THE IMPACT OF THE PRODUCTS LIABILITY DIRECTIVE ON LEGAL DEVELOPMENT AND CONSUMER PROTECTION IN WESTERN EUROPE

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1. *Introduction*

On 25 July 1985, the Council of Ministers of the European Economic Community promulgated a directive "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products"[1]. This paper will try to assess the directive's impact on the law in the member countries of the European Communities (E.C.) and more particularly in the Netherlands. It will give an outline of the directive's contents and of the acts and bills implementing the directive. Where possible, reference will be made to products liability law in some other countries, more particularly in Australia, New Zealand and the United States.

The question of what impact the directive will have, has raised considerable controversy among legal commentators. The most common attitude is to belittle its influence and to question its effect on consumer protection. Bourgoignie concludes that "[t]he Community initiative falls far short of introducing into the European scene a collective, social and comprehensive risk allocation system among producers, distributors, consumers and citizens in general for accidents and damage caused by contemporary mass-consumption processes."[2]

Krämer, quoting Dahl[3], sees the directive as "a 'fixation of a traditional and individualistic system' which hardly contributes to promote the development of liability law, in particular in the area of environment protection, biotechnology, pharmaceutical and chemical products"[4]. Mann and Rodrigues conclude that the adoption of the Directive and its incorporation into the national laws of the Member States is a guarded step toward harmonization of law, but also "that the promulgation of the Directive will retard further effort to increase the level of consumer protection in the Netherlands"[5]. Reich writes of a "consumer victory", yet "the progress made by the directive with regard to compensation is minimal and will help the injured consumer only in a limited number of cases"[6].

1 Official Journal L 210.

2 Thierry M. Bourgoignie, Product Liability: old arguments for a new debate?, *European Consumer Law Journal*, 1986/1, p.6 at 17.

3 B. Dahl, Pilleskader og produktansvarsreform, in: *Forbrugerådet: Forbrug på mange måder/ Festskrift Munch-Pedersen, Kφbenhavn 1983, p.79 at 82.*

4 L. Krämer, E.E.C. Consumer Law, Bruxelles/Louvain-la-neuve, 1986, 293p. -294.

5 L.C. Mann & P.R. Rodrigues, The European Directive on Product Liability: The Promise of Progress? in: D. Kokkini-Iatridou & F.J.A. van der Velden (eds.), *Eenvormig en vergelijkend privaatrecht*, Lelystad 1988, p. 126, 147.

6 Norbert Reich, Product Safety and Product Liability, 9 *Journal of Consumer Policy* 133, at 150-151 (1986).

It is my contention that the directive's impact will be larger than is generally assumed and than is suggested by the above-quoted authors[7]. The impact will be especially large in the development of what in continental Europe is called the civil law (*burgerlijk recht, civilrätt, derecho civil, diritto civile, droit civil, Zivilrecht*). It will be smaller, although not negligible, where consumer protection is concerned. In this regard it should be observed that products liability considerations may only play a limited role in influencing a manufacturer's policy concerning the safety of his products[8]. Indeed, product safety regulation and technical norms probably are of more significance as inducements to do so[9].

Although the paper intends to challenge other commentators of the directive, it is chiefly written for those lawyers who are not familiar with European law. This category does not only include academics from Australasia and the Americas, it also encompasses a majority of lawyers in the E.C. member countries, who until recently regarded European law as something which was not their concern. The paper will first give a brief impression of the institutional framework within which the directive originated (part 2) and describe the main (part 4) and other (part 5) provisions of the directive. In parts 6 and 7, the major aims of the directive, the approximation of law (part 6) and consumer protection (part 7), will be analysed. For the benefit of Australasian and American readers, the European directive will be compared with these legal systems (parts 8 and 9). Finally, some conclusions will be drawn (part 10).

2. *European Communities and Council of Europe*

First, let me briefly embark upon the institutional framework of the product liability directive. There are now two major West European networks, the European Community and the Council of Europe. The older and more-embracing organisation is the Council of Europe, which encompasses all non-socialist countries of Europe. It may soon even accept socialistic countries as members, provided these can guarantee democratic freedoms. Yugoslavia is scheduled to become the first socialist member country, and Hungary may follow suit.

The Council of Europe has a wide range of activities, several of which overlap those of the European Community. Its main legal instruments are the treaty and the non-binding recommendation. Although the Council has drafted a large number of treaties, only a limited number of these has been ratified[10]. One of the Council's most effective treaties has proven to be the

[7] After writing the first draft of this article, I found an ally in W. von Marschall, The Directive of the European Communities on Products Laibility, paper presented at the Fourth biennial conference of the International Academy of Commercial and Consumer Law, Melbourne.

[8] See M. Adams, Ökonomische Analyse der Gefährdungs- und Verschuldungshaftung, Heidelberg, 1985, and G. Brüggemeier, Sichere Produkte durch strengere Haftung?, forthcoming. As to the American discussion, see G. Eads and P. Reuter, Designing Safe Products/Corporate Responses to Product Liability Law and Regulation, Santa Monica, 1983; Richard J. Pierce Jr., Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 *Vanderbilt Law Review* 1281-1331 (1980); Stephen D. Sugarman, Doing Away with Tort Law, 73 *California Law Review* 558-676 (1985).

