



The Law Commission
and
The Scottish Law Commission

(LAW COM. No. 82)
(SCOT. LAW COM. No. 45)

LIABILITY FOR DEFECTIVE PRODUCTS

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

*Presented to Parliament by the
Lord High Chancellor and the Lord Advocate
by Command of Her Majesty
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LIABILITY FOR DEFECTIVE PRODUCTS

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART I—INTRODUCTION	1	1
The terms of reference	1	1
The Royal Commission	3	1
The Strasbourg Convention	6	2
The EEC Directive	7	3
Our consultative document	9	3
Results of consultation	11	4
The need for an early report	18	5
The scheme of the report	19	5
 PART II—REFORM OF THE LAW OF THE UNITED KINGDOM	 20	 6
Main considerations of policy	23	6
Adequacy of existing rights and remedies	24	7
Additional rights and remedies in contract	30	9
Reversing the onus of proof	34	10
Our main recommendations—strict liability in tort or delict	38	11
Non-commercial production	43	15
Existing rights and remedies	44	15
The meaning of “defective”	45	16
The producer and the product	50	17
Manufactured articles	51	18
Movables and immovables	52	18
Products causing a nuclear occurrence	54	19
Pharmaceuticals	55	19
(a) The conclusions of the Law Commission	61	21
(b) The conclusions of the Scottish Law Commission	62	21
Components	66	22
(a) The views of the Law Commission	67	23
(b) The views of the Scottish Law Commission	77	24
Natural products	83	26
(a) The views of the Law Commission	84	26
(b) The views of the Scottish Law Commission	89	28
Retailers, wholesalers, distributors and importers	97	29
(a) Retailers and suppliers of own-brand products	99	29
(b) Retailers and suppliers of “anonymous” goods	100	29
(c) Imported products	102	30

	<i>Paragraph Page</i>	
Defences	104	31
Compensation for injury and death	113	33
Financial limits	115	33
Compensation for property damage and other losses.	117	34
Burden of proof	122	36
The producer's rights of recourse	124	37
Summary of conclusions and recommendations	125	37
PART III—THE STRASBOURG CONVENTION AND THE EEC DIRECTIVE	126	40
Aspects of the Strasbourg Convention and of the EEC Directive that are consistent with our main recommenda- tions in Part II	127	40
An appraisal of the EEC Directive	131	41
(a) The course of a business	132	41
(b) Non-pecuniary losses	133	41
(c) Financial limits	134	42
(d) Property damage	136	42
(e) Generally	138	43
Particular problems inherent in both the Strasbourg Con- vention and the EEC Directive	140	44
(a) Limitation periods	141	44
The views of the Law Commission	142	44
The views of the Scottish Law Commission	143	44
(b) The "cut-off" period	150	46
The views of the Law Commission	151	46
The views of the Scottish Law Commission.	154	47
(c) Components and natural products	161	49
Conclusions	162	49
The EEC Directive	162	49
The Strasbourg Convention	164	50
(a) The views of the Law Commission	165	50
(b) The views of the Scottish Law Commission	166	50
APPENDIX A: Strasbourg Convention on products liability in regard to personal injury and death		52
APPENDIX B: Proposal for a Council Directive relating to the approximation of the Laws, Regulations and Adminis- trative Provisions of the Member States concerning liability for defective products		76
APPENDIX C: Organisations and individuals who commented on Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20		94

THE LAW COMMISSION
and
THE SCOTTISH LAW COMMISSION

*Report by the Law Commission and the Scottish Law Commission
on a Reference under section 3(1)(e) of the Law Commissions Act 1965*

LIABILITY FOR DEFECTIVE PRODUCTS

*To the Right Honourable the Lord Elwyn-Jones, C.H.,
Lord High Chancellor of Great Britain, and
the Right Honourable Ronald King Murray, Q.C., M.P.,
Her Majesty's Advocate.*

PART I. INTRODUCTION

The terms of reference

1. On 2 November 1971, by separate references made under section 3(1)(e) of the Law Commissions Act 1965, the Law Commission and the Scottish Law Commission were asked as follows:

“to consider whether the existing law governing compensation for personal injury, damage to property or any other loss caused by defective products is adequate, and to recommend what improvements, if any, in the law are needed to ensure that additional remedies are provided and against whom such remedies should be available.”

2. The two Law Commissions have acted together throughout their consideration of this topic. They started by setting up a Joint Working Party with whose assistance a joint consultative document was prepared. This document was completed for publication on 3 June 1975 and was published shortly afterwards as Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20. The title given to it was “Liability for Defective Products”. We refer to this publication hereafter as “our consultative document”. The comments on it that were received have been considered by the two Law Commissions who have now arrived at firm conclusions on the recommendations to be made. On most but not all aspects of the topic the two Law Commissions have reached the same conclusions. Accordingly we are submitting a joint report. The views expressed in it are the views of both Law Commissions except where otherwise stated.

The Royal Commission

3. Whilst we have been considering compensation for personal injury, damage to property or other loss caused by defective products, another body has been considering the law relating to compensation for personal injury. On 19 December 1972 the then Prime Minister said in the House of Commons¹ that a wide-ranging inquiry was required into the basis on which compensation for personal injury should be recovered. He adverted to the tragic consequences of the use by expectant mothers of the drug thalidomide and announced the setting up of

¹ *Hansard*, Vol. 848, Col. 1119.

a Royal Commission under the chairmanship of Lord Pearson. The full title of the Royal Commission is the Royal Commission on Civil Liability and Compensation for Personal Injury; we refer to it hereafter as "the Royal Commission". Its duty is to consider to what extent and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) in a number of situations including injury or death at work or on the roads. The Royal Commission were required to have regard "to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise". Compensation for personal injury or death "through the manufacture, supply or use of goods or services" was expressly included within the terms of reference and so our work and that of the Royal Commission has overlapped.

4. Although our terms of reference and those of the Royal Commission overlap this has not impeded the work of either body. The Royal Commission have been invited to take a broader approach to the question of compensation not only in the ambit of their inquiry but also in the possible solutions to be considered. They have to consider questions of compulsory insurance and, by implication, the provision of compensation from an insurance fund or from the State itself. Our terms of reference are narrower; they are only concerned with liability for defective products; moreover, they seem to assume the broad framework of party and party litigation by which civil redress is provided under the existing law. They are, however, wider in one respect, namely that they include the consideration of compensation for damage to property and for other loss in addition to personal injury and death.

5. In our consultative document we explained that we would be considering the provision of additional remedies, if any were needed, in the context of party and party litigation². Comments were invited and have been considered on this basis and we have not examined the need for compulsory insurance, or the desirability of setting up a State or other fund from which to provide compensation. It is, in our view, more appropriate for the Royal Commission than for ourselves to consider these aspects of compensation.

The Strasbourg Convention

6. The work of the Council of Europe on liability for defective products started shortly after you referred the topic to us. In 1970 the Council of Europe decided to set up a Committee of Experts whose task should be the harmonisation of the laws of Member States in respect of the liability of producers. A committee was duly formed, comprising experts from various Member States, including the United Kingdom, and the committee met at Strasbourg for the first time in November 1972. As a result a draft convention was prepared, together with an explanatory report. We annexed copies of these to our consultative document and invited comments on them. Since that time the convention and explanatory report have been put in final form and transmitted to the Committee of Ministers of the Council of Europe with the recommendation that the convention should be adopted. The Committee of Ministers have now

² Para. 3.

agreed to its adoption and it is open to signature by Member States³. The text of the convention and of the explanatory report is reproduced at the end of this report as Appendix A. The two documents are referred to hereafter as "the Strasbourg Convention".

The EEC Directive

7. At the time of publishing our consultative document the Commission of the European Communities in Brussels had produced a preliminary draft directive and an explanatory memorandum on the liability of producers for defective products. The text of each was annexed to our consultative document and comments on them were invited.

8. In the explanatory memorandum that accompanied the preliminary draft directive it was contended that a directive was needed to regulate the liability of producers within the Community because the law was not the same in all the Member States and the differences were an obstacle to the free movement of goods across frontiers within the Community. It was argued that the operation of the common market required that these obstacles should be removed since they tended to distort competition and, furthermore, that consumers within the common market ought all to have the same protection in relation to defective products. Further work on the directive has since been done and a final draft, together with a revised explanatory memorandum, has been adopted by the Commission. The text of the two documents is reproduced at the end of this report as Appendix B and they are referred to hereafter as "the EEC Directive". After the consideration of the Directive by the European Parliament and the Economic and Social Committee, the next step is for the Council of Ministers to decide whether it should be issued under Article 100 of the Treaty of Rome. Such a decision requires the Council to be unanimous and the final form of the Directive, if there is to be one, may be renegotiated within the Council.

Our consultative document

9. Our consultative document did not contain provisional conclusions on whether existing remedies were adequate nor did it contain provisional recommendations for change. It did, however, contain a summary of the existing law and indicated the various ways in which it might be changed if it were to be changed at all. The major questions posed were (a) whether the existing law was satisfactory (b) whether it would be appropriate to provide additional rights and remedies by changing the law of contract (c) whether changes should be made in the general requirement that a person who sues in tort or delict must prove failure to take reasonable care in order to obtain redress and (d) whether some form of strict liability of a tortious or delictual character should be introduced in respect of defective products⁴.

10. In our consultative document we posed the arguments for and against the various changes that might be made and invited comments from lawyers, consumers, manufacturers, importers, exporters, retailers, distributors, whole-

³ So far three Member States have signed: Belgium, France and Luxembourg.

⁴ By strict liability we refer to a system in which a claimant who suffers damage by a defective product can recover compensation without having to establish that the defect was attributable to fault, so long as he can prove that it was the defect that caused the damage.

salers, insurers and all other persons who might be affected by such changes. We indicated⁵ that, unless the individual contributor objected, we would pass on copies of any comments received to the Royal Commission and to those concerned in advising or representing Her Majesty's Government in connection with liability for defective products. We had in mind not only the work of the Royal Commission but also the work being done on the draft convention at Strasbourg and on the draft directive at Brussels.

Results of consultation —

11. We were very pleased with the response to our consultative document. We received many full and persuasive memoranda representing almost every section of the community and in particular the legal profession and the manufacturing industries. All the comments received have been considered; we have sent copies of them to the Royal Commission and also to the Department of Prices and Consumer Protection who have been leading the United Kingdom delegation at Brussels in connection with discussions of the proposed directive. A list of the various bodies and organisations from whom comments were received appears at the end of this report as Appendix C.

12. It is difficult to summarise the results of such very full consultation in a few sentences except in a somewhat general way. However we think it appropriate to set out, by way of introduction, the broad trend of the comments received in relation to the four major questions posed in our consultative document⁶.

13. Consultation revealed a widespread dissatisfaction with the existing state of the law. A clear majority thought that changes of some kind should be made. Some of those who made proposals for change suggested that additional remedies might be provided by means of a central fund. For reasons given earlier⁷ we have felt it inappropriate for the two Law Commissions to investigate these possibilities; we have no doubt that they will be considered by the Royal Commission.

14. Of the changes that were discussed in our consultative document as possible reforms there was minimal support for alteration in the rules of contract. The idea that the user of a defective product should be given contractual remedies against persons with whom he was not in contractual relations was rejected by the great majority of those who sent in comments.

15. Many commentators proposed reforms in the law of tort or delict. A majority expressed the view that the burden on the claimant of proving fault in order to recover compensation in respect of defective products was too onerous. Some argued that where a product was shown to be defective the producer should have to undertake the burden of proving that the defect arose without fault on his part and that this was the only reform in the law that was needed.

⁵ Para. 6.

⁶ See para. 9, above.

⁷ See para. 5, above.

16. A weighty body of opinion favoured going further and making the producer of a defective product strictly liable for certain kinds of injury, damage or loss. It is fair to say that most, but not all, of those who submitted comments on behalf of manufacturers and producers were against the idea of strict liability. Nevertheless there was an impressive number of commentators, particularly amongst those immediately concerned with the administration of justice in the courts, who favoured some form of strict liability in tort or delict.

17. There is one other point on which comments were received which it is appropriate to mention briefly at this point. It concerns what we describe later in this report as the provision of a "cut-off" point. This is a feature of both the Strasbourg Convention and the EEC Directive but has no exact parallel in English or Scots law⁸. The basis of it is that the strict liability imposed on the producer of a defective product (if such liability were to be imposed at all) should be subject to a time-limit to run not from the date of the wrong or from the date of injury but from the time when the product was put into circulation. The effect would be that unless the claim was started in the courts before the date on which the time-limit expired (the cut-off point) the case could not be founded on strict liability. In our consultative document we mentioned the arguments in favour of a cut-off point and the arguments against and invited comments⁹. Not everyone who expressed views on our consultative document dealt with the cut-off point but, of those who did, opinion was divided. The two Law Commissions have been unable to reach agreement on this issue and we return to it later¹⁰.

The need for an early report

18. Normally when the two Commissions recommend changes in the law, as we do in this report, we include a draft Bill with explanatory notes. This is the course that we might well have taken in the present case. However, it has been indicated to us that an early report would be of value to Her Majesty's Government in shaping United Kingdom policy in relation to the Strasbourg Convention and the EEC Directive. The preparation of a draft Bill would clearly involve some delay and may be thought premature before Her Majesty's Government have considered these instruments and, if available, the relevant recommendations of the Royal Commission. We are accordingly making our report to you without a draft Bill.

The scheme of the report

19. We have divided the main body of this report into two further parts. In Part II we discuss the reform of the law of the United Kingdom without reference to the provisions of the Strasbourg Convention or of the EEC Directive. Our conclusions and recommendations for change are summarised at the end of Part II. We then go on to consider the provisions of the Strasbourg Convention and the EEC Directive. These are the main topics in Part III. We set out our views on the relevance of each to our recommendations in Part II and conclude with our advice on the measure of support that each deserves.

⁸ See, however, s. 15 of the Nuclear Installations Act 1965. Also, as regards England, s. 1(5) of the Defective Premises Act 1972 might in certain circumstances produce results similar to a cut-off point.

⁹ Paras. 141-143.

¹⁰ Paras. 150-160, below.

PART II. REFORM OF THE LAW OF THE UNITED KINGDOM

20. Where a person suffers personal injury, damage to property or certain other losses as the result of a product's being defective he may recover compensation in the form of damages by proving a breach of contract, or the commission of a tort or delict or, in certain circumstances, the breach of a statutory duty¹¹. Otherwise he cannot obtain compensation unless either it is payable under the National Insurance scheme or he has provided for the situation by arranging his own first party insurance.

21. Before considering in detail whether the rights and remedies provided under the existing law are adequate we find it useful to set out the main considerations of policy that are relevant to the issue where the loss occasioned by a defective product should lie. These considerations comprise ideas of morality and justice as well as considerations relating to insurance, economics and administrative convenience; they are set out in paragraph 23, below. We have not overlooked certain other considerations which were raised for discussion in paragraphs 35-38 of our consultative document but these seem to us much less important having regard to the advice that we received on consultation.

22. As we have already indicated¹², the two Law Commissions are substantially in agreement on most matters covered by this report, although they would not necessarily give the same weight to each of the main considerations of policy set out below. The Law Commission would accept these considerations as applying broadly over the whole field of liability for defective products. The Scottish Law Commission have reservations, and in certain respects strong reservations, about their applicability in relation to questions between persons and producers of certain products¹³.

Main considerations of policy

23. The following are the main considerations of policy:—

- (a) Where a person suffers personal injury because of the defective state of a product, the loss should be borne by the person or persons who created the risk by putting the defective product into circulation for commercial purposes, rather than by the person injured.
- (b) It is desirable to impose liability on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product.
- (c) It is desirable that the risk of injury by defective products should be borne by those who can most conveniently insure against it.
- (d) Public expectations, which are sometimes raised by advertising and promotional material, should be taken into account in determining where the loss should lie.
- (e) It is desirable to remove difficulties of a procedural or evidentiary character which impede rather than assist the course of justice.

¹¹ See, in particular, s. 3(1) of the Consumer Protection Act 1961.

¹² See para. 2, above.

¹³ Pharmaceuticals, components and natural products: see paras. 55-96, below.

- (f) The policy of the law should be to discourage unnecessary litigation.
- (g) As a corollary to (c), it would not be in the public interest to discourage first party insurance in the circumstances in which it is at present usual and appropriate.
- (h) As a corollary to (f), the number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons¹⁴.
- (i) As a matter of general importance, the laws of the United Kingdom should not put such heavy additional liabilities on British producers as (i) to place them at an undue competitive disadvantage in the international market or (ii) to inhibit technical innovation or research or (iii) to cause reputable manufacturers to cease production in the United Kingdom altogether.

Adequacy of existing rights and remedies

24. Next we turn to the existing laws of England and Scotland to see whether the rights and remedies provided are adequate, having regard to the main considerations of policy just described. In our consultative document we set out the existing laws of England and Scotland at some length¹⁵ and mentioned the various rights and remedies that might arise between contracting parties where the subject matter of the transaction was a defective product¹⁶. We also mentioned that in tort or delict the only remedy provided by the existing law was the action for damages based on failure to take reasonable care, and that the burden of proof on all relevant issues lay on the person bringing the action¹⁷.

25. The facts of *Daniels and Daniels v. R. White & Sons Ltd. and Tarbard*¹⁸ provide a useful example of the remedies available under the existing law of England and Scotland in respect of injuries caused by a defect in a product. Mr Daniels purchased some lemonade from Mrs Tarbard, the licensee of a public house. The lemonade had been manufactured and bottled by R. White and Sons Ltd, and supplied by them to Mrs Tarbard. It contained some carbolic acid which had been introduced into the bottle in some unexplained way before the bottle left the factory of R. White & Sons Ltd. Mr and Mrs Daniels both drank the lemonade and were made ill by the presence of the carbolic acid.

26. The result of the case was that Mrs Tarbard was held liable to Mr Daniels for breach of contract in selling him lemonade that was not of merchantable quality. Mrs Daniels had no claim against Mrs Tarbard because there was no contract between them. As for R. White & Sons Ltd. the claims of Mr and Mrs Daniels were dismissed because they failed to prove that the presence of the carbolic acid in the lemonade was attributable to negligence; the system for checking the bottles at the factory was found to be "fool-proof".

¹⁴ This consideration is sometimes referred to as "channelling".

¹⁵ Paras. 15-24.

¹⁶ Paras. 21-23.

¹⁷ Paras. 16-20 and para. 26.

¹⁸ [1938] 4 All E.R. 258.

27. Despite the recognition by the law of Scotland that a third party may in certain circumstances be entitled to enforce a contract where the object of the parties was to advance the interests of the third party, it is thought that the same result would have been reached by a court in Scotland¹⁹.

28. We do not attach too much importance to the actual decision in *Daniels v. White*. If the case were heard today, nearly 40 years later, the court would probably be more easily satisfied that R. White & Sons Ltd. had been negligent. Moreover, although the only person held liable in the case was Mrs Tarbard, it is likely, at least in the present state of the law, that she would be entitled to claim an indemnity from R. White & Sons Ltd.²⁰ Nevertheless the case is, we think, an illustration of some of the major criticisms that can be made of the existing law of England and of Scotland.

29. In the view of the Law Commissions the main considerations of policy which we set out in paragraph 23 suggest that the existing law, while it has already responded in some measure to certain of the ideas embodied in these arguments, is nevertheless open to criticism in the following respects:—

- (a) In the absence of proof of fault on the part of the manufacturer, only a person standing in a contractual relationship with the supplier of goods has a right and remedy. Where the injured person was not the buyer, he must bear the loss himself.
- (b) In the absence of proof of fault on the part of the manufacturer, a person standing in a contractual relationship with the supplier has rights and remedies only against him—usually a retailer. Thus liability will often fall not on the manufacturer—who may commonly be regarded by members of the public and others as being responsible for the quality and safety of the product—but upon a retailer, who from a practical point of view is seldom nowadays regarded as being so responsible.
- (c) In a number of situations including that envisaged in the preceding paragraph, it may be necessary for each party in the chain of distribution to claim against his immediate supplier for breach of contract, and in consequence the existing law may multiply litigation.
- (d) A person who claims against a producer in tort or delict has to establish first that his injury was caused by a defect in the product, and second that the defect existed in the product when it left the hands of the producer. The latter burden, in particular, he may be unable to discharge.
- (e) A person who claims against a producer in tort or delict has a third task, that of establishing that the defect was there because of fault on

¹⁹ As a result of certain decisions of the House of Lords during the 19th and early 20th centuries, this area of Scots law—the *jus quaesitum tertio*—is in a state of some confusion. It has recently been examined by the Scottish Law Commission (Memorandum No. 38—Stipulations in favour of third parties) [1977].

²⁰ The right of indemnity might be excluded by a term in the contract of supply in which case the buyer would have to satisfy the court that it was not fair or reasonable for the suppliers to rely on it: Sale of Goods Act 1893 s. 55(4) as amended by s. 4 of the Supply of Goods (Implied Terms) Act 1973.

the part of the producer. Experience shows that if the claimant in tort or delict surmounts the two earlier hurdles he may often be able to surmount the third, because he is aided by the doctrine of *res ipsa loquitur* or its practical equivalents. He is, however, at a disadvantage in relation to access to the relevant evidence and scientific expertise, and this may be a real barrier to the initiation of an action on his part.

Additional rights and remedies in contract

30. One way of meeting at least some of these criticisms would be to change the basic rules of contract. In our consultative document we described the two main ways in which additional rights and remedies in contract might be provided in respect of defective products. It often happens, as indeed happened in *Daniels v. White*, that the person injured by a defective product bought it from a retailer who bought it from the producer: sometimes the chain of supply includes other links, such as wholesalers and distributors. In such a situation there is a chain of contracts linking the original producer to the ultimate purchaser. However, there is no contract between the two people at either end of the chain. French law allows the ultimate purchaser to "leap-frog" the intermediaries in the chain and to sue the producer direct as if there were a contract between them²¹. In our consultative document we invited views on whether a similar mechanism should be introduced into the contract law of the United Kingdom.

31. We also invited comments on the other way in which additional rights and remedies might be provided in contract, which is also illustrated by the facts in *Daniels v. White*. The purchaser of the lemonade obtained redress from the retailer for his injuries but his wife did not, since she did not stand in a contractual relationship to the retailer. We first considered this kind of situation in a joint consultative document that we published in 1968 when considering the revision of the Sale of Goods Act 1893²². We included a section on "Third Party Beneficiaries of Conditions and Warranties" and canvassed the idea that rights and remedies in contract, in respect of personal injuries at least, might be extended beyond the purchaser to the non-purchaser as well²³. As a result of the comments received we decided that this idea was better considered in the context of a general review of liability for defective products, and we said so in our joint report to your predecessors²⁴.

32. We raised the subject again in our consultative document on Liability for Defective Products but it received less support than it did in 1968. Commentators were generally critical of providing additional rights and remedies by altering the basic rules of contract. As for giving non-purchasers contractual

²¹ We understand, however, that it is the normal practice in France to sue the immediate seller, who in turn will bring his supplier into the proceedings and so on back to the producer. Each of the parties in the chain of distribution is linked to the next by what is referred to in the United States of America as "vertical privity".

²² Law Commission Working Paper No. 39 and Scottish Law Commission Memorandum No. 15.

²³ *ibid.*, paras. 32-41. This is an example of what, in the United States, would be termed "horizontal privity".

