

**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

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*, Giuffrè, 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

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

in the form of a presidential decree); d) interpreting the new statute on the basis of the language, the concepts, and preexisting laws.

The very complex procedure of implementation is further complicated when codes or special statutes regulating a given subject (such as producer liability) already exist in the legal system of the member state.

The implementation of an E.E.C. Directive in France gives rise to two different problems: the coordination with the civil code and coordination with special legislation.

As regards the civil code, both the regulations concerning extracontractual liability (art. 1292 ff.) and those concerning buying and selling (articles 1645 and 1646) are applicable; the special regulations now include a large number of measures (those concerning producer liability and product safety are specifically L.n^o 78-23 of January 10, 1978 and L.n^o 833-660 of July 21, 1983) which have been followed by a number of implementation decrees.

In England, apart from the consolidated principles of common law regarding tort, conditions, warranties, and misrepresentation, there also exist the Unfair Contract Terms Act of 1977, the Consumer Safety Act of 1978, the Consumer Safety (Amendment) Act of 1986, and, where applicable, the Trade Descriptions Act (and other statutes including the Health and Safety at Work, etc. Act of 1974). Here again, therefore, the common law discipline and special legislation must be coordinated with the new regulations in the Consumer Protection Act of 1987.

The new provisions can be included--depending on the structure of the legal system and the state of development of the sector under examination--within the realm of extracontractual liability, or contractual liability. On this point, the Directive expresses a preliminary option which prefers extracontractual liability but does not exclude the possibility for member states to discipline also the contractual side, as stated in art. 13: "This Directive shall not affect any right which an injured person may have according to the rules of the law of contractual or noncontractual liability or a special liability system existing at the moment when this Directive is notified."

The comparison between the new discipline and the regulatory "background" also helps to explain the reasons for the complexity of the regulations in the French bill and in the English statute and why these implementation laws appear to be richer than their Italian counterpart.

The first French draft is divided into three sections, the first dedicated to the "general provisions" (articles 1387, 1387-1 to 1387-10), the second to contractual liability for injury deriving from a product (articles 1387-11 to 1387-17), and the third dedicated to liability for a defect in product safety. Each of these three parts would require an in-depth analysis that goes beyond our present purpose.⁷

The English model, on the other hand, is divided into five sections. The first is dedicated to product liability and corresponds, therefore, to the general provisions of the French system and to the general rules of the Directive and is included in the Italian draft in sections 1-9; the second is dedicated to consumer safety, including general safety standards, warnings given on the product, and consumer information (secs. 10-19); the third part deals with price indication (secs. 20-26) and errors, deception, and deceptive practices involving the consumer; the fourth (secs. 27-35) and the fifth (secs. 37-50) regard details, marginal rules, or interpretation. Only the first part is of interest for the purposes of this study. Though full discussion of its compatibility with the model of discipline already in existence cannot be attempted here, a detailed description is already available.

It should also be pointed out that the English legislator has taken advantage of the opportunity to introduce new product safety standards, and the French legislator has included (not a *tertium genus*, but) a specific source of extracontractual liability for infringement of the provisions regulating product safety.⁸

7. For a preliminary survey of French theory and law see ALPA, *RESPONSABILITA' DELL'IMPRESA E TUTELA DEL CONSUMATORE*, Milan, 1975, ch. IV and V; the texts of theory and sentence models are translated by ALPA AND BESSONE, *LA RESPONSABILITA' DEL PRODUTTORE*, Milan, 1987, p. 179. This book contains also the first French draft, which has been disbursed to participants of a meeting on products liability organized in Genoa in May 1987. I was told by Professors Ghestin and Malinvaud that the Governmental Commission charged to prepare the draft is now changing its mind and seems to prefer to draft a shorter text, omitting the rules on contractual liability.

8. For the French experience see also Ghestin, *La directive communautaire du 25 juillet 1985 sur la responsabilité du fait des produits défectueux*, in D. 1986, chron. 135; Taschner, *La future responsabilité du fait des produits défectueux dans la Communauté européenne*, in J.C.P., 1986, E.II.14761; CALAIS-AULOY, *DROIT DE LA CONSOMMATION*, Paris, 1986, p. 273 ff., CAS AND FERRIER, *TRAITÉ DE DROIT DE LA CONSOMMATION*, Paris, 1986, p. 221 ff.; Torem and Focseanu, *La directive du Conseil des Communautés européennes du 25 juillet 1985 relative à la responsabilité du fait des produits défectueux et le droit français en la matière*, in J.C.P., 1987, I, 3269.