[9] See Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz, Gert Brüggemeier, Die 3Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, Baden-Baden, 1988, with many further references, also to English language publications, at 506-523.

[10] See the annual Chart Showing Signatures and Ratifications of Council of Europe Conventions and Agreements, Strasbourg.

Convention on Human Rights and Fundamental Freedoms. For countries such as the Netherlands, which have no judicial review, the Convention increasingly has come to serve as a bill of rights which enables the European Court of Human Rights in Strasbourg as well as the domestic Dutch courts to set aside Dutch law for being at variance with an international treaty[11], which under Dutch constitutional law takes priority over domestic statutes[12]. This is quite different in a country such as Australia[13].

A treaty which has proven to be less successful than E.C.R.M. is the Council's 1976 Draft European Convention on Products Liability in regard to Personal Injury and Death. The main reason for the Convention's apparent failure is that only days after its promulgation, the E.E.C. Commission submitted a first draft of the present directive to the E.E.C. Council of Ministers. The Convention's main achievement appears to be that it paved the way for the present harmonization effort. Its preparation also provided a first opportunity for a valuable exchange of ideas between civil servants and academics of the various European countries.

The Council of Europe is governed by a Council of Ministers; it has set up the European Court and the European Commission on Human Rights and it has a Secretariat, all in Strasbourg, France. Strasbourg, and this continues to confound law students, also serves as the meeting place of the European Parliament of the European Communities, which however have their office in Brussels, Belgium (the E.C. Court of Justice as well as some services are located in Luxembourg). The E.C. started out later than did the Council of Europe, but it has rapidly overtaken the Council in importance. The Economic Community started in 1958 with six member states: the Benelux countries (Belgium, Luxembourg, the Netherlands), France, the German Federal Republic and Italy. These countries were later to be joined by Denmark, the Irish Republic and the United Kingdom (all in 1973), Greece (1981), Portugal and Spain (both in 1985). Austria has applied for membership and it is expected that most of the remaining European Free Trade Association (E.F.T.A.) members — with the exception of Switzerland — will soon follow. A Turkish bid for membership seems unlikely to be accepted within the next years. The establishment of a Common Market by the E.C. has brought prosperity to its member countries. This success is somewhat overshadowed by the adverse effect it has had on the international trade of other countries, such as Australia, Canada and the United States, which have been deprived of their traditional

[11] See for instance Madzy Rood-de Boer, The Netherlands: How to Tackle New Social Problems, 26 *Journal of Family Law* (Annual Survey of Family Law, vol.10) 141-147 (1987).

[12] See P. van Dijk, Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary: the Dutch Case, in: Progress in the Spirit of Human Rights/Festschrift fü Felix Ermacora, Kehl am Rhein etc. 1988, p. 631-650; Egbert Myjer, Dutch interpretation of the European Convention: a double system?, in: Protecting human rights: The European dimension/Studies in honour of Gerard J. Wiarda, Köln etc. 1988, p. 421-430. As far as New Zealand is concerned, K.J. Keith, The Courts and the Constitution (1985) 15 V.U.W.L.R. 29, 44, refers to proposals for a Pacific regional Human Rights Commission. It should be pointed out that although having a supra-national authority which may strike down one's laws may prove rewarding in the long run, it is bound to trouble patriotic feelings in the short run. Such feelings may be familiar to the New Zealand lawyers who feel frustrated by their country's continued allegiance to the (United Kingdom's) Privy Council — see Charles Cato, the Takaro Properties Case [1985] N.Z.L.J. 110 and Philip A. Joseph, Toward Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights (1985) 2 Canta L.R. 273.

[13] See M.D. Kirby, The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms, (1988) 62 A.L.J. 514.

wheat market, and especially New Zealand, which has lost its easy access to the U.K. market.

Involvement of the E.C. in the development of law has grown rapidly over the years. The E.C.'s legal instruments include recommendations, regulations, commands and directives. A directive is a charge to a member state to accomplish an express result; it leaves it up to the member state how to achieve such result, but this is controlled by the European Court of Justice in Luxembourg. Until recently, a directive required a unanimous decision in the E.C. Council of Ministers, but this is no longer the case. The Single European Act has added to the E.C. Treaty a number of new articles dealing among others with the elaboration of directives. Under the new article 100A, the Council may under certain conditions adopt harmonization measures by a qualified majority. However, in matters of health, safety, environmental protection and consumer protection, the Commission must retain as its starting point a high level of protection (article 100A, paragraph 3)[14].

Company law has already to a considerable extent been influenced by European directives. The civil law proper — as continental Europeans would call private law with the exception of civil procedure and commercial law — has so far escaped unscathed, but this may soon change. Apart from the directive which is the subject of this paper, the E.C. directives on consumer credit, door to door sales and misleading advertising should be mentioned in this regard. New initiatives concern the package tour and unfair contract terms[15]. In a further perspective, a European version of the United States' Restatements or Uniform Commercial Code is even envisaged[16].

