THE LAW REFORM COMMISSION OF HONG KONG

SUB-COMMITTEE

ON

CIVIL LIABILITY FOR UNSAFE PRODUCTS

CONSULTATION PAPER

JANUARY 1997

This Consultation Paper has been prepared by the Product Liability sub-committee of the Law Reform Commission. It does not represent the final views of either the sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The sub-committee would be grateful for comments on this Consultation Paper by 30th April 1997. All correspondence should be addressed to:

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It may be helpful for the Commission and the sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

The Law Reform Commission of Hong Kong

Product Liability sub-committee

Consultation Paper

on

Civil Liability for Unsafe Products

CONTENTS

Introduction

Product Liability

1. The topic, in short, can be referred to as "product liability".[1] The term, which has been familiar in America since the 1970' s,[2] is now becoming familiar to lawyers around the world. The topic has generated numerous and 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 the 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 complex product. The principle

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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.

known as caveat emptor - meaning ' let the buyer beware' - which may have been appropriate for traditional village market transactions, may no longer be appropriate for modern consumer transactions.[6]

5. Apart from changing social attitudes and production methods, the Thalidomide tragedy had also spurred an upsurge of interest in product liability legislation. The Thalidomide case involved a tranquilliser which could calm the nerves but would produce serious deformities in the foetus when taken by pregnant women. One of the victims brought an action[7] against the British company, Distillers Co. (Biochemicals), Ltd., 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 not a coincidence that important international conventions with far-reaching significance were subsequently concluded. These international conventions had not only caused the enactment of corresponding legislation by member states, they had also prompted or influenced the product liability legislation in non-member states. In our present study, we shall review 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 *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 (Chairperson)	Queen's Counsel
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 MBE	Managing Director Forward Winsome Industries Ltd.
Ms Connie Lau Yin-hing	Chief Research & Testing Officer Consumer Council
Dr Sarah Liao Sau-tung MBE JP	Managing Director EHS Consultants Ltd.
Dr John Lo Siew-kiong OBE 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 Branch
Ms Cathy Wan	Secretary of the sub-committee

9. The sub-committee considered the reference over the course of eight meetings before this Consultation Paper, and will hold further meetings to discuss and evaluate comments on this Consultation Paper.

Chapter 1

Product Liability in Hong Kong

1.1 Despite the efforts of the Government, the Consumer Council and other bodies in promoting the importance of product safety, incidents of injury and damage caused by unsafe or defective products have been incessant. Some of these incidents had even caused death. The number of cases concerning 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 injuries and deaths. The following data is updated as of 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
	Four incidents of explosions causing injuries

Pressure cooker	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 trapped in air inlet and got burnt; 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 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 collaspe and cause injury
Steam iron	May cause electrocution
Rice cooker	May cause fire

Heating rod in closet	May cause fire and electrocution

1.3 The above figures are likely to be just a fraction of the actual number of incidents of injury and damage caused or partly caused by unsafe or defective products, because not every such case would be reported to the Consumer Council. It is difficult to ascertain the actual number of injuries and deaths caused by unsafe or defective products due to the fact that 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). 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 the 1.7 million cases of injuries in Hong Kong were caused by unsafe or defective products, and taking account of the fact that some of the injury cases would be 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, such that instead of making a claim, people would merely stop using the product. It is believed by some, however, that the reserved attitude is gradually eroded due to 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]

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

2 *Ibid* at para. 1204.

3 *Ibid* at para. 1020.

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

1.5 We shall in the next two chapters review 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.

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, is comprised of both case law and legislation. Although this Consultation Paper 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 (No. 84 of 1994) 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 and he 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)
- which 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), and the subsidiary legislation
- which 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) and the subsidiary legislation
- which controls the sale and possession of certain poisons and pharmaceutical products.

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

(e) Electricity Ordinance (Cap. 406) and the subsidiary legislation
- which provides safety requirements for electrical products.

(f) Dangerous Goods Ordinance (Cap. 295) and the subsidiary legislation
- which 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.

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

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

(h) Nuclear Material (Liability for Carriage) Ordinance (No. 45 of 1995)
- which 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 Nuclear Material (Liability for Carriage) Ordinance (No. 45 of 1995)), 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 with only 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

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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.

to all the circumstances. Failure to comply with the safety standards will attract 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.

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 the person, property and his 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 new one. 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*

[10] (1854) 9 Exch. 341.

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]

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), the Sale of Goods (Amendment) Ordinance (No. 85 of 1994) 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, 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

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11 *Ibid* at page 354.

