MANUFACTURER, IMPORTER AND SUPPLIER LIABILITY IN ITALY BEFORE AND AFTER THE IMPLEMENTATION OF THE E.E.C. DIRECTIVE ON DAMAGES FOR DEFECTIVE PRODUCTS

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I. Foreword

The first task of a jurist in continental Europe (and Scotland) faced with the problem of damages deriving from defective products is to understand whether there has been a direct contractual relationship between the producer and injured consumer. Where such a relationship exists, the rules governing the contract of sale and related liabilities and warranties will be applicable, and the case will be extremely simple.

In this mass-merchandising era, however, this situation is extremely rare. When the injured consumer has not bought the goods from the producer but, for example, from a retailer, the problem is to give a "legal shape" to the circumstances. Presumptions, simulations, manipulation of rules and legal considerations may be used. In order to help the plaintiff, a French jurist will try to apply the rules of the civil code concerning the contract of sale, even if there was no actual contractual link (the so-called "*achat familiale*" or family sale). He will try to apply these same rules to show that the retailer (*vendeur*) was in bad faith because he or she should know of the existence of defects (art. 1645) or must pay all the expenses incurred by the injured buyer as a result of the sale of defective products (art. 1646).

A German jurist will try to demonstrate that there is a direct link between the producer and the consumer founded on reliance on the qualities of the product used or consumed (reliance created by advertising, by a warranty written on the product, or by the very appearance of the goods), in which case the producer will be liable because the goods were different from those expected by the consumer or user.

An Italian, a Spanish, or a Portuguese jurist will not rely on the contractual link but will try to apply the general clause of tort liability

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provided for in their civil code. (The French jurist will also be able to use the general provision of tort liability; so he or she will have not one but two means by which to help the plaintiff in his attempt to claim damages from a manufacturer.) These solutions are necessary but insufficient.

2. The Prerequisites of Civil Liability in Civil Codes

As the legal texts regarding the general provisions for civil liability are very similar throughout continental Europe, I shall look at that with which I am most familiar.

Art. 2043 of the Italian Civil Code states: "*Compensation for unlawful acts*. Any fraudulent, malicious or negligent act that causes an unjustified injury to another party obliges the person who has committed the act to pay damages."

The legislation of 1942 codified a system of rules of responsibility based on the principle of "no liability without fault." Thus, it is commonly held that an indispensable presupposition for civil liability (apart from the damage, the chain of causality, the illegal violation of protected interest, the capacity of the person) is also the fault (or fraud) of the tortfeasor. There is in fact a distinction between subjective elements of the illicit act (fault, fraud, awareness of intent and will) and objective ones (chain of causality, damage, illegality).

This, apart from the general clause on civil liability which sanctions any fraudulent or wrongful act which causes damage to others, defines the responsibilities of parents, of those who carry on dangerous activities, of owners of objects or of animals, and of drivers of automobiles, in terms of negligence (or, more properly, presumption of negligence). The notion of strict liability is therefore--according to traditional opinion--of an exceptional nature; it is limited to damage caused by employees or assistants (art. 2049) and to damage caused by defects in the construction or maintenance of the vehicle (art. 2054). Concerning the circulation of defective products, liability is based on negligence of the producer or his agents.

Some commentators have stressed that the consumer must demonstrate the fault of the entrepreneur in order to obtain the indemnity. However, in some cases a notion of fault has been applied which corresponds to objective standards (i.e., relating to the violation of regulations, laws, and standards); in other cases, recourse has been made to a process of logical presumption, on the basis of which it is affirmed that the product's defect could not be traced back to anyone

other than the firm producing it;[1] finally, in other cases, the fault of the enterprise has been affirmed in spite of the fact that the user has manifestly also been at fault.[2]

In the case of product liability, therefore, we find the entire spectrum of positions, ranging from responsibility based on "objective" fault to that based on a presumption of fault to that based on the criterion of entrepreneurial risk-taking. Some of these positions are in conflict, but there are now attempts seeking to develop systems in which the various criteria can be combined.