Critics of the E.C. have often challenged it for its apparent malfunctioning in shaping a common agricultural market and its rampant bureaucracy. It must be admitted that the entry of new member states causes some problems. Most notably, in order to get their quota of civil servants in Brussels, citizens of the new member states drive out better qualified civil servants from the original member states. Another problem which has arisen is that of a Europe with two speeds, the rich North (Benelux, Denmark, France, German Federal Republic, Northern Italy, Northern Spain, Southern England) and the poor South (Greece, Southern Italy, Portugal, Southern Spain) and semi-poor West (Irish Republic, parts of the United Kingdom). As of late, the promised establishment of a single market by 1 January 1993 has provided a new stimulus to interest in the European cause. So popular has this policy become with European businesspersons, that the addition '1992' to any conference on whatever subject is certain to make it a success.

3. *Development of the Products Liability Directive*

One of the E.C.'s projects which may conceivably have a positive influence on the 1992 policy is its directive on products liability. The first aim of the directive is to bring about an approximation of the laws of the member states. The aim is not a complete harmonization of the law. The long and often cumbersome history of the directive illustrates the unattainability of such aim

[14] See Marie-Christine Héloire, Community policy towards consumers: the conditions for a new impetus, *European Consumer Law Journal* 1987/1, at 3-17.

[15] See my paper "Unfair terms in consumer contracts: towards a European directive", *European Consumer Law Journal* 1988/3, p. 180-199.

[16] See Oliver Remien, Ansätze für ein Europäisches Vertragsrecht, 87 *Zeitschrift für Vergleichende Rechtswissenschaft*, 105-122 (1988).

in the present era. The second aim is a better consumer protection. During the discussion of the draft directive, the constitutionality of a directive based on this premise was challenged.

Products liability in its present form is an American invention. Laws on defective products go back as far as Hammurabi[17] and medieval guilds[18] had a strong hand in controlling the quality of their members' products. But it was the American courts, presided over by such enlightened judges as Roger Traynor, and learned writers, such as William Prosser, whose assault upon the citadel established products liability law as a separate key-word[19]. European lawyers who visited the United States were introduced into American law by courses on the development of products liability and took home this novel concept. When they came home, Europe was struck by a number of disasters, the most infamous of which was the thalidomide case which was responsible for the death and malformation of thousands of babies. In some instances, the courts, which always are in the front line when new technical and social developments occur, made an innovative use of old-fashioned tort or contract law to establish liability. In other instances, public opinion had to be mobilized (in the United Kingdom, thalidomide was marketed by a producer who also exported some well-known whisky brands such as Johnny Walker and Black Label to the United States, where consumers threatened to start a boycott unless the thalidomide victims were compensated[20]) or the state stepped in.

The new development in the law provided a fertile ground for efforts of harmonization, such as those of the Council of Europe and the E.C. The E.C. draft directive was submitted by the Commission to the Council of Ministers on 9 September 1976. It bore a striking resemblance to the Council of Europe's draft convention. This is understandable, since many civil servants involved in preparing the Convention had also been consulted with regard to the draft directive. The most important difference between the draft directive and the convention was that the latter was limited to personal injury — the draft directive also dealt with some forms of material damage.

The draft directive was criticized by consumers and producers alike. The European Parliament welcomed the Commission's proposals, but it did not concur with the Commission's proposal not to allow a state of the art defence. Another challenge came from the Legal Commission, which at first considered the proposal not in accordance with the E.C. Treaty on the ground that the Treaty did not explicitly provide for consumer protection. When the Commission's second draft directive (1979) included a state of the art defence, the Legal Commission suddenly forgot its previous constitutional doubts.

Still, the draft remained controversial. Germany objected to the non-inclusion of a financial ceiling. It feared that otherwise the liability would prove to be uninsurable. Other controversial issues remained the state of the art defence and the scope of the directive: personal injury only or property damage as well. Prospects of a compromise seemed dim and it therefore came as a surprise when in March 1985 a compromise was finally announced. And a compromise it proved to be, for the final directive only provides for a limited amount of harmonization and contains a number of options for member states.

[17] G.R. Driver & John C. Miles, The Balylonian Laws, Oxford 1952, p. 180-184.

[18] Wolfgang Schuhmacher, Verbraucher und Recht in historischer Sicht, Wien 1981.

[19] See G. Edward White, Tort Law in America/An Intellectual History, New York/Oxford, 1980.

[20] See H. Teff & C. Munro, Thalidomide/The Legal Aftermath, London, 1976.

