

PRODUCTS LIABILITY AND INTERNATIONAL TRADE LAW

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Introduction

The emergence of a body of legal literature which regards products liability as a topic meriting separate study as an identifiable sub-division of the law is a relatively recent phenomenon. The concern of this literature is with the rapidly developing law regarding the legal liability of producers, suppliers and others involved in the preparation and distribution of goods towards the ultimate purchaser or user who suffers loss as a result of defects in those goods. In particular, there has been since World War II a widespread tendency in many countries towards imposing stricter liability upon manufacturers or producers of defective goods. The development has been most far reaching in the United States.¹ In Australia, rather more belatedly, a similar tendency has emerged, although in contrast to the American law, legislative innovations seem destined to play the major role. (The Australian law is outlined below.) Although no European country appears as yet to have introduced a scheme of strict products liability by statute, the trend of judicial development of the law has been noticeably in the direction of strict liability.² It should

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¹ For brief discussions of the American law see: P.N. Legh-Jones, "Products Liability: Consumer Protection in America" (1969) 27 *Camb. L.J.* 54; R.S. Pasley, "The Protection of the Purchaser and Consumer under the Law of the U.S.A." (1969) 32 *M.L.R.* 241; C.R. Reitz & M.L. Seabolt, "Warranties and Product Liability: Who can sue and where?" (1973) 46 *Temple L.Q.* 527; C.J. Tobin, "Products Liability: A United States Commonwealth Comparative Survey" (1969) 3 *New Zealand Universities L.R.* 377; S.M. Waddams, "The Strict Liability of Suppliers of Goods" (1974) 37 *M.L.R.* 154.

² A recent survey of the European law is: Association Européenne d'Etudes Juridiques et Fiscales, *Product Liability in Europe* (Kluwer — Harrop Handbooks: London, 1975). See also the UNIDROIT Study referred to in n. 6, *infra*. Other useful discussions in English include: E. von Caemmerer, "Products Liability in Germany" in J.S. Ziegel & W.F. Foster (eds.), *Aspects of Comparative Commercial Law* (McGill University: Montreal, 1969); S.J.M. Donnelly, "Principled and non-principled development: a comparison of the shift from the fault principle in American products liability law and the evolution of strict liability in civil law" (1966) 17 *Syracuse L.R.* 419; F. Kessler, "Products Liability" (1967) 76 *Yale L.J.* 887; R.H. Mankiewicz, "Products Liability: A Judicial Breakthrough in West Germany" (1970) 19 *International and Comparative L.Q.* 99; P. Prag, "A comparative study of the concept and development of products liability in the U.S.A. Germany and Scandinavia" (1975) 1 *Legal Issues of European Intergration* 67; C. Szladits, "Comparative Aspects of Product Liability" (1966-67) 16 *Buffalo L.R.* 229. For a useful comparative survey of recent trends, with extensive references to the literature, see: von Hippel, *Verbraucherschutz* (Mohr: Tübingen, 1974) pp. 28-55.

also be mentioned that in the United Kingdom the Law Commissions are currently considering whether the existing law governing compensation for personal injury, damage to property or other loss caused by defective products is adequate. The Law Commissions have recently published an interesting Working Paper on the subject.³

The constant increase in recent years, at least in the more developed countries, in the consumption of manufactured goods has greatly increased the scope for uneasiness concerning the quality and safety of consumer goods.⁴ As a result of modern methods of production and distribution of consumer goods, as well as large scale advertising by manufacturers, consumers are encouraged to regard the manufacturer as being primarily responsible for the safety and quality of such goods, even though the consumer will normally have no direct contractual relation with the manufacturer. Moreover, the manufacturer is the person in the chain of commercial distribution best able (and in the case of technologically complex goods frequently the only person able) to take effective steps to minimize the risk that defective goods will cause damage to consumers. Of particular concern is the risk of personal injury caused by the use of defective products.⁵

Concern over the problem of striking a proper balance between the interests of producers and consumers of goods has manifested itself on the international level, prompted in large part by the view that the increasing volume of international trade means that this problem can no longer be approached on a purely national basis. As a result, the United Nations Commission on International Trade Law (UNCITRAL) (of which Australia is an active member) is at present considering the feasibility of preparing uniform rules for an international law of products liability. The present article is based upon a paper presented by the writer at the Fourth International Trade Law Seminar, held in Canberra in April, 1977. The Federal Attorney-General's Department conducts an annual seminar with the dual purpose of acquainting Australian buyers and businessmen with current developments in the field of international trade law and of receiving comments from the participants on likely implications for Australia of such developments. In the next section of this article an account is given of the work of a number of international organizations as a preliminary to a discussion of the proposal that UNCITRAL

³ Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20, *Liability for Defective Products* (H.M.S.O., 1975) (hereinafter referred to as the "Law Commissions' Working Paper").

⁴ For a discussion see Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), Chapters 1, 9.

⁵ There is no adequate statistical information in Australia: *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (1974) Vol. II, pp. 105-106, 111-115. In 1970 the U.S. National Commission on Product Safety found that product-related injuries in the U.S. resulted annually in 30,000 deaths and 20 million injuries. The Chairman of the Committee was of the opinion that perhaps 20% of these deaths and injuries could be avoided by more effective product safety standards: Bureau of National Affairs Inc., *The Consumer Product Safety Act* (1973) p. 45.

should become involved in the field of products liability. An outline is then made of the current state of products liability law in Australia, with special reference to some important recent legislative developments. The main section of the article discusses some of the major problems likely to be faced in the unification of products liability law, with special reference to the work which has been undertaken to date. In conclusion, an attempt is made to assess the likely impact of a unified products liability law on Australian businessmen and consumers.

THE WORK OF INTERNATIONAL BODIES

The Hague Conference on Private International Law

The uncertainty existing in many countries as to the conflict of laws rules applicable where damage has been caused by defective products led to the preparation by the Hague Conference on Private International Law of a Convention on the Law Applicable to Products Liability. The Convention was approved by the Hague Conference at its twelfth session in October, 1972.⁶ At the time of writing the Convention had not come into force, having been ratified by only two States (Yugoslavia and Norway). Articles 1 and 3 of the Convention determine the law applicable to the liability of manufacturers and certain other persons (e.g. suppliers and others involved in the commercial chain of preparation or distribution of a product) for damage caused by a product. Damage is defined in Article 2(b) to mean injury to the person or damage to property as well as economic loss, but damage to the product itself and economic loss consequential upon that damage is excluded unless associated with other damage. Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention does not, by virtue of Article 1, apply to their liability *inter se*. Thus any claim which a purchaser may have against the person from whom he purchased goods is excluded from the scope of the Convention. The Convention does not deal with jurisdiction in respect of product liability claims, nor with the recognition of foreign judgments.

The Council of Europe

The Committee of Ministers of the Council of Europe established in 1970 a Committee of Experts charged with proposing measures to harmonize the substantive law of member States in the field of liability of producers. The International Institute for Unification of Private Law (UNIDROIT) prepared for the assistance of the Committee of Experts

⁶ J.A. De Ment, "International Products Liability: Toward a Uniform Choice of Law Rule" (1972) 5 *Cornell International L.J.* 75; B. Durham "Hague Convention on the Law Applicable to Products Liability" (1947) 4 *Georgia Journal of International and Comparative Law* 178; H. Fischer, "The Convention on the Law Applicable to Products Liability" (1974) 20 *McGill L.J.* 44; W.L. Reese, "The Hague Convention on the Law Applicable to Products Liability" (1974) 8 *International Lawyer* 606; M.L. Saunders, "An Innovative Approach to International Products Liability: The Work of the Hague Conference on Private International Law" (1972) 4 *Law & Policy in International Business* 187.

a study on Products Liability and a memorandum on "Problems raised by the harmonization of laws governing the liability of producers".⁷ The Committee of Experts prepared a Draft European Convention on Products Liability in Regard to Personal Injury and Death.⁸ The Draft Convention, with an accompanying Draft Explanatory Report, was published in 1975 and submitted for observations by governments of Member States of the Council of Europe. A revised version of the Convention and Explanatory Report was published in August, 1977,⁹ and the Convention was opened to signature on 21st January, 1977.¹⁰

The European Convention would impose strict liability on a producer for death or injury caused by a defect in his product. The Convention is not concerned with damage caused by products to property. Liability is imposed without reference to the existence of a contract between the person liable and the person suffering damage. The main features of the Convention are referred to below in the course of discussion of the major problems likely to arise in the unification of products liability law. The Committee of Experts believed that the question of products liability could no longer be confined within national frontiers and that it was therefore important to introduce special rules on products liability at a European level. The Committee was guided by a desire to ensure better protection of the public and also by the advisability of taking producers' interests into account (particularly in respect of legal certainty), bearing in mind the need to achieve a fair balance between the various interests involved.¹¹

The Commission of the European Communities

On 9th September, 1976 the Commission of the European Communities presented to the Council of the Communities a "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".¹² The proposal is accompanied by an Explanatory Memorandum. The Draft Directive would oblige Member States, by virtue of Article 100 of the Treaty of Rome, to amend their national

⁷ EXP/Resp. Prod. (71) 1 (1972); EXP/Resp. Prod. (72) 1 (1972). The study, in three volumes, covers the law of the member States of the Council of Europe, together with that of the United States, Canada and Japan.

⁸ DIR/Jur. (75) 1, 20 March 1975.

⁹ DIR/Jur. (76) 5.

¹⁰ This Convention is hereinafter referred to as the "European Convention". The Convention is to enter into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification or acceptance: Art. 13. For discussions of earlier drafts of the Convention see J.G. Fleming, "Draft Convention on Products Liability (Council of Europe)" (1975) 23 *American Journal of Comparative Law* 729; W. Lorenz, "Some Comparative Aspects of the European Unification of the Law of Products Liability" (1975) 60 *Cornell L.R.* 1005; B.M.E. McMahon, "Liability for Defective Products: the Draft European Convention on Products Liability" [1973] *Irish Jurist* 227.

¹¹ Explanatory Report, §§ 4-5.

¹² Bulletin of the European Communities, Supplement 11/76 (hereinafter referred to as the "E.C. Draft Directive").

laws so as to comply with the principles contained in the Directive. The scheme adopted in the Draft Directive is very similar to that proposed in the European Convention. However, it is wider than the latter in one very important respect in that it would impose strict liability upon producers of defective articles, not only for death and personal injury, but also in certain circumstances for damage to property. The main features of the Draft Directive are referred to below in the course of discussion of the major problems likely to arise in the unification of products liability law. The principles proposed in the Draft Directive are based on the belief that the current differences in national laws of Member States relating to products liability may adversely affect the establishment or functioning of the common market in at least three ways:¹³

- (1) These differences may distort competition in the common market, the existence of equal conditions of competition for all producers being believed to be a pre-condition for the establishment and functioning of a common market.
- (2) The differences in laws may affect the free movement of goods within the Community, as the decision of a producer as to the Member States in which he should sell may be influenced by the laws of the Member States as to liability.
- (3) The present differing degrees of protection for consumers within the Community is seen as incompatible with a common market for all consumers.

United Nations Commission on International Trade Law

In December, 1973 the General Assembly of the United Nations requested UNCITRAL "to consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution".¹⁴ This resolution was considered by UNCITRAL at its Seventh Session in May, 1974. There was a considerable difference of opinion among the members of the Commission as to whether UNCITRAL should embark on this work. A major concern was that work by UNCITRAL might be premature until the studies of other organizations then in progress had been completed. Concern was also expressed as to whether "the civil liability of producers" fell within the terms of the Resolution of the General Assembly establishing UNCITRAL and determining its object as "the promotion of the progressive harmonization and unification of the law of international trade".¹⁵ It was decided that the Secretary-General of the United Nations should be requested to prepare a report for con-

¹³ Explanatory Memorandum, § 1. For a criticism of this reasoning see P.M. Storm in *Product Liability in Europe*, *op. cit. supra* n.2 pp. 20-21.

¹⁴ Resolution 3108 (XXVIII).

¹⁵ Resolution 2205 (XXI), 17 December, 1966.

sideration at the Eighth Session of UNCITRAL, the report to set out a survey of the work of other organizations in respect of civil liability for damage caused by products, a study of the main problems that may arise in this area and of the solutions that have already been adopted or are in contemplation, and suggestions as to UNCITRAL's future course of action.

The Secretary-General's Report, entitled "Liability for Damage Caused by Products Intended for or Involved in International Trade",¹⁶ was prepared for consideration at the Eighth Session of UNCITRAL in April, 1975. Frequent reference is made below to the discussion in the Report of the main problems likely to arise in this area. During UNCITRAL's discussion of the Report it was recognized that the preparation of uniform rules on product liability posed a number of serious problems. Some countries believed that UNCITRAL should not embark on work in this field until its other current projects had been completed, and some believed that in light of the somewhat uncertain and developing state of national law in many countries it might be preferable to wait until national laws had become more settled. Nonetheless, there was general agreement that the international regulation of products liability was an important problem and that further preliminary work should be undertaken. The Secretary-General was requested to prepare a further report considering, amongst other things, the extent to which the absence of unified rules on products liability affects international trade and the practicability and advantage of unification at a global level as opposed to unification at a regional level.