²⁴ *First Report on Exemption Clauses* (1969), Law Com. No. 24; Scot. Law Com. No. 12; H.C. 403 (1968-69), para. 63.

rights and remedies against the retailer, the objection was made that this was placing the risk on the wrong person; the right of redress should be directed at the producer rather than the retailer. As for giving ultimate purchasers contractual rights and remedies against the producer, it was observed that this introduced an unnecessary fiction by supposing the existence of an imaginary contract, and it would be simpler and better to solve the problem in the law of tort or delict. Practically no support was given to amending the law of contract in any way so as to provide additional rights and remedies in this field.

33. Having considered these points fully we have reached the conclusion that the advice which we received is sound and that the law of contract should not be extended to meet the problem. If additional rights and remedies are to be provided they should lie in tort or delict. We note in this context that the American law of liability for defective products went through a phase when the remedies against producers and the remedies against retailers for non-purchasers were framed in contract, but have now been generally accepted as remedies in tort²⁵.

Reversing the onus of proof

34. We now turn from contract to tort and delict. An idea that was much favoured by those who sent us comments was that the only change in the law that was needed was to reverse the burden of proof²⁶. Thus, instead of requiring the injured person to prove fault on the part of the producer of the defective product, it should be for the producer to establish that he had taken reasonable care. We have considered this carefully, not least because it would enable reform to be accomplished within the boundaries of concepts presently applying to liability for defective products, but have reached the conclusion that such a change would not go far enough in providing the additional rights and remedies that the underlying considerations of policy require.

35. If the producer were merely required to establish that he took reasonable care, but not to establish that the defect occurred for a reason that was not his fault, the claim might still fail for want of sufficient proof. The solution adopted by judicial decision in the Federal Republic of Germany is that it is not enough for the producer to establish that he took reasonable care: he must show how the defect actually arose²⁷. Even then, however, the procedural and evidentiary problems, although reduced, would not be entirely removed. There would still be difficulties with, for example, the product that was defective by reason of a latent defect in a component that the producer purchased from a reputable supplier. The producer of the finished product might establish his own lack of negligence and show that the fault lay with his supplier, but the evidence might emerge at too late a stage for the claimant to be able to start an action against the maker of the component. Even if he were eventually able to obtain redress from the component-maker there would be unnecessary expense and undesirable delay.

²⁵ The landmark in this transition is probably *Greenman v. Yuba Power Products Inc.* (1963) 377 P. 2d 897 (Cal.).

²⁶ An idea discussed in paras. 39-45 of our consultative document.

²⁷ BGHZ 51 s. 91; NJW 1969 s. 269. See R. H. Mankiewicz, "Products Liability—A Judicial Breakthrough in West Germany", 1970 19 I.C.L.Q. 99.

36. In addition, there are the evidentiary problems associated with the proof or disproof of fault. Even if the rules relating to the burden of proof were changed a claimant might still have less effective means than the producer of eliciting the facts; he would not necessarily be well placed to challenge the evidence, often of a very complex and technical character and relating, perhaps, to extensive and highly technical research procedures, which might be adduced against him to establish that reasonable care had been taken. Indeed all the available experts in one particular section of industry might be ranged on the side of the producer; the claimant might be unable to find an expert of sufficient stature to give evidence on his behalf. On the other hand, if the claimant did have such support the litigation would tend to become a contest between experts, making for long-drawn-out cases and unpredictability of outcome. These are unsatisfactory features of the existing system which are inherent in any system of compensation that is based on fault, whatever changes are made in the rules on burden of proof.

37. Accordingly it seems to us that the procedural and evidentiary difficulties in the existing law would not be solved merely by reversing the onus of proof. However, even if they could be so solved, it does not follow that the substantive remedies themselves would then be satisfactory. Where the producer could prove that he had taken all reasonable care, on facts such as occurred in the thalidomide case, the claimant would still be without a remedy. Our conclusion is that, as a solution to the problems in the existing law, the reversal of the onus of proof, without more, is inadequate and should be rejected.

Our main recommendations—strict liability in tort or delict

38. We have concluded that the main considerations of policy outlined in paragraph 23 and the criticisms of the existing law made in paragraph 29 justify the imposition of strict liability for injuries resulting from defects in products that are put into circulation in the course of a business, and that the liability should rest primarily on the producer. We take the points in the order in which they were set out in paragraph 23:—

- (a) The loss should lie primarily on the person who created the risk: we are convinced that, particularly when a product is mass-produced, this solution makes sense as a matter of economics. If 10,000 products are manufactured in the same run and one of them, being defective, causes an accident, the easiest way of spreading the loss fairly is to place it on the manufacturer, who can recover the cost of insuring against the risk in the price that he charges for his product.
- (b) Liability should be imposed on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product: this gives a producer an incentive to improve the safety standard of the product and to reduce the risk of further accidents. A product may be handled by many persons on its way to the buying public, some of whom control its quality, others of whom, such as wholesalers and distributors, usually do not. The person best able to control the quality of the product is, almost invariably, the producer and it is to him that the liability ought accordingly to be channelled. So far as practicable, however, this

should be done in a way which will not inhibit technical innovation or progressive industrial development. The possible incidence of spurious claims should also be taken into account.

- (c) It is desirable that the risk of injury by defective products should be borne by those who can most conveniently insure against it. In the existing state of the law most producers insure against their liability in tort or delict or in contract. First party insurance in respect of personal injury is comparatively rare and comprehensive cover is expensive. The producer is likely to be in the best position to insure against the risk. By putting on the producer the risk of injury caused by a defect in his product and by taking it away from the person injured one would be adding, no doubt, to the insurance premium otherwise payable by the producer, to an extent which, it must be conceded, is speculative until claims experience is acquired; but we believe that it would be a cheaper and administratively more convenient way of providing compensation for the person injured than to leave individuals to arrange their own first party insurance²⁸.
- (d) Public expectations should be taken into account in determining where the loss should lie. It is in the main the producer rather than the retailer whose name is linked in the public mind with the product, and our impression is that when the product turns out to have a defect which causes an accident public expectation is that the producer should provide redress. Public expectations in the safety and performance of products may be raised by advertising and promotional material emanating from the producer.
- (e) It is desirable to remove difficulties of a procedural or evidentiary character which impede rather than assist the course of justice: as we have explained in paragraphs 29 and 35-36, actions in tort or delict against manufacturers of defective products often pose such difficulties, because the circumstances under which the product has been designed, made and tested may be exclusively within the knowledge of the manufacturer.
- (f) The policy of the law should be to discourage unnecessary litigation: it is not our function in this report to examine this problem in detail but we are persuaded that the competency of a direct action by the injured person against the person ultimately responsible for causing the injury can only serve to keep litigation to a minimum.
- (g) It would not be in the public interest to discourage first party insurance in the circumstances in which it is at present usual and appropriate. There are some kinds of risk for which first party insurance is normal, the most significant being the risk of damage to property. The discussion that follows relates only to claims arising out of personal injury and death. We set out, in paragraphs 117 to 121, why we reject the suggestion that strict liability for defective products should extend to property damage or other heads of damage, such as pure economic loss.

²⁸ The Scottish Law Commission have specific observations to make on this point in the context of pharmaceuticals, components and natural products. See paras. 62, 77-79 and 92-93, below.

- (h) The number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons. Otherwise costs, and with them the price to the ultimate consumer, are likely to increase. Many different persons and organisations may be involved in the production and distribution of a single product. In some legal systems, notably the State of California, the risk of an accident caused by a defect in a product is put on every member in the "producing and marketing enterprise"²⁹ including retailers, wholesalers, distributors, those who supply goods on hire and even financing institutions who provide the loan capital for manufacturing companies³⁰. If each and every member is liable and has to arrange his own insurance cover, the extra administrative costs and the extra litigation costs mean an increase in the ultimate price to the public of the product. This point was argued at greater length in paragraph 54 of our consultative document and its validity was not challenged by any of those who sent us comments. On the other hand special considerations apply where the defective product has been manufactured abroad. These are considered more fully at paragraphs 102 and 103.
- (i) As a matter of general importance, the laws of the United Kingdom should not put such heavy additional liabilities on British producers as (i) to place them at an undue competitive disadvantage in the international market or (ii) to inhibit technical innovation or research or (iii) to cause reputable manufacturers to cease production in the United Kingdom altogether. The explanatory report accompanying the EEC Directive emphasises that the producer in a country which imposes strict third party liabilities on him is unable to compete on equal terms with the producer in a country that is more indulgent towards its producers³¹. This is because the cost of the extra liabilities is an extra element to be included in the price of the product. Moreover, our own producers if subjected to heavy additional liabilities might leave the United Kingdom in favour of other jurisdictions where they were less vulnerable; alternatively, such additional liabilities might discourage scientific research and technical innovation to the lasting detriment to our industry.

39. The last of the nine considerations listed above is the one that has caused us the most difficulty. It concerns the cost to the producer of assuming or insuring against this extra liability. We have not obtained sufficient evidence on consultation to enable us to say what the cost to producers would in fact be. In some industries the cost of the extra liability may mean a significant increase in their running costs and in the price of their products. Some commentators indeed suggested that adequate extra insurance cover would be simply unobtainable. It has not been easy for us to make a proper assessment of these matters and without adequate claims experience an assessment may not be

²⁹ *Vandermark v. Ford Motor Co.* (1964) 391 P. 2d 168 (Cal.).

³⁰ *Conner v. Great Western Savings & Loan Associates* (1969) 447 P. 2d 609 (Cal.).

³¹ It may be said, in answer, that a person will not necessarily choose the cheaper product if inadequate rights of redress are provided in respect of defects.

practicable. Necessarily when a new kind of liability is created the cost of it must be a matter for speculation.

40. On the other hand, producers have liabilities in tort or delict in the present state of the law against which they usually insure up to such amount as may be appropriate to the risks involved and the cost of obtaining cover. They also have liabilities in contract for the quality of their products and against these too they may insure for a suitable amount. Their liabilities are theoretically unlimited but our enquiries have not revealed any case of a producer who has unlimited cover: it would not, we think, be obtainable. Additional liabilities, under our recommendations, would necessitate a reappraisal by producers (and their insurers) of the legal risks to which their activities exposed them and, no doubt, this would, initially at any rate, lead to an increase in premiums. But it is not an argument against moving from the present law by extending the scope of strict liability that unlimited cover to protect a producer against disaster would not be available. The chance of disastrous consequences being caused by failure to take reasonable care is already present³² and unlimited cover is unobtainable³³.

41. Claims that would, under our main recommendations, be founded on strict liability in tort or delict would include claims for which the producer is already liable under the existing law, either by reason of fault or by being passed up the chain of supply in contract. In order to gauge the extra cost of the additional liability that our main recommendation involves, it would be necessary to know how many claims would succeed by reason of it that would otherwise fail. We do not have the relevant statistics and doubt whether they are obtainable. There is a remarkable lack of reported cases since *Daniels v. White* in which claims in respect of defective products have failed solely because of the claimant's inability to prove fault but, of course, there may be many such claims that, under the existing law, never come to court. Nevertheless, doing the best that we can on the material provided on consultation, it seems to us that the risk of putting reputable producers out of business or of driving them out of the jurisdiction by the provision of additional rights and remedies for persons injured by defects in their products is, in general, slight and is, in any event, a risk that can justifiably be taken.

42. We are not overlooking the recent escalation in insurance premiums for products liability cover in the United States of America. This was much discussed at the First World Congress on Product Liability, which was held in London between 19 and 21, January 1977. There are, however, many differences between personal injury litigation in America and in this country. One difference is that in America lawyers and even, in some cases, witnesses may stipulate for remuneration on a contingency basis by receiving a percentage of the damages. Another difference is that exemplary or punitive awards of damages are made in cases where they would not be allowed in this country. A further difference is that the cost of medical treatment figures very largely in American awards

³² Such a situation would have arisen if the claimants had eventually been able to establish fault in the thalidomide case. See *S. v. Distillers Co. (Biochemicals) Ltd.* [1970] 1 W.L.R. 114.

³³ The Scottish Law Commission discuss this question specifically in the context of pharmaceuticals at para. 62, below.

whereas in this country, because of the operation of the National Health Service, medical expenses are, in the ordinary way, very small. Another possible factor is the greater use in America than in the United Kingdom of jury trial to determine questions of liability and the assessment of damages. For these and, no doubt, other reasons, the general level of awards for personal injuries is very much higher in America than in England or in Scotland and seems to be rising. It should be noted that the rise in insurance premiums for third party cover in the United States of America has not been confined to cases concerning defective products. There has, for example, been an equally remarkable rise in premiums for cover in respect of professional negligence or malpractice, for example by medical practitioners, where the liability is fault-based. It should also be remembered that many of the very high awards in America that have attracted publicity and, no doubt, led to an increase in insurance premiums for product liability cover—cases such as those arising out of the recent Paris air disaster—have been founded not on strict liability but on the proof (or admission) of fault on the part of the persons sued. It seems probable, therefore, that insurance premiums in America have been affected by a number of considerations that would not at present be applicable in this country. We have in consequence been unable to derive much assistance from the American experience in determining what the cost in insurance terms of introducing strict liability is likely to be. It should not however be left out of account that the introduction of strict liability in a context of increasing awards of damages could in due course have a significant effect on insurance costs.

Non-commercial production

43. So far, in this Part, we have been considering commercial production only, that is to say the making of products in the course of a business. Our view is that insurance against third party claims is, or should be, an ordinary incident of commercial production; the same considerations do not apply to production or manufacture that is undertaken otherwise than in the course of a business. It would, in our view, be unreasonable and wholly inconsistent with the general considerations of policy on which we have relied, if liability were imposed on those who do not act in the course of a business. A housewife, for instance, who makes home-made jam for her local church sale-of-work should not be liable; nor should the man who sells apples to his neighbour over the garden wall. On the other hand, the country dweller who provides home-made teas for tourists throughout the summer, and the small-scale market gardener, would presumably be regarded as acting in the course of a business. We see no particular difficulty in this matter, and express confidence that it can be resolved satisfactorily by the courts. In the first two examples it would be wholly unreasonable to expect the “producer” to take out insurance; this would not necessarily be so in the case of the other two examples.

Existing rights and remedies

44. In our consultative document we posed the question whether, if strict liability were imposed on producers in respect of accidents caused by defective products, all other kinds of liability should be removed³⁴. There is a precedent for this kind of channelling of liability: strict liability for certain nuclear occur-

³⁴ Paras. 55 and 57.

rences is imposed by statute on the licensee of a nuclear site, in substitution for existing remedies in contract, tort or delict³⁵. The unanimous opinion of those who commented on this point was that, whether or not additional rights and remedies against the producer were provided, existing rights and remedies against producers and others, such as retailers, should be preserved. With this we agree. This means not only that contractual and other rights against producers should be preserved but also that the producers' rights of recourse against other persons should be preserved as well³⁶.

The meaning of "defective"

45. Our main recommendation is that producers should be strictly liable for accidents caused by defects in their products. We must explain in greater detail what we mean by "defect" and "defective".

46. In our consultative document we suggested that there were two possible approaches to the definition of defect. One was to make the definition turn on safety; the other was to make it turn on merchantability³⁷. Having regard to our general conclusion in this report that strict liability should be confined to personal injuries³⁸, the latter approach is less suitable. Moreover as we pointed out in our consultative document, such an approach has conceptual and practical difficulties. The main problem is that the standard of merchantability required depends on the terms and circumstances of the contract under which the product is supplied, including the price³⁹. Let us suppose that an electric kettle of indifferent quality is produced, put into the stream of commerce and eventually sold to a member of the public. The ultimate purchaser may complain that the kettle is, in the "merchantability" sense, defective. As between himself and the retailer the merits of the complaint must be determined according to the terms of the contract that he made and the price that he paid. As between himself and the producer, however, no terms have been agreed and no price has been paid. If the kettle has been oversold by the retailer then it is the retailer not the producer who is to blame. If on the other hand the quality of the kettle is reasonable having regard to the terms on which the retailer sold it then the purchaser would seem to have no legitimate grounds for complaint.

47. Many of those who sent us comments accepted the points just made and said that if strict liability were to be imposed on the producers of defective products it should only be in respect of products that were unsafe, not products that were, to adopt the phrase used in our consultative document, "safe but shoddy". The majority view was that complaints about the quality and performance of products, as opposed to complaints about their safety, should be regulated by the law of contract, as at present. We agree entirely with this approach. We accordingly recommend that the essence of the definition of "defect" should be the lack of safety.

³⁵ Nuclear Installations Act 1965, s. 12.

³⁶ We return to the topic of rights of recourse later in the report, at para. 124, below.

³⁷ Paras. 95-109.

³⁸ Para. 38(g), above.

³⁹ Sale of Goods Act 1893, s. 62(1A).

48. A product should be regarded as defective if it is unsafe. However, this assertion raises further questions. Should a safety razor be classified as defective merely because on one occasion someone cuts himself when shaving? Should a person who has an allergy to strawberries be entitled to complain about strawberries that bring him or her out in a rash? Where someone buys analgesics in a bottle on which there is a printed warning against taking more than a certain number at the same time, should he or she be allowed to complain that the analgesics are defective because an overdose makes him or her ill? In each of these cases we think that the products in question—the safety razor, the strawberries and the analgesics—ought not to be regarded as defective. We think that these illustrations, and many more could be given, are sufficient to establish two propositions that we regard as fundamental, namely—

- (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 warnings 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.

49. There is one further point of possible difficulty. It concerns the time at which the defectiveness of the product should be determined for the purposes of imposing strict liability on the producer. There are, in our view, only two possible solutions; one is to judge the defectiveness of the product as at the time of the accident and the other as at the time that the producer put the product into circulation. We have no doubt that the appropriate time is when the producer put his product into circulation. He ought not, in our view, to be liable for defects in the product that accrue at a later stage. We do not think it would be right to impose liability on a producer for a product that was safe when it left his hands but which became unsafe later because it had been tampered with by others or had not been properly used. Nor do we think it would be fair to apply the safety standard of 1977 to products put into circulation in 1967. For example it would not be right to regard a 1967 car as defective merely on the ground that it was not produced with safety belts attached. We accordingly conclude that the producer of a product should not be liable where he can establish that the product was not defective when he put it into circulation⁴⁰.

The producer and the product

50. We have not attempted to define the words “producer” and “product”. If our recommendations were to be given legislative force a definition of each might be needed. As we mentioned earlier, we are not including a draft Bill in this report and for the purposes for which a final report is required⁴¹ we hope it will suffice if we indicate in general terms the kinds of person who are to

⁴⁰ For a complete statement of our recommendations concerning the burden of proof see paras. 122–123, below.

⁴¹ See para. 18, above.

be regarded as “producers” and the kinds who are not. Likewise with products: we explain below what we intend to include in our recommendations and what is to be excluded but have not attempted to reduce these ideas to a single formula. As will be seen, the Scottish Law Commission recommend excluding certain classes of producer and certain kinds of product which the Law Commission recommend should be included. We start with the matters on which the two Law Commissions are agreed and come to the points of disagreement later.

Manufactured articles

51. The regime of strict liability for defective products which both Law Commissions favour would seem particularly appropriate to those who manufacture articles by processes of mass production. However strict the checks and quality-controls, the occasional defective product will slip by and get into the stream of commerce, and we recommend that the unlucky person who is injured as a result ought to be compensated by the manufacturer. However, we do not think that strict liability should only apply to producers who employ techniques of mass-production. Where articles are individually made the public expectation of safety is, if anything, higher than in relation to mass-produced ones. These ought, as a general rule, to be included.

Movables and immovables

52. Whilst it is possible to think of an immovable, such as a building, as a “product” we indicated in our consultative document that we did not so regard it⁴². The provision of additional remedies in respect of defective premises was considered by the Law Commission in the report on which the Defective Premises Act 1972 was based⁴³. Moreover we understand that the Royal Commission are considering the question of compensation for unsafe buildings, not necessarily in the context of products liability. Accordingly we have not considered liability for immovables in the present study and we confine our recommendations to movable products only. This raises the question whether articles that are incorporated into immovable objects, for example cement used in the construction of buildings, ought to be excluded from the regime which we are recommending. We discussed this possible exclusion in our consultative document⁴⁴ and commentators were divided in their opinions. Those representing construction industries were generally in favour of exclusion and they were not alone.

53. In relation to building materials not yet incorporated in an immovable object both Commissions share the view that the same considerations apply to building materials as to other products. The Law Commission consider that the producer of such materials should continue to be liable for injuries caused by their defective state even after their incorporation into an immovable. The Scottish Law Commission, however, as explained below⁴⁵, consider that the producer of a component should cease to be strictly liable for defects in it after its incorporation into a new product. From that moment strict liability would

⁴² Para. 65.

⁴³ *Civil Liability of Vendors and Lessors for Defective Premises* (1970), Law Com. No. 40; H.C. 184 (1970-71).

⁴⁴ Para. 65.

⁴⁵ Paras. 77-82, below.

be assumed by the creator of the new product. In consonance with this view, the Scottish Law Commission consider that the producer of building materials should cease to be strictly liable for defects in them when they have been incorporated into an immovable, from which stage liability should rest on the principles applicable to immovables and on safety provisions such as those relating to building and engineering operations.

Products causing a nuclear occurrence

54. The one exception on which both Law Commissions are agreed is in respect of nuclear occurrences. The Nuclear Installations Act 1965 imposes strict liability on the licensee of a nuclear site in respect of injury or damage resulting from certain nuclear occurrences. No other person may incur liability for such injury or damage⁴⁶, so even if it could be shown that the occurrence was attributable to the negligent manufacture of a product in use at the site there would be no liability, under the existing law, on the producer. The purpose of the legislation was to channel the risk and the responsibility for arranging insurance to one person, the licensee, to the exclusion of others. To impose strict liability on producers in an area where existing liability in tort or delict is excluded by statute would be contrary to the policy that underlies the Nuclear Installations legislation and to the international conventions which that legislation implemented and which have been ratified by the United Kingdom. Almost all of those who sent us comments took this view and we share it. We recommend that strict liability for defective products should not apply to injury or damage resulting from those nuclear occurrences in respect of which liability is regulated by the Nuclear Installations Act 1965.

Pharmaceuticals

55. We consider pharmaceuticals separately because it was urgently represented to us that there were reasons for treating pharmaceuticals in a way different from other products.

56. On consultation three major points were made in favour of treating pharmaceuticals in a way different from other products. One was the argument that drugs only combat pain or disease by interfering with the natural processes of the body and that if drugs were completely safe they would not work; it was urged that a general standard of safety was inappropriate to drugs. The second point was that many drugs are only available on prescription and the suitability of the particular drug for the particular patient is monitored by persons and bodies other than the producer of the drug, including the medical practitioner who makes out the prescription. The third argument was that the imposition of strict liability on producers of pharmaceuticals might inhibit research into new products and retard the availability to the public of new medicinal remedies.

57. Taking these three points in turn, the first is, in the view of the Law Commissions, answered by the meaning to be given to the words "defect" and "defective". It is acknowledged that some drugs are potentially dangerous and that many can have unpleasant side-effects and that it would not be appropriate to stigmatise them as "defective" on these grounds alone. A line must be drawn

⁴⁶ Nuclear Installations Act 1965, s. 12.

between the risks and effects which a person taking a drug may reasonably be expected to accept without complaint and those which are beyond what a person ought reasonably to expect. We believe that the standard of reasonable safety, discussed earlier⁴⁷, is an appropriate standard for determining whether the pharmaceutical product in question is "defective" for the purposes of imposing strict liability on the producer.

