

# THE COUNCIL OF EUROPE CONVENTION ON PRODUCTS LIABILITY

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## I. INTRODUCTION

The case law of most European countries has, during the past few years, experienced a fundamental alteration in the field of products liability. This alteration has been prompted by the contemporary desire to protect consumers and has resulted in an extension of the producer's liability.

The national legal systems of the European countries continue to treat the problem in many different ways. While it is not the purpose of this Article to analyze these different national laws,<sup>1</sup> one can note that, depending on the European State concerned, the producer may be liable in contract and/or in tort, the conditions of liability under both systems being quite different and varying from one State to another. In several States, the courts presume knowledge of the defective character of the product on the part of the manufacturer; the extent of this, however, is not the same in all these countries. Similarly the treatment granted to exclusion clauses differs from State to State.

In the face of these and other differences and considering that questions of products liability could no longer be confined within national frontiers, the Council of Europe, the European Economic Community (E.E.C.), and the Hague Conference on Private International Law decided, each within its own territorial competence, to work toward the development of uniform law on the liability of producers. The purpose of this Article is to analyze what is probably the most important of these three texts: the Council of Europe Convention. Comparisons will be made with the two other texts, particularly with the proposed E.E.C. Directive.

## II. GENERAL BACKGROUND

At the outset, it is necessary<sup>2</sup> to mention a brief word about the

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<sup>1</sup> An excellent analysis of European legislation is included in Vernimmen and Krämer, *La responsabilité du fait des produits en Europe*, EUROPEAN NEWS AGENCY (Brussels, 1977).

<sup>2</sup> See generally Nascimbene, *Projets et initiatives en vue d'une réglementation uniforme de la responsabilité du producteur*, [1977] CAHIERS DE DROIT EUROPÉEN 371.

three instruments concerned and the institutions which drafted them.

A. *The Council of Europe and the European Convention*

The Council of Europe was founded in 1949 by ten European countries principally for military and economic purposes. It now includes 20 members.<sup>3</sup> According to its Charter,<sup>4</sup> the aim of the Council is to achieve a greater unity between its members through the examination of questions of common interest, by the conclusion of agreements and the adoption of common action in the economic, social, cultural, scientific, legal and administrative fields, as well as through the protection and development of human rights and fundamental liberties.<sup>5</sup>

The two principal institutions of the Council are the consultative Assembly and the Committee of Ministers, the latter having the power to set up committees of government experts whose mission is to develop in technical fields European solutions which can be accepted by all members. One such committee was set up in 1970 to propose measures with a view toward harmonizing the substantive law of the Member States in the area of producer's liability. This committee prepared a European Convention on Products Liability<sup>6</sup> (European Convention) which was opened for the signature of Member States on January 27, 1977, and is due to enter into force six months after the deposit of the third instrument of ratification.<sup>7</sup>

It is important to appreciate that the European Convention is not intended to replace the existing national legal systems in the countries concerned; it is only meant to supplement them. In other words, it only gives the victim a supplementary right of action against the producer. The injured party retains his right to bring an

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<sup>3</sup> Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxemburg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, The United Kingdom, Turkey.

<sup>4</sup> Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103 (1951).

<sup>5</sup> *Id.* at art. 1(b).

<sup>6</sup> European Convention on Products Liability in Regard to Personal Injury and Death, done Jan. 27, 1977. [1977] *Europ. T.S.* No. 91, reprinted in 16 *INT'L LEGAL MAT'LS* 7 (1977) [hereinafter cited as European Convention]. See generally Fallon & Cousy, *Développements récents, de la responsabilité du fait des produits: les projets européens face au droit belge*, [1976] *REU DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ* 53; Note, *Draft Convention on Products Liability*, 23 *AM. J. COMP. L.* 729 (1975); Lorenz, *Some Comparative Aspects of European Unification of the Law of Products Liability*, 60 *CORNELL L. REV.* 1005 (1975).