The member states were to introduce the directive into their legislation before 1 August 1988. By that time, most states were still in the course of enacting or even of drafting a bill on products liability. Only three member countries, Greece, Italy, and the United Kingdom, as well as one non-member country, Austria[21], had implemented the directive in time. Greece and Italy have simply incorporated the directive's provisions in their legislation. The United Kingdom has given its own interpretation to the directive. The Consumer Safety Act 1987 purports to be an implementation of the directive, but at least as far as the state of the art defence is concerned it deviates from the directive on a crucial point[22]. The impact of the directive on Europe is illustrated by the fact that not only Austria and Norway have implemented the directive, but other non-members such as Sweden are likewise considering the introduction of such legislation.[23]

4. *Main Provisions of the Directive*

The final 1985 directive consists of a preamble and 22 articles. The directive's principle is set out in article 1: the producer shall be liable for damage caused by a defect in his product. This principle is worked out in articles 2 (product), 3 (producer), 6 (defective product) and 9 (damage).

Article 2 defines a product so as to mean all movables and electricity[24]. An exception is made for primary agricultural products and game, but a member state may opt for inclusion of these movables in its legislation under article 15.

The directive contains a fairly extensive definition of a producer. This not only includes the manufacturer of a finished product, but also the producer of any raw material, the manufacturer of a component part and "any person who, by putting his name, trade mark or other distinguishing feature on the products presents himself as its producer" (article 3(1)). This raises the question whether a retailer who sells wine under his own brand may be qualified a producer, when it is clear that he cannot possibly have produced the wine. The question is partially answered by article 3(3), which holds the supplier of a product liable, if he does not inform the injured person of the identity of the producer or of the person who supplied him with the product.

Of special interest to foreign business circles should be article 3(2), which deems any person who imports into the E.C. a product for sale, hire, leasing

[21] Act of 21 January 1988, which came into force on 1 July 1988 — see Hanns Fitz, Meinhard Putscheller & Peter Reindl, Produkthaftung, Wien, 1988, and W. Rolland, Kommentar zum Produkthaftungsgesetz, 1988.

[22] See Geraint Howells, United Kingdom's Consumer Protection Act 1987 — The implementation of E.C. directive on product liability, *European Consumer Law Journal* 1987/3, at p. 159-167.

[23] Sweden had previously considered adopting the Council of Europe's draft Convention — see Produktansvar II, Produktansvarslag, Statens offentliga utredningar 1979:79. J. Hellner, Haftpflicht und Versicherung auf dem Gebiet der Produkthaftung im schwedischen Recht, *Studie cywilistyczne* 1987, 247, 254-255 explains that since the Convention only covers personal injury and since Sweden, like New Zealand, has an all-embracing system for recovery of personal injury, its impact in Sweden would have been slight.

[24] This raises the question whether damage caused by power cuts is covered by the directive. According to J. Schmidt-Salzer, Kommentar EG-Richtlinie Produkthaftung, vol.1: Deutschland, Heidelberg, 1986, p.298, this is not the case — non-delivery of electricity is *not* a product. Although I can in most circumstances agree with the outcome, the reasoning does not sound convincing. I would rather argue that power failures are something to be reckoned with and therefore do not always constitute a "defect" in the sense of article 6.

or any form of distribution in the course of his business to be a producer. It is apparent, then, that more than one person may be liable under the directive. Under article 5, all of these persons shall be liable jointly and severally. The directive leaves the rights of contribution and recourse to national law.

An important provision is article 6, which defines a defective product. The yardstick is to be "the safety which a person is entitled to expect, taking all circumstances into account". These circumstances include: "(a) the presentation of the product; (b) the use to which it could be reasonably be expected that the product would be put; (c) the time when the product was put into circulation". Thus, the merchantable quality of the product is not a criterion.

The directive covers damage caused by death or personal injuries, as well as damage to any item of property other than the defective product itself (article 9). Property damage, however, shall have a lower threshold of 500 E.C.U. (roughly NZ $1,000) and the item of property shall be of a type ordinarily intended for private use or consumption, and have been used by the injured person mainly for his own private use or consumption. The article is without prejudice to national provisions relating to non-material damage.

This article has given rise to a number of controversies. The first of these concerns the meaning of the word 'threshold'. Would this mean that material damages of for instance 600 E.C.U. are fully recoverable, or should 500 E.C.U. first be deducted? The French "*sous déduction de*", German "*unter Selbsbeteiligung von*" and Italian "*nella misura che ecceda la somma*" clearly point to the latter solution. The Dutch "*met toepassing van een franchise ten belope van 500 Ecu*", English "*with a lower threshold of 500 ECU*" and Greek "—*ημία η. καταστροφή, ϋψουξ πέραν τῶν* 51.456 *δραχμῶν κάθε περιουσιακοῦ στοιχείου*" texts, however, seem to leave the question open. The Dutch and English legislators have seized upon this possibility to introduce the first, more consumer-friendly interpretation.

A related question is whether the directive's aim of approximation allows national legislators to make a person other than the producer liable for damages below the franchise. A Dutch bill on consumer sales has done just this, making the vendor liable for such damages. This has been criticised for thwarting the directive's aims. On the other hand — and this should prevail — the directive's history clearly shows that the vendor's liability was not to be dealt with by the directive, neither in a positive way nor in a negative way. This presumably leaves it to the member states to act as the Dutch government has done.