58. As for the point that many drugs are only available on prescription, the Law Commissions do not see that this has any significance in determining the manufacturer's liability. A pharmaceutical product may be defective because of contamination or some other error in the processes of production. If so, then, whether or not the producer has been negligent, it seems appropriate that he should bear the legal responsibility for the risk that he has created. The fact that the drug may have been prescribed by a medical practitioner (who could not be expected to know of the contamination) seems to the Law Commissions to be immaterial. A prescription may or may not have been required for the particular drug. The fact that a drug is available on prescription probably means that it has been decided by the relevant authority that it satisfies a certain safety standard. But compliance with standards laid down by statutory bodies or licensing authorities can only be evidence, and not necessarily conclusive evidence, that a product is not defective when put into circulation.

59. The other ground on which a pharmaceutical product may be judged defective is that it has a propensity for harm that the producer has failed to discover at the time of putting it into circulation, that is to say it has a "design" defect. Here again it seems to us that the risk should be borne by the producer whether or not he has been negligent. The fact that a doctor has prescribed the drug is not, in our opinion, a sufficient reason in itself for relieving the producer of responsibility. Medical practitioners receive much promotional literature from the pharmaceutical industry which must have some influence on their judgment as to the qualities of the product in question and the purposes for which it should be prescribed. We believe that the producer who has, for commercial purposes, produced and promoted his product should accept legal responsibility for defects in it. This does not mean that the producer should be liable without more for injuries resulting when the doctor prescribes the drug for an inappropriate purpose or the pharmacist misreads the prescription. The producer's liability should depend on his product's being defective at the time he put it into circulation, having regard to all the circumstances including instructions and warnings that accompanied the product's promotion⁴⁸.

60. As for the argument that strict liability on the producers of pharmaceuticals may inhibit research, we believe that market forces provide a strong impetus to the development of new products which will not be significantly inhibited by the imposition of strict liability. In any event, the pharmaceutical industry is not the only one to be researching into new products. The same is true of new foods, fabrics, building materials and new products generally.

⁴⁷ See, in particular, para. 48, above.

⁴⁸ See para. 49, above.

(a) The conclusions of the Law Commission

61. The Law Commission believe that all the policy considerations in favour of imposing strict liability on producers apply with as much force to pharmaceuticals as they do to other products. The producer of defective pharmaceuticals creates the risk; he is the person best able to control the quality of the product; he is the person best able to insure against claims; and public expectation that drugs on the market will be safe is raised by advertising and by the promotional material with which the pharmaceutical industry supply the medical profession. Finally the thalidomide case itself, the history of which is too well known to need recounting, illustrates the procedural and evidentiary problems that face the claimant who seeks compensation under the existing law. The conclusion of the Law Commission is that strict liability for injuries caused by defective pharmaceuticals should be imposed on those who produce them. A substantial number of commentators arrived at the same conclusion. This is not to say that the Law Commission would necessarily oppose the idea of a central compensation fund for persons injured by drugs (whether prescribed or not) or other kinds of misadventure. But, like the Scottish Law Commission, they believe that the Royal Commission are the appropriate body to consider the advantages and disadvantages of such a fund.

(b) The conclusions of the Scottish Law Commission

62. The Scottish Law Commission agree with the Law Commission that strict liability for personal injuries caused by defective pharmaceuticals should be imposed on those who produce them, but they consider that there may be a case for the application of special legislative provisions to producers of certain pharmaceuticals, in particular prescription medicines. While it is possible that most claims arising from defects in pharmaceuticals can be met by producers, it is a matter for concern to the Scottish Law Commission that in the view of insurance and other concerned interests it may be virtually impossible to obtain insurance against some risks in this field, especially those of a "catastrophic" character. If this is so, cases may arise where the producer may have no cover in relation to the particular risk and may have insufficient resources to meet the claims in full. The two Commissions consider below, and on practical grounds reject, the fixing of financial ceilings on the liability of the producer⁴⁹.

63. The Scottish Law Commission also agree with the Law Commission that compliance with standards laid down by a body such as the Medicines Commission⁵⁰ should not by itself be taken to indicate that a medicine is not defective, and should not be regarded in itself as a reason why producers of pharmaceuticals should not be strictly liable. However, the very fact that certain medicines can only be supplied on prescription is an indication both that these medicines are potentially dangerous, and that, despite the danger, the State expressly permits their use by the medical profession in the treatment of patients. In certain circumstances the State may, in what it conceives to be the interest of the public generally, seek to encourage and even promote the use of certain drugs, as in programmes of immunisation. The development of new medicines

⁴⁹ See paras. 115-116, below.

⁵⁰ Established by the Medicines Act 1968, s. 2.

is frequently a response to public concern at the incidence of certain diseases, such as polio, and it seems important not to inhibit unduly the development and use of new drugs.

64. Thus the procedure for making certain medicines available only on prescription and State controls in connection with them place prescription medicines in a different category from other products. It is arguable, therefore, that, if strict liability is to attach to the producers of prescription medicines the State should consider accepting some of the responsibility where personal injury is sustained as a result of defects in medicines which are supplied only on prescription, possibly in the form of excess insurance.

65. The Scottish Law Commission have no specific proposals to make on these matters. They regard them as questions for the Royal Commission, which are expected to report later this year. They have noted, however, that the possibility of treating drugs as a special case has attracted some support in other countries. They are informed that a recent committee report in Sweden included a proposal that the State should undertake to pay part of the compensation, and that a law imposing strict liability on producers of drugs has recently been promulgated in West Germany⁵¹, the main provisions of which may be summarised as follows:

- (1) There is to be strict liability ("Gefährdungshaftung") if death or personal injury results from the use for which the drug was intended (so-called "bestimmungsgemässer Gebrauch"). The damage done must be so as to go beyond that point which, according to the state of medical science, is still regarded as tolerable and must have its source either in the development or in the production of the drug. This excludes so-called "Bagatellschäden" (minor side-effects of an otherwise helpful and effective drug), but expressly includes development risks⁵².
- (2) The same standard of liability will apply if injury results from insufficient labels or instructions for use or instructions which are not in accordance with the state of medical science.
- (3) The compensation will be limited to 500,000 DM per person (as a capital sum), or an annual payment of 30,000 DM. In case of "dommage en série" the total amount of a producer's liability will be 200 million DM, or 12 million DM in any year.
- (4) There will be no public compensation fund, but each enterprise in the pharmaceutical industry will be under an obligation to seek insurance coverage up to the amounts specified above. It is understood that private insurers have declared their willingness to provide insurance coverage required under the Act.

Components

66. The question whether strict liability should be imposed on the producers of components or material incorporated into other products has been difficult

⁵¹ SOU, 1976 (Sweden); Gesetz zur Neuordnung des Arzneimittelrechts, promulgated on 24 August 1976 and coming into force on 1 January 1978. (Bundesgesetzblatt 1976 I p. 2445).

⁵² "Development risks" are considered in para. 104, below.

to resolve. Of those who commented on the point about twice as many argued for the exclusion of components as contended that components should be included. The two Law Commissions have arrived at different conclusions.

(a) The views of the Law Commission

67. The Law Commission agree that the arguments of the Scottish Law Commission in favour of excluding components from the regime of strict liability have much force. Nevertheless they are satisfied that it would be neither practicable nor, on policy grounds, justifiable to leave components out.

68. A component is a product and the only means that the Law Commission have been able to devise of dividing component-products from the rest is by treating the final producer in the chain of production as the only producer. This might work satisfactorily with some products such as motor-cars. The car is put together by the final producer out of components supplied by various other producers, and as long as the car-manufacturer is in a good way of business and properly insured it is arguably appropriate for the claims arising out of defects in the final product to be directed against him rather than against the maker of the components—say the brake-shoes or the steering-linkage—that contain the defect. This invites the conclusion that in all cases it is only the final producer who should carry the burden of strict liability.

69. The difficulties that the Law Commission feel in accepting this conclusion are many. The first is that it runs contrary to the policy requirement that the risk should rest on the person who is responsible for the quality-control. Some components, such as altimeters or television tubes, are extremely sophisticated instruments and it would be reasonable to expect greater facilities for checking the safety of the component to be available to the person who made it than to the maker of the product into which the component was finally incorporated. It might be wholly unreasonable to expect a cabinet maker who merely provided the wooden frame in which a television set was housed to ensure that the television set had no latent defect that might cause it to catch fire.

70. Even where the component is a less sophisticated product, say a steel rivet or a rubber tyre, it is usually the maker of the component rather than the maker of the product into which the component is incorporated who has the better opportunity of checking it for safety.

71. In addition to the positive reason, above, for holding the maker of a component strictly liable for the safety of his product there is also the negative reason that releasing all but the final producer from strict liability could lead to anomalies and injustice.

72. If only the final producer was strictly liable the manufacturer might be encouraged to have the finishing touches put on his products by an uninsured and expendable subsidiary which would be the only entity against which claims founded on strict liability would lie. This would, of course, be most undesirable.

73. To take another point, if only the final producer was strictly liable, a person injured by the blow-out of a defective tyre on a car might have to find out whether the tyre was on the car before or after it left the car-makers' factory

in order to know whether his claim lay against the maker of the car or the maker of the tyre.

74. Then there is the problem of the manufacturer who is unable to satisfy the claim. The maker of the finished product is sometimes a larger and better-insured concern than the concern from whom he buys the components that he uses; with some, however, such as the dispensing chemist, the opposite is more likely to be true. Assuming that, for whatever reason, the maker of the final product is unable to satisfy the injured person's claim and that the injury is attributable to a defect in a component made and supplied by someone else, it seems fairer that the loss should be borne by the maker of the defective component than that it should be borne by the injured person.

75. This leads on to a point that was emphasised by many commentators. The maker of simple components, such as nuts and bolts, has no control over the uses to which they may be put by the person to whom he supplies them and often knows nothing about the purposes for which they are required. It would be unfair to hold him strictly liable for an accident caused by the sheering of the bolt if the maker of the finished product had subjected the bolt to a stress that it was not designed to bear. The Law Commission accept this point entirely but believe that it is satisfactorily answered by the recommendations on the legal test for "defect"⁵³. Provided that the bolt is properly made to whatever specifications are required and is reasonably safe for reasonable use at the time of supply then it would meet the safety requirements that both Law Commissions recommend and the component-maker would not be liable.

76. The Law Commission have therefore reached the conclusion that no special provision for components should be made. The producer of a component should be subject to strict liability for accidents attributable to the defective state of his product when he puts it into circulation, whether or not it was thereafter incorporated into another product by another producer.

(b) The views of the Scottish Law Commission

77. The main considerations of policy and criticisms of the existing law put forward earlier in this report as justifying the imposition of strict liability on a producer either do not all apply, or do not apply with the same force, to the producers of components (including the constituent materials of a product). While it is true that the manufacturer of a defective component may create certain risks, the extent of those risks is largely a matter for the manufacturer of another product after the component is embodied in it. It is true that in some cases the component manufacturer may be the person best able to control the quality of the component as such; but components are increasingly produced to the specification of the ultimate manufacturer, who alone may know the eventual use to which a component is to be put. There is an intimate relationship between quality and price, and responsibility for the quality of the component may in fact really rest on the ultimate manufacturer. Nor may the producer of a component be in the best position, or indeed in any position, to insure against the risk. The ultimate destination and uses of the product cannot always be determined in advance and, for this reason, the component manufacturer may

⁵³ See paras. 45-49, above.

find it difficult or impossible to obtain adequate insurance cover. The imposition of strict liability on component manufacturers would run counter to the channelling argument that, so far as practicable, the number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons⁵⁴. It may be added that the argument for the imposition of strict liability which depends on public expectation of responsibility will rarely apply to component manufacturers.

78. The Scottish Law Commission are concerned that the retention of strict liability on the manufacturers of components after they have been embodied into another product would be likely to lead to a duplication or multiplication and cumulation of insurance in relation to the same risk. The manufactured product of today may consist of a series of sub-assemblies and these in turn of sub-sub-assemblies. Under a system of strict liability extending to components, the final producer, the intermediate producers and the producers of the original components, would all require to insure against the risk of third party claims. This would seem extremely undesirable. The Commission on consultation received some evidence that in important projects a system of joint insurance may be arranged. It is understood that such insurance was effected in the case of the Concorde aircraft. But this may not always be practicable since the ultimate destination of components and even of sub-assemblies may be unforeseeable. Apart from joint insurance, the risk of duplication or multiplication and cumulation of insurance cover is a real one, and the costs will be borne in increased prices paid by the purchasers of products.

79. Apart from the possibility of increased, and in some cases greatly increased, cost of insurance, the evidence submitted to the Commissions suggested that insurance in some cases might not be available at all, or be available only at prohibitive rates in respect of defects in components. It is conceded that the component manufacturer may well be insuring merely in relation to risks additional to those which he may incur under a system of fault liability. The precise extent of the risk, including these additional risks may, however, at first be difficult to assess and the Scottish Law Commission feel obliged to accept the advice which they have received that insurance may be difficult to obtain and the premiums high.

80. These considerations suggest to the Scottish Law Commission that in cases where one product has been incorporated into another, the case for extending strict liability beyond the person who put the ultimate product into circulation has not been made out. This should not be a hardship to injured persons: it will only be in rare cases that the insolvency of the ultimate manufacturer will render valueless the injured person's strict liability claim against him and in any case the injured person will retain his claim under the present law against the component manufacturer. An argument sometimes presented against the restriction of liability to the ultimate producer is that it may not always be clear whether a component was embodied in an article before or after its circulation. In terms of the scheme proposed, however this will be a

⁵⁴ See para. 38(h), above.

problem for the manufacturer of the final product rather than the injured person since the initial onus will rest on the former to show that a defect in the product arose after it was put into circulation. It may often be open to the manufacturer to protect himself by ensuring that components are identified by serial numbers.

81. The foregoing considerations do not, in the opinion of the Scottish Law Commission, lead to the conclusion that component manufacturers should not be strictly liable in respect of their products. A component until incorporated into another product is itself a product for which its manufacturer should be strictly liable. This seems inevitable since some products, for example radios, may be put into circulation independently of other products or by being embodied as components in other products, such as cars or caravans. The Scottish Law Commission, therefore, recommend that component manufacturers should be strictly liable for defects in their products when put into circulation, but they further recommend that this liability should cease when the component is incorporated into another article which itself is put into circulation.

82. If, contrary to the foregoing recommendation, it were decided to include components (including constituent materials) within a proposed new regime of strict liability even after they had been incorporated into another product and that other product had itself been put into circulation, the Scottish Law Commission recommend that the definition of "defect" or "defective"⁵⁵ should be reconsidered at least in the case of components. In particular, it is considered that the final guideline should refer not to "the use or uses to which it would be *reasonable* for the product to be put in these circumstances" but to "the use or uses to which it would be *normal* for the product to be put in these circumstances"⁵⁶. Indeed, the Scottish Law Commission might have been prepared to support the adoption of such phraseology for the purposes of a general definition of "defect" or "defective".

Natural products

83. The question whether natural products should be subject to the regime of strict liability was asked in our consultative document⁵⁷. After considering the consultation on this question the two Law Commissions have arrived at different conclusions.

(a) The views of the Law Commission

84. The line between natural and industrial products cannot be drawn with precision and the Law Commission think that it is only in respect of foodstuffs that an arguable case can be made for a different treatment; it seems clear that such things as coal, stone, minerals or chemicals which are mined, quarried or otherwise obtained from sea or land must be treated in the same way as manufactured goods.

⁵⁵ See para. 48, above.

⁵⁶ *cf.*, the terms of the EEC Draft Directive on Cosmetics: "Cosmetic products put on the market within the Community must not be liable to cause damage to human health when they are applied under normal conditions of use".

⁵⁷ At para. 66.

85. So far as foodstuffs are concerned it may be possible to draw a distinction between foodstuffs which have been in some sense processed and the primary produce of agriculture and fishing. A substantial section of industry and commerce is concerned with the production of food. Most food is subjected to some kind of process before it reaches the ultimate purchaser. There is a great variety of processes. Wheat is made into flour, flour is made into bread; pigs are made into pork, or bacon, pork is made into pork pies. Fruit is tinned; vegetables are frozen. Herrings are kippered, plaice is filleted. There are however some items of food that are put into the stream of commerce by their producer in their natural state and which reach the ultimate purchaser in the same state. But even fresh vegetables, which at first sight would seem to be a good example of unprocessed natural products, may have been sprayed by chemicals and the land in which they grew artificially fertilised.

86. The Law Commission are clear in the view that strict liability should rest on the person who carries out a process on foodstuffs if the product he processes is defective when he puts it into the stream of commerce. The question whether the producer of completely unprocessed foodstuffs such as the lobster fisherman and the fruit farmer should or should not bear the same strict liability was canvassed in our consultative document and both views were argued strongly by those who sent us comments. The case for excluding certain classes of natural products from a regime of strict liability was presented clearly and persuasively, especially by those representing the interests of farmers and fishermen. But despite these views, the Law Commission have concluded that they ought not to recommend the exclusion of any natural products, even those few which can be said to have been subjected to no process whatsoever. The Law Commission see no convincing ground of policy nor any practical justification for the exclusion of producers of such products from the strict obligations in regard to safety that are recommended for other producers in respect of other products.

87. It seems to the Law Commission that a person who is made ill by eating poisonous fish or poisonous fruit should be entitled to look to the person who put the product in question into the stream of commerce, provided, of course, that the product in question was defective at that time. If the injured person has no remedy against the producer he may have no remedy at all and this, the Law Commission think, would be wrong. It should not be forgotten that many of the products that are treated in this section as "natural" are in fact the result of non-natural processes and of industrial methods; "factory-farming" is on the increase with its artificial feeding methods and the spraying with chemicals of growing crops and the artificial fertilisation of the land is widespread. Of course the fisherman or the farmer may only be in a small way of business but this is equally true of small manufacturing businesses and the Law Commission do not think that size is a justifiable ground for treating one business differently from another.

88. Accordingly the Law Commission have reached the conclusion that no valid distinction is to be made between natural and other products or producers and that all should be included in the regime of strict liability that they recommend.

(b) The views of the Scottish Law Commission

89. The Scottish Law Commission suggest that the main considerations of policy and criticisms of the existing law advanced earlier in this report as justifying the imposition of strict liability do not apply, or apply with considerably less force, to the products of the agricultural and fishing industries to which no process designed to preserve the product or to transform it into a different product has been applied.

90. Two of the principal arguments for strict liability are that the loss should be borne by the person or persons who created the risk and were in the best position to exercise control over its quality and safety. In a very real sense, the risks involved in agricultural or fishery production may usually be laid at the door of nature or of a polluter rather than of the producer. This is obvious in the case of a producer of fish products, other than those which emanate from a fish farm, but is equally true of the farmer who is limited in the manner in which he can directly control the nature and quality of his product.

91. Lying behind the argument that a person who created a product, and therefore the risks incidental to the use of it, should be strictly liable for injuries caused by the use of the product, is an assumption that the manufacturer of goods in a series or in bulk is better able to bear those risks. This rationale does not apply or does not apply with the same force to agricultural products. A very high proportion of the farms in the United Kingdom are manned only by the farmer himself without any full-time paid assistance. The net revenue of many of these farms is very small.

92. The case for channelling liability to the producer is often coupled with the argument that he is best able to insure against claims for injuries caused by defects in the product. The evidence presented to the two Commissions suggests that it may not be easy for the producers of agricultural products to insure against claims.

93. One of the reasons which may make it difficult for the producer of agricultural or fishing products to insure, is that these products are for the most part perishable and may deteriorate rapidly after they have left the hands of the producer. According to the scheme proposed in this report, if an article is proved to be defective, it will be assumed to have left the producer in a defective condition and it will be for the producer to establish affirmatively that the product was in a satisfactory condition when it left his hands. It will often be extremely difficult for an agricultural or fish producer to discharge this onus.

94. It is proposed that a producer should be able to defend an action brought against him on the ground that the consumer was adequately warned by instructions and so on as to the use of the product. It may not be practicable, however, to have a warning sign attached to many items of agricultural or fishery produce, notably where they are delivered to a wholesaler in their natural state. It may be argued that the courts will apply the test of reasonable safety in a reasonable way, but where personal injuries are concerned, it is a matter of common experience that the courts will not be slow to impose liability on someone.

95. One of the main arguments for imposing strict liability on the producer is that public expectation should be taken into account in determining where the loss should lie. It is far from clear that the public, for example in the case of illness arising from food poisoning, would expect the original producer to be primarily liable rather than, say, those responsible for the preparation of the food.

96. It is likely, therefore, that the imposition of strict liability on the producers of agricultural and fishery products might be considered to be manifestly unfair to them, and it is no real answer to this to suggest that in many cases it might be difficult for the injured person to trace the primary producer. The Scottish Law Commission therefore recommend that consideration should be given to the exclusion of producers of primary agricultural and fishery products from the regime of strict liability.

Retailers, wholesalers, distributors and importers

97. On the issues that remain to be considered in this Part the two Law Commissions are in complete agreement. The first concerns the imposition of strict liability in tort or delict in respect of persons who are concerned in the chain of production and distribution of a defective product although not as producers. Most retailers, wholesalers, distributors and importers are within this category.

98. Our general approach to the imposition of strict liability in respect of defective products is that it should be channelled to the producer since he is the person best able to regulate the quality of the product. Conversely those who have no control over the quality of the product, typically the "middlemen" between the producer and the retailer, should not be strictly liable for defects in the product, although of course they may be liable under the existing law for defects arising out of their own failure to take reasonable care or breach of contractual duty. There are, however, three situations in which we recommend that strict liability should be imposed on persons other than (and in addition to) the producer of the defective product.

(a) Retailers and suppliers of own-brand products

99. Many commercial organisations sell products under their brand name as if they themselves had produced them, although the products were in fact made by their suppliers. This is particularly common amongst large retailing organisations and we see nothing wrong with it. However, if the product is defective and causes an accident then we believe that the organisation which held the product out as its own, by means of a brand-name, trade mark or other identifying feature, should carry the same responsibility for the accident as if it was in fact the producer. This is not to say that the real producer should not be strictly liable too; we envisage that he should be so liable. Whether the person who put his brand name on the product would have a right of recourse against the real producer would depend on the existence and terms of their contract. This view was widely supported on consultation.

(b) Retailers and suppliers of "anonymous" goods

100. Many products are sold to the public in packages or containers or with

labels affixed, and in these cases the identity of the producer⁵⁸ is usually disclosed on the package, container or label. Sometimes, however, the products do not carry any indication as to the identity of the producer. Such products may be described as "anonymous". This description applies, in particular, to many natural products and to other basic products such as building materials and fabrics.

101. In our consultative document we drew attention⁵⁹ to the provision in the Strasbourg Convention⁶⁰ that imposes strict liability on the supplier of a defective product unless he discloses the identity either of the producer or of the person who supplied him with the product. Not many commentators expressed opinions on this provision although some favoured it. We think that it is justified on three grounds. First, it assists the injured person in tracing the "anonymous" producer in circumstances where assistance is needed; second, it encourages retailers and other suppliers to keep records from which it may be possible to establish the identity of the supplier (or producer) of the product in question; third, by making it harder for the producer to remain anonymous it encourages him to reveal his identity by labelling his products where practicable. We accordingly recommend that strict liability should be imposed on the retailer or supplier of anonymous goods in the circumstances just indicated.

(c) Imported products

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

103. Two further points should be made. First, we think it appropriate to distinguish between the commercial importation of products and the non-commercial importation of, for example, food or gadgets purchased abroad by holiday-makers. Second, because of the practical problems involved in identifying the person who actually imports the products from abroad, we think it more convenient to impose the strict liability on the first distributor of the product within the jurisdiction into which it has been imported⁶¹.

⁵⁸ We here use the word "producer" loosely as including the "own-brand" supplier considered in the preceding paragraph.

⁵⁹ Para. 60.