For the English experience, see the official comment of the new statute, including brief cross-reference and coordination, in the series *CURRENT LEGAL STATUTES*

A final note. Implementation of the Directive--in a set of codified regulations--could have been achieved by means of a special law (retaining, therefore, the central position of the civil code and enriching the category of special provisions, with these prevailing over the code regulations, though this choice would entail a restrictive interpretation of the new regulations, their being considered extraordinary and sectorial in their effectiveness) or through complete renewal, this choice entailing the acquisition of general principles included in the civil code.

The Italian text (D.P.R. May 24, 1988, n. 224) adopts the former technique while the French bill conforms to the latter, even though the renewal (which to us may appear rather odd in that the new regulations have no general content but are applicable only to manufacturer liability) as utilized in France actually simply constitutes an integration of the civil code with special regulations (other examples are offered by the new discipline governing the sale of unbuilt immovables, introduced with L.n° 67-3 of January 3, 1967 and L.n° 67-547 of July, 1967, which integrate articles 1646 and 1648 on the subject of buying and selling).

These three models for implementation differ also in the way in which they conform, with fluctuations and freedom of choice, to the Directive: the order of the subjects, as given in the Directive, is followed almost wholly by the Italian model and, at least partially, by the French model which, however, uses the tripartition mentioned above: the English model is furthest from the order of subjects; even taking the subjects in toto and the way they are developed, their wording reveals differences, resemblances, and dissimilarities.

Many of the innovations introduced in the different linguistic versions of the Directive have been discarded in the implementation laws; though some have remained. Some examples may help to lend support to our assumptions.

The primary object that the Directive and implementation laws aim to regulate is the producer. In the jargon of Italian jurists, in their sentences and theoretical writings, the expressions "*produttore*" or "*fabricante*" or "*impresa*" (this last being used to mean the "productive" organization of goods, which are then passed on to another organization for commercial distribution, from initial to final stage)

ANNOTATED, London, 1987 (vol. 39 Sale of Goods and Consumer Protection); as well as Clark, *The Conceptual Basis of Product Liability*, in 48 MOD. L. REV., 1985, p. 325 ff.; CLARCK, THE CONSUMER PROTECTION ACT, 1987, p. 614 ff.; CARDWELL, THE CONSUMER PROTECTION ACT: ENFORCEMENT OF PROVISIONS GOVERNING THE SAFETY OF CONSUMER GOODS, 1987, p. 622 ff.

have always been used in an entirely fungible way. Apart from when clarifying which subjects may be liable, the Directive always uses the term "*produttore*" in that the semantic implications of this term are wider than those of "*fabricante*." The law itself has also retained this usage. The French term which corresponds to "*produttore*" is "*producteur*." This term constitutes a considerable innovation, however, since as has often been mentioned in Italian theoretical studies on the French experience, the "*vendeur-fabricant*" or "*fabricant*," in the strict sense of the word, or liability for "*fait*" of products had always been used (even the expression "defective product" is fairly recent since formerly defective or unsafe "*choses*" were spoken of).

The English term "producer" is also a neologism, though often used in other nonjuridical contexts, in that "manufacturer" or "products liability" are generally used, objectifying the formulation (as happens also in France with liability for "*fait*" of products or in Italy with "*responsabilita da prodotto*").

Changes have also occurred in the name given to another link in the production-distribution chain: the so-called "*fornitore*." This term, which is not used in the Italian Civil Code except as applied to the providing of services, has taken on a precise meaning in Italian juridical language, the content of which is given in art. 4 of the Italian statute. The same can be said of the corresponding French term ("*fournisseur*") but not of the apparent English equivalent "supplier," which not only includes the middleman between two dealers but also the retailer or final intermediary (the "seller").

The Italian term "*danno*" corresponds to the French "*dommage*" (though in French it is generally found in the form "*dommages-intérêts*") but not entirely to the English "damage" which indicates the pecuniary consequences of what, at least in this Directive, is translated as "injury." It is for this reason that the British Consumer Protection Act, section 5, which will be studied in more detail below, points out that--"subject to the following provisions of this section, in this Part "damage" means death or personal injury or any loss of or damage to any property (including land)."