12 [1973] 1 Q.B. 233.

13 [1978] R.T.R. 474.

14 *Hayes v Dodd* [1990] 2 A.E.R. 815.

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:

(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*:[15]

> "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."[16]

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, the cost of avoiding harm, etc.

(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 acts or events.

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.*:[17]

> *"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*

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15 [1990] 2 WLR 605.

16 *Ibid* at 617-618.

17 (1865)3 H & C 596.

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 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 buildings,[18] a motor vehicle mounting or overhanging the pavement[19] and accidents resulting from defective machines or apparatus.[20] 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.[21] 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.[22] 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.[23] 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.*,[24] 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.*,[25] 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

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

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

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

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

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

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

24 [1983] 1 AC 520.

25 [1985] 3 All ER 705.

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 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."*[26]

2.21 The decision of the House of Lords in *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co. Ltd.*[27] 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 Another restriction is that claims for damage to property are allowed only for damage to property other than the negligently manufactured item. Hence, 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'.[28]

Damage already suffered

2.23 A further point to note in relation to negligence claims is that the loss and damage must be already suffered. This requirement can be illustrated by the recent Hong Kong case of *Sunface International Ltd. v Meco Engineering Ltd.*[29] The plaintiffs were

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26 *Ibid* at page 706.

27 [1985] AC 210.

28 [1990] 3 WLR 414. (This is *obiter* in *Murphy v Brentwood District Council*.)

29 [1990] 2 HKLR 193.

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 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*[30] 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.*[31] 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 opined 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,[32] only one action can be brought and it must be brought in the name of the executor or administrator of the deceased.[33] The executor or administrator is required to deliver to the defendant full particulars of all persons on whose behalf the action is brought.[34] 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. Apart from bereavement damages, dependants may claim compensation for pecuniary loss suffered by the dependants as a result of the death,[35] 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.[36] The court would look at any established savings pattern, and if there is none, would consider factors like 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.[37]

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30 [1978] AC 728.

31 [1989] AC 177.

32 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.

33 Section 5(1) and (3).

34 Section 5(4).

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

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

37 *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 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.

[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 in 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 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 are mainly made up of case law and courts are bound to follow previous judicial decisions, it seems that appropriate changes are unlikely to occur swiftly from judicial decisions.

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 laws have 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 its 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 in what direction should changes 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;

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

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2 Ontario Law Reform Commission (1979) Chapter 3.

3.7 With regard to (a), the position of consumers bringing contractual claims has been greatly improved by recent legislation, and the major remaining drawback is the restriction due to the privity of contract in that only purchasers, and not necessarily users, are protected. The idea that the user of a defective product should be given contractual remedies against sellers with whom he did not have a contractual nexus is too drastic and uncalled for. A less radical solution is to improve the law by other available means. The contract/tort boundary should be preserved as it is logical to keep 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 (a) is that it would be placing the risk on the wrong person; the right of redress should be directed at the producer instead of the retailer. Hence (a) has received little support from law reform bodies in other jurisdictions which have examined the issue of product liability.

3.8 With regard to (b), changing the general requirement to prove failure to take reasonable care in negligence claims 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. Hence (b) would not be appropriate as it would impinge on areas other than product liability.

3.9 With regard to (c), it seems that (c) is worthy of further consideration and in fact, the law reform bodies in a number of other jurisdictions have favoured reform in this direction. As we shall see in the next chapters, (c) is the option preferred 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 is 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 between 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 covers personal injury, death and damage to personal property.[5] Both documents provided for members' adoption,

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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.

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

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 is implemented by 14 member states,[9] as of February 1995.[10] Hence, the Strasbourg Convention is effectively 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, 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, and 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 that a

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6 Austria, Belgium, France and Luxembourg. See Royal Commission on 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 Commmission, 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.

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 persons 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 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

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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.

particular product was put into circulation unless legal proceedings have in the meantime been instituted against the producer by the injured person.[33]

Differences between the Strasbourg Convention and the Product Liability Directive

4.14 The provisions of the Strasbourg Convention are in many aspects similar to those of the Product Liability Directive. There are, however, three substantive differences[34] 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.

4.15 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

4.16 According to the Product Liability Directive,[35] member states were obligated to enact conforming national laws within three years, that is, by July 1988. Some of the member states took much longer to pass the required legislation. As of February 1995, the following member states had enacted their own strict product liability laws:- United Kingdom, Greece, Italy, Luxembourg, Denmark, Portugal, Germany, Netherlands, Belgium, Ireland, Spain, Austria, Finland, and Sweden.[36] 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

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33 Article 11.