<sup>7</sup> European Convention, *supra* note 6, art. 13, § 2.

action in tort or in contract under the applicable system of national law.<sup>8</sup>

### B. *The E.E.C. and the Proposed E.E.C. Directive*

The creation in 1957 of the European Economic Community is no doubt the most important of all the efforts which have been made towards the unification of Europe. Although the E.E.C. appeared as a successor to the more limited European Coal and Steel Community, the Treaty Establishing the European Economic Community,<sup>9</sup> makes clear that the European partners intended to go further than a customs union; they wished "to establish the foundations of an ever closer union among the European peoples."<sup>10</sup>

The Treaty created institutions particular to the European Community:<sup>11</sup> the Assembly, which is essentially advisory; the Council, with legislative and executive powers; the Commission, which is the principal executive body; and the Court of Justice. There are also different and specialized permanent or temporary committees which assist the Commission in carrying out its task.

Among its legislative powers, the Council may, on the proposal of the Commission, adopt directives to harmonize those laws of the Member States which have a direct impact on the establishment and functioning of the E.E.C.<sup>12</sup> A proposal for a Council directive in the field of liability for defective products—which in its final draft is very similar to the European Convention—was submitted by the Commission to the Council on September 9, 1976.<sup>13</sup>

If the E.E.C. Directive is adopted, the Member States will be obliged to conform their national laws to the E.E.C. Directive

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<sup>8</sup> *Id.* at art. 12.

<sup>9</sup> Treaty Establishing the European Economic Community, done Mar. 25, 1957, 298 U.N.T.S. 11 (unofficial English text) [hereinafter cited as E.E.C. Treaty]. The English text may be found at 51 AM. J. INT'L L. 865 (1957) and [1958] EUROP. Y.B. 413, and 1 CCH COMM. MKT. REP. ¶ 151 (1973).

<sup>10</sup> E.E.C. Treaty, *supra* note 9, Preamble, cl. 1.

<sup>11</sup> *Id.* at art. 4, § 1.

<sup>12</sup> *Id.* at art. 100. It has been seriously questioned whether the conditions of this article were met in this case and consequently, whether the adoption of a directive in the field of products liability would not exceed the powers of the Council.

<sup>13</sup> 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, 19 O.J. EUR. COMM. (No. C 241) 9 (1976) [hereinafter cited as E.E.C. Directive]. See generally Fallon & Cousy, *supra* note 6, at 3; Tunc, *La directive des Communautés européennes en matière de responsabilité du fait des produits défectueux*, [1977] JOURNAL DES TRIBUNAUX 619.

within eighteen months from the date of adoption.<sup>14</sup> According to the Explanatory Memorandum, compliance with the E.E.C. Directive will not prevent the continuation of other systems based on the existence of fault by one of, or contractual relations between, the parties.<sup>15</sup> It, therefore, would appear that the E.E.C. Directive is to have only a supplementary character.

C. *The Hague Conference on Private International Law and the Convention on the Law Applicable to Products Liability*

Established in 1893, The Hague Conference on Private International Law has been working towards the unification of the rules of private international law of its members. The United States has only recently become a party to the Hague Conference (Conference). The Conference holds sessions during which it adopts conventions on different topics. To date, more than twenty conventions have been adopted by the Conference, one of the most recent being the Convention on the Law Applicable to Products Liability,<sup>16</sup> adopted at the 12th session in 1972. The Hague Convention is more limited in scope than the two other instruments, since it is restricted to the private international law (conflict of laws) aspect of the problem.<sup>17</sup>

### III. ANALYSIS OF THE EUROPEAN CONVENTION

#### A. *Basic Options of the European Convention*

The governmental experts who prepared the European Convention considered it necessary to develop a system which would achieve a fair balance between the interests of the public and those of the manufacturer. To this end, they proposed special and uniform rules on the liability of producers giving consumers a broader protection than that available under national laws, while at the same time enabling producers to foresee, and, therefore, to insure themselves against, possible future liability.

The governmental experts excluded the possibility of unifying the system of contractual and non-contractual liability existing in most European States. This was due to the virtually insuperable prob-

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<sup>14</sup> E.E.C. Directive, *supra* note 13, art. 13.

<sup>15</sup> *Id.* at art. 11, and Explanatory Memorandum (annex to Directive) § 30.