The second report of the Secretary-General is expected to be available for consideration by UNCITRAL at its Tenth Session in 1977. It is also expected that there will be available at that meeting the results of a questionnaire which has been circulated by the Secretary-General and which was designed to elicit information on relevant legal rules in national laws and on governmental attitudes to the issues involved. Neither of these documents was available to the writer at the time of writing.

OUTLINE OF PRODUCTS LIABILITY LAW IN AUSTRALIA

Limitations of space prevent a comprehensive account of the present Australian law of products liability. The purpose of the following paragraphs is to sketch in general outline the position under the general law of contract and torts and to indicate the way in which the position of the consumer has been improved in some very significant ways by a number

¹⁶ A/CN.9/103, 6 March 1975 (hereinafter referred to as the "UNCITRAL Report"). It should be noted that in discussing the E.C. Draft Directive the Report refers to the First Preliminary Draft Directive of August, 1974, which differs in important respects from the 1976 document referred to above. References made to the Draft European Convention refer to 1975 text referred to above.

of recent statutory provisions.¹⁷

The General Law — Contract

The purchaser of goods will normally have the benefit, by virtue of the sale of goods legislation of the States, of implied conditions to the effect that the goods will be of merchantable quality and that they will be reasonably fit for any particular purpose which has been made known by the buyer to the seller. Similar terms are implied by statute in the case of hire-purchase transactions, and at common law in certain other cases (such as a contract for the hire of goods). Liability is strict in that absence of fault on the part of the seller is no defence. (The seller is, however, in general bound to supply goods of reasonable quality rather than of the highest possible quality.) Damages recoverable for breach of the implied conditions include damages for economic loss (such as the loss suffered where the failure of the goods to comply with the appropriate standard of quality renders them less valuable than they would otherwise have been), as well as damages for personal injury and property damage. These implied terms may in principle be excluded by the use of an appropriately worded exclusion clause, although the hire-purchase legislation of the States has for some time rendered certain exclusion clauses void in hire-purchase transactions. The courts have adopted various devices to limit the effect of exclusion clauses, but the relevant law has become, especially in the last few years, very complex and uncertain.¹⁸

The doctrine of privity of contract is perhaps the major limitation, from the viewpoint of products liability law, on the utility of an action for breach of an implied term. The result of this doctrine is that it is only the purchaser of goods who may rely on the implied terms ("horizontal privity") and that he may sue only the person from whom he bought ("vertical privity"). It may well be that a defective product injures a user other than the purchaser (e.g. a member of his household), or even a bystander, but such persons will have no claim in contract against the seller. Moreover, in the normal case where the purchaser buys from a retailer, he will be unable to rely on the implied terms in an action against the manufacturer (or other person in the chain of distribution), even

¹⁷ A very useful account, considering both tort and contract law, is: J.G. Fleming, *Law of Torts* (4th ed. 1971), Ch. 21. For treatments of aspects of the Australian law see: G.L. Fricke, "Manufacturers' Liability for Breach of Warranty" (1959) 33 *A.L.J.* 35; G.L. Fricke, "Consumers' Remedies" (1962) 36 *A.L.J.* 153; D.J. Harland, "Consumer Protection in Australia" (1976) 40 *Rechts Zeitschrift* 631 at 641-650, 652-53; N.S.W. Law Reform Commission, *Working Paper on the Sale of Goods* (1975); S. J. Stoljar, "The International Harvester Case: A Manufacturer's Liability for Defective Chattels" (1959) 32 *A.L.J.* 307; K.C.T. Sutton, *Sale of Goods* (2nd ed. 1974), Part II. See also: P.S. Atiyah, *Sale of Goods* (5th ed. 1975), Ch. 13; *Benjamin's Sale of Goods* (1974), Ch. 14; J.A. Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law" (1969) 32 *M.L.R.* 1; New Zealand Torts and General Law Reform Committee, *Report on Products Liability* (1974); S.M. Waddams, *Products Liability* (Carswell: Toronto, 1974).

¹⁸ See e.g. Sutton, *op. cit. supra* n. 17, Ch. 23; B. Coote, "Discharge for Breach and Exception Clauses since *Harbutt's 'Plasticine'*" (1977) 40 *M.L.R.* 31.

though an exclusion clause or insolvency may make an action against the retailer of little practical value.¹⁹ Even where the manufacturer has given some express assurance as to the quality of goods (e.g. claims made in advertisements or in the "manufacturer's warranty" commonly supplied with consumer durables), the privity doctrine *prima facie* prevents any action in contract against the manufacturer. In some cases the purchaser may be able to rely upon the manufacturer's assurance as a collateral contract, but he would need to establish that he became aware of the existence of the assurance before or at the time of purchase. He must, moreover, establish that the assurance was intended to have contractual effect, and this requirement will often cause difficulty.²⁰

The General Law — Tort

A person suffering personal injury or damage to property caused by defective goods may recover against the manufacturer in tort if he can prove that the manufacturer was negligent. Lack of privity (either vertical or horizontal) is no bar to recovery. Liability is not restricted to manufacturers. Manufacturers of components parts of assemblers may be liable, as may distributors such as importers or retailers, though it is relatively infrequently that it is possible to establish negligence on the part of a distributor. Although the difficulties faced by a plaintiff in proving negligence have been progressively eased, especially by the application of the *res ipsa loquitur* rule, the standard of liability still falls significantly below one of strict liability.²¹ Moreover, a plaintiff will often experience difficulty in establishing that the defect existed at the time when the goods left the control of the defendant.²²

Not only may negligence prove much more difficult to establish than the strict contractual liability of a seller, but the rules as to the damages recoverable in an action in negligence may give rise to considerable difficulty. The balance of recent English authority is in favour of the proposition that no action will normally lie in negligence where there has been purely economic loss not consequential upon physical injury or damage to property.²³ Although the High Court of Australia has recently held that it is not essential to recoverability that economic loss be consequential in this sense,²⁴ it is by no means clear just when recovery

¹⁹ For recent tentative suggestions as to reform of the privity doctrine, see N.S.W. Law Reform Commission *Working Paper on the Sale of Goods* (1975).

²⁰ See e.g. *C.J. Grais & Sons Pty. Ltd. v. F. Jones & Co. Pty. Ltd.* [1962] N.S.W.R. 22; *J.J. Savage & Sons Pty. Ltd. v. Blakney* (1970) 119 C.L.R. 435.

²¹ See Fleming, *op. cit. supra* n. 17 pp. 447-49.

²² See e.g. *Godfrey's Ltd. v. Ryles* [1962] S.A.S.R. 33; *Hunnerup v. Goodyear Tyre & Rubber Co. (Aust.) Pty. Ltd.* (1974) 7 S.A.S.R. 215.

²³ See e.g. *S.C.M. (U.K.) Ltd. v. W.J. Whittall & Son Ltd.* [1971] 1 Q.B. 337; *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] 1 Q.B. 27. For a recent discussion see Craig, "Negligent Mis-statements, Negligent Acts and Economic Loss" (1976) 92 L.Q.R. 213.

²⁴ *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1977) 11 A.L.R. 227. Contrast *French Knit Sales Pty. Ltd. v. N. Gold & Sons Pty. Ltd.* [1972] 2 N.S.W.L.R. 133.

of non-consequential loss will be allowed. It would seem that a manufacturer is not liable in negligence where a defect in his product renders the article useless but does not cause personal injury or damage to property. Moreover, it is doubtful whether damages can be recovered in negligence when such a defect does in fact cause damage to the item purchased as distinct from damage to other property.²⁵

Statutory Developments

(a) *Exclusion Clauses*

Under the Trade Practices Act 1974 (Cth.), certain terms are implied into contracts for the supply of goods by a corporation to a consumer.²⁶ The implied terms are similar to those arising under the sale of goods legislation of the States, but their scope has been widened in some important aspects in favour of the consumer. Most importantly, under s. 68 any attempt to exclude, restrict or modify one of the implied terms is void. Although there is no exception to the rule that any attempt to limit or exclude liability is ineffective, the implied terms are so framed that certain factors are relevant in assessing the scope of the supplier's duty in any given case and in particular situations (such as for example the sale of second hand goods or goods described as "factory seconds") these factors may result in that duty being less extensive than would otherwise be the case.²⁷ In cases where, for constitutional reasons, the Trade Practices Act provisions relating to implied terms do not apply, recourse must be had to the law of the appropriate State. South Australia and New South Wales have provisions relating to consumer contracts which are similar in scope to the Trade Practices Act.²⁸ In other States no general statutory protection is given to the cash purchaser of goods, but some protection is given under the uniform hire-purchase legislation to persons acquiring

²⁵ See *Young & Marten Ltd. v. McManus, Childs Ltd.* [1969] 1 A.C. 454 at 469 per Lord Pearce; *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373 at 414-415 per Stamp, L.J.; but c.f. Lord Denning, M.R. at 396; *Rivtow Marine Ltd. v. Washington Iron Works* (1974) 40 D.L.R. (3d) 530.

²⁶ Ss. 69-73. "Supply" includes supply by way of sale, exchange, lease, hire or hire purchase: s. 4(1). Although these provisions are, relying on the corporations power of the Commonwealth Constitution, expressed to apply to contracts by a corporation, reliance is also placed on other heads of constitutional power so that they will in certain cases apply to contracts entered into by non-corporate suppliers: s. 6. "Consumer" is defined for the purposes of the Act in s. 4(3); at the time of writing it was proposed to extend considerably the scope of this definition: Trade Practices (Amendment) Bill 1977, s. 4B [These amendments came into force on 1st July, 1977. Eds.]

²⁷ For discussions of these provisions see: J. Goldring, "Consumer Protection and the Trade Practices Act" (1975) 6 *Federal L.R.* 287, D.J. Harland, "Consumer Protection: Implied Contractual Terms and Exclusion Clauses" (1976) 14 *Law Society Journal* 219; G.Q. Taperell, R.B. Vermeesch and D.J. Harland, *Trade Practices and Consumer Protection* (1974), Ch. 11.

²⁸ Sale of Goods Act, 1923 (N.S.W.), ss. 62-64; Hire Purchase Act, 1960 (N.S.W.), s. 5 (these provisions were introduced in 1974); Consumer Transactions Act, 1972 (S.A.), ss. 8-11. As to the provisions of the hire-purchase legislation of the other States see R. Else-Mitchell and R.W. Parsons, *Hire-Purchase Law* (4th ed. 1968), Supp. (1972).

goods under hire-purchase contracts. It should also be noted that in some cases steps have been taken to regulate commonly recurring types of transactions, in respect of which particular problems have emerged which may not satisfactorily be dealt with by means of general regulations applicable to all consumer transactions. Four States, for example, now impose minimum warranties, which cannot be excluded by contract, where a second-hand motor car is sold by a dealer.²⁹

(b) *Manufacturers' Liability*

The statutory provisions referred to in the previous paragraph do not, as a result of the privity doctrine, apply to a manufacturer or importer of consumer goods, except in the relatively rare case where the consumer contracts directly with the manufacturer or importer. Some jurisdictions have legislated on this matter. In New South Wales, where a consumer has initiated proceedings under a contract for the sale or hire-purchase of new goods and establishes that a defect has appeared in the goods which constitutes a breach of the implied terms as to merchantable quality, the court has a discretion to add the manufacturer as a party to the proceedings and to order him to pay the cost of rectifying the defect.³⁰ A much more extensive measure is the South Australian Manufacturers Warranties Act, 1974. Under that Act, where goods are purchased by retail, there arises a statutory warranty to the effect that the goods are of merchantable quality and, where the goods are of a kind that are likely to require repair or maintenance, that spare parts will be available for a reasonable period after the date of manufacture.³¹ The statutory warranties apply where manufactured goods are sold by retail in South Australia or are delivered, upon being sold by retail, to a purchaser in South Australia. Where a statutory warranty is not complied with, the purchaser (or any person deriving title through him) may recover against the manufacturer damages for that breach as if the action were for breach of warranty under a contract between the manufacturer and purchaser. Similar provisions are made in respect of express warranties (which may consist of statements made in advertisements or in promotional literature) made by the manufacturer. Any attempt to exclude liability for breach of an express or statutory warranty is ineffective, and a manufacturer attempting to exclude such liability is guilty of an offence. The only exception is that the manufacturer is not liable on the grounds that no spare parts are available if he took reasonable steps to notify purchasers of the goods that no such liability was undertaken by him. "Manufacturer" includes a person who imports goods which were manufactured by a person

²⁹ Motor Dealers Act, 1974 (N.S.W.); Second Hand Motor Vehicles Act, 1971 (S.A.); Motor Car Traders Act, 1973 (Vic.); Motor Vehicles Dealers Act, 1973 (W.A.). The N.S.W. Act also contains provisions relating to new vehicles.

