Common Law and Civil Law Perspectives on Tort Law

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VIII
Products Liability

1. Introduction

Products liability provides an excellent opportunity to look at the development of tort law comparatively for numerous reasons. First, the domain of law we now call "products liability" is a relatively new domain, in that lawyers, scholars, and courts did not use the term in English or its foreign language equivalents (*Produkthaftungsgesetz, responsabilité du fait des produits défectueux*, *responsabilità da prodotto*) until the 1960s. By this point in time a rich dialogue had developed among scholars and policymakers on both sides of the Atlantic about how to address injuries arising from mass-produced consumer and industrial goods. Second—and following on the first point—, the period of time in which products liability law developed paralleled the rise of (what is now called) the European Union (EU), and, more precisely, the rise of the use of the EU Directives as a mechanism for harmonization among the EU Member States' domestic private law. In 1985 the European Directive on products liability was adopted, and the drive toward its development required considerable comparative reflection by its drafters. Finally, during the same period, the American Law Institute in the United States developed two Restatements of products liability law, the first published in 1964 and the second in 1998. The Restatement process was accompanied by a

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lively debate over the purpose and justification of products liability, a process which both influenced Europe and also, to a lesser extent, drew lessons from Europe's experience in adopting its own early versions of products liability.

In surveying the development of the products liability law in the United States and Europe, this chapter tells more than a simple binary story of comparison, although there are places where a binary contrast is appropriate and may provide useful lessons.[1] It tells the story of convergence from multiple starting points: from the tort/contract foundations of products liability law found in the United States and France; to the more unitary foundations found in England, Germany and Italy, where tort from early on provided the best (although not always adequate) avenue for redress. Even after the passage of the Directive, which should have had the effect of "resetting" the various national laws on products liability to the same starting point, the legacy of national laws and the choices made within national legal traditions have influenced the reception of the Directive in the various EU countries. The same dynamic, it could be argued, can be seen in the persistence of negligence concepts in American products liability law, where negligence came back into the Restatement Third after a brief exile imposed by many academics and some state courts.

2. American Law: From Nineteenth-Century Law to Cardozo's Revolution

American products liability law has its roots in the law of contracts and torts and their parallel treatment of injuries caused by consumer products to their users. In this respect, the law of torts in the nineteenth century followed the English precedent of *Winterbottom v. Wright*, which famously held that the tort duties of a builder of a coach were controlled by the rules of privity.[2] In other words, while the builder did have tort duties, those duties ran only to the direct purchaser of the coach, with whom, of course, the builder also had a contract. This rule had two important consequences. First, and of most importance to historians of tort law, the plaintiff in that case, a driver who had been employed by a third party to drive the coach, was owed no duty by the coach builder in tort. The second consequence, often ignored by those

[1] See, eg, Marshall S Shapo, "Comparing Products Liability: Concepts in European and American Law" (1993) 26 Cornell Int'l LJ 279–330.

[2] [1842] 152 Eng Rep 402.

who discuss the case, is that the tort duties the coach builder did have, which ran to the purchaser of the coach only, could be adjusted, altered, or waived by contract. A further point, also often ignored, is that the tort duties that ran between the coach builder and purchaser were not necessarily identical with the rights under the contract of sale; for example, the damages rule that would be available under a tort claim between the seller and purchaser would be broader than the damages rule later on established by *Hadley v. Baxendale*, which would apply to a contract claim.[3]

American lawyers and courts followed English law where they found it persuasive and *Winterbottom* was treated as binding precedent. It was, however, as in England, limited in its scope by subsequent decisions that took a broader approach to the duties of manufacturers and the sellers of services. The most important early challenge to *Winterbottom* was *Thomas v. Winchester*, where the seller of chemical extract used in the compounding of medicine by pharmacist mislabeled the extract at the point of production, so that the pharmacist who used it innocently conveyed it to the consumer, who was severely injured.[4] New York's highest court held that a duty ran between the seller of the extract and the consumer (no claim in negligence against the pharmacist being possible). The court discussed *Winterbottom* explicitly and distinguished its holding from the unique facts of the case before it. Where the manufacturer was in the business of making things that were "imminently dangerous," it said, its duty in negligence ran to all persons who could be foreseeably injured by the imminently dangerous thing, regardless of whether they were in privity with the manufacturer. The court compared the mislabeled extract to a unattended horse and carriage or loaded gun, which, due to the owner's carelessness, could harm anyone in the world who had the misfortune of encountering it. By investing the object itself with a potential for "mischief" in the world, the court was able to reclassify it within the older and more familiar tort doctrines of negligence based on foreseeable harm.[5]