Finally, there is the question of non-material damage. The German bill — as opposed to the Austrian act — does not provide for any such damage. This has as a consequence that under German law the victims of a defective product will have to prove the producer's negligence in order to be able to claim non-material damage. In other countries, the victims may recover non-material damage under the same regime as material damage.

5. *Other contents of the directive*

I shall now briefly describe some of the other articles of the directive. Article 4 provides that the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage. He does not have to prove negligence. The doctrine of *res ipsa loquitur* will help him to prove the causal relationship.

Article 7 gives the producer a number of defences, such as that he did not put the product into circulation, that the defect came into being after the product was brought into circulation, that the product was not manufactured for commercial sale, that the defect is due to compliance with mandatory regulations issued by public authorities, or that in the case of a component the defect is attributable to a design or instruction fault. The most important of these defences is the state of the art defence, or development risks defence, as continental Europeans prefer to call it. This defence is defined in article 7(e) in the following words:

The producer shall not be liable as a result of this Directive if he proves:

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

The implementation of the defence in British legislation has already given rise to a controversy. The Consumer Safety Act lays down a subjective ("could this particular producer have known.") rather than the objective test suggested by the directive. Consumer's organisations have already applied to the European Commission to take the United Kingdom to the European Court for failure to comply with the directive on this point. This also applies to Italy.

Article 15(1) empowers a member state by way of derogation from article 7(e) to deny a producer the state of the art defence. So far no member states have made use of this power. Belgium, France and Luxembourg, however, may take this line. In other member states, it has been suggested that by imposing a heavy burden of proof on the producer — a negative state is always difficult to prove anyway — a court may in effect deny him the state of the art defence.

Articles 10 and 11 of the directive provide for a three year limitation period to apply to proceedings for the recovery of damages and for a ten year period of repose, beginning on the date on which the producer put the product into circulation, after which the injured person's rights shall expire. This will make it difficult to recover damages under the directive in cases of asbestosis or Diethylstilbestrol (D.E.S)[25]. A non-member of the E.C., Sweden, is expected to introduce a bill on products liability providing for a 25-year period of repose.

Article 12 declares invalid any clause limiting or exempting the producer's liability. Such clauses would already be considered unfair and therefore voidable under most modern unfair contract terms laws[26].

The approximation of law does not seem to be served by article 13, which provides that the directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability. The article continues that neither shall the directive affect a special liability system existing at the moment when the directive was notified. This exception to the requirement of approximation was introduced at the request of the Germans who feared that otherwise their *Arzneimittelgesetz* (Pharmaceutical Products Act) would be threatened. The article has been criticised by the consumer movement for bringing about a standstill in

[25] See *Sindell* v. *Abbott Laboratories*, (1980) 607 *P2d* 924 (Supreme Court of California).

[26] See my article "Unfair terms in consumer contracts: towards a European directive", *European Consumer Law Journal* 1988/3, at 180-199.

development of consumer protection. However, it should be pointed out that article 13 will not prevent the judiciary from extending consumer protection on the basis of existing general provisions, as has been done in countries such as France and the German Federal Republic.

By way of compromise, the directive contains three options for member states. Two of these, concerning the inclusion of primary agricultural products and the exclusion of the state of the art defence, have already been discussed. Article 16 provides a third option, once again introduced to placate the Germans, which allows member states to limit a producer's total liability for damage caused by identical items with the same defect to an amount which may not be less than 70 million E.C.U. (roughly NZ $140 million). Greece has adopted this option and the German Federal Republic is likely to follow suit, while other member states will probably refrain from doing so. Not only does a financial ceiling complicate any handling of large scale damages, it also is feared that it will raise claims to the level suggested by the enormity of the ceiling.

6. *Impediments to the Approximation of Laws*

As may have become apparent from the preceding description of the directive's contents, the objective of approximation of products liability law in the twelve member states of the E.C. is impeded by a number of inherent weaknesses. These may be distinguished in four separate groups. First, the directive offers member states options on three major issues. Second, it leaves a number of questions to national legislation. Third, the implementation of the directive may lead to national variations. Fourth, even the most sophisticated uniform laws may eventually suffer from varying interpretation by national courts.

The first group of impediments to approximation, the three options, will not be discussed here, since that has already been done in the previous paragraph. What is the present state of the matter? Italy and the United Kingdom have not invoked any of the three options, and Denmark and the Netherlands are unlikely to do so either. Greece has imposed a financial ceiling, as the German Federal Republic is considering doing. Belgium, France and Luxembourg may make use of the two other options: forsaking the state of the art defence and including primary agricultural products and game in the definition of movables.

The second group of impediments is of more importance. As we have already seen, national laws concerning the rights of contribution and recourse (article 5) and non-material damage (article 9) are not to be affected by the directive. Other examples of references to national legislation are provided by article 10(2) concerning the suspension and interruption of the three-year limitation period, and by article 13 concerning contractual and non-contractual liability as well as special liability systems. Apart from these explicit references to national law, various other questions which the directive leaves open will continue to be governed by national laws. As for the interpretation of the directive's terminology, domestic law and E.C. law will vie for precedence.

