states. Since the existing laws of contract and delict are expressly preserved, claims under the new strict liability regime (with the exception of France (371)) are added to them. Therefore, similar to the US, the plaintiff is free to assert a variety of theories of liability against the aircraft producer. For example in Germany, the plaintiff may consequently chose to base his claim against the aircraft manufacturer on the new strict liability regime as expressed in the ProdHaftG (372) or may choose tc act under the traditional delictual regime, or in the case of an airline will have to act on a contractual basis.

However, the different remedies are not available to every type of victims of defective aircraft. Indeed, one should distinguish between two categories of plaintiffs. The first category encompasses the victims of defective aircraft such as passengers or bystanders whose damage is covered by the strict liability regime (damage to health or property damage to private goods). These categories of victims, although having the choice between different causes of action, will very likely choose to act under the more favorable strict liability regime, since it facilitates the burden of proof and gives often substantial better rights against the manufacturer and seller of defective aircraft.

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(371) As we have seen in Part II., the last French project of law seems to put an end to the prexisting contract and delict law related to product liability. This is coherent with regard to the French prinicple of non-cumul generally applied in French product liability.

(372) See supra Part II.

The other category of victims of defective aircraft might be airlines or owners of private or business and commercial aircraft. This type of victims may not act under the strict liability regime since their damage is not covered by the EEC Directive. (373) Consequently, one must note that in Europe professionals of the aviation field may not act under the strict liability regime against an aircraft manufacturer, and will have to sue on the basis of contractual and/or delictual remedies provided for in the traditional national legal regimes. This is due to the consumer protective intent of the EEC Directive which did not aim at regulation of commercial relations between professionals. However, the particular situation in France, where the legal draft bill sets an end to the preexisting legal solutions, and establishes a *unique* strict product liability law, this EEC standard will equally be extended to the relation between e.g. airlines and their aircraft manufacturers.

B. COMPARATIVE EVALUATION

As we have seen above, the law is not so clear in the US and a professional in the aviation field might, in some circumstances, rely successfully on strict tort liability cause of action to obtain compensation from an aircraft producer. Consequently, one must note that the exposure to liability of aircraft manufacturers seems, at first sight, to be equivalent in the US and in Europe. On both sides of the Atlantic, aircraft manufacturers face product liability regimes based on strict or at least close to strict liability considerations; it is indifferent in this context, that the legal foundations of the applied systems are theoretically different.

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(373) The EEC Directive does not cover damage to professional goods or damage to the product itself; see supra Part II.

However, the specific developments in the strict aviation product liability in the US have led to a *de facto* very different situation. This is well illustrated by the somewhat excessive judicial doctrine of "crashworthiness", imposing on the aircraft producer a quasi *objective* standard of liability, since no more causal relation seems to be required between the defect and the recoverable damages.
Whatever may be the fear of aircraft manufacturers (374) caused by the new European strict liability regime, a causal link between the defect and the damage is always required in the European laws (375), whereas, under the US doctrine of "crashworthiness", an aircraft or component part manufacturer may be held liable even though the defect did not cause the accident as such. (376)

II. DAMAGES

Damages recoverable by victims of defective aircraft in Europe are the same as those recoverable in product liability in general. There is nothing like specific aviation damages that may be claimed in the US such as "impact fear", and "mental anguish", "post-impact traumatic stress", etc. (377)

In this regard European courts are somewhat more restrictive as they are normally limited to statutory clearly defined forms of damages being mostly more focused on material damages than on immaterial harm. In France and Germany, for example, the well established principle that the beneficiaries cannot claim "*pretium doloris*" for the suffering of the decedent, limit the reparation to be paid by the manufacturer

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(374) See the example of the statement by the Director of the Legal Department of Airbus Industrie GIE, Mr. C. Mannin: "The Effects in Aviation of the EEC Directive on Product Liability", in Air Law, volume XI, 1986, p. 248.

(375) The EEC Directive requires explicitly in its Art. 4 to prove the damage, the defect and the causal relationship between defect and damage.

(376) See supra.

(377) See supra Part III Chapter I.

to the strict material harm resulting from the aircraft accident for the decedent and its family. Consequently, innovative aviation damages, as those often created by US courts in order to award equitable reparation to aircrash victims are, from a legal theory point of view, impossible to be developed in a European context.

Furthermore, the amount of reparations recovered by European victims of defective aircraft seem to be much lower than what is generally awarded by American courts. This difference is amplified by the fact that European courts ignore the concept of punitive damages. In fact, European courts do, in general, not adopt the view that "civil actions" should contain elements of deterrence, sanction or repression, this being clearly attributed to the penal law systems. Consequently, the idea of charging a particularly negligent manufacturer with supplementary damages is in general foreign to European judgments. Other elements contribute in a manner which should not be neglected to lower awards in Europe: generally, European "civil courts" ignore jury assistance, being constituted by professional judges who might decide the case on a more objective and less emotional basis. Contingency fees, currently negotiated between attorneys and victims, contribute to the inflation in damages claimed from the aircraft manufacturer in the US. In Europe such "participation" of the lawyer to the award is generally prohibited or at least limited.