⁶⁰ Art. 3.3, App. A, pp. 53 and 68.

⁶¹ See para. 129, below, for the provisions of the Strasbourg Convention and of the EEC Directive, in relation to imported products.

Defences

104. In our consultative document we invited comments on the need to provide a defence that the product was as safe as the state of the art would allow at the time of production, so as not to discourage producers from developing new products⁶². A number of commentators, including generally those representing the interests of producers, were in favour of there being such a defence; on the other hand those who favoured the imposition of strict liability argued that the “development risks” were the principal risks which strict liability was designed to cover; these commentators were against the introduction of any special defence.

105. Our conclusion is that there should not be a special defence that the product was as safe as the state of the art would allow. In many cases such a product would not be held to be defective according to the principles which we suggested in paragraphs 48 and 49, since it would be as safe as a person would be entitled to expect. However, where the product turned out to be unsafe—and it is impossible to consider this problem without thinking of the facts of the thalidomide case—we think the injured person should be compensated by the producer however careful he had been.

106. This brings us on to two defences which are found elsewhere in the law of tort and delict, the defence of “assumption of risk” and the defence of contributory negligence. So far as the first is concerned, it is particularly appropriate to drugs with side-effects. It is well-known that many drugs relieve pain or illness but may directly or indirectly bring on other unpleasant and sometimes damaging results⁶³. There is a risk with most drugs and it may be appropriate that the patient should be told the risk so that he knows what to expect. Sometimes he will be willing to take the risk, sometimes not. It would, in our opinion, be wrong to allow him to claim compensation in respect of a risk that he willingly assumed. The same comment applies to wilful misuse by the person injured of the product in question. For example, there should, in our view, be no right of compensation for the person who deliberately ignores whatever instructions or warnings are given as to the proper use of the product.

107. Contributory negligence on the part of the person injured is available, under the existing law, as a partial defence to a claim founded in tort or delict. It is applied by the courts to reduce the amount of compensation recoverable where there is fault on the part of the injured person as well as liability on the other⁶⁴. It may be applied even where the liability is strict, for example where the liability arises on breach of a statutory duty imposed for the protection of employees⁶⁵.

108. There are, of course, many situations where a person who has been the author of his own misfortune has no remedy at all. This is because there is no

⁶² Para. 77.

⁶³ It may be, of course, that in such circumstances a drug is not defective; see para. 57, above.

⁶⁴ Law Reform (Contributory Negligence) Act 1945, s. 1(1).

⁶⁵ *Cakebread v. Hopping Brothers (Whetstone) Ltd.* [1947] K.B. 641.

causal link between the injury and any other person's conduct but his own. The claim may fail on the causation issue even where a breach of duty is established⁶⁶. Under the scheme of strict liability that we recommend it would be for the injured person to prove the causal link between his injury and the defect in the product. Where his injury was entirely his own fault, for example where he replaced an electric fuse with a six inch nail, the producer of the nail should not be liable under our recommendations any more than he would be liable under the existing law; the fact that the nail might have been defectively made should not be enough to found liability.

109. The question remains whether in cases where there *is* a causal link between the injury and the defect in the product the partial defence of contributory negligence should be available. A significant number of those we consulted argued that contributory negligence should be left wholly out of account, the contention being that since fault on the part of the producer was immaterial, fault on the part of the person injured should be immaterial too.

110. Our conclusion is that it would be unfair to producers to exclude the partial defence of contributory negligence. There will, we think, be cases where it is appropriate for the consequences of the injury sustained by reason of a defect in a product to be shared between the person injured and the producer. We are confident that the courts will be able to deal with this issue in a just way, as they do under the existing law, not only in cases where the claim is based on failure to take reasonable care but also in cases based on strict or even absolute liability.

111. Lastly in our consideration of defences we mention the question of "contracting out". It is unusual for producers to deal directly with the ultimate purchaser or user of their product, but sometimes a contract is established in the form of a manufacturer's guarantee or a servicing agreement. The enforceability of clauses that purport to restrict or remove liability that would otherwise be imposed was considered at great length in our *First* and *Second Reports on Exemption Clauses*⁶⁷. We canvassed the problem in our consultative document on Liability for Defective Products⁶⁸ and comments were divided; some favoured allowing contracting out in all cases; some argued that there should be no contracting out in respect of personal injuries or death; others said that no special provision should be made but that the problem should be covered by our general recommendations on exemption clauses.

112. Our *Second Report on Exemption Clauses* was published after we issued our consultative document. In it we recommended, *inter alia*, that liability due to "negligence" for death or personal injury caused by defective goods should not be capable of exclusion or restriction by means of a clause in a "guarantee" given to the ultimate purchaser by the manufacturer, where the goods were in consumer use⁶⁹. Having reconsidered the problem of "contracting out" in

⁶⁶ *McWilliams v. Sir William Arrol & Co. Ltd.* [1962] 1 W.L.R. 295 (H.L.).

⁶⁷ (1969) Law Com. No. 24; Scot. Law Com. No. 12; H.C. 403 (1968-69); (1975) Law Com. No. 69; Scot. Law Com. No. 39; H.C. 605 (1974-75).

⁶⁸ Para. 79.

⁶⁹ (1975) Law Com. No. 69; Scot. Law Com. No. 39; H.C. 605 (1974-75), para. 331.

relation to defective products, we have come to the conclusion that in any case where strict liability is to be imposed by our recommendation in respect of personal injuries (by which we mean to include death) it would be wrong to allow the person liable to escape his liability by means of an exemption clause. Such clauses should, to that extent, be void. However we should add that it would in our view be wholly appropriate for the producer to diminish the risk attached to the distribution of an otherwise dangerous product by seeing that it was accompanied by appropriate instructions for use and warnings.

Compensation for injury and death

113. Under the existing law of England and of Scotland a person who sustains personal injury may be awarded damages under two main heads, one in respect of pecuniary losses, the other in respect of non-pecuniary losses. Under the first head he is compensated for his financial loss, such as lost wages and out of pocket expenses. As for non-pecuniary losses, it is usual to award compensation on a more general basis for the pain, suffering and loss of amenity that result from the injury. There are differences between the two systems where a person dies from his injuries, but these differences need not trouble us in the present context.

114. In our consultative document⁷⁰ we invited views on the extent of compensation that should accompany the imposition of strict liability in respect of defective products. We mentioned the possibility of fixing a financial ceiling on the amount of compensation recoverable and we come to this question later in our report⁷¹. We also mentioned the idea that compensation might be put on a narrower basis than the ordinary basis for compensation at common law and that it might be limited to purely pecuniary losses. Opinion was almost equally divided amongst those who commented on this point. Our conclusion, however, is that it would be unjust to limit the compensation in such a way; the injustice would be particularly felt by those whose sole loss was of a non-pecuniary character. It would also be inconvenient procedurally since if the injured person wished to recover full damages he would have to set up two distinct causes of action in every case within the regime recommended, one based on strict liability (in respect of loss of wages and expenses) and the other based on his other rights in tort or delict (in respect of pain, suffering and loss of amenity). We accordingly recommend that compensation should be assessed in the same way under the scheme of strict liability as where the claim lies in tort or delict under the existing law.

Financial limits

115. As for the fixing of a financial ceiling on the liability of the producer, there are two ways in which it might be achieved. One would involve limiting the amount recoverable by any one person on any one set of facts (an "individual" limit). The other would involve limiting the total sum for which a producer might be liable in respect of any one product or run of products (a "global" limit). The former would, we think, be unlikely to reduce the cost to the producer of obtaining adequate insurance cover, unless the individual limits

⁷⁰ Paras. 80-81 and 92.

⁷¹ Paras. 115-116, below.

were set very low indeed. Any one product or run of products could give rise to a great number of claims and the setting of a limit on the amount recoverable by each individual would not mean a significant reduction in the aggregate liability of the producer, unless it was set so low as to give inadequate redress to the individual. There is a further problem with individual limits: the excess over the limit would only be recoverable on proof of fault, so the claim at common law would probably be litigated as well wherever there was a risk of the limit being exceeded.

116. The global limit has the advantage that it would assist producers in assessing the risk involved in putting any one product into the stream of commerce; many producers who sent us comments were in favour of it. However, it has serious disadvantages which, in our view, outweigh the advantage that it would give to the producer. The overwhelming objection to the setting of a global limit in respect of liability for defective products is that until all the claims in respect of one product or run of products were established and quantified it would be impossible to know whether they exceeded the limit in aggregate. It would therefore be unsafe to meet any individual claim until all were known and this might take very many years, as the history of the thalidomide case shows. We think that such delays would be contrary to the public interest, a point that was made with force by many commentators. Even the expedient of a series of annual limits would, we think, present formidable difficulties in practice. In the result, therefore, we recommend that no financial limits, whether individual or global, should be set upon the amounts recoverable in respect of personal injury or death.

Compensation for property damage and other losses

117. Our recommendations, above, assume that the claim arises out of personal injury or death. It is necessary to consider whether the regime of strict liability on producers should be enlarged to cover property damage and other kinds of loss as well, such as pure economic loss. If property damage and other losses were to be included it would be necessary to reconsider such questions as the meaning to be given to the words "defect" and "defective", contracting out of liability, the imposition of financial limits, the burden of proof and the setting of time-limits. On all these matters different considerations apply depending on whether the liability is for personal injury and death only or whether liability for property damage and other loss is to be included.

118. We devoted a whole section of our consultative document to property damage⁷² and received many interesting comments. A large number favoured including property damage within the regime; of those, however, some said that property damage should only be included where it was linked to a claim for personal injury. A greater number of others who favoured including property damage stressed that it should not go beyond personal belongings.

119. On the other side an impressive body of opinion favoured excluding property damage altogether. Insurers warned that the inclusion of property damage in a regime that imposed strict liability on producers would mean a

⁷² Paras. 84-93, comprising Part V.

significant increase in the cost to the producer of insurance. If damage to commercial property, such as to a factory or a piece of factory machinery, were included, then plainly the ultimate liability on the producer could be very heavy indeed. The cases of *Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd.*⁷³ and *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*⁷⁴ illustrate the very extensive losses that can be caused in the commercial area by defective products. The incidence of loss is shifted, under the existing law, by the proof of a breach of contract or of fault; the impact in this area of strict liability in tort or delict might have serious economic consequences.

120. As we indicated at the outset⁷⁵, general considerations of policy require that first party insurance should be encouraged where it is usual and appropriate. Damage to commercial premises and property is usually covered by the owner's taking out first party insurance and this seems appropriate. In the non-commercial sector first party insurance is much more common in regard to damage to property than it is in regard to personal injury. Most householders insure their own homes, and where the premises are rented the premises are usually insured either by the tenants or by the landlords. A large number of people insure the contents of their homes and their cars against damage or destruction, and "all-risks" policies for damage to property outside the home are frequently taken out. The information obtained on consultation does not allow us to go too deeply into the statistics of property insurance in the United Kingdom, but we are advised that first party insurance in respect of damage to property is usual and is generally regarded as prudent and appropriate.

121. What then would happen if property damage were included in the regime of strict liability? Provided that the claimant had taken out first party insurance his new remedy against the producer, in strict liability, would be of no immediate benefit to him but only to his insurers. On the other hand the extra cost to the producer of insuring against third party claims for damage to property would be passed on to the general public in the price of the product. Overall, those members of the public who took out first party insurance would be worse off than they are under the existing law, as they would be paying the same for their own insurance but would have to pay more for the products. We believe that first party insurance in relation to property ought generally to be encouraged, and we are worried that including property damage in the regime of strict liability would add to the cost of products without a commensurate increase in benefit to the public. We accordingly recommend that strict liability for defective products should provide compensation for personal injury and death, but not for property damage or for other heads of damage, such as pure economic loss. We have considered whether we ought to recommend a small relaxation of our recommendation in respect of personal property, such as clothing, damaged at the same time as the personal injury; but difficulties of definition have persuaded us not to do so. Whilst there might be thought to be a strong case for including an injured man's clothing (against damage to which

⁷³ [1971] 1 Q.B. 88. £74,689 was claimed for damage to factory premises and £300,000 for loss of profits.

⁷⁴ [1970] 1 Q.B. 447. £146,581 plus interest was awarded in respect of damage to factory premises and loss of profits.

⁷⁵ Para. 23(g), above.

he is unlikely to have insured) we can see no way of distinguishing between a wealthy man's shirt and the gold and diamond cuff links in it. And we are clearly of the opinion that valuables of this sort (which will almost certainly be covered by first party insurance) ought to be excluded.

Burden of proof

122. We have now plotted the boundaries of the new rights and remedies that we are recommending, indicating against whom the liability should be imposed and what it should entail. There remains the procedural question where the burden of proof should lie. We canvassed the question in our consultative document⁷⁶, and there was a clear majority in favour of putting the onus on the producer of establishing that a product that was found later to be defective was not defective when he put it into circulation, whether the defect which caused the injury was one which developed in the product thereafter or whether a product, reasonably safe by the standards of the time, was later regarded as defective as a result of a change in those standards⁷⁷. On other issues the general view was that the onus should, as usual, rest on the claimant.

123. The conclusions at which we have arrived on the foregoing questions of burden of proof, in the light of the comments made on consultation, are as follows:—

- (a) In order to establish the *prima facie* liability of a person made strictly liable by our recommendations the injured person should have to prove—
 - (i) that he was injured;
 - (ii) that the injury was attributable to a defect in or defectiveness of a product. As a matter of pleading a claimant could establish a *prima facie* case by showing that the product was defective by the standards prevailing at the time of his injury; the onus of proving that by the standards prevailing at the time the product was put into circulation it was not defective would then be on the defendant or defender;
 - (iii) that the defendant or defender had produced the product or dealt with it in circumstances rendering him liable to the same extent as if he were the producer⁷⁸.
- (b) It should be a sufficient defence to such proceedings for the defendant or defender either
 - (i) to negative propositions (i), (ii) or (iii) above; or
 - (ii) to prove that he had not put the product into circulation or, if he had, that he did not do so in the course of a business; or
 - (iii) to prove that the product was not defective when he put it into circulation.

⁷⁶ Para. 82.

⁷⁷ See para. 49, above.

⁷⁸ See paras. 97–103, above.

The producer's rights of recourse

124. Lastly we should mention the producer's rights of recourse, contribution and relief. Our intention, as we said earlier⁷⁹, is that these questions should be governed by the general law. In English law such rights as the producer may have against his supplier for breach of contract should remain unaffected. Moreover, where the producer and others are jointly liable under our recommendations as tortfeasors they will have rights of contribution *inter se* under the Law Reform (Married Women and Tortfeasors) Act 1935⁸⁰. In Scots law such rights as the producer may have against his supplier in contract or in delict should remain unaffected.

Summary of conclusions and recommendations

125. The conclusions at which the Law Commission and the Scottish Law Commission have arrived are as follows:—

- (a) Existing rights and remedies in English and Scots law, in respect of injury caused by defective products, are inadequate (paragraphs 24–29).
- (b) It would be more convenient to provide additional rights and remedies by imposing new obligations in tort or delict than by altering the rules of the law of contract (paragraphs 30–33).
- (c) Putting the burden on producers of disproving fault in situations where, under the existing law, the claimant must prove fault in order to succeed would not, by itself, redress the balance sufficiently in favour of the injured claimant (paragraphs 34–37).
- (d) Producers should, as a general rule, bear the risk of and be strictly liable for injuries caused by defects in their products, that is to say they should be liable, subject to the recommendations below, irrespective of fault (paragraphs 38–42).
- (e) Strict liability as in (d) should only apply to producers who put their products into circulation in the course of a business (paragraph 43).
- (f) Existing rights and remedies in contract and tort or delict should be preserved (paragraph 44).
- (g) A product should be regarded as defective if, at the time when it is put into circulation by whoever is responsible for it as its producer, it does not comply with the standard of reasonable safety that a person is entitled to expect of it; 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 warnings 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 (paragraphs 45–49).
- (h) Strict liability should rest on all kinds of producer of all kinds of movable product, subject to the exceptions set out below (paragraphs

⁷⁹ See para. 44, above.

⁸⁰ The Law Commission recommended certain changes in this Act in their Report on Contribution (1977), Law Com. No. 79; H.C. 181 (1976–77); these changes have the general effect of widening the court's jurisdiction to award contribution between persons liable, as tortfeasors or otherwise, in respect of the same damage.

50-53). Persons who merely buy and sell or act as agents or distributors for other persons' products should not be regarded as "producers" without more (paragraphs 97-98).

(i) Our recommendations should not apply to products that cause a nuclear occurrence in respect of which liability is regulated by the Nuclear Installations Act 1965 (paragraph 54).

(j) It is recommended that strict liability should rest on the producers of pharmaceuticals as on other producers. This is not to say that a central compensation fund would be inappropriate for pharmaceutical, or other, products but this is a question for the Royal Commission on Civil Liability to consider (paragraphs 55-65).

(k) As for components, including constituent materials, the views of the Law Commission and of the Scottish Law Commission diverge:

The Law Commission recommend that no exception be made for components: strict liability should rest on the producer of a component whether or not the component is later incorporated into another product by another producer (paragraphs 66-76).

The Scottish Law Commission recommend that:—

(i) strict liability should rest on the producer of components, including constituent materials, but that his liability should cease when the component is incorporated into another product which is itself put into circulation (paragraphs 77-82);

(ii) if strict liability is to continue after such incorporation the definition of "defect" should be reconsidered; the final criterion specified in (g) above should refer to the use or uses to which it would be *normal*, rather than *reasonable*, for the product to be put (paragraphs 77-82);

(iii) the liability of the producer of building materials should cease when they have been incorporated into an immovable (paragraphs 52-53 and 77-82).

(l) As for natural products there is, again, a difference of view between the Law Commission and the Scottish Law Commission.

The Law Commission recommend that strict liability should rest on the producer of natural products as on other producers (paragraphs 83-88).

The Scottish Law Commission recommend that consideration should be given to the exclusion of producers of primary agricultural and fishery products from the regime of strict liability (paragraphs 89-96).

(m) In addition to the liability on producers, as above, strict liability should be imposed on certain persons who play a part in the chain of distribution without necessarily being producers:—

(i) a person who puts his name, trade-mark or other distinguishing feature on a defective product so as to present it as his own should be strictly liable for it;

(ii) a person who in the course of a business supplies a defective product which does not carry any indication as to the identity of the producer should be strictly liable for it unless he discloses

the identity either of the producer or of the person who supplied him with the product;

- (iii) the first distributor of a defective product within the appropriate jurisdiction into which it has been imported should be strictly liable for it (paragraphs 97–103).
- (n) The availability of redress in respect of claims based on strict liability, as above, should be subject to the defences of “assumption of risk” and of “contributory negligence” as provided by the general law; however, a term in a contract made with the injured person which purports to exclude or restrict the injured person’s rights under our recommendations should be void (paragraphs 104–112).
- (o) Compensation for personal injury and death should be assessed in accordance with the general law pertaining to claims founded in tort or delict; in particular non-pecuniary losses should be compensated (paragraphs 113–114).
- (p) The compensation, as above, should not be subject to financial limits of any kind (paragraphs 115–116).
- (q) Whilst producers and certain others should be strictly liable, as above, for personal injury and death they should not be liable, by virtue of our recommendations, in respect of damage to property or pure economic loss (paragraphs 117–121).
- (r) In order to establish the liability of a person made strictly liable by our recommendations, the injured person should have to prove:—
 - (i) that he was injured;
 - (ii) that the injury was attributable to a defect in or defectiveness of a product;
 - (iii) that the defendant or defender had produced the product or dealt with it in circumstances rendering him liable to the same extent as if he were the producer.

It should be a sufficient defence to such proceedings for the defendant or defender either—

- (i) to negative propositions (i) (ii) or (iii); or
 - (ii) to prove that he had not put the product into circulation or, if he had, that he did not do so in the course of a business; or
 - (iii) to prove that the product was not defective when he put it into circulation (paragraphs 122–123).
- (s) A producer, liable under our recommendations, should have such rights of recourse, contribution or relief against other persons, including other producers, as may be provided under the general law (paragraph 124).

PART III. THE STRASBOURG CONVENTION AND THE EEC DIRECTIVE

126. Our purpose in this Part of the report will be to examine the Strasbourg Convention and the EEC Directive, to give our views on their provisions and to conclude with our general advice on the measure of support that Her Majesty's Government should, in our respectful opinion, give to each. When considering particular points in either instrument we refer, by footnote, to the Article in question, to the page of the appropriate Appendix (A or B) on which the text of the Article is set out and to the page or pages where its purport is explained. The two Law Commissions are agreed about the EEC Directive; its provisions run contrary to our recommendations for the reform of the law of the United Kingdom in a number of respects and there are other reasons why we would counsel great caution. So far as the Strasbourg Convention is concerned we are agreed that it is a much more satisfactory instrument in many ways. The Law Commission welcome the Convention from the point of view of the law of England and Wales, but it is the view of the Scottish Law Commission that the Convention contains some features which are objectionable from the point of view of the law of Scotland.

Aspects of the Strasbourg Convention and of the EEC Directive that are consistent with our recommendations in Part II

127. The approach to liability for defective products that has been taken at Strasbourg and at Brussels is broadly consistent with the approach that we recommend. In particular, the two instruments provide that persons injured by defective products should be entitled to compensation from the producer without having to prove fault⁸¹. The remedy is tortious or delictual in character and contributory negligence on the part of the injured person may provide a partial defence to his claim⁸². Contractual rights against the producer and other persons and the producer's own rights of recourse against other persons are preserved⁸³.

128. In attempting to define "products", "producers", "defect" and "defective" the two instruments are somewhat imprecise⁸⁴, but the general purpose does not seem to be substantially different from that which we recommend in Part II. The point that the defect must exist at the time the product was put into circulation in order to be a basis for strict liability is not as clearly expressed as we would like, but this seems to be the intention of the Strasbourg Convention at least⁸⁵. The exclusion of liability for nuclear occurrences⁸⁶ meets with our approval.

⁸¹Strasbourg Convention, Art. 3.1, App. A, pp. 53 and 67;
EEC Directive, Art. 1, App. B, pp. 79 and 82-83.

⁸²Strasbourg Convention, Art. 4, App. A, pp. 53 and 70-71.

Although contributory negligence is not mentioned in the EEC Directive itself the Explanatory Memorandum assumes that it will be available as a partial defence in accordance with the laws of each member State, App. B, p. 87.

⁸³Strasbourg Convention, Arts. 9a and 12, App. A, pp. 54 and 73-74;
EEC Directive, Art. 11, App. B, pp. 80 and 93.

⁸⁴Strasbourg Convention, Arts. 2a, b, and c, App. pp. 52 and 63-67;

EEC Directive Arts. 2 and 4 ("article" is not defined), App. B, pp. 79 and 84-85, 86-87.

⁸⁵Strasbourg Explanatory Report, paras. 37 and 42, App. A, pp. 66 and 67.

⁸⁶Strasbourg Convention, Art. 9b, App. A, pp. 54 and 73;

EEC Directive, Art. 12, App. B, pp. 80 and 93.

129. The imposition of strict liability on certain non-producers is broadly in line with our own thinking in relation to own-brand products⁸⁷, anonymous products⁸⁸ and imported products⁸⁹. The provision about imported products in the EEC Directive is confined to the importation of products into the European Community. As for the Strasbourg Convention, Article 16 allows a member State which adopts the Convention to declare that, in pursuance of an international agreement to which it is a party, it will not consider imports from one or more specified States which are also parties to that agreement as imports for the purposes of paragraphs 2 and 3 of Article 3.