³⁰ Sale of Goods Act, 1923, s. 64; Hire-Purchase Act, 1960, s. 5.

³¹ The Act does not apply in the case of goods which are normally offered for retail sale at a price in excess of \$10,000: s. 3(1).

who does not have a place of business in Australia.³²

The effect of the South Australian legislation is to impose upon the manufacturer a strict liability in favour of the consumer wherever the manufacturer has supplied defective goods, provided that the defect was such as to render the goods unmerchantable. As liability arises under a deemed contract, the problems which may arise in a negligence action as to whether economic losses (such as the cost of repair of a defective item) are recoverable are avoided. The Australian Capital Territory Manufacturers Warranties Ordinance 1975 was very similar to the South Australian Act, but was broader in scope in that it also imposed statutory warranties as to fitness for purpose, correspondence with sample and correspondence with description. The Ordinance was repealed in 1976,³³ but the Senate Standing Committee on Constitutional and Legal Affairs later recommended that the Ordinance be re-enacted with certain amendments.³⁴ In April, 1976 the Federal Government appointed the Trade Practices Review Committee to consider the operation and effect of the Trade Practices Act. That Committee subsequently recommended that the Trade Practices Act be amended so as to incorporate provisions on manufacturers' liability similar to those contained in the A.C.T. Ordinance.³⁵ The Federal Government announced that it had accepted this recommendation in principle, but legislation had not been introduced at the time of writing.

(c) *Civil Remedies under the Trade Practices Act*

Although, as indicated above, the provisions of the Trade Practices Act on implied terms will not normally apply to manufacturers, it seems that in many cases a manufacturer may now often be liable under the Act where express representations as to the quality or safety of his goods prove to be false or misleading. Section 52 of the Act provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive. Section 82 provides that a person who suffers loss or damage by an act of another person that was done in contravention of a provision of the Act may recover the amount of that loss or damage by action against that person. It would seem to follow that in many cases a purchaser relying on a statement made in a manufacturer's advertising or promotional material may recover damages under the Act,

³² The Act is based upon recommendations made by the Ontario Law Reform Commission in its *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972). Provision is made for the control of express warranties (s. 9) as to which see also Consumer Affairs Act 1970-1974 (Qld.), ss. 36A-36G.

³³ Manufacturers Warranties Ordinance (Repeal) Ordinance, 1976. For a useful analysis of the A.C.T. and S.A. legislation see Department of the Australian Capital Territory, *Misrepresentation and Manufacturers Warranties: Submission to the Senate Standing Committee on Constitutional & Legal Affairs* (1976).

³⁴ *Report on the Manufacturers Warranties Ordinance* (tabled 6 December, 1976). This recommendation had not, at the time of writing, been implemented. [The recommendation was implemented by the enactment of the Law Reform (Manufacturers Warranties) Ordinance 1977. Eds.]

³⁵ *Report of the Trade Practices Act Review Committee* (1976) §§ 9.120-9.127.

even though he might have difficulty in establishing a collateral contract under the general law.³⁶

(d) *Consumer Product Standards*

There is a bewildering variety of provisions in each of the States relating to product standards, particularly, as might be expected, in relation to food and drugs.³⁷ Normally, however, this legislation does not expressly provide any remedies to the consumer who has suffered as a result of an infringement. Sections 62 and 63 of the Trade Practices Act provide machinery whereby action may be taken to prescribe regulations laying down compulsory consumer product safety and information standards. Most importantly for present purposes, a person who suffers loss as a result of goods being supplied in contravention of a standard has a statutory claim to recover damages in respect of that loss,³⁸ and important evidentiary provisions are designed to assist a plaintiff in establishing the necessary causal connection between the contravention of the standard and the suffering of loss.³⁹ Although a supplier may in some cases shift liability on to his own supplier by establishing by way of defence a lack of intentional or negligent infringement on his part, the person from whom he acquired the goods will normally be liable to the consumer unless he can himself establish a similar defence; in any event, this defence is not available to the manufacturer or an importer of the goods.⁴⁰ The potential impact of these provisions in the area of product liability is in the writer's view very significant indeed, but much will of course depend on the manner in which the regulation-making power is in fact exercised.⁴¹

SOME PROBLEMS IN THE UNIFICATION OF PRODUCTS LIABILITY LAW

(a) *Requirement of international trade*

The resolution of the General Assembly which requested UNCITRAL to consider commencing work on products liability refers to "the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution".⁴² The definition of the situations in which a product should be regarded as having been the subject of international trade in such a way to make it appropriate for the producer's liability for defects to be governed by an international law is obviously of prime importance, but does give rise to considerable

³⁶ See further D. J. Harland, "The Application of Consumer Law to Commercial Transactions: Some further implications of the Trade Practices Act 1974" (1976) 8 *Commercial Law Association Bulletin* 23.

³⁷ See Australian Federation of Consumer Organizations, *Report on Australian Consumer Protection Laws* (1975) pp. 44-67.

³⁸ See Taperell, Vermeesch & Harland, *op. cit. supra* n. 27 pp. 218-223, 240-42.

³⁹ Ss. 62(3), 63(3), 82.

⁴⁰ S. 85(4), (5).

⁴¹ At the time of writing the only regulations prescribed were the Trade Practices (Buoyance Aids Safety Standards) Regulations 1974.

⁴² Resolution 3108 (XXVIII), 12 December, 1973.

difficulties. The Convention of the Limitation Period in the International Sale of Goods provides in Article 2(a) that a contract shall be considered international for the purposes of that Convention if, at the time of conclusion of the contract, the buyer and seller have their places of business in different States. A similar criterion is adopted in Article 1 of the 1976 Draft Convention on the International Sale of Goods. Each Convention contains provisions to deal with the situation where a party has more than one place of business and where the place of business of a party is not disclosed at or before the time of contract.⁴³

In the context of products liability the fact that the producer and the person injured will not normally have any contractual relations necessitates a different approach. One possible approach would be to provide that any proposed Convention should apply wherever goods have been the subject of an international transaction at some stage in the chain of distribution. The UNCITRAL Report suggests that if a Convention were to be concerned only with the liability of producers, such a rule might not result in the imposition of liability contrary to the normal expectations of commercial circles.⁴⁴ However, many producers, especially small manufacturers, may well be engaged solely in production for the domestic market, and it would seem unreasonable that such a producer should be subjected to liability, which may well be more extensive than under his local law, merely because in a particular case his product has been exported without his knowledge by the purchaser from him (or some other more remote actor in the distribution chain). It is true that at present an Australian producer in such a situation, if he can effectively be sued in another country, may well find that the conflicts rules of the forum may subject him to liability under a legal system which could never have been contemplated by him,⁴⁵ but at least where the forum is in Australia he will to a large extent be protected against unexpected liability by the Australian conflict of laws rules applicable to actions in tort.⁴⁶ It is believed, therefore, that the suggestion should be adopted of imposing a further condition of liability to the effect that the person sued knew, or could reasonably foresee, that the product would be the subject of an international trade transaction.⁴⁷

⁴³ See D.K. Malcolm, "Practical Implications arising from the Ratification by Australia of the Convention on the Limitation Period in the International Sale of Goods" (1975) 3 *Australian Business L. Rev.* 209 at 218-19; K.C.T. Sutton, "The Draft Convention on the International Sale of Goods" (1976) 4 *Australian Business L. Rev.* 269 at 270-73.

⁴⁴ § 66.

⁴⁵ The Hague Convention seeks to avoid this situation by providing that neither the law of the State of the place of injury (which otherwise might be applicable under Art. 4) nor the law of the State of the habitual residence of the person directly suffering damage (Art. 5) is to be applied if the defendant proves that he could not reasonably have foreseen that the product, or his own products of the same type, would be made available in that State through commercial channels: Art. 7.

⁴⁶ See P.E. Nygh, *Conflict of Laws in Australia* (3rd ed. 1976), Ch. 18.

⁴⁷ See UNCITRAL Report, § 67.

A further possible condition would be that the person sued and the person injured were resident in different States.⁴⁸ Such a condition would perhaps be desirable if persons in the distribution chain such as retailers and wholesalers are to be subjected to liability.⁴⁹ Even if liability is in principle to be confined to producers, it may well be thought desirable to render an importer subject to the same liability as a producer. (This matter is discussed below.) However, if diversity of residence were to be a crucial factor in liability, the resultant exclusion of liability of importers to ultimate consumers resident in the importer's State would, for reasons explained below, render the new rules of liability of little practical importance for most consumers.

The difficulties outlined above would of course be completely avoided if any proposed Convention were to be of general application, irrespective of whether the goods concerned were involved in international trade. This is the effect of the European Convention and the E.C. Draft Directive, but that is because the aim of both documents goes beyond the unification of international trade law and is aimed at the harmonization of the laws of member States. The UNCITRAL Report suggests that such an approach may, in light of the differences of view which exist in different States as to the desirable solutions to major issues involved, be too ambitious in the context of UNCITRAL's work.⁵⁰ The writer respectfully agrees and believes that any likelihood that there is of obtaining agreement on substantive rules of product liability would be severely threatened if a proposed Convention were to apply to purely domestic situations.⁵¹

If liability were to be based upon products having become the subject of an international transaction, it would still be necessary to decide the circumstances in which contracting States would be obliged to apply the proposed international rules. It could be decided that a contracting State should apply these rules wherever products had become the subject of an international transaction in the relevant sense. Alternatively, it might be thought necessary to provide a further condition that the State of residence of the person sued or some other State which might be deemed relevant (such as the State where the injury occurred, or the State where the product was acquired by the person suffering damage, or the State where that person habitually resided) should also

⁴⁸ *Ibid.*

⁴⁹ It is suggested below (at 373-75) that other persons involved in the chain of distribution, such as wholesalers and retailers, should not come within the scope of any proposed Convention, and the further difficulties which would be caused if such persons were to be made liable are not pursued here — see UNCITRAL Report, §§ 66-68.

⁵⁰ § 68.

⁵¹ In the Australian context, any such broader approach might also increase the danger that legislation implementing such a Convention would be held to fall outside the external affairs power (s. 51 (xxix)) of the Constitution. For a discussion of a somewhat similar problem arising under the Trade Practices Act 1974 (Cth.) see G. Evans, "The Constitutional Validity and Scope of the Trade Practices Act 1974" (1975) 49 *A.L.J.* 654 at 668-670.

be a contracting party. The latter approach would introduce complications of a kind which a project for the unification of substantive law should seek to avoid so far as possible and could in practice severely limit the number of cases in which those rules might be applicable. The former approach could result in arbitrary results in some cases (though perhaps no more arbitrary than those which can at present result from the uncertain and widely differing rules as to the conflict of laws in many countries), but would at least have the virtue of simplicity and of ensuring that the aim of unification of products liability law was achieved in the widest range of cases.

(b) "Product"

An important initial question is that of how the term "product" is to be defined. Both the European Convention and the E.C. Draft Directive adopt a broad approach, and in particular indicate that products liability may attach in respect of agricultural products as well as manufactured products. For the purpose of the European Convention Article 2(a) provides that:

the term "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable.

Although "product" is not defined in the E.C. Draft Directive, both the Preamble and the Explanatory Memorandum⁵² indicate that the same broad concept is envisaged. Both texts envisage that the liability may attach in respect of products which have been incorporated into immovables, even though such products will usually have become part of the immovable and have lost their separate identity for the purposes of the law of the *situs*. Such a provision is, for example, important if a consumer is to be adequately protected in respect of a wide range of domestic appliances.

"Natural products" is clearly intended to include agricultural produce and animal products. No question of products liability will arise prior to the severance of crops, and hence any distinction between *fructus industriales* and *fructus naturales*⁵³ is irrelevant for present purposes. The UNCITRAL Report suggests⁵⁴ that, as the object of any proposed rules would be to delimit the liability of the producer, only things produced as the result of human activity should be included. On this view crops and livestock should be included, as the product is at least in part the result of human activity, but difficulty could arise in respect of such items as seafood or material gathered by mining which are sold in an

⁵² § 3. While the First Preliminary Draft Directive (August, 1974) spoke in Art. 1 of "the producer of an article manufactured by industrial methods or of an agricultural product", no similar language appears in the current Draft. The phrase "manufactured by industrial methods" was intended to refer to large scale production and to exclude products of craft industries.

⁵³ See *Benjamin's Sale of Goods* (1974) pp. 55-59.

