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Cover Page Footnote
The authors wish to acknowledge the excellent research assistance rendered by Ms. Nancy Aliquo, a third-year student at the Dickinson School of Law, in the preparation of this article.
Developments in European Product Liability

Ferdinando Albanese*
Louis F. Del Duca**

I. Introduction

Liability for personal or property damage caused by a product during use or consumption (i.e., products liability) has been the subject of intense study, comment and innovative change during the post World War II era. In 1966 Dean Prosser in his landmark article on "The Fall of the Citadel" documented the demise of manufacturers' immunity from actions by injured parties lacking privity of contract. No one imagined that the European citadel would stand for such a long period of time. In fact, conditions for production and consumption of goods were becoming so similar in the European States and in the United States that it was reasonable to assume (especially after the Thalidomide case) that demands for product liability law

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The authors wish to acknowledge the excellent research assistance rendered by Ms. Nancy Aliquo, a third-year student at The Dickinson School of Law, in the preparation of this article.


3. In the early sixties many children were born, all over Europe, with deformities and incapacities. During pregnancy their mothers had taken a pharmaceutical preparation containing thalidomide. Many writs were issued against the producers who always denied liability. The cases were solved outside the courts about 10 years later. In Germany, a financial foundation was established to aid thalidomide victims. The foundation was set up with 100 million DM donated by the makers of the drug on the condition that criminal proceedings against them were dropped. In the United Kingdom, 95% of the victims' families accepted a settlement offered by the producers. The settlement was approved by the High Court.
reform would produce greater protection for consumers in Europe.

It was also reasonable to anticipate that the European citadel would fall when in January 1977 the Council of Europe's¹ "Convention On Product Liability In Regard To Personal Injury And Death" (hereinafter The Convention)³ was opened for signatures of member States. Belgium, France and Luxembourg signed the Convention on the date of its opening for signature (January 27, 1977) and Austria signed it on August 11, 1977. Since that date no other state has signed the Convention and no ratification has been obtained, because the European Economic Community⁶ (hereinafter "Community")

thalidomide tragedy contributed strongly to develop the public's concern about the product liability problem in Europe.

4. The Council of Europe was founded in 1949 by 10 European nations "to work for greater European unity, to improve the conditions of life and develop human values in Europe and to uphold the principles of parliamentary democracy, the rule of law and human rights." STATUTE OF THE COUNCIL OF EUROPE, MAY 5, 1949, 87 U.N.T.S. 103 (1951). It now includes the following 21 nations: Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, The United Kingdom and Turkey.

5. See Appendix I attached, European Convention on Products Liability in Regard to Personal Injury and Death, done Jan. 27, 1977 [1977] Europ. T.S. No. 91, reprinted in 16 INT'L LEGAL MAT'LS 7 (1977) [hereinafter Convention]. Conventions may be offered by the Council of Europe to its member states on any subject pertinent to its broad statement of purposes set forth, supra note 4. Once a convention is duly ratified by the requisite number of member states, it becomes binding on them.

6. The European Economic Community is composed of 12 European nations consisting of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom. Operating under the Treaty of Rome Establishing the European Economic Community done March 25, 1957, 298 U.N.T.S. 79 [hereinafter EEC Treaty], the major branches (denominated by the EEC Treaty as "Institutions" of the EEC) are the Commission, the Parliament, the Council of Ministers and the European Court of Justice.

The Commission proposes and supervises laws and policies which are enacted by the Council of Ministers after study and comment is received from the Parliament. The EEC promulgates both regulations and directives. Regulations directly bind member states and also individuals in the member states. Directives, while binding, allow member states a specified time period within which the law of each member state must be adjusted so that it complies with the general rules of policy set forth by the particular directive. In effect, while directives are binding on each member state, they leave to national legislation the details as to methods regarding their implementation. EEC Treaty, id. at art. 189.

The structure and jurisdiction of the European Court of Justice is provided for by Articles 164 to 188 of the Treaty of Rome, EEC Treaty, id. at arts. 164 to 188. The provisions of the Treaty grant broad jurisdiction to the court over actions involving interpretations and applications of the Treaty, regulations, directives and other actions of the Institutions of the Community. Such actions may be initiated by (a) members states; (b) the Commission, Council or other Institutions of the Community; or (c) natural or legal persons. Of particular interest is Article 177 of the treaty which provides:

The Court of Justice shall have jurisdiction to give preliminary rulings (emphasis supplied) concerning:

(a) the interpretation of this Treaty,
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

When such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
was simultaneously working on a draft directive on product liability. It was understandable that states who were members of both the Community and Council of Europe would not take a definitive stand on the Convention before knowing the final result of the Community's work. This attitude resulted from the fact that in September 1976 (that is before the opening of the Convention for signature of member states) the Commission of the Community had transmitted to the Council of Ministers a proposal for a product liability directive.

Nine years of intense debate and accommodation of consumer, producer, and various national interests were necessary for the Council to conclude its work. A massive breach in the European citadel did occur on July 25, 1985 when the Council of Ministers of the European Community adopted the Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products (hereinafter The Directive).

The citadel thus has been breached but its walls have not yet been destroyed. Article 19 of the Directive gives the member states three years from July 30, 1985, the date of notification of the Directive as a maximum period for bringing into force the laws, regulations and administrative provisions necessary to comply with the Directive. Since the impact of the new rules on the presently existing national laws of the member states is far-reaching, they will probably adopt the new implementing legislation some time close to July 30, 1988, the closing date for complying with the Directive. At that time, assuming due compliance by the member states, the law of

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.


7. EEC Treaty, supra note 6 at art. 189.
8. Id.
10. See Appendix II attached, The Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 28 O.J. EUR. COMM. (NO. L 210) 29 (1985) [hereinafter Directive] is a legally binding instrument as to the result to be achieved by each member state. Each member state is obliged to take steps to ensure that the result is achieved but the choice of the form of the measures and methods used in achieving the results required under Community law is left to the national authorities.
"strict" liability will be applicable to products in at least twelve European states.

The efforts by the Council of Europe and the Community to achieve harmonization in European product liability law in order to make this area of the law fair to consumers and producers were preceded by a rise in consumer expectations. Independent, separate changes in the product liability laws in most European countries were generated. The fragmented, non-uniform movement towards improvement of the product liability law created great uncertainty for producers in predicting the extent of their future liability, and made injured consumers' claims turn on the accident of where the injury was sustained.

In such a fragmented system, answers to questions of liability depend on which national law is applicable. A seller may be liable in tort, breach of warranty, or strict liability theories depending on which national law is applicable. Answers to many other questions are equally uncertain. For example: Does protection extend to buyers, users, and innocent bystanders injured by the product? Is privity of contract a prerequisite to recovery? Which statute of limitations is applicable? Which party has the burden of proof? What defenses are available? Is there liability for defect of design, production, and failure to properly instruct the user or describe the product? What is the measure of damages? Such questions, answerable only on the basis of the chance combination of time and place where the injury is sustained, are compounded in difficulty in those situations where interstate accidents occur and conflicts of law problems arise. Such problems are mitigated by the work of the Hague Convention on Private International Law in developing conflicts of law rules regarding liability resulting from products manufactured in one state and used in another state.11

The Council of Europe Convention and Community Directive were developed in this setting. Understanding of the Directive and the forthcoming implementation legislation will be facilitated by: (1) a review of the events which led to its adoption; (2) an overview of the product liability law of selected countries to illustrate existing similarities and differences in the domestic law of European States; and (3) a comparison of the Convention and the Directive to highlight their similarities and differences.12

The mechanism for implementing the Convention would be rati-

fication of the Convention by member states of the Council of Europe. Conversely, the Directive is binding on the twelve member states of the Community who are now required to have implementation legislation in place by July 30, 1988.

The two international instruments are best understood in light of eight basic questions that had to be addressed before European product liability law could be reformed. The eight questions integrated into the matters discussed in this article are as follows:

Why is new legislation needed in the field of product liability?
What should be the basis of a new regime of product liability?
Who should be liable?
What products should be subject to a new regime of product liability?
Who should be entitled to sue?
What defenses shall be allowed?
What damage should be compensated?
How long should the producer's liability last?

II. Analysis of the Problems - The Need For Reform

The inadequacy of the existing framework of rights, duties, and remedies provided by the laws of the European States was the backdrop in which the Convention and Directive were initiated.

The following brief comparative view of the product liability law of several European countries will illustrate the general status of this body of law as the Directive begins to be implemented by the member states of the Community. The domestic law of these countries will continue to be important even after the Directive is implemented, particularly because of Article 13 of the Directive. This Article makes the Directive a minimum level of protection for injured parties while preserving additional rights granted to them by the domestic law of member states. It provides that “this Directive shall

13. See supra note 4.
15. The legal literature on the problem is so vast that it would be impossible to list all the books and articles written on the reform of product liability. The authors selectively quote the following publications which contain views and contributions from many specialists:

not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability . . . .”

A. French Law

In France, a high degree of protection is accorded to those who are injured by dangerous or defective products. Remedies are provided both under the general law of contract, sales, and torts.

1. Law of Sales.—The French Civil Code requires a seller to warrant against hidden defects (vices caches) in the product. The liability of a seller who is unaware of such a defect is limited to restitution of the price. However, a seller who knew of a defect at the time of sale must pay in addition to the restitution of the price, all losses and damage suffered by the purchaser.