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

35 Article 19.

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

in the number of product liability claims, nor has it caused an increase in the level of insurance premiums.[37] 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.[38]

4.17 There has been only a handful of cases based on the 1985 Product Liability Directive and as of December 1995, and no national court had referred any question of interpretation to the European Court.[39]

4.18 In another recent study[40] ("the Study") on the Directive's implementation, it was found that responses from the insurance sector were almost unanimous in reporting that there have been no significant increase in the number or pattern of claims or premium costs, whether since 1985 or the introduction of the 1985 Directive in the different countries.[41] 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 ...".[42] Another response was of the view that the 1985 Directive had brought about a concentration on improving safety standards complemented by the encouragement given by insurers for industry to adopt risk analysis and reduction techniques in the design, manufacture and marketing of products, which resulted in safer products being put on the market. This view, however, is a general impression for which quantifiable evidence is not available.[43]

4.19 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, insurance premium is affected by the type of product, the turnover of the manufacturer, and the risk management system of the manufacturer. It was mentioned[44] that a very large food manufacturer whose products are considered to be a 'light risk' might pay a rate as low as 0.002% of turnover, whereas a pharmaceutical manufacturer with a much lower turnover but perceived '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.[45]

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

38 *Idem.*

39 *Idem.*

40 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.

41 *Ibid* at paragraph 39.

42 *Idem.*

43 *Idem.*

44 *Idem* at paragraph 50.

45 *Idem* at paragraph 51.

4.20 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.[46]

4.21 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.[47]

4.22 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.[48]

Implementation of Optional Clauses

4.23 The Product Liability Directive contains three optional provisions:-

(i) extension to unprocessed primary agricultural products and game;[49]

(ii) exclusion of the "development risks" defence;[50] 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

(iii) a cap on total liability of not less than 70 million ECU.[51]

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46 *Idem* at paragraph 97.
47 *Idem* at paragraph 106.
48 *Idem* at paragraph 107.
49 Article 15(1)(a).
50 Article 15(1)(b).
51 Article 16.

4.24 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.[52]

4.25 Development risks defence - is allowed in all member states except Finland and Luxembourg,[53] and it is allowed in Germany only in respect of medicinal products.

4.26 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.[54]

United Kingdom

4.27 Proposals to alter manufacturer' s liability from negligence to strict liability were made by the English and Scottish Law Commissions[55] and the Pearson Commission[56] 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.

4.28 Part I of the Consumer Protection Act, 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 Directive and came into force on 1 March 1988. Part II of the Consumer Protection Act deals with criminal liability of ' suppliers' of unsafe consumer goods and is similar to the Consumer Goods Safety Ordinance 1994 in Hong Kong.

4.29 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 a case *Daniels and Daniels v R White & Sons Ltd*,[57] which was decided before the Consumer Protection Act. 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 consumer had failed to prove negligence. If this same case had

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52 Commission of the European Communities, *Ibid*, at Annex.

53 *Idem.*

54 *Idem.*

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

56 *The Royal Commission on Civil Liability and Compensation for Personal Injury* (1978 : Cmnd 7054).

57 [1938] 4 All ER 258.

been decided after the Consumer Protection Act came into effect, the consumer should be able to recover damages without difficulty.

4.30 Part I of the Consumer Protection Act is similar to the Product Liability Directive 1985 in many other aspects including onus of proof, range of persons liable, range of claimants, defences.

4.31 Products - The range of products covered is based on the 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."*[58]

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.[59]

4.32 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 Act. Government sources explained that ' process' involves something which changes the characteristics of the product, and that ' industrial' involves something done on large and continuing scale with the use of machinery.[60] 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.[61] Although the rule excluding reference to Parliamentary material in construing legislation is relaxed by the House of Lords decision of *Pepper v* Hart,[62] the absence of a statutory definition leads to difficulties in ascertaining what constitutes ' industrial process'.

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58 Section 1(2).

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

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

61 *Idem.*

62 [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).

4.33 Defences - Once the claimant can prove the defect and the damage, it is up to the defendant to establish one of the defences. Liability, however, cannot be "limited or excluded by any contract term, by any notice or by any other provision".[63] The defences are:-

(a) that the defect is attributable to compliance with any statutory requirement or European Community obligation;[64]

(b) that the defendant did not at any time supply the product to another;[65]

(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;[66]

(d) that the defect did not exist when the defendant supplied it to another;[67]

(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;[68]

(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;[69]

(g) that it is a partial defence if the damage is caused partly by the fault of the claimant.[70]

The wording of two of the above defences differ slightly with that of the European Community Product Liability Directive. In relation to sub-paragraph (e) which only requires the defendant to prove that no producer within the trade could have discovered the defect, the European Community Product Liability Directive requires the defendant to prove that no one could have discovered the defect.[71] 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.