Third, there may be linguistic problems because of the fact that the authentic texts of the directive in the nine official languages of the E.C. — Danish, Dutch, English, French, German, Greek, Italian, Portuguese, Spanish — do not always match. An example of this, the 500 E.C.U. threshold, has already been discussed above. It is interesting to see how the principal draftsman

of the text takes the view that his personal view, which has best been expressed in the French and German texts, should prevail over the 'translations' into the other languages. Historically, his view may be correct, but the E.C.'s rules of interpretation do not give historical interpretation priority over other methods of interpretation.

Not all variations in the national laws implementing the directive should be attributed to linguistic problems. A directive does leave a Member State some freedom to adapt the contents to its legislation. Whether this should allow the United Kingdom to offer a definition of agricultural products (section 2(4) Consumer Protection Act: "not undergone an industrial process") which differs from article 2 of the directive ("undergone initial processing"), is of course the question. A similar question is raised by the definition of product safety in par.3 of the German bill (*"die Sicherheit, die unter Berücksichtigung aller Umstände berechtigterweise erwartet werden kann"*) as compared with article 6(1) of the directive ("the safety which a person is entitled to expect").[27]

Fourth, even when the linguistic problems and the questions raised by national deviations from the directive finally may be solved by the European Court of Justice, there remain a number of questions of ordinary interpretation. Thus, the question has been raised as to when a product has been brought into circulation. This plays a role with regard to three of the producer's defences envisaged by article 7, as well as with regard to the beginning of the ten-year period of repose referred to in article 11. Several interpretations are possible. As two commentators have put it: "When is a prescription drug put into circulation: at the time of shipment to a pharmacy, at the time of distribution to an intermediary, or at the time of sale to a consumer?"[28]. The answer to this question is not only important for consumers but also for employees, who — although neither the directive nor its legislative history give any clue — seem to fall under the directive's scope of application[29]. Most writers conclude that a product is brought into circulation once it has left the factory.

Another example is the question of whether software is a product. It might be expected that this is not the case. In legal writing, however, it has been argued that it is.[30]

At first sight, then, it seems that the critics of the directive's impact upon the approximation of laws are right. The impediments to such approximation are manifold. A closer look, however, reveals that things are not as bad as they appear. As has already been suggested, the E.C. treaty provides for questions such as those mentioned under headings three and four. The establishment of a clearing house of national case law on the directive may contribute to approximation of its interpretation by national courts.

As to the impediments listed under headings one and two, it should be observed that even within countries such as Australia, Canada and the United States, regional differences between the laws of the various states and provinces

[27] For these examples see Harald Koch, Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie, 152 *Zeitschrift für das gesamte Handelsrecht* 537-563 (1988).

[28] Mann and Rodrigues (see fn.5).

[29] Likewise, in the United States damage suffered by employees of asbestos producers are considered to be products liability cases — and indeed have come to constitute the financially most important cases of the moment.

[30] See C. Stuurman and G.P.V. Vandenberghe, Softwarefouten: een 'zaak' van leven of dood?/ De status van software onder de EG-richtlijn produktenaansprakelijkheid en de Nederlandse uitvoeringswetgeving, *Nederlands Juristenblad* 1988, 1667-1672.

may exist. It is true that these countries have common stocks of terminology and textbooks at their disposition. But may the E.C. directive on products liability not serve to bring about a change of mind within European lawyers, who for the most part are very parochial in outlook, where knowledge and skills in E.C. law and law of the neighbouring countries are concerned? There has always existed in every European country a small number of comparative law freaks, such as this author, who are generally regarded as a sort of legal Greenpeace: somewhere in between idealists and lunatics. During the last decade these soft lawyers have been joined by a fast-growing group of company and commercial lawyers who deal with E.C. competition law. The implementation of the products liability directive may well have the effect that the rank-and-file of domestic lawyers will be forced to join the E.C. "in crowd". As directives such as the one on products liability become a part of national law, these lawyers will have to look into E.C. law. The many weaknesses of the products liability directive may even turn out to be a blessing in disguise, by forcing domestic lawyers to finally take that course in E.C. law or at least not shrug off comparative law. This may eventually lead to a situation, which is comparable with although — in view of the multitude of languages (nine official languages in the E.C.) — not similar to that in the Americas and Australasia.

7. *Impediments to Consumer Protection*

Not only has the directive been criticized for not going far enough in the direction of approximation of the laws, it has also raised criticism on the issue of consumer protection. The main argument is that the directive brings little, if any, extra protection to consumers, while stifling any new developments. It usually is added that the directive may well be beneficial for southern member states, where products liability law still appears to be underdeveloped.