130. Finally, so far as the burden of proof is concerned, neither the Strasbourg Convention nor the EEC Directive deal with the question explicitly or in detail, but there seems to be nothing in either instrument that is inconsistent with the detailed rules that we recommend⁹⁰.

An appraisal of the EEC Directive

131. There are a number of points about the EEC Directive that are not to be found in the Strasbourg Convention and which cause us particular concern.

(a) The course of a business

132. Our own recommendation in Part II was that strict liability should be imposed only on commercial producers, that is to say on persons who put their products into circulation in the course of a business⁹¹. This idea is also to be found in the Strasbourg Convention⁹². It is not, however, provided for in the EEC Directive in its present form, so the Directive would, contrary to the policy we recommend, impose strict liability on persons not acting in the course of a business. We think that this would be regrettable. The EEC proposal may find some justification in the ideals of consumer protection, but it hardly seems relevant to the Community's policies on competition and the free movement of goods⁹³.

(b) Non-pecuniary losses

133. We recommend in Part II that the compensation for injury should cover non-pecuniary as well as pecuniary losses⁹⁴, and the wording of the Strasbourg Convention and of the EEC Directive suggests the same approach. However, in the explanatory memorandum that accompanies the EEC Directive it is clearly provided that the term "personal injuries" "... does not include payment

⁸⁷Strasbourg Convention, Art. 3.2, App. A, pp. 53 and 68;
EEC Directive, Art. 2, App. B, pp. 79 and 85.

⁸⁸Strasbourg Convention, Art. 3.3, App. A, pp. 53 and 68;
EEC Directive, Art. 2, App. B, pp. 79 and 85.

⁸⁹Strasbourg Convention, Art. 3.2, App. A, pp. 53 and 68;
EEC Directive, Art. 2, App. B, pp. 79 and 85;

⁹⁰Our recommendations are at para. 123, above. They seem to be consistent with the Strasbourg Convention, Art. 5.1, App. A, pp. 53, 71, and the EEC Directive, Art. 5, App. B, pp. 79, 87.

⁹¹Para. 43, above.

⁹²Art. 5.1c, App. A, pp. 53 and 71.

⁹³See para. 8, above.

⁹⁴Paras. 113-114, above.

of compensation for pain and suffering . . .”⁹⁵ If the policy of the Directive is to exclude heads of damage recoverable in the general law of tort or delict we think the policy is undesirable and unjustifiable for the reasons mentioned in Part II⁹⁶.

(c) Financial limits

134. We recommend that compensation should not be subject to financial limits, individual or global. As we have said in Part II⁹⁷, individual limits would be irrelevant to the cost of insurance to the producer unless they were set so low as to make the injured person’s right and remedy inadequate; a global limit would, in our view, probably be unworkable. At best it would present formidable difficulties, even if the limit were to be applied on an annual basis. The Strasbourg Convention allows States accepting the Convention to reserve the right to limit the amount of producer’s liability first by an individual claim limit and second by a global limit⁹⁸. The reservation is optional and the limits are extremely high. We do not believe that the individual claim limit will have any relevance to insurance against liability for death or personal injury. The global limit may have such relevance but the problems of dividing up a global sum, possibly over a period of years, amongst an unascertained number of claimants with unquantified claims are, in our view, likely to prove insuperable.

135. The EEC Directive provides a global limit for “all personal injuries caused by identical articles having the same defect”⁹⁹. This provision is not optional but mandatory, and, for the reasons just given, we believe it to be unworkable. In our view, strong objection should be taken to it.

(d) Property damage

136. The Strasbourg Convention is only concerned with liability for personal injury and death. The question of strict liability for property damage has not yet been fully considered there; it is possible that it may be made the subject of another convention. However, the Law Commissions have considered liability for property damage and have reached the conclusion that compensation for it should continue to be governed by the present law; as at present advised we do not think that producers should be strictly liable for it, for the reasons given in Part II¹⁰⁰.

137. The EEC Directive imposes strict liability on producers in respect of certain kinds of property damage, namely “any item of property other than the defective article itself where the item of property (i) is of a type ordinarily acquired for private use or consumption; and (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession”¹⁰¹. At first glance the definition appears to be concerned with movable property only, but

⁹⁵App. B, p. 88.

⁹⁶ Paras. 113–114, above.

⁹⁷ Para. 115.

⁹⁸Annex, para. 2, App. A, pp. 58 and 70.

⁹⁹Art. 7, App. B, pp. 80 and 89–91.

¹⁰⁰ Paras. 117–121, above.

¹⁰¹Art. 6, App. B, pp. 79 and 88–89.

Article 7 explains that there is to be strict liability in the case of immovable property up to 50,000 European units of account, which is about £35,000 at the present time. The liability for movable property is limited to 15,000 European units of account (about £10,000), which is high enough to cover much more than merely personal belongings, such as clothing or carpets. We think that these provisions are unsound as a matter of policy and that objection should be taken to them on the grounds indicated in Part II¹⁰².

(e) Generally

138. The Directive is not yet in final form. It is at present being considered, or has already been considered, by the European Parliament and the Economic and Social Committee, and changes may be made within the Council of Ministers. However, even if all the features of it that we have criticised were suitably amended, there is the further disadvantage with this, as with other legislation stemming from Brussels, that it may prevent our own legislature from acting within the domain covered by the Directive. The present state of Community law is far from clear on the point¹⁰³ but the issue and implementation of the Directive would seem to preclude, for example, the setting up within the United Kingdom of a scheme to provide compensation for persons injured by defective products or for the victims of accidents generally. If such a scheme provided for the victims of unsafe products in a way that was peculiar to the United Kingdom it would, arguably, distort competition within the Community in a way that the Directive would not permit and which it has the declared object of preventing; the conclusion of this line of argument is that the United Kingdom would be unable to legislate for a broadly based compensation scheme whatever the support for it within the United Kingdom, because of the EEC Directive.

139. In contrast to the EEC Directive, the Strasbourg Convention allows States adopting the Convention to provide for the compensation of the victims of defective products by means of "a guarantee fund or other form of collective guarantee, provided that the victim shall receive protection at least equivalent to the protection he would have had under the liability scheme provided for by this Convention."¹⁰⁴ It is hoped that, in the event of the United Kingdom adopting the Convention, this provision would allow the United Kingdom sufficient latitude to give legislative effect to such system of compensation, if any, as the Royal Commission may recommend. This might be of particular importance in areas such as pharmaceuticals which we considered under a separate heading earlier in this report¹⁰⁵.

¹⁰² Paras. 117–121, above.

¹⁰³ The argument that national legislative competence is removed in areas that are subject to Community legislation is supported by two decisions of the European Court of Justice in particular: *Re: the European Road Transport Agreement: EEC Commission v. EEC Council* (Case 22/70) [1971] C.M.L.R. 335 (the "ERTA" Case); and *Re: the OECD Understanding on a Local Cost Standard*, Opinion No. 1/1975 [1976] 1 C.M.L.R. 75.

¹⁰⁴ Art. 11, App. A, pp. 54 and 74.

¹⁰⁵ Paras. 55–65, above.

Particular problems inherent in both the Strasbourg Convention and the EEC Directive

140. There are three areas of controversy, common to both the Strasbourg Convention and the EEC Directive, on which the two Law Commissions have differing views. They concern (a) limitation periods (b) the "cut-off" period and (c) components and natural products.

(a) Limitation periods

141. Both the Strasbourg Convention and the EEC Directive provide for a three-year period of limitation to run from the day when the injured person became aware or should reasonably have become aware of the damage, the defect and the identity of the producer, but also provide that the laws of member States regulating the suspension or interruption of the period should not be affected¹⁰⁶.

The views of the Law Commission

142. Whereas the Law Commission regard matters of limitation as primarily matters for domestic law they recognise that there are arguments of international comity in favour of time-limits being harmonised. One argument in favour of such harmonisation is that it tends to reduce forum-shopping between States that are party to the instrument in question. On the other hand there are clear disadvantages in particular instances, as are set out below in the views of the Scottish Law Commission. In the present instance it so happens that the time-limits provided by both the Strasbourg Convention and the EEC Directive are substantially similar if not quite identical to the present provisions in English law¹⁰⁷. The conclusion of the Law Commission is that, so far as the law of England is concerned, the time-limits provided in the Strasbourg Convention and the EEC Directive are unexceptionable.

The views of the Scottish Law Commission

143. The Scottish Law Commission are satisfied that as a general rule it is undesirable that special rules of prescription or limitation should be applied in relatively small areas of law, particularly where the effect is to destroy the simplicity and uniformity of the existing rules in a legal system. The resulting confusion may be a fertile source of injustice, and, in cases where different grounds of action subject to different periods of prescription or limitation overlap, may produce highly anomalous consequences. Practitioners rightly dislike exceptions to general rules of prescription or limitation, unless they can be convinced that such exceptions are justified, and it is not unusual for claims for professional negligence to derive from a practitioner's failure to institute proceedings within a prescribed time-limit. The present law of Scotland, which in this respect is the same as the law in England, provides that in a fatal accident the three-year period runs either from the date of death, or from the date of knowledge of a claimant (whether an executive or a dependant) whichever is the later¹⁰⁸. This provision is not reproduced in either the Convention or the

¹⁰⁶Strasbourg Convention, Art. 6, App. A, pp. 54 and 72-73;

EEC Directive, Art. 8, App. B, pp. 80 and 91-92.

¹⁰⁷Limitation Act 1939, s. 2 and the additional sections 2A-2D, inserted by s. 1 of the Limitation Act 1975.

¹⁰⁸Prescription and Limitation (Scotland) Act 1973, s. 19(3) and (4); *cf.*, Limitation Act 1939 s. 2A(5) and s. 2B(3).

Directive, so the acceptance of either would require a specific exception to be made to domestic law. The Directive may be thought to be more prejudicial to executors and dependants, in that it provides that time should run from the date of the knowledge of the injured person, whereas the Convention refers to the date of knowledge of the claimant. The two Articles are therefore incompatible.

144. It would be a departure from existing practice if the United Kingdom were to agree to the imposition of a special rule which required exceptions to be made to the general law, where the primary object of the international exercise is to harmonise domestic laws. Hitherto, the United Kingdom has agreed to such special rules only where the subject matter is more obviously of an international character (such as international carriage Conventions) and generally with reluctance. It is questionable whether any advantages would be gained in the United Kingdom by an innovation of this kind. It would set an undesirable precedent, and eventually increased Community activity might lead to special rules applying to large areas of the law of contract and delict.

145. The period laid down in both the Convention and the Directive, whereby proceedings may not be instituted against the producer of a defective product after a period of 10 years has elapsed¹⁰⁹, is capable of cutting off rights in relation to which the ordinary limitation period of three years had not yet expired, or in certain circumstances, had not even begun. This is contrary to the philosophy of the domestic law of prescription or limitation¹¹⁰.

146. The laws of England and Scotland, in relation to claims arising out of personal injury and other damage, are currently under review. The law relating to claims for personal injury has already been reviewed in England and is to be the subject of a Memorandum being prepared by the Scottish Law Commission. The Scottish Law Commission will wish to seek opinion on whether the present period of three years is the appropriate one, having regard to the period for other contractual and delictual obligations, which is five years; and whether a judicial power to dispense with a period of limitation, such as was introduced into the law of England by the Limitation Act 1975, should be extended to Scotland. It is by no means clear that such a judicial power would be permitted by Article 8 of the Directive. It would in any case be unfortunate if efforts to devise improvements and achieve simplification in this area of Scots law were to be prejudiced or thwarted by the imposition of special rules in relation to liability for defective products.

147. The imposition of a special provision will by itself be insufficient to discourage forum-shopping. Within the EEC, it would no doubt be possible to provide that, in cases such as injury caused by defective products, only the courts of the place where the injury was sustained should have jurisdiction.

¹⁰⁹ See para. 150, below.

¹¹⁰ *cf.*, Lord Denning in *Watson v. Fram Reinforced Concrete Co. (Scotland) Ltd. and Winget Ltd.* 1960 SC(HL) 92 at p. 115: "No one supposes that Parliament intended to bar a man by a time-limit before he is injured at all . . . a man may lose his right of action before he has got it. Which is absurd." *cf.*, Lord Reid at p. 106.

We note, however, that Article 5(3) of the European Judgements Convention has recently been interpreted as meaning that, in addition to the place where the injury was sustained, the place where the act giving rise to the injury occurred may also be a ground of jurisdiction¹¹¹. In addition, under Article 2, a defender can be sued in the State where he is domiciled. It would, in any case, be difficult for the Community to prevent forum-shopping in countries which were not member States of the Community: for example, the dependants of the victims of the recent Paris air disaster have been able to sue in California. The most common reason why a claimant may choose to raise an action in a jurisdiction other than that in which he sustained injury is that he is persuaded that awards of damages are likely to be higher, although differing laws of prescription and limitation may occasionally provide a motive for forum-shopping¹¹². We note in this connection that neither the Strasbourg Convention nor the EEC Directive contains any provision which would significantly reduce the divergences in levels of awards of damages which at present exist in the member States.

148. It is not clear that the acceptance of the Convention or the Directive would, in fact, lead to harmonisation in this respect. Even within the United Kingdom procedural differences require a pursuer in Scotland to prepare a case more fully before a summons is served than his counterpart in England is obliged to do before issuing a writ (the corresponding acts required in the two jurisdictions to prevent a claim from being time-barred). Moreover, the principle suggested leans so heavily on the subjective knowledge of the injured person or the claimant that it is by no means certain that there will be uniform interpretation either in the member States of the Community, or more widely, in those member States of the Council of Europe which ratify the Convention.

149. The Scottish Law Commission, therefore, recommend that the time-limits provided in the Strasbourg Convention and the EEC Directive should not be accepted, and that these questions should be left to national law.

(b) The "cut-off" period

150. Both the Strasbourg Convention and the EEC Directive provide for a 10-year cut-off period, after which proceedings against a producer of a defective product may not be instituted. There is a slight difference in that with the Strasbourg Convention the period starts with the date on which the product is put into circulation by the producer¹¹³, whereas the EEC Directive provides for it to start at the end of the year in which the product was put into circulation¹¹⁴. The effect of the cut-off point is to prevent the commencement of proceedings thereafter, even though the claimant may have been injured only shortly before the expiry of the period and may have extremely good reasons for not having instituted the proceedings earlier.

The views of the Law Commission

151. The Law Commission are impressed by the criticisms of the cut-off

¹¹¹ *Handelskwekerij G. J. Bier B.V. and the Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*, Case 21/76: see Official Journal of the European Communities, 25 January 1977.

¹¹² e.g., *M'Elroy v. M'Allister* 1949 S.C. 110.

¹¹³ Art. 7, App. A, pp. 54 and 72-73.

¹¹⁴ Art. 9, App. B, pp. 80 and 91-92.

period made by the Scottish Law Commission, and accept that the period is arbitrary and, for this reason, capable of working hardship and injustice to persons injured in the later stages of a product's life. However the cut-off period of 10 years is not likely to be of much relevance to perishable goods and as for durable goods, such as motor-cars and building materials, the Law Commission believe that a cut-off point is needed in fairness to the producers on whom the burden of strict liability must otherwise rest indefinitely.

152. It is in the producer's interests that he should be able to close his books on a product after it has been in circulation for a fixed period. It assists him in assessing the risk and it facilitates insurance and amortisation, thus keeping the insurance premium down. There is thus some saving, albeit marginal, which redounds to the general benefit of the public. More important, perhaps, it sets a date after which the producer no longer has the burden of proving that a product which has caused an accident was not defective when he put it into circulation. This burden is increasingly difficult for him to discharge as the years pass and it seems only fair that there should come a point when it is entirely removed.

153. The merits of a cut-off point have been canvassed not only at Strasbourg and Brussels but also in America and elsewhere. On 14 September 1976, in Washington, the Under Secretary of Commerce set up an Interagency Task Force on Product Liability to investigate, amongst other things, the alteration of State statutes of limitations. An idea covered by this investigation and much discussed at the First World Congress on Product Liability was that, in respect of defective products, a limitation period should be introduced that ran not from the date of injury but from the date when the product was sold; it was strongly supported by those representing insurance interests. The Law Commission believe that acceptance of the principle is justified. So far as the period itself is concerned it must be arbitrary if it is to be the same for all products. Once the principle of a cut-off is accepted, and the Law Commission do accept it, they think that a period of 10 years ought to be accepted as the fairest that can be devised.

The views of the Scottish Law Commission

154. The Scottish Law Commission accept that there may be certain commercial advantages in releasing some producers from strict liability after a period such as 10 years has elapsed from the date when the product was put into circulation. They consider, however, that if the introduction of strict liability can be justified, one of its principal justifications must be that liability should subsist for as long as the product can be regarded as defective.

155. The Scottish Law Commission are less concerned at the effect which the absence of a cut-off period would have on a producer. In theory, a seller faces a similar difficulty: the Sale of Goods Act lays down no period to determine how long goods should last, presumably because no single period would be appropriate for every kind of goods. An aggrieved buyer may have to prove that the goods are not of merchantable quality, and the seller may have to establish as a defence that there was nothing wrong with the goods at the time of the sale. In practice, the longer the time since the sale, the easier it will be

for the seller to establish that the defect arose from fair wear and tear, misuse, or some other cause not giving rise to a breach of contract on his part. It may be that in some cases a seller would find the burden difficult to discharge after a period of years, but this will generally happen where a longer life span could reasonably be expected from the goods. It may be that insurance premiums in respect of such products may be higher if there is no cut-off period, but altogether to deprive an injured person of a right or a remedy in these circumstances seems too high a price to pay.

156. A time-limit of universal application is as arbitrary in the context of products liability as it is in sale, and cannot take the life span of a particular product into account. If injury is sustained as a result of the consumption of 10-year-old perishables, a producer should not find it difficult to persuade a court that the goods were not defective at the time when they were put into circulation; on the other hand, there are products which arguably should be capable of use for more than 10 years without becoming dangerous.

157. The proposal in both the Convention and the Directive not only imposes an arbitrary period of 10 years which is apparently adjudged to be the useful life span of the product: it also requires the claimant to institute proceedings before that period has elapsed or, in the case of the Directive, before the end of the year in which the 10 year period expires. Thus a claim may be time-barred before an injured person could reasonably have discovered his injury, or even before the injury had occurred¹¹⁵. Injured persons might be compelled to resort to otherwise unnecessary litigation in order to protect their interests in circumstances where extrajudicial settlements might have been achieved. A somewhat different proposal, that liability should be incurred only if a defect in the product caused injury (or, in the case of a continuing injury, began to cause the injury) within 10 years of the product being put into circulation, would be more acceptable to the Scottish Law Commission, although it would still be open to the objections stated in paragraphs 155 and 156. It would at least ensure that an injured person would have enough time to discover the relevant facts, intimate a claim and, if necessary, bring an action into court¹¹⁶.

158. A provision of this kind would be unfair to an injured person, who would not in general know on what date the product had been put into circulation. If component makers are to be liable as well as main producers, different cut-off periods will apply in respect of each component: an injured person wishing to sue a component maker would have at the very least a complicated task in ascertaining whether his action was likely to be time-barred, and evidence to this effect might not emerge until after the injured person had incurred considerable expense in pursuing his claim. He would be well advised in most cases

¹¹⁵ See the remark of Lord Denning quoted in footnote 110 to paragraph 145.

¹¹⁶ It is said that the proposal in the Convention and the Directive stems from a belief in certain western European countries that the long negative prescription in their systems is too long. This prescription cuts off claims after a certain period from the date of the injury, irrespective of the injured person's date of knowledge, and in some countries it is still as long as 30 years. It will be recognised that a cut-off period of whatever duration running from the date of injury is less draconian than a period running from the date when a product is put into circulation.

to found his claim on common law delict as an alternative, which would to some extent defeat the object of introducing strict liability.

159. A further undesirable effect of the proposal is that it may relieve certain producers from liability in respect of products which are obviously defective and in respect of which, it might be thought, they should incur liability. Much of the benefit conferred on injured persons by the introduction of strict liability would be lost if, for example, the effects of a defective drug did not manifest themselves for a long period, or if a 10-year-old aircraft crashed as a result of a design defect. The Scottish Law Commission consider that the problem of development risks in any particular industry should not be solved by the application of a doctrine of this kind, and that if it is thought right that strict liability should attach to producers in these industries, strict liability should subsist for as long as the product can be said to be defective.

160. The Scottish Law Commission therefore recommend that no cut-off period of any kind ought to be accepted.

(c) Components and natural products

161. There is a difference of opinion between the two Law Commissions on whether components and natural products should be included within a regime of strict liability for defective products¹¹⁷. They are included in the Strasbourg Convention¹¹⁸ and the EEC Directive¹¹⁹.

Conclusions

The EEC Directive

162. It is the view of both Law Commissions that the EEC Directive has many objectionable features and that, in particular, it deals inadequately or wrongly with the following topics:—

- (a) production otherwise than in the course of a business (paragraph 132);
- (b) non-pecuniary losses (paragraph 133);
- (c) financial limits (paragraphs 134 and 135); and
- (d) property damage (paragraphs 136 and 137).

Furthermore, the issue of the Directive, even if amended to take account of the points made above, would be detrimental to the further development and reform of the law of the United Kingdom in respect of liability for defective products¹²⁰. For all these reasons we would advise that the EEC Directive, certainly in its present form, should be resisted.

¹¹⁷ Paras. 66–96, above.

¹¹⁸ Art. 2a, App. A, pp. 52 and 63; Art. 3.4, App. A, pp. 53 and 68–69.

¹¹⁹ Art. 2, App. B, pp. 79 and 84

¹²⁰ Para. 138.

163. In addition, the terms of the EEC Directive are inconsistent with the recommendations of the Scottish Law Commission on components, natural products, limitation periods and the "cut-off" period¹²¹.

The Strasbourg Convention

164. Whereas the two Law Commissions are agreed about the EEC Directive they are not agreed about the Strasbourg Convention.

(a) The views of the Law Commission

165. The conclusions of the Law Commission are that the Strasbourg Convention meets all the main points that they would like to see in a regime of strict liability for injuries caused by defective products, assuming, as has been assumed throughout, that rights of compensation are to be provided on a party and party basis, rather than by the introduction of a central compensation fund. Moreover the Strasbourg Convention, if adopted throughout Europe, would not only improve the remedies available to persons injured in the United Kingdom but would neutralise the impact that such a regime might otherwise have on United Kingdom producers by putting them at a disadvantage vis-a-vis their Continental competitors. The conclusions of the Law Commission are accordingly wholly favourable to the Strasbourg Convention. They would welcome accession to the Convention as providing a substantial improvement in the existing law of England and Wales.

(b) The views of the Scottish Law Commission

166. The Scottish Law Commission acknowledge the value of the work done at Strasbourg in seeking to eliminate differences in the legal systems of member States of the Council of Europe, and in assisting those concerned in the reform of the law of the United Kingdom in their examination of this branch of the law. However, the Convention is inconsistent with the Scottish Law Commission's recommendations on components, natural products, limitation periods and the cut-off period¹²², and for these reasons the Scottish Law Commission cannot recommend accession to the Convention. Some of the objections which they have to certain provisions in the Strasbourg Convention suggest that international instruments of this kind should be more modest in their aims, and should confine themselves strictly to essentials, without straying into peripheral areas of law or procedure where any advantages gained by international harmonisation would be more than outweighed by the damage and inconvenience caused to a domestic system. The Scottish Law Commission doubt, in particular, whether the concept of a 10-year cut-off period would even have been discussed in this report if it had not featured in either the Strasbourg Convention or the EEC Directive.