The next step away from *Winterbottom* was *MacPherson v. Buick Motor Co.*, where Judge Cardozo famously rejected the privity rule.[6] MacPherson,

[3] [1854] 156 Eng Rep 145. "Although the principle [in contract law] is often characterized as a 'foreseeability doctrine,' the principle as traditionally formulated and applied cuts off most foreseeable damage." Melvin A Eisenberg, "The Principle of *Hadley v Baxendale*" (1992) 80 Cal LR 563, 566 (citation omitted).

[4] 6 NY 397 (NY 1852).

[5] See, eg, *Heaven v Pender* [1883] 11 QBD 503 (CA).

[6] 217 NY 382 (NY 1916).

who had purchased a Buick automobile from a dealer, was injured when one of the car's wheels broke while he was driving it. The consumer sued Buick on the grounds that the manufacturer failed to reasonably inspect the wheel before it assembled the finished product which it sold to the dealer who sold it to the consumer. Buick defended, in part, by arguing that the rule in *Winterbottom* applied to it; it was in the same position as the coach builder in that case. Cardozo refused to directly overturn the privity rule in *Winterbottom* but instead expanded the category of things "imminently dangerous" to include "things of danger"—anything which "it is reasonably certain to place life and limb in peril if negligently made."[7] Into this category Cardozo placed automobiles, which were designed, as he noted, to go up to fifty miles an hour and to be used not by the person who bought it from the manufacturer (the dealer) but by persons with whom the manufacturer was certain not to be in privity, such as the consumer and his passengers.

The holding in *MacPherson* worked a revolution in American tort law.[8] The privity rule soon disappeared completely, although, as will be seen in this chapter, questions remained concerning the tort obligation owed by a seller to a buyer. Cardozo's principle—that a manufacturer owed a duty to anyone who could be harmed by a "thing of danger" was soon expanded to bystanders, and not just consumers or their guests.[9]

2.1. The "Objectivization" of Liability: From the 1920s to the 1960s

The duty owed by a manufacturer to the consumer in *MacPherson* was in negligence, and, as such, permitted the manufacturer to avoid liability if the consumer could not prove that the defect which caused his injury was the result of the manufacturer's carelessness. While this was an improvement for injured consumers compared to the privity rule in *Winterbottom*, it did not help consumers who were injured by defects that were not the result of negligence or, if they were, the consumer could not prove that they were the result of negligence.

[7] 217 NY 382 at 389 (NY 1916).

[8] The "decision swept the country." William L Prosser, "The Assault on the Cathedral (Strict Liability to the Consumer)" (1960) 69 Yale LJ 1099, 1100.

[9] See, eg, *Flies v Fox Bros Buick Motor Co*, 218 NW 855 (Wis 1929).

Two doctrines developed in the early twentieth century which offered consumers a chance to recover from manufacturers even if they could not demonstrate fault. Both would fade away as modern products liability doctrine took effect in the 1960s but they are worth reviewing since they have paved the way to subsequent developments and still inform the American approach to the problems and issues at stake.

2.1.1. Implied Warranty Theory

By the early twentieth century many American states had adopted an implied warranty theory for food. Prosser counted twenty-two states that had adopted an implied warranty of fitness for food by either judicial decision or statute.[10] Under this theory, the seller of food—whether the retailer or the manufacturer—was to have warranted that the food was uncontaminated. This was a contract theory, and no proof of negligence was required for a finding of liability.[11] The rule of strict liability for contaminated food stood on a separate and independent ground than the rule articulated in *MacPherson*, and early on in its history there was some confusion as to whether it was a tort or contract rule. As one court in 1920 said in connection to a case of food poisoning caused by a contaminated can of beans:

> If we call it a duty to use care in the preparation and manufacture, then, in that sense, a breach of that duty would constitute negligence. Or it may be treated as a representation or a warranty that, because of the sacredness of human life, food products so put out are wholesome. In either event, a failure in this respect is a breach of duty and a breach of warranty, and the plaintiff suing may rely on either or both, and, when he makes a prima-facie case, he is entitled to go to the jury on the question as to whether defendant's evidence negatives plaintiff's prima-facie case.[12]