The “hidden defect” principle has been considerably extended by the case law in two ways. First, the concept of “defect” has been broadly interpreted to include anything that makes the product inappropriate for its contemplated use. Second, since the principle was framed as a presumption, it enabled the “professional” (i.e., merchant) seller to escape liability by proving that they could not have known about the defect. To avoid this result, the Cour de Cassation has ruled that in the case of professional sellers, liability is imposed for the consequences of hidden defects even if the seller: (a) positively proves that he or she did not know about its defect; (b) reasonably could not be expected to know about the defect; or (c) was physically incapable of discovering the defect.

Although generally effective, these decisions are limited by Article 1648 of the Civil Code which provides for only a short time for an action to be initiated. The text of Article 1648 requires the action to be initiated by the buyer “within a brief delay.” Although not otherwise specifically fixed by the Code, this time limitation is deemed to be a few months from the discovery of the defect. Furthermore, the plaintiff must prove the existence of the defect, its “hidden” character in relation to the buyer and its existence prior to

18. For a concise but complete presentation of the French Law, see G. Viney, The Civil Liability of Manufacturers in France, published in UKCLS supra note 12, at 3.
19. CODE CIVIL [C. Civ.] art. 1641. (Fr.) [hereinafter C. Civ.].
20. C. Civ. art. 1646 (Fr.).
21. C. Civ. art. 1645 (Fr.).
23. The Cour de Cassation is the court of final appeal for cases involving matters other than administrative law.
the delivery of the product. Because of complicated production procedures and the remoteness of the ultimate consumer from that process, such burdens constitute a virtually insurmountable barrier to recovery for an injured party.

2. General Contractual Liability.—To avoid these barriers, a victim can base an action on the theory of general contractual liability. The Cour de Cassation has today widely defined this general liability for product defects. The product must be appropriate for its prescribed use. This requirement includes all defects which may be created by the manufacturer of goods in their design, manufacture, quality control or distribution. The Court has even required that the seller provide information that warns against any dangers which might be created by the product. This construction leaves virtually almost no loopholes since the victims can sue any person who is a link in the distribution system, including the manufacturer. Therefore, even an ultimate purchaser with no contractual relation to a manufacturer has a “direct action” (action directe) against that manufacturer. However, one situation not covered by this contractual theory of liability is that of a person who is not the purchaser being injured by a product who is not the purchaser of it.

3. Torts.—The injured non-purchaser must, therefore, act in tort. Article 1382 of the Civil Code requires that the plaintiff must prove negligence on the manufacturer's part or on the part of an employee. However, paragraph 1 of Article 1384 provides that “[A] person is liable not only for the damage caused by his own acts but also by that caused by the acts of persons for whom he is responsible or by things of which he is in charge.” Applying this language French courts have imposed liability without a requirement that negligence be established.

French courts have imposed liability under Article 1384 for: (a) garde de la chose (guardianship - liability for acts of persons for whom one is responsible); (b) garde du comportement (responsibility for behavior - responsibility for conduct of persons); and (c) garde de la structure (charge of the structure of the thing - responsibility for the physical quality of property). The manufacturer is considered as having charge of the structure of the product and, therefore, is responsible for damage caused by it. The injured person only must establish that the damage was caused by the product and liability on

the part of the "guardian" follows. No fault need be established.\(^8\)

The protection given by French law, as interpreted by the Cour de Cassation, is therefore very effective.\(^9\) This protection is reinforced by the prohibition against the seller or the manufacturer using any disclaimers of liability. One example of this is that by widely interpreting the concept of "gross negligence" (faute lourde), the Court has considered most faults of a professional seller to have the character of gross negligence. Accordingly, since gross negligence has the same effect as intentional fault, all seemingly valid clauses disclaiming liability are to be considered null and void.\(^30\) In tort liability, there is a general and traditional bar on all exemption clauses.\(^31\)

**B. Law of the Federal Republic of Germany**

1. Law of Sales.—In the Federal Republic of Germany\(^32\) the vendor’s liability is dealt with in Article 459 of the German Civil Code. This article provides that a vendor warrants that the thing sold is free from defects diminishing or destroying its value or fitness for either ordinary use or the use contemplated in the contract. Article 460 of the Code provides that this warranty does not apply if the purchaser knew of the defect or if the defect was apparent at the time the contract was concluded.

The remedies provided for breach of the implied warranties are cancellation of the contract or the reduction or repayment of the price.\(^33\) In addition, the purchaser may sue the vendor for damages (1) where based on the vendor’s specific representations the purchaser believed a quality in the product to exist and the quality did not exist; and (2) where the vendor has in bad faith kept silent about the existence of a defect in the product. However, under the reported cases, damages awarded are limited to redressing the economic con-

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30. In Belgium and Luxembourg the law is very similar to the French law, since the Code Napoleon also is in force in these two countries. There are, however, some differences in the interpretation of the relevant articles. The principal distinction is that the vendor's liability for hidden defects can be rebutted in Belgium. Belgian law, unlike French law, admits also the validity of exemption clauses excluding or limiting liability for hidden defects. In tort, the Belgian interpretation of the strict liability under Article 1384 for things which the manufacturer has in his or her charge, limits such liability to objects which are dangerous because of some inherent defect or imperfection and are, therefore, unsuitable for normal use. Thus, a consumer has to prove not only that he or she was injured by that product and the manufacturer was the "guardian" of it, but also that the product was in some way defective.
31. C. Civ. art. 1383.
32. For an appraisal of German law, see Simitis, Product Liability: The West German Approach published in UKCLS, supra note 12.
33. BÜRGERLICHES GESETZBUCH [BGB] § 462 (W. GEr.).
sequences to the purchaser of the vendor's non-performance of the contract and do not include personal injury.\(^4\)

2. *General Contract Liability.*—It follows that the German law of implied warranties provides an insufficient and unsatisfactory remedy in the case of personal injury. Resort to the general law of contract is therefore necessary.\(^5\) It provides for only two types of breach of contract, namely delayed performance and impossibility of performance attributable to the fault of one of the contracting parties. However, German courts have added a third type of breach of contract, referred to as "positive violations of contractual duty."\(^6\) According to the legal literature and the courts' decisions, the obligee must establish that the performance of the contract by the obligor was deficient in that it failed to fulfill the former's legitimate expectations. The burden of proof is upon the obligee also to establish that the misperformance was not due to his fault.\(^7\)

In many cases an injured purchaser will not succeed in such a general contractual fault action. The vendor frequently will be able to prove that the delivery to the purchaser involved no fault on his or her part, especially since German courts have never accepted that there is a general duty upon a retailer to inspect for defects the goods which he sells.\(^8\) Moreover, in Germany there is no equivalent of the French *action directe*, despite some unsuccessful attempts by courts to provide such remedies.\(^9\)

3. *Torts.*—In view of the grave obstacles to success in a contractual action against the vendor, consumers have resorted to delictual actions. Until 1968, any action of this kind was generally ineffective since the producer's liability, based on fault, could be eliminated by virtue of Article 831 of the German Civil Code. A producer could eliminate liability by establishing that, despite the fault of employees: (1) the producer had exercised proper care in their selection; and (2) had taken proper care in regard to the supply of tools and appliances; or (3) in any event, the damage would have


\^5\) BGB §§ 145-157.

\^6\) This theory developed by extrapolating from articles 276 and 286 or 242 (of the German Civil Code) that the seller had a duty of care not to sell defective goods. *See Orbán*, *supra* note 16 at 353.

\^7\) See the famous Concrete Mixer Case, Judgment of Bundesgerichtshof, W. Ger., 47 Bundesgerichtshof in Zivilsachen [BGHZ] 312.

\^8\) Judgment of September 25 1968, Neue Juristische Wochenschrift [NJW] 2238.

\^9\) In one case, the Court found that the manufacturer of a lorry was liable for defective brakes, despite the fact that the vehicle was purchased from a dealer, because a factory warranty accompanied the vehicle. Judgment of February 15, 1915, Bundesgerichtshof, W. Ger., 87 Reichsgericht in Zivilsachen [RGZ] 1.
resulted even if such proper care had been taken.40

On November 26, 1968, however, the Supreme Court of Germany ruled that where a person establishes that he was injured by a defective product, the manufacturer may only escape liability by proving precisely how the defect came into existence.41 This ruling holds even in circumstances where the manufacturer is entitled to invoke the defenses set forth in Article 831.42 Only by carrying this burden may a manufacturer be exculpated from liability.

This decision offers greater, but by no means complete protection to consumers. The manufacturer may still escape liability by establishing that the defect arose through the act or omission of a particular employee or through the technical failure of a particular piece of equipment and, at the same time, proves that he exercised due care in the selection of that equipment or in the selection and supervision of that employee.43

4. Special Legislation.—Since January 1, 1978, there has been a new law in Germany on the liability for damages caused by pharmaceuticals.44 This liability is strict within a global financial limit of 200 million DM and a limit of 500,000 DM for individual claims.45 It applies if, during development and production, the medication has dangerous results which go beyond a measure acceptable to medical science.46 This is so even though the medication has been used as intended. Alternatively, liability is also imposed if the damage has occurred due to descriptions or instructions for use which do not correspond to the standards required by medical science.47

C. English Law

In the United Kingdom, although the law of sales can be considered to provide strict liability,48 tort liability is still based on negligence. The inadequacies of this system including its failure to provide relief against remote vendors and to protect injured nonbuyers are admirably summarized in the report Liability For Defective