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

4.34 Limitation period - A claimant has to comply with the three-year and ten-year rule under the Product Liability Directive. It should be noted that the court has a discretion to extend the three-year period in case of personal injuries. If the above time limits cannot be met, the claimant may still have a claim in negligence.

4.35 Compensation for damage - Pursuant to the Product Liability Directive, compensation is recoverable in relation to death and personal injury.[72] Since liability under Part I of the Act is liability in tort,[73] the claimant will be compensated for pain and suffering, loss of amenity, future expense, loss of future earnings and earning capacity. Quantifiable monetary losses including medical expenses and loss of earnings up to judgement are also recoverable. Economic loss, however, cannot be recovered.

4.36 Property Damage - Various limits[74] are imposed on claims for damage to property, such that 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.

4.37 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 House of Lords case *Rookes v Barnard*[75]:-

(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.*,[76] the Court of Appeal had further clarified that negligence claimants would not be awarded punitive damages.[77]

People's Republic of China

4.38 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

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72 Section 5(1).
73 Section 6(7).
74 Section 5(2), 5(3) and 5(4).
75 [1964] AC 1129.
76 [1993] QB 507.
77 Clerk & Lindsell, *Torts*, 17th ed 1995 at 9-18.

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.

4.39 The PQL protects both consumers and users of products against sub-standard or unsafe products, and its legislative intention is to strengthen the state's supervision and control over product quality with a view to improve product quality.[78] 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.[79] It is the manufacturer's obligation to ensure that the manufactured product should not pose any unreasonable risk of injury or damage to property.[80] The seller's obligation would be to check the standard certificates (if applicable) and to maintain the quality of the products.[81]

4.40 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.[82]

4.41 PQL also stipulates that where a defect in 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.[83]

4.42 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.[84] 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.[85]

4.43 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

78 Explanatory note to the draft law dated 30 October 1992.
79 Article 8.
80 Article 14.
81 Articles 21 and 22.
82 Article 34.
83 Article 29.
84 Article 30.
85 Article 31.

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.[86]

4.44 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 unsafe goods, the CRPL protects only consumers against both products and services.[87] Chapter 2 of the CRPL deals with the rights of the 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.[88] It is specifically provided that a seller shall bear civil liability for any defects in the products.[89] For personal injury and damage to property caused by defective products, the consumer as well as other injured person, have the right to claim compensation from either the seller or the manufacturer.[90] Compensation includes medical expenses, loss of income, damages for permanent handicap, living allowance of the injured and their dependents. Serious breach of the law may constitute criminal offence.[91]

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

Japan

4.46 Japan enacted its Product Liability Law of 1st July 1994[92] which came into force one year after its promulgation.[93] 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,[94] and consequently, Japan also has tort liability for negligence.

4.47 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

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86 Article 33.
87 Article 2.
88 Article 7.
89 Article 40.
90 Article 35.
91 Article 41.
92 OEDC, *Product Liability Rules in OECD Countries*, 1995 at page 47.
93 *Ibid* at page 49.
94 OEDC, *Ibid,* at page 17.

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.[95]

4.48 Persons Liable[96] - These include:-

(a) the maker of manufactured products;

(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.

4.49 Products - The word ' product' is defined to mean movable property, which is manufactured or processed.[97] 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 one of the defences relates to component parts, products should by implication include component parts.

4.50 Claimants - Like the Product Liability Directive, the legislation does not specify the range of claimants. Since it is stipulated[98] that the manufacturer shall be liable for damages when he injured 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, one can conclude that any injured person, whether he is a consumer, user or a mere bystander can make a claim under the legislation.

4.51 Defences - Only two defences[99] 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

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95 Article 2(2).
96 Article 2(3)
97 Article 2(1).
98 Article 3.
99 Article 4.

(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.

4.52 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.

Australia

4.53 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.[100] Part VA of the Trade Practices Act 1974 is modelled on the European Community Product Liability Directive 1985, and it 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.[101]

4.54 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.[102]

(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

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100 D Everett, *Bond Law Review*, December 1994, at page 112.