<sup>16</sup> Conférence de La Haye de droit international privé, Actes et documents de la douzième session 2 au 21 octobre 1972, Tome III, Responsabilité du fait des produits, Acte final 246-50 (1974) [hereinafter cited as Hague Convention].

<sup>17</sup> See Reese, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMP. L. 311 (1978).

lems which such unification would have entailed, especially in the field of contract law. The experts, therefore, decided to set up a special unitary system of producers' liability without any reference to the eventual existence of a contract between the victim and the person liable for the damage. Such an approach was said to ensure equal protection for all consumers, whether purchasers or other users, and also to generate the legal certainty demanded not only by the persons suffering damage but also by the producers.<sup>18</sup>

The governmental experts considered, in addition, that "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,"<sup>19</sup> the notion of fault was no longer a satisfactory basis of liability for dangerous products. The experts declared themselves in favor of a system of strict liability and, consequently, went further than any of the European national legislations. The principle is set forth in article 3 of the European Convention which provides that "the producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product."<sup>20</sup> Thus, the notion of fault is completely abandoned.

## B. *The Conditions of Liability*

### 1. *The Requirement of a "Defect" in the Product*

Under the European Convention, the basis of the producer's liability is a "defect" in the product. Other proposals had been made during the preliminary discussions. Some experts had proposed that the notion of a dangerous product be the basis of the system of strict liability. A list of products considered as dangerous would have been annexed to the European Convention. This proposal was, however, rejected.<sup>21</sup> Although the concept of dangerous products offers the advantage of indicating clearly the reason for imposing a system of strict liability, that is, the risk inherent in the product, it is difficult to determine if a product is dangerous. On the other hand, danger is not necessarily inherent in a product. Some products only become dangerous when they are defective or incorrectly used.

For these reasons, the governmental experts preferred that the

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<sup>18</sup> Draft European Convention on Products Liability in Regard to Personal Injury and Death and Draft Explanatory Report, Council of Europe, DIR/JUR. (75) 1 (Mar. 20, 1975) ¶ 9 [hereinafter cited as Draft Report].

<sup>19</sup> *Id.*

<sup>20</sup> European Convention, *supra* note 6, art. 3, § 1.

<sup>21</sup> Draft Report, *supra* note 18, at ¶ 10.

producer's liability should be based on a "defect" in the product. According to article 2, "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."<sup>22</sup>

Safety and legitimate expectation are thus the basic elements of the definition. The notion of "defect" may, however, appear extremely restrictive because a product may cause damage without being defective, either because it is dangerous or for unknown reasons. For this reason, the notion of "defect" has been refined and enlarged. The courts have been instructed to consider all the circumstances including the presentation of the product and, more specifically, the absence of directions for use or warnings as to the dangerous character of a product, or the fact that these directions or warnings are incorrect or incomplete.<sup>23</sup> The fact that the producer observed or was required to observe statutory or administrative rules does not preclude liability. "Defect" is thus not limited to inherent defects.

The way the product has been used by the consumer must also be taken into account. Although the expectations of the actual customer should not be considered, the courts must consider the expectations of the average customer.<sup>24</sup>

The time factor must also be taken into consideration to appreciate either the existence or importance of a defect.<sup>25</sup> The purchaser of an appliance manufactured in 1955 can not expect the same safety standards as the same article manufactured in 1978. Does that imply that if at the time the item was bought its scientific implications were unknown the producer can avoid liability? According to the general law in force in most European countries, the answer is in the affirmative, although several of these systems presume that manufacturers know the defects of their products. They generally also exclude all liability in the case of development risks which the manufacturer could not have known at the time of manufacture.

The European Convention is innovative on this point. Development risks, as they are called, are not a ground for exclusion of

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<sup>22</sup> European Convention, *supra* note 6, art. 2(c).

<sup>23</sup> Draft Report, *supra* note 18, at ¶ 35.

<sup>24</sup> *Id.* at ¶ 34.