40. BGB § 831(1).
42. Id.
43. In Switzerland, contractual liability is very similar to that of Germany. In tort, liability is based on fault, but Swiss courts have long since recognized a general principle that if a person's acts or omissions creates a potentially dangerous situation he or she is at fault if he or she fails to take all possible and practicable means to prevent the occurrence of the damage. See PETITPIERRE, LA RESPONSIBILITE DU FAIT DES PRODUITS (1974) (available in Libraire de l'Universite, Georg, Geneve).
44. GESETZ ZUR NEUORDNUNG DES ARZNEIMITTELRECHTES, Aug. 24, 1976, BGBI I 2445 (W. GER.) [hereinafter GESETZ].
45. Id. at 2448.
46. Id. at 2450.
47. Id.
48. UKCLS, supra note 12 at 3.
Paragraph 29 of the Law Commission's report is worth noting. It provides that:

a. In the absence of proof of fault on the part of the manufacturer, only a person standing in a contractual relationship with the supplier of goods has a right and remedy. Where the injured person was not the buyer, he must bear the loss himself.

b. In the absence of proof of fault on the part of the manufacturer, a person standing in a contractual relationship with the supplier has rights and remedies only against him — usually a retailer. Thus liability will often fall not on the manufacturer — who may commonly be regarded by members of the public and others as being responsible for the quality and safety of the product — but upon a retailer, who from a practical point of view is seldom nowadays regarded as being so responsible.

c. In a number of situations, including that envisaged in the preceding paragraphs, it may be necessary for each party in the chain of distribution to claim against his immediate supplier for breach of contract. The existing law may therefore multiply litigation.

d. A person who claims against a producer in tort (delict) has to establish first that his injury was caused by a defect in the product, and second that the defect existed in the product when it left the hands of the producer. The latter burden, in particular, may be difficult to meet.

e. A person who claims against a producer in tort (delict) has a third task, that of establishing that the defect was there because of fault on the part of the producer. Experience shows that if the claimant in tort surmounts the two earlier hurdles he may often be able to surmount the third, because he is aided by the doctrine of res ipsa loquitur or its practical equivalents. He is, however, at a disadvantage in relation to access to the relevant evidence and scientific expertise, and this may be the real barrier to the initiation of an action on his part.

D. Swedish Law

Sweden appeared to be moving in the direction of introducing strict liability. In 1977, a new law concerning compensation for injuries due to medicines\(^5\) entered into force.\(^6\)

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51. Produktansuvar I, Ersättning for Rikemedelsukada (Compensation for dam
The system involves direct compensation from an insurance fund. The insurer's responsibility is not based on the existence of liability for damages on the part of manufacturers of medicines or on the part of other persons. Thus it is not a matter of third party liability insurance. Rather, the insurance can be characterized as a kind of compulsory accident insurance for injuries caused by medicines. Insurance is collective and is to be paid for by manufacturers and importers subject to certain restrictions.

The insurance relates to injuries from such medicines which, in conformity with the Swedish control legislation, have been made available in Sweden on a commercial basis for consumption. Compensation will, however, also be paid for injuries sustained through medicines purveyed illegally, if the injured person was unaware of the circumstances which made the purveyance illegal.

In principle, compensation from the insurance is to be payable as soon as the use of a medicine has caused the injury. Thus the right of compensation is not based on the doctrine of negligence. It is not even required that there be a defect in the product. Since it is often difficult in some cases to show the causal connection between the injury and the use of medicines, a relaxation of the burden of proof on the part of the injured person has been provided, to the effect that a predominant probability of a causal connection will be sufficient. This relaxation, however, applies only to physical injuries.

The amount of compensation is to be determined in accordance with the principles of the Tort Liability Act. There are, however, two kinds of limitations of liability. Both are common to the whole compensation system. The liability relating to those injuries which have manifested themselves during the same calendar year is limited to 150 million Swedish Kronor. Within this framework, a special limitation of seventy-five million Swedish Kronor is proposed for a sequence of injuries which are due to the same defect inherent in the medicine provided that this defect was not known to the expert (the medical practitioner) at the time when the medicine was made available for use.

52. See generally Oldertz, supra note 50, at 639-43; see also Hellner, Compensation for Personal Injury: The Swedish Alternative, 34 AM. J. COMPAR. L. 613 (1986).

53. Oldertz, supra note 50 at 639-43.

54. Id. at 648.

55. Id. at 640-41.

56. Id. at 651.
E. Conclusions: Law Reform Perspective

The wide range of approaches among the European legal systems indicates (1) the lack of predictability in determining product liability; and (2) the limited extent of consumer protection.

Even in French law, where consumer protection seems to be very comprehensive, there is still the possibility that the protection extended by judicial decisions may be changed. This case-law is contested by manufacturers who are unwilling to accept the legal fiction according to which they are considered to be acting in "bad faith" ("presumption de mauvaise foi") if a defective product is sold.

Despite efforts made by Courts to improve the consumer's situation, in some cases by having recourse to legal fictions, the existing European law is inadequate because it has not coped with the changes which have occurred in the economic processes. These changes are essentially of two kinds:

1. the change in the relationship between consumers and producers;
2. the change in production methods due to developments in technology.

Mass production has largely replaced crafts production, so that the direct relationship existing in most cases between the producer and the consumer has gradually disappeared. With the expansion of distribution networks, products reach ultimate consumers after passing through the hands of a great many intermediaries. The consequence of this development is that neither consumers nor sellers can exercise quality control over products. As previously indicated, in many states actions cannot be brought against the seller since the latter can frequently prove the absence of fault on his part. Another deficiency of the contractual action is that it often cannot be brought by the "innocent bystander" or by the user who is not a party to the contract, although related to the buyer.

More serious consequences follow from the change in production methods. The complexity of manufacturing processes makes it almost impossible for the victim to prove any fault on the part of the producer, whose factory is very often located a long distance away from the place where the damage occurs. Moreover, since the manufacturing process is in many cases substantially automated, damages which occur from a defect in a single article can result from a momentary breakdown of a machine which cannot be detected by the existing means of quality control. Under these considerations the ex-

57. See supra text accompanying notes 19-30.
isting remedies in contract as well as in tort do not adequately respond to the new situation. The demand for reform which has been developing in Europe is in itself evidence of the desirability of developing rules which will provide greater predictability in assessing liability and more equitable protection for consumers.

III. General Purposes Of The Convention And The Directive

The necessity of protecting the consumer is explicitly stated in the Preamble of the Strasbourg Convention on Product Liability as the primary objective of the text. The second paragraph of the Preamble expressly mentions the “desire to protect consumers taking into account the new production techniques and marketing and sales networks.” The third paragraph states as the aim of the Convention the desire “to ensure better protection of the public and, at the same time, to take producers’ legitimate interests into account.”

The starting point of the Directive is slightly different. The first paragraph of the Preamble states the necessity for “approximating” (i.e., making uniform) the product liability law because the divergencies existing at present might distort competition in the Common Market, affect the free movement of goods within the Common Market, and entail a differing degree of protection of consumers against damages caused by defective products to their health or property.

In light of options to adopt non-uniform provisions left by the Directive to the member states on important matters such as development risk, the Directive to that extent fails to achieve the purpose of approximating the product liability law in Europe. However, the Directive should be considered as an evolving instrument since many of its provisions give the Community Commission the power to make proposals for modifying its contents in light of experience acquired after a number of years of its application.

Despite the differences in their respective objectives, the protection of consumers’ interests is nevertheless clearly a common and major feature of both the Convention and Directive, based on the premise that existing law does not grant consumers adequate protection.

58. Convention, supra note 5, Preamble.
59. Id. at para. 2.
60. Id. at para. 3.
63. See infra text accompanying notes 112-18.
A. **New Strict Liability System**

If the existing system of liability is inadequate to achieve the aims of a new policy of consumer protection, what changes then should be made to the existing law? Both the experts of the Council of Europe and the Commission of the European Communities thought that improvement of the consumer's situation could not be obtained by altering the basic rules of contract.\(^65\)

The two possible solutions in this respect were in fact considered as unsatisfactory. First, giving the purchaser contractual rights against the retailer would be unsatisfactory since the person held liable should not be the seller but rather the producer who created the risk by putting a defective product on the market.\(^66\) Second, giving the ultimate purchaser or the non-purchaser a contractual right against the producer would require the introduction of a fictional contractual relationship which would be difficult to justify from a theoretical point of view.\(^67\) Therefore, the conclusion agreed upon was that the solution should be found in tort law reform.

The possibility of granting a tort remedy which reverses the burden of proof was suggested. This solution was, however, also considered inadequate since even the most severe system existing at present might produce results unfair to the consumer. For example, the law of the Federal Republic of Germany which, as previously indicated, requires the producer not only to establish that he took reasonable care but also to show how the defect actually arose, might be unfair if applied to the consumer. In some cases the producer could avoid liability by (1) proving that the fault lay with one of his suppliers; or (2) that he had used the best materials, the best machines, the most qualified workers and a very sophisticated quality control system.\(^68\) It would be difficult for the consumer to challenge such evidence, which is often only remotely available and very complex and technical in character.

For these reasons, the experts of the Council of Europe and the Commission of the European Community thought that the most appropriate protection would be the adoption of a "strict liability" system. There was a great deal of discussion regarding what the basis of such a system should be. Some thought that the most appropriate basis for a system of strict liability was the concept of "dangerous

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\(^{65}\) **EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON PRODUCTS LIABILITY IN REGARD TO PERSONAL INJURY AND DEATH**, para. 8 (1977) [hereinafter EXPLANATORY REPORT] (this report can be obtained from the Council of Europe, Strasbourg, France).

\(^{66}\) *Id.* at para. 10.

\(^{67}\) This is a fictional kind of contractual action in that under this system the injured party can sue the manufacturer (with whom the injured party has no privity) under a tort theory but not under a contract theory.

\(^{68}\) *See supra* note 40.
products." This would have the advantage of clearly indicating the reason for a system of strict liability for damage caused by products, i.e., the "risk" inherent in them.