101 E Beerworth "Australia", Campbell (ed) *International Product Liability* at page 21.

102 *Ibid* at page 29.

the time products were supplied was not such as to enable the defect to be discovered.[103]

(d) The three-year and ten-year limitation periods[104] 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.[105]

[103] Section 75AK(1)(c).
[104] Section 75AO.
[105] 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 of 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 coexist 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, which 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 getting 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 product liability may encounter additional

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

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 it believed that the practical difficulty was effective enforcement. 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 have 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 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

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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.

what the claimant actually knew, and is a subjective 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, by merely proving 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 received rigorous opposition. The greatest contention was in relation to 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 also mentioned 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 such state law has been devised substantially by 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 rules. At roughly the same time as the English 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 undoubtedly a more logical and appropriate way of achieving the same goal and 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 which was a non-binding but highly influential attempt to distil common-law principles as operated by the courts at that time.[6] 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 were ready to expand the Section 402A rule beyond its plain wording and the apparent contemplation of its drafters. The rule was eventually applied to even lessors of products such as self-drive vehicles,[7] as well as claims for pure economic loss.[8] 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 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*

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

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

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

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.'[9]

6.6 Public concern over the 'products liability insurance crisis' and the uncontrolled growth of the scope of the 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[10] was issued in 1978. Eventually, the Model Uniform Product Liability Act 1979[11] 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 Another comprehensive study on the product liability area was conducted in 1988 by the Conference Board, a US-based business information service.[12] 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 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.*"[13]

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

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

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

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

13 *Idem.*

6.8 Calls for product liability reforms were fuelled by the publicity of the amount of money set aside by manufacturers to meet the 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.[14] It was reported[15] that in 1985, the cost of settling liability claims both in and out of court 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 adoption of the strict product liability rule when the rule had attracted considerable criticisms in the United States,[16] 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 did not cause the problems experienced in the United States. Hence it should be questioned whether it was the strict liability basis or other factors which had caused the problems.

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.[17] 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 there has been great judicial restraint in controlling jury awards. The courts will reduce a jury award only if it is so excessive as to be 'unconscionable' or 'shocking'.[18] Since juries generally have no technical training or prior litigation experience, they are subject to influence by attorneys in ways that judges are not.[19]

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

15 *The Economist*, 27 March 1986.

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

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

18 *Ibid* at page 74.

19 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.[20] In *Grimshaw v Ford Motor Co.*[21] 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 such publicity would affect jury sensibilities and fuel the expectations of would be claimants and their legal representatives.[22]

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.[23] 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,[24] a claimant bears virtually no risk in proceeding with litigation, even if his case is weak.[25]

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.[26] Some individual lawyers even specialize in product claims relating to one type of product, e.g. pharmaceuticals, or to one particular product.[27] It was commented that the specialist, aggressive plaintiff's bar would find the contingency fee system particularly lucrative and this

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20 Ontario Law Reform Commission, *Ibid* at page 75.

21 (1978), 21 ATLA L. Rep. 136 (Cal. Sup. Ct.)

22 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 78.

23 Organisation for Economic Co-operation and Development, *Product Liability Rules in OECD Countries* 1995 at page 26.

24 Ontario Law Reform Commission, *Report on Products Liability* 1979 at page 76.

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

26 The Australian Law Reform Commission, *Product Liability*, Report No. 51 1989 at page 10.

27 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 79.

encouraged speculative argument in favour of expansion of liability.[28]

Precedents not binding - The American courts openly embrace a high level of judicial law-making and looseness towards precedents.[29] To American judges, predictability and certainty in the law seem to count for less than perceived justice in the individual case.[30]

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.[31]

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.[32] 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."*[33]

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28 Jane Stapleton, *Product Liability* (Butterworths 1993) at pages 75 and 79.

29 *Ibid* at page 71.

30 The Australian Law Reform Commission, *Product Liability*, Report No. 51 (1989) at page 10.

31 *Ibid* at page 10.

32 Jane Stapleton, *Product Liability* (Butterworths 1993) at page 80.

33 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 reform the 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 substantially 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 industries are concerned with law reform in the product liability field, lest the reform goes beyond what can better protect the public at large without stifling 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 naturally public expectation on product

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

safety and legal protection have become 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*

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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.

products, there might not be enough incentive to market goods which were safe and free from 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]

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.

Policy objectives

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

(a) that injured parties should get fair compensation and should not be deterred from seeking compensation due to 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

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

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

Alternative approaches

Central compensation fund

7.8 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.

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

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

Compulsory insurance

7.9 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.

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

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

The way goods acted approach

7.10 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.