The translation of "*danno morale*" as "*dommage immatériel*" in the French version of the Directive (rather than simply "moral") and "nonmaterial damage" rather than "pain and suffering" or similar expressions in the English may be somewhat disconcerting. It is no coincidence that in the implementation texts of the Directive these expressions have either disappeared or no mention is made of this type of "damage."

The Italian decree for implementation of the Directive opens with a general statement (art. 1), which follows the provisions of art. 1 of the Directive and is drawn up along similar lines: "the producer shall be liable for damage caused by a defect in his product."

The provision introduces a typical case of no-fault liability in that it limits liability, in subjective terms, to the producer (excepting the extensions as explained below) and, in objective terms, exclusively to the injuries deriving from product defects. This is clearly not a case of "absolute" liability: there are, as has already been mentioned, mitigations dictated by reasons for exclusion (or exemption) from liability. The question as to the unexpected chance occurrence remains, but if the cause of the defect giving rise to the injury is unknown, the producer cannot in any way be exonerated from liability.

What innovations are introduced by the general rule? This has already been discussed in the comments on the drafts and definitive text of the Directive.

The general principle in art. 1 corresponds precisely to the proposals made by the doctrine at the dawn of the juridical construction of this subject: the producer must answer, without fault, for all damage caused by defects in his products, whether production or construction defects or design defects, i.e., defects regarding the "concept" of the product.

Art. 1 eradicates, therefore, both the reservations expressed by the earliest jurisprudence which argued in terms of liability through presumed fault, and those, justified by the need for a rational distribution of risk, regarding the part of the doctrine which, though adhering to the perspective of the producer's enormous liability, attempted to keep an area of imputation of liability based on fault for defects deriving from product design.

Does this general principle also introduce important innovations into the French experience? According to its commentators, the text, as it has been drawn up, clarifies, setting it out in straightforward terms, a principle which is already present in the relevant doctrine and jurisprudence, and raises, as it were, the special regulations accumulated over time to the level of general regulations.

It has been mentioned that, as regards extracontractual liability, jurisprudence has created an "incontestable presumption of fault" against the manufacturer;⁹ just as it has asserted that there exists an

9. Malinvaud, *La responsabilité civile du fabricant en droit français*, in *Gaz. Pal.*, 1973, doct., p. 467.

"*obligation de résultat*" against the manufacturer, which integrates this contractual case (and which regards not only the immediate buyer but also the final purchaser of the product), and on the basis of which this manufacturer must answer for all the damage suffered by the injured purchaser;¹⁰ as is already known, liability for property in safekeeping has been resorted to, and also in this case a presumption of fault has been spoken of.

It has, in any case, become accepted opinion that the liability of the "*producteur*" as expressed in the Directive is "*indépendante de toute faute*."¹¹

That the Directive implies a form of "strict liability for defects in consumer products" is obvious and agreed upon also by the commentators of the Consumer Protection Act.¹² That this principle should be accepted, so that the public will receive adequate protection, is also the general and consolidated opinion in the English experience: the Note sent out by the Department of Trade and Industry (Nov. 1985) reproduces the conclusions of the Pearson Commission which suggested that it would be opportune to introduce the concept of strict liability for injuries deriving from defective products.

Unlike actual given practice in France, the English experience was marked by doctrine and jurisprudence anchored to the principle of liability based on fault (in fact producer liability itself arose as a first hypothesis of the general tort of negligence).

The principle laid down by sec. 2(1) of the English Consumer Protection Act appears, therefore, to be of particular importance. A "new conceptual structure" is seen in which the liability is strict rather than based on fault, underlining the fact that the criterion of imputation is no longer intended to control the behavior of the manufacturer, but to keep check on the state of the product.¹³

The general rule must be coordinated with art. 8 of the Italian text which states:

- (1) The injured party shall be required to prove the damage, the defect, and the causal relationship between defect and damage.

10. VINEY, *L'application du droit commun de la responsabilité au fabricants et distributeurs de produits*, in RESPONSABILITÉ DES FABRICANTS ET DISTRIBUTEURS, Paris, 1975, p. 76.

11. Torem et Focseanu, *op. cit.*, § 8.

12. See General Note in Halsbury's Statute Service: Issue 17, p. 25.

13. CLARCK, THE CONSUMER PROTECTION ACT, *op. cit.*, p. 614.

(2) The producer shall be required to prove those facts which may exclude liability in accordance with the provisions of article 6. In order to exclude the liability provided for in article 6, letter b, it is sufficient to demonstrate that, having regard to the circumstances, it is probable that the defect did not exist at the time the product was put into circulation.