How exactly a consumer would carry his burden of proof of unreasonable care by the defendant in a case like this if he chose to go to the jury on a negligence theory is the subject of section 2.1.2, but for the moment let us remain on the option of implied warranty. It clearly had the advantage of requiring no proof of unreasonable care and in all other respects it served the same

[10] Prosser (n 8) at 1108.
[11] Prosser (n 8) at 1104.
[12] *Davis v Van Camp Packing Co*, 189 Iowa 775, 801 (Iowa 1920).

functions as tort law: the damages included personal injury and the obligation contained within the warranty extended not only to the consumers, but to others to whom the consumer might serve the food, such as his family and guests in his household.[13] As a model for products liability generally, it seemed to be an improvement, at least from the perspective of the injured consumer.[14]

But the limitations of the theory of implied warranty must also be noted. As a common law doctrine, it arguably was developed, or developed most completely, in the case of contaminated food. The theory was later extended more broadly under a variety of model laws, such as the Uniform Sales Act[15] and the UCC. Under UCC § 2-314 (2)(c), every sale of goods has, unless disclaimed, an implied warranty of that the product "is reasonably fit for the ordinary purposes for which such goods are used." As James Henderson and Aaron Twerski put it, "along with the 'good news' " of warranty law "the "bad news" was quite substantial."[16] UCC § 2-318 extended the warranty to include the consumer's household, but until *Henningson v Bloomfield Motors, Inc.*,[17] the implied warranty in UCC § 2-314 (2)(c), extended only to the party with whom the consumer had privity, which in most cases would be a store, not the manufacturer. This put the consumer in a worse position than he would have been in tort law if he could prove negligence.

The law of sales had other problems, including the requirement that prompt notice must be given by the purchaser to the seller and manufacturer in event of the breach of warranty (this becomes, for unsophisticated persons, a "trap for the unwary"), as well as the UCC's statute of limitations, which ran from the tender of delivery.[18] The problems were so great that Prosser concluded in 1960 that "the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish."[19] As the Supreme Court of California concluded in 1963, "the remedies of injured consumers ought not to be made to

[13] See Mark A Geistfeld, *Principles of Products Liability* (Foundation Press 2006) 14.

[14] As Karl Llewellyn put it, "[t]his is not a question of food. This is a question of consumer [...] [the contaminated food cases] were typical of a general trend." Karl N Llewellyn, "On Warranty of Quality, and Society: II" (1937) 37 Colum LR 341, 404–405.

[15] 1 Uniform Laws Ann §§ 12–16 (1950).

[16] James A Henderson & Aaron D Twerski, *Products Liability: Problems and Process* (8th edn, Wolters Kluwer 2008) 15.

[17] *Henningson v Bloomfield Motors, Inc*, 32 NJ 358, 161 A2d 69 (NJ 1960).

[18] *Greenman v Yuba Power Prods, Inc*, 377 P2d 897, 900 (Cal 1963).

[19] Prosser (n 8) at 1127.

depend upon the intricacies of the law of sales," and it concluded, as has most American jurisdictions, that the sounder footing for strict products liability was the law of torts.[20]

2.1.2. Res Ipsa Loquitur

The doctrine of res ipsa loquitur ("the thing speaks for itself") is a common law doctrine that allows the fact-finder to infer that the defendant's conduct was negligent because of the occurrence of the accident. It is a doctrine that allows juries to decide cases that would otherwise be normally decided on behalf of the defendant on a motion for summary judgment[21] (for obvious reasons having to do with human psychology, the res ipsa loquitur is not typically employed when the fact-finder is the judge, but, in theory, it could be).