(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 should, for instance, insert a needle inside a soft toy during play and is subsequently injured by the soft toy with needle, the manufacturer would have a difficult task trying to prove the needle was inserted after it left the factory.

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

Proposals for reform

7.11 We recommend adopting the defect approach 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

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

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, and there has not been major criticism of the approach.

(d) The defect approach, compared with ' the way goods acted' approach is a gradual improvement of the existing law which is preferred to any drastic change.

(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

7.12 Although 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, that is, strict liability using the defect approach, the meaning of defect in the two documents is slightly different. 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"[8]. In the Directive, a product is defective ' when it does not provide the safety which a person is entitled to expect.[9] 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.

7.13 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:-

[8] Section 3(1).
[9] Article 6(1).

"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"[10].

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.

Relevant time

7.14 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."[11]

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."[12]

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 the above principles.

Persons liable

Persons principally liable

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

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10 *Idem.*

11 Article 6(2).

12 Section 3(2).

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

(b) the producer of processed natural product;

(c) the own-brander (person who puts his name or trade mark on the product and has held himself out to be producer); and

(d) the importer.

7.16 It should be noted that a new form of liability is imposed on own-branders and importers.[13] 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 having loopholes, principal liability is also imposed on importers and own-branders.[14]

Persons bearing subsidiary liability

7.17 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.

Though retailers bear subsidiary liability, they are seen to benefit indirectly from the increased liability on producers, importers and own-branders.[15]

7.18 If two or more persons are liable for the same damage, their liability towards the claimant shall be joint and several.[16] 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.

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

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

15 *Idem.*

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

We recommend that the above categories of liable persons should be jointly and severally liable under the proposed new form of liability, and that liability of these persons *inter se* under the existing general law should not be affected.

Range of products

7.19 In the Directive, products are defined[17] 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.

According to the above definition, both industrial and hand-made products are covered.[18] Things not covered by the Directive include:-

(a) human organs and tissues, blood;

(b) real estate; and

(c) intellectual works.[19]

7.20 The definition of products[20] in the Act is based on that of the Directive, but is more detailed. Products include:-

(a) any goods (which includes substances, growing crops[21] and things comprised in land by virtue of being attached to it, and any ship, aircraft or vehicle);[22]

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17 Article 2.

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

19 *Ibid* at page 605-606.

20 Section 1(2).

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

22 Section 45.

(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);[23]

(c) electricity (but refers to defects in the generation of electricity and not from failure to supply);[24]

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

(e) agricultural produce and game which have undergone industrial process.[25]

We recommend that the proposed legislation should include the range of products set out above.[26]

7.21 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.[27] The Australian Law Reform Commission[28] had considered this point and recommended that the definition of products should not be extended to incorporeal property like computer software and information. The fact that computer software is usually licensed out instead of sold should also be taken into account.

Although we recognise the possibility that computer software may cause personal injury or damage,[29] we do not recommend stretching the definition of products to cover incorporeal property like computer software.

Unprocessed agricultural produce and game

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23 Section 45.

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

25 Section 2(4).

26 With regard to sub-paragraph (d) above on component parts, please see also *infra* paragraphs 5.28 to 5.34.

27 *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 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".

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

29 For example, a defective computer software installed in sophisticated medical equipment causing a malfunction of the medical equipment.

7.22 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*
>
> *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:*
>
> *(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."*

7.23 Under the Act, agricultural products and game are excluded from strict liability unless they have been subject to some ' industrial or other process' .[30] The term ' industrial or other process' is not defined in the Act.[31]

7.24 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.

7.25 The English Law Commission and the Scottish Law Commission have considered this issue. The views[32] 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

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30 Section 1(2).

31 See the discussion *supra* at paragraph 4.32.

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

be put on the consumer market seemingly in their natural state. An example would be fresh vegetables which at first sight seemed 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.

7.26 The Scottish Law Commission, however, believed that natural products should be excluded from strict liability and its reasons[33] were:

(a) Two of the principal arguments for strict liability were 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.

(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.

7.27 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.

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[33] *Ibid* at paragraphs 89-96.

(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 anomaly. For instance, if one consignment of infected live cattle was imported and half of it is sold as fresh meat whereas the other half of it was 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 can prove to be 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 if done in small meat stalls using manually operated mincers it may not be so regarded. 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

7.28 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[34] 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 reasons[35] of the English Law Commission were chiefly:

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

35 *Ibid* at paragraph 69-76.

(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 the latent defect for 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 was 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.

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

7.29 On the other hand, the Scottish Law Commission was 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 reasons[36] of the Scottish Law Commission 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, for example the manufacturing of the Concorde aircraft, a

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

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.