The problems of defining the limits of fault and of assessing fault have never been solved. However, if we examine other developments in case law, we can discern two trends. According to the first, the entrepreneur is obliged to adapt his activities to technical progress in order to prevent any damage to third parties even if the measures to be adopted are not commonplace for the industry in which the firm operates. With this doctrine, the responsibility of banks for the destruction of valuables held in their vaults as a result of the floods in Florence was upheld because the precautionary measures were not sufficient and not on a par with the equipment of the Armed Forces. The second trend is less rigorous, demanding from the entrepreneur the adoption of measures which might be required "as a matter of good faith." As regards product liability, jurisprudence has not tackled this problem.

Case law in Italy has maintained, at various times, that the manufacturer was responsible for the damage incurred by the consumer when eating spoiled biscuits which caused damage to health and has admitted the indemnification of the damage suffered by a child who suffered abrasions when playing carelessly with a "pistol."[3]

On the other hand, there are cases in which the liability of the producer was excluded. For example, there are cases in which the damage caused, being of an "economic" nature, was not held to be susceptible to indemnity.[4] In other cases, although as a matter of principle it was admitted that the damage could be indemnified, reparation was then denied on the basis of a de facto judgment by

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1. Particularly well known is the *Saiwa* case concerning poisonous biscuits (Cass. 25 May 1964, no. 1234, now published in ALPA AND BESSONE, LA RESPONSABILITÀ DEL PRODUTTORE, Giuffré, Milano 1987, p. 215).

2. This is the washing machine case decided by Trib. Savona, 21 December 1971, ivi, p. 220.

3. App. Genoa, 5 June 1964, Foro padano, 1965, I, 31.

4. Trib. Savona, 31 December 1974, Giurisprudenza di merito, 1972, I, 313; and Trib. Naples, 5 December 1969, Foro padano, 1970, I, 212.

which the inexistence of the damage was declared. There are also cases in which, although defects were shown to exist in the product, the fault of the damaged party was held to be a mitigating factor and therefore obstructive to the chain of causality.[5] Then again, there are cases in which the legal imposition of responsibility on subjects other than the manufacturer (as happens by the application of article 2054 of the Civil Code in the matter of damage arising from the circulation of defective vehicles) is held to exclude any liability and thus to create genuine privileges in favor of the enterprise.[6]

3. The E.E.C. Directive on Product Liability

On July 25, 1985, the E.E.C. Council passed a Directive on product liability. The aims of this Directive are connected with the economic proposal to put producers selling goods on European markets on a par as regards liability (and costs), and the social proposal to help consumers recover damages from manufacturers, importers and even retailers who sell nonidentified products.

The text of a directive contains certain principles, and member states are compelled to introduce new provisions or to adjust existing provisions to these principles. The term of application is usually long (three years), but member states often disregard the order and wait for a longer period, according to their domestic political or economic needs.

At the time of writing (January 1990) only Great Britain (on May 15, 1987), Italy (on May 24, 1988), and Greece (on July 30, 1988) have accomplished the task and enacted new statutes according to these principles. The other member states (Spain, Portugal, Belgium, Netherlands, Luxembourg, Germany, Denmark, Ireland, France) have only prepared drafts of statutes, but it is not clear when they will be enacted.

Now let us take a closer look at this E.E.C. Directive.

Article 1 lays down the principle of strict liability by providing that a producer will be liable for damage caused by a defect in his product.

Article 2 defines products as all movables (i.e., tangible property other than land or buildings) with the exception of primary agricultural products and game, even though incorporated into another

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5. Cass. 6 February 1978, no. 545, Foro Italiano, 1978, I, 215.
6. Cass. 15 July 1960, no. 1929, in Alpa and Bessone, *op. cit.*, p. 320.

movable or into an immovable (i.e., land or buildings). The effect is that the Directive will apply to building material producers but not to the work of building and civil engineering contractors. The position of primary agricultural products (i.e., primary products of the soil, of stock-farming and of fisheries) is discussed in Part A. "Product" includes electricity but in this respect the Directive is intended, subject to further consideration, solely to cover defects due to the process of generation of electricity and not to defects due to external agents intervening after the electricity has been put into the network, nor to damage resulting from a failure to supply.