In a contaminated food case, like the one reviewed above, if the case went forward as a negligence case, it is likely that the plaintiff would invoke res ipsa loquitur to carry the burden of proof on negligence. This strategy clearly could be extended from contaminated food to the defective container in which the food was transported and sold to the consumer. One of the earliest cases in which the potential of res ipsa loquitur as a comprehensive option for products liability was *Escola v. Coca Cola Bottling Co.*[22] In this case the plaintiff was not a consumer but a waitress who was injured when a bottle of soda exploded, cutting her hand. She sued the company that filled the bottle with soda under the standard negligence principles established under *MacPherson*. The trial judge allowed the plaintiff's case to reach the jury despite the fact that she admitted that she had no evidence whatsoever about how the explosion occurred other than evidence that the bottle was not subjected to any unusual forces that could have caused the explosion after it was delivered to her place of employment by the defendant. She argued that, under the doctrine of res ipsa loquitur the jury could conclude that some unidentified unreasonable act on the part of the bottler caused the bottle to explode, since normally bottles that have been handled reasonably do not explode. An appeal was made by the defendant after the jury found for the

[20] *Greenman* (n 18) at 901 (quoting *Ketterer v Armour & Co*, 200 F 322 (DNY 1912)).

[21] In principle, trial by jury is the rule for both tort and contract cases, but in contractual litigation juries are often excluded by the (growing) practice of including a jury waiver in contracts. See Stephen J Ware, "Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights" (2004) 67 L&Cont Probs 167–205.

[22] *Escola v. Coca Cola Bottling Co.*, 150 P2d 436 (Cal 1944).

plaintiff. The California Supreme Court upheld the trial judge's decision to apply the doctrine of res ipsa loquitur to the case.[23]

In a concurrence, Justice Traynor argued that the court had reached the correct result but for the wrong reason. He argued that the doctrine of res ipsa loquitur could not be applied in this case and, further, that the court's inclination to stretch the doctrine to allow plaintiffs to succeed in cases like *Escola* was unnecessary. His argument against the application of of res ipsa loquitur had technical, pragmatic, and theoretical dimensions. Technically, the doctrine can only be applied to cases where the accident attributed to the instrumentality in the defendant's control could not have occurred in the absence of negligence by the defendant, and testimony by various witnesses (including a witness from the company that made the bottles) clearly established that the bottle may have possessed a defect as a result of no one's fault.[24] As a tactical matter, Traynor argued, encouraging plaintiffs to seek redress through negligence and res ipsa loquitur was a losing game, since defendants could still win summary judgment in these cases where they can provide "clear, positive, uncontradicted" and credible evidence that they had in place adequate safety measures at the place of production, and the plaintiff will often not be able to challenge the defendant's rebuttal.[25] As a theoretical matter, Traynor argued, the liberal application of res ipsa loquitur should be seen for what it really was—a legal fiction, much like the idea of implied warranty, to smuggle strict products liability into the common law.[26]

As a matter of policy, the argument for strict liability in tort, unmediated by negligence or contract doctrine, was straightforward. First, by placing the cost of all accidents resulting from the activity on the manufacturer, the manufacturer will be incentivized to reduce the costs of accidents, even those accidents for which it could not be held liable under negligence. Second, assuming that perfect safety is unachievable and accidents will inevitably occur, the manufacturer is in a better position to pay for the cost of the accident in comparison with the consumer, and it is fairer to make the

[23] *Escola* (n 22) at 439.

[24] See Geistfeld (n 13) 23, according to whom in *Escola* the court misapplied the doctrine of res ipsa loquitur.

[25] *Escola* (n 22) at 461 (quoting *Blank v Coffin*, 126 P2d 868 (Cal 1942). The plaintiff's inability to rebut could be a matter of fact (in *Escola* there was evidence that it was commercially impracticable to inspect every bottle) or process (because the plaintiff could not afford to win a "battle of the experts").

[26] For example: "[i]t is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence" and "[i]n the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer." *Escola* (n 22) at 441–442.

manufacturer pay, since then the cost of the accident is spread out among all the users of the product (since "the risk of [accident] is a constant and a general one [...] [a]gainst such a risk there should be general and constant protection").[27]

2.2. The Rise of Strict Liability

By the 1960s three distinct theoretical arguments for strict liability for injuries caused by products had emerged: (a) deterrence, (b) cost spreading, (c) fairness. The normative valence of each of these theories will explain, to some extent, the development of products liability in the following decades.