It certainly is easy to criticize the directive from a consumer point of view. The option of a financial ceiling, the acceptance of the development risks (the state of the art) defence, the non-introduction of the guarantee fund and of market share liability, the ten-year period of repose, these and other drawbacks combine to make the resulting law less than ideal. On the other hand, it should be observed that the directive lays down some important principles, not the least important of which is the principle of strict liability in article 1. It may be that the directive provides an impediment to raising the level of consumer protection by new legislation. On the other hand, it will not prevent the courts from doing so. Let me give one example: it is quite possible that courts dealing with a claim which is just below the 500 E.C.U. threshold, and which therefore must be decided on the basis of traditional tort or contract law, will be inclined to consider the threshold rather artificial and will ignore it by imposing upon the defendant the burden of proof, thereby achieving a result which is equal to that under the directive. Finally, it should be added that the introduction of a common core of products liability law will invite courts and lawyers alike to take into consideration not only the precedents in their own jurisdiction but those of other member states as well. This will be particularly welcome to a country like the Netherlands, where appellate decisions on products liability are rare and Supreme Court decisions even rarer. An influx of foreign-born case law is likely to help setting up a better framework for dealing with products liability cases. Thus, like the previous part, this part does end with a brighter outlook than do most other

commentators.

8. *A Comparison with Australasian Law*

The outline of European products liability law, set out in the previous parts, may not immediately be clear to lawyers in other continents. This must be attributed, at least partially, to this author who so far has failed to provide any reference to American, Australian and New Zealand law. In this part and the next, I shall try to remedy this shortcoming. First, I shall devote some attention to developments in Australasia, with a heavy accent on Australia.

A discussion of European law is of particular relevance to Australia, where the Australian Law Reform Commission is at present carrying out a review of products liability law. The matter was referred to the Commission by the federal Attorney-General on 11 September 1987, following the publication of a report on Product Safety by the National Consumer Affairs Advisory Council in June 1987. The Terms of Reference call for the Commission to review (a) whether Australian laws, relating to compensation for injury and damage caused by defective or unsafe goods are adequate and appropriate to modern conditions, (b) the appropriate legislative means of effecting any desirable changes to the existing law, and (c) any related matter[31]. Following the reference, the Australian Law Reform Commission published an issues paper, in which it identified the following issues:

(i) how should innocent bystanders, who have no contractual link with a retailer or a quasi-contractual link with a manufacturer, be protected on the same footing as a contracting party,
(ii) should sellers and distributors have greater legal responsibility than the manufacturer,
(iii) how should the person be identified against whom a claim shall be made,
(iv) should the manufacturer have a state of the art defence and the retailer not,
(v) should compensation in contract and tort differ,
(vi) how to proceed in case the production process has a foreign element,
(vii) how to present proof of a claim, and
(viii) how to identify the defendant[32].

In 1988, the Commission published a discussion paper, which sets out provisional proposals for reform of the law of product liability[33]. The major proposals are the following. New statutory rules should be enacted (para.42) and the new regime should apply for the benefit of all persons who suffer loss or damage, not only of consumers (para.45). Liability may be imposed if the goods are in the condition of being unsafe or unacceptable. The standard of safety shall depend on all circumstances including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation (para.51). The standard of acceptable quality should consist of two elements: a basic principle that the quality of the goods should be such as would be fully acceptable to a reasonable person, and a list of aspects of quality, some or all of which may be important in the particular case (para.56). There shall be no special

[31] (1987) Reform 170.
[32] (1988) Reform 71.
[33] Law Reform Commission, Product Liability, Discussion Paper no.34, August 1988.

development risks (state of the art) defence (para.85). A person shall not be able to exclude or limit liability under the regime (para.89).

The proposed regime is to provide compensation for both economic and non-economic loss arising from personal injury and property damage (para.98). There shall be no overall limit on the amount of damages, nor any limit on the amount of damages awarded to an individual complainant (para.108, 109). There shall be a three year limitation period (para.126, 127). The Commission has not yet reached a view on whether there should be a statute of repose (para.135). Rights in contract and rights in tort under State and Territory laws shall be preserved (para.141).

As is apparent from the Commission's discussion paper, influence of the E.C. directive has been great. In many instances the Commission recognizes this influence. Yet, there are also some major divergences. The most important of these, in my view, is the inclusion of the quality of the goods as a condition which may lead to liability under the new regime. Under the E.C. directive, only a standard of safety is applied. The Australian proposal would in effect bring a large number of sales transactions under the new regime on products liability. Since a person would not be able to exclude or limit liability under the regime, this will have a large impact on Australian commercial law.

Another matter on which the Australian Law Reform Commission has taken a more radical stand than the E.C. is the rejection of the state of the art defence as well as the financial ceiling. Unlike the European directive, the Australian proposals also deal with the relation between the injured person and the retailer.

As far as could be ascertained, New Zealand has not yet considered the introduction of a products liability bill. The common law provides many barriers to recovery of damages in court[34] and the imposition of strict liability has been argued for[35]. But apparently, this call for action has not yet had any result.

9. *A Comparison with American Law*

How does the future regime of European products liability compare with American law? There could hardly have been an area in which American and European law are further apart than that of products liability. Some American courts do accept market share liability[36]; they are more willing to accept *res ipsa loquitur* than Australian courts; ten year periods of repose have not been imposed in the asbestos cases and the D.E.S. cases, etc.