¹²¹ Paras. 77-82, 89-96, 143-149 and 154-160.

¹²² Paras. 77-82, 89-96, 143-149 and 154-160.

(Signed) SAMUEL COOKE, *Chairman,*
Law Commission.

STEPHEN EDELL.

DEREK HODGSON.

NORMAN S. MARSH.

PETER M. NORTH.

J. M. CARTWRIGHT SHARP, *Secretary.*

J. O. M. HUNTER, *Chairman,*
Scottish Law Commission.

A. E. ANTON.

R. B. JACK.

JAMES MACKAY.

T. B. SMITH.

J. B. ALLAN, *Secretary.*

21 April 1977.

APPENDIX A

Strasbourg Convention on Products Liability in regard to Personal Injury and Death

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Considering the development of case law in the majority of member States extending liability of producers prompted by a desire to protect consumers taking into account the new production techniques and marketing and sales methods;

Desiring to ensure better protection of the public and, at the same time, to take producers' legitimate interests into account;

Considering that priority should be given to compensation for personal injury and death;

Aware of the importance of introducing special rules on the liability of producers at European level,

Have agreed as follows:

Article 1

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

Article 2

For the purpose of this Convention:

- a.* the term "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;
- b.* the term "producer" indicates the manufacturers of finished products or of component parts and the producers of natural products;
- c.* a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product;
- d.* a product has been "put into circulation" when the producer has delivered it to another person.

Text of the Convention

Article 3

1. The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.
2. Any person who has imported a product for putting it into circulation in the course of a business and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such.
3. When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be deemed to be a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.
4. In the case of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product and the producer incorporating that product shall be liable.
5. Where several persons are liable under this Convention for the same damage, each shall be liable in full (*in solidum*).

Article 4

1. If the injured person or the person entitled to claim compensation has by his own fault contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.
2. The same shall apply if a person, for whom the injured person or the person entitled to claim compensation is responsible under national law, has contributed to the damage by his fault.

Article 5

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

Strasbourg Convention

Article 6

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

Article 7

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

Article 8

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

Article 9

This Convention shall not apply to:

- a.* the liability of producers *inter se* and their rights of recourse against third parties;
- b.* nuclear damage.

Article 10

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

Article 11

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

Article 12

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

Article 13

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

Text of the Convention

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

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

Article 14

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

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

Article 15

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

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

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

Article 16

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

Strasbourg Convention

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

Article 17

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

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

Article 18

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

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

Article 19

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

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

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Text of the Convention

Done at Strasbourg this 27th day of January 1977, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies of each of the signatory and acceding States.

Strasbourg Convention

ANNEX

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

1. to apply its ordinary law, in place of the provisions of Article 4, in so far as such law provides that compensation may be reduced or disallowed only in case of gross negligence or intentional conduct by the injured person or the person entitled to claim compensation;
2. to limit, by provisions of its national law, the amount of compensation to be paid by a producer under this national law in compliance with the present Convention. However, this limit shall not be less than:
 - a. the sum in national currency corresponding to 70,000 Special Drawing Rights as defined by the International Monetary Fund at the time of the ratification, for each deceased person or person suffering personal injury;
 - b. the sum in national currency corresponding to 10 million Special Drawing Rights as defined by the International Monetary Fund at the time of ratification, for all damage caused by identical products having the same defect.
3. to exclude the retailer of primary agricultural products from liability under the terms of paragraph 3 of Article 3 providing he discloses to the claimant all information in his possession concerning the identity of the persons mentioned in Article 3.

Explanatory Report

EXPLANATORY REPORT

Introduction

1. Industrial development and technological progress have increasingly involved cases of producers' liability and the growth of inter-State commercial trade has resulted in the problem of producers' liability acquiring in certain cases, an international aspect.

2. The position in the majority of member States being characterised, on the one hand, by the absence of any specific legislation, and, on the other hand, by a tendency in judicial decisions to impose greater liability on producers, the Committee of Ministers of the Council of Europe, on the proposal of the European Committee on Legal Co-operation (CCJ) set up in 1970 a committee of experts to propose measures with a view to harmonising the substantive law of the member States in the area of producers' liability.

Canada, Finland, Japan, Spain and the United States of America were invited to send observers to the committee's meetings. The International Institute for the Unification of Private Law (Unidroit), the Hague Conference of Private International Law, the Commission of the European Communities, the International Chamber of Commerce, the European Committee of Insurers, the International Organisation of the Consumers' Unions, the International Organisation of Commerce and the Union of Industries of the European Communities have participated in the work as observers.

Furthermore, Cogeca (General Committee on Agricultural Co-operation of the European Economic Community), AECMA (the European Association of Aerospace Manufacturers) and the European Council of Federations of Chemical Industry (CEFIC) and the Committee of European Foundry Associations have submitted written observations.

3. Between 1972 and 1975 the committee of experts held seven meetings in the course of which it produced the text of the convention.

4. At the outset, the committee of experts, on the basis of a comparative study produced by Unidroit, held an exchange of views on the legal position in the different States relating to producers' liability.

It took particular note of the following:

- a. there was an absence in all countries of special rules governing the liability of producers;
- b. case-law solutions, in some jurisdictions, being based on the general principles of legal liability had recourse to fiction to ensure the better protection of consumers and were highly complex;
- c. there was an almost general trend towards stricter liability of producers apparently caused by a desire to protect consumers from the effects of new techniques and marketing and sales methods;
- d. it was important to introduce special rules on the liability of producers worked out at European level, since the question of products liability could no longer be confined within national frontiers.

Strasbourg Convention

5. In the light of these considerations the committee discussed the specific questions involved in the tentative harmonisation of national laws, and was guided not only by the desire to ensure better protection of the public but also by the advisability of taking producers' interests into account, particularly in respect of legal certainty. The committee stressed the need to achieve a fair balance between the various interests.

6. Two preliminary questions needed to be settled by the committee:
- a. the question whether it should establish a special unitary system of producers' liability instead of attempting to unify each of the regimes existing in most States, namely, the systems of contractual and extra-contractual liability, or better still, deal with extra-contractual liability only and exclude from its scope contractual liability;
 - b. the question whether the notion of fault ought to remain the basis of producers' liability or whether it ought to be replaced by some other concept.

7. Concerning the question mentioned in 6 a. above, it was stressed, on the one hand, that the distinction between contractual and extra-contractual liability was a relative one as it differed according to the law of each State and, on the other hand, it was a doubtful dichotomy because of the difficulty in certain States of establishing any clear and precise distinction.

8. The committee first of all excluded the possibility of harmonising each of the two systems of liability separately by reason of the virtually insuperable problems which would arise in any attempt to harmonise the rules governing contractual liability (it would in fact entail an incursion into the field of the law of contracts). The discussion was therefore limited to the following two possibilities:

- a. to exclude from the field of application of the proposed instrument the whole sphere of contracts possibly by following the Hague Convention on the Law Applicable to Products Liability which in Article 1, second sub-paragraph, states: "Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the convention shall not apply to their liability *inter se*"; or
- b. to establish a set of rules governing liability without reference to the existence of a contract between the person liable and the person suffering damage.

9. The committee was in favour of the solution indicated under b. above which in its opinion was the only one capable of ensuring equal protection for all consumers (whether purchasers or other users) and of generating the legal certainty demanded not only by the persons suffering damage but also by the producers. Indeed, from the point of view of legislative policy, it might be difficult to justify discriminatory treatment of the consumer who had purchased a product from other consumers.

10. Concerning the question mentioned in 6 b. above (the legal basis of the system of liability) the majority of the committee agreed that the notion of

Explanatory Report

“fault”—whether the burden of proof lay with the person suffering damage or with the producer—no longer constituted a satisfactory basis for the system of products’ liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks, which the consumer could not be expected to accept.

11. In view of the changes in doctrine and practice that had already become manifest in certain States, the committee declared itself in favour of a system of “strict” (*i.e.*, proof of the producer’s fault or absence of fault is not required) liability, to which, however, certain limits would be established.

12. Some experts felt that the most appropriate basis for a system of strict liability on the part of producers should be the notion of “dangerous product” which system would, possibly, include a list of products considered dangerous. This solution would have the advantage of indicating clearly the reason for the existence of a system of strict liability in respect of damage caused by products, namely the “risk” inherent in them.

A contrary view, however, suggested that the notion of “dangerous product” was equivocal and unsatisfactory because of the difficulty of deciding at the outset what products were dangerous, some products being dangerous by their very nature and others being likely to become so if defective, or if incorrectly used. The most serious damage was often caused by products which were not originally thought to be dangerous. In regard to the suggested list of dangerous products to which the uniform rules would apply, the opinion was advanced that such a list would necessarily be arbitrary and incomplete.

13. Some experts thought that the basis of the system of products liability should be a defect in the product. This solution would have the advantage of indicating that the manufacturer would not be liable for all damage caused by his product but only for that resulting from a defect, which was almost always the real cause of damage.

Other experts felt that this would be too restrictive as there might be cases where a product without any defect caused damage by reason of its dangerous properties, not to mention damage caused for unknown reasons.

14. In an effort to reach a compromise, a solution was proposed which retained both concepts: “the specific dangerous qualities of the product” and “the defect” of the product. Criticism was levelled at the phrase “specific dangerous qualities of the product”. Several experts pointed out the difficulty of defining the exact scope of these words, a difficulty amply illustrated, moreover, by the complex problems encountered in certain countries where the attempt had been made to arrive at a valid legal definition of “danger” as a basis for responsibility.

15. In conclusion, the committee decided to consider the notion of “defect” as the basis of liability, which is defined in Article 2, paragraph *c.* as the absence of safety which a person is entitled to expect.

Strasbourg Convention

Article 2, paragraph *c*, introduces, as it were, the legal concept of "defect" which can be different from the meaning usually given to the word (see paragraphs 33 to 42 hereafter).

The principle at the basis of the liability retained by the Committee is as follows: the producer must pay compensation for damages resulting in death or personal injuries caused by a defect in his product. The injured person must prove the damage, the defect and the causal link between the defect and the damage, while the producer can successfully defend himself by proving in particular that the defect did not exist when the product was put into circulation or, put positively, that the defect arose after the product was put into circulation—or also that the product was not put into circulation by him. The victim's own fault may completely or partially reduce liability when all the circumstances are taken into account.

16. One expert felt that a regime of absolute liability was not acceptable in the field of producers' liability. He maintained that a reversal of the burden of proof obliging the producer to prove the absence of fault would be effective protection for the consumer in the great majority of cases. It would represent considerable progress for systems of liability based on fault and would have the advantage of encouraging producers to improve the quality-control of their products. However, he added in cases where quality-control was carried out by machines, the producer should not be able to exonerate himself by proving that the failure of the machine was not due to any fault of his. In addition, a special solution should be sought in the case of "development risks".

17. Contrary to the opinions of this expert, it was pointed out that in its present form the system established by the committee was not one of absolute liability but a mixed system. A system which merely introduced a reversal of the burden of proof would not represent any appreciable improvement on the current situation in a number of countries and, in any event, would not meet the public's demands. Such a system would be unfavourable to consumers in that, as a result of the reversal of the burden of proof, they would find themselves disputing the internal operation of the firm in question.

18. The committee decided to limit the convention only to damage causing death or personal injuries.

It in fact considered that, owing to a lack of time, it was not possible to make a thorough study of questions relating to damage caused to goods which in some respects raised different problems (for example, it was not certain that the definition of "defect" given in paragraph *c* of Article 2 could be applied to material damage).

Furthermore, certain experts considered that a convention which introduced a system of strict liability could be more easily ratified by States if it was limited only to damage causing death or personal injuries.

The committee considered that the matter relating to damage caused to goods could, with useful purpose, be dealt with in a separate instrument.

Explanatory Report

19. The convention does not deal with the problem of compulsory insurance.

The committee in effect feel that it would be extremely difficult to have a uniform system of insurance, considering the variety of products, the number of producers, the different geographical situations and the varied financial characteristics of enterprises. In practice, there would be the additional difficulty of ensuring that all producers have taken out insurance when it is remembered that, in general, enterprises do not need any prior administrative authorisation to commence their activities. (It is only in the administration of such authorisation that one can effectively ensure that insurance exists, as for instance in the case of automobile insurance, where such insurance is required before registration of the vehicle).

The committee felt that it was not necessary under the Convention to make insurance compulsory in order to make producers insure their civil liability.

Commentary on the provisions of the convention

Article 1

20. This article fixes the obligations of the Contracting States. In it they undertake to make their national law conform to the provisions of the convention (see however Article 12). Each State shall be free to decide by which method this result will be achieved.

Article 2

21. This article contains the definitions of the terms used in the convention.

22. Paragraph *a* defines the term "product".

The committee agreed that the convention should not cover immovables (such as buildings), liability in respect of this being governed by special rules in most States.

23. On the other hand, movables incorporated into another movable or into an immovable are included in the arrangements for liability laid down in the convention.

Some members would have preferred the convention to apply only to movables which did not lose their individuality when incorporated into immovables. This suggestion, however, was not accepted by the committee.

In fact the committee considered that the reason for the exclusion of immovables—viz. the existence, in several countries of a liability system specific to immovables—could not be invoked as, in these countries, the special rules relating to liability applied to the manufacturer of an immovable in its entirety and not to the producers of component parts.

24. The exclusion of immovables from the field of application of the convention does not prevent States from applying the system provided by the convention to this property, if they so wish.

25. There was discussion on whether waste should be considered as a "product" and accordingly, be subject to the provisions of the convention.

Strasbourg Convention

The committee considered that if the producer were to use waste in some later manufacturing process or to supply it to another person for that purpose, the waste must be regarded as a product and therefore be subject to the system of liability provided for in the convention. If, however, the waste is discarded, thus becoming refuse, the convention would not apply.

26. Paragraph *b* defines the term "producer", that is the person who is considered as primarily liable. Paragraphs 2 and 3 of Article 3, however, indicate certain other persons who are equally liable on the same basis as the producer even though they are not real "producers" who have participated in the making of the product.

27. In formulating this definition, the committee was obliged to choose between two conflicting proposals. The first emphasised the need to guarantee to the victim maximum protection by having a fairly wide choice of persons against whom he could bring an action (manufacturers of finished products, suppliers and others including repairers and warehousemen who constitute the commercial chain of products' production and distribution, persons mentioned in Article 3 of the Hague Convention). The other suggested that a single person should be selected namely the real "producer", *i.e.* the party who has put the product into the state in which it is offered to the public.

28. Finally the committee decided that the real "producer" should be the person to be liable under the convention. It felt that it was in fact undesirable and economically wasteful as a matter of legislative policy to impose strict liability on a large number of persons, some of whom play a secondary part in the production process. The application of the convention to these persons would, moreover, have the disadvantage of inappropriately interfering in contractual relations between these persons and the buyer.

29. Nevertheless, Article 3 extends liability to certain other persons who are to be considered as having either the same liability as producers (importers and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product) or subsidiary obligation (suppliers of a product). The committee wished, in fact, to tighten the system of liability so that no loophole would remain due to the fact:

- a. that the producer was a foreigner and did not have a place of business in the country of the victim;
- b. that the name that appears on the product is not that of the real manufacturer, who often has insufficient financial standing to offer an adequate guarantee to the victim, but is the name of a large store;
- c. that the product is "anonymous", *i.e.* it does not indicate the name of either the manufacturer or the distributor.

30. The committee agreed that the term "producer" includes the person who merely assembles the parts manufactured by other products and the person who puts into circulation the product of hunting, fishing and the gathering of fruit and vegetables.

Explanatory Report

31. Although the committee was aware of the problem, it did not consider it to be desirable to deal in the convention with the problems created by bankrupt producers.

32. It is worth noting that paragraph 4 of Article 3 supplements the term "producer" by establishing the liability of the producer of the component part when a defect in this part caused the damage (see paragraphs 50 and 51 below).

33. Paragraph *c* defines the term "defect", a concept which is at the heart of the system of liability established by the convention.

34. In the early stages of its deliberations the committee attempted to define the idea of "defect" by indicating in a positive way the causes of the defect. Thus, it considered that there would be a defect when the product was unsuitable for the purpose for which it was designed. Examples of defects were also put forward in this definition (in particular, it was suggested, a defect could arise from either the design or the manufacture; it could also arise from the storage, packing, labelling of the product or from any mis-description of the product or from a failure to give adequate notice of its qualities, its characteristics or its methods of use).

This definition was not retained, as it did not cover all cases of liability for products, in particular in the case of a product that, although it achieves the result for which it was made, nevertheless causes damage (for example, a contraceptive pill which is suitable for birth control but causes injury).

35. Accordingly the committee formulated a definition of defect taking as the basic elements "safety" and "legitimate expectancy".

This, however, does not involve the safety or the expectancy of any particular person. The use of the words "a person" and "entitled" clearly shows that a product's safety must be assessed accordingly to an objective criterion. The words "a person" do not imply any expectation on the part of a victim or a given consumer. The word "entitled" is more general than the word "legally" (entitled); on other words, mere observance of statutory rules and rules imposed by authorities do not preclude liability.

The committee did not wish to use the term "reasonably". Such expression in French ("*raisonnablement*") could diminish the consumer's rights, since it could include considering economic factors and assessing expediency which ought not to be taken into account in determining the safety of a product.

36. In determining whether a defect exists it will be necessary, consequently, to take account of all the circumstances, for example, if the product was utilised more or less correctly or used in a more or less foreseeable way (if the actions of the consumer amount to fault, but the product nevertheless is regarded as defective, the situation will be governed by Article 4).

The committee did not, of course, wish to enumerate all these circumstances, but it did expressly indicate one, namely, the presentation of the product, so that in all the States the notion of "defect" would cover incorrect or incomplete directions for use or warnings. As it is, the legislation or judicial decisions of some States consider that only "intrinsic" defects are real defects and hold

Strasbourg Convention

that direction or incomplete or incorrect warnings do not amount to "intrinsic" defects.

The expression "presentation of the product" ought to be interpreted as including not only warnings or directions which are incorrect or incomplete, but also the absence of directions for use or warnings. The marketing of the product is also included in the expression "presentation of the product".

37. The question was posed as to whether it would not be expedient to stipulate the time at which the safety of a product must be determined. It was suggested that the safe nature of the product must be judged at the time the product was put into circulation and not at the time when the damage occurred.

The committee was against including any stipulation of this kind in paragraph *c* since it would implicitly admit as an exception "development risks". Moreover, the definition of "defect" in paragraph *c* gave the judge a sufficient margin of appreciation to enable him to take the time factor into account.

38. As the convention provides for a system of "strict" liability and in so far as it does not expressly stipulate that the producer may be discharged of his liability if he proves that damage is the result of a "development risk", such risks are not to be regarded as an exception and are therefore covered by the convention.

This concerns damage produced by a cause that could not be foreseen or avoided given the state of scientific knowledge at the time when the product was put into circulation. In other words, the defect existed when the product was put into circulation but was not and could not be known to the producer. The defect could be revealed only as the result of a subsequent scientific discovery.

39. Some experts maintained that "development risks" should be a ground for exclusion of liability in the case of technically advanced products. Any stipulation to the contrary might discourage scientific research and the marketing of new products.

40. Against this opinion it was argued that such an exception would make the convention nugatory since it would reintroduce into the system of liability established by the convention the possibility for the producer to prove the absence of any fault on his part. Exclusion of liability in cases of "development risk" would also invite the use of the consumer as a "guinea-pig".

41. In conclusion the committee considered that the problem was one of social policy, the main question being whether such risks should be borne by the consumer or the producer and/or, in whole or in part, by the community.

The committee considered that, as insurance made it possible to spread risk over a large number of products, producers' liability, even for development risks, should not be a serious obstacle to planning and putting into circulation new and useful products.

The committee therefore decided that development risk should not constitute an exception to producers' liability.

Explanatory Report

42. On the other hand the committee agreed that a distinction should be made between "development risks" and other situations in which the "time factor" played a part and which were covered by the definition of a "defect".

This is a case of "subsequent defects", that is to say defects which were not considered as such when the product was put into circulation but became "defects", in the meaning of the definition, as the result of new technological discoveries. In other words, the product is manufactured in accordance with the rules in force at the time when it is put into circulation but can no longer be regarded as complying with the rules governing safety following new scientific and technological development. The defect may then be revealed by comparison with a similar product manufactured according to the new methods.

It is, for example, obvious that if a person buys in 1977 a refrigerator manufactured in 1948 which lacks certain safety devices (such as a door that can be opened from inside) included in 1977 models, that person is not entitled to expect the same degree of safety as would be offered by a refrigerator manufactured in 1977.

43. Paragraph *d* defines the term "put into circulation".

This definition indicates the moment when the producer becomes liable under the convention, and so separates this type of liability from that which is provided by the ordinary rules of law. For example, in certain States the producer will be liable as the "keeper" of the product until it is put into circulation and liable under the "products liability" system after it has been put into circulation.

The committee of experts agreed that the producer did not put the product into circulation within the terms of paragraph *d* merely by giving the product to a scientific or other institute to carry out tests. In fact, in this case, the producer has not made all the controls concerning the quality of the product.

Article 3

44. This article sets out the principle of liability on which the convention is based. It is up to the injured party to establish the damage, the defect and the causal link between damage and defect, whereas the producer would be able to free himself of liability in particular by proving that the defect did not exist at the time when the product was put into circulation (see sub-paragraph *b* of paragraph 1 of Article 5).

45. One expert stated that so far as his country was concerned, it would be difficult to accept such a principle since, according to the ordinary rule under which the plaintiff had to furnish proof of his grounds for taking legal action, it was incumbent upon the plaintiff to prove that the defect existed at the time the product was put into circulation by the producer. A solution placing such a burden of proof on the injured party would be desirable because it would not only conform to general principles of law in most countries, but would also have the effect of deterring parties from instituting ill-founded legal proceedings.

46. The Committee was against such a proposal since it would be difficult, if not impossible, for an injured party—who in many cases would have received the product from another consumer or who had not himself used the product—

Strasbourg Convention

to prove the existence of a defect when the product was put into circulation. The present wording of sub-paragraph *b* of paragraph 1, Article 5, enabled a judge to reach his own conclusions after comparing the different probabilities revealed by the circumstances of a given case or in the light of experience. If necessary this problem could be satisfactorily settled by expert investigation and report.

47. Paragraphs 2 and 3 indicate the other persons who are liable under the convention; such persons' liability may be primary (when they are treated like the producer) or subsidiary (see paragraph 29 above). However, as far as the liability of the importer is concerned, see also Article 16.

The use of the expression in paragraph 2 "who has presented a product as his product" indicates that the basis of liability in this case is the fact that, by inducing the user to believe that he is the producer, the person who has placed his name on the product in such a way that this product appears to be his, takes it upon himself to ensure the safety of the user.

A further advantage of the said expression is that it excludes from the field of application of the convention persons whose names appear of the product, either as a means of advertisement (for example a garage whose name appears on a car) or because the law so requires (in one State, for example, retailers must put their names on products), without, however, having the intention to appear as the "producer". This term also excludes the person who grants a licence.

48. In the case of imported products, the committee considered that an indication of the name of the foreign producer (who may have no establishment or assets in the importing country) was insufficient; if the product, therefore, does not indicate the importer's identity, the supplier must indicate the name of the person from whom he obtained the product or the importer.

49. A reservation (see Reservation No. 3 in the annex to the convention), however, allows States to exclude from the scope of the convention the retailer of primary agricultural products who discloses to the claimant all information in his possession, even though this information may be insufficient to identify the supplier. The expression "agricultural products" also includes, in this context, the produce of fishing and animal products.

