THE LAW REFORM COMMISSION
OF HONG KONG

REPORT ON

CIVIL LIABILITY FOR UNSAFE PRODUCTS

February 1998

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***Ms Cathy Wan**, Senior Government Counsel, was principally responsible for the writing of this Commission report.*

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Mr Alasdair G Morrison
Professor Peter Wesley-Smith
Mr Justein Wong Chun, JP
Mr Roderick B Woo, JP

The Secretary of the Commission is **Mr Stuart M I Stoker** and its offices are at:

20/F Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Telephone: 2528 0472
Fax: 2865 2902
E-mail: hklrc@hkreform.gcn.gov.hk
Website: http://www.info.gov.hk/hkreform

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REPORT ON CIVIL LIABILITY FOR UNSAFE PRODUCTS

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Introduction

Product liability

1. The subject of "product liability"[1] is a term, which has been familiar in America since the 1970's,[2] and is now becoming familiar to lawyers around the world. The topic has generated numerous substantial studies by law commissions in many jurisdictions, resulting in a rapid increase in the volume of legislation to protect the public against products which fail to meet appropriate safety standards.

2. The fundamental need for review of product liability legislation arises from new business methods and changing social attitudes.[3] Not only have products become more complex, methods of distribution have also changed substantially. The Royal Commission on Civil Liability and Compensation for Personal Injury expressed its views in its 1978 report that :-

> *"Until a fairly late stage in the industrial revolution most goods were manufactured by small business, often selling direct to the user. Now the situation is transformed by the scale of production, the complexity of technology, the number of processes, producers and distributors involved with any one item, and the sheer quantity of goods produced and consumed. The consumer is dependent on producers he does not know and processes he does not understand."*[4]

3. The committee of experts of the Strasbourg Convention 1977 shared similar views and stated that:-

> *"Industrial development and technological progress have increasingly involved cases of producers" liability and the growth of inter-state commercial trade has resulted in the problem of producers" liability acquiring in certain cases, an international aspect."*[5]

4. It is apparent that the consumer can no longer be expected to rely on his own judgment in determining the safety and performance of a

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1 The title given to a joint report by the Australian Law Reform Commission (1989 : Report No. 51) and the Law Reform Commission of Victoria (1989 : Report No. 27) was "*Product Liability*"; the title given to a joint report by the English Law Commission and the Scottish Law Commission (1977: Cmnd 6831) was "*Liability for Defective Products*"; the title given to a report by the Ontario Law Reform Commission (1979) was "*Report on Products Liability*".

2 See the discussion, *infra*, at Chapter 6.

3 R Lowe & G Woodroffe, *Consumer Law and Practice*, 4th edition 1995 at page 2.

4 at para. 1203.

5 Explanatory Report to the Strasbourg Convention at paragraph 1.

complex product. The principle known as *caveat emptor* (meaning "let the buyer beware"), which may have been appropriate for the traditional village market, may no longer be appropriate for modern consumer transactions.[6]

5. Apart from changing social attitudes and production methods, the Thalidomide tragedy spurred an upsurge of interest in product liability legislation. The Thalidomide case involved a tranquillizer which produced serious deformities in the foetus when taken by pregnant women. It was estimated that about 400 children in the United Kingdom, and over 8,000 children worldwide, were born with deformities caused by the drug taken by pregnant women between 1958 and 1961.[7] The claims were settled out of court in 1973 and liability was never admitted. Before the claims were settled, one of the overseas victims brought an action[8] against the UK manufacturer for negligence in respect of pre-natal injuries caused by the mother's taking the drug containing thalidomide. This case highlighted the problems faced by product liability claimants. The drug was manufactured in England and sold to an Australian company. The claimant's mother, whilst pregnant, purchased and consumed the drug in New South Wales in Australia. The claimant was born with defective eyesight and without arms. The claimant intended to proceed against the English company and legal technicalities were resolved only at the Privy Council level after protracted legal proceedings.

6. Public concern at the problems experienced by the thalidomide claimants in trying to recover damages under the traditional laws of contract and tort led to renewed pressure for reform. Hence, it was no coincidence that a number of international conventions with far-reaching significance were subsequently concluded. These international conventions not only caused the enactment of corresponding legislation by member states, but also prompted or influenced product liability legislation in non-member states. This report reviews whether our existing law can be improved in the light of international developments.

Terms of reference

7. On 26 September 1994 the Chief Justice and the Attorney General referred the following matter to the Law Reform Commission:

> *"To consider the existing law governing compensation for injury and damage caused by defective or unsafe goods and to recommend such changes in the law as may be thought appropriate."*

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6 Senator Murphy, then Australian Attorney-General, introducing the Trade Practices Bill of the Commonwealth of Australia in the Senate.

7 Rogers, *Winfield & Jolowicz on Tort*, 14th edition at page 40.

8 *Distillers Co. (Bio-chemicals) Ltd v Thompson* [1971] AC 458; [1971]1 All ER 694.

Sub-committee membership

8. The Commission appointed a sub-committee in December 1995 to research, consider and advise on the present state of the law in this area and to make proposals for reform. The sub-committee members are:-

Ms Audrey Eu JP	Senior Counsel (Chairman)
Dr John Ho Dit-sang	Associate Professor Department of Law City University of Hong Kong
Professor Richard Ho Yan-ki	Dean Faculty of Business City University of Hong Kong
Mr Mark Kwok Chi-yat	Managing Director The Wing On Department Stores (Hong Kong) Ltd
Mr Jeffrey Lam Kin-fung	Managing Director Forward Winsome Industries Ltd.
Ms Connie Lau Yin-hing	Chief Research & Testing Officer Consumer Council
Dr Sarah Liao Sau-tung JP	Managing Director EHS Consultants Ltd.
Dr John Lo Siew-kiong JP	Director Gold Peak Industries (Holdings) Ltd.
Mr Ma Ching-nam	Partner Shea, Ma & Ho Solicitors
Mr Patrick Nip Tak-kuen	Principal Assistant Secretary Trade & Industry Bureau (until 2 May 1997)
Ms Cathy Wan	Senior Government Counsel (Secretary)

Meetings

9. The sub-committee met on nine occasions to discuss the broad principles of its recommendations. Details were finalized by circulation to

sub-committee members. The sub-committee's consultation paper and subsequent report were considered by the Commission at its 146th, 151st and 152nd meetings.

Consultation

10. A consultation exercise was carried out between February and May 1997 to solicit views on the sub-committee's interim recommendations. Copies of the Consultation Paper were distributed to over 70 organisations and all District Boards. A press conference was held on 24 February 1997 to announce the publication of the Consultation Paper, and there was press coverage in two English newspapers and ten Chinese newspapers. The Consultation Paper was also discussed in a radio programme on 25 February 1997.

11. A total of sixteen written responses were received. In arriving at the recommendations contained in this Report, the Commission has carefully considered all the responses received and is grateful to all the consultees concerned.

Chapter 1

Product Liability in Hong Kong

1.1 Despite the efforts of the Government, the Consumer Council and other bodies to promote product safety, incidents of injury and damage caused by unsafe or defective products continue to occur, some even resulting in death. The number of cases involving unsafe products reported to the Consumer Council were 125, 183 and 131 in 1993, 1994 and 1995 respectively. Some of the more illustrative cases were published in the Consumer Council's "Choice" magazine. The published cases showed the wide range of products which could cause injury and death. The following data is updated as at July 1996:-

Product	**Injury/Death**
Folding table	Eight children trapped and killed
Folding bed	One old woman trapped and died of heart attack
Table lamp	One student died of electrocution
Washing machine	An eighteen-month old child drowned
Baby crib	A twelve-month old child died of suffocation as head was trapped between the railings
Baby pushchair	A twenty-one month old child died of asphyxiation. Five incidents of injuries caused by structural defects
Tape recorder cleansing fluid	A six year old child died of accidental poisoning
Luggage trolley	Three incidents of injuries to face, and serious or permanent eye injuries
Pressure cooker	Four incidents of explosions causing injuries to two persons
Arm-wrestling machine	Five incidents of broken arm

Freon (a refrigerant)	Two incidents of explosions causing injuries to four persons
LPG Cassette Cooker	One incident of serious injury caused by explosion
Air-rifle	One incident of permanent eye injury

1.2 Other products which the Consumer Council found inherently unsafe include:-

Product	**Unsafe Feature**
Hair-dryer	Hair may be trapped and burnt in air inlet; wiring may cause fire
Water pump in fish tank	May cause fire
Plug socket	May cause fire and electrocution
Adaptor	May cause fire and electrocution
Electric food-mixer	May cause fire and wounds
Condom	Leakage may cause exposure to sexually transmitted diseases including AIDS
Lipstick	Suspected to contain carcinogen
Hair-spray	Suspected to contain carcinogen
Hair-dye	Contain irritants, heavy metal ingredient and suspected to contain carcinogen
Chair	May collapse and cause injury
Steam iron	May cause electrocution
Rice cooker	May cause fire
Heating rod in closet	May cause fire and electrocution

1.3 It is likely that the cases reported to the Consumer Council are but a fraction of the actual number of incidents of injury and damage caused, or partly caused, by unsafe or defective products. It is difficult to ascertain the actual number of injuries and deaths caused by unsafe or defective products as data compiled by the Department of Health and the Hospital Authority do not categorize information in this manner. According to the Hospital Authority

Annual Report 1994 - 1995, there were over 1.7 million cases of Accident & Emergency attendances (including follow up attendances). Although there is no detailed breakdown on the disease categories of cases attending the Accident & Emergency Department, it is estimated that around 10% of all Accident & Emergency attendances in public hospitals are due to injuries and poisoning. This figure inevitably covers also injuries caused by traffic accidents, industrial accidents, assault, etc. In one study conducted in the United Kingdom,[1] it was estimated that about one per cent of all injuries may be caused by defective products including drugs. If we also assume one per cent of all cases of injuries and poisoning in Hong Kong were caused by unsafe or defective products, and taking account of the fact that some of the injury cases would be unreported or treated by private doctors, the number of injuries caused by unsafe or defective products would be considerable. Although one would expect the majority of these injuries and damage to be minor in nature, product liability injuries and damage have the potential to cause serious injuries affecting a large number of people.[2]

1.4 There are not many known legal actions of product liability in Hong Kong. We believe there are multiple reasons for this phenomenon:-

(a) If the injury or damage is suspected to have been caused by misuse, then the user would refrain from making any claim.

(b) It could be due to the reserved nature of Asian culture, so that instead of making a claim, people would merely stop using the product. It is believed by some, however, that this reserved attitude is gradually being eroded by the influence of Western culture.

(c) It could be due to the fact that the majority of the injuries or damage are minor, and could be settled expeditiously by the parties involved without legal action. This coincides with the findings of a study that product liability claims tend to be disposed of at an earlier stage than other claims.[3]

(d) It could be due to the fact that the average citizen would find the complexity of the existing law and the costs involved in lodging a claim prohibitive, even if they have a valid claim.

1.5 We shall review in the next two chapters whether the existing law is adequate for product liability claimants, which are not restricted to consumers alone. A claimant under Part I of the United Kingdom Consumer Protection Act 1987, for instance, need not be a purchaser or even a direct user of the defective product. Hence, our terms of reference will affect the community at large, as well as consumers.

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1 Royal Commission, *Civil Liability and Compensation for Personal Injury*, (1978 : Cmnd 7054I), at para. 1201.

2 *Ibid* at para. 1204.

3 *Ibid* at para. 1020.

Chapter 2

Product Liability Law in Hong Kong

2.1 The terms of reference should be considered in the light of the existing legislation on product liability and it is essential first of all to examine the extent of protection afforded by the existing law before determining what changes in the law are appropriate. The existing law on product liability for personal injuries and damage to property, both civil and criminal, comprises of both case law and legislation. Although this report is concerned with the review and reform of civil liability, the existing position on criminal liability will also be briefly set out.

Criminal liability

2.2 Our review of the existing law begins with a recent enactment which imposes criminal liability for unsafe products. Section 6 of the Consumer Goods Safety Ordinance (Cap. 456) stipulates that a person shall not supply, manufacture or import into Hong Kong consumer goods unless the consumer goods comply with the general safety requirement or the applicable approved standard for the particular consumer goods. The general safety requirement is an objective test requiring consumer goods to be reasonably safe having regard to all the circumstances including the manner in which the goods are presented and promoted, the instructions or warnings given, reasonable safety standards published by a standards institute, and the existence of any reasonable means to make the goods safer taking into account the cost, likelihood and extent of any improvement. Defences for contravention of section 6 of the Consumer Goods Safety Ordinance include:

(a) a person took all reasonable steps and exercised all due diligence to avoid committing the offence.[1]

(b) a person reasonably believed that the consumer goods would not be used or consumed in Hong Kong.[2]

(c) a person supplied the consumer goods as a retailer who neither knew nor had reasonable grounds for believing the consumer goods failed to comply with the general safety requirement.[3]

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1 Section 24.
2 Section 22(2)(a).
3 Section 22(2)(b).

(d) the consumer goods were not supplied as new goods.[4]

2.3 A person found guilty is liable to a fine at level 6 and to imprisonment for 1 year on first conviction, and a fine of $500,000 and to imprisonment for 2 years on subsequent conviction.

2.4 The scope of the Consumer Goods Safety Ordinance should be noted in that it is not applicable to a range of goods specified in the Schedule to the Ordinance. These include food, water, pleasure craft and vessels, motor vehicles, gas, electrical products, pesticides, pharmaceutical products, traditional Chinese medicines, toys and children's products, and any other goods the safety of which is controlled by specific legislation.

2.5 There are also various ordinances dealing, *inter alia*, with criminal product liability of specific products, including:-

(a) *Toys and Children's Products Safety Ordinance (Cap. 424)*
- provides for safety standards in relation to toys and children's products.

(b) *Part V of the Public Health and Municipal Services Ordinance (Cap. 132*
- makes it an offence to sell for human consumption, any food rendered injurious to health by the use of adulterants, and any drug injuriously affected in its quality, constitution or potency by the use of adulterants.

(c) *Pharmacy and Poisons Ordinance (Cap. 138)*
- controls the sale and possession of certain poisons and pharma-ceutical products.

(d) *Antibiotics Ordinance (Cap. 137)*
- controls the sale and supply of certain specified antibiotic substances.

(e) *Electricity Ordinance (Cap. 406)*
- provides safety requirements for electricity supply, electrical wiring and electrical products.

(f) *Dangerous Goods Ordinance (Cap. 295)*
- regulates the possession, manufacture, shipment, storage, sale and use of dangerous goods such as explosives, compressed gases, petroleum, poisonous or corrosive substances, readily or spontaneous combustible substances.

(g) *Gas Safety Ordinance (Cap. 51)*
- regulates the importation, manufacture, storage, transport, supply and use of gas in the interests of safety.

[4] Section 22(2)(c).

(h) *Nuclear Material (Liability for Carriage) Ordinance (Cap. 479)*
- regulates liability in respect of injury or damage caused by the carriage of nuclear material in Hong Kong.

Civil liability for breach of statutory duty

2.6 While the provisions of the Consumer Goods Safety Ordinance provide a criminal sanction for non-compliance, they do not automatically enable the consumer to claim compensation. Case law shows that when construing legislation the court is reluctant to imply civil rights for victims. The rationale seems to be that the legislation is for the protection of the public generally and is not intended to afford a civil remedy to individual members of the public. In *Square v Model Farm Dairies (Bournemouth), Ltd*.,[5] a consumer who suffered illness from contaminated milk brought a civil action for damages for breach of statutory duty. The Court of Appeal rejected his claim because the consumer had a remedy for breach of contract under the Sale of Goods Act. However, in *Buckley v La Reserve,*[6] a consumer who suffered severe food poisoning but was taken to a restaurant as guest and therefore had no contractual claim, still had her civil claim for breach of statutory duty dismissed by the court. Other cases which show the court's restrictive interpretation include *Phillips v Britannia Hygienic Laundry Co., Ltd.*[7] and *Badham v Lambs Ltd.*[8]

2.7 Hence, a civil claim for breach of statutory duty can be brought only if the legislation expressly provides for this. If the legislation is silent on the point, the presumption is that it gives no civil remedy. Given the above, whilst the existence of the Consumer Goods Safety Ordinance as well as the legislation set out in paragraph 2.5 above offer protection to consumers by imposing standards and criminal sanctions and fines on manufacturers and suppliers, consumers cannot claim compensation by civil action for breach of statutory duty (except under the Nuclear Material (Liability for Carriage) Ordinance (Cap. 479)), and must instead sue for breach of contract or for breach of duty of care in tort.

2.8 Similarly, the Toys and Children's Products Safety Ordinance (Cap. 424) deals only with criminal but not civil product liability. The Ordinance requires toys and children's products to meet internationally recognised standards as well as the "general safety requirement"[9] which means a duty to ensure that the product is reasonably safe having regard to all the circumstances. Failure to comply with the safety standards will attract a fine and imprisonment. However, there is no provision relating to civil liability in this Ordinance and compensation can be claimed only by instituting legal action in tort or contract.

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5 [1939] 2 KB 365.
6 [1959] Crim. L.R. 451.
7 [1923] 2 KB 832.
8 [1946] KB 45.
9 Section 8.

Civil liability

2.9 Civil product liability law in Hong Kong can be found in the law of contract and the law of negligence which will be examined in turn.

Law of contract

2.10 Provided the consumer has a direct contractual nexus with the seller, the consumer is entitled to damages if the other party has broken an express or implied term of the contract. For persons dealing as consumer, the Sale of Goods Ordinance (Cap. 26) comes into play by implying into the contract certain terms which are examined below. The seller would be liable for any breach of the terms of the contract even though he has taken all reasonable care and is in no way to blame for the defect. The question lies in quantifying the claim and deciding for what items of loss the seller is liable and on what principles should compensation be assessed.

2.11 Provided the damage satisfies the requirements of remoteness of damage, then subject to the consumer's duty to take reasonable steps to mitigate loss, the general principle of compensation is that compensation should, so far as possible, place the injured party in the same position as if the contract had been performed properly. Hence the consumer would be compensated for any harm to his person, property and economic position. However, to compensate a claimant for all loss which flows from a breach of contract would often lead to undesirable results. The law has therefore developed certain rules on remoteness of damage for the purpose of limiting damages.