Article 3 defines the scope of the word "producer" for the purposes of establishing who is liable under the Directive. The main purpose is to provide a clear route for the injured person in a wide range of circumstances. This means that there will be some situations in which two or more persons in the chain of supply may be jointly and severally liable (see Article 5). Those liable include the manufacturer of a finished product or component, the producer of raw materials, or a person who holds himself out to be a producer (e.g., by putting an own-brand label on the article).

Where an article is manufactured outside the E.E.C., the importer will also be liable. Where it is not possible for the injured person to identify the manufacturer or the importer--for example where an identical product is produced from more than one source and is not labelled--any person in the chain of supply including the retailer is liable unless he can show who supplied the product to him.

The position of pharmacists, doctors, nurses, and others operating in the health sector requires particular consideration. Many doctors and health care personnel are the last link in the chain of supply of medicines from manufacturer to patient, and as such might be liable under the provision of this article when the producer of a defective medicinal product could not be identified.

However, for NHS staff, the supplier would be the health authority, not the member of staff concerned. It is expected that the authority's records would need to provide particulars of the sources of its drugs if it is to be sure of avoiding liability under the Directive. Some health care personnel such as general medical and dental practitioners are not employees of health authorities but are self-employed and under contract to the authorities. Their position is similar to that of retail pharmacists who would be expected to maintain adequate records or, in the absence of such records, to be subject to liability when the producer cannot be identified. It should be stressed that the exercise of clinical judgment in favor of one medicinal product rather than another will not of itself create a liability under the Directive on the part of the medical practitioner concerned for damage caused by

the product; nor will the exercise of such judgment of itself affect the patient's right of action against the producer.

Special problems arise with those industries dealing with products concerned with information, such as books, records, tapes, and computer software. It has been suggested, for example, that it would be absurd for printers and bookbinders to be held strictly liable for faithfully reproducing errors in the material provided to them, which--by giving bad instructions or defective warnings--indirectly causes injury. It does not appear that the Directive is intended to extend liability in such situations. On the other hand, it is important that liability is extended to the manufacturer of a machine which contains defective software and is thereby unsafe, and to the producer of an article accompanied by inadequate instructions and warnings, the article thereby becoming a hazard to the user. The line between those cases may, however, not be easy to draw, particularly in the field of new technology where the distinction between software and hardware is becoming increasingly blurred. Views are therefore invited on the extent to which strict liability should be extended to those responsible for providing products with information errors.

Article 4 provides that the injured person must prove the damage, the defect, and the causal relationship between them. It is implicit that these matters will be determined by the laws and procedures applicable in each member state. The injured person is not, of course, required to prove any fault on the part of the defendant.

Article 5 provides that where two or more persons are liable for the same damage, they shall be liable jointly and severally.

Article 6 states that a product is defective when "it does not provide the safety which a person is entitled to expect, taking all circumstances into account." These circumstances will include the presentation of the product (including instructions, labelling, advertising, and marketing arrangements), the use to which it could reasonably be expected to be put, and the time when the product was put into circulation.

The criterion of reasonably expected use, combined with that of presentation of the product, is particularly important for producers whose goods are capable of being unreasonably misused, or used for a purpose for which they were clearly not intended. Raw materials, such as wood, would not normally be regarded as defective in the sense that they can be used quite safely for many different purposes. However, if it should be established that their use for a particular purpose was dangerous, then the question of whether the raw material supplier is liable will depend largely on the presentation and manner of marketing of the primary material, including any indications of use, warnings,

etc. The manufacturer of the final product would be liable under the Directive if he selected a material which was unsuitable for the product in question and therefore resulted in the final product's being unsafe.

A product will not be considered defective simply because a better (i.e., safer) product is subsequently put into circulation. This, in conjunction with the relevance of "the time when the product was put into circulation" is particularly important in sectors where expectations of safety change significantly over time.