(3) Should it appear probable that the damage has been caused by a product defect, the court can order that the costs of the technical expert be advanced by the manufacturer.

The first paragraph corresponds exactly to art. 4 of the Directive; the subsequent paragraphs coordinate with the causes of disallowance of liability provided for by art. 6 of the bill and art. 7 of the Directive.

The French bill distinguishes between the requirement of proof of general manufacturer liability (in which, together with the corresponding provision of the first paragraph of art. 8, the judge is provided, as in the Italian text, with the possibility of charging provisional payment of the technical consultant's fees to the manufacturer) and the proof requested of the buyer where a contractual relationship (either direct or indirect) exists with the producer (art. 1387-13); this provision is particularly interesting in that it modifies the legal discipline of actions based on the guarantee against defects, bringing it nearer to jurisprudential discipline. It lays down the rule:

Le demandeur doit prouver que le défaut existait au moment de la fourniture du produit.

Le défaut qui se révèle dans le délai de garantie conventionnelle indiquée par le professionnel est présumé, sauf preuve contraire, avoir existé au moment de la fourniture.

En l'absence d'un tel délai, cette présomption joue pendant deux ans à compter de la fourniture.

The general rule must also be linked with the grounds for exclusion of liability (art. 7 of the Directive). In the Italian text art. 6 follows the Directive provision almost word for word; the bill added a rule which was of particular importance in our local context which, unlike the situation elsewhere in Europe, seemed totally insufficient. This rule in paragraph 1, letter (e), after exclusion of producer liability for so-called "development risk," stated: "However, should the

producer, after putting the product into circulation, become aware or be expected to become aware of its harmfulness, he is liable by the civil code if he fails to adopt appropriate measures to avoid ensuing injury, such as informing the public, offering to recall the product for revision or to withdraw it altogether." The reasons why this paragraph was abolished in the definitive text are unknown, or rather they can be imagined; but the question is whether this was a wise choice. A similar provision is included in the French bill (art. 1387-10, 2d paragraph), which adds to art. 1387-15 regulating the contractual relationship that: "le producteur ou le fournisseur professionnel n'est pas responsable s'il prouve que l'autre partie connaissait ou ne pouvait légitimement ignorer le défaut du produit au moment de sa fourniture"; (we will return to this provision below); and finally, included within liability for a defect in product safety, art. 1387-22 stipulates:

Le producteur ou le fournisseur professionnel est responsable à moins qu'il ne prouve:

- 1) qu'il n'avait pas mis le produit en circulation;
- 2) que le défaut n'existait pas au moment où il a mis le produit en circulation;
- 3) que le produit n'a été fabriqué pour la vente ou pour toute autre forme de distribution dans un but économique;
- 4) ou que le défaut est du à la conformité du produit avec des règles impératives émanant des pouvoirs publics, sans prejudice des dispositions de l'art. 1387.

Le producteur est responsable du défaut alors même que le produit a été fabriqué dans le respect des règles de l'art ou de normes existantes.

The English model (sec. 4) is substantially the same as the Italian model. There has, however, been considerable discussion as to whether it would be better to include development risk within the risk with which the producer is charged and, therefore, to abolish or not include this item in the category of what the producer may use in his defense. The proceedings recorded in the House of Lords reveal that the decision taken to the contrary was motivated by the requirements of the national economy, by problems of competition with producers from other member states who would not be burdened with such risks, and

by the need to allow greater freedom of innovation and experimentation.¹⁴

Art. 2 defines the product as:

- 1) For the purpose of these provisions 'product' means all movables, even though incorporated into another movable or into an immovable.
- 2) 'Product' includes electricity.

Unlike the Directive, the definition of the "transformation" of the product has been added.

The application of the Directive to agricultural products of the soil, of stock-farming, of fisheries and game is excluded. The Directive leaves the member states free to include these categories, excluded in limine from community provisions.

The French bill, on the other hand, limits itself to reiterating the text of the Directive (art. 1387-3) but includes agricultural products, stock-farming, fisheries and game; agricultural products are excluded in the English Act (unless they have been subjected to a process of industrial transformation (see sec. 2(4))).