2.12 Case law governing remoteness of damage dates back more than 100 years to *Hadley v Baxendale.*[10] The case involved the plaintiff sending a piece of equipment to the manufacturers to serve as a sample for the production of a replacement. The manufacturers delayed its delivery so that there was a stoppage of work of several days at the plaintiff's mill. The plaintiff sought to claim damages for their loss of profit during the stoppage period. The court laid down certain principles:

> "*The damages ... should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.*"[11]

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10 (1854) 9 Exch. 341.

11 *Ibid* at page 354.

2.13 Apart from injury to person and damage to property, the consumer is also entitled to compensation for mental distress under common law. The leading case on compensation for mental distress is *Jarvis v Swan Tours*[12] which concerns breach of holiday contracts. The first sale of goods case in which mental distress compensation was awarded was the Court of Appeal case of *Jackson v Chrysler Acceptances,*[13] in which the claimant made it clear that the car was bought for a family holiday, and hence, a spoilt holiday was held to be a foreseeable consequence of the breach of contract. A claim for mental distress compensation was, however, disallowed in a purely commercial dispute because the object of the contract was not to provide peace of mind or freedom from distress.[14] It seems that the claim can be sustained more easily if the aggrieved party is dealing as a consumer.

2.14 Legislation, such as the Sale of Goods Ordinance (Cap. 26) and the Control of Exemption Clauses Ordinance (Cap. 71), has supplemented the protection offered by the common law concerning claims for compensation for breach of contract. Section 16 of the Sale of Goods Ordinance offers protection to persons dealing as consumer by implying into contracts for supply of goods, a condition that the goods are of merchantable quality. Following amendment of the Sale of Goods Ordinance in 1994[15], the definition of merchantable quality has been expanded and now one of the requirements is that the goods should be as free from defects (including minor defects) and as safe as it is reasonable to expect having regard to the description, the price (if relevant) and all other relevant circumstances. It should be noted that there is strict liability in respect of merchantable quality; the seller will not be able to avoid liability by proving he neither knew, nor ought to have known, of the defect.

2.15 To ensure that the consumer can enjoy the implied term of merchantable quality, section 11(2) of the Control of Exemption Clauses Ordinance (Cap. 71) stipulates that liability for breach of the said implied condition of merchantable quality cannot be excluded or restricted by a contract term as against a person dealing as a consumer. Apart from regulating exclusion of liability for breach of contract, the Control of Exemption Clauses Ordinance (Cap. 71) covers also liability in tort for negligence so that a person in business cannot validly exclude liability for negligence causing personal injury or death.

Law of negligence

2.16 If the claimant does not have a contractual relation with the supplier of the goods, he will have to bring proceedings in tort for compensation. The onus is on the claimant to prove negligence by establishing:

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12 [1973] 1 Q.B. 233.
13 [1978] R.T.R. 474.
14 *Hayes v Dodd* [1990] 2 A.E.R. 815.
15 No. 85 of 1994.

(1) *that the defendant owed a duty of care to him* - The prevailing approach in determining whether a duty of care exists is summarized by Lord Bridge in *Caparo Industries plc v Dickman*:[16]

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist ... a relationship characterised by the law as one of „proximity" or „neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."*[17]

This is the so-called three-stage approach of foreseeability, proximity, justice and reasonableness test.

(2) *that there was a breach of that duty of care* - this is a question of law, not fact, and the standard of care is that of the reasonable man, taking into account factors including the likelihood of harm, the seriousness of the risk, the utility of the act of the defendant and the cost of avoiding harm.

(3) *that the defendant's breach of duty resulted in the claimant's loss or injury* - the damage must not be too remote a consequence of the breach, a question which can be complicated by a particularly vulnerable victim ("egg-shell skull rule"), or some intervening act or event.

Res Ipsa Loquitur

2.17 The onus of proving negligence can be formidable, especially in the case of a highly complex piece of equipment or where chemicals are involved. Yet the burden of proof remains with the claimant. In some cases, the facts themselves point to negligence and, under the doctrine of *res ipsa loquitur*, the onus on the claimant to prove negligence is shifted so that the defendant will have to adduce evidence in order to rebut the inference of negligence. An illustrative explanation of *res ipsa loquitur* can be found in Erle CJ's famous statement in *Scott v London and St Katherine Docks Co.*:[18]

> *"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable*

16 [1990] 2 WLR 605.
17 *Ibid* at 617-618.
18 (1865)3 H & C 596.

evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

If *res ipsa loquitur* can be successfully raised, the onus is shifted to the defendant to rebut inference of negligence. However the defendant will not be liable if he can show reasonable care has been taken.

2.18 Case law shows that *res ipsa loquitur* has been applied to a barrel of flour falling from a building,[19] a motor vehicle mounting or overhanging the pavement[20] and accidents resulting from defective machines or apparatus.[21] On the other hand, the doctrine was held inapplicable where a fire was left unattended by a lodger in his grate, and neighbouring rooms were damaged by fire spreading from that room.[22] The reasoning was that fires can occur through accidents without negligence on anybody's part, and the judge found that the lodger had not left any "improper" or "larger than usual" fire in his room. It is certainly debatable whether leaving a fire unattended and without any fire guard or iron fender can amount to negligent conduct. However, circumstances where *res ipsa loquitur* has been applied cannot be treated as principles on points of law and can merely be used for reference. Hence, a claimant should not expect that *res ipsa loquitur* can be invoked with ease and certainty.

Pure economic loss

2.19 The controversy over claims for pure economic loss should be noted. Pure economic loss refers to financial loss suffered by a plaintiff which is unconnected with, and does not flow from, damage to his own person or property.[23] The courts have found it necessary to place some limit on the liability of a wrongdoer towards those who have suffered economic damage as a consequence of his negligence.[24] Hence, pure economic loss is normally irrecoverable in negligence save in some limited circumstances. In the light of decisions after *Junior Books Ltd. v Veitchi Co. Ltd.*,[25] the scope of the duty to avoid economic loss has been more restrictively defined. In the Court of Appeal case of *Muirhead v Industrial Tank Specialities Ltd*.,[26] the plaintiff devised a plan to buy lobsters in the summer when the price was cheap, and store them until December for sale on the Christmas market to reap high profits. The lobsters were stored in tanks with sea-water pumps which proved to be defective. The plaintiffs sued the manufacturers of the pumps in negligence for:- (1) loss of lobsters which died in the tanks; (2) expenditure on attempts to correct the faults; and (3) their loss of profit on the whole enterprise. The Court of Appeal decided that the plaintiff was

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19 *Byrne v Boadle* (1863) 2 H & C 722.

20 *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152.

21 *Ballard v North British Ry Co* (1923) SC 43, HL (defective coupling on train); *Kealey v Heard* [1983] 1 All ER 973 (collapsed scaffolding).

22 *Sochacki v Sas* [1947] 1 All ER 344.

23 Clerk & Lindsell, *Torts*, 17th Ed. 1995 at 7.54.

24 *The Mineral Transporter Ltd.* [1985] 2 All ER 935 at 945.

25 [1983] 1 AC 520.

26 [1985] 3 All ER 705.

entitled to damages for loss of the dead lobsters and the financial loss in respect of the dead lobsters, but the wasted remedial expenditure and the general loss of profits were irrecoverable.

2.20 The *Muirhead* case clarified that:-

> *"a manufacturer of defective goods could be liable for economic loss suffered by the ultimate purchaser if there was very close proximity or relationship between the parties, and the ultimate purchaser had placed real reliance on the manufacturer rather than the vendor. ... there was nothing to distinguish the plaintiff's situation from that of an ordinary purchaser of goods who, having suffered financial loss as a result of a defect in those manufactured goods, could only look to the vendor and not to the ultimate manufacturer to recover damages for purely economic loss."*[27]

2.21 The decision of the House of Lords in *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co. Ltd.*[28] further confirmed the prevailing uncertainty and difficulty to claim for pure economic loss arising from negligent conduct. It was held that in determining whether or not a duty of care of particular scope (i.e. referring to economic loss) was owed by the defendant, the test was whether it was just and reasonable that it should be so.

Damage to other property

2.22 The duty of care is a duty to avoid inflicting injury to another's life or property. Therefore, claims are allowed only for damage to property other than the negligently manufactured item. If the negligently manufactured goods are expensive items, the claimant's inability to claim for the cost of the defective item itself may represent a serious loss to the consumer. It should be noted, however, that where a defective component causing damage to the structure into which it is incorporated was separately installed, this damage to the structure "may" be recoverable as damage to "other property".[29]

Damage already suffered

2.23 A further point to note in relation to negligence claims is that the loss and damage must have already been suffered. This requirement can be illustrated by *Sunface International Ltd. v Meco Engineering Ltd*.[30] The plaintiffs were owners/occupiers of houses. The defendant was the subcontractor responsible for electrical wiring and circuits which were defectively installed. The defects were discovered and replaced at some

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27 *Ibid* at page 706.
28 [1985] AC 210.
29 [1990] 3 WLR 414. (This is *obiter* in *Murphy v Brentwood District Council.*)
30 [1990] 2 HKLR 193.

considerable cost to the plaintiffs, including the cost of demolition of certain structures to effect the repair works. The plaintiffs sought to rely on *Anns v Merton London Borough Council*[31] and claimed that the defects created a situation of "imminent harm" and therefore the costs of making the premises safe were recoverable. This argument was rejected by the court by applying certain dicta of Lord Oliver in *D & F Estates Ltd v Church Commissioners.*[32] The fact that the law does not allow recovery in negligence for replacement of the defective part itself was also a relevant consideration. It was also held that, as no "damage" had yet been suffered, to award damages would be tantamount to granting a warranty of quality which should be the province of contract law.

Death

2.24 Where the defective or unsafe goods cause death, a claim for tortious compensation may be brought under both the Fatal Accidents Ordinance (Cap. 22) and the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23). Section 3 of the Fatal Accidents Ordinance enables an action to be brought for the benefit of the dependants of the deceased person against a person who wrongfully caused the death. Although the action is brought for the benefit of the dependants,[33] only one action can be brought and it must be brought in the name of the executor or administrator of the deceased.[34] The executor or administrator is required to deliver to the defendant full particulars of all persons on whose behalf the action is brought.[35] An action under the Fatal Accidents Ordinance may include a claim for damages for bereavement, the sum of which is now fixed at $70,000. In addition to bereavement damages, dependants may claim compensation for pecuniary loss suffered by the dependants as a result of the death,[36] including funeral expenses. Pursuant to the Law Amendment and Reform (Consolidation) Ordinance, dependents may also claim for loss of accumulation of wealth by the time that the deceased would otherwise have died.[37] The court would look at any established savings pattern, and if there is none, would consider factors such as the deceased's lifestyle, his thrift, his age at death, his family circumstances and how he was coping with them financially, and his employment situation and prospects.[38]

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31 [1978] AC 728.

32 [1989] AC 177.

33 Defined in section 2. Dependants include grandparents and great grandparents but do not include parent-in-law *per se*. See *Chan Sim Lan v Sheen State International Ltd.* [1995] HKLD E41.

34 Section 5(1) and (3).

35 Section 5(4).

36 Section 6(1). Often referred to as loss of dependency.

37 Section 20(2)(b)(iii).

38 *Ho Pang Lin v Ho Shui On* [1995] HKLD F50.

Chapter 3

Limitations and Anomalies of the Existing Law

3.1 In the course of reviewing the existing law in the previous chapter, certain limitations and anomalies have been identified.

Law of contract

3.2 *Privity of Contract* - In relation to actions for breach of contract, the existing "strict liability" protection given by legislation to consumers is considerable. It is irrelevant that the retailer is morally not subject to blame and may lack the opportunity to discover the defect. The consumer is also entitled to claim compensation for mental distress and for losses including personal injury, damage to property, subject to the normal rules of remoteness of damage. The major lacuna of contract law as a means of protection against unsafe or defective goods arises from the rules of privity of contract under which only the immediate contracting party would be protected by the law of contract; whereas the purchaser's family, passers-by or donees from the buyer would not be afforded the protection given by contract law. The device of agency has been used to get around the privity of contract rules. However, the circumstances which allow an inference of agency will be strictly limited. In *Priest v Last,*[1] a mother buying goods for her child cannot be said to act as the child's agent. She may be able to recover any loss to herself caused by injury to the child. So if a small child is scalded by a faulty hot water bottle purchased by his mother, the mother may sue on her contract with the retailer and recover the cost borne by her for taking care of the injured child. The child however will be unable to recover in contract for his pain and suffering, and must sue in negligence instead.

3.3 *Multiplicity of litigation* - Another drawback relating to contract law is that it is necessary for each party in the chain of distribution to claim against his immediate supplier for breach of contract. There may be one or several distributors between the retailer and the manufacturer, thus causing a multiplicity of litigation. Besides, the contractual recourse will be lost if any valid exemption clause comes into play, or if any party involved is insolvent, untraceable or has closed down its business. The loss would hence fall on a relatively innocent intermediate distributor instead of the manufacturer.

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1 [1903] 2 KB 148.

Law of negligence

3.4 *Difficulty of Proof* - In relation to actions based on negligence, it can be seen that the scope of liability for negligent manufacture and distribution is potentially large in that manufacturers, assemblers, wholesalers and retailers may be held liable. It is the formidable task of proving negligence which is fraught with technicalities and uncertainties. Unless the claimant can invoke *res ipsa loquitur,* which is itself a technical hurdle, the onus is on the claimant to prove all the elements of negligence. Given the complexity of many of today's household items and pharmaceutical products, legal proceedings are likely to involve expensive battles between expert witnesses. Since success can depend on hair-splitting distinctions, the remedies and compensation available to claimants are by no means certain. Consideration should be given as to whether the availability of a claim in negligence is sufficient protection to the public at large against defective or unsafe products. Since the rules of negligence consist mainly of case law, and the courts are bound by previous judicial decisions, there is little likelihood of significant change without legislative intervention.

Anomaly in the law - retailer bearing heavier burden than manufacturer

3.5 The case for reform rests on the anomalies in the structure of the law. If a legal system is to choose one standard of liability for the manufacturer of a defective product, and another standard of liability for the retailer who is often just an innocent distributor of a product with a latent defect, it would seem rational to impose the heavier burden on the manufacturer.[2] However, the existing law has done precisely the opposite. It is the retailer who bears the burden of strict liability whereas as against the manufacturer, negligence must be proved. It is true that the retailer can try to seek indemnity from his supplier, but if the chain of litigation breaks down, the retailer will have to bear the brunt of strict liability.

Direction of reform

3.6 Since the existing law is unsatisfactory in a number of ways, changes of some kind should be made. The question remains as to the direction in which those changes should be made:

(a) whether it is appropriate to extend the law of contract to provide additional rights and remedies to persons who are not parties to the contract;

(b) whether it is appropriate to change the law of negligence concerning the requirement to prove failure to take reasonable care;

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[2] Ontario Law Reform Commission (1979) Chapter 3.

(c) whether it is appropriate to establish a set of product liability rules without reference to any contractual link and any breach of the duty of care in addition to the existing contract and negligence law.

3.7 With regard to option (a), the position of consumers bringing contractual claims has been greatly improved by recent legislation, and the major remaining drawback is the restriction caused by privity of contract which protects purchasers, but not necessarily users. To provide the user of a defective product with contractual remedies against a seller with whom he did not have a contractual nexus would be a radical reform. A less radical solution is to improve the law by other available means. Maintaining the contract/tort boundary keeps the spheres of consensual relations separate from relations regulated by public policy, especially in relation to commercial as opposed to consumer transactions. Another objection to option (a) is that it places the risk on the wrong person; the right of redress should be directed at the producer instead of the retailer. Hence option (a) has received little support from law reform bodies in other jurisdictions which have examined the issue of product liability.

3.8 Option (b), too, may be too sweeping. Apart from product liability, the law of negligence is relevant to claims arising from defective buildings, professional negligence and employer's liability etc. Changes to the law of negligence would impinge on areas other than product liability.

3.9 In contrast, we believe that option (c) is worthy of further consideration. Law reform bodies in a number of other jurisdictions have favoured reform in this direction. As we shall see in the next chapter, option (c) is the option followed by, among others, the Strasbourg Convention, the European Community Product Liability Directive, the English and Scottish Law Commissions, and the Pearson Commission.

Chapter 4

Product Liability Law in Other Jurisdictions

Introduction

4.1 The preceding chapters have outlined the existing law in Hong Kong and its shortcomings. Our terms of reference enjoin us to recommend appropriate changes in the law. Before attempting to make such recommendations, it would be helpful to examine the law in other jurisdictions and to review the implementation of relevant legislation in those jurisdictions.

Strasbourg Convention 1977

4.2 The first international convention aimed at harmonizing product liability legislation was the Strasbourg Convention 1977.[1] In 1970, the Council of Europe[2] established a panel of experts to make proposals to, *inter alia*:-

(a) achieve greater unity in product liability law among its members; and

(b) ensure better protection of the public and, at the same time, to take producers' legitimate interests into account.[3]

4.3 On 27 January 1977, the Strasbourg Convention, formally named the "European Convention on Products Liability in regard to Personal Injury and Death", was presented for signature by member states. The preparatory work of the European Community Product Liability Directive ran parallel to the formulation of the Strasbourg Convention.[4] The scope of the two documents is similar but not identical - the Strasbourg Convention is confined to personal injury and death whereas the Product Liability Directive

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1 Earlier conventions, for instance, the Hague Convention on the Law Applicable to Products Liability 1975, and the Hague Convention on the Applicable Law on the contracts for the International Sale of Goods 1955, relate to conflicts of law issues.

2 The Council of Europe was formed in 1949, and its membership included eighteen European countries as of conclusion of the Strasbourg Convention. See English Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20, *Liability for Defective Products*, at paragraph 4.

3 Preamble to the Strasbourg Convention 1977.

4 S Rinderknecht, "The European Community" in Campbell (ed) *International Product Liability* at page 603.

covers personal injury, death and damage to personal property.[5] Both documents provided for members' adoption of strict product liability on the part of producers of defective or unsafe products. Differences between the Strasbourg Convention and the Product Liability Directive will be examined later in this chapter. The Strasbourg Convention was signed by four states,[6] but member states were not bound to accede to it.[7] In fact, the Strasbourg Convention has not been ratified by any state.[8] On the other hand, the Product Liability Directive has been implemented by 14 member states,[9] as at February 1995.[10] Hence, the Strasbourg Convention has effectively been superseded by the Product Liability Directive.