⁵⁴ § 21.

unprocessed state.⁵⁵ For the purposes of the Hague Convention "product" includes "natural and industrial products, whether raw or manufactured and whether movable or immovable".⁵⁶ That Convention therefore applies to natural products such as fish, mineral water or natural gas, even though they are not even partially generated as a result of human activity (such as by the use of fertilizers or insecticides) and even though they have not been treated prior to sale. It was decided not to exclude agricultural products from the scope of the Convention, mainly because of the difficulty of defining when a product has been "treated".⁵⁷ (One of the permissible reservations to the Convention is, however, in respect of raw agricultural products).⁵⁸ The reference in the European Convention to raw natural products would produce the same results. Bearing in mind the importance of Australia's position as a producer of agricultural and natural products, the question of whether such products (either *in toto* or when not produced as a result of human cultivation) should be regarded as "products" for the purposes of products liability law would obviously require consideration if Australia were to contemplate becoming a party to an international convention on products liability.⁵⁹ Any such exclusion would be contrary to existing trends and would seem to be difficult to justify as a matter of principle.

The Law Commissions have suggested that if a standard of strict liability is adopted, possibly products liability should not arise in respect of certain natural products, such as fish, which may quickly become unfit for human consumption. The concern here is that, especially if the producer had the onus of proving that the product did not become defective until after it left his control, he might find great difficulty in practice in resisting claims made against him.⁶⁰ Similar problems also arise, however, in the case of processed food and of delicate and easily damaged manufactured items, and it is submitted that it would be difficult to justify any special treatment for a particular category of products.

(c) Persons liable

The resolution of the General Assembly referring the question of products liability to UNCITRAL uses the word "producer". The

⁵⁵ *Quaere* whether items treated subsequently to their gathering (e.g. frozen fish) would be "products" on this view; presumably such items as crude oil, unprocessed minerals, and natural gas would not be.

⁵⁶ Art. 2(a).

⁵⁷ See H. Fischer, "The Convention on the Law Applicable to Products Liability" (1974) 20 *McGill L.J.* 44 at 55.

⁵⁸ Art. 16.

⁵⁹ It should be noted that the Manufacturers Warranties Act, 1974 (S.A.) and the Manufacturers Warranties Ordinance 1975 (A.C.T.) are restricted in their application to "manufactured goods".

⁶⁰ *Working Paper* pp. 62-63. The Law Commissions also refer to the danger that there may in some cases be more than usual potentiality for catastrophe and multiple claims (e.g. where crops are contaminated by lead in the soil, or fish affected by mercury).

UNCITRAL Report points out⁶¹ that this word is wider than "manufacturer" in that, for example, a farmer would be regarded as a "producer", but hardly a "manufacturer", of his crops. A primary question for resolution will be whether liability under any proposed Convention should be imposed only upon producers, or whether all, or some, of the persons involved in the chain of distribution should also be liable. Many arguments, which cannot be fully canvassed here, have been raised both for and against imposing liability on persons not involved in the production process.⁶² It is, for example, argued that it is in the interests of the consumer that he should have as wide as possible a range of potential defendants in view of the difficulty he may have in the event of the insolvency of, or of there being other practical obstacles in the way of enforcing liability against, a manufacturer of a product. On the other hand, it is argued that the encouragement of higher standards by producers will best be served by "channelling" liability to those able to control the production process, and that such a restriction, at least where strict liability is concerned, is also more economically efficient in that it tends to avoid the necessity for wasteful multiplication of insurance coverage.

American products liability law tends to impose strict liability on a wide range of persons. Thus, for example, § 402-A of the Restatement of Torts (Second) imposes strict liability irrespective of privity of contract problems on any person, from the manufacturer down to the retailer who sells a product in a defective state; and under two of the three alternative versions of § 2-318 of the Uniform Commercial Code a similar result arguably follows in respect of a seller's express or implied warranty in respect of goods.⁶³ The Hague Convention is similarly broad in scope, and applies to the liability of manufacturers of a finished product or component part, producers of a natural product, other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product, and to the liability of the agents or employees of those persons.⁶⁴ It should, however, be remembered that this Convention is not concerned with the substantive rules applicable to the liability of these persons, but with the choice of law rules which will identify the applicable substantive law.

By way of contrast, both the European Convention⁶⁵ and the E.C.

⁶¹ § 30.

⁶² A useful discussion will be found in the Law Commissions' *Working Paper*, pp. 44-48. See also UNCITRAL report, §§ 30-41; E.C. Draft Directive, Explanatory Memorandum, §§ 7-11; European Convention, Explanatory Report, §§ 26-32.

⁶³ See *Nacci v. Volkswagen of America Inc.* 325 A. 2d 617 (1974) and White & Summers, *Handbook of the Law under the Uniform Commercial Code* (1972) pp. 327 ff. It is, however, generally assumed that these versions of § 2-318 only extend the scope of abolition of horizontal privity and do not affect the problem of vertical privity relevant here: see the references cited in n. 1, *supra*.

⁶⁴ Art. 3.

⁶⁵ Arts. 2, 3.

Draft Directive⁶⁶ are much more limited in scope. Both are essentially concerned with the liability of "the real 'producer' i.e. the party who has put the product into the state in which it is offered to the public".⁶⁷ For practical reasons, which will become apparent below, liability is however extended to certain persons who, it was thought, should bear the same liability as a producer. The primary object of both documents (the "producer") is the manufacturer of finished products and the producer of natural products. The Committee of Experts which produced the European Convention concluded that it was undesirable and economically wasteful as a matter of legislative policy to impose strict liability on a large number of persons, some of whom play a secondary part in the production process. The Committee also desired to avoid "inappropriately interfering" in contractual relations between these persons and the buyer, and believed that any attempt to harmonize the rules of contractual liability of member States would raise virtually insuperable problems.⁶⁸ Certainly it may be said that the main pressure for reform in the law of products liability has been for the creation of more effective remedies for the consumer against the manufacturer or producer of goods, and that the likelihood of obtaining international agreement will be increased if, at any rate initially, attention is concentrated on the liability of such persons. Under both the European Convention and the E.C. Draft Directive the liability of distributors is governed by the appropriate national law.⁶⁹

Both the European Convention and the E.C. Draft Directive render liable any person who represents a product as his own by causing his name, trademark or other distinguishing feature to appear on the product. (Such persons are deemed to be manufacturers of the purposes of the South Australian and Australian Capital Territory legislation on manufacturers' liability).⁷⁰ This provision is obviously important where a retailer, or perhaps a distributor, presents products as his "own" or "house" brand, and the ultimate buyer is induced to rely on the reputation of that person rather than of the real manufacturer, whose identity is usually unknown to the buyer and who may often be a small manufacturer with few assets. An importer is also liable as a producer under

⁶⁶ Art. 2.

⁶⁷ European Convention, Explanatory Report, § 27. Presumably, one who gathers but does not treat or process a raw natural product (e.g. a fisherman) will, in light of the wide concept of "product", be regarded as a "producer": see Explanatory Report, § 30.

⁶⁸ Explanatory Report, §§ 8, 27-28. See also E.C. Draft Directive, Explanatory Memorandum, § 6. Under this approach the fact that in some cases the plaintiff and defendant will be in a contractual relation is ignored (contrast the position under the Hague Convention, discussed at 360, *supra*). However, a plaintiff who does have a contract with the defendant may, in so far as he bases his claim on the defendant's strict products liability, recover only for "injury caused by the article"; in respect of "commercial injury" or "injury caused by the sale" he must look to the applicable law of contract: see UNIDROIT Memorandum, *supra* n. 7.

⁶⁹ See 392 *infra*.

⁷⁰ S.A.: s. 3(1); A.C.T.: s. 3(1).

both documents.^{70a} From the viewpoint of consumer protection, the liability of the importer is of crucial importance, for in many cases an injured consumer will effectively be without remedy if his only potential defendant is a foreign manufacturer, and it is for this reason that both the South Australian and A.C.T. legislation on manufacturers' liability impose liability on an importer.⁷¹ (In both cases, however, the liability attaches only where the manufacturer does not have a place of business in Australia, a limitation which protects the consumer without unnecessarily expanding the range of persons liable). For obvious geographical reasons this provision would be of even greater significance to an Australian consumer of imported goods than to a European consumer of goods produced elsewhere in Europe. It must, however, be borne in mind that the adoption by Australia of international rules incorporating such a principle could have a very significant impact on the rules which would be applied in what otherwise would be regarded as purely domestic litigation. If Australia were to become a party to an international convention on products liability, very careful consideration would have to be given to the relationship between the rules of that convention and the proposed Commonwealth legislation on manufacturers' liability.⁷²

The European Convention also provides that where a product does not indicate the identity of any of the persons regarded as a "producer" for the purposes of the Convention, each supplier shall be liable as a producer unless he discloses, at the request of the claimant and within a reasonable time, the identity of the producer or of the person who supplied him with the product.⁷³ In the case of an imported product, a provision not included in the 1975 text requires disclosure of the identity of the importer or of the supplier, even if the name of the producer is indicated. The purpose of this provision is to assist a claimant in establishing the identity of the importer in cases where he wishes to proceed against the importer rather than against a

^{70a} European Convention, Art. 3(2); E.C. Draft Directive, Art. 2 (restricted to a person importing into the European Community). Article 16 of the European Convention permits a contracting State to declare that, in pursuance of an international agreement to which it is a party, it will not consider imports from one or more specified States (also parties to that agreement) as imports for the purpose of Article 3. In such a case the person importing the product into any of these States from another State shall be deemed to be an importer for all the States which are parties to the agreement. Article 16 was introduced to take account of the principle of the free circulation of goods in groups of States such as the European Communities: Explanatory Report, § 78.

⁷¹ S.A.: s. 3(1); A.C.T.: s. 3(1). See also Trade Practices Act 1974, s. 85(4). These provisions were discussed above at 367-68.

⁷² See 368 *supra*. Importers would be treated as manufacturers for the purposes of this legislation.

⁷³ Art. 3(3). Under Article 17, a limited reservation is permitted in respect of primary agricultural products. States may exclude the retailer of such products from liability under Art. 3(3), providing he discloses to the claimant all information in his possession concerning the identity of the persons referred to in Art. 3. This reservation was introduced to take account of the difficulty which the retailer may have in identifying the source of such products, especially when a particular product has been mixed with similar products from different suppliers: Explanatory Report, § 49. No equivalent provision appears in the Draft Directive.

foreign producer who may well have no establishment or assets in the importing country.⁷⁴ The E.C. Draft Directive contains a similar provision, although it is not clear whether under this document, in cases where the name of the foreign producer is disclosed, the name of the importer must also be disclosed.⁷⁵ This is a useful provision which should ease the burden of an injured person in establishing the identity of the manufacturer where goods are marketed anonymously, while at the same time not imposing an undue burden on other suppliers.

It should finally be noted that both documents also impose liability upon the producer of a component which is incorporated into another product.⁷⁶ The European Convention makes it clear that the producer of the component is liable only when damage is caused by a defect in his own product. The Explanatory Memorandum to the E.C. Draft Directive indicates that the same result is intended under that document,⁷⁷ though the text of the Directive itself is somewhat ambiguous on the point. The final text of the Convention omits as unnecessary a qualification contained in the earlier draft to the effect that the component producer might escape liability by proving that the defect which caused injury resulted from the design or specification of the person incorporating the component into another product. The Committee of Experts considered that if a component part in itself satisfies legitimate safety expectations, that product is not defective and its producer is not liable, even if the finished product is defective because the component was unsuitable for incorporation into that product or because of erroneous technical specifications of the manufacturer.⁷⁸ Where under any of the above provisions one or more persons are liable for the same damage, each is liable jointly and severally.⁷⁹

(d) Persons in whose favour liability is imposed

The question of the persons in whose favour products liability should

⁷⁴ Explanatory Report, § 48.

⁷⁵ Art. 2.

⁷⁶ European Convention, Art. 3(4); Draft Directive, Art. 2. Neither document is restricted to manufactured components. The E.C. document speaks of "any material or component"; the Convention speaks of "a product incorporated into another product", a phrase which, in view of the wide definition of "product", would seem to have a similar result. For criticism of these provisions as being likely to lead to unnecessary duplication of insurance cover, see *International Chamber of Commerce Commentary on the Commission of the European Communities Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of Member States Concerning Liability for Defective Products* (Doc. No. 240/460 — 21/23, 1964) § 4; The Law Society (U.K.) *Liability for Defective Products* (1977) § 5 (a commentary by the Council's Law Reform Committee on the Draft Directive).

⁷⁷ § 7.

⁷⁸ Explanatory Report, § 51. The Senate Standing Committee on Constitutional and Legal Affairs has recommended that the proposed A.C.T. Ordinance on manufacturers warranties should provide that a manufacturer who manufactures goods according to the specifications of a person should be entitled to be indemnified by that person in respect of liability arising because of his having manufactured in accordance with those specifications: *Report on the Manufacturers Warranties Ordinance* (1976), pp. 19-20.