B. "Defective" Product Liability - Comparative Causation

Some argued that the notion of "dangerous product" was ambiguous and unsatisfactory, since it was difficult to determine in advance which products were dangerous. While some products are dangerous in themselves, others may become so owing to a defect or to improper use. Often the greatest damage is caused by products not originally thought to be dangerous.

Other experts suggested that the system of product liability ought to be based on a product's defectiveness. Under this system, the manufacturer would not be liable for all damage caused by his product but only for damage arising from a defective product — the most common actual cause of damage. This is the solution adopted. Article 3 of the Convention reads: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." Article 1 of the Directive similarly states: "The producer shall be liable for damage caused by a defect in his product." It follows that the producer is liable for a defect in his product, even if he has not committed any intentional or negligent wrong. The Convention accordingly refers to "products liability" and not "producers liability." The Directive employs the expression "liability for defective products."

The injured person, for his part, is required to prove the damage, the defect, and the causal link between the defect and the damage. This bars the use of a "presumption" regarding the existence of the defect. Article 4 of the Directive expressly states these requirements. Under the Strasbourg Convention it was thought that these elements were implied in the system set up by the Convention.

The producer can escape liability only by proving one of the circumstances which are mentioned by the Convention or the Directive as defenses. These defenses are discussed later in this article.

The axis of the system is the definition of "defect." Article 2 paragraph (c) of the Convention provides that "a product has a 'defect' when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product." The more detailed definition of Article 6 of

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70. Id.
71. Id. at para. 13.
72. Convention, supra note 5, at art. 3.
74. Convention, supra note 5, at art. 2 para. c.
the Directive provides:

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
   (a) the presentation of the product;
   (b) the use to which it could reasonably be expected that the product would be put; and
   (c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.75

While no substantial difference exists in the results intended by these two different texts, some differences in the format are worth noting. The additional terms of the text of the Directive are addressed seriatim in the discussion which follows.

The committee drafting the Convention did not wish to enumerate the three types of defects set forth in Article 6, paragraph 1 of the Directive. However, it did expressly indicate that the presentation of the product would encompass the notion that a "defect" covers incorrect or incomplete directions or use of warnings. This is covered by Article 6(1)(a) of the Directive. Presently some states provide through legislation or judicial decisions that only "intrinsic" defects are real defects and incomplete or incorrect directions or warnings do not amount to "intrinsic" defects.76

The reference to the use to which the product reasonably could be expected to be put (explicitly mentioned in paragraph 1(b) of Article 6 of the Directive) makes explicit elements of the definition of defect which are mentioned in paragraph 36 of the Explanatory Report to the Convention. This report reads in part "In determining whether a defect exists it will be necessary, consequently, to take account of all the circumstances, for example, if the product was utilized more or less correctly or used in a more or less foreseeable way."77 If the actions of the consumer amount to negligence, but the product nevertheless is regarded as defective, the situation would be governed by Article 4 of the Convention and Article 8 of the Directive. These articles provide for proportionate reduction of liability or its disallowance where the conduct of the injured party is partly responsible along with the defective product for the injury. However, under this comparative causation system, no reduction of liability is

76. EXPLANATORY REPORT, supra, note 65, at para. 35.
77. Id. at para. 36.
permitted where the defect and the conduct of a third party jointly caused the injury.

The reference in Article 6 paragraph 1(c) to evaluating the safety of the product at “the time when the product was put into circulation,” is dealt with by the draftsman of the Convention in paragraph 37 of its Explanatory Report which states:

The question was posed as to whether it would not be expedient to stipulate the time at which the safety of a product must be determined. It was suggested that the safe nature of the product must be judged at the time the product was put into circulation and not at the time when the damage occurred. The Committee was against including any stipulation of this kind in Paragraph (c) since it would implicitly admit as an exception “development risks.”

Moreover the definition of “defect” in paragraph (c) gives the judge a sufficient margin of discretion to enable him to take the time factor into account.

Finally, paragraph 2 of Article 6 of the Directive makes explicit the concept of “subsequent defect” which constitutes a ground for exemption from liability. It states that “a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.” This exemption can also be found under the Convention and it is explained in paragraph 42 of the Explanatory Report to the Convention as follows:

On the other hand the committee agreed that a distinction should be made between “development risks” and other situations in which the “time factor” played a part and which were covered by the definition of a “defect.” This is a case of “subsequent defects,” that is to say defects which were not considered as such when the product was put into circulation but became “defects” as the result of new technological discoveries. In other words, the product is manufactured in accordance with the rules in force at the time when it is put into circulation but can no longer be regarded as complying with the rules governing safety following new scientific and technological development. The defect may then be revealed by comparison with a similar product manufactured according to the new methods. It is, for example, obvious that if a person buys in 1977 a refrigerator manufactured in 1948 which lacks certain safety devices (such as a door that can be opened from inside) included in 1977 models, that person is not entitled to expect the same degree of safety as would be offered by a refrigerator manufactured in 1977.

78. Id. at para. 37.
79. Id. at para. 42.
It will be helpful to emphasize two things about the definition of “defect” given both by the Directive and the Convention. First, it does not refer to the safety which the victim or a particular consumer is entitled to expect. Rather the reasonable expectations of the public at large is the standard to be applied. It therefore involves an objective rather than a subjective determination. Second, the example in Article 6 (1)(b) of the Directive brings into consideration the reasonable expectations of the producer as to proper uses to which the product would be put in determining whether it was defective or non-defective. In this connection it will be necessary therefore to take into account any improper use or inadequate maintenance of the product by the injured party.

C. “Producer” - Joint and Several Liability

Both the Convention and the Directive are substantially similar regarding the determination of persons liable. Under their definitions of “producer” the person principally liable is the manufacturer of the finished product or a component part, and the producer of natural products (referred to by the Directive as “raw material”). These definitions exclude all other persons involved in the production and distribution chain, such as suppliers, warehousers, and retailers. However such persons are subject to the Convention and Directive provisions which preserve rights of injured persons granted by the domestic law of member states. In a multistate situation, the Hague Convention on Conflicts of Law in the field of product liability provides rules for determining applicable law.

Both the Convention and the Directive are aimed at restricting the application of the new liability system to “real” producers. The Convention recognized that imposing strict liability on a large number of persons including those who only play a secondary part in the production process would be inexpedient and economically costly from a legislative point of view, because of the potential multiple liability and resulting increased insurance costs.

Since the concern is with products liability, the person responsible should be the one who had the opportunity to exercise quality control in producing the product. This rationale is based on the fact that the person who puts the product into the state in which it is offered to the public is the origin of the damage suffered by the injured person (i.e., he is the “real” producer). In addition, through insurance he is able to spread the risk inherent in production over a large number of products sold.

80. Convention supra note 5, at art. 5; Directive, supra note 10 at art. 7.
81. Convention, supra note 5, at art. 12; Directive, supra note 10 at art. 13.
82. See supra note 11.
The producer of a component part is also liable under both the Convention and the Directive in cases where the component part is defective. This provision has been criticized by those who would have preferred channeling liability entirely to the producer of the finished product. It must be borne in mind, however, that strict liability on the part of the producer of a component part is justified not only in terms of principle (the component is in itself a finished product which might be defective), but also in practical terms. Such liability is in the interests of the consumer, since the component manufacturer may be financially in a better position than the producer of the finished product of the component part. In addition, the component manufacturer may not wish to leave the defense of his case to someone else.

A different problem arises where the component part is not defective but the finished product is. In this situation Article 7(f) provides that the producer shall not be liable as a result of this Directive by specifying that:

in the case of a manufacturer of a component, 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, the manufacturer is liable.

D. "Importer" and "Supplier" Liability

It was also realized that if only the "real producer" is found liable, consumer protection may sometimes be meaningless. Frequently, the real producer is a foreigner who has no office in the victim's country. Additionally, the name which appears on the product is often not that of the real producer, but the name of a large distributor who usually has insufficient financial standing to offer an adequate guarantee to the victim. Finally, the product may be anonymous because it bears neither the name of the manufacturer nor the distributor.

In order to avoid any situations where no one would be accountable for the defective product, the Convention and Directive in their definition of producer explicitly include importers and certain suppliers within that term, and thereby make such persons equally liable as the producer.

Liability is thereby imposed (1) on the importer of the product and (2) the person presenting the product as his by showing his

84. Convention, supra note 5, at art. 3 para. 2, 3, 4; Directive, supra note 10, at art. 3 para. 2, 3; see also Explanatory Report, supra note 65, at para. 48.
name, his trademark or other distinctive sign on it. This latter provision also applies to products marketed under the name of a large store.85

Subsidiary liability is borne by the supplier of the product where the product states the identity neither of the producer nor of the importer and the supplier fails within a reasonable time to divulge to the injured person the identity of the producer.86 Under these rules, wholesalers and department stores will insist on the identity, including addresses, of importers into the European community being indicated on the product. It will also be necessary for product suppliers to keep records concerning the purchase of products so that they will be able to prove the identity of importers or producers. These records will have to be kept for a period of at least ten years because of the "statute of repose" provisions of Article 11 of the Directive.

E. Joint and Several Liability

In all cases where several persons are liable, either under the Convention or the Directive, they are jointly and severally liable. Each of those persons has a recourse action against the other but the Strasbourg Convention, not dealing with this problem, refers back to national legislation.87 The reason why the problem of contribution or recourse was not covered in the Convention is because membership in the Council of Europe comprises twenty-one member states between whom there is no agreement of the type available to the member states of the Community under the Brussels Convention, concerning recognition and enforcement of judicial decisions.88 Article 5 of the Directive explicitly refers the problems back to national legislation by stating that "where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the right of contribution or recourse." (emphasis supplied).