The safety which a person is entitled to expect raises particularly complex issues in respect of medicinal products and adverse reactions to them. Establishing the existence of a defect in a medicine administered to a patient is complicated by the fact that not only is the human body a highly complex biological organism, but at the time of treatment is already subject to an adverse pathological condition. In order to avoid an adverse reaction, a medicine will have to be able to cope successfully with already faulty organs, disease, and almost infinite variations in individual susceptibility to the effect of medicines from person to person. The more active the medicine and the greater its beneficial potential, the more extensive its effects are likely to be and, therefore, the greater the chances of an adverse effect. A medicine used to treat a life-threatening condition is likely to be much more powerful than a medicine used in the treatment of a less serious condition, and the safety that one is reasonably entitled to expect of such a medicine may therefore be correspondingly lower.

Attention would also have to be paid to related environmental factors (emergency or routine, method of administration, situation, and supervision, etc.) and to possible interactions and correlations between the various factors, for example between a patient's diet and the medicine, or published warnings and the patient's ability or opportunity to understand them. These are all circumstances which should be taken into account in determining the level of safety a person is reasonably entitled to expect, and hence in determining whether a particular medicinal product is defective. Similar considerations should apply to the administration of veterinary medicinal products to animals.

The expression "a person" is to be interpreted objectively, that is, as referring neither to the particular injured person nor to the particular producer, but to the concept of a reasonable person. The defectiveness of the product will be determined not by its fitness for use, nor, in the case of a medicine, by its efficacy, but to the level of safety that is reasonably expected of it. An inferior quality product is not considered "defective" for the purpose of this Directive unless it actually introduces a risk of injury.

Article 7 provides six exemptions from liability for the producer.

(a) The producer will not be liable if he proves that he did not put the product into circulation. It is understood that a product has been "put into circulation" when it has been delivered to another person in the course of business or when it has been incorporated into an immovable. Medicinal materials used in trials before marketing will generally be exempt under this provision.

(b) The producer will not be liable if he proves that the defect which caused the damage did not exist when he put the product into circulation. This is particularly important for products with a short life expectancy, or for products accompanied by warnings and instructions for use which might be detached by the final supplier.

(c) The producer also has a defense if he can show that he did not manufacture the product for an economic purpose, nor distribute it in the course of his business. This would apply to the supplier of goods under most private transactions.

(d) The producer will not be liable if he proves that the defect is due to compliance of the product with mandatory regulations issued by public authorities. It should be stressed that mere compliance with a regulation will not necessarily discharge a producer from liability; he would have to show that the defect was the inevitable result of compliance, i.e., that it was impossible for the product to have been produced in accordance with the regulations without causing the product to be defective. The expression "mandatory regulations" is understood to mean only those imposed by law and not, for example, contractual specifications.

(e) Development Risks Defense. Article 7(e) provides that the producer shall not be liable as a result of the Directive if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered. Article 15 provides that, by way of derogation from Article 7(e), each member state may maintain or introduce liability for development risks. Development risk liability could be maintained or introduced for whatever sector or sectors individual member states considered necessary.

A true development risk is rare and yet the availability of the defense has been one of the most controversial issues raised by the Directive. Some have argued that the inclusion of such a defense would leave a significant gap in the liability system through which victims of unforeseeable disasters would remain uncompensated and

which would bring back many of the complexities and legal arguments that the introduction of strict liability is supposed to avoid. Manufacturers, on the other hand, have argued that it would be wrong in principle, and disastrous in practice, for businesses to be held liable for defects that they could not possibly have foreseen. They believe that the absence of this defense would raise insurance costs and inhibit innovation, especially in high risk industries. Many useful new products, which might entail a development risk, would not be put on the market, and consumers as well as business would lose out.

(f) A producer of a component will not be liable if he proves that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product. In other words, suppliers of components made to the specification of the manufacturer of the final product will not be liable if the defect in the component was the inevitable result of compliance with the specification or of the design of the final product over which the component supplier has no control (though the final product manufacturer would be liable in these circumstances).

Article 8 provides that a producer cannot avoid or reduce his liability under the Directive when the damage is caused both by a defect in his product and by the act or omission of a third party (e.g., where a defective product has been badly maintained by a supplier, and the damage resulted from a combination of these faults). However, national laws governing recourse and contribution are not affected. Moreover the liability of the producer may be reduced or extinguished in the event of contributory negligence on the part of the injured person.