(a) Deterrence. As Traynor noted in *Escola*, by forcing the costs of an accident on the producer, the producer "internalizes" the cost of the accident and is thereby left with a choice: either to absorb it or reduce it.[28] Accident cost reduction seemed to be within the capabilities of many large corporations; the only question was how to get them to achieve it. One approach available to society is regulation—to determine safe practices and then to order private firms to adopt them. But this kind of "command and control" approach was viewed with skepticism for numerous reasons, ranging from doubt over the efficacy of government actors to make the most efficient safety decisions to doubt that American political culture would accept regulation through government edict.[29] There was a great deal of optimism that private enterprises could achieve great safety gains if they put their efforts toward doing so.[30]

[27] *Escola* (n 22) at 441.

[28] This is the central insight of the theory of "enterprise liability." Enterprise liability was developed by many scholars associated with the legal realist movement such as Fleming James Jr, Leon Green, and Albert Ehrenzweig. See Anthony J Sebok, "The Fall and Rise of Blame in American Tort Law" (2003) 68 Brook LR 1031–1051 (2003). It is also, of course, an insight associated with Guido Calabresi, who explicitly accepted the premises of the earlier enterprise liability scholars. See, eg, Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Yale LJ 499–553.

[29] See Jeffrey O'Connell, "Expanding No-Fault Beyond Auto Insurance: Some Proposals" (1973) 59 Va LR 749, 806–812.

[30] Large organizations could reduce overall costs if they could (1) remove consumers from a dangerous position; (2) train them to act safely despite their accident proneness; or (3) construct prophylactics so that when consumers act unsafely (an inevitable event), their injury is ameliorated. Of these three options, industrial America was especially keen on (2) and (3). See John Fabian Witt, "Speedy Taylor and the Ironies of Enterprise Liability" (2003) 103 Colum LR 1, 37 (describing the work of "safety engineers" on behalf of large corporations who wished to reduce their workman compensation costs after 1910).

There was, of course, also a political context to the belief that defendants could do more to reduce accidents than they were already doing. The consumer movement, which started with the publication of Sinclair Lewis's *The Jungle*[31] and reached its zenith with the publication of Ralph Nader's *Unsafe at Any Speed*,[32] fed a perception that private manufacturer's had no incentive to pursue safety and that both the government and consumer market behavior were too weak to drive them to invest in greater safety.

(b) Cost spreading. Again, as Traynor noted in *Escola*, even in an ideal world where manufacturers chose to invest in safety, accidents would still occur. This is for two reasons. First, perfect safety is simply impossible in this world, given the laws of statistics and the reality of human psychology.[33] Second, even where safety can be increased (and sometimes increased by a great deal), it is simply not rational to do so because overinvestment in safety is inefficient from a standpoint of aggregate social welfare.[34] This conclusion—which comes from the so-called Hand Test for negligence—was taken by advocates of strict liability as an argument for spreading the costs of inevitable (or cost-justified) accidents on all the users of a product.[35] The cost-spreading argument was not motivated by a suspicion of the manufacturer, but rather the opposite: it saw the manufacturer as a trustworthy intermediary to transfer the cost of accidents among all the users of a product. As Jeffrey O'Connell (who could not be described as a friend of the plaintiffs' bar) saw it, the decision to permit a risky activity was a decision by society to allow a certain number of accidents.[36] Manufacturers were the most effective intermediaries to channel the true cost of those risky activities back to those members of society who were interested in engaging in those activities.[37] Without strict liability, people would engage "unwittingly [in] more of that activity [...] than people would choose if its full costs were known."[38]

[31] (Doubleday 1906).

[32] *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (Grossman Pub 1965).

[33] James believed that most accidents were the inevitable consequence of certain persons being more "accident-prone" than others. Fleming James Jr & John J Dickinson, "Accident Proneness and Accident Law" (1950) 63 Harv LR 769–795.

[34] See Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press 1970); and William M Landes & Richard A Posner, "A Positive Economic Analysis of Products Liability" (1985) 14 J Leg Stud 535.

[35] See George L Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law" (1985) 14 J Leg Stud 461.

[36] Jeffrey O'Connell, *The Lawsuit Lottery: Only the Lawyers Win* (Free Press 1979) 183–184.

[37] O'Connell (n 29) at 781.

[38] O'Connell (n 36) at 184.