<sup>25</sup> *Id.* at ¶ 37.

liability in the case of technically advanced products.<sup>26</sup> This same principle is included in the proposed E.E.C. Directive.<sup>27</sup> An exclusion for such risks would have negated the system of strict liability set up by the European Convention, such system implying that the producer cannot escape liability by proving the absence of any fault on his part. It seems only fair that a producer who places on the market a product, the safety of which he can not guarantee, must bear the consequences of any damage caused by a defect in the product. The system of strict liability is designed to protect consumers against defective products, irrespective of the cause of such defects, and to place the risk on the party who is financially stronger. It is consequently difficult to comprehend why the system does not apply where the attitude of the producer may to some extent be considered negligent.

It is improbable that such exclusion will discourage manufacturers from putting new products into circulation since insurance coverage enables them to spread the risks over a large number of products and share the cost of such insurance with the consumer through the price of the product. This is, no doubt, a fair allocation of risk.

## 2. *Meaning of "Product"*

According to article 2 of the European Convention, the term "product," indicates "all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable."<sup>28</sup> Immovables as such are not included in the definition since in most European States liability for immovables is governed by special rules. This exclusion does not, however, prevent States from applying the system provided by the European Convention to immovables. Article 2 includes agricultural products in the term "product;"<sup>29</sup> however, it does not appear to extend to items of artisanal manufacture. This definition is identical with that of the Hague Convention and the proposed E.E.C. Directive, except that the former also applies to immovables<sup>30</sup> and the latter includes craft products.<sup>31</sup>

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<sup>26</sup> *Id.* at ¶ 38-40.

<sup>27</sup> E.E.C. Directive, *supra* note 13, arts. 1 and 4.

<sup>28</sup> European Convention, *supra* note 6, art. 2(a).

<sup>29</sup> *Id.*

<sup>30</sup> Hague Convention, *supra* note 16, art. 2.

<sup>31</sup> E.E.C. Directive, *supra* note 13, preamble, cl. 11.

### 3. *The Proof of a Causal Link Between the Defect and the Damage*

Even if the product is defective, the producer will not be liable except where the injured party proves a causal link between the damage and the defect; that is, the injury must be "caused" by the defect.<sup>32</sup> This is a fundamental requirement of the theory of liability.

#### C. *Who Is Liable*

According to the European Convention, when the conditions of liability are met, the producer has to accept the consequences of the damage caused by the product he has put into circulation. The term "producer" is defined in article 2 as "the manufacturer of finished products or of component parts and the producers of natural products."<sup>33</sup> It appeared undesirable to impose strict liability on a large number of persons some of whom only play a secondary role in the production process.

If the producer proves that the defect appeared after the product was put into circulation,<sup>34</sup> the consumer will have to sue the seller or the carrier, or any other intermediary who may be responsible under the applicable national legislation. Only the Hague Convention extends to the whole chain of preparation and distribution of a product,<sup>35</sup> which can be explained by the fact that the Hague Conference is limited to the choice of law applicable to products liability.

The term "producer" in the European Convention is supplemented by article 3(4) which establishes the liability of the producer of the component part when it is a defect in this part which caused the damage.<sup>36</sup> According to this provision, when some component parts of the product have been produced by another, both producers are jointly and severally liable.<sup>37</sup> In the event that two or more persons are found liable for damage, neither the European Convention<sup>38</sup> nor the proposed E.E.C. Directive<sup>39</sup> state how the liability is

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<sup>32</sup> European Convention, *supra* note 6, art. 3, § 1.

<sup>33</sup> *Id.* at art. 2(b).

<sup>34</sup> *Id.* at art. 5, § 1(b).

<sup>35</sup> Hague Convention, *supra* note 16, art. 3, § 5.

<sup>36</sup> European Convention, *supra* note 6, art. 3, § 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 3, § 5. The Convention states only that "where several persons are liable. . . for the same damage, each shall be liable in full (in solidum)."

<sup>39</sup> The preamble to the E.E.C. Directive states that "any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be

to be shared. The question is left to national law. This solution can only be approved to the extent that the legislation of the Member States concerned has criteria which could apply in the absence of fault.