Article 9 defines the kinds of damage for which compensation may be claimed under the terms of the Directive. It includes death, personal injuries, and damage to or destruction of property for private use or consumption, though individual items of property worth less than 500 ECU (about 500 dollars) are excluded. This lower threshold is intended to discourage trivial claims. Private property includes only property which is both ordinarily intended for private use or consumption and which was actually used by the plaintiff mainly for these purposes. Damage to commercial property is therefore not subject to compensation under the terms of the Directive.

The Directive is without prejudice to national provisions relating to nonmaterial damage such as pain and suffering and pure economic loss.

Article 10 provides for a limitation period of three years for the bringing of proceedings, counting from the day on which the

plaintiff became aware, or should reasonably have become aware, of the damage, the defect, and the identity of the producer.

Article 11 provides that, notwithstanding the limitation period provided in Article 10, no action can be commenced under the Directive after a period of ten years from the date on which the actual product was put into circulation (not the date on which the type of product was first marketed). Persons injured by products with latent defects which do not appear for at least ten years will not therefore be able to claim compensation under this Directive, though they may still have rights of redress under the law of tort (or delict).

Article 12 provides that liability of the producer to the injured person may not be limited or excluded by contract or any other form of agreement. (This does not affect provisions in commercial contracts relating to the apportionment of liability as between the parties to that contract.)

Article 13 provides that the rights of an injured person under the laws of contract and tort (and delict) of member states remain unaffected by the Directive.

Article 14 provides that the Directive does not apply to damage arising from nuclear accidents covered by existing international conventions.

Article 15 allows member states to derogate from Article 2 by extending strict liability to primary agricultural products and game; and/or to derogate from Article 7(e) by extending strict liability to development risks. Development risk liability can only be introduced after the application of a "standstill" procedure, details of which are set out in Article 15(2).

The Commission will report to the Council after ten years on the application of the development risks defense and the exercise in some member states of strict liability without this defense. This report will analyze whether the different approaches have led to differing levels of consumer protection and/or to distortions in trade between member states. In the light of the report, the Council may make amendments to the Directive (including, but not limited to, possible repeal of the defense).

Article 16 provides that member states may introduce a financial limit on liability resulting from the same defect in identical items of not less than 70,000 ECU.

Paragraph 2 of Article 16 provides that the Commission will report to the Council after ten years on the application of financial limits by some member states. (As in Article 15).

Article 17 provides that the Directive shall not be applied retrospectively to products put into circulation before the date of entry into force of the Directive in individual member states.

Article 18 concerns the definition of the ECU for the purposes of the optional financial limit and of the threshold limit to private property claims. Every five years the Council may revise the amounts specified in the Directive in the light of economic and monetary trends in the Community.

Article 19 requires the Directive to be implemented by July 30, 1988.

Article 20 requires member states to inform the Commission of measures they have taken to implement the Directive.

Article 21 requires the Commission to report to the Council every five years on the application of the Directive. The Commission is, of course, free at any time to make fresh proposals to the Council.

4. The Implementation of the E.E.C. Directive in the Italian Legal System

The jurist faced with a text drawn up by the E.E.C. Council has to solve many problems, the main four being: (a) understanding the language. Since every member state language is considered an official language of the E.E.C., any text drawn up by the Council is written in a form familiar to the European jurist, but the administrative staff in Brussels has the difficult task of translating each text into many different languages. Some of these languages are similar in phonetics and meaning (e.g., Italian, Spanish, Portuguese, French), but others are very different (German, English, Greek, Danish, etc); b) understanding concepts. The legal framework of each of the member states is different (except for countries with Roman-derived systems, such as Italy, France, Spain, Portugal). If the text was originally drawn up by an English-speaking jurist, the concepts may be different from those familiar to jurists of other countries and other languages; c) applying the concepts and translating them into statute rules (I am talking now of the jurist whose job it is to prepare the draft text of the national statute; the text will be approved and enacted by national parliaments or, as happens in Italy, enacted directly by the Government