⁷⁹ European Convention, Art. 3(5); E.C. Draft Directive, Art. 3.

arise has been the subject of extensive discussion in the United States. § 402-A of the Restatement of Torts (Second) imposes upon sellers of defective products a strict liability in tort, limited however to liability for physical harm caused to person or property, in favour of "the user or consumer". This phrase does not include casual bystanders injured by a defective product, such as employees of a retailer of the product or a pedestrian injured by a defective motor vehicle. In the official comment to § 402-A the American Law Institute stated:

There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumer's pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

In many American States bystanders have, however, been successful in actions based upon strict liability in tort.⁸⁰ The diversity of approaches which have been taken by the courts is also reflected in the drafting of § 2-318 of the Uniform Commercial Code, which extends the benefit of a seller's express or implied warranties to certain third parties.⁸¹ Under Alternative A, which is the version of § 2-318 adopted in a majority of States, the seller's liability extends to personal injury caused to any natural person who is in the family or household of the buyer or who is a guest in his home, if it is reasonable to expect that such person may use, consume or be affected by the goods. Alternatives B and C are much broader in scope. Alternative B applies to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. Alternative C is wider still, in that liability is not restricted to natural persons and the type of injury in respect of which recovery may be had is not limited to personal injury.

Both the South Australian and Australian Capital Territory legislation on manufacturers' liability confine the range of potential plaintiffs within fairly narrow limits. Both statutes enable a consumer of goods to recover damages from a manufacturer who is in breach of an express or statutory warranty.⁸² The problem of "vertical" privity is thus overcome in so far as the ultimate purchaser may sue the manufacturer despite the absence of any contract between them. A relatively minor inroad upon

⁸⁰ For brief discussions see W.L. Prosser, *Law of Torts* (4th ed. 1971) pp. 662-63; C.R. Reitz and M.C. Seabolt, "Warranties and Product Liability: Who can sue and where?" (1973) 46 *Temple L.Q.* 527 at 536-37.

⁸¹ Alternative A is the original formulation of § 2-318. Following extensive criticism, Alternatives B & C were proposed in 1966; see Reitz & Seabolt, *supra* n. 80 at 534-37.

⁸² S.A.: s. 5.; A.C.T.: s. 5.

the problem of "horizontal" privity is made in that "consumer" is in both cases defined so as to include any person deriving title to the goods through or under the consumer.⁸³ This approach can give rise to anomalous results. A wife who is injured by a defective household appliance may sue the manufacturer for breach of warranty if her husband purchased the appliance as a gift for her, but if the husband purchased the appliance himself and title remains in him, the wife must establish negligence if the manufacturer is to be liable to her. The Trade Practices Act Review Committee recommended a similar approach to that adopted in the South Australian and Australian Capital Territory legislation.⁸⁴

Neither the E.C. Draft Directive nor the European Convention imposes any restriction on plaintiffs, other than that the plaintiff must be a person whose loss is caused by a defect in the product.⁸⁵ Thus users of the product (whether or not they be owners) and bystanders are within the scope of both documents. It is important, however, to remember that the European Convention is concerned only with death or personal injuries, whereas the E.C. Draft Directive also extends to liability for certain types of property damage.⁸⁶ It is suggested that the question of the relationship of a potential plaintiff to the defective product cannot be considered in isolation from the question of the type of loss in respect of which recovery is to be allowed. If a Convention on product liability were to be restricted to liability for death or personal injury, it would seem difficult to justify exclusion of users without title (or even bystanders), whereas a different view might be taken if liability were to extend to purely property damage. Policy questions as to the extent to which liability should be imposed upon producers would arise in an even more acute form if it were proposed to impose liability for purely economic loss, the extent of which could in some cases be enormous and virtually incalculable (especially in the case of "development risks", discussed below). In considering the types of liability, careful consideration must be given to the cost of (and, indeed, the availability of) insurance cover.⁸⁷ In view of the restricted range of persons entitled to sue, in the absence of negligence, under present Australian law, the adoption of any proposal to impose upon producers a strict liability (especially if extending beyond personal injury) in favour of users or bystanders would, from the viewpoint of Australian domestic law, involve a considerable expansion of the scope of liability of producers.

(e) Basis of liability

It is impossible in this article to discuss comprehensively the policy factors customarily put forward in support of strict products liability,

⁸³ S.A.: s. 3(1); A.C.T.: s. 3(3).

⁸⁴ §§9.120 - 9.127. Contrast N.S.W. Law Reform Commission, *Working Paper on the Sale of Goods*, §§ 6.54 - 6.67.

⁸⁵ Draft Directive, Art. 1; European Convention, Art. 3.

⁸⁶ See 384-88 *infra*.

⁸⁷ See UNCITRAL Report, § 46; see further *infra* at 398-99.

but the major arguments may be summarized as follows:⁸⁸

- (a) Modern methods of production and distribution may impose an unfair burden in requiring an injured person to prove negligence against a producer who may be situated far away and to whose manufacturing processes the injured person will normally not have direct access. In some systems this problem is attempted to be met by imposing upon a manufacturer the burden of disproving negligence (and even of positively establishing the cause of the defect) once it has been shown that a defect existed.⁸⁹
- (b) Manufacturers may be regarded as having a moral responsibility for the safety of their products, especially when one considers the profits likely to be made by the distribution of such products and the public confidence often generated by the manufacturer's advertising.
- (c) It is felt to be unreasonable that individual persons should stand to bear the risk of loss caused by the defective products which will inevitably occur in any system of mass production. Especially where personal injury results, the individual affected will not normally have insured against the risk. Such insurance coverage can more easily and efficiently be procured by the manufacturer, with the result that the cost of such inevitable losses is ultimately borne by the consuming public as a whole as the cost of insurance is built into the manufacturer's price structure.
- (d) It is said that strict liability will serve as an incentive to more effective quality control.
- (e) Although liability may ultimately be brought home to the manufacturer by a series of contractual actions (in which liability will often, but by no means always, be strict), allowing the injured person a direct action against the manufacturer avoids the costs involved in such a series of actions, and overcomes the danger that the chain of liability may be broken at any stage by an exclusion clause or by insolvency. This argument is also sometimes allied with the assumption that the manufacturer is likely to be the person in the chain of distribution

⁸⁸ The following outline is largely based on the UNCITRAL Report, §§ 85-94, and the Law Commissions' *Working Paper*, pp. 28-42. See also European Convention, Explanatory Report, §§ 10-17; E.C. Draft Directive, Explanatory Memorandum, § 1; K. Kessler, "Products Liability" (1967) 76 *Yale L.J.* 887 at 924 ff.; G.W.R. Palmer, "Dangerous Products and the Consumer in New Zealand" [1975] *New Zealand L.J.* 366.

⁸⁹ Such a requirement may well place a heavier burden on the manufacturer than the common law rule of *res ipsa loquitur*: see in particular R.H. Mankiewicz, "Products Liability — A Judicial Breakthrough in West Germany" (1970) 19 *International and Comparative L.Q.* 99 at 111 ff.; Fleming, *op. cit. supra* n. 17 pp. 508-510.

best able to bear the cost of liability (an assumption which is, of course, not necessarily justified in the case of a small manufacturer who sells to large wholesale or retail distributors).

Among the arguments put in favour of imposing liability only if negligence can be proved are:

- (a) There may be thought to be little moral justification in imposing tortious liability in the absence of fault.
- (b) Strict liability may inhibit the development of new products, to the ultimate disadvantage of the community at large. This argument is perhaps strongest in the case of products resulting from new technology which are regarded as safe in the light of available knowledge at the time of development, but which have in fact inherent dangers which may not be manifested until a much later date (the case of so-called "development risks").
- (c) The impossibility of assessing the likely quantum of claims based on strict liability could render the cost of adequate insurance enormous, and indeed in many cases full coverage might not be obtainable at all.

Under both the E.C. Draft Directive and the European Convention the liability of the producer is strict. Article 1 of the E.C. Draft Directive provides:

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

The European Convention produces a similar result by providing in Article 3(1):

The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.

In thus adopting a standard of strict liability, both texts follow what was seen to be the predominant tendency in products liability law, at least in Europe and the United States. In France and Germany (and possibly Norway) the courts have developed (though on differing doctrinal bases) what for most practical purposes amounts to a regime of strict liability for producers of defective products. In other European countries, though the basis of liability is still one of negligence, various devices (and in particular various formulations of a rule for the reversal of the burden of proof) have significantly improved the position of the plaintiff.⁹⁰ The Committee of Experts responsible for the European Convention expressly stated that "a system which merely introduced a reversal of the burden of proof would not represent any appreciable improvement on the current situation in a number of countries and, in any event,

⁹⁰ See the materials on European products liability law cited *supra* n. 2.

would not meet the public's demands".⁹¹

Under both texts, the liability of a producer is strict in that absence of fault is no defence, but the liability is not absolute. A plaintiff is required to prove that he suffered loss as a result of a "defect" in the product. In both cases a product is regarded as defective if it does not provide the safety which a person is entitled to expect.⁹² This definition is extended to exclude cases where loss is suffered because a product is not suitable for the purpose for which it was designed, such loss being regarded as a matter which should be governed by the law relating to sale of goods.⁹³ The Committee of Experts rejected a suggestion that the European Convention should be expressed in terms of "dangerous products"; such a concept was regarded as "equivocal and unsatisfactory because of the difficulty of deciding at the outset what products were dangerous, some products being dangerous by their very nature and others being likely to become so if defective, or if incorrectly used".⁹⁴ Although the absence of reference to the expectation of the "reasonable man" was deliberate,⁹⁵ it is clear that the test is an objective one. Abnormally sensitive persons could, perhaps, establish a defect if the product were not accompanied by adequate instructions or warnings. The European Convention expressly provides that in determining the degree of safety which a person is entitled to expect regard must be had to all the circumstances, including the presentation of the product. This provision was inserted in order to make it quite clear that a product may be regarded as defective if, although it is not "intrinsically" defective, a risk of damage arises because of a failure to provide adequate instructions for use or warnings as to the characteristics of the product.⁹⁶ The E.C. Draft Directive makes no such provision, though its framers assumed that it was implicit in the definition of "defect".⁹⁷

Where a plaintiff has established that he suffered damage caused by a defect in the product, the producer will under both texts escape liability if he proves that he did not put the product into circulation or that it was not defective when he put it into circulation.⁹⁸ The

⁹¹ Explanatory Report s. 17. One member of the Committee of Experts has remarked that "the discussions . . . were permeated with the idea that the European public was demanding a spectacular change, and that this demand, as one delegate remarked . . . , could only be satisfied by doing something 'revolutionary'": Lorenz, *supra* n. 10 at 1012.

⁹² European Convention, Art. 2(c); E.C. Draft Directive, Art. 4.

⁹³ European Convention, Explanatory Report, §§ 33-36; E.C. Draft Directive, Explanatory Memorandum, § 13. See also n. 68, *supra*.

⁹⁴ Explanatory Report, § 12.

⁹⁵ Explanatory Report, § 35. The concept of a "reasonable person" was apparently omitted from the 1976 Draft Convention on the International Sale of Goods on the ground that the concept was unknown to some systems of law: see Sutton, *supra* n. 43 at 274.

⁹⁶ Explanatory Report, § 35.

⁹⁷ Explanatory Memorandum, § 13.

⁹⁸ European Convention, Art. 5; E.C. Draft Directive Art. 5. The Convention provides (Art. 2(d)) that a product has been "put into circulation" when the producer has delivered it to another person.

presumption thus created in favour of the plaintiff is likely to be of great importance in practice because, where the possibility exists that the defect was caused by acts of third parties after the product left the producer's hands, the producer will be liable unless he can positively prove either that the product was not defective when it left his control or that the defect was introduced at some later stage.⁹⁹ The producer would be liable whether or not it was probable that an intermediate examination after the product left his control would reveal the defect.¹⁰⁰ The European Convention provides a further defence, namely that the product was neither manufactured for sale, hire or any other form of distribution for the economic purposes of the producer, nor manufactured or distributed in the course of his business.¹⁰¹ The European Convention expressly provides that the liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.¹⁰²

Neither text allows any exception in respect of "development risks", the view having been taken that it is unreasonable to expect individuals to bear such risks, and that the cost of liability can normally be passed on by the producer. The Committee responsible for preparing the European Convention considered that "as insurance made it possible to spread risk over a large number of products, producers' liability, even for development risks, should not be a serious obstacle to planning and putting into circulation new and useful products".¹⁰³ The E.C. Draft Directive expressly covers the situation by providing that "the producer shall be liable even if the article could not have been regarded as defective in the light of scientific and technological development at the time when he put the article into circulation".¹⁰⁴ The Committee of Experts considered that the definition of "defects" in the European Convention (and in particular the deliberate failure to stipulate that whether the product was defective must be judged as at the time when the product was put into circulation) was adequate to produce the same result.¹⁰⁵ The approach taken on the question of development risks is, in light of the potential catastrophic extent and unpredictable nature of the liability involved, perhaps the most controversial feature of both documents.¹⁰⁶

⁹⁹ Compare the position under the Australian cases cited in n. 22, *supra*. The result would appear to be to impose a more stringent liability than is imposed under strict liability in American law: Lorenz, *supra* n. 10 at 1020.