On the other hand, in its very principle, the affirmation without any restriction of the liability of a producer of component parts may appear exaggerated; it will certainly raise difficult problems, especially in the case of producers of multipurpose parts as, for example, screws. The producers of such parts usually do not know what use will be made of the products they sell. If screws are used in the manufacture of a sophisticated machine and one of them is defective and causes serious damage, can the manufacturer be held liable to repair the damage which he could not have foreseen? Is he to be liable if the manufacturer of the machine should reasonably have noticed the defect? Neither the European Convention nor the proposed E.E.C. Directive answers these questions.

What if the defective product is anonymous in the sense that it does not disclose the identity of the producer? Is the consumer deprived of any remedy? If the producer is not identified, the actual producer could escape liability under the European Convention. Article 3(3) provides that when the product does not indicate the identity of the producer, "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."<sup>40</sup>

Similarly, the consumer need not ascertain whether the person whose name appeared on the product is the actual producer. According to article 3(2), "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,"<sup>41</sup> the consumer being induced to believe that this person is the producer. This principle should not, however, be applied too strictly. The entity, for example, a garage, whose name appears on a car as an advertisement or as required by law, should not be considered a producer and held liable as such, as long as it is obvious that this

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governed by the laws of the individual Member States." E.E.C. Directive, *supra* note 13, preamble, cl. 13.

<sup>40</sup> European Convention, *supra* note 6, art. 3, § 3.

<sup>41</sup> *Id.* at art. 3, § 2.

person did not put his name on the product with the intention to appear to be a producer.<sup>42</sup> It is probable, however, that in some cases the distinction will be difficult to draw.

Finally, even if the injured party has a right of action against the producer or any person who represented himself as such on the product, a problem of jurisdiction may arise where the company is located in a foreign country. The ordinary rules of jurisdiction do not generally allow the victim to sue in the country where he has suffered damage. In such a case, the consumer would have to assume the cost of proceedings in a foreign country where the European Convention may not necessarily be applicable, for example, where the country is located outside Europe. For these reasons, article 3(2) of the Europe Convention provides that "any person who has imported a product for [the purpose of] putting it into circulation in the course of a business . . . shall be deemed to be the producer and shall be liable as such."<sup>43</sup> If the product does not indicate the identity of the importer, each supplier of the product shall be deemed to be a producer<sup>44</sup> in the same manner as with non-imports. The proposed E.E.C. Directive makes similar provisions.<sup>45</sup>

#### D. *The Damage Coverage*

The European Convention only applies to liability for death or personal injuries. Damages to goods are not covered. Owing to a lack of time, the experts found it impossible to make a thorough study of the question. The governmental experts also considered that it would be easier to secure ratification if the strict liability system was limited to damage causing death or personal injuries. Damages to goods could be dealt with in a subsequent instrument.<sup>46</sup> It is correct that the need for a system of strict liability is particularly essential with regard to damage causing death or personal injuries. The attitude of the experts can be, therefore, easily understood.

Article 3 does not define the limits of damage which can be claimed under the European Convention. Limitations must, therefore, be determined in accordance with the appropriate national legal system. This situation creates a danger of forum-shopping

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<sup>42</sup> Draft Report, *supra* note 18, at ¶ 46.

<sup>43</sup> European Convention, *supra* note 6, art. 3, § 2.

<sup>44</sup> *Id.* at art. 3, § 3.

<sup>45</sup> E.E.C. Directive, *supra* note 13, art. 2.

<sup>46</sup> Draft Report, *supra* note 18, at ¶ 18.

since harmonization of the national laws on this point appears to be impossible.

Article 8 provides that "the liability of the producer under this Convention cannot be excluded or limited by any exemption or exoneration clause."<sup>47</sup> This provision, which does not exclude transactional agreements, is consistent with the principle of strict liability. It represents a considerable innovation with regard to the current law of most European countries where exemption clauses, although narrowly interpreted by the courts, are generally considered valid if brought to the knowledge of the other party within sufficient time.