Art. 3 outlines the definitions of "producer":

- 1) Producer means the manufacturer of a finished product or of a component part of a finished product and the producer of any raw material.
- 2) For agricultural products of the soil or stock-farming, of fisheries or game, the producer is he who has subjected these items to a transformation process.
- 3) The same liability as that for the producer applies to whoever, in the course of business, imports into the European Community a product for sale, hire, leasing, or any form of distribution and whoever presents himself as importer into the European Community by affixing his name, trademark, or other distinguishing mark on the product or on its packaging.

There is no significant change with respect to the Directive (art. 2) which is repeated almost word for word. The definitions given by

14. As expressed by Lord Chilworth, Off. rep., vol. 483, no. 25, c. 841.

the English Act (sec. 1) and the French bill (articles 1387-4, 1387-5) are equivalent.

The definition of "supplier" in art. 4 is, however, of particular interest.

While the French bill (art. 1387-4) limits itself to reproducing the text of the Directive (art. 3), the English text introduces limitations to supplier liability which the Directive, except for certain adjustments, equates to that of the producer.

Sec. 2(3) establishes that the supplier shall be held liable for the damage only if the person who suffered the damage requests the supplier to identify the persons responsible; if this request is made within a "reasonable" period after the damage has occurred and at a time when it is no longer possible for the person who suffered the damage to identify the person responsible directly and, finally, if the supplier fails within a reasonable period of time to comply with the request and to identify the person who supplied him with the product.

The equally precise Italian text provides that (art. 4):

1) When the producer has not been identified, the supplier who has distributed the product in the course of any business of his is subject to the same liability if he fails to inform the injured person, within three months after receiving the request, of the identity and domicile of the producer or whoever supplied him with the product.

2) The request must be made in writing and must identify the product which caused the damage, and the place and, within a reasonable margin, the time of the purchase; it must also include the proposed supply of the product, where still in existence.

3) If service of the preliminary act of the judgment is not preceded by the request provided for in the previous paragraph, the respondent can supply this information within a period of three months following this date.

Art. 5 lays down the criteria used to identify a defective product. The text repeats the wording of art. 6 of the Directive, with some corrections.

The French bill reiterates the intention of the Directive by which the concept of defect is the difference between the state of the product

and the safety which the consumer is entitled to expect; however, it also stipulates that this difference can be investigated on the basis of criteria or reference determined by what is agreed upon by the parties (which obviously presupposes that the unsafe and, therefore, defective product has been used directly by the purchaser) or that the lack of safety is in contrast with the quality of the product and its suitability for the use for which it is intended (art. 1387-1).

The Italian text is more limited on this subject in that it does not take into account the "conventional" qualities since it does not deal with the contractual side of the question; as regards the consumer's expectations, it returns, twice, to the criterion of reasonableness, in reference to the intended purpose of the product, to avoid claims for damages deriving from abnormal use of the product, and to foreseeable behavior, again in connection with use (art. 6, par. 1(b)).

The Italian text then insists on the manifest characteristics of the product, in order to avoid the user, once aware of the inherent dangers of the product, making claims against these said dangers; an abstract evaluation of the dangerous nature of the product is, therefore, proposed, moderated by its appearance, by the evidence, that is, of its defects, flaws, and dangers: the conduct of the consumer will, therefore, be considered at fault should it be ascertained that in using the product he has not noticed evident defects or dangers present in the object which a normally careful person would have discovered or been aware of. The illustrative report (page 4 of the report) explains that these further circumstances, in addition to the list of criteria which the Directive gives as examples to identify a defective product, are useful because "the degree to which the risks deriving from use of the product can be recognized has an important role not only in evaluating possible contributory negligence on the part of the injured person, but first and foremost in establishing the level of risk below which the product can be considered socially acceptable and not defective." These criteria clearly apply for evaluation of a user's conduct in the case of a claim for liability against a producer in an extracontractual context.

Similar principles are adopted in the French bill, though not in extracontractual cases but within the realm of a producer's contractual liability. As stated above, the French bill adapts the principles of the Directive also to contractual regulations; under art. 1387-15, in fact, it is the responsibility of the producer or "professional supplier" to prove that the injured party (purchaser) was aware of the product defect. This is not excessively strict, in that it can also describe the circumstances in which the purchaser "could not reasonably be unaware" of the product defect. The characteristics of the defect do not change, however, since the concept of defect is the equivalent of that outlined in the Directive, and being less limiting than that given in the Italian text, the burden of proof falling on the injured party is considerably heavier.