¹⁰⁰ As to the difficulty which can still be caused on occasion under Australian law in the "intermediate examination" cases, see Fleming, *op. cit. supra* n. 17 pp. 506-507.

¹⁰¹ Art. 5(1)(c).

¹⁰² Art. 5(2).

¹⁰³ Explanatory Report, § 41. See also E.C. Draft Directive, Explanatory Memorandum, § 2.

¹⁰⁴ Art. 1.

¹⁰⁵ Explanatory Report, § 36. *Quaere* whether, in light of the definition of "defect" in terms of "the safety which a person is entitled to expect", this interpretation is likely to be followed by the courts: Lorenz, *supra* n. 10 at 1014-15.

¹⁰⁶ For further discussion, see *infra* at 396-97.

Were an international convention on products liabilities to be prepared, the stand taken on this point could well prove a crucial factor in determining the extent of acceptance of the scheme proposed. It should be noted in this connexion that the Draft Directive establishes limitations on the monetary liability of a producer for damage caused by identical products having the same defect, and the European Convention, while establishing no limitation directly, permits States to reserve the right to establish certain limitations. These provisions, which are discussed below,¹⁰⁷ are largely designed to lessen the impact of strict liabilities in respect of development risks.

(f) Kinds of damage compensated

(i) *Death or personal injury*

The European Convention renders a producer liable only in respect of death or personal injuries caused by a defective product.¹⁰⁸ The Committee preparing the Draft proposed this limitation because it was felt that, owing to a lack of time, it was not possible to make a thorough study of questions relating to damage caused to goods. The Committee considered that this question could be dealt with at a later stage by a separate instrument. Moreover, some experts believed that a Convention imposing strict liability would be likely to achieve a greater number of ratifications if limited to claims in respect of death or personal injuries.¹⁰⁹ "Damage" is not defined in the European Convention. The Explanatory Report indicates that such questions as whether damages for pain and suffering may be recovered are to be left to national law, the Committee believing that the disadvantages (e.g. forum shopping) inherent in this approach were out-weighed by the fact that any attempt to harmonize national law on this matter would raise considerable difficulty which might jeopardise the success of the Convention. The Convention also leaves to be determined by national law the rights to compensation of such persons as the dependants of the person directly suffering injury.¹¹⁰

The E.C. Draft Directive covers, but is not limited to, "death or personal injuries".¹¹¹ This phrase is intended to cover the rights of dependants of a deceased person. "Personal injuries" is intended to include such matters as impairment of earning capacity, but not compensation for pain and suffering (which would be governed by national law). Questions of remoteness of damage are also not governed by the directive.¹¹²

¹⁰⁷ At 389-391.

¹⁰⁸ Art. 3(1). Nuclear damage is excluded from the scope of the Convention: Art. 9.

¹⁰⁹ Explanatory Report, § 18.

¹¹⁰ Explanatory Report, § 53.

¹¹¹ Arts 1, 6.

¹¹² Explanatory Memorandum, §§ 17, 21. Also excluded is injury or damage arising from nuclear accidents: Art. 12.

The greatest pressure for reform of the law of products liability has been in relation to cases of death or personal injury, and any draft convention on international products liability law would obviously have to provide for compensation for such damage. A plaintiff able to rely on such a convention would clearly benefit in very many cases by avoiding the notoriously difficult conflict of laws problems which can arise, and in avoiding the difficulty of proving the content of the applicable law, a law which in many countries is still in a state of development and subject to many uncertainties.¹¹³ A defendant would also benefit by the increase in certainty as to the applicable legal principles, although this benefit might seem of dubious value to him if the result were to impose upon him a higher standard of liability than would otherwise have been the case. However, such benefits could be very considerably reduced if questions relating to the types of loss in respect of which damages could be recovered were not regulated by the convention. Where litigation takes place in Australia these matters will apparently be governed by the law of the forum,¹¹⁴ but in other countries another choice of law rule may well be applied.¹¹⁵ There is considerable variation among the different national laws on such questions as whether damages may be recovered for pain and suffering, the damages recoverable where the injury results in death and the effect on the quantum of damages of receipt by the victim of social security payments.¹¹⁶ It may well be difficult to achieve international agreement on such matters, but a failure to do so will result in no solution being offered to many complex problems which now face the parties in international products liability litigation.

(ii) *Damage to property and economic loss*

As indicated above, the E.C. Draft Directive is not limited to damage occurring as a result of death or personal injury. "Damage" for the purposes of the Directive includes:¹¹⁷

damage to or destruction of any item of property other than the defective article itself where the item of property

- (i) is of a type ordinarily acquired for private use or consumption; and

¹¹³ See generally the references cited in n. 6, *supra*.

¹¹⁴ The point is one of great uncertainty: see Nygh, *op. cit. supra* n. 46, Ch. 18.

¹¹⁵ In German law, for example, the *lex loci delicti commissi* will generally apply: Association Européenne d'Etudes Juridiques et Fiscales, *Products Liability in Europe* (1975) p. 80.

¹¹⁶ See generally *Products Liability in Europe*, *ibid*.

¹¹⁷ Art. 6. The Law Commissions have recently proposed a similar test for the purposes of a recommendation that exclusion clauses contained in a guarantee of consumer goods and purporting to exclude the manufacturer or distributor from liability for negligence should be void: *Exemption Clauses: Second Report* (Law Com. No. 69, Scot. Law Com. No. 39, 1975) pp. 40-42.

- (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

The Explanatory Report indicates that such property damage has been brought within the scope of the Directive on the ground that otherwise the new rules would not meet the need for an adequate consumer protection system. At the same time, the Directive does not extend to damage caused to economic interests in the purely commercial sphere, at least partly on the ground that it is in this area that large-scale damage is most likely to arise. The Commission does, however, reserve the right to prepare proposals in this field at a later date.¹¹⁸

The definition of the type of property which will be covered by the Directive will not be strange to the Australian reader, being similar to the definition of when goods will be regarded as having been acquired by a "consumer" for the purposes of the Commonwealth Trade Practices Act 1974.¹¹⁹ Although this definition has been subjected to some criticism in Australia,¹²⁰ the writer believes that the difficulties said to arise have been somewhat exaggerated and that such a definition is a workable one.¹²¹ Moreover, it is highly relevant in the present context to note that this approach embodies concepts which appear to have found general acceptance in Europe.¹²² The inclusion of an objective element ("of a type ordinarily acquired") in the definition is presumably meant to assist a producer in assessing the risk likely to be incurred in the production of different types of product. It will be noted that particular goods must have been both acquired and subsequently in fact used for private purposes in order to come within the definition. (It would be desirable for this provision to clarify the situation where a product is acquired, or used, for both private and business purposes; it is presumably intended that regard must be had to the predominant purpose, though, in respect of the use made of the goods, it might be more satisfactory to provide that regard must be had to the use which was being made of the goods at the time when the damage occurred.) The exclusion of liability for property damage in non-consumer cases can perhaps be justified on the basis that property belonging to commercial enterprises is more likely

¹¹⁸ Explanatory Memorandum, § 18.

¹¹⁹ S. 4(3). See also Sale of Goods Act, 1923 (N.S.W.) s. 62. Both provisions are based on the definition contained in the Supply of Goods (Implied Terms) Act, 1973 (U.K.).

¹²⁰ See *Report of the Trade Practices Act Review Committee* (1976), §§ 9.38-9.45. A new definition of "consumer", based on the Committee's views, is included in the Trade Practices Act Amendment Bill, 1977, s. 5. [This provision came into force on 1 July, 1977. Eds.].

¹²¹ See Taperell, Vermeesch & Harland, *op. cit. supra* n. 27 at 174-76.

¹²² European Committee on Legal Co-operation, *Final Activity Report on the Protection of Consumers Against Unfair Contract Terms* (Council of Europe, 1976) p. 22; U. Bernitz, "Consumer Protection: Aims, Methods & Trends in Swedish Consumer Law" [1976] *Scandinavian Studies in Law* 13 at 21-24. The objective element is, however, normally omitted and appears to have been borrowed here from the U.K. legislation referred to in n. 119, *supra*.

to be adequately covered by insurance. Damage to the item itself is excluded on the basis that claims based on defective quality in a newly-purchased product should be within the province of the law of sale of goods.¹²³ A strong argument can certainly be made that products liability should not give rise to claims based solely upon alleged defects in quality which render a product unsuitable for its intended purpose (or even wholly useless).¹²⁴ However, it is perhaps somewhat illogical to exclude claims for actual damage to the item caused by defects in its construction rendering it unsafe.¹²⁵ It is also pointed out in the UNCITRAL Report¹²⁶ that the making of such a distinction means that where a defect causes damage both to the product itself and to something external to that product, liability for the defect would be subject to two different legal régimes.

The definition of "damage" in the E.C. Draft Directive would appear to exclude economic loss consequent upon damage to property of the claimant (e.g. where expense is incurred in hiring a substitute article while the damaged article is being repaired, or where the damaged article is used in a profit-making activity). It clearly excludes economic loss not consequent upon damage to such property, e.g. where damage to one person's property (say, the supply line of a gas company) causes financial loss to another person (the owner of a factory rendered in-operative by interruption of gas supply). Apart from claims based on defective quality of goods purchased, such economic loss will in any event most commonly arise in the commercial sphere and would for that reason also be excluded from the scope of the Directive. The extent to which purely economic loss may be recovered in actions based on negligence is an unsettled and complex question in Australian domestic law.¹²⁷ It should, however, be remembered in the context of present and proposed Australian law that the imposition upon manufacturers of liability for breach of implied warranties as to quality results in consumers being able to recover such loss from a manufacturer upon a

¹²³ Explanatory Memorandum, § 20. The Hague Convention provides that "‘damage’ shall mean injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damages": Art. 2(b).

¹²⁴ This point is a matter of considerable dispute in the American law. For a useful discussion of the policy issues involved see Law Commissions' *Working Paper*, pp. 86-95. See also, Fleming, *op. cit. supra* n. 17 pp. 504-506; C.J. Tobin, "Products Liability: Recovery of Economic Loss?" (1970) 4 *New Zealand Universities Law Review* 36; S.M. Waddams, "The Strict Liability of Suppliers of Goods" (1974) 37 *M.L.R.* 154.

¹²⁵ *Semble* such damage is not recoverable in a negligence action under Australian law: see *supra* at 365-66. The New Zealand Torts and General Law Reform Committee considered that "repair" loss (i.e. the cost of repairing an article to avert the risk of damage to the article itself by a defect or the cost of repair after such damage has eventuated) should be treated on the same basis as damage caused by a defective product to other property; it was influenced in this view by the apparent impossibility (at least for consumers) of insuring against such repair loss: *Report on Products Liability* (1974) pp. 17-19.

¹²⁶ § 56.

¹²⁷ See *supra* at 365-66.

statutorily implied contract.¹²⁸

The Law Commissions have pointed out that the social considerations supporting the imposition of strict liability in respect of personal injuries have less force when applied to property damage, in that people do tend to insure themselves against damage to property more frequently than against personal injury. Moreover, it is usually more expensive to insure against third party claims for property damage than against third party claims for personal injury, and cover for third party claims for purely economic loss may be prohibitively expensive.¹²⁹ These considerations obviously would carry less weight if any proposed international rules were to impose liability only on the basis of negligence, though it should be remembered that the uncertainties of the present Australian law relating to negligently caused economic loss stem from a fear of making liability so extensive as to impose an excessive burden on manufacturers and others.¹³⁰ In view of these difficulties the compromise adopted in the E.C. Draft Directive seems to be a reasonable one, though it might be felt that the restriction of liability for property damage to damage caused to consumers is unduly restrictive.

(g) Defences

Both the European Convention and the E.C. Draft Directive enable a producer to escape liability by proving that he did not put the product into circulation, or that the defect did not exist at the time when he put the product into circulation.¹³¹ The European Convention also provides that the compensation payable may be reduced or disallowed if the plaintiff contributed to the damage by his own fault.¹³² The E.C. Draft Directive makes no express provision on the point, the view having been taken that such a provision would have been superfluous as contributory negligence leads to a reduction in, or exclusion of, liability under the laws of all member States.¹³³ For similar reasons

¹²⁸ See *supra* at 367-68. It is worth remembering that the liability of a seller for breach of conditions and warranties going to the quality of goods was *semble* originally intended to extend only to commercial loss, liability for physical injury and property damage being regarded as within the province of tort law: J.A. Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law" (1969) 32 *M.L.R.* 1 at 15; Waddams, *supra* n. 124, at 155-57.

¹²⁹ *Working Paper*, pp. 77-78.

¹³⁰ See *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1977) 11 A.L.R. 277 at 241-42 (*per* Gibbs, J.), 258-261 (*per* Stephen, J.), 273 (*per* Mason, J.). See also UNCITRAL Report, § 57.

¹³¹ At 382-83, *supra*.