Product Liability Directive 1985

4.4 The preparatory work of the European Community Product Liability Directive started in the mid-1970's and after protracted debates and negotiations, the Product Liability Directive ("the Directive"), formally named the "Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective products",[11] was finally adopted on 25 July 1985.

Main features of the Product Liability Directive 1985

4.5 *Basis of liability* - A new basis of liability is devised independent of any contractual link and any breach of duty of care on the part of the producer. It should be noted that the new basis of liability is in additional to, and will not affect, the existing contractual or tortious liability.[12] According to the Directive, the producer is liable for any personal injuries, death or damage to personal property[13] caused by a defect in the product.[14] A product is considered defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation.[15] A product shall not be considered defective for the sole reason

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5 Royal Commission, *Civil Liability and Compensation for Personal Injury* (1978 : Cmnd 7054-I) at para. 1198.

6 Austria, Belgium, France and Luxembourg. See Royal Commission, *Civil Liability and Compensation for Personal Injury*, *ibid*, at para. 1197.

7 English Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20, *op cit*, at paragraph 4.

8 F Albanese, "Legal Harmonisation in Europe, Product Liability" in Miller (ed) *Comparative Product Liability* at pages 28-29; also Australian Law Reform Commission, Product Liability Research Paper No. 1 September 1988 at paragraph 249.

9 Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

10 Commission of the European Communities, *First Report on the Application of Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products,* December 1995, page 2.

11 85/374/EEC.

12 Article 13.

13 Article 9.

14 Article 1.

15 Article 6.

that a better product is subsequently put into circulation.[16] Hence, the safe nature of the product would be judged at the time the product was put into circulation instead of the time when the damage occurred.

4.6 *Onus of Proof* - The onus is on the injured person to prove the damage, the defect and the causal relationship between defect and damage.[17]

4.7 *Persons liable* - Persons principally liable are the manufacturer of the finished product and component parts, the producer of any raw material, the importer, and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.[18] The latter group would include franchisors, licensors, and own-branders. Other suppliers of the product, including distributors and retailers, would bear subsidiary liability only if they fail to divulge the identity of the party principally liable or of the person who supplied the product to the supplier.[19] Parties liable will be jointly and severally liable for the damage.[20]

4.8 *Claimants* - In the absence of a definition, and given the wording of Articles 1 and 4, any injured person, whether he is party to a contract or not, and whether he is the user of the product or a mere bystander, is covered by the strict liability system.[21]

4.9 *Products* - Immovable property, game and unprocessed primary agricultural product (meaning products of the soil, of stock-farming and of fisheries) are excluded from the definition of "product".[22] However, member states have the option to include unprocessed primary agricultural products and game in their own legislation. All moveables, primary agricultural products which have undergone initial processing, and electricity are within the scope of the Directive.

4.10 *Defences* - A producer or manufacturer cannot limit or exclude liability by any exemption clause.[23] He will not be liable only if he can prove any one of the following defences:-

(a) the product has not been put into circulation by him;[24]

(b) the defect did not exist at the time the product was put into circulation;[25]

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16 Article 6(2).
17 Article 4.
18 Article 3(1), (2).
19 Article 3(3).
20 Article 5.
21 F Albanese *op cit* at page 21.
22 Article 2.
23 Article 12.
24 Article 7(a).
25 Article 7(b).

(c) the product was not manufactured for sale or distribution for economic purposes, nor was it manufactured or distributed in the course of his business;[26]

(d) the product complies with mandatory regulations issued by public authorities;[27]

(e) 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[28] (member states have the option to exclude this defence in their own legislation); and

(f) in the case of a manufacturer of a component, the defect is attributable to the design of the product, or to the instructions given by the manufacturer of the product.[29]

4.11 *Compensation for damage* - Compensation is recoverable under several heads of damage, namely:-

(a) damage caused by death;

(b) damage caused by personal injuries; and

(c) damage to property, other than the defective product itself, subject to a lower threshold of 500 ECU and provided that the product (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.[30]

4.12 Whilst the lower threshold is not an optional clause, member states may choose whether or not to impose a maximum cap on a producer's total liability resulting from the same defect; provided, however, that if such a cap is imposed, it should not be less than 70 million ECU.[31]

4.13 *Limitation period* - A claimant for compensation must initiate the legal proceedings within a limitation period of three years from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.[32] In addition, the rights conferred upon the injured person under the Directive shall be extinguished upon the expiry of a period of ten years from the date on which the particular product was put into circulation unless legal proceedings have in the meantime been instituted against the producer by the injured person.[33]

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26 Article 7(c).
27 Article 7(d).
28 Article 7(e).
29 Article 7(f).
30 Article 9.
31 Article 16.
32 Article 10.
33 Article 11.

4.14 *Disclaimer* - There is express provision in the Directive specifying that "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."[34] Despite the use of the words "in relation to the injured person" the article is not limited to personal injury and death cases and would extend to property damage as well.[35]

Differences between the Strasbourg Convention and the Product Liability Directive

4.15 The provisions of the Strasbourg Convention are in many aspects similar to those of the Product Liability Directive. There are, however, three substantive differences[36] between the two documents:-

(i) whereas it is an optional provision that primary agricultural products and game are not covered by the Product Liability Directive, such products are covered by the Strasbourg Convention;

(ii) whereas it is a defence under the Product Liability Directive that the defect is due to compliance of the product with mandatory regulations, there is no such defence in the Strasbourg Convention; and

(iii) whereas it is an optional defence under the Product Liability Directive that the state of scientific and technical knowledge at the time did not enable the defect to be discovered, there is no such defence in the Strasbourg Convention.

4.16 It can be seen that the liability imposed on producers is more onerous in the Strasbourg Convention than in the Product Liability Directive. Although it is true that sub-paragraphs (i) and (iii) above are optional provisions of the Product Liability Directive, in reality most member states have taken advantage of the optional provisions and adopted a milder level of protection against defective or unsafe products.

Implementation of the Product Liability Directive

4.17 According to the Product Liability Directive,[37] member states were obliged to enact conforming national laws within three years, that is, by July 1988. Some member states took much longer to pass the required legislation. As at February 1995, the following member states had enacted their own strict product liability laws:- United Kingdom, Greece, Italy,

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34 Article 12.

35 The words "the injured person" actually mean "the aggrieved person" or "the claimant". See, for example, Articles 4 and 9.

36 F Albanese, *op cit*, at page 28.

37 Article 19.

Luxembourg, Denmark, Portugal, Germany, Netherlands, Belgium, Ireland, Spain, Austria, Finland, and Sweden.[38] According to the First Report on the Application of the 1985 Product Liability Directive conducted by the Commission of the European Communities in 1995, despite general expectation that there would be more litigation, the Directive has not caused an increase in the number of product liability claims, nor has it caused an increase in the level of insurance premiums.[39] It was also stated that the Directive has eased the claimant's burden in proving his case, and has contributed towards an increased awareness of, and emphasis on, product safety.[40]

4.18 There have been only a handful of cases based on the 1985 Product Liability Directive and, as at December 1995, no national court had referred any question of interpretation to the European Court.[41]

4.19 In another recent study[42] ("the Study") on the Directive's implementation, it was found that responses from the insurance sector were almost unanimous in reporting that there had been no significant increase in the number or pattern of claims or premium costs, since the introduction of the 1985 Directive.[43] One of the written responses commented "even though there was a lot of discussion in the market place at the time of [the 1985 Directive's] introduction ... the impact has been minimal ...".[44] Another response suggested that the 1985 Directive had brought about a concentration on improving safety standards, which had been complemented by the encouragement given by insurers for industry to adopt risk analysis and reduction techniques in the design, manufacture and marketing of products. This had resulted in safer products being put on the market. This view, however, is a general impression for which quantifiable evidence is not available.[45]

4.20 The insurance sector further reported that, in general, the 1985 Directive had had no noticeable effect on the price or availability of product liability insurance. As the level of product liability premium depends most importantly on the claims made, the absence of a rise in premium should be the natural result of the lack of claims. The only exception might be for importers of products into the European Community, who would need to be underwritten as if they were manufacturers within the European Community. Apart from the amount of claims, the level of insurance premium is affected by the type of product, the turnover of the manufacturer, and the risk management system of the manufacturer. The study gave the example of[46] a large food manufacturer whose products are considered to be a "light risk".

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38 Commission of the European Communities, *op cit*, at Annex.

39 Commission of the European Communities, *op cit*, at page 2.

40 *Idem.*

41 *Idem.*

42 Christopher J S Hodges, *Report for the Services of the Commission of the European Communities on the application of Directive 85/374/EEC on Liability for Defective Products*, 1994.

43 *Ibid* at paragraph 39.

44 *Idem.*

45 *Idem.*

46 *Ibid* at paragraph 50.

Such a manufacturer might pay a rate as low as 0.002% of turnover, whereas a pharmaceutical manufacturer with a much lower turnover, but perceived as "heavy risk", might pay as much as 1% of turnover and occasionally more. The level of premium is also affected by the destination of a company's exports. Exports to the United States of America, for instance, could attract a rate of 10 to 20 times the rate for the same product in the European Community market.[47]

4.21 As the level of insurance premiums has not risen significantly, product prices generally have not been affected by the 1985 Directive. The Study, however, quoted the comments from a German organisation *Wirtschaftsverband Stahlverformung*, which represents about 500 companies in the steel processing sector, 98% of which are small or medium sized companies. 90% of the products manufactured by the members of the Organisation are component parts supplied to other manufacturers, and 50% of such products are supplied to the car industry. Although the Organisation had not been able to increase product price due to market conditions, it estimated that production costs for the period from the beginning of 1991 to the end of 1993 had increased by about 10% as a result of the quality requirements.[48]

4.22 The Study mentioned that, in general, the 1985 Directive had : 1) made it easier for consumers to succeed in a claim for damage caused by defective products; and 2) encouraged industry to settle claims which might otherwise have involved more costly fault liability arguments.[49]

4.23 The Study also mentioned that the 1985 Directive had so far not led to undesirable results. It cautioned, however, that this might be due to the fact that a considerable lead time would be involved before the injury was manifested and the causes researched sufficiently to justify a claim.[50]

Implementation of optional clauses

4.24 The Product Liability Directive contains three optional provisions:-

(i) extension to unprocessed primary agricultural products and game;[51]

(ii) exclusion of the "development risks" defence;[52] i.e. the state of scientific and technical knowledge at the time was not such as to enable the existence of the defect to be discovered; and

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47 *Ibid* at paragraph 51.
48 *Ibid* at paragraph 97.
49 *Ibid* at paragraph 106.
50 *Ibid* at paragraph 107.
51 Article 15(1)(a).
52 Article 15(1)(b).

(iii) a cap on total liability of not less than 70 million ECU.[53]

4.25 *Unprocessed primary agricultural products and game* - these are excluded from the definition of product in the United Kingdom, Italy, Denmark, Netherland, Belgium, Ireland, Austria, Portugal, Germany and Spain.[54]

4.26 *Development risks defence* - is allowed in all member states except Finland and Luxembourg,[55] and it is allowed in Germany only in respect of medicinal products.

4.27 *Cap on total liability* - is adopted in Germany, Spain and Portugal. Hence, there is no cap on total liability in United Kingdom, Italy, Denmark, Finland, Greece, Sweden, Netherlands, Belgium, Austria, Ireland and Luxembourg.[56]

United Kingdom

4.28 Proposals to alter manufacturer's liability from negligence to strict liability were made by the English and Scottish Law Commissions[57] and the Pearson Commission[58] in the 1970's. However, it was not until the European Community Council of Ministers adopted the Product Liability Directive in 1985 whereby member states were required to pass the appropriate legislation by 30 July 1988 that the United Kingdom passed the Consumer Protection Act 1987.

4.29 Part I of the Consumer Protection Act 1987, which exists side by side with the law of contract and negligence, deals with civil liability of "producers" for unsafe products. It is designed to implement the European Community Product Liability Directive and came into force on 1 March 1988. Part II of the Consumer Protection Act 1987 deals with criminal liability of "suppliers" of unsafe consumer goods and is similar to the Consumer Goods Safety Ordinance 1994 in Hong Kong.

4.30 *Basis of Liability* - The defect approach as propounded in the Product Liability Directive 1985 is adopted. Negligence hence becomes irrelevant. The change can be illustrated by the case of *Daniels and Daniels v R White & Sons Ltd*,[59] which was decided before the Consumer Protection Act 1987. A consumer who had no contractual relation with the retailer was seriously injured when he drank lemonade containing a large quantity of carbolic acid. The judge, however, accepted evidence of the precautions taken by the manufacturers to avoid such a contingency and found that the

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53 Article 16.
54 Commission of the European Communities, *Ibid*, at Annex.
55 *Idem.*
56 *Idem*.
57 *Liability for Defective Products* (1977 : Cmnd 6831).
58 The Royal Commission, *Civil Liability and Compensation for Personal Injury* (1978 : Cmnd 7054).
59 [1938] 4 All ER 258.

consumer had failed to prove negligence. If this same case had been decided after the Consumer Protection Act 1987 came into effect, the consumer should be able to recover damages without difficulty.

4.31 Part I of the Consumer Protection Act 1987 is similar to the European Community Product Liability Directive in many other aspects including onus of proof, range of persons liable, range of claimants, defences.

4.32 *Products* - The range of products covered is based on the European Community Product Liability Directive. Products are defined as:-

> *"... any goods or electricity and ... includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise."*[60]

According to section 45, "goods" includes substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle; and "substance" means any natural or artificial substance whether in solid, liquid or gaseous form or in the form of a vapour and includes substances that are comprised in or mixed with other goods. Electricity is included as a product but refers to defects in the generation of electricity and not from failure to supply.[61]

4.33 With regard to agricultural produce and game, agricultural produce and game are not subject to strict liability unless they have "undergone an industrial process". Unfortunately "industrial process" has not been defined by the Consumer Protection Act 1987. Government sources explained that "process" involves something which changes the characteristics of the product, and that "industrial" involves something done on a large and continuing scale with the use of machinery.[62] Examples of "industrial process" given during parliamentary debates included canning, freezing, crushing and filleting of food, and even washing and packing if done off the farm; whereas harvesting, picking or grading of produce, even if done by machine would not be an industrial process.[63] Although the rule excluding reference to Parliamentary material in construing legislation is relaxed by the House of Lords decision of *Pepper v* Hart,[64] the absence of a statutory definition leads to difficulties in ascertaining what constitutes "industrial process".

4.34 *Defences* - Once the claimant can prove the defect and the damage, it is up to the defendant to establish one of the defences. Liability,

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60 Section 1(2).

61 P McNeil "England" in Campbell (ed) *International Product Liability* at page 178.

62 J R Bradgate and Nigel Savage, *The Consumer Protection Act 1987 - Part I*, New Law Journal October 2, 1987 at page 931.

63 *Idem*.

64 [1992] 2 WLR 1032. The three limbs of the case are : "(a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear." (Headnote).

however, cannot be "limited or excluded by any contract term, by any notice or by any other provision".[65] The defences are:-

(a) that the defect is attributable to compliance with any statutory requirement or European Community obligation;[66]

(b) that the defendant did not at any time supply the product to another;[67]

(c) that the supply of the product by the defendant was otherwise than in the course of business, and otherwise than with a view to profit;[68]

(d) that the defect did not exist when the defendant supplied it to another;[69]

(e) that the state of scientific and technical knowledge at the time of supply was not such that a producer of the same kind of product might be expected to have discovered the defect;[70]

(f) in the case of a component maker, that the defect in the finished product was wholly attributable to the design of the finished product or to compliance by the component maker with instructions given by the manufacturer of the finished product;[71]

(g) that it is a partial defence if the damage is caused partly by the fault of the claimant.[72]

The wording of two of these defences differs slightly from that of the European Community Product Liability Directive. Sub-paragraph (e) only requires the defendant to prove that no producer within the trade could have discovered the defect, while the European Community Product Liability Directive requires the defendant to prove that no one could have discovered the defect.[73] In relation to sub-paragraph (f), which requires the component maker to prove that the defect was wholly attributable to the design or specifications given, the European Community Product Liability Directive only requires the component maker to prove that the defect was attributable to the design or specifications given.

4.35 *Limitation period* - The Limitation Act 1980 has been amended to implement the Directive. Pursuant to section 11A of the Limitation Act 1980, a claimant must bring proceedings within three years from the date on

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65 Section 7.
66 Section 4(1)(a).
67 Section 4(1)(b).
68 Section 4(1)(c).
69 Section 4(1)(d).
70 Section 4(1)(e).
71 Section 4(1)(f).
72 Section 6(4).
73 Please see also discussion, *infra*, at paragraphs 7.42-7.43.

which the cause of action accrued, or the date of knowledge of the claimant, whichever occurs later. The date of knowledge is defined in section 14 (1A) of the Limitation Act 1980 as the date on which a person first had knowledge of the following facts:-

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

It should be noted that the court has a discretion to extend the three-year period in cases of personal injury, using the guide-lines set out in section 33 of the Limitation Act 1980. In cases where the plaintiff is under disability, that is, if the plaintiff is an infant or of unsound mind, the limitation period is extended to three years after the disability has ceased. The limitation period, therefore, does not start to run as long as the plaintiff is under disability.

4.36 *Cut-off period* - Section 11A(3) was inserted in the Limitation Act 1980 to comply with Article 11 of the European Community Product Liability Directive. Section 11(A)3 reads:-

> *"An action to which this section applies shall not be brought after the expiration of the period of the ten years from the relevant time*[74] *... and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years."*

It should be noted that this ten-year cut-off period overrides the three-year limitation period, the special provisions for persons under disability, and the court's discretion to proceed outside the normal limitation period.

4.37 *Compensation for damage* - Pursuant to the Product Liability Directive, compensation is recoverable in relation to death and personal injury.[75] Since liability under Part I of the Consumer Protection 1987 Act is liability in tort,[76] the claimant will be compensated for pain and suffering, loss of amenity, future expense, loss of future earnings and earning capacity.

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74 The relevant time, as against a party bearing principal liability, is the time when he supplied the product to another; and, as against a party bearing subsidiary liability, is the time when the product was last supplied by a party bearing principal liability. (See section 4(2) Consumer Protection Act 1987).

75 Section 5(1).

76 Section 6(7).

Quantifiable monetary losses including medical expenses and loss of earnings up to judgement are also recoverable. Pure economic loss, however, cannot be recovered.