F. Products Subject To The Products Liability Regime

"Product" is defined by Article 2(a) of the Convention to mean all movables (i.e., personal property), natural or industrial, whether raw or manufactured, even though incorporated into another mova-

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85. Consider the case of Sears using a Kenmore label on a product by a company such as Whirlpool. Such a vendor is liable as a manufacturer even though it is not the "true" manufacturer of the product.
86. Convention, supra note 5, at art. 3 para. 3; Directive, supra note 10, at art. 3 para. 3.
87. EEC Treaty, supra 6, at art. 189.
88. See supra note 4.
ble or into an immovable. This definition clearly shows that the Con-
vention applies to all products except immovables (*i.e.*, realty),
which in most countries are already subject to a special system of
liability.\(^8\)

The Article 2 Directive definition of "product" introduces an
important difference by excluding from the strict liability regime
"primary agricultural products and game" which are defined as
"products of the soil, of stock-farming and of fisheries, excluding
products which have undergone initial processing." Like the "farm
product in their unmanufactured state" standard of the Uniform
Commercial Code in the United States,\(^9\) the "primary agricultural
products initial processing" standard of the Directive may require
judicial clarification regarding the status of items such as deep fro-
zen meats or fish, feed animals injected with hormones, vegetables
sprayed with insecticides, etc.

Article 2 specifies that "product" includes electricity. This
avoids ambiguities which exist in the United States case law.\(^1\)

The reason given for excluding primary agricultural products
and game is set forth in the third paragraph of the Preamble of the
Directive which states that:

Liability without fault should apply only to movables which
have been industrially produced . . . As a result, it is appropriate
to exclude liability for agricultural products and game, except
where they have undergone a processing of an industrial nature
which could cause a defect in these products.\(^2\)

Because of the divided opinion on the desirability of exempting "ag-
ricultural products and game" from the coverage of the Directive,

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89. *Convention, supra* note 5, at art. 2(a).
90. Products of crops or livestock, even though they remain in the possession of a person
engaged in farming operations, lose their status as farm products if they are subjected to a
manufacturing process. What is and is not a manufacturing operation is not determined by
this Article. At one end of the scale some processes are so closely connected with farming —
such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar — that they
would not rank as manufacturing. On the other hand, an extensive canning operation would be
manufacturing. The line is one for the courts to draw. After farm products have been sub-
jected to a manufacturing operation, they become inventory if held for sale. *Uniform Com-
91. Cincinnati Gas & Elec. Co. v. Goebel, 28 Ohio Misc.2d 4 (1986) (metered electric-
ity is "goods"); Pierce v. Pac. Gas & Elec. Co., 166 Cal. App.3d 68, 212 Cal. Rptr. 283
325, 196 N.W.2d 316 (1972) (sale of electricity is service not "goods"); Farina v. Niagara
Mohawk Power Corp., 81 A.D.2d 700, 438 N.Y.S.2d 645 (1981) (unable to conclude electric-
ity is "goods" as defined by Uniform Commercial Code).
92. *Directive, supra* note 10, Preamble para. 3. It will be interesting to observe the case
law and development of the concept of "primary agricultural products and game." The line of
demarcation may have to be drawn by the Court of Justice as the evolution from feathered to
plucked to frozen to canned chicken type of cases arise.
Article 15(1) of the Directive permits the member states to include primary agricultural products and game under the definition of "product." It will be interesting to observe which states, if any, will exercise this option to extend the application of the Directive.

The Convention does not grant an exemption to agricultural products and game. This approach was shared by the English Law Commission in its study of product liability.93

G. Persons Entitled To Sue

Neither the Directive nor the Convention contain any provisions specifying persons entitled to sue. In the absence of a definition, Article 1 of the Directive and Article 3, paragraph 1, of the Convention are drafted in such a way as to lead to the conclusion that any injured person benefits from the strict liability system whether or not he is a party to a contract and whether he is the user of the product or a bystander.94 The two instruments therefore by-pass the distinc-
tion between “contractual” and “tortious” liability by simply introducing an additional right of action based on “strict liability” for all victims. This makes it possible for the injured person to decide whether to take action either under the strict liability system, or depending on the applicable domestic laws, on the ground of fault or under the terms of a contract. However, under Article 13 of the Directive, the domestic law of member states supplements the Directive to the extent that it grants the injured person additional rights beyond that granted by the Directive.

H. Defenses Allowed To Producers

In a strict liability system only defenses expressly allowed to the person liable can be used. The defenses that both the Directive and the Convention grant to producers are (1) the product has not been put into circulation by the producer; (2) the defect did not exist at the moment when the product was put into circulation; (3) the producer is not liable if he proves that the product was neither manufactured or distributed in the course of his business; and (4) contributory negligence of the victim which, having regard to all circumstances, can be a cause for reducing or disallowing compensation.

The Directive adds three other defenses: (5) the defect is due to compliance of the product with mandatory regulations issued by public authorities; (6) the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered; and (7) in the case of a manufacturer of a component, 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.

1. Defective Finished Product - Component Part.—The last of
these defenses is also provided by the Convention but not in such an explicit way. Paragraph 51 of the Explanatory Report to the Convention reads:

The Committee considered that there was no need for the Convention to contain a provision enabling the producer of the component part to establish that he is not liable by proving that the defect resulted from the design or instructions of the producer into which it was incorporated.

The reason is that it follows from Article 3, paragraph 1, taken together with Article 2, paragraph b of the Convention, that the producer of a component part is liable only if that component part is defective, and that is for the injured party to demonstrate and prove. The point about the question of defectiveness, according to Article 2, paragraph c, is whether the component part considered in itself — that is, as an autonomous product — does not provide the safety that may legitimately be expected of it.

If the component part in itself satisfies legitimate safety requirements, the liability of the producer of that part cannot be invoked. This principle applies even if the finished product as a whole is defective because the component part, owing to the general design of the producer of the finished product, was unsuitable for incorporation into that finished product, and also if the component part was manufactured according to technical specifications provided by the manufacturer of the finished product and it then transpires that those specifications were erroneous. Article 3, paragraph 4, does not apply in such cases.

If on the other hand, the component part, considered as an independent product — that is, without regard for its subsequent use by the manufacturer of the finished product — does not meet the safety requirements that may legitimately be expected of it, then the producer of that component part is liable, under Article 3, paragraph 1, taken together with Article 2, paragraphs b and c.

2. National Mandatory Regulations.—The other two defenses, which are compliance with national mandatory regulations and the development risk, constitute important differences between the Convention and the Directive. Under the Convention, a defense based on compliance with mandatory regulations is excluded by the use of the word "entitled" in the definition of defect (i.e. "safety which a person is entitled to expect"). Since this is a mandatory rule, the user is not entitled to expect anything other than what the law says. See Explanatory Report, supra note 65, at para. 15.
planatory Report to the Convention states that "the word 'entitled' is more general than the word 'legally' (entitled). In other words, mere observance of statutory rules and rules imposed by authorities does not preclude liability." 107

Without case law clarifying the provisions of the legal texts adopted on the basis of the Directive, it is difficult to appreciate the significance of the exception of compliance with mandatory regulations issued by the public authorities. 108 In fact, in most states, many safety standards are framed in such a way as to prevent the use of some components or to require the producer to satisfy minimum requirements. 109 In the latter case, nothing in the regulations prevents the producer from adopting stricter standards if he wants to comply with the duty of "safety" imposed upon him by Article 2 of the Convention and Article 6 of the Directive. 110 It seems therefore that the exoneration provided for by paragraph 7(d) of the Directive 111 can be invoked only if the regulations impose upon the producer strict instructions on how to manufacture a product, without giving him an alternative.

An example of this is subjecting the distribution of the product to a conformity control (i.e., the product is required to meet certain specifications). Although this might be a rare occurrence, the question of a subsidiary liability imposed upon a state is present in all these cases. Therefore, it will be interesting to see how the courts in member states will interpret the concept of "mandatory" regulations. The matter is of great importance since too loose an interpretation of paragraph (d) of Article 7 of the Directive might result in depriving producer strict liability of any practical significance.

3. Development Risk.—Article 7(d) of the Directive exempts the producer from liability when "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." This ground for exemption, called "development risk," is not provided for in the Convention.

The Convention denies development risk as an exception to the liability of the producer by simply not mentioning it as a defense. Therefore, by virtue of the principle that in a "strict liability" system only the defenses which are expressly provided for may be as-

107. EXPLANATORY REPORT, supra note 65, at para. 35. The mere fact that the manufacturer is following these regulations does not automatically mean that he is entitled to expect that his product is "defect free."

108. Directive, supra note 10, at art. 7(d). Article 7(d) states that, "the defect is due to compliance of the product with mandatory regulations issued by the public authorities . . . ."