It should, however, be pointed out that the Appendix to the European Convention allows ratifying Member States to make reservations, limiting the amount of compensation which may be awarded to individual parties<sup>48</sup> and in respect to total damages caused by identical defective products;<sup>49</sup> the only restriction is that these limits may not be less than the amounts set out in the reservation itself.<sup>50</sup> The text of the reservation makes clear that these limits apply to each producer individually. Therefore, in the case of a product manufactured by two different producers, each of them will be liable up to the maximum limit provided for under the reservation.

It is with respect to damages that the most important differences exist between the European Convention and the proposed E.E.C. Directive. The provisions of the E.E.C. Directive apply to death or personal injury and to damage or destruction of property other than the defective article, provided that the item damaged or destroyed is of a type "ordinarily acquired for private use or consumption"<sup>51</sup> and, was not acquired or used by the claimant for the purpose of his trade, business or profession."<sup>52</sup> Pecuniary damage caused by reason of the defective character of the product is not included within the scope of the E.E.C. Directive.

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<sup>47</sup> European Convention, *supra* note 6, art. 8.

<sup>48</sup> *Id.* at Appendix, § 2(a).

<sup>49</sup> *Id.* at Appendix, § 2(b).

<sup>50</sup> *Id.* at Appendix, § 2. The limit may not be less than the amount in national currency equal to 70,000 Special Drawing Rights (SDR) for each deceased or injured person and not less than 10 million SDR for all damage caused by identical products having the same defect. The amount of the SDR is determined by the International Monetary Fund definition at the time of ratification.

<sup>51</sup> E.E.C. Directive, *supra* note 13, art. 6(b)(i).

<sup>52</sup> *Id.* at art. 6(b)(ii).

On the other hand, the E.E.C. Directive includes ceilings on liability for all personal injuries caused by industrial products, as well as for damage to property. Corporal damages being generally more serious than material damages, the ceiling for the former is much higher.<sup>53</sup> The existence of ceilings is significant from the viewpoint of insurance. The application of the ceiling for personal injuries in the E.E.C. Directive may also raise difficult questions when the defect only becomes apparent a long time after the product has been used or put into circulation; claims may, therefore, be spread out over a lengthy period. Neither this problem nor the situation where the damages claimed by all the victims exceed the maximum are envisaged by the proposed E.E.C. Directive.

### E. *Exemptions from Liability*

In the system set up by the European Convention the producer will not necessarily be liable in all cases where damage has been caused by a product which he has manufactured. He may avoid liability in particular cases.

#### 1. *The Product Has Not Been Put into Circulation by the Producer*

The producer may avoid liability where he himself has not put the product into circulation.<sup>54</sup> For example, when the product has been put into circulation by a person who stole it, this provision appears to be quite rational. Since the strict liability imposed on the producer is based on the fact that the product is defective, it would be unfair to impose liability on a producer who is not responsible for putting the product into circulation, for example, where the producer considered the product to be unfit for consumption. A similar exemption is also included in the proposed E.E.C. Directive.<sup>55</sup>

#### 2. *The Product Was Not Defective When It Was Put into Circulation*

The manufacturer can only be strictly liable where the defect

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<sup>53</sup> *Id.* at art. 7. The liability of a producer is limited to 25 million European units of account (EUA) for corporal damages, 15,000 EUA in the case of movable property and 50,000 EUA in the case of immovable property. The European unit of account has been defined by Commission Decision No. 3289/75/ECSC of December 18, 1975, and is worth approximately \$1.16 (U.S.). The final paragraph of art. 7 provides for necessary revisions in this ceiling at three year intervals.

<sup>54</sup> European Convention, *supra* note 6, art. 5, § 1(a).

<sup>55</sup> E.E.C. Directive, *supra* note 13, art. 5.

which caused the damage existed at the time the product was put into circulation.<sup>56</sup> This defect is, however, presumed, and the manufacturer has the burden of proving that the defect did not exist at that time or that it was created subsequently by a third party.<sup>57</sup>

This presumption, which is a fundamental feature of the European Convention and an essential element of the strict liability system, is based on two considerations. First, it is easier for the producer to prove that the defect appeared after the product was put into circulation than for the consumer to prove to the contrary. Second, any doubt should benefit the consumer, since the producer always has the possibility of reallocating his costs. The proposed E.E.C. Directive contains similar provisions for exemption from liability and allocation of burden of proof.<sup>58</sup>

### 3. *Products Not Manufactured for Sale or in the Course of Business*

The European Convention only applies to products manufactured for sale by professionals in the course of their business.<sup>59</sup> A strict liability system can only be conceived of in this context.