4.38 *Property Damage* - Various limits[77] are imposed on claims for damage to property. Claims for damage to the product itself, claims concerning products not ordinarily intended for private use, products not intended by the claimant for his own private use, and claims worth less than £275 are not allowed.

4.39 *Disclaimer* - It should be noted that, by virtue of section 7 of the Consumer Protection Act 1987, liability under Part I of the Consumer Protection Act 1987 "shall not be limited or excluded by any contract term, by any notice or by any other provision". There is no reference as to reasonableness.

4.40 *Punitive damages* - Punitive damages, also referred to as exemplary damages, are designed to punish and deter the wrongdoer. Unlike the United States, punitive damages are available only in limited circumstances. The three situations for which punitive damages can be awarded are set out in the House of Lords case *Rookes v Barnard*[78]:-

(1) Oppressive or arbitrary or unconstitutional acts by government servants;

(2) The defendant's conduct has been calculated to make a profit for himself which might well exceed compensation payable to claimants; and

(3) Express statutory provision.

In *A.B. v South West Services Ltd*.,[79] the Court of Appeal had further clarified that negligence claimants would not be awarded punitive damages.[80]

People's Republic of China

4.41 There are various laws and regulations governing product quality in China and two of these are relevant for our purpose. One is the People's Republic of China Product Quality Law (the "PQL") made effective as from 1 September 1993. The other is the People's Republic of China Consumer Rights Protection Law (the "CRPL") made effective as from 1 January 1994.

4.42 The PQL protects both consumers and users of products against sub-standard or unsafe products, and its legislative intention is to

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77 Section 5(2), 5(3) and 5(4).
78 [1964] AC 1129.
79 [1993] QB 507.
80 Clerk & Lindsell, *Torts*, 17th ed 1995 at 9-18.

strengthen the state's supervision and control over product quality with a view to improving product quality.[81] The PQL stipulates that industrial products must comply with the safety standards imposed by the state and the trade; and if no such standard applies, the industrial product must comply with the safety requirement to ensure protection from damage to health, life and property.[82] It is the manufacturer's duty to ensure that the manufactured product should not pose any unreasonable risk of injury or damage to property.[83] The seller's duty would be to check the standard certificates (if applicable) and to maintain the quality of the products.[84]

4.43 Chapter 4 of the PQL is apparently influenced by the defect approach formulated by the European Community's Product Liability Directive 1985. Defect in a product is defined in the PQL to mean the existence of unreasonable risk of injury and damage to property; and in the case of products to which any state or trade safety standard applies, a defect would mean non-compliance with that standard.[85]

4.44 The PQL also stipulates that where a defect in a product has caused injury or damage to other property (excluding the defective product itself), the manufacturer shall pay compensation unless the manufacturer can establish any one of the three defences - (1) the product has not been put into the market; (2) the defect did not exist when the product was put into the market; or (3) the state of scientific and technical knowledge at the time did not enable the defect to be discovered.[86]

4.45 If the seller's fault has caused the defect, or if the seller cannot identify the manufacturer or its supplier, compensation should be paid by the seller.[87] The claimant shall have the right to seek compensation from both the seller and the manufacturer; and as between the seller and the manufacturer, they are expected to settle their respective share of liability between themselves.[88]

4.46 As for the limitation period, instead of the three-year and ten-year limitations provided in the Directive, the PQL requires a claimant to institute legal proceedings within two years from the time he became aware, or should reasonably have become aware, of the infringement of his rights. The claimant's rights to seek compensation will also cease upon the expiry of ten years from the time the product was delivered to its first user.[89]

4.47 As for the People's Republic of China Consumer Rights Protection Law (the "CRPL"), its scope is slightly different from the PQL. Instead of applying to both consumers and users against sub-standard or

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81 Explanatory note to the draft law dated 30 October 1992.
82 Article 8.
83 Article 14.
84 Articles 21 and 22.
85 Article 34.
86 Article 29.
87 Article 30.
88 Article 31.
89 Article 33.

unsafe goods, the CRPL protects only consumers against both products and services.[90] Chapter 2 of the CRPL deals with the rights of consumers and provides that, in the purchase and use of products, consumers have the right to demand that their personal and property rights should be protected from harm and that the products sold and the service rendered are in accordance with the safety requirements.[91] It is specifically provided that a seller shall bear civil liability for any defects in the products.[92] For personal injury and damage to property caused by defective products, the consumer as well as other injured persons, have the right to claim compensation from either the seller or the manufacturer.[93] Compensation includes medical expenses, loss of income, damages for permanent handicap, and living allowance of the injured and their dependents. Serious breach of the law may constitute a criminal offence.[94]

4.48 There is some overlapping between the PQL and the CRPL, and the CRPL has referred to the PQL on various issues. The two laws are complementary, with CRPL supplementing the PQL.

Japan

4.49 Japan's Product Liability Law was enacted on 1st July 1994[95], and came into force one year after its promulgation.[96] Japan's legislation is largely modelled on the European Community Product Liability Directive 1985, although there are some minor differences. Japan's Product Liability Law should be read in conjunction with the Civil Code. Where the Product Liability Law contains no express provision, the Civil Code of Japan (Law No. 89-1896) shall apply. The Civil Code is based on the continental European model and is much influenced by the German Civil Code,[97] and consequently Japan also has tort liability for negligence.

4.50 *Basis of Liability* - the defect approach is adopted and "defect" is defined to mean a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer delivered the product and other circumstances concerning the product.[98]

4.51 *Persons Liable*[99] - These include:-

(a) the maker of manufactured products;

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90 Article 2.
91 Article 7.
92 Article 40.
93 Article 35.
94 Article 41.
95 OECD, *Product Liability Rules in OECD Countries*, 1995 at page 47.
96 *Ibid* at page 49.
97 OECD, *Ibid,* at page 17.
98 Article 2(2).
99 Article 2(3)

(b) the producer of processed products which are not manufactured (for example, agricultural products);

(c) the importer; and

(d) any person who, by putting his name, trade name, trade mark or other feature on the product and presents himself as its manufacturer, or in a manner mistakable for the manufacturer.

4.52 *Products* - The word " product" is defined to mean movable property, which is manufactured or processed.[100] Therefore, processed agricultural products and game are within the scope of the Product Liability Law, whereas unprocessed agricultural products and game are not. There is no specific provision specifying whether products include component parts, but given the fact that one of the defences relates to component parts, products should by implication include component parts.

4.53 *Claimants* - Like the Product Liability Directive, the legislation does not specify the range of claimants. Since it is stipulated[101] that the manufacturer shall be liable for damages when he injures someone's life, body or property by the defect in the product which he manufactured, processed, imported or put his name, trade name, trade mark or other feature upon, it seems clear that any injured person, whether he is a consumer, user or a mere bystander can make a claim under the legislation.

4.54 *Defences* - Only two defences[102] are allowed:-

(i) that the state of scientific or technical knowledge at the time when the manufacturer supplied the product was not such as to enable the existence of the defect to be discovered; and

(ii) where the product is used as a component or raw material of another product, that the defect is substantially attributable to compliance with the instructions concerning the specifications given by the manufacturer.

In relation to (ii) above, contrast the difference with the European Community Product Liability Directive, which requires that the defect is attributable to the design or specifications given, and the UK legislation which requires the defect to be wholly attributable to the design or specifications given.

4.55 *Limitation period* - The three-year and ten-year limitation periods found in the Product Liability Directive are also adopted in Japan's Product Liability legislation.

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100 Article 2(1).
101 Article 3.
102 Article 4.

Australia

4.56 After referring the issue to the Australian Law Reform Commission and then to the Industry Commission, and after consultation with business and consumer groups, the Federal Government of Australia introduced the Trade Practices Amendment Bill 1992 which was enacted as Part VA of the Trade Practices Act 1974.[103] Part VA of the Trade Practices Act 1974 is modelled on the European Community Product Liability Directive 1985, and supplements the strict liability provisions in force in some of the Australian states and territories, as well as a well-developed body of common law defining liabilities in tort and contract.[104]

4.57 The main features of the European Community Product Liability Directive are adopted in Part VA of the Trade Practices Act 1974:-

(a) Strict liability is imposed on manufacturers, importers and others for the supply of defective goods which are not as safe as persons are generally entitled to expect.

(b) Compensation is available for personal injury or damage to other property provided the claimant can prove on a balance of probabilities that the product was defective or unsafe, that the product was produced by the defendant in trade or commerce, and that the claimant suffered loss or damage in consequence of the defect.[105]

(c) The development risk defence is available so that a defendant's liability can be absolved if he can establish that the state of scientific or technical knowledge at the time products were supplied was not such as to enable the defect to be discovered.[106]

(d) The three-year and ten-year limitation periods[107] are also adopted by Australia.

(e) For component parts manufacturers, their liability will be absolved if the defect in the component part was attributable only to the design of the end product or to the specifications given by the manufacturer of the end product.[108]

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103 D Everett, *Bond Law Review*, December 1994, at page 112.
104 E Beerworth "Australia", Campbell (ed) *International Product Liability* at page 21.
105 *Ibid* at page 29.
106 Section 75AK(1)(c).
107 Section 75AO.
108 Section 75AK.

Chapter 5

Alternatives to the Defect Approach

Introduction

5.1 Apart from the defect approach discussed in the preceding chapter, other alternatives have been suggested as possible directions for reforming the law beyond the traditional spheres of contract law and negligence law.

New Zealand - central compensation fund

5.2 A central no fault compensation fund can co-exist with tort-based liability, or it can replace tort-based liability as in the case of New Zealand.[1] The first comprehensive no-fault compensation scheme in the world for personal injury caused by accident was introduced in New Zealand in 1974, and since then New Zealand's no-fault compensation scheme has been closely studied by countries which are reviewing the inadequacy of the tort system. The New Zealand Accident Compensation Act 1972, No. 43 abolished entirely litigation for injuries caused by accident. The 1972 Act originally applied only to those injured in motor vehicle accidents and "earners", but it was amended by the Accident Compensation Amendment Act (No. 2) 1973, No. 113 and the scope of the Act was extended to cover all persons suffering personal injury by accident. The 1972 Act was subsequently amended by the Accident Compensation Act 1982.[2] The accident compensation scheme mainly followed the recommendations made in 1967 by the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand ("the Woodhouse Commission"). The accident compensation scheme was comprised of three separate schemes: one for earners, another for persons injured by motor vehicles, and a supplementary scheme for non-earners. The earners scheme covered all employed or self-employed persons who suffered injury by accident. It was financed by levies on employers and the self-employed. The motor vehicle accident scheme covered persons injured by accident caused by, through or in connection with the use of a vehicle in New Zealand, and this scheme was financed by annual levies on motor vehicles. The supplementary scheme covered anyone injured or killed by accident who was not covered by the two other schemes. Non-earners such as pensioners, housewives and visitors to New Zealand could receive benefits for non-pecuniary loss and for loss of potential earning capacity. This scheme was financed from national revenue.

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1 OECD, *Product Liability Rules in OECD Countries*, 1995 at page 9.

2 *Commonwealth Law Bulletin*, Vol. 13 No. 2 April 1987.

5.3 The rationale for the accident compensation scheme was that there would be more efficient, rational and just methods of compensating those injured by accident than the system of tort litigation, which was considered time-consuming and expensive. The time and resources of the courts, lawyers and expert witnesses could be saved by simply paying compensation to those injured by accident. Given that the main purpose of the system was accident compensation, there should not be a distinction between the innocent victim of an accident who is fortunate enough to find a party legally liable, and another accident victim who could not find any (or any solvent) party to be made liable. The Woodhouse Commission outlined five basic principles for any modern system of compensating accident victims. These were community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.

5.4 There were signs of stress in New Zealand's compensation scheme, and in 1992 the New Zealand government proposed introducing a 15 per cent disability threshold before the scaled disability allowance would become payable. This would disqualify a significant number of non-earner accident victims from compensation.[3] The reason for the proposed changes was the escalation of cost, which was said to have increased by 25 per cent annually for five years before 1992. The figure of 25 per cent was adjusted to 16.5 per cent after taking into account inflation. It was estimated that without the proposed changes, the average levy payable by the employer would have to be increased from $1.71 per $100 wages to $3.16 per $100 wages.

5.5 In evaluating the New Zealand schemes, it is important to bear in mind that whilst it is true that the system of tort litigation is expensive, a comprehensive compensation scheme may not be exactly economical; a claims procedure which is too simple may lead to abuse or inequity, whereas a claims procedure which is sophisticated may be expensive to operate. Further, there are vast differences between Hong Kong and New Zealand in terms of socio-economic conditions, social attitudes and public expectation. Given that there is no evidence of a strong public demand for a central compensation fund for product liability in Hong Kong and that such a fund would take up substantial administrative resources, a central compensation fund would not seem appropriate for Hong Kong for the time being.

Compulsory insurance

5.6 The central argument in favour of having a compulsory insurance scheme is that it ensures that those entitled to compensation actually receive it. Some are of the view that if legislation were to impose strict liability with the object of improving a victim's chances of winning compensation, it would be logical to insist that such liabilities should be insured. At present, third party insurance cover is compulsory for employers and motorists. However, extending the scope of compulsory insurance to

[3] *Commonwealth Law Bulletin*, Vol. 18 No. 2 April 1992 pages 768 to 770.

product liability may encounter additional problems given the variety and diversity of products and the number of producers. The Royal Commission on Civil Liability and Compensation for Personal Injury[4] ("the Pearson Commission") considered amongst other issues the desirability of compulsory insurance, and concluded that effective enforcement presented a significant practical difficulty. Compulsory insurance in relation to employees and motor vehicles was enforced through a system of certification and licensing. For many other risks the cost of effective enforcement might prove disproportionate in terms of money and manpower.[5] The Pearson Commission concluded that:-

> *"There are formidable difficulties in the way of imposing compulsory liability insurance. There would be great problems in the way of enforcing any requirement at a reasonable cost in money and manpower; and it would be necessary in each case to provide for some limitation of the amount of cover required."*[6]

5.7 The Committee of Experts of the Strasbourg Convention 1977 had also considered briefly the issue of compulsory insurance. It was of the view that given the variety of products and other factors, it would be difficult to establish a uniform system of insurance. The Committee of Experts further believed that it was not necessary to make insurance compulsory in order to make producers insure their civil liability.[7]

Australian Law Reform Commission - "The way goods acted" approach

5.8 In 1989, the Australian Law Reform Commission and the Law Reform Commission of Victoria (collectively referred to as "the Commissions" in this chapter) recommended certain reform proposals. The Commissions recommended that manufacturers and suppliers of goods should be liable to pay compensation for loss caused by the goods if the loss is caused by "the way goods acted".[8] In the draft legislation annexed to the Commissions' Report, the word "acted" is defined as follows:-

> *"A reference to the way goods acted is a reference to any of the following:-*
>
> *(a) the way the goods acted or behaved;*
>
> *(b) the effect the goods had; and*

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4 (1978 : Cmnd 7054-I).

5 *Ibid* at paragraph 321.

6 *Ibid* at paragraph 1266.

7 Explanatory Report of the Strasbourg Convention, at paragraph 19.

8 The Australian Law Reform Commission Report No. 51; the Law Reform Commission of Victoria Report No. 27 on *Product Liability* (1989) at paragraph 4.03.

(c) *the failure of the goods to act or behave in a particular way, or to have a particular effect."*

The claimant must establish that the loss was caused by something the goods did or failed to do, or the effect the goods had; however, the claimant need not establish any more than this to establish a *prima facie* right to compensation.[9] In particular, the claimant need not establish that the goods did not comply with a general standard of safety or quality.[10] No general standard postulates a purely "objective" test of safety or quality, and a test of liability based on a general standard gives rise to the same problems as the test based on "reasonable care" in the law of negligence.[11] If a defendant could not establish any of the specific defences whereby liability could be completely exonerated, then the amount of compensation would have to be determined. Manufacturers and suppliers would not be liable for loss caused by factors outside their control, such as the conduct of the claimant or of a third party, or by natural forces (also called Acts of God). If it could be shown that part of the loss was caused by the "other factors", the amount of compensation would be reduced to exclude that part of the loss.[12] If appropriate, the amount of compensation could be reduced to zero.

5.9 With regard to the reduction of compensation for loss caused by "other factors" such as the conduct of the claimant or of a third person, the Commissions recommended that the reasonableness of the conduct should be taken into account. This, the Commissions believed, could promote prudence on the part of consumers and users of goods. It was explained that such a reduction would be different from the apportionment of damages for contributory negligence. There the court compares the parties' responsibility for the accident in the context of their respective breach of the standard of care and apportions damages accordingly. Under the recommendations, the degree of unreasonableness of the conduct will be the key matter in deciding by how much the amount of compensation is to be reduced. The Commissions acknowledged that this would give the court considerable discretion, but this would be unavoidable if the cost of determining the reduction is to be contained to a reasonable level.

5.10 The Commissions recommended several defences for product liability whereby the defendant could be completely exonerated:-

(a) "Acceptance of risk"[13] - This defence is not available in the United Kingdom Consumer Protection Act 1987. If what the claimant knew about the goods before the loss occurred would have enabled a reasonable person to assess the risk that the goods would act in the way they did, there should be no right to compensation. It should be noted that the first part of the test is focused on what the claimant actually knew, and is a subjective

9 *Ibid* at paragraph 4.04.
10 *Ibid* at paragraphs 4.29-4.40.
11 *Ibid* of paragraph 4.41.
12 *Ibid* at paragraph 4.06.
13 *Ibid* at paragraphs 4.15 to 4.16.

test; whereas the second part of the test is objective. There were submissions against the subjective test saying that it would be extremely difficult for the defendant to prove what the claimant actually knew about the goods, and that the subjective test would be open to abuse. The Commissions, however, were of the view that a wholly objective test of "what a claimant ought to have known" would raise similar issues and problems to those of negligence claims, and would by no means be certain. Further, the claimant's assertions could be challenged by the manufacturer/supplier, not to mention that the manufacturer/supplier could protect its position by giving sufficient warnings and instructions.

(b) "Development risks" - This defence is also available in the United Kingdom. If, when the goods were first supplied in trade and commerce to a person who did not acquire them for re-supply, it could not have been discovered, using any scientific or other technique then known that the goods could act in the way they did, manufacturers and suppliers should not be liable to pay compensation. It would not be sufficient, for the purpose of raising this defence, to merely prove that the manufacturer complied with the trade practice, or that it was not economical to deal with the risks.