On the latter point, many American states are at present trying to curtail products liability[37]. The starting point of this movement may be said to be the founding of the Inter-Agency Task Force on Products Liability, which published its Final Report in 1976. Another important instance was the publication, in 1979, of a Model Uniform Product Liability Act. In the absence of federal legislation, state legislatures and courts have endeavoured to curb products liability. The policy objective of these efforts is to restrict a liability which has become too heavy a burden.

[34] Geoffrey W.R. Palmer, Dangerous Products and the Consumer in New Zealand [1975] N.Z.L.J. 366.

[35] Sally Garrett, New Zealand: Last Bastion of Laissez-Faire? Comparative Perspectives on Consumer Protection (1986) 5 A.U.L.R. 277, 294.

[36] See footnote 25.

[37] See Tony Young, Product Liability Research Paper no 1, Australian Law Reform Commission, September 1988, para.204.

European companies often fear that American law will sometime be exported to Europe. This fear is only justified to a small extent. The introduction of the directive may well — and should — have the effect that more claims are made. Dutch insurance companies have announced premium rises from 0% to 15% for the most exposed trades. Still, this is a long way from the American scene. A German author estimates that before introduction of the directive, American product liability is ten times that of German liability. After the introduction this may be only ninefold.[38]

What then may be the background of the enormous differences? Several arguments have been advanced. Five categories may be discerned. First, American substantive product liability law is more plaintiff oriented than is European law. This, however, is only a minor element. Second, American law outside the area of products liability is far more plaintiff oriented than is European law. Third, American procedural law is more favourable towards plaintiffs. Fourth, the American legal system favours access to justice as well as high compensation awards. Fifth, social insurance in the United States is less developed than in European countries.

American substantive products liability is more favourable towards plaintiffs; witness the acceptance in some states of market share liability.[39] Other examples may be given, but more importantly American tort law in general is far more generous towards victims; loss of consort and punitive damages for instance are unknown in many European jurisdictions. As far as American procedural law is concerned, pre-trial discovery which allows plaintiffs to get documents from the manufacturer which may substantiate their claim is highly attractive for plaintiffs. Groups actions and class actions provide other instruments.

The fact that the American legal system favours an access to justice as well as high awards is well known. Access in case of products liability is facilitated by the contingency fee system for compensating attorneys. European states do not allow this system for ethical reasons. Whatever may be its demerits, the contingency fee system does have the merit of providing an incentive to lawyers to look for new fertile grounds for justice to be rendered. High awards are favoured by the American jury system, which in civil cases does not exist in E.C. member states.

Finally, the E.C. countries often have alternative systems for the compensation of injured persons. Private insurance may only play a limited role; social insurance on the other hand is of great importance. In many E.C. countries, injured persons will recover their wage losses fully or almost fully for periods up to two years. Medical costs also are fully compensated. Left out are material damage and compensation for pain and suffering. Since the awards for pain and suffering are not high anyway, there is little incentive to begin a court action.

10. *Some Conclusions*

When the Council of Ministers of the European Communities reached its historical consensus on the promulgation of a products liability directive, most commentators were pleasantly surprised that a compromise had been arrived at after all. These commentators were sceptical about the contents of the

[38] J. Schmidt-Salzer, Kommentar EG-Richtlinie Produkthaftung, vol. I: Deutschland, Heidelberg 1986, p.207.

[39] *Sindell* v. *Abbott Laboratories*, (1980) 607 *P2d* 924 (California).

compromise. When the directive was finally published in August 1985, a brief reading seemed to confirm their doubts. Approximation of the laws of the twelve member states was hardly to be brought about, with so many options left to the member states. The protection of consumers appeared to be no improvement over the present state of the law in most northern European countries and it was feared that the directive would stifle any further development in this area.

A comparison of the directive with American law would indeed show that European products liability law is still in its infancy. Many commentators would wish it to remain right there. A comparison with Australian law on the other hand informs us that European solutions sometimes serve as an example elsewhere in the world.

Legal materials often take on a different dimension when put into their context. When one first reads the American case of *Marbury* v. *Madison*[40], a European comment will be that the opinions are poorly drafted and legally uninteresting. Only when one finds out about the fundamental importance of this decision to the development of America, does one change one's verdict.

The European directive on products liability will not win a prize in a legislative beauty contest, nor will it rank with President Kennedy's Special Message to the Congress on Protecting the Consumer Interest[41] as a charter of consumer rights. It has at least the potential, however, of serving as a catalyst for developing a European brand of lawyers as well as for more cross-fertilization of national consumer protection. This in itself would be a highly important achievement.

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[40] 1 Cranch 137, 2 L.Ed. 60 (1803).

[41] March 15, 1962, Public Papers of the Presidents of the United States, John F. Kennedy, Containing the Public Messages, Speeches, and Statements of the President, January 1 to December 31, 1962, 235-243.

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