### F. *Reduction of Liability*

In some cases, the producer may not have to assume total liability for the damages suffered by the victim. "[I]f the injured person or the person entitled to claim compensation has by his own fault contributed to the damage," the court will have the right to reduce or disallow the compensation having regard to all the circumstances.<sup>60</sup> The judge will assess the relative importance of the fault in relation to the defect shown by the product. This is a classical application of the theory of comparative negligence. It should, however, be pointed out that in order to allow the Member States to preserve their national law, the Appendix to the European Convention gives them the opportunity to make a reservation stipulating that compensation may only be reduced or disallowed in cases of the victim's gross negligence or intentional conduct.<sup>61</sup>

A similar reduction for contributory negligence may apply in

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<sup>56</sup> European Convention, *supra* note 6, art. 5, § 1(b).

<sup>57</sup> *Id.* at art. 5, § 1.

<sup>58</sup> E.E.C. Directive, *supra* note 13, art. 5.

<sup>59</sup> European Convention, *supra* note 6, art. 5, § 1(c).

<sup>60</sup> *Id.* at art. 4, § 1.

<sup>61</sup> *Id.* at Appendix, § 1.

cases of vicarious liability, that is, "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."<sup>62</sup> However, no reduction shall be allowed "when the damage has been caused both by a defect in the product and by the act or omission of a third party."<sup>63</sup>

The proposed E.E.C. Directive contains no provisions on reduction of liability in case of fault of the victim; this decision is left to national legislation.<sup>64</sup> This solution cannot be approved due to the fact that legislations differ on the question, a situation which may jeopardize the uniformity pursued by the E.E.C. Directive.

### G. *Time Limitations*

Several national legislations in Europe provide that the action against the producer must be brought within a short time after discovery of the defect. What is considered a short time is to be determined by the courts and depends in each case upon the type of defect and, more generally, upon the circumstances.

The European Convention attempts to strike a balance between the interests of the consumers and those of the producers. Proceedings are subject to a limitation period of three years from the day the claimant became aware or should reasonably have become aware of the damage, the defect and the identity of the producer.<sup>65</sup> These three conditions are cumulative; they all aim at protecting the victim. One may wonder whether a delay of three years from the moment the victim is in possession of all the elements to bring his action is necessary. This liberal period is, however, subject to another limitation.

The right to compensation under the European Convention is extinguished if proceedings are not brought within ten years from the date on which the producer put into circulation the particular product which caused the damage.<sup>66</sup> Since the producer is submit-

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<sup>62</sup> *Id.* at art. 4, § 2.

<sup>63</sup> *Id.* at art. 5, § 2.

<sup>64</sup> According to the preliminary report, the drafting committee considered that reduction of liability should only be allowed in the case of gross negligence or intentional misconduct. This reduction, however, was not included in the first text. See Document de Travail sur la "Proposition d'une directive du Conseil relative au rapprochement des dispositions législatives, réglementaires et administratives des États membres de responsabilité des produits défectueux." Comité Economique et Social, Dossier: IND/49, Apr. 28, 1977, at 26.

<sup>65</sup> European Convention, *supra* note 6, art. 6.

<sup>66</sup> *Id.* at art. 7.

ted to a system of strict liability, fairness dictates that he should not be held responsible for damage resulting from a cause which manifests itself after a period of ten years. This period appears to be equitable in view of the need to fix some limit, even though in certain cases an extended period may elapse before the product reaches the consumer. Because the liability of the producer is limited as to duration, he is more easily insurable.