(c) Fairness. This approach views the political and social relations between consumers and producers very differently than the cost-spreading approach. Under this perspective, the act of selling a product in a market society is a private act that, while legal and perhaps desirable, is also an act of self-interest. The seller of a product gains from the imposition of risk of injury on the purchaser and the public in general. Even if the risk cannot be eliminated completely, or eliminated without making the cost unreasonably high, the fact remains that the seller is making a financial gain and the consumer or public suffer a risk of personal injury. Therefore, from the perspective of fairness (or corrective justice) the party who makes the gain in the transaction must repair the losses that flow from the transaction.[39] This approach is arguably an extension of the contract-based reasoning that motivated the effort to ground products liability on implied warranty theory.[40]

2.3. The Modern Doctrine. The Second Restatement

In 1964, the above rationales were summarized by the American Law Institute in § 402 A of the Restatement Second of Torts.[41] According to § 402 A (1), the seller of a product

> in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property.

[39] See Virginia E Nolan & Edmund Ursin, "The Deacademification of Tort Theory" (1999) 48 Kan LR 59, 100–104.

[40] Dan B. Dobbs, *The Law of Torts* (West Group 2000) 976, according to whom the arguments put forward by Marshall Shapo (see Shapo (n 1)) in favor of strict liability are based on the latter's view that sellers are obliged to make good on the implicit promise of safety communicated by their act of entering the market.

[41] § 402 A of Restatement Second of Torts (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The term "Product" goes undefined in § 402 A.

The seller is liable even if he "has exercised all possible care in the preparation and sale of his product" and the user or consumer "has not bought the product from or entered into any contractual relation with the seller."[42] While the section leaves the notion of product undefined,[43] this has been always understood to cover personal property, including electricity but excluding vaccines and drugs, which were made subject by cmt k (devoted to "unavoidably unsafe products") to special rules.[44]

Section 402 A clearly reflects the influence of warranty. First of all, the rule imposes strict liability following from the *commercial* sale of a defective product. Section 402 A holds every commercial participant in the manufacturing and distribution process, including retailers, strictly liable for physical harm to consumers and users, so as to maximize latter's chances of getting recovery and to create incentives on downstream participants in the manufacturing and distribution chain to exert pressure on manufacturers to produce safer goods.[45] Second, the test for defectiveness is modeled upon the law of warranty, insofar as it is grounded on the reasonable expectations of ordinary consumers about product safety:

> the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.[46]

[42] See Restatement Second of Torts § 402 A (2), respectively (a) and (b).

[43] See Michael D Green & Jonathan Cardi, "Product Liability in United States of America," in Piotr Machnikowski (ed), *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies* (Intersentia 2016) 575, 583.

[44] According to cmt k, [t]he seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

[45] Mathias Reimann, "Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?" (2003) 51 AJCL 751, 764 (2003) (who also notes that many states limit retailers' liability by requiring fault).

[46] § 402 A, cmt i. On the warranty legacy of this version of the test, see W Page Keeton, "The Meaning of Defect in Products Liability Law—A Review of Basic Principles" (1973) 45 Mo LR 579, 589; Gary Schwartz, "Foreword: Understanding Strict Liability" (1979) 67 Cal LR 435, 438; John Wade, "Strict Products Liability" (1989) 19 The Brief 8, 57; Jane Stapleton, *Product Liability* (Butterworths 1994) 10–15.

By linking the idea of a defective product to consumer expectations rather than lack of care on the part of the seller, while at the same time eliminating the requirement of contractual privity, § 402 A brought together elements of negligence and warranty law to create a new form of tort liability.[47]

As is well known, the new tort proved to be extremely influential. In the 1960s and 1970s, as cases started to multiply, litigation moved from denouncing obvious manufacturing defects (such as those affecting exploding soda bottles and nonfunctional car brakes) to attacking products that should have been made safer than they were by adding safety features, modifying the design, or accompanying them with instructions or warnings. A tripartition between manufacturing, design, and warnings defects therefore started to emerge: manufacturing defects were defects arising accidentally during production; design defects concerned products that were (correctly made but) affected by flaws in their conception; and warning defects referred to cases in which the producer/seller failed to warn of reasonable dangers or to provide consumers with proper product use instructions.[48] Although the consumer expectation test posed the difficulty of determining who the "average" consumer was and whose expectations were to be taken into account,[49] manufacturing defects obviously fell beneath any average consumers' expectations. The test, however, proved much less satisfactory when applied to design and instruction/warning defects, with regard to which consumer expectations are often vague or nonexisting. The dissatisfaction with the indeterminacy of the consumer expectations test for these kinds of cases, as well as worries about the aggressiveness of the plaintiffs' bar, led since the mid-1970s many courts to differentiate more sharply among types of defects and to evaluate cases of design and warning defects through the lens of the so-called risk-utility test[50] and of negligence-based

[47] Green and Cardi (n 43) 582.