(c) "Mandatory Standards" - This defence is also available in the United Kingdom. Manufacturers and suppliers would not be liable to pay compensation if the goods acted as they did only because the goods complied with a mandatory standard.

5.11 The recommendations of the Commissions were debated in Parliament[14] and subjected to rigorous opposition. The most contentious issue was the question of the onus of proof.[15] If the Commissions' proposals were adopted, the onus of proof would be effectively shifted, so that instead of the claimant having to prove defect on a balance of probabilities, the manufacturer would have to prove an alternative cause of loss, or to invoke one of the available defences, or to show that the loss was caused by unreasonable use of the product.

5.12 The Industry Commission's views were referred to during the parliamentary debate.[16] The Industry Commission was of the view that if the Commissions' proposals were adopted, Australia's export competitiveness, product innovation and availability would be adversely affected, not to mention that the proposed sweeping changes would entail substantial adjustment costs. The Industry Commission suggested that some minor amendments to the current law would produce a more efficient product liability regime.

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14 Australia House of Representatives debate on Trade Practices Amendment Bill 1992 on 4 June 1992.

15 *Ibid* at page 3670.

16 *Ibid* at page 3695.

Chapter 6

United States - A Case Against Strict Liability?

Introduction

6.1 Strict product liability rules have attracted much criticism in the United States. It is worth examining whether it was strict product liability itself or other factors which have caused problems such as the "insurance crisis" and the "litigation explosion".

Strict liability in the United States

6.2 It should be made clear at the outset that American product liability law is made up of the substantive and procedural law of America's 50 states and that state law has been derived substantially from judicial decisions.[1] Despite the lack of uniformity in its product liability law, the United States' head start in formulating strict product liability rules and the evolution of these rules provide useful clues and lessons to our examination of strict product liability. At roughly the same time as the House of Lords ruled that the manufacturer of ginger beer had to bear liability upon proof of fault in *Donoghue v Stevenson,*[2] courts in the United States had begun to expand product liability law and effectively created forms of strict liability by liberal interpretation of the *res ipsa loquitur* doctrine, and expansion of contract theories including agency, third-party benefit, unilateral offer and the "running" of a warranty with a chattel.[3]

6.3 Compared to expanding contract law by the implied warranty and other devices, strict liability in tort is a more logical and appropriate way of achieving the same goal. In the leading case of *Greenman v Yuba Power Products Inc*.[4] the Supreme Court of California held that:-

> *"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."*[5]

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1 David Debusschere and Jimmy L Hom, "United States" in Dennis Campbell (ed), *International Product Liability* (1993) at page 565.

2 [1932] AC 562, HL.

3 Ellen Beerworth, *Product Liability* (1989) at page 7.

4 27 Cal. Rptr. 697 (1963).

5 *Ibid* at page 700.

6.4 These developments influenced the drafting of the Second Restatement of Torts[6] which was a non-binding but highly influential attempt to distil common-law principles as operated by the courts at that time.[7] Section 402A of the Second Restatement of Torts as published in 1965 reads:-

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

6.5 Section 402A did not bring about greater uniformity in product liability rules among the states. Instead there was a proliferation of claims as courts proved willing to expand the Section 402A rule beyond its plain wording and the apparent contemplation of its drafters. The rule was eventually applied even to lessors of products such as self-drive vehicles,[8] as well as claims for pure economic loss.[9] It was observed that:-

> *"California ... had refused to require that the defect also be "unreasonably dangerous" as stated in s. 402A. ... From 1970, courts increased the range of transactions to which the rule could apply so that the new liability began to infect settled areas of liability such as realty sales, landlord and tenant, occupiers' liability and workers' compensation. Under the pressure of product claims the attitude to punitive damages also developed*

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6 At the time of writing this Report, the American Law Institute is considering a Draft Third Restatement of Torts: Product Liability, which is expected to be published in mid-1998.

7 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 24.

8 *Cintrone v Hertz Truck Leasing* 212 A 2d 769 (1965).

9 *Santor v A & M Karagheusian Inc.* 207 A 2d 305 (1965).

in pro-plaintiff directions. ... The acceleration from the early 1970's in the rate of litigation ... had a number of dramatic effects. ... it led in some dramatic cases to the bankruptcy or take-over of particular corporations, leading to developments in the separate fields of insolvency and successor liability law. ... [it led to] the 1975-6 "product liability insurance crisis". Having remained constant from 1963 until 1975, the cost of liability insurance, as a percentage of sales revenue, suddenly increased."[10]

6.6 Public concern over the "products liability insurance crisis" and the uncontrolled growth of the scope of substantive liability led to the establishment of the Interagency Force on Product Liability by the Federal Government in 1977 to look into product law reform, and its final report[11] was issued in 1978. Eventually, the Model Uniform Product Liability Act 1979[12] was formulated with the hope that the states would adopt it, creating uniformity which could help to stabilize insurance rates. However, that hope did not materialize.

6.7 A further comprehensive study of product liability was conducted in 1988 by the Conference Board, a US-based business information service.[13] The study found that the level of product liability claims had led to a decrease in new product development and innovation. About one-third of the surveyed enterprises had decided against introducing new products because of the claims environment. Fifty-eight per cent of the corporations which had experienced a significant increase in their liability costs chose to discontinue some of their affected products. Examples included:-

(a) "The pharmaceutical firm, G.D. Searle decided in 1986 to pull its intra-uterine contraceptive from the market even though it was previously approved by the Food and Drug Administration as safe and effective. The company had defended itself against lawsuits on four occasions in 1985, and it had won each time. However, the cost of litigation and the unavailability of adequate insurance outweighed the profit potential of the product.

(b) The costs of product liability insurance forced Wepco, Inc., a manufacturer of driving controls for handicapped people, to discontinue all operations in 1986. The company's products were endorsed by the (US government's) Veterans Administration and the firm had never been sued successfully."14

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10 Jane Stapleton, *Product Liability* (Butterworths 1993) at pages 29-31.

11 United States Department of Commerce, *Interagency Task Force on Product Liability, Final Report* (1978).

12 Model Uniform Product Liability Act, 44 Fed Reg 62, 714 (1979).

13 Organisation for Economic Co-operation and Development, *Product Liability rules in OEDC Countries* 1995 at pages 35-36.

14 *Idem.*

6.8 Calls for product liability reforms were fuelled by the publicity given to the amount of money set aside by manufacturers to meet strict liability: $2.5 billion by one asbestos company, $3 billion by another asbestos company, $2.4 billion by the manufacturer of Dalkon Shield and $4.75 billion by suppliers of silicone breast implants.[15] It was reported[16] that in 1985, the cost of settling liability claims both in and out of court had reached US$70 billion. Hence, the 1980's had witnessed a pro-manufacturer shift in judicial and academic attitude, and a retraction of the scope of product liability.

Lessons of the United States experience

6.9 Commentators in the United States often lament the blindness of the European Community's adoption of the strict product liability rule when the rule had attracted considerable criticisms in the United States,[17] and the problems experienced in the United States were regarded by some as reasons against the imposition of strict liability. But the imposition of strict liability in the European Community countries have not caused the problems experienced in the United States. It is a matter for conjecture whether it was strict liability or other factors which were the root cause of the difficulties in the United States.

6.10 The Ontario Law Reform Commission considered "the American experience" in their Report on Products Liability issued in 1979. They came to the conclusion that the American "insurance crisis" had little to do with the substantive law of products liability, but was closely related to the high damage awards caused by certain features of the American civil litigation system.[18] These features include:-

Trial by jury - It is a unique feature of the American legal system that a plaintiff is entitled to a jury trial in almost any case involving personal injuries. The jury decides on the issue of liability as well as on damages and the courts have shown great reluctance to control jury awards. The courts will reduce a jury award only if it is so excessive as to be "unconscionable" or "shocking".[19] Since juries generally have no technical training or prior litigation experience, they are subject to influence by attorneys in ways that judges are not.[20]

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15 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 33.

16 *The Economist*, 27 March 1986.

17 Jane Stapleton, *Ibid*, at page 36.

18 Ontario Law Reform Commission, *Report on Products Liability* 1979 at page 78.

19 *Ibid* at page 74.

20 David Debusschere and Jimmy L Hom, "United States" in Dennis Campbell (ed), *International Product Liability* (1993) at page 564.

Punitive damages - Punitive damages are also within the jury's discretion in many States, and the readiness of American courts and juries to award punitive damages is another reason for high awards in the United States.[21] In *Grimshaw v Ford Motor Co.*[22] a punitive award of $125 million was originally awarded for a defect in the designed location of a fuel tank, though the award was eventually reduced to $3.5 million. The problem was compounded by the high publicity given to the initial awards and the relative under-reporting of the reduced quantum on appeal. It was believed that that publicity would affect jury sensibilities and fuel the expectations of would be claimants and their legal representatives.[23]

Contingency fee - Under a contingency fee arrangement, a claimant will pay his lawyer a specified portion of the amount recovered. The lawyer normally receives one third of the award though the percentage can range from 20 per cent to 50 per cent.[24] If no money is recovered, the claimant does not need to pay his lawyer. Since an unsuccessful plaintiff does not normally have to pay the defendant's legal costs,[25] a claimant bears virtually no risk in proceeding with litigation, even if his case is weak.[26]

Specialized plaintiff bar - There is a division between lawyers who specialize in acting for plaintiffs on contingency fee and defence lawyers who charge hourly rates.[27] Some individual lawyers even specialize in product claims relating to one type of product, e.g. pharmaceuticals, or to one particular product.[28] It has been observed that the specialist, aggressive plaintiff's bar find the contingency fee system particularly

21 Ontario Law Reform Commission, *Ibid* at page 75.
22 (1978), 21 ATLA L. Rep. 136 (Cal. Sup. Ct.)
23 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 78.
24 Organisation for Economic Co-operation and Development, *Product Liability Rules in OECD Countries* 1995 at page 26.
25 Ontario Law Reform Commission, *Report on Products Liability* 1979 at page 76.
26 David Debusschere and Jimmy L Hom, "United States" in Dennis Campbell (ed), *International Product Liability*(1993) at page 564.
27 The Australian Law Reform Commission, *Product Liability*, Report No. 51 1989 at page 10.
28 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 79.

lucrative and this encouraged speculative argument in favour of expansion of liability.[29]

Precedents not binding - The American courts openly embrace a high level of judicial law-making and a flexible approach to precedents.[30] To American judges, predictability and certainty in the law seem to count for less than perceived justice in the individual case.[31]

Discovery - The process of discovery is such that it is possible for an action to be commenced without any substantive evidence, and the process of discovery can be used to find both evidence and defendant.[32]

6.11 In addition, since tort claims by employees against their employers are barred by the United States workers' compensation law, the awards of which are considered inadequate, employees have a strong incentive to sue manufacturers in tort.[33] The above features of the American civil litigation system tend to make initially borderline or speculative cases more worth pursuing in the United States than in other jurisdictions.

6.12 Given the factors outlined above, it can be seen that the American experience should not be a reason for avoiding strict product liability. In fact, the Australian Law Reform Commission considered the American experience and concluded that:-

> *"Whatever changes may be made to the substantive rules of law in Australia would not and could not bring about the "mess" that exists in the US. The differences between the two systems are far greater than most Australians could imagine."*[34]

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29 Jane Stapleton, *Product Liability* (Butterworths 1993) at pages 75 and 79.
30 *Ibid* at page 71.
31 The Australian Law Reform Commission, *Product Liability*, Report No. 51 (1989) at page 10.
32 *Ibid* at page 10.
33 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 80.
34 The Australian Law Reform Commission, *Product Liability*, Report No. 51 (1989) at page 11.

Chapter 7

Recommendations

7.1 We have set out in the preceding chapters an outline of the present product liability law in Hong Kong, together with its deficiencies and anomalies. Having examined the product liability legislation in various jurisdictions, it is evident that legislators in both civil law and common law jurisdiction countries have recognised the need to legislate on civil liability for defective or unsafe products.

Arguments for and against reform

7.2 Experience of other jurisdictions has shown that there will be objections to reforming product liability law beyond the traditional spheres of contract law and negligence law. Industries in other jurisdictions have put forward economic reasons against reform and these are conveniently summarized as follows:-

> *"It was strenuously argued that while individual consumers who suffered injury from defective products might benefit from the introduction of strict liability, consumers as a whole would be adversely affected by such a change. The cost of products would rise to cover increased insurance premiums required by the need to insure against strict liability. The variety of goods available would decrease, limiting consumer choice of goods. Companies would protect themselves by sticking to well-known and well-tried products and not take risks with minor variations. Finally, and most cogently, it was contended that research and technological innovation ... would be seriously impeded."*[1]

7.3 It has also been pointed out that the manufacturing success of Hong Kong owed much to the ability of manufacturers and traders to react more swiftly to the market than Hong Kong's competitors by producing new products at a reasonable price. Therefore it is understandable that the commercial sector is concerned with law reform in the product liability field, lest reform goes beyond improved protection for the public at large to stifle business and innovation.

7.4 On the other hand, Hong Kong has made considerable economic progress and has become more affluent in the past few decades, and public expectations of product safety and legal protection have become

[1] M Brazier, *Street on Torts*, 8th edition at page 302.

higher. Product safety, hence, has become a primary concern to consumers and the public at large. Given the existing legislation[2] and standards specifically directed at product liability, the average citizen may assume that products on the market are basically safe and they may be surprised to know that recently enacted legislation which imposes criminal liability on unsafe or defective products does not directly help them to claim compensation.

7.5 Other law reform bodies have also put forward economic reasons in favour of reforming product liability law by imposing strict product liability:-

> *"It is often said that strict liability is an effective means of spreading losses caused by accidents. The effect of holding the manufacturer liable is to take the loss from the shoulders of the person injured and to distribute it among the consumers of the product. Loss sustained by injuries that are caused by defective products can be fairly said to be part of the cost of product. If the cost of injuries is not included in the price of the product, the injured person is, in effect, subsidizing all other users .... By "internalizing" the cost of accidents, strict liability encourages the manufacturer to develop cost-justified methods of reducing defects in his products. As soon as it becomes less expensive to develop means of reducing defects than to pay the costs of accidents, a manufacturer will have a greater incentive to develop those means. Under a negligence regime, provided that a manufacturer follows common practice in the industry, and provided that the means of reducing defects are not a reasonably obvious precaution, he may possibly be able to continue his practice without liability .... The effect of strict liability may be to make production of some products unprofitable; for example, where the increased cost to the manufacturer cannot be passed on to his consumers. In such circumstances, it may be right that the manufacturer should cease business. A product that can only be produced at the expense of innocent persons injured by its defects perhaps ought not to remain on the market. Should there be a public interest in the availability of such a product, then possibly public funds should compensate innocent persons who are injured thereby .... This analysis supports the imposition of strict liability upon the manufacturer of a defective product."*[3]

7.6 Similarly, it has been said that:-

> *"... if the law gave free rein to manufacturers and distributors, and did not give any compensation rights to persons injured by unsafe or defective products, there might not be enough incentive to market goods which were safe and free from*

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2 Like the Consumer Goods Safety Ordinance which came into force in 1995.

3 Ontario Law Reform Commission, *Report on Products Liability*, 1979 at page 69.

defects. There would be increased costs to the community as a whole, because it would lead to increased use of health and rehabilitation services. Economists may suggest that market forces would decide the fate of those whose products were unsafe or defective, but even if market mechanisms were perfect (which they are not), they would take time to operate. In that process there may be a spate of unnecessary injuries with adverse effects on productivity and social well-being."[4]

7.7 During our consultation exercise, two organizations questioned the need for reform chiefly on the basis that precautionary measures, such as stepping up information campaigns about the proper handling of products and their inherent hazards, are more effective in reducing incidents of injuries and death caused by unsafe products.

7.8 We are, however, of the view that stepping up education alone, without corresponding civil and criminal sanctions, cannot solve the problems caused by unsafe or defective products. Manufacturers and traders can make more profit by producing or selling unsafe products, especially if the compensation claim procedure is not in favour of the claimants. Supplying unsafe products is also a form of unfair competition as it gives the supplier of unsafe products an unfair advantage over a competitor who is prepared to incur the costs of ensuring that the products are safe. Facilitating the compensation claim procedure can help to make it unprofitable to produce or sell unsafe products, and thereby encourage the production of safer products.

7.9 With the small manufacturing base in Hong Kong, almost all household products and foodstuffs are manufactured or produced outside Hong Kong. For users of unsafe products who cannot obtain compensation from the retailer by means of contract law (for example, if the hair-dryer or contaminated vegetable was bought by the mother, and it is the son who suffers injury), the only alternative is to sue the manufacturer or producer outside Hong Kong. This kind of litigation is not affordable for ordinary members of society in terms of both time and expense. Without the proposed legislation, some aggrieved users of unsafe products are effectively left without recourse for compensation.

7.10 It is clear that reform of our product liability legislation is timely, taking into account the economic and technological progress in recent years. Hong Kong lags behind many of its major trading partners, some of which reformed their product liability law over ten years ago, and should lose no more time in reforming its product liability law.

7.11 Balancing the arguments for and against reform, we recommend that the law governing compensation for product liability should be expanded beyond the existing spheres of contract law and negligence law.

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[4] Australian Law Reform Commission, *Product Liability Issues Paper*, 1988 at paragraph 8.

Policy objectives

7.12 We consider that product liability legislation should take into account the following policy objectives :-

(a) that injured parties should receive fair compensation and should not be deterred from seeking compensation by legal technicalities;

(b) that the loss should be borne by those who created the risk by putting the defective product into circulation;

(c) that liability should be imposed on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product and, hence, can most conveniently insure against it; this would ensure that the product price reflects the costs of preventing and compensating the loss;

(d) that multiplicity of litigation should be minimized so that compensation claims could be determined in an economical manner;

(e) that frivolous and unnecessary litigation should be discouraged;

(f) that any liability imposed should not put local manufacturers and traders at an undue disadvantage in the international market; and

(g) that the legislation should encourage and educate the public to lay stress on product safety.

Alternative approaches

Central compensation fund

7.13 We have considered the central compensation fund model[5] in force in New Zealand:-

(a) We accept that the system of tort litigation is considered to be time-consuming and expensive.

(b) On the other hand, a comprehensive and sophisticated compensation fund would take up substantial valuable administrative resources, while a simple scheme would lead to abuse.

[5] See discussion, *supra*, at paragraphs 5.2-5.5.