¹³² Art. 4(1). The same rule applies if a person for whom the plaintiff is responsible under national law has contributed to the damage by his fault: Art. 4(2). (Such persons might, depending on the national law involved, include the legal representative, employee or child of the plaintiff: Explanatory Report, § 57). A State would be entitled to reserve the right to apply its ordinary law insofar as such law provides for a defence of contributory negligence only in the case of gross negligence or intentional conduct. Art. 17. (This reservation was permitted in light of proposed alterations to the general law on contributory negligence in some States: Explanatory Memorandum, § 56).

¹³³ Explanatory Memorandum, § 16.

both texts leave defences based on unavoidable accident or *force majeure* to be governed by the appropriate national law.¹³⁴

(h) Limitations on recovery of compensation

The European Convention provides¹³⁵ that the liability of a producer under the Convention cannot be excluded or limited by any exemption or exoneration clause. The E.C. Draft Directive provides that liability as provided for in the Directive may not be excluded or limited, the omission of any reference to an exclusion *clause* being intended to cover, in addition to attempted contractual exclusions, any attempt by a producer to assert that the consumer had voluntarily assumed the risks which might arise from the defectiveness of the product.¹³⁶ In most legal systems the fact that the producer in the majority of cases has no contractual relation with the person suffering loss would make it difficult in any event for the producer to exclude his liability. There also appears to be some tendency internationally towards holding void exclusion clauses designed to protect a person from liability for personal injuries.¹³⁷ The question of the permissible scope (if any) of exclusion of liability could prove more controversial if any proposed convention on products liability law were to extend beyond the scope of death and personal injury.

The European Convention contains no limit on the monetary liability of a producer, but does permit¹³⁸ States to reserve the right to limit by provisions of national law the liability of a producer, provided that this liability is not less than certain minimum sums expressed in terms of Special Drawing Rights as defined by the International Monetary Fund at the time of ratification by the State making the reservation. Those sums are 70,000 S.D.R.¹³⁹ for each injured or deceased person and 10,000,000 S.D.R.¹⁴⁰ for all damage caused by identical products having the same defect. The reservation could apply in the case of certain products only, or in the case only of development risks, and is permitted

¹³⁴ European Convention, Explanatory Report, §§ 64-65; E.C. Draft Directive, Explanatory Memorandum, § 16.

¹³⁵ Art. 8.

¹³⁶ Art. 10; Explanatory Memorandum § 29.

¹³⁷ See E. von Hippel, "The Control of Exclusion Clauses: A Comparative Study" (1967) 16 *International and Comparative L.Q.* 591 at 612; but *c.f.* Law Commissions, *Exemption Clauses: Second Report* (Law Com. No. 69, Scots. Law Com. No. 39, 1975) (recommendation that provisions excluding or restricting liability for negligence should as a general rule be subject to a "reasonableness" test; in certain cases, including clauses contained in manufacturers' guarantees and limited categories of situations resulting in death or personal injuries, the provisions would be void).

¹³⁸ Art. 17.

¹³⁹ \$A75,000 approx.

¹⁴⁰ \$A11,500,000 approx.

in order to facilitate the ratification of the Convention by the greatest possible number of States.¹⁴¹

The E.C. Draft Directive imposes two upper limits of liability:¹⁴²

- (a) in respect of all personal injuries caused by identical articles having the same defect the total liability is 25 million European Units of Account¹⁴³
- (b) in respect of damage to property, liability is limited in respect of each injured person to 15,000 EUA¹⁴⁴ for movable property and 50,000 EUA¹⁴⁵ for immovable property.

The limitations contained in the E.C. Draft Directive are of particular importance in light of the approach taken to exclusion clauses and of the fact that no exception is made to the liability of producers in the case of development risks. These limitations are designed to prevent incalculable risks being placed on producers (possibly resulting in the impairment of economic and technical progress) and to prevent an unacceptably high level of price increases due to the very high cost of insurances against incalculable risks.¹⁴⁶ The overall limitation in case of death or personal injury is intended to ensure that in most cases of liability to a specific individual damages are for practical purposes unlimited, while still providing in the rare instances of major disasters (as in the thalidomide cases) an upper limit which will be useful in calculating the maximum insurance coverage necessary.¹⁴⁷ No overall limit of liability has been adopted in the case of property damage, the reasoning being that mass damages are hardly likely to occur in such cases but that the damage likely to be suffered by any individual may be very difficult to calculate in advance.¹⁴⁸

It may well be that an overall limitation in respect of injuries caused "by identical articles having the same defect" may in practice afford less protection to producers than might at first sight be supposed, for where minor changes are made from time to time to the design of a manufactured product, each new model must be regarded as a new product for this purpose, even though such changes may be quite minor or purely stylistic and even though the defect causing injury is identical

¹⁴¹ Explanatory Report, § 54. Article 11 permits States to replace the liability of the producer, in a principal or subsidiary way, wholly or in part, in a general way, or for certain risks only, by the liability of a guarantee fund or other form of collective guarantee, provided that the victim shall receive protection at least equivalent to the protection he would have had under the liability scheme provided for by the Convention. This provision was inserted to make it possible for States having guarantee funds or insurance systems replacing the liability of producers to be parties to the Convention: Explanatory Report, § 75. For discussions of one such fund see Fleming, *supra* n. 10 at 733; Lorenz, *supra* n. 10 at 1017-18.

¹⁴² Art. 7. Provision is made for periodic revision of the stipulated amounts.

¹⁴³ \$A25.5 million approx.

¹⁴⁴ \$A15,250 approx.

¹⁴⁵ \$A51,000 approx.

¹⁴⁶ Explanatory Memorandum, § 22.

¹⁴⁷ *Id.* § 24.

¹⁴⁸ *Id.* § 25.

in all models. A similar problem could arise where what is essentially the same product is made available in different forms e.g. pharmaceutical products marketed in both liquid and tablet form.¹⁴⁹ Further, in cases where the defective product has been distributed over a substantial period of time, it is not clear whether (and, if so how) all potential claimants must be identified so that each is treated equitably in respect of the quantum of damages available to him, or whether each claimant is to receive payment in full of his entitlement until such time as the maximum figure is reached, with subsequent claimants receiving nothing.¹⁵⁰

Under both texts, questions of causation and remoteness of damage are to be determined by national law. It may well be that unification would not be practicable on these issues, and the adoption of some monetary limits on liability may render these matters of less importance.¹⁵¹ (Whether the limits imposed by the two documents discussed above are such as are likely to produce this result is, of course, another question). The imposition of a limitation on liability under any proposed convention would no doubt be more likely to receive general acceptance if strict liability, rather than liability based on negligence, were provided for.

(i) Limitation Period

If agreement could be reached upon a set of substantive rules relating to products liability, much thought would have to be given to the difficult problems which would arise concerning the appropriate limitation period, especially as the absence of any provision on this topic would undoubtedly lead to forum-shopping in view of the wide diversity of limitation periods in national legal systems¹⁵² and the divergent choice of law approaches applied in different countries. The UNCITRAL Report contemplates that the work previously undertaken in respect of the United Nations Convention on the Limitation Period in the International Sale of Goods might well be useful in this context.¹⁵³

The European Convention¹⁵⁴ and the E.C. Draft Directive¹⁵⁵ have adopted the same approach on this point. A limitation period of three years applies to proceedings for the recovery of damages, the period commencing on the day when the injured person became aware, or should reasonably have been aware, of the damage, the defect and the identity of the producer. Thus, the period will not commence to run until the plaintiff has knowledge, actual or assumed, of all three matters men-

¹⁴⁹ International Chamber of Commerce, *supra* n. 76 § 14.

¹⁵⁰ Law Society (U.K.), *supra* n. 76 § 10.

¹⁵¹ See UNCITRAL Report, §§ 69-73.

¹⁵² This can range from as little as one year to as long as 30 years: Lang and Lansorena, "General Report: 'Products Liability'" (Congress of the Union Internationale des Avocats, Munich, 1975).

¹⁵³ § 106. For a discussion of the Convention see Malcolm, *supra* n. 43.

¹⁵⁴ Arts. 6, 7.

¹⁵⁵ Arts. 8, 9.

tioned. Further, the liability of the producer is extinguished if an action is not commenced within 10 years from the date on which the producer put the defective article into circulation. The period of 3 years may, but the period of 10 years may not, be suspended or interrupted¹⁵⁶ (presumably under the law which the forum would apply pursuant to its conflict of law rules on the limitation of actions). The desire to provide a well-balanced solution to the problem of "development risks" is one reason for the adoption of the 10 year period.¹⁵⁷

(j) Liability of producers *inter se*

The European Convention provides¹⁵⁸ that the provisions of the Convention shall not apply to the liability of producers *inter se* and their rights of recourse against third parties. It may be that two or more persons are liable as producers in respect of the same damage (e.g. a manufacturer and an importer). Although both will be liable in full to the injured party¹⁵⁹ the question of whether the importer is entitled to full or partial contribution must be determined by the appropriate national law. A similar situation could arise where damage is caused both by a defect in a product and an act or omission of a third party; although the producer is liable in full to the injured party,¹⁶⁰ he may under national law have a right to contribution from the third party. The Explanatory Memorandum to the Draft Directive assumes¹⁶¹ that claims to contribution or indemnity will continue to be governed by national law, it being considered that it was unnecessary to deal with this matter in the Directive.

(k) Relationship of unified law to national law

A difficult and controversial question is that of the appropriate relationship between any international rules on product liability and that existing rules of national law on the subject. The difficulties which may arise can be illustrated by contrasting the provisions of the E.C. Draft Directive and the European Convention.

Article 11 of the Draft Directive provides that "claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected". The intention is that the injured person may still assert any claim (whether categorised as one in tort or contract) which he may have against the producer under the appropriate national law. Such rules are left untouched by the Directive "because they also serve the objective of an adequate

¹⁵⁶ This is expressly provided in Art. 8 of the E.C. Draft Directive, and is assumed in the Explanatory Report on the European Convention (§ 69) to follow as a result of the 3 year period being a period of limitation of action. For criticism of the selection of the 10-year period see McMahon, *supra* n. 10 at 245.

¹⁵⁷ E.C. Draft Directive, Explanatory Memorandum, § 28.

¹⁵⁸ Art. 9.

¹⁵⁹ Art. 3(5), discussed at 377 *supra*.

¹⁶⁰ Art. 5(2).

¹⁶¹ § 12.

protection of consumers".¹⁶² As no agreement can effectively exclude a claimant's rights under the Directive,¹⁶³ the effect is that the Directive provides a minimum standard of liability and that the claimant will normally wish to resort to national law only if this is more favourable to him than the rules of the Directive. This will, because of the breadth of the liability imposed under the Directive, presumably arise only rarely.¹⁶⁴ However, a claimant may well wish to resort to national law if his claim under the Directive has not been brought within the limitation period but would not be statute-barred under national law. Moreover, if he can, on the same facts as give rise to liability under the Directive, establish a claim in tort or contract under national law, he might well be able to evade the restrictions as to the maximum amounts of liability provided for in Article 7. When it is remembered that some national laws will provide for liability irrespective of fault, and that one reason for the imposing of these limits is to effect a reasonable balance between the interests of producers and consumers, the policy bases of the rules of the Directive may be to some extent undermined.¹⁶⁵ Moreover, as is pointed out in the UNCITRAL Report,¹⁶⁶ the objective of seeking uniformity and certainty would be adversely affected "as producers and their insurers would continue to have to ascertain the national law of of each State, which may be complex or unclear".

By way of contrast, the European Convention would appear at first sight to adopt a quite different approach as Article 10 forbids contracting States adopting rules derogating from the Convention, even if these rules are more favourable to the victim. However, Article 12 then provides that the Convention does not affect any rights which a person suffering damage may have according to "the ordinary rules of the law of contractual and extra-contractual liability". Difficulties will obviously arise in determining what is the "ordinary law" of tortious or contractual liability. Under French law, for example, a "professional seller" of goods is usually held liable to his purchaser for damages caused by "hidden defects" even if he was unaware of their existence (contrary to the general rule requiring knowledge if damages, as opposed to rescission or reduction in price, are to be available) and this liability may be enforced by the purchaser directly against the manufacturer even though there is no privity of contract between them.¹⁶⁷ Article 11 expressly provides that rules concerning the duties of a seller who sells goods in

¹⁶² Explanatory Memorandum, § 30.

¹⁶³ Art. 10, discussed at 389 *supra*.

¹⁶⁴ It should be remembered, however, that the Directive has no application to claims (whether in tort or contract) for economic loss, or property damage falling outside the scope of Art. 6.

¹⁶⁵ The uncertainties of the conflicts of laws rules of many countries increases the difficulty which a producer may have in attempting to assess his potential liabilities in respect of any particular product.

¹⁶⁶ § 102.