109. Id.

110. Convention, supra note 5, at art. 2; Directive, supra note 10, at art. 6.

111. See supra note 108.
asserted, development risk (which is not expressly mentioned by the Convention as a defense) cannot be asserted as such.\textsuperscript{112}

It is interesting to recall the reasons which led the experts in Strasbourg\textsuperscript{113} to exclude development risk as a possible defense. The experts drafting the Explanatory Report to the Convention agree with the reasons promulgated at the Strasbourg Convention. Some experts\textsuperscript{114} maintained that "development risk" should be a ground for exclusion of liability in the case of technically advanced products. It should, however, be pointed out that even in the framework of the Directive, development risk can be excluded as a defense to the producer. Article 15(1)(b) of the Directive gives to the states the possibility, by way of derogation from Article 7(e), to provide in their legislation that the producer will be liable, even in case of development risk.\textsuperscript{115}

However, such a derogation is subject to the special procedure set forth in paragraph 2 of Article 15.\textsuperscript{116} A member state wishing to enact the exclusion of development risk as a defense, must communicate the text of the proposed measure to the Commission. The Commission must in turn inform the other member states thereof. The member state concerned must then hold the proposed measures in abeyance for nine months after receiving the said information. If the Commission within three months of receiving such information does not advise the member state concerned that it intends to submit such a proposal to the Council, the member state may adopt the proposed measure immediately. If the Commission does submit to the Council such a proposal amending the Directive within the aforementioned nine months, the member state concerned shall hold the proposed measure in abeyance for a further period of eighteen months from the date on which the proposal is submitted.\textsuperscript{117}

Ten years after the date of notification of the Directive, the Commission must submit to the Council a report on the effect that rulings by the courts as to the application of Article 7(e) (development risk) and of paragraph 1(b) of Article 15 (special procedure

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{112} Explanatory Report, supra note 65, at paras. 39-42.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Article 15(1)(b) of the Directive provides that, Each Member State may:
  \begin{itemize}
    \item by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves 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 a defect to be discovered.
  \end{itemize}
  \item \textsuperscript{116} Directive, supra note 10.
  \item \textsuperscript{117} Id.
\end{itemize}
\end{footnotesize}
for excluding development risk as a defense) have had on consumer protection and the functioning of the Common Market. In light of this report, the Council (acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty\textsuperscript{118}) shall then decide whether to repeal Article 7(e).

I. Joint Causation — Force Majeure

Neither the Convention\textsuperscript{119} nor the Directive\textsuperscript{120} allow joint causation of an injury by a defect in the product, and by the act or omission of a third party as a defense for the producer. They both specify that “the liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.” The Directive adds that any recourse against the third party is regulated by national law.\textsuperscript{121} Although not mentioned expressly in the Convention, this is implicitly accepted by it for the reasons indicated in the discussion of joint and several liability.\textsuperscript{122}

Neither the Convention or Directive deal with “force majeure” as a possible defense. In this respect, it is interesting to quote the Explanatory Report to the Convention which states that:

The Committee did not think that it was necessary to make special provision in the case where (a) the intervention of a third party or employee or force majeure occurred before a product was put into circulation; (b) the intervention of a third party or force majeure occurred after the product was put into circulation and is the sole cause of the defect; and (c) the intervention of a third party or force majeure, although the product has a defect, is the sole cause of the damage. In fact, the Committee felt that in the case envisaged in (a) above, liability should rest entirely on the producer; in the case envisaged in (b) above, Article 5, paragraph 1.b already provides a defense, and in the case envisaged in (c) above, the chain of causation between the defect and the damage is broken.\textsuperscript{123}

In the small number of cases where force majeure or “cas for-

\textsuperscript{118} EEC Treaty, supra note 6, at art. 100.
\textsuperscript{119} Article 5 para. 2 of the Convention provides that, “The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.” Convention, supra note 5. In this case liability should rest entirely on the producer since he may in any event proceed to recover his loss against the third party. EXPLANATORY REPORT, supra note 65, at para. 61.
\textsuperscript{120} Article 8(1) of the Directive provides, “Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.” Directive, supra note 10.
\textsuperscript{121} Id.
\textsuperscript{122} See supra notes 87-88.
\textsuperscript{123} EXPLANATORY REPORT, supra note 65, at para. 64.
tuit" (as defined by the ordinary law of the different states) in conjunction with a defect in the product contributed to the damage, the Committee decided not to make any specific provision in the Convention. This decision was based on the fact that problems might arise in determining a definition of force majeure acceptable to all states. Consequently, these problems will be determined by the national law of each state.

J. Derogation Of Liability Prohibited

To assure effective application of the strict liability rules the producer is prohibited from limiting, excluding or exempting himself from liability to the injured person. 124

K. Damages

The next question to be considered is what confers entitlement to compensation under the Convention and the Directive. As the title of the Convention indicates, its application is confined to physical injury and death. The Council of Europe chose to apply the Convention only to physical injury and death claims because of (1) the urgency of dealing first with the problem of physical injury; and (2) the problems of liability for damage to property were slightly different and perhaps required a different solution. 126 The Directive applies to property damage as well as physical injury and death. 126

The Convention does not stipulate types of damage or forms of compensation, which will accordingly be governed by national law. Nor does it provide for any financial limit on liability. In some states the introduction of strict liability has been accompanied by a restriction on the amount of compensation. 127 In order to facilitate ratification by the largest possible number of states, the Convention does provide for the possibility of a reservation whereby states will be able to limit the financial extent of product liability, first by an individual claim limit and second by a global limit. 128 These limits cannot be lower than those stipulated in the Appendix to the Convention.

The Directive provides that any member state may provide that a producer’s total liability for damage resulting from 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

124. Convention, supra note 5, at art. 8; Directive, supra note 10, at art. 12. The experts were in general agreement that in relation to personal injuries, the producer ought not to have the power to limit or avoid his liability by means of a contractual clause. EXPLANATORY REPORT, supra note 65, at para. 70.
125. EXPLANATORY REPORT, supra note 65, at para. 53.
127. GESETZ, supra note 44, at 2448; Oldertz, supra note 50 at 651.
128. Convention, supra note 5, at annex.
Ten years after the date of notification of the Directive, the Commission must submit to the Council a report showing the effect on consumer protection and the functioning of the Common Market resulting from the implementation of the financial limit on liability by those member states which have exercised the option. In light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal or retain the financial limit on liability.

In this context, the reasons why the majority of experts on the Committee of the Council of Europe excluded the possibility of fixing a minimum level of compensation are worth noting. The justifications presented for adoption of such a minimum level of compensation were not considered convincing.

It has been said that the limitation of the amount of compensation is necessary to make insurance costs easier to predict—in other words, to facilitate the determination of the risk. The insurance companies in the European Committee of Insurers have never endorsed such a statement. Their position is that the legislative limit and the quantitative limit in the insurance policy are two different questions. In fact, it is possible that some products, which present high risks will never be insured up to the amount provided by the law, and, vice versa, there might be products which would be insured for a higher amount.

Another argument is that providing for a limitation of compensation is necessary in order to guarantee that the conditions of free competition in Europe are the same in all states. If a common limit to compensation were fixed for the whole of Europe, the consequence would always be a distortion of competition. This is because economic conditions and the standard of living are so different in the various countries that two hundred million Deutsch Marks, for instance, in France represent a certain sum, but in Italy they would represent a much higher sum and be more burdensome on industry. This thinking has led the Council of Europe’s experts to abandon the idea of setting a common compulsory limit to the amount of compensation.

The Council of Europe also raised a “moral issue” in this situation. As a consequence of limitation of compensation, some people would receive no compensation in cases where they suffer injury a long time after the sum representing the maximum amount has been divided and exhausted. In this respect a quote from the report of the Swedish Committee on Pharmaceuticals which proposed a limitation for the amount of compensation is relevant. This report states:

129. Directive, supra note 10, at art. 16(1).
130. EEC Treaty, supra note 6.
In cases where compensation has to be reduced owing to limitation of liability, the committee proposes that the State should undertake to pay compensation in accordance with principles which the Swedish Parliament will determine when the case arises.\textsuperscript{131}

The Directive also covers in Article 9 damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ETU, provided that the item of property is of a type ordinarily intended for private use or consumption,\textsuperscript{132} and was used by the injured person mainly for his own private use or consumption.\textsuperscript{133} The Directive specifies that Article 9 does not prejudice national provisions \textsuperscript{134} relating to "non-material" damage.

L. Duration Of The Producer's Liability

Both the Directive and the Convention provide for a ten year "cut-off" statute of repose period after which proceedings against a producer cannot be instituted. This "cut-off" period was adopted to preserve a balance between the interests of consumers and producers. Two arguments were made in Strasbourg to justify such a provision. First, it was deemed necessary to afford producers some security by avoiding liability for damage resulting from cases initiated after a long period of time. Second, by fixing a time for termination of liability, the goal of facilitating amortization of insurance costs is furthered.

A difference exists between the Convention and the Directive in this field. The Directive states that actions for damages may not be brought after a period of ten years "unless the injured person has in the meantime instigated proceedings."\textsuperscript{135} This is not a substantive difference, because it merely makes explicit a principle emerging from a combination of Articles 6 and 7 of the Convention.\textsuperscript{136}

The Convention and the Directive also provide for a three-year period of limitation which runs from the day when the injured person became aware or should reasonably have become aware of the damage, the defect and the identity of the producer.\textsuperscript{137} This provi-

\textsuperscript{131} See supra note 51.
\textsuperscript{132} Directive, supra note 10, at art. 9(b)(i).
\textsuperscript{133} Id. at 9(b)(ii).
\textsuperscript{134} Id. at 9(b).
\textsuperscript{135} Directive, supra note 10, at art. 11.
\textsuperscript{136} Article 6 of the Convention provides, "Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer." Further, Article 7 of the Convention provides that, "The right to compensation under this Convention against a producer shall be extinguished if an action is not brought within ten years from the date on which the producer put into circulation the individual product which caused the damage." Convention, supra note 5.
\textsuperscript{137} Convention, supra note 5, at art. 6; Directive, supra note 10, at art. 10(1).
sion was introduced into the two texts to avoid forum-shopping which might be the consequence of different limitation periods in different states, some of which would apply the lex fori while others would apply the lex causae.

M. Lapse Provisions

The Directive adds an element (which is not explicitly mentioned in the Convention) by providing that "the laws of member states regulating suspension or interruption of the limitations period shall not be affected by this Directive." This is not a substantive difference between the two texts. The experts of the Council of Europe thought that this generally recognized principle was applicable to the Convention, even though it was not explicitly stated therein.