(c) The present situation could be improved by less sweeping changes.

We therefore do not recommend the setting up of a central compensation fund.

Compulsory insurance

7.14 We have also considered the compulsory insurance scheme[6] examined by the Pearson Commission and the Committee of Experts of the Strasbourg Convention:-

(a) It was argued that compulsory insurance would ensure that those entitled to compensation actually receive it.

(b) The cost of administering and enforcing a compulsory insurance scheme may be prohibitive, and given the diversity of products, it may be necessary to have different schemes for different products.

(c) Parties would voluntarily arrange for insurance coverage even without a compulsory scheme, especially if insurance premiums could be contained at a reasonable level.

We do not recommend the establishment of a compulsory insurance scheme.

The way goods acted approach

7.15 As an alternative to the defect approach, we have also considered "the way goods acted" approach[7] proposed by the Australian Law Reform Commission:-

(a) The main attraction of this alternative approach is that it may result in simpler legal proceedings because the major evidence is restricted to that of the claimant's and third parties' conduct, instead of the nature of the product and the inherent risk level of the product.

(b) As the onus of proof is shifted to the manufacturer to prove an alternative cause of loss or a valid defence, the level of protection offered to claimants is substantially increased.

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6 See discussion, *supra*, at paragraphs 5.6-5.7.

7 See discussion, *supra,* at paragraphs 5.8-5.12.

(c) However, "the way goods acted" approach was opposed by the business sector and the Australian Industry Commission, who believed that there would be a rise in total product liability, insurance costs, production costs and finally product prices.

(d) "The way goods acted" approach is a higher standard than the defect approach. If we adopt a higher standard, suppliers will be discouraged from supplying to Hong Kong products which are available internationally. This may also put local manufacturers at a disadvantage.

(e) This alternative approach is not an effective safeguard against unfounded and frivolous claims. If a child claimant, for instance, inserts a needle inside a soft toy during play and is subsequently injured, the manufacturer would have to prove the needle was inserted after it left the factory.

We do not recommend adopting "the way goods acted" approach.

Proposals for reform

7.16 We recommend adopting the defect approach based on the Product Liability Directive 1985[8] and the Consumer Protection Act 1987[9] for the following reasons:-

(a) The defect approach is widely adopted in many countries and can be regarded as the emerging international standard for product liability legislation. If Hong Kong does not progress to strict product liability in line with the international trend, traders would be encouraged to dump inferior and unsafe products in Hong Kong.

(b) By adopting the defect approach of strict product liability, our product liability law can be harmonized with our trading partners. Foreign traders and manufacturers will find our product liability law easy to comprehend, and trading activities can be enhanced.

(c) The defect approach has been implemented and tested for many years in other jurisdictions, without any major criticism.

(d) The defect approach, compared with "the way goods acted" approach, represents a gradual improvement to the existing law, which we prefer to any drastic change. Whilst the defect approach may be considered by some as too conservative in certain aspects, it is at least a good start in improving our

[8] See discussion, *supra*, at paragraphs 4.5 - 4.14.
[9] See discussion, *supra*, at paragraphs 4.28 - 4.40.

product liability law. If we go further than the international trend, Hong Kong would be unnecessarily placed in a disadvantageous position arising from increased production and trading costs.

(e) The defect approach is in line with the common law principle that he who asserts must prove. Reversing the onus of proof without exceptional reasons would be contrary to the common-sense of the common law principle.

(f) With the onus of proof remaining on the claimant, the defect approach is a better safeguard against unfounded and frivolous claims.

We recommend that the defect approach should be adopted.

Basis of liability

Definition of defect

7.17 The basis of liability of both the European Community Product Liability Directive ("the Directive") and the United Kingdom Consumer Protection Act 1987 Part I ("the Act") is the same: strict liability using the defect approach. The meaning of defect in the two documents is slightly different, however. Under the Act, a product is regarded as defective "if the safety of the product is not such as persons generally are entitled to expect"[10]. In the Directive, a product is defective "when it does not provide the safety which a person is entitled to expect"[11]. It is ambiguous whether the standard of the general public, or that of the claimant himself, should be used. The preamble to the Directive stipulates that safety be judged by what the community is entitled to expect, and not merely the expectations of the person making the claim. Hence, the definition of defect in the Act is preferred to that of the Directive.

7.18 Both the Directive and the Act further clarified the matters to be considered in determining whether a product is defective. Basically, both the Directive and the Act intend that "all the circumstances" should be taken into account. The Act however lists a number of additional factors which are:-

> *"the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product"*[12].

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10 Section 3(1).
11 Article 6(1).
12 *Idem.*

As the Act has further clarified the definition of defect without limiting its scope, we recommend that the Act's definition of defect should be adopted.

7.19 One of the responses to our Consultation Paper expressed the view that the general public might not have sufficient knowledge and expertise to judge the safety standard of products, especially technologically advanced and sophisticated products. It was suggested that safety should be judged by reference to the commonly accepted standard of those sectors of the general public which were familiar with the use and operation of the products in question.

7.20 If that suggestion is adopted, the safety test would be no different from the negligence regime, and provided that a manufacturer follows common practice in the industry, he may possibly avoid liability. There will be little added protection to the consumer, not to mention that the need to identify the sector of the public which is familiar with the use and operation of the product would further complicate the matter. It should be borne in mind that the proposed legislation is aimed at protecting ordinary members of the society and consumers. It is only logical that the standard of the general public be adopted.

7.21 Another response to our Consultation Paper mentioned that "what persons generally are entitled to expect" involved balancing the utility and inherent risks of the product, and would be difficult to prove. We believe, however, that the standard of safety that persons generally are entitled to expect may not be difficult to prove in most cases. For example, if a person falls ill after consuming contaminated food, or if a person suffers electric shock from using an electrical appliance, these situations would clearly fall short of the safety standards that persons generally are entitled to expect. There are other less clear-cut situations. A pharmaceutical product with some but inadequate warnings may be an example. Questions of degree and reasonableness can be found in many other legal issues, and the question of the standard of safety can be determined by the court as in other areas of the law.

7.22 We recommend that the safety of the product should be judged by reference to the expectations of the general public, rather than certain sectors which are familiar with the use and operation of the products in question.

Relevant time

7.23 Both the Directive and the Act make provisions as to the relevant time in different wording.

The Directive stipulates that :-

"A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation."[13]

The Act stipulates that :-

"... nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question."[14]

We agree with the principles that the safe nature of the product should be judged at the time the product was put into circulation and not at the time when the damage occurred, and that the availability of a subsequent better product does not necessarily mean a product is defective. We recommend that appropriate legislation should be drafted to reflect these principles.

Persons liable

Persons principally liable

7.24 Under both the Directive and the Act, the persons principally liable are:-

(a) the manufacturer of the finished product or of a component part;

(b) the producer of processed or un-processed natural product;

(c) the own-brander (persons who put their name or trade mark on the product and hold themselves out to be the producer); and

(d) the importer.

Persons bearing subsidiary liability

7.25 Other groups of persons bear subsidiary liability in that they would be liable only if they fail within reasonable time to identify the person who supplied the product to them. These include:-

(a) wholesalers;

(b) distributors; and

(c) retailers.

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13 Article 6(2).

14 Section 3(2).

7.26 It should be noted that a new form of liability is imposed on own-branders and importers.[15] Although both the Directive and the Act are aimed at making the actual manufacturer of the defective product directly liable to the claimant, if the category of persons liable is limited to the actual manufacturer alone, the protection may be of little value to a claimant if the manufacturer is a foreigner and has no business presence in the claimant's country. To avoid loopholes, principal liability is also imposed on importers and own-branders.[16]

7.27 Two of the responses to our Consultation Paper expressed the view that importers should not be held principally liable. They pointed out that importers were only middlemen whose position is similar to that of wholesalers and distributors. Another response proposed that manufacturers who manufacture for the product owner (that is, the one who possesses the trademark, copyright or patent rights of the product) on an "original equipment manufacturing" (OEM) basis, should be exempted from liability since all design specifications, production directions, and quality test methods are laid down by the product owner.

7.28 On the other hand, there were other responses which welcomed an expansion of the categories of persons principally liable to include importers. As most of Hong Kong's household products and foodstuff are manufactured or produced outside Hong Kong, importers play a key role in maintaining the level of product safety in Hong Kong. If importers are exempted from liability, local manufacturers would be faced with unfair competition from imported unsafe products. As for OEM manufacturers, they should not be exempted from liability because the defect could well be caused by a manufacturing fault. In cases in which the defect is caused by a design fault, the OEM manufacturer can claim against the product owner under contract law.

7.29 The rationale behind differentiating principal and subsidiary liability can be aptly summarized by the observations of the English Law Commission and the Scottish Law Commission:-

> *"Our general approach to the imposition of strict liability in respect of defective products is that it should be channelled to the producer since he is the person best able to regulate the quality of the product. Conversely those who have no control over the quality of the product, typically the "middlemen" between the producer and the retailer, should not be strictly liable for defects in the product, although of course they may be liable under the existing law for defects arising out of their own failure to take reasonable care or breach of contractual duty. ... Imported goods present a problem. The producer, being resident abroad, is sometimes hard to find; even then, it may not be possible to obtain jurisdiction against him. It is likely to*

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15 R Nelson-Jones & P Stewart, Product Liability, (1987) at page 92.

16 C J Miller, *Comparative Product Liability* (1986) at page 20.

be inconvenient and expensive to litigate in the producer's own country and the outcome of litigation depends to a large extent on the law of that country. It would be entirely unsatisfactory, however, if the remedies of a person injured by a defective product should depend on whether or not the product is an imported one. However, in our view, the importer of goods should answer for the quality of these goods not only to persons with whom he is in a contractual relationship, but to any person who may be injured by them. He creates the risk by importing the product into the jurisdiction for commercial purposes. This was the preponderant view of a great number of commentators. No doubt in many cases the person on whom strict liability was imposed in accordance with this recommendation would have rights of recourse against the producer abroad."[17]

7.30 During discussion, there was concern that importers would be able to avoid principal liability by using shell companies to act as importers, and we have considered whether or not distributors too should be made principally liable. Manufacturing and trading interests have expressed some views on the issue which are summarized as follows:-

- If an importer would like to do business on a long term basis, it is important for him to establish goodwill in the trade, otherwise the importer would have difficulty in securing the confidence of the overseas manufacturer/exporter, and of the local bankers, insurers and buyers. Hence, it is unlikely that shell companies would be used to evade the proposed new legislation.

- Importers in Hong Kong recognise the risk of legal claims and importers generally deal with that risk by obtaining insurance coverage on a voluntary basis.

- Using a shell company as importer could avoid only one form of liability, that is, the proposed strict product liability regime. The "real" importer who hides behind a shell company would still be liable for claims in contract and tort. The drawbacks of using a shell company as importer may well outweigh any advantages.

- Even if an importer, with only short term profits in mind, deliberately imports inferior/defective products, it is logical to assume that only the small-scale sole-proprietor type of distributors would be interested in distributing such types of products. Such distributors are likely to be without assets and uninsured. Even if all such distributors are made principally liable under the proposed strict liability regime, in practice the plaintiff may not find the distributors worth suing. It is easier to

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[17] English Law Commission and The Scottish Law Commission (1977 : Cmnd 6831) at paragraphs 98,102.

set up a shell distributor company than to set up a shell importer company.

7.31 Apart from the views of the manufacturing and trading interests, we have also taken into consideration the fact that no other jurisdiction has taken the step of making distributors principally liable, and since the business nature of distributors can take many forms, it would be difficult to differentiate some distributors from others; hence, it may be necessary to hold all distributors, except the retailer, principally liable. We hesitate to put local traders at an undue disadvantage when compared to their counterparts in other countries, and we do not recommend that distributors should be made principally liable.

7.32 To discourage importers from using shell companies to avoid liability, we suggest at least the addition of the words "directly or indirectly" in the definition[18] of importer, so that it reads "any person who has, *directly or indirectly,* imported the product ... in order, in the course of any business of his, to supply it to another".

7.33 If two or more persons are liable for the same damage, their liability towards the claimant shall be joint and several.[19] Any rights of recourse or contribution between the liable parties under any contract or negligence law should not be affected by the proposed new form of liability.

7.34 We recommend following the Directive and the Act, and adopting their categories of persons bearing principal and subsidiary liability. Where two or more persons are liable, they should be jointly and severally liable under the proposed new form of liability, and liability of these persons *inter se* under the existing general law should not be affected.

Range of products

7.35 In the Directive, products are defined[20] to mean:-

(a) all movables, and primary agricultural products and game which have undergone initial processing;

(b) (optional) primary agricultural products and game which have not undergone initial processing;

(c) movables incorporated into another movable or into an immovable; and

(d) electricity.

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18 Section 2(2)(c) of the UK Consumer Protection Act 1987.

19 Article 5 of the Directive; section 2(5) of the Act.

20 Article 2.

According to this definition, both industrial and hand-made products are covered.[21] Things not covered by the Directive include:-

(a) human organs and tissues, blood;

(b) real estate; and

(c) intellectual works.[22]

7.36 The definition of products[23] in the Act is based on that of the Directive, but is more detailed. Products include:-

(a) any goods (which includes substances, growing crops[24] and things comprised in land by virtue of being attached to it, and any ship, aircraft or vehicle);[25]

(b) substance (which means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of a vapour, and includes substances that are comprised in or mixed with other goods);[26]

(c) electricity (but refers to defects in the generation of electricity and not from failure to supply);[27]

(d) product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise[28]; and

(e) agricultural produce and game which have undergone industrial process.[29]

We recommend that the proposed legislation should include the range of products set out above.

7.37 We have considered whether computer software should be covered by the proposed legislation. The English Court of Appeal recently commented that computer software, being commands instructing the computer hardware what to do, of itself should not be regarded as within the definition of "product" in the Act.[30] The Australian Law Reform Commission[31]

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21 S Rinderknecht "The European Community" in Campbell (ed) *International Product Liability* at page 605.

22 *Ibid* at page 605-606.

23 Section 1(2).

24 See however section 2(4) which excludes unprocessed agricultural produce.

25 Section 45.

26 Section 45.

27 P McNeil, "England" in Campbell (ed) *International Product Liability* at page 178.

28 See also *infra* paragraphs 7.46 to 7.53.

29 Section 2(4).

30 *Obiter* in *St Albans City and District Council v International Computers Ltd.* (judgement delivered on 26 July 1996) that computer software is not "goods" within the statutory definition

had considered this point and recommended that the definition of products should not be extended to incorporeal property such as computer software and information. The fact that computer software is usually licensed out instead of sold should also be taken into account.

7.38 On the other hand, if computer software is excluded from the definition of product and a product is defective solely because of a software design fault, a claimant may be left without recourse. In the light of the growing influence of computers and computer software in every sphere of our lives, the usefulness of the proposed legislation to the public would be undermined if computer software were not included. We believe that standardized software which is integrated into the computer to run the hardware and without which the computer cannot function, should be treated as part of the computer, and should be included in the definition of product. On the other hand, computer software which is specially written for a client's particular business or purpose should be regarded as intellectual work, and hence not a product under the proposed new form of liability. Claimants can, in such cases, pursue their claims against the software company for contract or negligence.

7.39 We recommend that standardized software which is integrated into the computer to run the hardware and without which the computer cannot function should be treated as part of the computer, and should be included in the definition of "product".

Unprocessed agricultural produce and game

7.40 Whether or not unprocessed agricultural produce and game should be covered by the strict regime is a controversial issue, and it is one of the optional provisions of the Directive. Relevant articles of the Directive are :-

> *"Article 2*
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> *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 ..."*
>
> *"Article 15*
>
> *1. Each Member State may:*

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in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, both of which defines "goods" to include "all personal chattels other than things in action and money".

[31] Australian Law Reform Commission Report No. 51; the Law Reform Commission of Victoria Report No. 27 *Product Liability* (1989) at paragraph 5.22.

(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."

7.41 Under the Act, agricultural products and game are excluded from strict liability unless they have been subject to some "industrial or other process".[32] The term "industrial or other process" is not defined in the Act.[33]

7.42 The Strasbourg Convention, on the other hand, covers unprocessed agricultural produce and game. According to Article 2(a) of the Strasbourg Convention, the term "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable. If this approach is adopted, the question of what constitutes "initial or industrial process" becomes irrelevant.

7.43 The English Law Commission and the Scottish Law Commission have considered this issue. The views[34] of the English Law Commission favouring inclusion of natural products were chiefly:-

(a) The line between natural and industrial products could not be drawn with precision, and different treatment was not warranted.

(b) In the case of foodstuffs, most food would have been subjected to some kind of process before it reached the consumer. Some items of food, however, would be put on the consumer market seemingly in their natural state. An example would be fresh vegetables, which at first sight seem natural unprocessed products. But the vegetables might have been sprayed by chemicals, or treated by artificial fertilisers. It would then become arguable whether fresh vegetables should be regarded as natural products.

(c) Even if a foodstuff or product was not subjected to any process whatsoever, a consumer who suffered illness or damage should be entitled to look to the person who put the product into the stream of commerce for compensation.

7.44 The Scottish Law Commission, however, believed that natural products should be excluded from strict liability and its reasons[35] were:

(a) A principal argument for strict liability was that the loss should be borne by the person who created the risk and was in the best position to exercise control over its quality and safety. In agricultural or fishery production, the risk might have been laid by a polluter or nature itself.

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32 Section 1(2).

33 See the discussion *supra* at paragraph 4.33.

34 *Liability for Defective Product* (1977 : Cmnd. 6831) at paragraphs 83-88.

35 *Ibid* at paragraphs 89-96.

(b) Lying behind the argument that a person who created a product, and therefore the risks incidental to the use of it, should be strictly liable for injuries caused by the use of the product, was the assumption that the manufacturer of goods in bulk would be better able to bear those risks. It was contended that a high proportion of farms in the United Kingdom were manned only by the farmer himself earning only a small net revenue.

(c) It might be difficult for the producers of agricultural products to insure against claims. One of the reasons for the difficulty was that the products would be mostly perishable and the producer might find it difficult to raise the defence that the defect did not exist in the product when it left the producer.

(d) It was further contended that public expectation would be that the party responsible for the preparation of the food, instead of the original producer, should be primarily liable for food poisoning.