Because of the more subjective quality of the "non-economic damages" and the unpredictability of punitive damages, much of the inequity and uncertainty existing in the United States are virtually non existing in Europe. Furthermore, aircraft manufacturers in some European states (378), as far as it concerns strict liability actions, have their liability concerning the same accident submitted to an upper limit equivalent to 70 millions ECU. (379)

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(378) as we have seen in Part II. this is especially the case in Germany.

(379) 1 ECU is roughly equivalent to 1,3 US $.

In conclusion one can note that the US law, despite a similar basic protective approach on both sides of the Atlantic, is clearly more severe and exposes the manufacturer potentially to more harsh financial consequences than European law does - even under harmonized strict liability regimes.

III. POTENTIAL DEFENDANTS

Under preexisting product liability law in the EEC countries observed, manufacturers of finished aircraft are the traditional potential defendants in aircraft product liability litigations. If suppliers of component parts or raw materials might be sued, they have the possibility to discharge themselves as well in the United Kingdom, as in France and Germany, by proving that they had acted in conformity with specifications given by the final assembler (manufacturer of the aircraft).

Under the new product liability regime the "producer" concept on which strict liability is based, includes many persons other than the mere manufacturer. For the purposes of the new regime, "producer" means also suppliers and importers. Liability of component part suppliers has, thus, been aggravated since they will always be treated as producer even if they have produced pursuant to precise specifications or on the basis of legal or manufacturing standards imposed by the final assembler.

Other persons than those having contributed to the manufacturing process of the aircraft itself, i.e. the manufacturer as such and his component part suppliers, might be exposed to liability consequences. As we have seen in Part II. the EEC Directive provides for the legal enhancement in particular situations of the notion of "producer" to any person who imports professionally (in the course of his business) into the Community a product "*for sale, hire, leasing or any form of distribution*".

This provision is particular important since aircraft leasing is more and more widespread (380) and will be increasingly important for the airlines suffering from bad financial conditions in a period of major change. (381)

It is sufficient that the lessor brings the aircraft or parts or the aircraft into the EEC in form of a leasing agreement and that the leasing operation is part of its business in order to consider a lessor as "importer" in the sense of the new product liability regime. It is neither necessary that the lessor company has its seat within the EEC nor that it exercises any distribution activity.

This liability consequence for the lessor is not a subsidiary one. The lessor will be liable on the same level as the producer since he is legally deemed to be the producer. Consequently, the victim is clearly in the position to chose the defendant or even to claim damages from two defendants being completely liable for the occurred damage. This very far-reaching legal consequence which might be leading to claims based on "deep-pocket" considerations cannot remain without major implications on lessors owning aeroplanes operating in Europe. (382)

Legal practice of the lessors shows that insurance solutions seem to be best adapted to this financial threat. Generally, it seems, today, that lessors impose on their airline clients to include them as additional insured in their insurance policies. These policies provide generally for a sufficient amount of liability coverage. (383)

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(380) Pursuant to GPA (Shannon, Ireland) leasing operations will constitute the basis of about 60 % of all commercial aircraft sales in the 1990ies. See Report on the Air Transport Colloque by the Financial Times in June 1990.

(381) One may remember the deregulation movement in the United States and in Europe leading to more competition.

(382) See e.g. C.P. Coleman, "Aircraft Hull, Liability and Repossession Insurance: Issues for the Financer/Lessor", in Air Finance Journal, Febr. 1990, p. 8.

(383) Airlines today usually carry more than 1 Million $ of liability insurance for each passenger.

The EEC Directive creates a legal situation which is far more severe than the above described legal regime lessors face in the US. Whereas the US financial lessor will normally not be defendant in a product liability litigation, the same lessor is subject to strict product liability in Europe ! Only the operating lessor, having duties of care with respect to maintenance, reparation and operation of the aircraft is in a similar situation in the US and in Europe.

IV. DEFENSES

As we have seen before, the general product liability law provides, in Europe, for a system of rules equally applicable to aircraft manufacturers. The same is true in the field of defenses.

A. DISCLAIMERS OF LIABILITY

Under pre-existing national delict laws, disclaimers and limitations of remedy are generally unenforceable against private consumers. However, as far as it concerns business relations, aircraft manufacturers may validly disclaim their liability. Under the new harmonized EEC regime, both, contractual and non-contractual provisions which attempt to exclude liability, will be ineffective in the case of personal injuries or damages to private goods.