The testing ground is switched (not only from the extracontractual to the contractual, but, more particularly,) from objective criteria governing the behavior which may reasonably be expected and the intended purpose to criteria which appear more subjective since they refer to the knowledge and experience of the user who either should have been aware of the defect, or, in other words, of the danger, or could not have been unaware of this defect. Nor is there, either in a general or in an abstract sense, a threshold below which the product--however defective and, therefore potentially dangerous--would acquire the description of socially "tolerable."

What is particularly striking in the French bill, apart from these few factors which may be considered of marginal importance, is that apart from the definition of "defective" product, the bill--integrating what is laid down in the Directive--introduces a series of provisions regulating "liability for lack of product safety."

The intention, in effect, is to coordinate the Directive with preexisting French legislation, in particular with articles 1 and 2 of L.n^o 83-660 of July 21, 1983, which it will be better to quote in full: "les produits et les services doivent, dans des conditions normales d'utilisation ou dans d'autres conditions raisonnablement prévisibles par le professionnel, présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la santé des personnes"; and again, "les produits ne satisfaisant pas à l'obligation générale de sécurité prévue à l'art. 1er seront interdits ou réglementés dans les conditions fixées ci-après."

This clearly resorts to similar criteria to those proposed by the Italian text, in that it speaks of the conditions of "normal use" of the product; however, while the Italian text describes only the abstract behavior of the average consumer, and the actual behavior of the injured consumer, the French bill also adds a criterion which shifts attention onto the producer's behavior in that it speaks of the conditions of use which can be "reasonably expected" by the producer. This facilitates the burden of proof which lies with the consumer and also concedes abnormal use of the product on condition that this can be foreseen by the producer.¹⁵

The law also states that products cannot be dangerous to a person's health, and that whoever produces an article is subject to an "*obligation générale de sécurité*," a phrase which translates, within a general and abstract rule, introduced by a special law, a theoretical construction of which a certain area of French contractual doctrine was

15. On this point see CALAIS-AULOY, *op. cit.*, p. 249.

particularly fond,¹⁶ and which is obviously intended as an obligation of outcome.¹⁷

Product safety requirements, understood at first in France as integrating the requirement of product "conformity" to the rules issued by the association for product standardization (*Afnor*), became "*un but en soi*" when the 1983 law came into force. In France, therefore, a product is intrinsically dangerous, in that unsafe, if the rules imposed by the Public Administration or those established in the sectors under the jurisdiction of *Afnor* are not respected.

The 1983 law had already used the expression, also introduced by the Directive, of "safety which a person is entitled to expect." On this subject the doctrine had already observed, in interpretation and application of law, that it is not sufficient for a product to be marketable to determine the existence or lack of its conformity to the provisions laid down by the Government or by *Afnor*, when the product may injure the user's health; it is no longer enough to carry out conformity inspections; it is also necessary to check on reasonable safety expectations, reasonable expectations fostered--it should be emphasized--by the public (and not by the entrepreneur). It is, therefore, the yardstick of the so-called social conscience to guide the court in evaluating "reasonable expectations"; but it should be added that the qualification given by the word "reasonable" means that "the public can exact no more than the measure of safety which is compatible with the present state of technology and the economic situation."

The "state of technology" means, therefore, taking into account the development inherent in the manufacturing process of that article, and that inherent in the manufacture of safety mechanisms, devices and expedients used to prevent damage and to contain it. But it cannot involve the producer's also taking on "development risk" because the Directive explicitly excludes this from producer liability (except where modified by member states). The "state of technology," therefore, can be understood as the "state of the art," a criterion which is accepted practice in expert assessments and has on more than one occasion received legislative and jurisprudential approval.

It is more difficult to understand the criterion of the "economic situation" referred to in French doctrine. Given the nonspecific nature of this term of reference, an evaluation relating to the "costs/profits" ratio in the production of the article may be considered suitable, as may its safety threshold in proportion to manufacturing and marketing costs

16. On this point see ALPA, *RESPONSABILITA' DELL'IMPRESA*, pp. 212 ff.

17. On this point see also CAS ET FERRIER, *op. cit.*, p. 466 ff.

(this kind of term of reference has also been used by some Italian writers); but the mention, though in passing, of the economic situation would seem to imply a more comprehensive evaluation made on a national level (the exigencies of the domestic economy, mentioned in art. 844 c.c., are brought to mind when making a comparative evaluation of the interests of owner and entrepreneur causing damaging output).