7.45 We are of the view that unprocessed agricultural produce and game should be covered by the proposed legislation for the following reasons:-

(a) Unprocessed foodstuff is consumed by almost every member of the public. An area of general public concern should not be left unregulated under the proposed legislation.

(b) Hong Kong and neighbouring countries have recurrent problems of contaminated vegetables and seafood, and the inclusion of such products in the proposed legislation would encourage producers and importers to take extra effort to ensure that their products are safe. Retailers will also be encouraged to ascertain and keep records of their source of supply.

(c) Given the serious threat to health that unsafe natural foodstuff may cause, any increase in product price that may be brought about will still be justifiable.

(d) If unprocessed natural products are excluded, it will lead to anomalies. For instance, if one consignment of infected live cattle is imported and half of it is sold as fresh meat whereas the other half of it is sold as frozen meat, people who suffer illness from the frozen meat can be compensated whereas people who suffer illness from the fresh meat cannot.

(e) Excluding unprocessed natural products will necessitate a definition of industrial process, which is likely to prove difficult. Any distinction is likely to be fine and artificial, and may lead to uncertainty. For example, the mincing of meat if done in

factories using automated machinery will be regarded as having undergone an industrial process, whereas it may not be so regarded if done in small meat stalls using manually operated mincers. It may be uncertain whether mincing constitutes industrial process.

We recommend that unprocessed agricultural produce and game should be covered by the proposed legislation.

Component parts

7.46 Both the Directive and the Act have expressly included component parts in the definition of product. However, the question whether strict liability should be confined to manufacturers of finished articles only, or whether it should be imposed as well on producers of components or material incorporated in other products has generated much discussion. In the joint report[36] by the English Law Commission and the Scottish Law Commission, the two Commissions were unable to reach consensus on this issue. The English Law Commission believed that it would be neither practicable nor, on policy grounds, justifiable to exclude the liability of manufacturers of component parts. The English Law Commission's reasons[37] were chiefly:

(a) It ran contrary to the policy requirement that the risk should rest on the person who was responsible for the quality control. Some components could be extremely sophisticated instruments, and the manufacturers of these components would be better equipped than the final producer to check the safety of these sophisticated instruments. For example, if a cabinet maker who merely gave the finishing touch to a television set by constructing the wooden frame of a television set was held strictly liable for a latent defect in the television set, the result would be too harsh on the cabinet maker.

(b) Releasing all but the final producer from strict liability could lead to anomalies and injustice.

(c) The maker of the finished product would usually be a larger and better-insured concern than the concern which manufactured the components. However this might not be true in every case. If the maker of the final product were unable to satisfy an injured person's claim arising out of an injury attributable to a defect in a major component, it would seem fair that the loss should be borne by the maker of the defective component instead of by the injured person.

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36 *Liability for Defective Products* (1977 : Cmnd. 6831).

37 *Ibid* at paragraph 69-76.

(d) If only the final producer were strictly liable, the manufacturer might be encouraged to have the finishing touches put on his products by an uninsured and expendable subsidiary, which would be the only entity against which strict liability claims would lie.

7.47 On the other hand, the Scottish Law Commission was of the view that strict liability for component parts should cease when the component was incorporated into another product which itself was put into circulation. The Scottish Law Commission's reasons[38] were mainly:-

(a) They accepted that the component manufacturer might be the person best able to control the quality of the component. However, components would be increasingly produced to the specification of the ultimate manufacturer, who alone would know the eventual use to which a component would be put.

(b) As the ultimate destination and use of the product could not be controlled by the maker of the component, it might be difficult or impossible to obtain adequate insurance cover; or insurance would be available only at prohibitive rates.

(c) The retention of strict liability on makers of components would lead to duplication or multiplication of insurance in relation to the same risk. For some important projects, such as the manufacturing of the Concorde aircraft, a system of joint insurance was arranged. But such arrangements might not always be available or practicable.

(d) The duplication or multiplication of insurance cover would lead to increased costs, which in turn would be reflected in increased prices paid by purchasers of products.

(e) It would only be in rare cases that the insolvency of the final manufacturer would render the strict liability claim valueless, and in any event the injured person could retain his claim under the existing law against the component maker.

7.48 With regard to sub-paragraph (a) in the preceding paragraph, it should be noted that if the component was defective because it was made according to specifications given by the final product manufacturer, that would constitute a defence under both the Directive and the Act. As for the point on duplication of insurance mentioned in sub-paragraphs (c) and (d) above, the insurer can be asked to take into account the fact that both the component and the final product would be insured and to make adjustments in their calculation of risk and premium to avoid duplication of insurance. Although liability is joint and several towards the injured person, the component manufacturer is likely to have a contractual claim against the final product

[38] *Ibid* at paragraphs 77-82.

maker for any liability borne in excess of the component manufacturer's fair share.

7.49 The Ontario Law Reform Commission (the "OLRC") examined the arguments of the English and Scottish Law Commissions for and against the inclusion of components parts and concluded that component parts should be included. The OLRC pointed out[39] that suppliers of component parts would normally take out insurance against negligence claims even without strict product liability imposed on them. Even if a supplier of a defective component were to be exempt from direct liability to the person injured, he would probably still be liable to indemnify the manufacturer of the finished product under contract law. Consequently, it would be desirable that the claimant should be able to choose whether to proceed against the supplier of the component part or the manufacturer of the finished product, or both, and to leave it to the various suppliers to make their own arrangements for contribution or indemnity.

7.50 The OLRC also recommended that "strict liability should apply to all products, that is, any tangible goods whether or not they are attached to or incorporated into real or personal property". Hence, they recommended that component parts should not be exempted from the principle.

7.51 The Australian Law Reform Commission also recommended that the claimant should have a choice of whether to sue the supplier of the component part or of the finished product.[40]

7.52 It can be seen that there are valid reasons both for and against the view that strict liability should be confined to manufacturers of finished products. The choice between the two views is rendered especially difficult by the fact that the same general principle has to cater for situations which have little in common.[41] Whilst it seems fair and reasonable that makers of sophisticated components should be held strictly liable for defects of the component, the same may not be true for makers of simple components such as nuts and bolts. Makers of simple components may not have control over the uses to which the simple components are put and may not be aware of the purposes for which the simple components are required. However this problem can be resolved by the definition of defect as adopted in the Act, i.e. a product is to be regarded as defective if it does not comply with the standard of reasonable safety that persons are entitled to expect of it, and the standard of safety should be determined objectively having regard to all the circumstances. Given this definition of defect, provided that the nuts and bolts are properly made and are reasonably safe for reasonable use, the maker of such components will not be unjustly held liable under the strict liability regime. In relation to the Scottish Law Commission's concern about the difficulty of arranging insurance, it is noted that insurance might be difficult to obtain for novel and high-tech products, such as the Concorde aircraft quoted as an example by the Scottish Law Commission; but the difficulty

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39 Report on Products Liability (1979) at paragraph 91.

40 Report No. 51 *Product Liability* at paragraph 5.23.

41 Miller and Lovell, *Product Liability* (1977) page 359.

hinges more on the novelty and complexity of the product than on strict liability.

7.53 Balancing the different views, we recommend that strict liability should not be confined to manufacturers of finished products only, and that manufacturers of components must also be subject to strict liability.

Persons entitled to sue

7.54 Under the Directive and the Act, any injured person, whether or not he is party to a contract, and whether or not he is a user of the product or a bystander, benefits from the strict liability system.[42] This is widely accepted, and any attempt to distinguish between business and private users would be fraught with difficulties. **Accordingly, we recommend that any injured person, whether or not he is party to a contract, and whether or not he is user of the product or a mere bystander, should be covered under the proposed strict liability regime.**

Defences

7.55 As mentioned in the policy objectives set out in paragraph 7.12 above, we recognize the need to protect the legitimate interests of the business sector and appropriate defences should therefore be allowed. We find that the majority of the defences allowed in the Act are non-contentious and are fair and reasonable. These are :-

(a) The defect is attributable to compliance with statute.[43]

(b) The defendant did not at any time supply the product to another.[44]

(c) The supply of the product by the defendant was otherwise than in the course of business, and otherwise than with a view to profit.[45]

(d) The defect did not exist in the product when the defendant supplied the product to another.[46]

(e) Where the defect in a subsequent product was wholly attributable to the design of the subsequent product, or to compliance by the producer of the component with instructions

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42 See the discussion *supra* at paragraphs 4.8 and 4.31.

43 Section 4(1)(a). It should be noted that compliance with mandatory standards would not constitute a defence.

44 Section 4(1)(b).

45 Section 4(1)(c).

46 Section 4(1)(d).

given by the producer of the subsequent product, the producer of a component part will not be liable.[47]

(f) Where the damage is caused partly by the fault of the claimant, the person liable has a partial defence.[48]

We recommend that these defences should be adopted to protect legitimate business interests.

7.56 One of the responses to our Consultation Paper suggested including a defence of "acceptance of risk", so that if a user of the product is injured by a product with sufficient warnings, the user is taken to have accepted the risks. We are of the view, however, that the proposed definition of "defect" already takes into consideration whether or not sufficient warnings and instructions are given. It is more desirable that warnings are considered in the context of "all other circumstances".

Development risks defence

7.57 It is a difficult question whether a producer should still be liable if 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.[49] The dispute over this development risks defence was the major reason why it took almost ten years to finalize the draft Directive.[50] Eventually a compromise was achieved by making this defence one of the three optional clauses of the Directive. This defence was considered by the English Law Commission [51] and the Pearson Commission [52] and both Commissions advised against its inclusion. The Pearson Commission stated that:-

> *"... to exclude development risks from a regime of strict liability would be to leave a gap in the compensation cover, through which, for example, the victims of another thalidomide disaster might slip."*[53]

7.58 The committee of experts of the Strasbourg Convention 1977[54] also did not favour adopting the defence, and stated that:-

> *"The committee considered that, as insurance made it possible to spread the risk over a large number of products, producers' liability, even for development risks, should not be a serious*

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47 Section 4(1)(f).
48 Section 6(4).
49 Article 7(e) of the Directive.
50 R Lowe & G Woodroffe *Consumer Law and Practice* at page 70.
51 *Liability for Defective Products* (1977 : Cmnd 6831) at paragraph 105.
52 Royal Commission, *Civil Liability and Compensation for Personal Injury* (1978: Cmnd 7054).
53 *Ibid* at Vol. 1 paragraph 1259.
54 Formally named the European Convention on Products Liability in regard to Personal Injury and Death.

obstacle to planning and putting into circulation new and useful products."[55]

7.59 The Australian Law Reform Commission, however, took a different view and recommended[56] the inclusion of a development risks defence. It is mentioned in the report that a significant majority of written responses and submissions favoured the provision of some form of development risks defence. A number of submissions[57] argued that the defence was vital to protect technological and innovative development of industry. If technological and innovative development was not protected, then locally manufactured goods would be less competitive in overseas market, and the community would be deprived of reasonably priced products as insurance would become too expensive to be practicable. Some other submissions[58] dealt with pharmaceutical products and argued that drugs with a high therapeutic value are usually associated with high risk and that the evaluation of the safety and efficacy of a pharmaceutical product would inevitably involve the balancing of risk and benefit.

7.60 Taking into consideration these views, we note that:-

(a) The development risks defence is adopted in all the European Community member states (except Finland and Luxembourg), Japan, People's Republic of China and Australia. Hence adopting the defence would be in line with our policy consideration to harmonise our product liability law with the international standard.

(b) The development risks defence has always been available in negligence-based liability though hidden under the cloak of "reasonable foreseeability".[59]

(c) If it was not possible for anyone to have discovered the defect, manufacturers and suppliers of goods would be in no better position than the claimant to assess the risk and to price the goods according to the level of risk.

We therefore recommend that the development risks defence should be adopted.

7.61 We further recommend that the scope of the defence should be restricted in order to avoid an anomaly. The material time of the development

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55 Explanatory Report to the Strasbourg Convention at paragraph 41.

56 The Australian Law Reform Commission Report No. 51 on *Product Liability* (1989) at paragraphs 4.17 to 4.21.

57 Submissions include Queensland Government Submission 30 January 1989, J. Simpson (Minter Ellison, Solicitors) Submission 30 May 1988, Insurance Council of Australia Ltd Submission 16 December 1988, Chemical Confederation of Australia Submission 2 June 1989, Australia Chamber of Manufacturers Submission 7 June 1989.

58 Proprietary Association of Australia Inc Submission November 1988, Commonwealth Serum Laboratories Commission (Madden Butler Elder & Graham, Solicitors) Submission 29 November 1988.

59 P McNeil, "England" in Campbell (ed) *International Product Liability* 1993 at page 190.

risks defence was at the time when the product was put into circulation. However, there may be scientific knowledge available subsequent to the time of supply which enables the defect to be discovered. The manufacturer should be expected to recall the product, otherwise he may be subject to criminal liability under, for instance, the Consumer Goods Safety Ordinance or other applicable legislation. It would be an anomaly if failure to recall the defective product would lead to criminal liability, whereas civil liability could be completely avoided by pleading the development risks defence.

7.62 One option would be to render the development risks defence unavailable if a defendant failed to take all reasonable steps to recall the products after he had been, or should reasonably have been, aware of the defect. Such an approach, however, would be regarded as a substantial modification of the European model of strict product liability, and would introduce a significant degree of uncertainty into the defence. We therefore recommend adopting a more conservative measure to deal with the anomaly mentioned in the preceding paragraph, and that the development risks defence should cease to run where the manufacturer fails to comply with a statutory recall order. It is true that for some types of products, there may not be any statutory recall provisions. However, this caveat to the development risks defence is intended as a conservative measure to eliminate the anomaly.

7.63 Accordingly, we recommend that the development risks defence should cease to be available to the defendant if he has failed to comply with any statutory recall order.

7.64 One further note on the development risks defence is that there is some discrepancy between the Act and the Directive as to the scope of the defence. In the Act, the relevant provision reads:-

> *"that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control;"*[60]

In the Directive, the relevant provision reads:-

> *"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."*[61]

7.65 The wording of the Act constitutes a subjective test of knowledge judged by reference to the knowledge of the industry concerned; whereas in the Directive, the test is judged by reference to general scientific and technical knowledge.[62] It is easier to prove that no producer within the trade could have discovered the defect than to prove that no one could have

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60 Section 4(1)(e).

61 Article 7(e).

62 M Jones *Medical Negligence* (1996) at page 452.

discovered the defect, given the existing state of scientific and technical knowledge.[63] Therefore, the definition adopted in the Act affords less protection to claimants than the Directive. Since it is stipulated in the Act[64] that Part I of the Act "shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly", and also since it is one of our objectives to adopt an international standard, the definition in the Directive is preferred and **we recommend that the definition in the Directive of the development risks defence should be adopted.**

Compensation

Maximum limit

7.66 The Directive contains three optional provisions, and one of these is a cap on total liability for damage. Article 16(1) of the Directive provides :-

> *"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."*

7.67 According to a report[65] on the application of the Directive ("the Report"), some believe that a minimum level for a cap is illogical and that it would be more sensible for a specific level to be specified, if any level is to be specified at all. Many people would find Article 16(1) conceptually difficult because it provided for an upper limit of total liability of not less than a specified amount. However, Article 16(1) was in fact a cap as it allowed the total amount of compensation payable for all claims arising from the same defect to be limited to a figure; albeit the figure should not be less than 70 million ECU. On the other hand, it can be said that a fixed level is not appropriate given the differing and changing conditions in the member states.

7.68 According to the Report, there are further difficulties as to how the provision would operate:

> *"Plaintiffs whose claims are adjudicated later than others may arbitrarily be denied compensation. Yet it would be quite impractical and pointless to delay awarding or paying compensation to the first successful plaintiffs in order to see whether subsequent claims are made and what level of compensation is awarded".*[66]

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63 *Ibid.*

64 Section 1(1).

65 Christopher Hodges, *Report for the Services of the Commission of the European Communities on the application of Directive 85/374/EEC* May 1994 at paragraph 27.

66 *Ibid* at paragraph 26.

7.69 From the wording of the Directive it is also uncertain whether the cap applies to each party which qualifies as "producer", or to "all producers" in aggregate.

7.70 The 70 million ECU cap on damages has been adopted by three states:- Germany, Portugal and Spain.

7.71 Some responses to our Consultation Paper mentioned the following points in favour of having a cap on compensation:-

- it can avoid difficulties in assessing the amount of insurance coverage and contingent liability reserves
- it can avoid driving companies into liquidation
- admiralty matters can be resolved with caps on compensation
- a manufacturer is likely to be more disposed to pursue safety if he can insure his liability

7.72 The English Law Commission and the Scottish Law Commission ("the Law Commissions") expressed their views on the issue. Whilst the Law Commissions recognised that setting a maximum limit would assist manufacturers to quantify their risks, there would be serious disadvantages to such a course which outweighed the advantage that it would give to the manufacturer. Until all the claims in respect of the product were established and quantified, it would be impossible to know whether the maximum cap would be exceeded. Yet it would be contrary to the public interest to delay satisfying the claims of successful claimants. Further, as strict product liability legislation exists side by side with the law of negligence and contract, fixing a cap on strict liability claims could not enable manufacturers to assess the "total" amount of compensation payable under all applicable law. The Law Commissions also considered the possibility of putting a cap on each individual claim, but concluded that this could not help to reduce insurance premiums unless the individual claim limit was set very low. The Law Commissions concluded that a cap on total damages would be unworkable.

7.73 In addition to the arguments canvassed by the Law Commissions, it would seem preferable for the insured amount to be determined according to relevant factors such as trade practice, business turnover, and the risks involved, rather than an arbitrarily set sum. This is the method adopted for assessing professional liability insurance, for which there is no set maximum limit.

7.74 The absence of any maximum limit would not pose any difficulty to insurers, as it is for the insured party to decide the appropriate insured amount. The Hong Kong Federation of Insurers indicated that persons liable under the proposed new form of liability should not find it difficult to obtain insurance cover. Insurance companies in Hong Kong provide insurance for

export goods to the United States of America where punitive damages are not uncommon. Since compensation likely to be awarded by the courts in Hong Kong would be lower than that in the United States, insurance companies are unlikely to find the new form of liability too risky. The fact that insurers cannot inspect the manufacturing process should not cause difficulty, as the same applies to insurance provided for export goods, where a large proportion of such goods are manufactured outside Hong Kong.

7.75 We consider that a cap on total liability is arbitrary and unworkable, and do not believe that a maximum limit on compensation should be imposed. Provisions should ensure that a claimant cannot recover twice for the same injury or damage by, for instance, claiming under contract law and then under the proposed new form of liability.