IV. Conclusions

A. Comparison Between The Convention And The Directive

In conclusion, there are three important differences of substance between the Directive and the Convention, namely:

(a) Article 2 of the Directive states that "product' means all movables, with the exception of primary agricultural products and game;" Article 2(a) of the Convention applies to all movables including primary agricultural products and game.

(b) Article 7(d) of the Directive states that the producer shall not be liable when "the defect is due to compliance of the product with mandatory regulations issued by the public authorities." The Convention does not contain this ground for exemption.

(c) Article 7(e) of the Directive exempts the producer from liability when "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." This ground for exemption, called "development risk," is not provided for in the Convention.

Article 15 of the Directive permits member states to opt not to apply the agricultural products exemptions contained in Article 2. It also permits member states by use of a special procedure to opt not to use the development risk exemption contained in Article 7(e). Consequently, those EEC states which chose not to apply these exemptions could in theory ratify the Convention while at the same time applying the Directive, whereas the others could not.

On the other hand, grounds for exemption based on "conformity with current regulations" is mandatory and constitutes the real ob-

stacle to ratification of the Convention by any European Economic Community states which choose not to apply the optional exemptions contained in Article 2 and Article 7(e) of the Directive, and to that extent have their implementation of the Directive conform to the Convention. Therefore, if the two texts are otherwise deemed compatible, a Protocol amending the Convention should be drawn up to insert "conformity with current regulations" as an additional ground for exemption from liability. In addition, to bring the Convention completely and directly in line with the Directive the two other optional exemptions regarding "primary agricultural products and game" and "development risk" could be added.

Although it is necessary to include in the Convention the ground for exemption provided for in Article 7(d) of the Directive, the inclusion of "development risk" and "primary agricultural product and game," is not a legal necessity. This should be the result of a policy decision, taking into account the final position on the Directive taken by the member states of the Community. The reason for this is that if a group of EEC member states were to choose not to apply these last two grounds, they could also ratify the Convention. This would afford a higher degree of consumer protection than that currently provided for in the Directive. Thus, the Convention would become a long-term objective for those States which are at present only able to accept the level of protection offered by the Directive and its optional grounds for exemption. EEC member states may wish to see the results of the implementation of the Convention and the Directive without its optional exemptions before deciding whether to increase consumer protection and ratify the Convention.

In this respect, it should be noted that under Article 15 of the Directive, ten years after its date of notification to member states the Commission is required to submit to the Council a report on both the effect on consumer protection and on the functioning of the common market of the absence or presence of "development risk" as a ground for exemption in the legislation of member states. Therefore, it is possible that the Commission, in light of such a report, might be induced to propose repealing "development risk" as a defense for the producer. Paradoxically, Article 15 of the Directive has been invoked as an obstacle to the ratification of the Convention if its use produces

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139. Directive, supra note 10, at art. 7(d).
140. Article 2 of the Directive provides that, "For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game..." (emphasis supplied). Directive, supra note 10.
141. See supra text accompanying notes 112-117, see also Directive supra note 10, at art. 7(e).
142. Some authors seem to think that although more balanced, the text of the Directive seems to take into consideration the interest of the producers more than the Convention. See GHESTIN, supra note 64 at 135.
differences between the Convention and the Directive.\textsuperscript{143} Ratification by Community member states of the Convention containing provisions different from the Directive would be considered as blocking any future modification of Community rules since an international undertaking of a member state might deter any attempt of the Commission to modify the Directive.

According to the AETR decision of March 1971, when the European Communities have taken measures setting out common rules, member States would not be entitled to undertake any different obligations affecting such common rules. According to this decision, the adoption of the Directive on Product Liability has created common rules in the field and Community member states would be able to ratify the Convention only if it were identical to the Directive.\textsuperscript{144}

Without taking a stand on the question of whether the AETR decision is applicable to the field of product liability, there is some question as to whether ratification of the Convention as suggested above would encounter serious difficulties from a legal point of view. In fact, even if an EEC member state ratified the Convention, it could always denounce it if the Council of Ministers modified, on the

\textsuperscript{143} Article 15 states,  
1. Each Member State may:  
(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive “product” also means primary agricultural products and game;  
(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves 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 a defect to be discovered.  
2. A Member State wishing to introduce the measure specified in paragraph 1(b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof.  
The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter. However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member States may take the proposed measure immediately.  
If the Commission does not submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.  
3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7(e) and of paragraph 1(b) of this Article have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7(e).  

proposal of the Commission, the present text of the Directive.

At any rate, it is still too early to see how the Convention should be modified. The Directive gives the member states a period of three years from the date of notification of the Directive, to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive. Therefore, it envisioned that the EEC member states may not take a decision on whether to avail themselves of the options provided by Article 2 and 7(e) before the expiry of such a period of three years.

B. The Future Of Product Liability Law Reform In Europe

At present we do not know what the precise provisions of the law on product liability will be in Europe because of (1) the options offered by the Directive to the states; and (2) the current unavailability of the legislation and regulations of member states to implement the Directive. It is nevertheless safe to state that, despite variances in the different systems, the essential features will be the following:

a. the producer will be responsible for any defect in his product put into circulation in the course of his business;
b. the injured person will be obliged to prove the defect and the fact that the damage was caused by the defect;
c. the producer will be able to escape liability by proving that the defect did not exist at the moment when the product was put into circulation or that he did not put the product into circulation;
d. the contributory negligence of the injured person will be a cause for reduction or exclusion of liability;
e. no disclaimer of liability will be permitted;
f. a “cut off” period for the liability of the producer will be provided.

Certainly the existence or non-existence of a defense based on development risk will make a difference among the laws of member states. However, this difference, in the long run, could be overstated. In fact, as defined in paragraph (e) of Article 7 of the Directive, the concept of “development risk” lends itself to such divergent interpretations that the conditions of competition may be seriously distorted. The Commission then will be obliged to act on the basis of Article 15 of the Directive and endeavor to obtain either its suppression as a defense or its general introduction in all member states according to a common interpretation.

Despite the fact that the interpretation of the concept of devel-

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development risk ultimately will be under the supervision of the Court of Justice, widely divergent views are possible in the various member states. For instance, in a consumer-protection-minded state, this defense might never be recognized by courts if they conclude that the responsibility required by paragraph (e) of Article 7 must be absolute and should not be the consequence of the difficulties or cost involved in the research necessary to discover or suppress the defect. In a producer-oriented country, development risk may become a routine exception if the courts accept the notion that in proving development risk no producer of a product could have discovered or avoided the defect in light of the then current state of science. At any rate, a system following the above mentioned parameters would be a step towards striking a proper balance between consumer and producer interests.

The consumer's situation is improved insofar as he will no longer have to prove fault on the part of the producer, which is often very difficult because (1) the evidence is virtually always in the possession of the producer; and (2) in the modern technical production process, it is difficult to determine precisely at what stage of production the fault occurs. On the other hand, the producer's position is not considerably worsened since (1) the consumer must prove the defect; and (2) fault on the part of the injured consumer may reduce or exclude liability. In this sense the producer does not incur absolute liability. In addition, a short time limit—ten years—has been set for actions for damages. This is a further advantage for the producer.

The most tangible advantage for the producer is that, from the legislative point of view, by "crystallizing" the situation, the Convention and the Directive provide producers with a degree of legal certainty which they have lacked hitherto. In recognition of this requirement of legal certainty, Article 10 of the Convention prohibits states from adopting rules which do not conform to the Convention even if they are more favorable to victims.

It has been said that a strict liability system in Europe would create for industry a situation comparable to that prevalent in the United States of America, where the high victim damage awards have caused a "liability crisis." However, differences between the United States and Europe which would tend to avoid such a development exist as follows:

a. According to the system of liability set out by the Convention and the Directive, contributory negligence and, more generally, the way in which the product is handled by the con-

146. See supra note 6.
sumer will be taken into consideration in assessing liability. In addition, the existence of a definition of "defect" will also tend to avoid possible excesses;

b. In Europe damages are awarded by the judge and not by a jury. This, together with the stricter, traditional way of calculating damages, will tend to avoid the charge of excessive awards on the part of some United States courts.

c. In Europe "punitive damages" are, in the great majority of states, unknown;

d. In Europe the system of "contingency fees" is not widespread.

Vigorous arguments pro and con have been made and continue to be made regarding the new product liability regime created by the Convention and the Directive. It is sometimes argued that the new system may promote enormous additional costs for certain products and, ultimately, cause the industry concerned to go bankrupt. Because so many factors (such as the differing inclination of consumers in various countries to become involved in litigation) are not clearly known, the arguments are admittedly extremely difficult to evaluate. However, three major arguments have been used to justify the adoption of a strict liability system as follows:

1. Strict liability is preferable to fault liability because it will foster an increase in the level of safety over the long term;

2. Strict liability is preferable to fault liability because it facilitates the "spreading" of accident costs among a greater number of cost-bearers;

3. Strict liability is preferable since it simplifies the evaluation of accident costs insofar as it obliges the producer to take these costs into account in production, safety and pricing decisions.

If one tackles the problem from the point of view of the economic cost for society, the difference between the two systems of liability are not dramatic. In the case of both negligence and strict liability the eventual cost will be borne by the consumer in the form of higher product costs. In the case of strict liability for those countries which have a developed system of social security, the cost will be spread by insurance among all consumers.