¹⁶⁷ See Kessler, *supra* n. 88 at 921-23; de Leyssac in *Products Liability in Europe*, *op. cit. supra* n. 115 pp. 55-61.

the course of his business are to be regarded as part of the "ordinary law". This provision was inserted because of doubts which had been expressed as to how this liability should be categorized in the absence of an express provision.¹⁶⁸ However, the effect of legislation such as the South Australian Manufacturers Warranties Act, 1974 would appear to be very similar in operation, and yet such legislation would presumably be regarded as imposing "special" rather than "ordinary" rules, because that Act imposes liability upon a special class of persons among those involved in supplying goods in commerce, and imposes that liability only in favour of consumers.¹⁶⁹ Although Article 10 is stated to be an attempt to achieve a fair balance between the interests of producers and consumers,¹⁷⁰ Article 12 does, as one commentator has remarked, seem to bring about "a fundamental disturbance of the fair balance the Convention purports to achieve in itself".¹⁷¹ On the other hand, the circumstances in which national law relating to the liability of a producer for death or personal injury caused by defective products will be more favourable to a plaintiff than the rules of the Convention may well be so rare that the inconsistency in policy is more apparent than real, and permitting States to continue to apply their "ordinary law" concurrently with the Convention may assist in making the Convention acceptable to a larger number of States.

CONCLUSION

There is a growing body of opinion that a need exists for a régime of products liability rules having international application, especially in relation to death and personal injury. While the progress made to date in Europe in the preparation of the European Convention and the E.C. Draft Directive has been more rapid than one might have expected given the complexity of the subject, it remains to be seen whether either document will in fact be implemented. It appears that there has been considerable opposition from commercial interests to certain fundamental aspects of both documents,¹⁷² and it may well be that further progress will be slow. An attempt to re-draft these documents so as to have greater regard to producers' interests (especially in regard to limitations on liability for development risks) would no doubt make them more acceptable to some States, but would presumably be regarded by others as an unacceptable retreat from a satisfactory level of consumer protection. When one bears in mind the existing substantial impetus towards harmonization of law in other fields in Western Europe, together with a widespread similarity in legal and economic systems, the difficulties involved in reaching agreement on principles of product liability are likely

¹⁶⁸ Explanatory Report, § 77.

¹⁶⁹ See *supra* at 367-38.

¹⁷⁰ Explanatory Report, § 74.

¹⁷¹ Storm, in *Products Liability in Europe*, *op. cit. supra* n. 115 p. 18.

¹⁷² See Storm in *Products Liability in Europe*, *op. cit. supra* n. 115 p. 21; Fleming, *op. cit. supra* n. 10 p. 21. See also International Chamber of Commerce, *supra* n. 76; Law Society (U.K.), *supra* n. 76.

to be greatly magnified if the problem is approached on a global rather than, as hitherto, on a regional basis.

Nonetheless, the writer believes that in light of the widespread interest in the topic and of the substantial work already undertaken, it would be appropriate for a body such as UNCITRAL to commence work on products liability law. Such work should, in the writer's view, preferably extend to liability for property damage as well as personal injury, though the need for reform and the prospects of agreement would appear to be greater in respect of the latter. It should be noted that, as was remarked by one commentator in the context of the work of the Council of Europe on products liability, such work is likely, irrespective of its ultimate results on the international level, to be valuable in stimulating thought on the topic and stimulating the impetus for reform of domestic systems of law.¹⁷³ If it proves possible to develop a workable system of international rules, very considerable advantages could be expected to follow. In the first place, the need to resort to complex and often uncertain conflict of laws rules would be avoided altogether (and the apparent failure of the Hague Convention to attract widespread support means that that Convention will probably not alleviate this difficulty to any substantial degree). Even where the applicable conflict of laws rules are reasonably clear in a given case, the system of national law to which those rules refer is in many countries in a confused and uncertain state, thereby increasing the great difficulties which can be faced in trying to ascertain with some accuracy the likely effect of the rules of a foreign system in any given factual situation. The certainty gained by the existence of an international Convention would be a major factor in gaining widespread support (and for this reason the temptation to leave to national law difficult subsidiary points,¹⁷⁴ which may of course often assume major importance in particular cases, should be resisted wherever possible). A major question for debate in the context of a possible international régime for products liability would clearly be that of whether liability should be based upon fault or whether strict liability should be imposed. The writer finds the arguments which have been put forward in favour of a system of strict liability persuasive. However, the primary need would appear to be for greater certainty and uniformity, and a Convention establishing an international régime based upon fault liability could, if sufficiently comprehensive in scope so as to include such matters as the type of damage which could be recovered and the evidentiary presumptions which were to be available as a plaintiff, be a worthwhile advance on the present situation. It should also be noted that a number of commentators have expressed the view that (except perhaps in the much debated cases of development risks) the standard of liability applied by many national systems where fault is, at least in theory, a pre-condition of liability may

¹⁷³ Fleming, *op cit. supra* n. 10 at 737.

¹⁷⁴ E.g. the types of loss in respect of which damages may be recovered (discussed at 385 *supra*); contributory negligence as a defence (388 *supra*).

in practice diverge only rarely from the standard which would be applied were strict liability to be adopted explicitly.¹⁷⁵

The attraction of an international Convention from the viewpoint of protection of the Australian consumer may seem, in light of geographical factors, to be somewhat remote, for it will be a rare case where a consumer, even though suffering severe loss, will have both the means and inclination to embark upon litigation overseas against a foreign producer.¹⁷⁶ If a system of strict liability were adopted, the result would be that the Australian consumer would no doubt bear a proportion of the costs of strict liability built into his overall pricing structure by the overseas manufacturer, while as a practical matter being unable to enforce that strict liability. (However, care should be taken not to exaggerate the likely extent of such price increases, and it should be remembered that a manufacturer subject to strict liability in respect of a substantial proportion of his production may well increase his quality control and production standards generally, thus benefiting all consumers.) In those rare cases where an Australian consumer did embark upon overseas litigation, the existence of a unified system of law on products liability would obviously substantially reduce the difficulties faced by a litigant in such cases. A similar advantage would follow in cases where, even though the manufacturer was amenable to the jurisdiction of an Australian court, under the rules of the conflict of laws the substantive issues would at present be governed at least in part by a foreign law (e.g. where it is necessary to show that an act or omission was "not justifiable" under the law of the place where the act or omission occurred).¹⁷⁷

The practical importance for Australian consumers of a unified law would be very much increased if such a law were to impose strict liability upon importers of defective products. On the other hand, the significance of such a rule would be lessened once the Trade Practices Act is amended so as to make manufacturers (and importers) liable upon a statutory warranty that goods are of merchantable quality.¹⁷⁸ In so far as the statutory warranty would extend to defects in quality in addition to defects making the goods unsafe, the manufacturer's statutory liability would be more extensive than that which is contemplated under either the European Convention of the E.C. Draft Directive. In addition, the statutory liability would extend to all types of property damage as well as to economic loss. However, the statutory manufacturers' liability would extend only to purchasers or those deriving title from them, but no

¹⁷⁵ See e.g. Kessler, *supra* n. 88 at 899; New Zealand Torts and General Law Reform Committee, *supra* n. 125, pp. 21-22.

¹⁷⁶ For a recent example see *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458 (P.C.); however, the facts were exceptional and it was held that, contrary to what will normally be the case where negligence abroad causes injury in Australia, the Australian courts had jurisdiction over the foreign manufacturer.

¹⁷⁷ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; *Koop v. Bebb* (1951) 84 C.L.R. 629.

¹⁷⁸ See the discussion at 368 *supra*. [The Act had not been amended in this respect at time of going to press. Eds.]

such limitation is made in the Convention or the Draft Directive. Moreover, under both documents a producer is liable for damages caused as a result of "development risks".¹⁷⁹ The extent to which the presence in goods of a defect undiscoverable in light of scientific and technological developments at the time of sale will render those goods unmerchantable (and thus render a seller strictly liable under the law of sale of goods) is a matter of considerable doubt.¹⁸⁰ (The paucity of discussion of the point in the context of the law relating to sale of goods suggests that its practical importance may be considerably less than is often assumed in discussions of the law of products liability.)

It should also be noted that if Australia did adopt proposals which have been made for a system of national compensation for personal injury and such a system were to operate to the exclusion of common law remedies¹⁸¹ a unified law of product liability would be of small concern to the Australian consumer except in so far as it imposed liability in respect of damage to property or economic loss occurring independently of physical injury.

Were Australia to become a party to an international Convention on products liability, the Australian importer of goods from abroad would not be directly affected unless it were decided to make importers liable as producers. It has been argued above¹⁸² that an effective products liability law should do so. It was also suggested¹⁸³ that any imposition of strict liability upon an importer would subject him to some increased liability, though the likely extent of that liability may well be less than might at first sight be supposed. An importer subject to such liability would no doubt wish to protect himself by means of a contractual indemnity from his supplier (whether or not that supplier were also liable as a "producer"). The extent to which he would be able to do so would, of course, depend upon his bargaining position and the contractual terms he is able to negotiate, unless the Convention regulated the liability *inter se* of producers and distributors. Both the European Convention and the E.C. Draft Directive leave this matter to be solved by national law. Any evaluation of the possible effect of imposing strict liability on Australian importers would obviously have to take account of the extent to which it appeared likely that importers would be able in practice to receive full or partial indemnity in respect of their increased potential liabilities.

¹⁷⁹ The approach taken on development risks is perhaps the most controversial aspect of both documents: see e.g. Lorenz, *supra* n. 10 at 1014 ff.; International Chamber of Commerce, *supra* n. 76 at s. 1. Law Society (U.K.), *supra* n. 76 at s. 4.

¹⁸⁰ See Henderson, "Of Merchantable Quality" (1970) 86 *L.Q.R.* 167; Sutton, *op. cit. supra*, n. 17 p. 181; Fleming, *op. cit. supra* n. 17 p. 510.

¹⁸¹ See *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (1974). In New Zealand, where such a system has been introduced, the Torts and General Law Reform Committee recommended, by a majority, against the introduction of a system of strict products liability in relation to property damage and economic loss: *Report on Products Liability* (1974).

¹⁸² *Supra* at 375-76.

¹⁸³ See *supra* at 396.

The Australian manufacturer of goods for export, as well as possibly primary producers, would perhaps be more directly affected by a Convention on products liability. Where the Convention applied, the exporter might often find, if a standard of strict liability were adopted, that his potential liability for defective products was significantly greater than would be the case at present. And no doubt the person to whom he exported would often (especially if himself subject to liability under the Convention) seek by his contract to place all or part of the risk of liability on the exporter. The extent to which Australian exporters would be susceptible to such pressure would, of course, depend upon the realities of relative bargaining strength.

The above attempt to analyze the factors which would have to be considered in assessing the implications for Australian businessmen and consumers were Australia to become a party to a Convention on products liability has assumed that, following the approach of the European work already undertaken, such a Convention would adopt a standard of strict liability. Even if some other standard were adopted it seems likely that it would at least take the form of a system based in principle on fault but with a presumption of fault that could be rebutted only in limited circumstances, an approach which could in some cases result in a somewhat higher standard of liability than at present. Whether or not any increased degree of potential liability were judged to be acceptable from the Australian viewpoint would also be influenced by the types of damage in respect of which that liability were to be imposed. It may be that it would be concluded that a Convention limited to death or personal injury would be more acceptable than would be the case if the Convention extended to other damage. Another crucial factor will be the availability of, and cost of, insurance against the risks involved. Both the European Convention and the E.C. Draft Directive proceed on the assumption that the liability of producers under those documents will be able to be covered by insurance, but there does not appear to have been any adequate investigation of how far this is in fact the case.¹⁸⁴ Whether or not maximum amounts of liability were to be provided, the size of those maximum amounts and the possibility that these limits might be evaded by resort to national law¹⁸⁵ would be factors of vital importance in determining whether the risks of liability faced by producers would in practice be both calculable and insurable. It may be noted that the typical products liability policies available in Australia appear normally to exclude liability arising from design defects, damage to the defective goods themselves or purely economic loss.¹⁸⁶ A thorough study of the types of policies available in Australia would seem to be called for, bearing in mind the likelihood that new insurance practices will develop

¹⁸⁴ See Lorenz, *supra* n. 10 at 1016-17.

¹⁸⁵ See *supra* at 392-94.

¹⁸⁶ Fleming, *op. cit. supra* n. 17 at 444-45. See also Waddams, *Products Liability* (1974), Ch. 10.

(or may already be developing) as a stricter standard of liability is applied by the domestic Australian law.

One final observation must be made. If a Convention on international products liability law were to come into force and to be widely adopted, Australia would be affected by that Convention whether or not Australia became a party to it. For if Australia's major trading partners did adopt such a Convention, commercial pressures would inevitably be applied on Australian producers and exporters in relation to the contractual liability undertaken by them towards their overseas purchasers. (Irrespective of developments on a global sphere, such pressures would, of course, also be likely to arise from European purchasers if the European Convention or the E.C. Draft Directive were to come into force.) This fact alone would, in the writer's opinion, be a strong reason why Australia should seek to play an active role in assisting to produce a régime of liability that provides a balanced solution to the many problems which will clearly arise in the context of an international law on products liability.