The French bill, however, comes to the interpreter's aid, in that in art. 1387-20 it establishes that, together with the other criteria which may be taken into account when weighing a product's safety, "all the circumstances" and in particular "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" must be taken into account. These criteria are almost identical to those found in the Italian text (art. 5).

English doctrine insists on the concept of defect both in examining the general problems of producer liability and in connection with the text of the Directive and, now, with the text of the legislative act.

A preliminary study revealed that the typical attitude of the courts (both in England and elsewhere) in deciding on whether a product is defective, is not simply to compare the product under examination with the usual production standards for like articles, but rather to examine whether the product in question, made according to a given design, is socially acceptable.¹⁸

It was also found that the concept of defect changes depending on how it is considered: depending on whether the measure of defectiveness is evaluated in an extracontractual context or where a contractual relationship exists. This is of considerable importance for English doctrine since it is only recently that the need has been felt to separate these two sectors.¹⁹ On the other hand, North American experience gives two different definitions of a defective product, one deriving from § 402 A of the Restatement (Second) of Torts and the other from § 2-315 - 2-318 of the U.C.C. (ignored, however, by Clarck).²⁰

18. See in particular Twerski et al., *The Use and Abuse of Warnings in Products Liability--Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 527 (1976).

19. On this point see also CLARCK, *THE CONCEPTUAL BASIS*, p. 325.

20. On this point see ALPA, *RESPONSABILITA' DELL'IMPRESA*, pp. 252 ff.

This doctrine looks at all the various definitions of defective product offered by the English legislative commission, comparing them with the third Community Directive (of 1979):

Law Commission, paragraph 48

(a) a product should be regarded as defective if it does not comply with the standard of reasonable safety that a person is entitled to expect of it, and (b) the standard of safety should be determined objectively having regard to all the circumstances in which the product has been put into circulation, including, in particular, any instructions or warning that accompany the product when it is put into circulation, and the use or uses to which it would be reasonable for the product to be put in these circumstances;

Pearson Commission, paragraph 1247

A product has a defect when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product." (The word "presentation" should be taken to include warning and instructions);

EEC Draft Directive, Article 4

"A product is defective, if being used for the purpose for which it was apparently intended it does not provide for persons or property the safety which a person is entitled to expect, taking into account all the circumstances, including its presentation and the time at which it was put into circulation."

It also discusses the admissibility of evaluations based on cost-benefit analyses, though decided on its exclusion, if accepted without contrasts.²¹ Alternatively, the test of "the consumer's expectations" is considered which, as emphasized above, is the preferred means of the Community legislator and has, therefore, become compulsory also for the English legislator. The doctrine proposes a composite evaluation combining both criteria.²²

Though clearly following the Directive, the legislative act makes some changes. It defines as defective a product whose safety does not

21. CLARCK, *op. cit.*, p. 334.

22. CLARCK, *op. cit.*, p. 337.

correspond to what "people in general are entitled to expect"; it establishes that "safety" in this context is also taken to mean the safety of the component parts and must be understood as safety in the context of risks of damage to property as well as risks of personal injury (sec. 3).

The criteria given for evaluation include both how the product has been marketed, the application of particular marks, instructions for use and warnings, what might be expected to be done with the product, and the time when the product was put onto the market, all criteria which correspond to those adopted by the Italian text.

Contrary to the Italian text, however, the purposes for which the product was marketed are also taken into consideration; the official comment itself underlines the fact that the expression: "what might reasonably be expected to be done with or in relation to the product," widens the range of reasonable behavior expected of the consumer. Not only normal or reasonable use is considered as in the Italian text; the expression "expected to be done with the product" involves "producer obligation to take into account the irregular and incorrect uses to which his product may be put." This does not, however, exclude negligence on the part of the consumer and, therefore, the affirmation or exclusion of producer liability.

Article 7 in the Italian text regulates the putting into circulation of the product; art. 9, the joint liability between the persons who may be blamed for the injury. These provisions, repeated in more or less similar terms in the other texts, require no further comment.

The involvement of third parties in the damage sustained does, however, require more careful examination.

The various drafts of the Directive attracted considerable comment on this particular subject.

The intent of the Directive is clear: the involvement of a third party does not exclude producer liability (art. 8, par. 1): concurrent fault involving the injured person may give rise to a reduction or disallowance of the liability of the producer (art. 8, par. 2). In this latter provision, the Community orientation is modified in that a concurrent fault on the part of the injured party could not bring about exclusion of liability, only reduction.