In comparison to the valid US regime, we have to note that on both sides of the Atlantic the rules with regard to disclaimers are generally the same. Therefore, the disclaimers do not tend to modify sensibly the situation for one or the other aircraft manufacturer.

B. CONTRIBUTORY NEGLIGENCE OF THE VICTIM

Under the new strict product liability regime, as under the pre-existing laws, the aircraft manufacturer may invoke the contributory fault of the victim in order to limit his liability. However, a mere misuse of the product might not be considered as a contributory negligence that would alleviate aircraft manufacturer's or supplier's liability.

Nevertheless, it is difficult to appreciate, on a theoretical basis, the extent to which courts might take into account the fault of the victim in order to limit its reparation, since that might be very much subjected to the particular circumstances of the case. It is however likely that the only case of applicability of this defense will be the event of a pilot fault or negligence, as it is most often in the US.

C. STATE OF THE ART DEFENSE

The possibility introduced by the EEC Directive given to individual member states to exclude the State of the Art defense, has been very much criticized and seen by many commentators as equivalent to giving the possibility to a Member state to impose "liability for non-defective product". (384) Producers have argued that to exclude this defense would place a too heavy burden on their industry and discourage technological innovation which particularly essential in the aircraft industry. This especially because manufacturers would be required to assume the insurance costs of development risks (385) which is difficult to bear in case of undetermined and undeterminable risk.

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(384) See H.V. von Huelsen, " The Status of Product Liability de lege lata and de lege ferenda in Federal Republic of Germany and in Europe as Seen by Industry", in Internationales Wirtschaftsrecht, Product Liability in Air and Space Transportation, Colloque Cologne, 1977, p. 29.

(385) See C. Mannin, op. cit. supra (fn. 374), p. 248.

Finally all the EEC countries considered in this study have adopted this defense at the relief of the aviation industry. Consequently, manufacturers of aircraft or component parts thereof in Europe may validly invoke this defense to exclude their liability in a strict liability claim.

This is not the case in the US where, as we have seen above (386), if aircraft manufacturers may use the State of the Art defense in front of some jurisdictions, but where they may not rely completely on it in strict liability claims to escape from liability as manufacturers of aircraft in Europe.

This difference with regard to the effectiveness of defenses might be of major importance with regard of the introduction of new technologies in commercial aircraft. One may think of the application of fly-by-wire or composite materials in Airbus aircraft in the 1980ies, an evolution which might have been hindered by legal considerations in the US aircraft industry.

D. COMPLIANCE WITH STATUTORY REGULATIONS

In contrast to the situation aircraft manufacturers face in the US, the aircraft manufacturer in Europe shall not be liable under strict liability if he proves that the defect is due to compliance of the product with mandatory regulation issued by public authorities. In the aviation context, the obvious examples are the airworthiness directives that are issued by air transport authorities. (387) However, it is doubtful that mere compliance with the directives will constitute a valid defense. It is more likely that a manufacturer will have to show that the defect was the inevitable result of compliance with the airworthiness directive.

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(386) See supra Part III. Chapter I.

(387) In the countries under examination in our study:
Direction Générale de l'Aviation Civile (France);
Luftfahrtbundesamt (FRG), Civil Aeronautics Authority (UK).

Furthermore, since the issuance of an airworthiness directive seldom takes place without extensive consultation between manufacturers and airworthiness authorities (those authorities often placing considerable reliance on the advice and experience of manufacturers) it is likely that this defense will currently arise in practice. (387a)

Therefore in the US as well as in Europe, if compliance with mandatory requirements and standards may be admitted as a defense, it will rarely be sufficient to constitute a complete defense in strict liability actions.

E. OTHER DEFENSES AVAILABLE TO PRODUCERS OF DEFECTIVE AIRCRAFT UNDER THE NEW STRICT LIABILITY REGIME IN EUROPE

One of the particular defenses available to manufacturers of a defective product under the new European regime is the defense according to which

> *"having regard to the circumstances, it is probable that the defect did not exist at the time when the product was put into circulation or that the defect came into being afterwards."*

In the aviation industry, this defense might be particularly relevant. Indeed, due to the high quality control standards and the maintenance of records, an aircraft manufacturer might find it easy to prove that his aircraft was not defective at the time it was put into circulation, or that the defect arose afterwards. However, many problems of considerable technical complexity may arise where for example a defect manifests itself as a fatigue failure and it becomes necessary to know whether the origin of this failure was due to over-stressing after manufacture, or to incorrect metallurgical constituency at the time of the manufacture. Consequently, one may expect many litigations concerning this

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(388) If the manufacturer may not validly rely on the issuance of an airworthiness directive to escape from liability, he might have a recourse against the authority having issued this directive.

defense in the European product liability context which will clarify the extent and applicability of this provision.