The reason for this reservation is that, as in most cases these products come from different sources, it is difficult for the retailer to determine, sometimes after a fairly long period of time, the source of a given product which has often been mixed with other similar products from different suppliers.

50. Under paragraph 4, producers of a component part are liable when a defect has caused or contributed to the damage.

As a result the victim will have in this case a choice of action against either the producer of the component part (paragraph 4) or the producer of the finished product (Article 3, paragraph 1, combined with paragraph *b* of Article 2) or both at the same time (under paragraph 5 of Article 3).

Explanatory Report

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

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

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

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

52. Paragraph 5 establishes joint liability when, by virtue of paragraph 1 of Article 3 (combined with paragraph *b* of Article 2) or paragraphs 2, 3 and 4 of this article, several persons are liable for the same damage under the convention.

53. Article 3 does not define damage, leaving it to national law to stipulate the heads of damage (for example pain and suffering etc.) which can be claimed under the convention and the measure of damages. The committee was aware that this solution might give rise to undesirable “forum shopping”, but it believed that this disadvantage was acceptable in view of the fact that any attempt to harmonise national law on this subject would raise considerable difficulty which might jeopardise the success of the convention.

In this respect it was pointed out that the Committee of Ministers of the Council of Europe had adopted Resolution (75) 7 relating to compensation for physical injury or death, which contains principles concerning this subject.

Furthermore, Article 3 does not indicate those persons who are entitled to compensation. This question therefore is left to be determined by the national law of each State.

54. Under the convention the extent of liability cannot be limited.

However, taking into account the fact that in certain States where strict liability has been introduced the amount of compensation has always been

Strasbourg Convention

limited, the committee in order to facilitate the ratification of the convention by the greatest possible number of States, permitted the reservation (No. 2) contained in annex to the convention.

This reservation allows States to limit the compensation awarded to each person and the compensation awarded for a series of damage caused by identical products having the same defect subject to the condition that these limits shall not be less than the amounts set out in the reservation itself.

It should be noted that these limits apply to each producer so that if the same defective product is manufactured by two different producers, but not in the case of co-producers, each will be liable up to the maximum limit provided for under the reservation. However, if, according to Article 3, several persons are liable *in solidum* for the same product, their total liability should not exceed the maximum limits provided for under the reservation.

It should also be noted that the reservation is drafted so that States in particular may either:

- a. limit liability for all products without distinction; or for certain products only, either for each person or for a series of damage or for both; or
- b. limit liability for development risks only, either for all products without distinction, or for certain products only.

55. The term "person" as used in paragraphs 2 and 5 of Article 3 includes not only natural persons but also legal persons.

Article 4

56. This article concerns the extent to which an injured person was responsible for causing the damage. The use of the terms "injured person" and "person entitled to claim compensation" was intended to make clear that it was permissible to take into consideration not only the fault of the injured person but also where this is relevant according to national systems of law, the fault of the person seeking compensation, *e.g.* following the death of the injured person.

The words "having regard to all the circumstances" were included in the text of paragraph 1 in order to enable the judge to assess the relative importance of the fault in relation to the defect shown by the product.

Taking into account the fact that certain States intend to introduce in a general manner in the law relating to extra-contractual liability the principle that compensation may only be reduced or disallowed in cases of the victim's gross negligence or intentional conduct, the committee drafted a reservation (Reservation No. 1 contained in the annex to the convention) providing that these States may derogate from the provisions of Article 4 so as to preserve their national law.

57. Paragraph 2 indicates that the compensation may also be reduced or disallowed when the fault was committed by a person for whom the injured person or the person claiming compensation is responsible under national law (for

Explanatory Report

example, as the case may be according to the different laws, the legal representative, the employee, the children).

Article 5

58. This article enumerates the circumstances which exclude the producer from liability, apart from the victim's own fault which is dealt with in Article 4.

59. Sub-paragraph *a* of paragraph 1 is intended to enable the producer to establish that he is not liable by proving that he has not put the defective product into circulation, for example, the product was put into circulation by a person who stole it. Such a provision is fully justified since, the basis for liability being a defect in the product, it is only fair that the producer should be given the opportunity of deciding himself when a product is fit for consumption.

60. Some experts would have liked to see the phrase "or that he had made appropriate efforts to have it withdrawn" added to sub-paragraph *a*.

The committee was against such an exclusion which, on the one hand, would reintroduce fault into the convention's system of liability and, on the other hand, since it was phrased in general terms, would deprive the convention of part of its substance.

61. Sub-paragraph *b* of paragraph 1 enables the producer to establish that he is not liable by proving that the defect was not attributable to him. The evidence may either show that the defect did not exist at the time when the product was put into circulation ("*preuve negative*") or that after the product was put into circulation a third party created the defect ("*preuve positive*").

62. Sub-paragraph *c* excludes from the scope of the convention the case of a person who has made a product which was not produced for sale or in the course of his business.

On the other hand the case of a product given without payment but produced in the course of a business and the case of a product which is not produced in the course of a business but is produced in order to be sold are not excluded from liability under the convention.

63. Paragraph 2 deals with the case where the damage is caused partly by the defect in the product and partly by the act of a third party. In this case liability should rest entirely on the producer since he may in any event proceed to recover his loss against the third party.

64. The committee did not think that it was necessary to make special provision in the case where:

- a.* the intervention of a third party or employee or *force majeure* occurred before a product was put into circulation;
- b.* the intervention of a third party or *force majeure* occurred after the product was put into circulation and is the sole cause of the defect;
- c.* the intervention of a third party or *force majeure*, although the product has a defect, is the sole cause of the damage.

Strasbourg Convention

In fact, the committee felt that in the case envisaged in *a* above, liability should rest entirely on the producer; in the case envisaged in *b* above, Article 5, paragraph 1.*b* already provides a defence, and in the case envisaged in *c* above, the chain of causation between the defect and the damage is broken.

65. In the case where *force majeure* (or *cas fortuit*) as understood by the ordinary law of the different States relating to liability, in conjunction with a defect in the product contributed to the damage, the committee decided not to make any specific provision in the convention having regard to the small number of cases of liability on account of the products themselves in which the problem might arise and to the difficulty of finding a definition of *force majeure* acceptable to all States. Consequently, these problems will be determined by the internal law of each State.

Article 6 and 7

66. These articles deal with the time-limits within which the action may be brought.

In order to avoid forum-shopping, which would prevail in the absence of a provision in the convention, because of the existence of different limitation periods due to some States applying *lex fori* while others apply *lex causae*, there was general agreement in the committee that this question should not be left to national law.

67. The committee decided on two time-limits. The first is a three year limit (see Article 6). For the better administration of justice and avoidance of abuses, proceedings for the recovery of damages are to be barred unless taken within three years of the day on which the claimant became aware, or should reasonably have been aware, of the damage, the defect and the identity of the producer.

The committee thought it expedient to lay down three conditions (awareness of the damage, of the defect and of the producer's identity) in order to protect the victim in all possible eventualities; a person is often aware of the damage and the producer's identity without realising until long after the damage occurred that it was due to a defect.

68. The second time-limit (see Article 7) of ten years is intended to preserve a balance between consumers' and producers' interests.

As the producer's liability under the convention is increased it is important that the producer should not be held liable for damage resulting from a cause which manifests itself after a period of ten years. A fixed time-limit has the additional advantage of facilitating insurance and amortisation.

The question arose whether a ten-year limit is appropriate to a wide range of different products, some of which are expected to last more than ten years (*e.g.* machinery) and others to be consumed in a shorter period (*e.g.* foodstuffs).

Though aware of the complexity of the problem, the committee considered ten years an acceptable period in view of the need to fix some limit (ten years being a fair average) and the desirability of affording producers some security.

Explanatory Report

69. It should be noted that where there are several producers there may be different starting dates under Article 7, action thus becoming barred at different times.

Another point to consider is that, whereas the period provided for in Article 6 can be suspended or interrupted (being a period of limitation of action), the fixed period laid down in Article 7 cannot be.

Article 8

70. This article concerns clauses limiting or exonerating the producer's liability.

The committee was in general agreement that in relation to personal injuries, the producer ought not to have the power to limit or avoid his liability by means of a contractual clause.

71. The problems which arise because of incorrect and incomplete directions for use or warnings (or because of their absence) are dealt with in the definition given to the word "defect" (see paragraph 36 above).

Article 9

72. The convention does not apply to certain matters which are expressly set out in this article.

The fact that the rights of recourse which may be used on the basis of paragraph 5 of Article 3 (liability of producers *inter se*) and paragraph 2 of Article 5 (rights of recourse between producers and third parties having contributed to the damage) are not dealt with by the convention allows national legislators to adopt special rules on the subject if necessary. The committee in fact did not wish to adopt rules in a very complicated field where contractual relations between different producers are very important.

The committee excluded nuclear damage as it did not wish to interfere with international conventions concluded in this matter or with specific national laws adopted by States concerning civil liability for nuclear damage.

Article 10

74. Although Article 1 of the convention, in so far as it requires States to make their laws conform with the provisions of the convention, already prevents States from ratifying the convention while adopting different rules for matters dealt with by the convention (either expressly or impliedly), the committee considered that it was appropriate to repeat this principle in a separate article. Owing to the existence in other conventions (see for example Article 13 of the European Convention on Civil Liability for Damage Caused by Motor Vehicles) of provisions allowing more favourable rules for the victims, the silence of this convention in the matter might have misled States into believing that such a possibility would be open to them after ratifying this convention. The committee, taking into account the fact that the convention attempts to achieve a fair balance between the interests of consumers and those of producers, considered

Strasbourg Convention

it appropriate to indicate clearly that States may not ratify the convention and make rules which are more favourable for victims.

Article 11

75. This provision was inserted in the convention to make it possible for States having guarantee funds or insurance systems replacing the liability of producers to be Parties to the convention.

Article 12

76. This article was adopted by the committee to make it clear that the convention merely introduces a supplementary right of action against the producer but is not intended to modify the ordinary law of tortious liability, which remains in full force. Accordingly, in the event of damage caused by a product, the injured person may take action either under the system established by the convention, or on the ground of fault or, depending on the case in question and on systems of municipal law, under the terms of the contract. Municipal law will be able to regulate the relationship between these different systems of liability as well as any incompatibility between them.

77. The article also points out that the convention does not impose any duties on States in regard to rules concerning the duties of the seller who sells goods in the course of his business. This precision was considered necessary as, in certain States, the question was raised whether or not this law was part of the ordinary law of contractual liability.

Article 16

78. Article 16 was included in the convention to take account of the principle of free circulation of goods in certain groups of States, such as the European Communities. It is for this reason that States have been given the possibility to make the declaration provided for in this Article.

However, in order to avoid any loophole which might arise from the fact that importers of products between these States will no longer be liable under Article 3 and that these products may come from a third State, the committee considered that when these States, by reason of an international agreement binding them, avail themselves of the declaration provided for in Article 16, the importer in these States of products coming from a State outside this group of States will be liable in all the States bound by the said agreement for damage caused by these products.

Articles 13 to 15 and 17 to 19

79. These articles—which contain the final provisions—have been drawn up on the basis of models approved by the Committee of Ministers of the Council of Europe for the European conventions and agreements drawn up within the framework of that organisation.

80. The convention does not contain any transitory provisions to determine whether the rules relating to liability adopted in internal law on the basis of the convention apply only to damage caused by products put into circulation after

Explanatory Report

the entry into force of the convention or if they also govern damage caused by products put into circulation prior to its entry into force. Consequently this problem should be determined by national legislators.

APPENDIX B

Proposal for a Council Directive relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products

(Presented by the Commission to the Council on 9 September 1976)

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

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

Whereas the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in the common market; whereas the rules on liability which vary in severity lead to differing costs for industry in the various Member States and in particular for producers in different Member States who are in competition with one another;

Whereas approximation is also necessary because the free movement of goods within the common market may be influenced by divergencies in laws; whereas decisions as to where goods are sold should be based on economic and not legal considerations;

Whereas, lastly, approximation is necessary because the consumer is protected against damage caused to his health and property by a defective product either in differing degrees or in most cases not at all, according to the conditions which govern the liability of the producer under the individual laws of Member States; whereas to this extent therefore a common market for consumers does not as yet exist;

Whereas an equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes on the injured party almost insurmountable difficulties of proof or does not cover the important causes of damage;

Whereas liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects;

Whereas liability cannot be excluded for those products which at the time when the producer put them into circulation could not have been regarded as defective according to the state of science and technology ("development risks"), since otherwise the consumer would be subjected without protection to the risk that the defectiveness of a product is discovered only during use;

Preamble

Whereas liability should extend only to moveables; whereas in the interest of the consumer it nevertheless should cover all types of moveables, including therefore agricultural produce and craft products; whereas it should also apply to moveables which are used in the construction of buildings or are installed in buildings;

Whereas the protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product or component part or any raw material supplied by them was defective; whereas for the same reason liability should extend to persons who market a product bearing their name, trademark or other distinguishing feature, to dealers who do not reveal the identity of producers known only to them, and to importers of products manufactured outside the European Community;

Whereas where several persons are liable, the protection of the consumer requires that the injured person should be able to sue each one for full compensation for the damage, but any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be governed by the laws of the individual Member States;

Whereas to protect the person and property of the consumer, it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect;

Whereas the producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances;

Whereas in order to protect both the health and the private property of the consumer, damage to property is included as damage for which compensation is payable in addition to compensation for death and personal injury; whereas compensation for damage to property should nevertheless be limited to goods which are not used for commercial purposes;

Whereas compensation for damage caused in the business sector remains to be governed by the laws of the individual States;

Whereas the assessment of whether there exists a causal connection between the defect and the damage in any particular case is left to the law of each Member State;

Whereas since the liability of the producer is made independent of fault, it is necessary to limit the amount of liability; whereas unlimited liability means that the risk of damage cannot be calculated and can be insured against only at high cost;

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for; whereas the stipulated limit of 25 million

EEC Directive

European units of account covers most of the mass claims and provides in individual cases, which in practice are the most important, for unlimited liability; whereas in the case of the extremely rare mass claims which together exceed this sum and may therefore be classed as major disasters, there might be under certain circumstances assistance from the public;

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particular case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based on an estimated average of private assets in a typical case; whereas since this private property includes moveable and immovable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;

Whereas the limitation of compensation for damage to property, to damage to or destruction of private assets, avoids the danger that this liability becomes limitless; whereas it is therefore not necessary to provide for an overall limit in addition to the limits to liability in individual cases;

Whereas by Decision 3289/75/ECSC of 18 December 1975¹ the Commission, with the assent of the Council, defined a European unit of account which reflects the average variation in value of the currencies of the Member States of the Community;

Whereas the movement recorded in the economic and monetary situation in the Community justifies a periodical review of the ceilings fixed by the directive;

Whereas a uniform period of limitation for the bringing of action for compensation in respect of the damage caused is in the interest both of consumers and of industry; it appeared appropriate to provide for a three year period;

Whereas since products age in the course of time, higher safety standards are developed and the state of science and technology progresses, it would be unreasonable to make the producer liable for an unlimited period for the defectiveness of his products; whereas therefore the liability should be limited to a reasonable length of time; whereas this period of time cannot be restricted or interrupted under laws of the Member States, whereas this is without prejudice to claims pending at law;

Whereas to achieve balanced and adequate protection of consumers no derogation as regards the liability of the producer should be permitted;

Whereas under the laws of the Member States an injured party may have a claim for damages based on grounds other than those provided for in this directive; whereas since these provisions also serve to attain the objective of an adequate protection of consumers, they remain unaffected;

Whereas since liability for nuclear damage is already subject in all

¹ OJ L 327 of 19.12.1975. Also the Council Decision of 21.4.1975 on the definition and conversion of the European unit of account used for expressing the amounts of aid mentioned in Article 42 of the ACP-EEC Convention of Lomé, OJ L 104 of 24.4.1975.

Text of the Directive

Member States to adequate special rules, it has been possible to exclude damage of this type from the scope of the directive,

Has adopted this Directive:

Article 1

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.

The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.

Article 2

“Producer” means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer. Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the article.

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

Article 3

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.

Article 4

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

Article 5

The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.

Article 6

For the purpose of Article 1 “damage” means:

- (a) death or personal injuries;
- (b) damage to or destruction of any item of property other than the defective article itself where the item of property
 - (i) is of a type ordinarily acquired for private use or consumption; and
 - (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

EEC Directive

Article 7

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).

The liability of the producer provided for by this directive in respect of damage to property shall be limited *per capita*

—in the case of moveable property to 15 000 EUA, and

—in the case of immoveable property to 50 000 EUA.

The European unit of account (EUA) is as defined by Commission Decision 3289/75/ECSC of 18 December 1975.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amounts specified in EUA in this Article, having regard to economic and monetary movement in the Community.

Article 8

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

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

Article 9

The liability of a producer shall be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

Article 10

Liability as provided for in this directive may not be excluded or limited.

Article 11

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected.

Article 12

This directive does not apply to injury or damage arising from nuclear accidents.

Article 13

Member States shall bring into force the provisions necessary to comply with this directive within eighteen months and shall forthwith inform the Commission thereof.

Explanatory Memorandum

Article 14

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this directive.

Article 15

This directive is addressed to the Member States.

Explanatory Memorandum

1. Defective products can lead to extensive personal injuries to, or even the death of, anyone using or consuming the product. They may cause damage to property and that damage may be seriously detrimental to economic interests. The legal position of the injured person varies under the legal systems of the Member States. Whereas some laws provide for compensation in respect of this damage, in so far as they impose liability on the person who produced the defective product, even where fault does not exist or cannot be proved, others require the injured person to prove fault on the part of the producer. It is extremely difficult or even impossible to provide this proof. Under these laws, the injured person then has to bear the damage alone. He is unprotected in such a case.

These divergencies in laws directly affect the establishment or functioning of the common market in different ways, and must therefore be removed².

They may distort competition on the common market. Liability rules imposed on producers of defective products which vary in strictness lead to differences in costs for the economies of the various Member States and in particular for producers in various Member States who are in competition with each other.

Where a producer is liable irrespective of fault, the damage suffered by the user of the defective article is passed on to him. The compensation paid forms part of the general production costs of the product. This increase in costs is reflected in the pricing. The damage is thus, from an economic point of view, spread over all the products which are free from defects. Before any claims are made, the producer will make allowance for possible compensation payments, and form a reserve or attempt to cover himself by effecting insurance. Where, however, the producer is liable only where he is guilty of fault to be proved by the injured person the same costs do not exist. The difficulty or indeed impossibility of supplying proof usually safeguards the producer from claims.

These differences in costs lead to differing situations with regard to competition. The existence of equal conditions of competition for all producers in the Community is a precondition for the establishment and functioning of a common market. Differences in costs leading to unequal conditions of competition must be removed by approximation of the differing liability provisions.

Differences in laws can also affect the free movement of goods within the Community.

² Article 100 of the EEC Treaty.

EEC Directive

Under the laws of the individual Member States the liability of the producer is usually governed by the law of the State in which the damage has arisen; therefore, the producer's decision as to the Member State in which to sell could be influenced by, amongst other factors, the liability laws of the Member States. Economic decisions should however be based on economic, and not legal considerations.

As a result of the differences in laws mentioned above the person and personal property of the consumer are protected to varying degrees within the Community.

Where the injured person has to prove that the producer was at fault in respect of the defect in the product causing the damage as is the case under the traditional laws in the majority of the Member States, he is in practice in most cases without protection. As an individual, he will in most cases not succeed in discharging this burden of proof in relation to large manufacturing companies, because he has normally no access to their production processes. Even a rebuttable presumption of fault on the part of the producer, as arises under the laws of some Member States, does not lead to adequate protection of the injured person, since in most cases of damage, the defects cannot, in spite of every precaution, be detected, so that the producer can rebut the presumption of his fault by proof that he has taken every precaution and therefore avoid liability.

Where liability of the producer is based simply on the fact that the damage has been caused by a defect although no fault on his part is involved as is the case in other Member States, then the loss or damage suffered by the consumer is passed on to the producer. The consumer in these Member States is thus in a much better position than his counterpart in the other Member States. A differing degree of protection of consumers as a result of differences in the laws of individual States is however not compatible with a common market for all consumers. For these reasons, the Council, in its Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy³ includes the introduction of adequate and equal protection for all consumers among those priorities which should be achieved as soon as possible.

Article 1

Principle of liability for defective products

2. Article 1 lays down the principle of liability irrespective of fault. The fact that this liability is not based on fault is made clear in the final clause of paragraph 1. The liability is that of the producer. "Producer" is defined in Article 2.

Only a liability of this type leads to an adequate protection of the consumer, since he is freed from the burden of proving fault on the part of the producer and also need not fear that he will have to bear his damage alone because the producer can prove that there was no fault.

³ OJ C 92 of 25.4.1975, item 15(a)(ii), p. 5; items 26 and 27, p. 7.

Explanatory Memorandum

Liability irrespective of fault does not burden the producer to an unjustified extent. Normally he can divide the costs of damage passed on to him as a result of liability being made independent of fault among all users or consumers of products free of defects from the same range, or of his production as a whole, by including the expense incurred (payment of damages or payment of insurance premiums) in his general production costs and in his pricing of the goods. Thus all consumers bear the costs of the damage to a reasonable extent.

Any other type of liability would in the overwhelming majority of cases leave the injured person to bear the damage. By this means, he receives only a completely inadequate protection against the risks arising from defective products. Paragraph 2 of Article 1, makes it clear that the producer is also liable in respect of damage even when nobody could have recognised the injurious defect, because the product, according to the state of science and technology at the time when the producer put it into circulation, could be considered as free from defects. Later scientific and technical knowledge sometimes makes it possible only at a later date to realize that a product considered to be harmless is in reality dangerous (development risks). If these extremely rare cases of damage were to be excluded from the producer's liability, the consumer would have to bear the risk of unknown defects. Here also only the principle of liability irrespective of fault can lead to a universally acceptable solution, whereby the costs of the damage is divided among a large number of consumers by the producer. For this reason development risks had to be included.

This decision, however, makes it necessary to limit the period of liability, because liability for an unlimited period would place an unreasonable burden on the producer in view of the constant development of science and technology. Paragraph 2 of Article 1 must be therefore considered in conjunction with Article 9, which provides for the extinction of liability after ten years. If after this period of ten years, it is discovered that an apparently harmless product used widely for all these years has given rise to damage, then this is comparable to an unavoidable accident, the risk of which has to be borne by everyone as part of the general hazards of life and for which no-one else need to be answerable.

3. Liability extends only to moveable property. Special rules exist in all Member States to cover defective immoveable property such as buildings. Where, however, moveable objects are used in the erection of buildings or installed in buildings, the producer is liable in respect of these objects to the extent provided for in this directive.

No distinction should be made between industrial and craft products. Although there is perhaps a smaller incidence of defects and therefore less risk of damage with the latter, since they are subjected to continuous supervision by the craftsman during the production process, adequate consumer protection requires here also that the producer be made liable.

Article 1 also includes agricultural products, irrespective of whether they have undergone processing or are consumed in their natural state. The consumer has to be protected also against the dangers arising from these products.

EEC Directive

4. The producer is liable to anyone who suffers damage from the defective product. Whether or not the injured person was the owner of the object is unimportant. It is even irrelevant whether the injured party was using the product when the damage arose or merely happened to be standing near the user. The wording of the Article covers these persons.