It should also be pointed out that the preliminary report makes clear that while the three year period, being a period of limitation of the time in which to bring an action, can be suspended or tolled, the fixed 10 year period in article 7 which extinguishes the right to compensation cannot.<sup>67</sup> The proposed E.E.C. Directive contains identical provisions but refers, as to suspension or tolling, to the laws of the E.E.C. Member States regulating the question.<sup>68</sup>

#### H. *Derogation by the Signatory States*

The possibility for the signatory States to incorporate reservations on specific points has already been examined. Except for the possibilities contained in the Appendix, the European Convention forbids Contracting States to adopt rules derogating its provisions, even if they are more favorable to the victim.<sup>69</sup> The European Convention attempts to achieve a fair and delicate balance between the interests of consumers and producers. This precarious balance should not be jeopardized by individual Member States.

The European Convention does not apply to the liability of producers *inter se* or to the recourses between producers and third parties having contributed to the damage.<sup>70</sup> The reason lies in the fact that these problems are specific and very complicated. Consequently, national legislatures are allowed to adopt special rules on the subject if necessary.

It should also be pointed out that the European Convention does not apply to nuclear damage since it is the object of specific treatment in other international conventions and national legislation.<sup>71</sup> The same exclusion is included in the proposed E.E.C. Directive.<sup>72</sup>

As stated earlier, the European Convention is to enter into force

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<sup>67</sup> Draft Report, *supra* note 18, at ¶ 63.

<sup>68</sup> E.E.C. Directive, *supra* note 13, arts. 8 and 9.

<sup>69</sup> European Convention, *supra* note 6, art. 10.

<sup>70</sup> *Id.* at art. 9(a).

<sup>71</sup> *Id.* at art. 9(b).

<sup>72</sup> E.E.C. Directive, *supra* note 13, art. 12.

six months after the date of deposit of the third instrument of ratification.<sup>73</sup> It should be noted that the European Convention does not contain transitory provisions to determine the applicability of its provisions to damage caused by products put into circulation before its entry into force. This problem is, therefore, to be resolved by national legislatures.

#### IV. CONCLUSION

This writer believes that only a system of strict liability can offer the consumer the protection necessary in view of the fact that, not only have the products capable of causing damage been put into circulation by the producer for his own profit, but furthermore, it is the manufacturer who has created the risk. In these circumstances it is the manufacturer/producer who should bear the risk as he is in a better position to reallocate loss by shifting the cost over a large number of products. In order to be functional, however, such a system must afford the producer the possibility to foresee and insure against the consequences of the risks he creates. For these reasons the uniform system set up by the European Convention must be welcomed as an important step in that direction.

From the consumer's point of view, the ideal is for strict liability to be extended to all suppliers of the product. However, as already noted, such an extension is undesirable as it would impose a heavy burden on intermediaries who have played an insignificant role in the commercialization of the product.

In the light of these considerations, it is unclear why the European Convention and the proposed E.E.C. Directive allow the consumer to retain the right to sue the producer on the basis of appropriate national legislation; this situation could undermine the whole system of strict liability. More fundamentally, it is regrettable that the producer can avoid liability by proving that the defect did not exist at the time the product was put into circulation. Although such an exception is fair from the point of view of the producer, it will probably leave the consumer with the impossible task of determining who in the chain of commercialization and distribution is responsible for the defect. This problem should have been dealt with.

Finally, one may also regret that the European Convention does not deal with the problem of compulsory insurance. The official explanation is that the experts found it difficult to impose a uniform

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<sup>73</sup> European Convention, *supra* note 6, art. 13, § 2.

system of insurance considering the variety of products, the number of producers, the different geographical situations and the varied financial characteristics of enterprises. It was further claimed that insurance raised a difficult problem of control in that enterprises do not generally need special authorization to commence their activities. Such controls would be difficult to establish as a preliminary step in mandatory insurance coverage.<sup>74</sup> By contrast, automobile insurance, which is required before registration of the vehicle, has been easily imposed and enforced because of the existing regulatory scheme. Although it is probable that most producers will carry liability insurance without being forced to do so, the problem remains for small producers who may, in practice, present a higher risk for consumers.

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<sup>74</sup> Draft Report, *supra* note 18, at ¶ 19.