As previously stated the Federal Republic of Germany introduced on January 1, 1978 a new law on strict liability for pharma-


148. Id.

149. Id. at 5-6.

150. Id. at 6.
pharmaceutical products which sets a global financial limit of 200 million DM and an individual claim limit of 500,000 DM. This has cost the industry a premium of one-tenth of one percent of the turnover for a coverage from zero to ten million DM and a premium of four-tenths of one percent of the turnover for a coverage from 10 to 200 million DM, that is to say a total charge of forty-four hundredths of one percent. This is for an industry which is said to run a high risk.\footnote{151}

Although highly relevant, cost factors must nevertheless be considered along with other factors. As the British Royal Commission on Civil Liability and Compensation for Personal Injury has noted, the problem of product liability must also be considered in the context of the public concern to protect the interests of the consumer, the weaker segment of the production-consumption process. \footnote{152}
Appendix I

European Convention on Products Liability in Regard to Personal Injury and Death

The member States of the Council of Europe, signatory hereto.
Considering that the aim of the Council of Europe is to achieve a greater unity between its Members.
Considering the development of case law in the majority of member States extending liability of producers prompted by a desire to protect consumers taking into account the new production techniques and marketing and sales methods:
Desiring to ensure better protection of the public and, at the same time, to take producers' legitimate interests into account;
Considering that priority should be given to compensation for personal injury and death;
Aware of the importance of introducing special rules on the liability of producers at European level,
Have agreed as follows:

Article 1

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

Article 2

For the purpose of this Convention:

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

b. the term “producer” indicates the manufacturers of finished products or of component parts and the producers of natural products;

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

d. a product has been “put into circulation” when the producer has delivered it to another person.
Article 3

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

2. Any person who has imported a product for putting it into circulation in the course of a business and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such.

3. When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be deemed to be a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

4. In the case of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product and the producer incorporating that product shall be liable.

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

Article 4

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

2. The same shall apply if a person, for whom the injured person or the person entitled to claim compensation is responsible under national law, has contributed to the damage by his fault.

Article 5

1. A producer shall not be liable under this Convention is he proves:
   a. that the product has not been put into circulation by him; or
   b. that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
   c. that the product was neither manufactured for sale, hire or any other form of distribution for the economic purposes of the pro-
ducer nor manufactured or distributed in the course of his business.

2. The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.

Article 6

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

Article 7

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

Article 8

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

Article 9

This Convention shall not apply to

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

b. nuclear damage.

Article 10

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

Article 11

States may replace the liability of the producer, in a principal or subsidiary way, wholly or in part, in a general way, or for certain risks only, by the liability of a guarantee fund or other form of collective guarantee, provided that the victim shall receive protection at least equivalent to the protection he would have had under the liability scheme provided for by this Convention.

Article 12

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

Article 13

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

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

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

Article 14

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

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

Article 15

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

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

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect
on the first day of the month following the expiration of a period of six months after the date of receipt by the Secretary General of the Council of Europe of the declaration of withdrawal.

Article 16

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in pursuance of an international agreement to which it is a Party, it will not consider imports from one or more specified States also Parties to that agreement as imports for the purpose of paragraphs 2 and 3 of Article 3; in this case the person importing the product into any of these States from another State shall be deemed to be an importer for all the States Parties to this agreement.

2. Any declaration made in pursuance of the preceding paragraph may be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect the first day of the month following the expiration of a period of one month after the date of receipt by the Secretary General of the Council of Europe of the declaration of withdrawal.

Article 17

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

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

Article 18

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

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

Article 19

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

a. any signature;
b. any deposit of an instrument of ratification, acceptance, approval or accession;
c. any date of entry into force of this Convention in accordance with Article 13 thereof;
d. any reservation made in pursuance of the provisions of Article 17, paragraph 1;
e. withdrawal of any reservation carried out in pursuance of the provisions of Article 17, paragraph 2;
f. any communication or notification received in pursuance of the provisions of Article 1, paragraph 2, Article 15, paragraphs 2 and 3 and Article 16, paragraphs 1 and 2;
g. any notification received in pursuance of the provisions of Article 18 and the date on which denunciation takes effect.

ANNEX

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

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

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

a. the sum in national currency corresponding to 70,000 Special Drawing Rights as defined by the International Monetary Fund at the time of the ratification, for each deceased person or person suffering personal injury;
b. the sum in national currency corresponding to 10 million Special Drawing Rights as defined by the International Monetary Fund at the time of ratification, for all damage caused by identical products having the same defect.

3. to exclude the retailer of primary agricultural products from liability under the terms of paragraph 3 of Article 3 providing he discloses to the claimant all information in his possession concerning the identity of the persons mentioned in Article 3.
Appendix II

de 25 July 1985 on the approximation of the laws, regulations and
administrative provisions of the Member States concerning liability
for defective products (85/374/EEC)

The Council of the European Communities,

Having regard to the Treaty establishing the European Eco-
nomic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas approximation of the laws of the Member States con-
cerning the liability of the producer for damage caused by the defec-
tiveness of his products is necessary because the existing divergences
may distort competition and affect the movement of goods within the
common market and entail a differing degree of protection of the
consumer against damage caused by a defective product to his health
or property;

Whereas liability without fault on the part of the producer is
the sole means of adequately solving the problem, peculiar to our age
of increasing technicality, of a fair apportionment of the risks inher-
et in modern technological production;

Whereas liability without fault should apply only to movables
which have been industrially produced; whereas, as a result, it is ap-
propriate to exclude liability for agricultural products and game, ex-
cept where they have undergone a processing of an industrial nature
which could cause a defect in these products; whereas the liability
provided for in this Directive should also apply to movable which are
used in the construction of immovables or are installed in
immovables;

Whereas protection of the consumer requires that all producers
involved in the production process should be made liable, in so far as
their finished product, component part or any raw material supplied
by them was defective; whereas, for the same reason, liability should
extend to importers of products into the Community and to persons
who present themselves as producers by affixing their name, trade
mark or other distinguishing feature or who supply a product the
producer of which cannot be identified;

Whereas, in situations where several persons are liable for the
same damage, the protection of the consumer requires that the in-
jured person should be able to claim full compensation for the dam-
age from any one of them;

Whereas, to protect the physical well-being and property of the
consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances;

Whereas the protection of the consumer requires that the liability of the producer remains unaffected by acts or omissions of other persons having contributed to cause the damage; whereas, however, the contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer;

Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law;

Whereas, to achieve effective protection of consumers, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured person;

Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain
Whereas, to the extent that liability for nuclear injury or damage is already covered in all Member States by adequate special rules, it has been possible to exclude damage of this type from the scope of this Directive;

Whereas, since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products;

Whereas, for similar reasons, the possibility offered to a producer to free himself from liability if he proves 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 a defect to be discovered may be felt in certain Member States to restrict unduly the protection of the consumer; whereas it should therefore be possible for a Member State to maintain in its legislation or to provide by new legislation that this exonerating circumstance is not admitted; whereas, in the case of new legislation, making use of this derogation should, however, be subject to a Community standstill procedure, in order to raise, if possible, the level of protection in a uniform manner throughout the Community;

Whereas, taking into account the legal traditions in most of the Member States, it is inappropriate to set any financial ceiling on the producer's liability without fault; whereas, in so far as there are, however, differing traditions, it seems possible to admit that a Member State may derogate from the principle of unlimited liability by providing a limit for the total liability of the producer for damage resulting from a death or personal injury and caused by identical items with the same defect, provided that this limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market;

Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization; whereas it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals;

Whereas it is particularly important in this respect that a reexamination be carried out of those parts of the Directive relating to the derogations open to the Member States, at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market,
Has Adopted This Directive:

Article 1

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

Article 2

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

Article 3

1. “Producer” means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the 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. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

Article 4

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

Article 5

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.
Article 6

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, indicating:
   (a) the presentation of the product;
   (b) the use to which it could reasonably be expected that the product would be put;
   (c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 7

The producer shall not be liable as a result of this Directive if he proves:
   (a) that he did not put the product into circulation; or
   (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
   (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
   (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
   (e) 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; or
   (f) in the case of a manufacturer of a component, 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.

Article 8

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

2. The liability of the producer may be reduced or disallowed, when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.
Article 9

For the purpose of Article 1, “damage” means:
(a) damage caused by death or by personal injuries;
(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
(i) is of a type ordinarily intended for private use or consumption, and
(ii) was used by the injured person mainly for his own private use or consumption.
This Article shall be without prejudice to national provisions relating to non-material damage.

Article 10

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

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

Article 11

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Article 12

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Article 13

This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.
Article 14

This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Article 15

1. Each Member State may:

(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive "product" also means primary agricultural products and game;

(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves 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 a defect to be discovered.

2. A Member State wishing to introduce the measure specified in paragraph 1(b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof.

The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter. However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member States may take the proposed measure immediately.

If the Commission does not submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7(e) and of paragraph 1(b) of this Article have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7(e).
Article 16

1. Any Member State may provide that a producer's total liability for damage 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.

2. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the common market of the implementation of the financial limit on liability by those Member States which have used the option provided for in paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the term of Article 100 of the Treaty, shall decide whether to repeal paragraph 1.

Article 17

This Directive shall not apply to products put into circulation before the date on which the provisions referred to in Article 19 enter into force.

Article 18

1. For the purposes of this Directive, the ECU shall be that defined by Regulation (EEC) No. 3180/78, as amended by Regulation (EEC) No. 2626/84. The equivalent in national currency shall initially be calculated at the rate obtaining on the date of adoption of this Directive.

2. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community.

Article 19

1. Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The procedure set out in Article 15(2) shall apply from the date of notification of this Directive.

Article 20

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.
Article 21

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

Article 22

This Directive is addressed to the Member States.


For the Council
The President
J. POOS