7.30 With regard to sub-paragraph (a) above, 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 adjustment 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 maker for any liability borne in excess of the component manufacturer' s fair share.

7.31 The Ontario Law Reform Commission (the "OLRC") had examined the arguments of the English and Scottish Law Commissions for and against the inclusion of components parts and opined that component parts should be included. The OLRC mentioned[37] 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 could choose to proceed against either the supplier of the component part or manufacturer of the finished product, or both, and to leave it to the various suppliers to make their own arrangements for contribution or indemnity.

7.32 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.

7.33 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.[38]

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

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

7.34 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.[39] 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, like the Concorde aircraft quoted as an example by the Scottish Law Commission; but the difficulty hinges more on the novelty and complexity of the product than on strict liability.

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

7.35 Under the Directive and the Act, any injured person, whether or not he is party to a contract, and whether or not he is user of the product or a bystander, benefits from strict liability system.[40] The above provision is widely accepted, and any attempt to distinguish business and private users would be fraught with difficulties it is recommended that the above provision should be adopted.

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

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

40 See the discussion *supra* at paragraphs 4.8 and 4.30.

7.36 As mentioned in the policy objectives set out in paragraph 7.7 above, we recognize the need to protect legitimate interests of the business sector and therefore appropriate defences should be allowed. We find that the majority of the defences allowed in the Act are non-contentious and on the whole fair and reasonable. These are :-

(a) The defect is attributable to compliance with statute.[41]

(b) The defendant did not at any time supply the product to another.[42]

(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.[43]

(d) The defect did not exist in the product when the defendant supplied the product to another.[44]

(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 given by the producer of the subsequent product, the producer of a component part will not be liable.[45]

(f) Where the damage is caused partly by the fault of the claimant, the person liable has a partial defence.[46]

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

Development risks' defence

7.37 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.[47] The dispute over this development risks' defence was the major reason why it took almost ten years to finalize the draft Directive.[48] 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

41 Section 4(1)(a).
42 Section 4(1)(b).
43 Section 4(1)(c).
44 Section 4(1)(d).
45 Section 4(1)(f).
46 Section 6(4).
47 Article 7(e) of the Directive.
48 R Lowe & G Woodroffe *Consumer Law and Practice* at page 70.

Commission[49] and the Pearson Commission[50] and both Commissions advised against having the defence. 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."*[51]

7.38 The committee of experts of the Strasbourg Convention 1977[52] also recommended against having 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 obstacle to planning and putting into circulation new and useful products."*[53]

7.39 The Australian Law Reform Commission, however, took a different view and recommended[54] 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[55] argued that the defence is vital to protect technological and innovative development of industry. If technological and innovative development is 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[56] dealt with pharmaceutical products and argued that drugs with a high therapeutic value are usually associated with high risk and hence, the evaluation of the safety and efficacy of a pharmaceutical product would inevitably involve the balancing of risk and benefit.

7.40 Taking into consideration the above views, we are of the view that:-

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49 *Liability for Defective Products* (1977 : Cmnd 6831) at paragraph 105.

50 *The Royal Commission on Civil Liability and Compensation for Personal Injury* (1978: Cmnd 7054).

51 *Ibid* at Vol. 1 paragraph 1259.

52 Formally named the European Convention on Products Liability in regard to Personal Injury and Death.

53 Explanatory Report to the Strasbourg Convention at paragraph 41.

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

55 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.

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

(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' .[57]

(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 recommend that the development risks defence should be adopted.

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

We recommend that the development risk defence should cease to be available to the defendant if he failed to recall the defective product when the state of scientific and technical knowledge enabled the defect to be discovered.

7.42 One further note on development risks defence is that, there is some discrepancy of the scope of the defence between the Act and the Directive. 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;"*[58]

In the Directive, the relevant provision reads:-

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

[58] Section 4(1)(e).

"that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."[59]

7.43 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.[60] It is easier to prove that no producer within the trade could have discovered the defect than to prove that no one could have discovered the defect, given the existing state of scientific and technical knowledge.[61] Therefore, the definition adopted in the Act affords less protection to claimants than the Directive. Since it is stipulated in the Act[62] 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.

We recommend that the definition in the Directive of the development risks' defence should be adopted.

Compensation limits

Maximum

7.44 The Directive contains three optional provisions and a cap on total damage is one of them. 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."

7.45 According to a report[63] on the application of the Directive ("the Report"), some believe that a cap of not less than a certain figure 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

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59 Article 7(e).