5. The injured person has to affirm and to prove the facts giving rise to liability specified in Article 1.

6. Liability based on Article 1 is that of the producer of the defective product. Dealers have not been included among those persons against whom claims may be brought, in so far as they do not come under the exceptions specified in Article 2. Liability on the part of dealers in defective products, of the type provided for in the directive, would indeed make it easier for the injured consumer to claim his rights. This would however be achieved at a high cost, since every dealer would have to insure himself against claims even in respect of products which are almost completely free of risk. This would lead to a sharp increase in the price of the products, without the protection of the consumer being increased otherwise than by facilitating proceedings. Moreover, the liability of the dealer would be in any event only an intermediate liability, since he in turn would claim against his suppliers and back to the producer. Finally, there is no reason to make the dealer liable since in the overwhelming majority of cases he passes on the purchased product in unchanged form, and therefore has no opportunity to affect the quality of the goods. Only the producer is capable of this. The directive proceeds from the presumption (Article 5) that the defect must have arisen in the producer's production process. Merely to protect the good name of his product the producer will do everything to prevent defects by carefully organizing his production. None of these considerations apply to the dealer. It was therefore considered advisable to concentrate liability for defective products on the producer.

Article 2

Definition of persons against who claims may be brought

7. Article 2 defines the meaning of the term "producer". It covers all persons who were involved on their own responsibility in the process of producing the article. It is obvious that where there are several producers of component parts of an article, only those whose contribution was defective and therefore made the end product defective are liable. It was considered inopportune to concentrate liability on the producer of the final product as used by the consumer. It would have been easy to evade such exclusive liability. Moreover, it is more just to include in the liability irrespective of fault, the component producer in whose production stage the defect arose. The protection of the consumer is increased if all those involved in the production process are liable. This is particularly true where the producer of the final product is only a small undertaking while the supplier of the component is a large undertaking. Since the risks arising from component parts are easier to calculate if the insurer knows the component producer, but become incalculable if only the producer of the final product is liable (a fact which is reflected in higher premiums), such a multiplication of liabilities also does not lead to a superfluous and expensive multiple insuring of the same risk.

Explanatory Memorandum

8. "Producer" includes any person who, even if he did not himself manufacture the defective article, represents himself as its producer by putting his distinguishing feature on the article. This provision is intended to cover primarily those undertakings, such as mail order firms, which have products, especially articles for mass consumption made by unspecified undertakings in accordance with precise instructions and sell them under their own name. This close economic link between the actual producer and the bulk buyer who represents himself to the public as the sole producer must result in liability on the part of the dealer in this case. There would be inadequate protection of the injured consumer if the dealer could refer him to the producer who is unknown and in many cases may hardly be worth suing.

9. The same applies where a product is sold anonymously in the sense that the producer cannot be identified from the particulars accompanying the product. In this case there is a substitute liability of each supplier in order to compel him to reveal the actual circumstances, in particular the identity of the producer. Such a rule protects the consumer against anonymous products and provides an incentive for the marking of products.

10. "Producer" finally includes any person who imports into the European Community products from non-member countries. This liability also aids consumer protection, since proceedings in any non-member country usually present the injured person with insurmountable difficulties. Such a liability, which however in contrast to the case in the second paragraph does not lapse where the producer is known and can be sued, should also be required of the importer. He can protect himself against his liability by means of contractual terms at the time when he agrees to buy the goods from his supplier.

11. Within the European Community it is neither necessary nor desirable to provide for liability of other links in the chain of distribution. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968⁴, which has been in force between the six original Member States since 1 February 1973 and will apply in the three new Member States in the near future, gives adequate opportunity to claim against the producer even in a Member State other than that in which the injured person is resident. Under this Convention, the injured person can indeed sue the producer in the court in whose jurisdiction the tortious act occurred⁵, which is often the place where the injured person is resident. A judgment in his favour can then be enforced in the Member State in which the producer is established⁶.

Article 3

Joint and several liability

12. The joint and several liability, provided for in Article 3, of all producers liable under Articles 1 and 2 gives the injured person the opportunity of claiming against the person in the production chain who because of his economic position is most able to pay compensation for the damage. He is also freed from the

⁴ OJ L 299 of 31.12.1972.

⁵ Article 5(3).

⁶ Article 31 *et seq.*

EEC Directive

need to initiate proceedings against all producers to obtain from each the proportion of damages which corresponds to his share in causing the damage.

Claims for contribution by the person who paid the damages in full against those persons who are jointly and severally liable with him are governed by the laws of the individual Member State. There was no reason to include these provisions in the scope of the directive. The same is true in respect of whether and to what extent a person who under the principles of the directive is solely liable to the injured person can for his part have recourse to his suppliers.

Article 4

Definition of defectiveness

13. Since the directive is intended to protect the consumer's person and personal property not used for business purposes, the definition of defectiveness is based on the safety of the product. It is therefore irrelevant whether a product is defective in the sense that it cannot be used for its intended purpose. Such a concept of defectiveness belongs to the law of sale. A liability which applies in respect of all persons suffering damage from the defective article and the aim of which is to protect the rights of the consumer can be based only on lack of safety. It follows that it is not possible to make a distinction between persons and property and to apply in the case of damage to property a different concept of defectiveness from that applied in the case of personal injury. There is a perfectly legitimate interest on the part of the user or consumer of a product that it should not cause damage to his personal property, *i.e.*, that it should also be safe in relation to these objects. It would be too narrow to restrict the concept of safety to the integrity of the person.

The measure of safety an article must provide in order not to be considered defective must be judged according to objective criteria on the basis of the circumstances in each individual case. Such a decision can be made only by the court. It is impossible to determine in advance for all conceivable products the measure of safety that the whole range of consumers is entitled to expect. The producer is liable in respect of the risk of damage arising from the particular subjective tendency of a person to suffer injury, such as allergies to medicinal products which are objectively harmless, only where he has failed to point out such generally known risks in presenting his product, in particular in the instructions for use. This decision however also depends on the special circumstances of the individual case, which have to be assessed by the court.

An article does not however become defective merely because it wears out through use. A person who uses a worn product usually runs a higher risk than someone who uses a brand new product. The former is not entitled to expect the same degree of safety as the latter. It is clear from Article 5 that the article must be defective at the time the producer puts it into circulation. This is presumed, but the presumption is rebuttable. Where articles have been used over a long period of time, the court will pay particular attention to this circumstance.

The same applies where safety regulations are tightened up after a product has been put into circulation, at which time it met the existing requirements. In such a case there is in principle no obligation on the part of the producer to

Explanatory Memorandum

withdraw all products. Anyone using products which do not meet more recent safety requirements does so at his own risk. Here also, however, the court's assessment of the facts will be decisive in individual cases.

The definition of the term defect should be considered in conjunction with Article 9, which provides for the extinction of the producer's liability after the expiry of a period of ten years from the time when the product was put into circulation.

Article 5

Exclusion of liability

14. One of the conditions for the liability of the producer is that the defect in the article should arise in the producer's production process. Another condition is that the producer should put the product into circulation of his own free will. Liability is therefore excluded where the defect arose only after that time or the article was put into circulation against the will of the producer, *e.g.* through theft.

The existence of these two facts establishing liability is however presumed. The producer can prove the contrary.

As with any evidence, it can only be a question of establishing a high degree of probability, sufficient to convince the court, in accordance with general experience, that the fact to be proved does exist. Since this probability results above all from the interrelationship between the type of defect, the nature of the defective article and the time which has elapsed since the article was put into circulation, regard must be had to these factors, especially as the relevant objective criteria.

It is evident that this burden of proof rule is also intended to decide who has to bear the consequences where proof cannot be provided. Otherwise the rules of procedural law of the Member States are unaffected.

15. It was not considered necessary to define the term "put into circulation"⁷ since this is self-explanatory in the ordinary meaning of the words. Normally, an article has been put into circulation when it has been started off on the chain of distribution.

16. It is not laid down in the directive that contributory negligence on the part of the injured person leads to a reduction in or exclusion of liability. Such a provision would be superfluous since this principle applies under the laws of all Member States.

The same applies to exclusion of liability by reason of unavoidable accident, such as an act of God which under the laws of all Member States may be pleaded by the producer as a defence to an action by the injured person.

Article 6

Definition of damage

17. Article 16 defines the damage for which the producer is liable.

The reference to the death of the user or consumer of the defective article is

⁷ Articles 1(2), 5 and 9.

intended to cover both rights to compensation arising for the benefit of the injured person in the period between the event giving rise to injury and his death, and rights to compensation arising for the benefit of persons who had rights against the deceased. These will be primarily rights to maintenance of the spouse or close relatives.

The term "personal injuries" comprises the cost of treatment and of all expenditure incurred in restoring the injured person to health and any impairment of earning capacity as a result of the personal injury.

The directive does not include payment of compensation for pain and suffering or for damage not regarded as damage to property (non-material damage). It is therefore possible to award such damages to the extent that national laws recognize such claims, based on other legal grounds.

18. Limiting the scope of the damage for which compensation must be paid to the economic consequence of death and to personal injury is not possible, since it would not meet the need for an adequate consumer protection system. The express object of the preliminary programme for a consumer protection and information policy referred to above⁸ is to protect the economic interests of consumers as well as their health. The scope of the directive therefore also extends to damage to property in so far as this is necessary to protect the interests of consumers, but does not extend to damage to economic interests in the commercial sphere. It is obvious that it is precisely in this field that defects in products can lead to large-scale damage. The Commission, for the approximation of this area of law, reserves the right to prepare proposals in view of its importance for the common market.

19. The definition of the scope of the directive given in Article 6 is based on these considerations. In deciding whether compensation is to be paid in respect of damage to property, account must be taken of whether the property damaged by the defective product meets the criteria laid down in Article 6(b). An objective and a subjective criterion have been used to define the scope of the directive. The damaged property must firstly be of a type normally acquired only for private use or consumption. The term "private" is used to indicate the activities of the injured person outside his work or profession. Secondly, a further requirement must be laid down in the form of the subjective purpose of the purchaser at the moment of purchase or, alternatively, the subjective use at the moment when the damage occurred, likewise aimed at private use and not commercial use or consumption.

The combined application of both criteria effectively separates those of the consumer's assets which it is intended to protect as private, non-business property from those used for business purposes.

These commercial activities are described by the words "trade, business or profession". The addition of "profession" has the effect of including the "liberal professions", to which the same considerations relating to economic competition apply.

20. Claims for compensation in respect of damage to or the destruction of the defective product itself are excluded. Product damage is damage which is

⁸ OJ C 92 of 25.4.1975.

Explanatory Memorandum

inflicted upon the user or purchaser of a defective article in the form of personal injury or damage to property. The producer of the article is liable in respect of this type of damage. Liability in respect of the quality of a newly-purchased article, its fitness for particular purposes, including its freedom from defects in the sense that it will not be damaged or destroyed in its entirety as a result of defects in part of it, is normally governed in the laws of all the Member States by the law relating to the sale of goods. This field is not affected by the directive. If for reasons connected with the protection of consumers the need arises to improve the legal position of the purchaser of a defective article *vis-a-vis* its seller or to improve his rights of action against the producer, this can be achieved under the legal systems of the Member States in which the need shows itself. In so far as it is necessary for the functioning of the common market, it could be achieved by approximating the law relating to standard form contracts.

21. The amount of damages to be awarded in individual cases on the basis of this distinction is even under the legal systems in the Member States not determined by legislation. Under all these systems, it is the courts which decide on the amount of damages. This matter is therefore also not governed by the directive, but is left for the courts in the Member States to decide.

“Direct” damage such as expenditure incurred in repairing or replacing the damaged or destroyed article must obviously be compensated for. Compensation in respect of further damage is dependent upon the chain of causation between the defect and the damage. This question of remoteness of damage is a matter for the courts in each Member State to decide. Research into the comparative law on the subject has shown that in practice, however, the amount of damages awarded in individual cases will not differ substantially.

Article 7

Limit on liability

22. If the liability of the producer is no longer made to depend upon fault on his part and is thus deprived of the limiting factor of personal contribution for the damage, as a condition of his liability, another limiting factor must be provided for. Liability irrespective of fault without any kind of limitation would place an incalculable burden of risk on the producer. This would involve the danger that producers would be afraid to take business risks in developing new products. This would in turn impair or jeopardize economic and technical progress, which is not in the general interest, particularly of consumers.

It would follow from the impossibility of calculation that the risk of causing damage could be insured against only at a high cost. Every insurance contract provides for a limit on the amount for which cover is given. This amount is determined according to the risk to be insured and the readiness of the insurer to make a particular sum available in the event of damage being caused and of the insured party to pay the necessary premiums. Where liability is not limited by law, the sum insured can be very high. In fact, it will be very high because the producer has an interest in covering every conceivable risk including even those which are beyond the realms of probability. The premiums payable are reflected substantially by increases in the price of the products, which must be borne by the public and thus by the consumer. It therefore seems in the interests

EEC Directive

of achieving an equitable balance between the need to protect consumers and the burden imposed upon industry to put a legal limit on liability.

Liability is limited in amount⁹ and in time¹⁰.

The limitation on the amount sets an upper limit on claims against the producer based on his liability irrespective of fault. Since he will not be liable according to the strict criteria of this directive for sums in excess of that limit, there is no need for insurance cover beyond that limit.

23. The possible extent of the infringement of the rights involved, the moral imperative of compensation and the purpose of such a limitation, all require that, in fixing the upper limit on liability, a distinction should be made between personal injury and damage to property.

24. Since personal injury involves the infringement of a legal right of the highest importance, which it is imperative to protect, only an overall limit can be laid down, covering the entire range of damages suffered by all injured persons. An appropriate limit would appear to be 25 million European units of account.

A further limitation limiting liability in the individual case, has not been imposed. The need for the risk of damage to be calculable is met by the overall limitation. It is the setting of an overall limit alone which in individual cases of damage, and these are far more frequent than cases of mass damage, causes the liability to be unlimited, since injury to a single person cannot reach the limit proposed in the directive. This means that the interests of the consumer, who usually suffers damage or injury in isolation, are fully taken into account.

On the other hand, an upper limit such as that represented by the sum proposed could to the greatest extent cover mass damages. Mass damages are included under the words "injuries caused by identical articles having the same defect". This is to cover the relatively infrequent cases in which the same defect occurs in various products of the same kind, therefore damaging a number of consumers. In cases of personal injuries, several hundred persons could be compensated within the framework of the proposed limit, provided their claims are of an average amount. Cases where the damage is more extensive than this should be classed as major disasters. In these extremely rare exceptions, the assistance of the public may under certain circumstances be forthcoming, as was the case with the thalidomide cases. It would not be advisable to adopt these exceptional cases as a standard for liability in the usual individual case and to use them to determine the upper limit of liability. A limit to liability would lose all meaning if its amount were based on very rare major disasters.

25. Since widespread damage caused by the defectiveness of a product, leading to mass damages, scarcely arises in the case of damage to property, but in the more frequent individual cases, in spite of restriction to personal assets not used for professional purposes, damage may arise which is difficult to calculate in advance, a converse ruling has been provided for these damages,

⁹ Article 7.

¹⁰ Article 9.

Explanatory Memorandum

namely limitation in individual cases without aggregation of all cases of damage in an overall limit. Where widespread damage resulting from a product defect scarcely arises, there is no danger that the risk of damage in respect of all claims cannot be calculated.

To determine the ceiling of liability for damage, however, it is necessary to distinguish between the moveable and immoveable property of the injured person, since the two types of property by nature differ greatly in value. A single limit for both types of property would be too high for moveable property and too low for immoveable property. In determining the amount it was essential to find an average value for personal assets not used for professional purposes. A figure of 15 000 EUA for moveable property and 50 000 EUA for immoveable property seems appropriate. In the latter case, account should be taken of the fact that in all Member States of the European Community, in the majority of cases, immoveable property is insured by the owner against destruction or damage, so that in general adequate protection is available, whereas this is not the case to this extent with moveable property.

These two limits operate independently, not cumulatively.

26. The new European unit of account used to determine the maximum limits of liability is an average variation in value of all currencies of the Member States. By using this unit of account it is possible to solve the monetary problems which arise as a result of the fact that the exchange rates of the various currencies involved change daily.

This latter fact, in combination with the circumstances that the calculation of the equivalent in national currency is necessary only at the point of time when the amount of damages is fixed, either by agreement or by judicial decision, indicated that it was appropriate to adopt that point of time as the time when the European unit of account should be converted into the relevant national currency. A fixing generally of a specific date for conversion of the European unit of account into national currencies would involve the danger that the relative values of the currencies would change again between the date so specified and the day on which the damages were awarded.

In an age where purchasing power of all currencies is readily being eroded it is necessary to adjust from time to time the specified maximum limits of liability in order to maintain their value at the level laid down in the directive. A period of three years appeared to be appropriate. Therefore, a clause has been provided for paragraph 5 of Article 7 which takes these matters into consideration.

Articles 8 and 9

Limitation period and extinction of liability

27. The right of the injured person to compensation, being subject to limitation, arises upon the occurrence of the damage. It is, however, proposed that the limitation period should commence only when the injured person has, or ought to have, according to the circumstances, all the information necessary to bring proceedings. This is specified in the first paragraph of Article 8.

It is in the interest both of consumers and of industry to provide for a uniform period of limitation. Accordingly, it was necessary to regulate this matter in the directive. A period of three years appeared appropriate in view of the fact that the directive gives the victim the right to bring action against the producer directly and, as the producer will in many cases be resident in another Member State, the victim may well require that length of time. Where legal relationships cross frontiers, the parties should have adequate time to reach a fair compromise between their interests, thus avoiding the need for court proceedings.

28. Products wear out in the course of time. It therefore becomes more and more difficult to establish whether the defect causing the damage already existed at the time the article left the producer's production sphere or arose later through wear. New, more advanced products replace outdated ones. New safety standards lay down stricter requirements. Progress in science and technology makes it possible to acquire better knowledge as to whether products with many inherent risks are dangerous or harmless. For these reasons a limitation of the period of liability is necessary¹¹. It would be unreasonable to burden the producer beyond a certain period with an ever-increasing risk of damage. This is particularly true because the presumption that the product was originally defective operates against him.

A limit to the period of liability is necessary above all to provide a well-balanced solution to the problem of "development risks". The producer can be liable in respect of defects which are discovered within a certain period of time as a result of progress in science and technology. An unlimited period of liability, however, would mean that the producer would have to bear an inordinately high risk particularly in this field.

Ten years appeared appropriate as an average period.

The rule that the period commences in each case at the beginning of a calendar year is intended to make the limitation period easier to calculate.

The period is a cut-off period. Its effects are absolute. It cannot therefore be interrupted or suspended by provisions in the laws of the Member States relating to cut-off periods of this type.

Where proceedings for the recovery of damages are pending, the plaintiff cannot lose any rights he may have by the expiry of this period. The sole ground, therefore, for suspending the period is the bringing of an action by the injured person within this period.

Article 10

Prohibition of exclusion or restriction of liability

29. The object of the directive to achieve an adequate protection of consumers would not be achieved if the liability provided for by this directive were subject to freedom of contract. It is therefore proposed that this liability is obligatory. It cannot be restricted or excluded by an agreement between the producer and the consumer. The provision has however been worded in such a way that it

¹¹ Article 9.

Explanatory Memorandum

does not cover only a contractual exclusion of liability in the strict sense. The text also excludes any assertion by the producer that the consumer, by using the product, has voluntarily assumed the risks which might arise from the defectiveness of the product.

Article 11

Relationship to claims based on other grounds

30. In addition to the right to damages based in the laws of Member States on this directive, and which may rank as a claim in tort, rights to damages may possibly, under the laws of individual Member States, be based on other grounds. These may be of a contractual nature, either arising from a special agreement between the producer and the injured person (guarantee of freedom from defects and agreement to accept responsibility for all the consequences of the defectiveness), or under the legal systems of some Member States, being considered according to interpretation of existing laws, as obligations arising under the law of sale of all sellers of a defective article, including the producer. In addition there may be claims in tort based on the fault of the producer, in so far as it exists. Such rules may be left untouched by the directive because they also serve the objective of an adequate protection of consumers.

Since, however, the right based on this directive gives the injured person a better legal position under the laws of all the Member States, it will in due course replace *de facto* other rights which may perhaps exist.

Article 12

Exclusion of damage arising from nuclear accidents

31. As regards damage arising through or in connection with the use of atomic energy, there are in force in all Member States similar special rules governing these risks based on liability criteria which are as strict as those of this directive. It has therefore been possible to exclude damage of this type from the scope of this directive.

APPENDIX C

Organisations and individuals who commented on Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20.

Agricultural Engineers Association
Association of the British Pharmaceutical Industry
Association of Manufacturers of Domestic Electrical Appliances
Professor G. J. Borrie
Mr. J. W. Bourne, C.B.
Brick Development Association
British Agricultural and Garden Machinery Association Ltd.
British Agrochemicals Association
British Association of Grain, Seed, Feed and Agricultural Merchants Ltd.
British Chemical and Dyestuffs Traders' Association Ltd.
British Electrical and Allied Manufacturers' Association Ltd.
British Industrial Truck Association
British Insurance Association
British Mechanical Engineering Confederation Ltd.
British Medical Association
British Metal Castings Council
British Non-Ferrous Metals Federation
British Photographic Manufacturers Association Ltd.
British Printing Industries Federation
Business Equipment Trade Association
Dr. D. R. Chambers
The College of Justice in Scotland
Committee of Associations of Specialist Engineering Contractors
Compound Animal Feeding Stuff Manufacturers National Association Ltd.
Construction Industry (Overseas) Directorate (Department of the Environment)
The Honourable F. R. Davies
Department of Commerce, Northern Ireland
Department of the Environment, Road Safety Vehicles Division
Electronic Components Board
Electronic Engineering Association
Engineering Industries Association
Federation of Associations of Materials Handling Manufacturers
Federation of Associations of Specialists and Sub-Contractors
Federation of British Port Wholesale Fish Merchants Association

Federation of Gelatine and Glue Manufacturers Ltd.
Federation of Manufacturers of Construction Equipment and Cranes
Federation of Wire Rope Manufacturers of Great Britain
Finance Houses Association
Mr. H. Golsong (Council of Europe)
Grain and Feed Trade Association Ltd.
Grower and Smallholder Services Ltd.
Mr. R. N. Harding
Hawker Siddeley Group Ltd.
Mr. W. Horton Rogers
Imperial Chemical Industries Ltd.
Imperial Tobacco Ltd.
Institute of Trading Standards Administration
International Computers Ltd.
The Law Society
The Law Society of Scotland
Law Students at the Bournemouth College of Technology
Mr. W. A. Leitch, C.B.
Lloyd's
Magnesium Industry Council
Medical Defence Union
Medical Protection Society
Medicines Commission
Melvin Brothers Ltd.
Mr. C. J. Miller
Multiple Shops Federation
National Automobile Safety Belt Association
National Chamber of Trade
National Council of Building Material Producers
National Farmers' Union
National Federation of Consumer Groups
National Federation of Wholesale Grocers and Provision Merchants
National Pharmaceutical Union and Chemists' Defence Association Ltd.
National Television Rental Association Ltd.
North Cornwall Tractors Ltd.
Northern Ireland Seed Trade Association
Office of Fair Trading
Pharmaceutical Society of Great Britain
The Post Office
Process Plant Association

Property Services Agency (Department of Environment)
Scottish Fishermen's Federation
The Senate of the Inns of Court and the Bar
Ship and Boat Builders' National Federation
Smith Kline and French Laboratories Ltd.
Society of British Aerospace Companies Ltd.
Society of Motor Manufacturers and Traders Ltd.
Sutton & District Consumer Group
H.M. Treasury (on behalf of Purchasing Departments)
University of Bristol Faculty of Law
University of Glasgow Faculty of Law
Mr. S. M. Waddams
Mr. M. Whincup

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