We have to note that this kind of defense is not known in the United States. Consequently, European law, if this defense reaches the impact one might expect, offers to aircraft manufacturers an important device to mitigate or even avoid the severe consequences of strict liability, as there may remain in a number of cases a serious doubt about the existence of the defect from the beginning on. The European law might, in legal practice, offer more flexible means of defense and, thus, be less severe with the manufacturer than US law is today.

V. CONCLUSION AND COMMENT

Today, on both sides of the Atlantic, aircraft manufacturers have to face product liability regimes based on strict or "close-to-strict" liability considerations. In the United States as in Europe, in order to obtain compensation from the aircraft manufacturer, a defect must be proven and be the proximate cause of the accident. In both legal regimes, aircraft manufacturers have the possiblity to avoid or limit their liability by using certain defenses.
However, one must note that the application of the rules of product liability made by US courts has aggravated the legal situation of aircraft manufacturers. The way the strict liability regime is applied by courts in the United States is nevertheless only one factor having contributed to the deterioration of aircraft producers' liability situation. The procedural environment (jury system, contingency attorney fees, etc.) is responsible for the inflation of claims and damages in this field.

These particular elements of US product liability and procedure do not exist in Europe and it is very likely that for this reason aircraft manufacturers' liability in Europe will stay in reasonable limits, despite the recent legal move by the EEC, and will not reach the excesses observed in the US. Out-of-court settlement will probably remain the

predominant way of clearing litigation in this field in Europe.

However, we have to note, that despite this tendency towards out-of-court settlement in Europe, the new legal regime, applied to aircraft manufacturers, presents clearly some very important legal differences in comparison to the legal situation aircraft manufacturers are facing in the US. European law remains less severe than in the States in spite of the similarity of the basic legal regime: strict liability. This difference is essentially due to various defenses available in Europe and the less extensive award of damages.

There are essentially the "state of the art" defense and the argument that the damage was not existing at the moment when the product was "brought into circulation" (to be proven by the plaintiff) which alleviate the burden of the manufacturer. In common situations, it might be very difficult for the plaintiff to bring evidence with regard to these elements.
As far as it concerns damages recoverable, the admissible forms of damages are much more restrictive in Europe than in the US, where mental harm of different, vaguely specified forms, are admitted. Equally the level awards of damages is normally much lower in Europe than in US jurisprudence.

There is however one point we have to note, where the European harmonized legal regime is more severe than the American practice. Generally the definition of the potential defendant is more extensive and includes the lessor. The financial operator, being entirely assimilated to the producer, will generally be exposed to conditions of liability which are far heavier than in the US.

GENERAL CONCLUSION

In the United States as well as in Europe, the need for uniformity of product liability law has been recognized and the will to uniform the law found its concrete expression on the one hand by the adoption of the so-called "Restatement of Torts" by the American Law Institute and on the other hand by the issuance of a directive by the European Community, both designed to harmonize product liability law under strict liability.

The historical development of product liability law has been marked by conflicts of diverging interests. First the risk of the product had to be born exclusively by the buyer or consumer, the very old rule of "caveat emptor" (let the buyer beware) governig commercial relationships. This situation led to excessive unfairness, consumers having suffered from a product, being often left without compensation. Progressively this tendency was reversed and the courts entered the era of "consumer protection". The boundaries of liability were extended always farther especially by US courts where pro-plaintiff positions were systematically adopted. The sometimes excessive application of this consumer friendly position has been clearly illustrated in the aircraft industry. In fact, the "crashworthiness" theory must be regarded as one of the most extreme extensions of product liability making the manufacturer the clients' "insurer".

However, since the beginning of the eighties, we observe in the United States that the tendency in jurisprudence has changed; the courts seem to be more demanding in admitting plaintiffs' claims. Many attempts to reform product liability law through the means of legislation have been made and the nowadays tendency is to find a new balance between consumer protection and the imperatives of industry competitiveness.

In the meantime, in Europe, the recently implemented (partly) harmonized national product liability laws follow the strict liability scheme practiced for a long time on the other side of the Atlantic. However, in difference to the US model,

the new European regimes, which complete or replace the preexisting domestic laws, provide for extensive defenses available to manufacturers and those persons being assimilated to them. The European product liability becomes, thus, a more equitable compromise between industry's and consumers' justified interests, between manufacturing progress and product safety.

In our mind, the harmonization process in Europe is only the first step towards global approximation of liability standards for product defects. It certainly is a good example showing, first, the importance for harmonized standards when intending to avoid market distorsion in open commercial exchange (as intended in the GATT process); second it teaches how harmonization of legal matter can be handled in a manner that allows to preserve the particularities and doctrinary specificities of common law and Roman law-based civil law systems. Especially in global industries, as the aircraft manufacturing is, harmonization of legal standards of liability will, without any doubt, become a subject of prime interest.

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