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

61 *Ibid.*

62 Section 1(1).

63 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.

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.

7.46 Further according to the Report, there are difficulties with how the provision would be operated.

> *"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".*[64]

7.47 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.

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

7.49 The English Law Commission and the Scottish Law Commission ("the Law Commissions") have expressed some views on the issue. Whilst the Law Commissions recognised setting a maximum limit would assist manufacturers to quantify their risks, there would be serious disadvantages which outweigh 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 is exceeded. Yet, it would be contrary to public interests 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.

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

Minimum

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64 *Ibid* at paragraph 26.

7.50 With regard to the issue of a lower limit, the Act[65] 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.

7.51 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.

Limitation Period

7.52 According to the Directive, a claimant is required to observe two limitation periods. First, legal proceedings should be commenced within 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.[66] Second, legal proceedings should be commenced before the expiry of ten years from the date on which the particular product was put into circulation.[67]

7.53 It should be noted that the Scottish Law Commission was against the idea of having the ten years cut-off period. They considered that if the introduction of strict liability could be justified, one of its principal justifications must be that liability should subsist for as long as the product could be regarded as defective. 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 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 the 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. Further, a cut-off provision would be unfair to an injured person who would not in

65 Section 5(4).
66 Article 10(1).
67 Article 11.

general know the date on which the product had been put into circulation. Different cut-off periods would apply to different component parts and the injured person would face a complicated task in ascertaining whether his action was time-barred. Relevant evidence might not emerge until considerable expense had been incurred.

7.54 The English Law Commission, though impressed by the arguments of the Scottish Law Commission, believed that a cut-off point 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 the insurance premium down. The savings would be reflected in the price, which would be of general benefit to the public.

7.55 A Report[68] of the Directive also pointed out that limitation periods would be required by the business sector and their insurers, not only for limitation of risks, but also to limit the length of time for which records must be kept. A limitation period would be a rational and sensible solution although the 10 year limit might not be long enough for some damage to become apparent - e.g. pharmaceutical causing the diethylstilboestrol (DES) phenomenon (cancer occurring in women after reaching puberty allegedly caused by a product taken by their mothers in pregnancy).

We recommend that claimants should satisfy both the three-year and ten-year limitation periods referred to in the Directive (see paragraph 7.52 above).

7.56 We have considered whether the ten-year limitation period should be extended for pharmaceutical products. We find that it is difficult to legislate appropriate time limits for different products, and that it is desirable to harmonize our proposed legislation with the international standard.

We recommend that the ten-year limitation period should be adopted for all products covered by the proposed new form of liability.

7.57 Under existing provisions in the Limitation Ordinance (Cap. 347), the limitation period for breach of statutory duty involving personal injuries is three years,[69] which can be extended if it appears to court that it would be equitable to do so.[70]

We recommend that the court should be given the discretion to extend the ten-year limitation for personal injury cases as well.

Summary of Recommendations

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68 Christopher Hodges, *Op cit.*

69 Section 27.

70 Section 30.

7.58 The recommendations of the sub-committee are summarized as follows:-

(a) 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 7.6*)

(b) The setting up of a central compensation fund is not recommended. (*Paragraph 7.8*)

(c) The establishment of a compulsory insurance scheme is not recommended. (*Paragraph 7.9*)

(d) "The way goods acted" approach, which involves shifting the onus of proof to the manufacturer to disprove fault, is not recommended. (*Paragraph 7.10*)

(e) 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 7.11*)

(f) The standard of safety required should be judged by reference to the standard of the general public instead of the claimant. (*Paragraphs 7.12 - 7.13*)

(g) The standard of safety required should be judged at the time the product was put into circulation. (*Paragraph 7.14*)

(h) 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 7.15 - 7.18*)

(i) The proposed new form of liability should cover all kinds of movable products subject to products expressly included or excluded. Unprocessed natural products and game, and component parts should also be covered. (*Paragraphs 7.19 - 7.34*)

(j) 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 7.35*)

(k) Specific defences available under the United Kingdom Consumer Protection Act should be allowed to protect legitimate business interests. (*Paragraph 7.36*)

(l) 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 recall the defective product when the state of scientific and technical knowledge enabled the defect to be discovered. (*Paragraphs 7.37 to 7.43*)

(m) 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 7.44 to 7.51*)

(n) Claimants should commence legal action within both the three-year and the ten-year limitation periods, which should be adopted for all products. The court should have the discretion to extend both the three-year and the ten-year limitation periods if it is equitable to do so. (*Paragraphs 7.52 to 7.57*)