The Italian text does not reiterate art. 8, par. 1, in that it is considered "an obvious principle of constant application by courts," though judges (see, for instance, the rules cited above) tend to equate the involvement of a third party with a contingent case and, therefore, to exonerate the injured person. Omission should not, however, give

rise to any problems: jurisprudence may adapt, the principle contained in the Directive may convince the judge of the advisability of asserting producer liability even in the presence of third-party involvement. It will be a question of ascertaining, according to the given circumstances, to what extent this involvement has affected the process leading to the damage.

As regards contributory negligence, the Italian bill originally assisted naturally incapable minors below the age of twelve years, but this provision has been dropped from the final text (again without apparent motive).

The French bill reproduces art. 8, par. 1 of the Directive (art. 1387-8) regarding third-party involvement; while allowing the producer, as regards contributory negligence of the user in a contractual context, as already underlined, to demonstrate that the user was aware or was in the position to be aware of the defects (art. 187-15), and as regards safety defects provides only for a reduction but not for exclusion of liability (art. 1387-24).

English law refers to contributory negligence only to indicate circumstances in which the consumer may find himself in a position of negligent behavior: in particular, sec. 5(7) states that the "knowledge" that a person might be considered to have--and, therefore, that he can reasonably be expected to have acquired--must derive "from facts observable or ascertainable by him" or "with the help of appropriate expert advice which it is reasonable for him to seek."

The other rules provided in the Italian text do not offer any particular diversity with respect to the Directive or to the law in force or with respect to other countries.

Only one point is worth consideration: the introduction in the Italian law of minimum requirements for legal proceedings to be started for damage to property (art. 11, par. 2 establishes that such damage can be compensated only if it exceeds 750,000 lire, (\$1 = almost 1,250 lire)) and the fact that a maximum limit for damage from production line defects is not provided for.

No limits are given in the French bill while the English act states that no damages can be awarded if the amount does not exceed L. 275 (sec. 5(4)).

This comparative analysis of the Italian text against the models used in some other European countries shows that the legislative texts drawn up follow fairly similar criteria. However, in some cases there has been coordination with producer liability in contractual regulations and the consumer has been guaranteed, to a certain degree, a stronger

position (particularly in consideration of the concept of product defect and anticipation of abnormal use of a product).²³

Coordination with the general rules disciplining product safety is also guaranteed, and this is what today most concerns one who has the consumer's interests at heart, filtering out, obviously, paternalism and irrational rigidity, naive disregard of "the necessities of the national economy" or even the suggestions offered by cost-benefit analysis or by the economic analysis of the law.

However, it is not very reassuring to offer the consumer an easier path to compensation without having established minimum product safety standards, perhaps with general formulas that the courts can weigh, from case to case, with the caution befitting their position and with the assistance of proper technical advice.

The problem therefore, is whether judges of different cultures, who have different rules to observe, will all react, when faced with a text of this kind, in the same manner, arriving at the same decision. The harmonization of laws is not a mechanical process.

But let us now return to the Italian statute.

5. Foreseeable Problems of Interpretation

The Italian jurist is well aware that at this moment in time the problems involved in interpretation and application of this statute are only just beginning. Faced with this particular phase, some of the preliminary questions which may arise could include: (a) when is the statute applicable and when the general clause of the civil code? A possible answer could be that it depends on the plaintiff: if he wants to take advantage of the benefits of the new statute or of a (reduced) strict liability of the producer-defendant, he will ask the judge to apply the statute; if the plaintiff cannot use the statute, because its requirements are not satisfied in the given circumstances, he will ask the judge to apply the general rules of the civil code; (b) but if the judge applies the general rules, is it possible for him to give a broad interpretation, acting on behalf of the consumer to try to help prove the fault of the manufacturer as in the past, or should he apply the statute according to a strict, literal interpretation without those presuppositions and manipulations of the text we discussed earlier? and (c) what general meaning will the judges give to terms or concepts with which they are

23. CLARCK, *op. cit.*, p. 27.

not familiar, such as "reasonable expectation" with regard to product quality?

It is impossible to find an immediate answer. The first decisions, the first comments on the statute and the comments on the decisions drawn up by authors, the first public, academic or professional discussions on the new principles will shape the possible interpretations, so completing the normative text on product liability.