Minimum limit

7.76 With regard to the issue of a lower limit, the Act[67] stipulates that no damages shall be awarded for damage to property if the amount of the award does not exceed £275. This is pursuant to the lower threshold requirement of 500 ECU under the Directive.

7.77 We are of the view that:-

(a) If the intention of imposing a minimum threshold is to avoid frivolous claims, it should be noted that frivolous claims could be raised whether or not a minimum threshold is imposed.

(b) Given the diverse nature of possible claims, it would be difficult to set a particular minimum threshold which is appropriate for all types of damage to property claims, and any such threshold would be arbitrary.

(c) The equivalent amount of £275 may constitute a substantial sum of money to an average family in Hong Kong.

We recommend departing from the European practice in this respect, and a minimum threshold should not be adopted for damage to property claims.

Damage to the defective product

7.78 As compensation under the proposed form of liability is based on tort compensation, damage to the defective product itself is not recoverable. The duty of care under tort liability is a duty to avoid inflicting injury to another's life or property. Damage to the product itself and any consequential loss of profit are classified as economic loss, and therefore

[67] Section 5(4).

irrecoverable, save in special circumstances. One of the responses to our Consultation Paper suggested that consumers would be better protected if damage to the defective product itself is included in the heads of compensation, as sometimes the only expensive item damaged is the defective product itself. We believe that such added protection to users can be provided without significant costs to manufacturers and importers. **We therefore recommend that the heads of compensation under the proposed new form of liability should be based on those for tortious liability. Damage to the defective product itself should, however, be recoverable under the proposed form of liability.**

Disclaimer

7.79 Although a claimant and a defendant manufacturer under the proposed legislation may not have a direct contractual nexus to enable any disclaimer clause to become effective, we agree that disclaimer clauses should not be allowed in order to ensure the effects of the proposed legislation would not be watered down. **We recommend that disclaimer clauses should not be allowed to limit or avoid any liability under the proposed legislation.**

Limitation period and cut-off period

7.80 According to the Act, a claimant is required to observe a limitation period and an overriding cut-off period. First, legal proceedings should be commenced within three years from the date on which the cause of action accrued, or "the date of knowledge" of the claimant, whichever is later.[68] The "date of knowledge" is defined in section 14(1A) of the Limitation Act 1980 as the date on which a person first had knowledge of certain material facts.[69] If the claimant died before the three-year period, the limitation period would be three years from the date of death, or the date of the personal representative's knowledge, whichever is later.[70] The three-year limitation period can be extended in appropriate cases. If a claimant is under a disability on the date when any the right of action accrued, legal proceedings may be brought at any time before the expiration of three years from the date when the claimant ceased to be under a disability or died, whichever first occurred.[71] The three-year limitation period can also be extended at the court's discretion if the action involves personal injuries or death claims, and if it is equitable to grant the extension.[72] In exercising the

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68 Section 11A(4) of the Limitation Act 1980.

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

70 Section 11A(5) of the Limitation Act 1980.

71 Section 28(7) of the Limitation Act 1980.

72 Section 33 of the Limitation Act 1980.

discretion, the court shall have regard to all the circumstances of the case,[73] several specific factors are also set out.[74]

7.81 We recommend that the three-year limitation period should be adopted, and that the special provisions relating to claimants under disability and the court's discretion to proceed outside the limitation period for personal injury cases should apply to the three-year limitation period.

7.82 In addition to the three-year limitation period, both the Directive and the Act have imposed a ten-year cut-off period which overrides the three-year limitation period. Unlike limitation periods which normally run from the date of accrual of action or the date of knowledge of certain material facts, cut-off periods usually run from the date of supply. According to section 11A(3) of the Limitation Act 1980:-

> *"An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time[75] ... and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years."*

7.83 Unlike the three-year limitation period, the ten-year cut-off period cannot be extended by the special provisions relating to disability or the court's discretion to proceed for personal injury cases.

7.84 Under the Act, the ten year limitation will start running for each member in the chain of supply at different times.[76] The relevant time, as against a party bearing principal liability, is the time when he supplied the product to another; and as against a person bearing subsidiary liability, is the time when the product was last supplied by a person bearing principal liability. For example, suppose a car was manufactured in Japan in March 1988, supplied to the United Kingdom importer on 1 June 1988, sold by the importer to the distributor on 1 September 1988, by the distributor to the retailer on 1 December 1988, and by the retailer to the consumer on 1 March

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73 See *Nash v Eli Lilly & Co.* [1993] 1 WLR 782.

74 Section 33(3) of the Limitation Act 1980:- (a) the length of, and the reasons for, the delay on the part of the plaintiff; (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, section 11A or (as the case may be) by section 12; (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

75 "The relevant time" is defined in section 4(2) of the Act.

76 Paul McNeil, "England" in Campbell (ed) *International Product Liability* at page 217. See also Consumer Protection Act 1987, schedule 1.

1989. In those circumstances, the ten year period will start to run for the manufacturer on 1 June 1988, and for the importer and retailer on 1 September 1988.

7.85 The operation of the ten-year cut-off period aroused concern during our deliberations. Clark rightly pointed out that:-

> *"The 10-year „cut-off" period raises wider and more controversial issues. Given the relative life spans of products in general, 10 years appears to be a reasonable window of exposure to potential liability. But any cut-off period has an element of arbitrariness. Different types of product have many different lengths of expected non-dangerous life; there are many products which persons generally could not reasonably expect to last for 10 years, but equally there are others, such as aircraft, for which such expectations are reasonable. Also, it would appear to be anomalous that in a regime of strict product liability, liability does not subsist for as long as the product is defective. Further, the absence of a similar cut off for retailers in respect of their liabilities under the Sale of Goods Act 1979 has not proved to be overly burdensome. It may also be thought iniquitous that an injured person could be barred by the cut-off period even before the three-year limitation period has started to run. There are certainly some product-caused injuries (for example, asbestos-related diseases, or the cancers caused by diethylstilbestrol) which do not manifest themselves for a considerable period after use of the product. As Lord Denning said in the context of the pre-existing rules on limitation:*
>
> > *„No one supposes that Parliament intended to bar a man by a time-limit before he is injured at all ... a man may lose his right of action before he has got it. Which is absurd."*
>
> *It is a further difficulty that different cut-off periods can be applied within the same product, as where various components were supplied at different times, and the product itself supplied later again. Take, for example, a car with a „defective" component part. Assume that the component was supplied just over 10 years prior to injury, and that the car was supplied just under 10 years from that date. An action against the producer of the component is time-barred, but action against the car manufacturer is not."*[77]

7.86 The Scottish Law Commission also did not favour a ten-year cut-off period. A cut-off period of universal application was arbitrary because no single period would be appropriate for all kinds of goods. The Scottish Law Commission appreciated that insurance premiums payable by the

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[77] Alistair M. Clark, *Product Liability*, (1989) at page 206.

producers could be higher if there was no cut-off period, but considered that depriving an injured person of his rights and remedies was unjust in some circumstances. For instance, if an eleven-year-old aircraft crashed as a result of a design defect, the manufacturer would not be caught under strict liability. A cut-off period would be unfair to an injured person who would not in general know the date on which the product was supplied by the defendant in question. Furthermore, given that the ten year period would start to run on different dates for different parties in the chain of distribution, it would be possible that a claimant might commence a claim within the time limits against parties bearing subsidiary liability, only to find out, after incurring legal costs and expenses, that the responsibility of the importer or manufacturer is extinguished by the ten year period.

7.87 Debusschere and Hom [78] have also commented on cut-off periods (often referred to as statutes of repose in America) in the American context. They point out that some American jurisdictions have adopted statutes of repose barring claims that are not brought within a specific period from the time when a product was placed on the market, and that statutes of repose in American jurisdictions often specify a 15 or 20 year period. In other states, however, the courts have ruled that statutes of repose are unconstitutional in that they violate due process and equal protection before the law. The theory behind these decisions is that it is inequitable to bar a plaintiff's claim prior to the time the plaintiff was actually injured.

7.88 We are also aware that tortious claims are not subject to any overriding cut-off period, and it could be argued that it would be undesirable for the proposed liability to be even more restrictive than the existing tortious liability.

7.89 In view of the criticisms of the ten-year cut-off period, and cut-off periods in general, we have considered whether other options should be adopted instead. Together with the option to follow the Directive and the Act, there are several possible options:-

(a) An absolute ten-year cut-off period which overrides the three-year limitation period.

(b) A ten-year cut-off period which can be extended at the court's discretion if the three-year limitation period has not yet expired.

(c) Dispense with the ten-year cut-off period altogether so that the three-year limitation period would operate on its own.

(d) Retain the ten-year cut-off period but exclude its operation in relation to certain specific products, such as pharmaceutical products.

[78] Campbell (ed), *International Product Liability*, (1993) at page 596.

(e) Retain the ten-year cut-off period but exclude its operation for personal injury claims.

(f) Substitute a longer period for the ten-year cut-off period.

7.90 Among the various options in the preceding paragraph, we have rejected options (d) and (e) because they add further elements of "arbitrariness" to the ten-year cut-off period which is itself already an arbitrary rule. They would further complicate the issue, but could not eliminate the hardship caused to claimants in individual cases. Option (f) is rejected because it differs little from option (a). Option (f) does not enjoy the most important and fundamental advantage of option (a), which is harmonization with the international standard.

7.91 Option (b), if adopted, would enable the ten-year cut-off period to be extended by the court in appropriate cases, using the existing criteria applicable to the extension of the three-year limitation period. Apart from the harmonization issue, a major drawback of option (b) is that it would lead to more interlocutory proceedings. The logic of strict liability is to make the claim procedure and the legal position as simple as possible for the claimant. It would not, therefore, be logical to incorporate into a strict liability scheme a discretion to extend. We also recognise that a cut-off period is inevitably fixed arbitrarily to strike a compromise between individual justice and other interests, such as harmonization, controlling the costs of insurance, and maintaining competitiveness. On the other hand, the court's discretion to extend is intended primarily to enable justice to be served in individual cases by balancing the prejudice to the plaintiff and that to the defendant. A cut-off period and the court's discretion to extend therefore operate at different levels and should not be linked together. In particular, in determining the proper balance in a case, the court is not in a position to determine fairly how much weight is to be given to those other interests taken into account by the legislature originally in fixing the cut-off period.

7.92 Option (c), if adopted, could avoid the drawbacks of having a ten-year cut-off period mentioned earlier in this part, and would not lead to additional interlocutory proceedings. In deciding whether it is more appropriate to adopt option (a) or option (c), we have also considered arguments for retaining the cut-off period.

7.93 The English Law Commission believed that a cut-off period was needed in fairness to producers on whom the burden of strict liability must otherwise rest indefinitely. A cut-off period could assist producers in assessing risk and amortisation, thus keeping insurance premiums down. The savings would be reflected in the price, which would be of general benefit to the public.

7.94 A report[79] of the Directive pointed out that a cut-off period would be required by the business sector and their insurers, not only for limitation of

[79] Christopher Hodges, *Op cit.*

risks, but also to limit the length of time for which records must be kept. The report further pointed out that a cut-off period would be a rational and sensible solution, although the ten year limit might not be long enough for some damage to become apparent, such as pharmaceuticals causing the diethylstilbestrol (DES) phenomenon (cancer occurring in women after reaching puberty allegedly caused by a product taken by their mothers in pregnancy).

7.95 With some hesitation, we have concluded that the ten-year cut-off period should be adopted. As mentioned earlier, a cut-off period is inevitably fixed arbitrarily to strike a compromise between the justice of the individual case and wider interests, such as harmonization, controlling insurance costs, and maintaining competitiveness. The fact that almost all countries which have adopted the defect approach of strict product liability have adopted the ten-year cut-off period has weighed heavily in our decision. If Hong Kong does not adopt a ten-year cut-off period, its manufacturing and trading interests would be subjected to a more onerous liability than their counterparts in other countries. Insurance costs and compensation awards would increase, and affect trade competitiveness. We also note that the cut-off period has been in operation in other countries for some time, and there is no evidence so far of adverse experiences elsewhere. Even if a claimant's case is barred by the ten-year cut-off period, he is not left without redress; he may still have a tortious claim which is not subject to any cut-off period. We have adopted a conservative approach in following the international standard strictly on this aspect, but believe that the question of a cut-off period should be reviewed by the administration in the future. **We therefore recommend that a ten-year cut-off period, overriding the three-year limitation period, should be adopted.**

Applicability

7.96 Subject to the proviso below, it is envisaged that the proposed legislation would not contain provisions expressly limiting the application of the proposed legislation to products supplied to Hong Kong. We intend to allow the rules on conflict of laws to deal with the issue. Take the example of a product manufactured in Hong Kong, exported to California and which injures a plaintiff residing in California. Although it is more likely that a plaintiff in a product liability case would choose to sue the Californian retailer or supplier under Californian law, it is possible, subject to the rules on conflict of laws and the appropriate forum, for the plaintiff to sue the Hong Kong manufacturer applying the proposed legislation. We believe that Hong Kong manufacturers and exporters have ample experience of trading with economically advanced countries whose product liability laws may well be more onerous than the proposed legislation. In fact, it may send the wrong message to other countries if we expressly restrict our manufacturers' and suppliers' liability to products supplied to Hong Kong.

7.97 We believe the position relating to *entrepot* trade should, however, be distinguished. Taking into consideration the volume of Hong

Kong's *entrepot* trade the question arises as to whether an importer should be made liable for goods imported into Hong Kong solely for the purpose of re-export to other countries. According to the definition of importer as set out in the Act, an importer is one who "imported into [Hong Kong] from any place outside [Hong Kong] in order, in the course of any business of his, to supply it to another". If this definition is adopted without modification, and bearing in mind that importers will bear principal liability under the proposed legislation, a Hong Kong importer who imported products from Thailand or the mainland for immediate re-export to the United States, can be held principally liable to a claimant in the United States. Hong Kong importers would then effectively become guarantors of products manufactured outside Hong Kong for foreign nationals. Such an arrangement would also encourage forum-shopping, enabling claimants in jurisdictions without strict product liability, or whose damages awards are generally less favourable, to bring their proceedings in Hong Kong. We consider it desirable that importers of goods imported into Hong Kong solely for the purpose of re-export to other countries should not be liable under the proposed legislation. Subject to the views of the draftsman, this can be achieved by adding the under-lined words to the definition of importer:-

> "anybody who imported into Hong Kong from any place outside Hong Kong in order, in the course of any business of his, to supply it to another <u>in Hong Kong</u>."

Conversely, the proposed legislation may provide a defence to an importer if he reasonably believed that the product would not be used or consumed in Hong Kong. **We recommend the application of the proposed legislation should not be limited to products supplied to Hong Kong, save that importers should not be liable for products which are imported into Hong Kong solely for the purpose of re-export.**

Chapter 8

Summary of Recommendations

8.1 The law governing compensation for injury and damage caused by defective or unsafe goods should be expanded beyond the existing spheres of contract law and negligence law. (Paragraphs 7.2 to 7.11)

8.2 The setting up of a central compensation fund is not recommended. (Paragraph 7.13)

8.3 The establishment of a compulsory insurance scheme is not recommended. (Paragraph 7.14)

8.4 "The way goods acted" approach, which involves shifting the onus of proof to the manufacturer to disprove fault, is not recommended. (Paragraph 7.15)

8.5 The proposed new form of liability should be based on the defect approach, which means that a product is regarded as defective if it does not meet the standard of safety that persons generally are entitled to expect. (Paragraph 7.16)

8.6 The standard of safety required should be judged by reference to the standard of the general public instead of the claimant. The definition of defect in Part I of the Consumer Protection Act 1987 should be adopted. (Paragraphs 7.17 - 7.18)

8.7 The standard of safety should not be judged by reference to certain sectors of the public which are familiar with the use and operation of the product in question. (Paragraphs 7.19 - 7.22)

8.8 The standard of safety required should be judged at the time the product was put into circulation. (Paragraph 7.23)

8.9 Persons liable for the defective or unsafe products should include the manufacturer of the finished product and any component part, the producer of natural products, the own-brander and the importer. Wholesalers, distributors and retailers should be liable if they fail to identify their supplier within reasonable time. The above categories of liable persons should be jointly and severally liable under the proposed new form of liability, and liability of these persons, *inter se*, under the existing general law should not be affected. (Paragraphs 7.24 - 7.34)

8.10 The proposed new form of liability should apply to all the products covered by Part I of the Consumer Protection Act 1987. Standardized software which is integrated into the computer to run the hardware and without which the computer cannot function should be treated as part of the computer, and should be included in the definition of product. Unprocessed natural products and game, and component parts should also be covered. (Paragraphs 7.35 - 7.53)

8.11 Any injured person, whether or not he is party to a contract, and whether or not he is a user of the product or a mere bystander, should be covered by the proposed new form of liability. (Paragraph 7.54)

8.12 Specific defences available under Part I of the Consumer Protection Act 1987 should be allowed to protect legitimate business interests. (Paragraph 7.55)

8.13 The producer should have a defence if the state of scientific and technical knowledge at the time of supply did not enable the defect to be discovered. This defence should cease to be available if the producer failed to comply with any statutory recall order. The definition of development risks defence in the Directive should be adopted. (Paragraphs 7.57 to 7.65)

8.14 Compensation under the proposed new form of liability should not be subject to any maximum or minimum limits, but provisions should ensure that a claimant cannot recover twice for the same injury or damage. (Paragraphs 7.66 to 7.77)

8.15 The heads of compensation under the proposed form of liability should be based on those for tortious liability, and should also include damage to the defective product itself. (Paragraph 7.78)

8.16 Disclaimer clauses should not be allowed to limit or avoid any liability under the proposed legislation. (Paragraph 7.79)

8.17 The three-year limitation period should be adopted and that the special provisions relating to claimants under disability and the court's discretion to proceed outside the limitation period for personal injury cases should apply to the three-year limitation period. (Paragraphs 7.80 - 7.81)

8.18 The ten-year cut-off period, overriding the three-year limitation period, should be adopted. (Paragraphs 7.82 - 7.95)

8.19 The proposed legislation should not contain provisions expressly limiting its application to products supplied in Hong Kong only, save that importers should not be liable for products which are imported to Hong Kong solely for the purpose of re-export. (Paragraphs 7.96 - 7.97)