[48] Reimann (n 45) 769–770.

[49] James A Henderson & Aaron D Twerski, "What Europe, Japan and Other Countries Can Learn from the New American Restatement of Product Liability" (1999) 34 Tex Int'l LJ 1, 3. The problem is particularly hard in case of products injuring bystanders. In such cases, American courts tend to consider the expectation of purchasers of the product: see *Bellotte v Zayre Corp*, 352 A2d 723 (NH 1976) (a five-year-old child was burned when he was playing with matches and his cotton pajama top caught fire. The court held that the expectations as to the pajama safety were those of the parents who purchased the pajama for their kid).

[50] According to such a test, a product is defective only if the risk of danger created by the product outweighs its benefits. As to the development of such test, see the cases cited and arguments employed by John W Wade, "On the Nature of Strict Tort Liability for Products" (1973) 44 Miss LJ 825–851; Keeton (n 46) 592; John W Wade, "On Product Design Defects and Their Actionability" (1980) 33 Vand LR 551, 572–573; David G Owen, "Defectiveness Restated: Exploding the 'Strict' Products Liability Myth" (1996) U Ill LR 743, 754–755; David G Owen, "Toward a Proper Test for

doctrines.[51] From the 1980s, the judicial trend became consistently less plaintiff friendly[52] and, consequently, the frequency of product liability litigation began to decline.[53]

2.4. The Third Restatement

In 1998, skepticism of broad strict liability for defective consumer products was formally embodied in the American Law Institute's Restatement Third of Torts—Products Liability.

On the one hand, the Third Restatement maintains the focus on whoever is "engaged in the business of selling or otherwise distributing products" (§ 1), and on products as any "tangible personal property distributed commercially for use or consumption" (§ 1), including electricity[54] but excluding drugs and medical devices,[55] as well as blood.[56]

On the other hand, the new Restatement clearly embraces the tripartition of categories of defectiveness between defects in manufacturing, design, and instructions/warnings, and retains the consumer expectation test of

Design Defectiveness: Micro-Balancing Costs and Benefits" (1996–1997) 75 Tex LJ 1661, 1664. See also below, section 2.4.

[51] See for instance *Barker v Lull Engineering Co*, 573 P2d 443 (Cal 1978) (classifying product defects into the tripartition mentioned in the text).

[52] In the same period, courts started reducing punitive damages awards in products liability cases: see, for example, *Grimshaw v Ford Motor Company* (the so-called Pinto case), 119 Cal App3d. 757 (Cal 1981), in which the plaintiff, who suffered burns to 90% of his body because a design defect in his Pinto car, was awarded by the jury at the trial punitive damages in the sum of $125 million, but the sum was later reduced to $3.5 million on appeal. From the 1990s onward, the Supreme case law has imposed further restrictions on punitive damages awards: *BMW of North America, Inc v Gore*, 116 SCt 1589 (US 1996); *Philip Morris USA v Williams*, 549 US 346 (US 2007).

[53] Mathias Reimann, "Product Liability," in Mauro Bussani & Anthony J Sebok (eds), *Comparative Tort Law. Global Perspectives* (2nd edn, EE 2021)236, 238.

[54] Restatement Third of Torts—Product Liability § 19 (a).

[55] Restatement Third of Torts—Product Liability § 6 (b) (1). The manufacturer of a drug or medical device is liable only when the latter "is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided" (§ 6 (d)). Thus, under the Restatement Third, the liability game in cases of drugs and medical devices is "with the warnings candle, not with design": Michael D Green, "Prescription Drugs, Alternative Designs, and the Restatement (Third): Preliminary Reflections" (1999) 30 Seton Hall LR 207, 209.

[56] Restatement Third of Torts—Product Liability § 19(c). With regard to defective blood, the majority of American States have "blood shield laws," that is, statutes immunizing blood providers from strict liability or breach of warranty actions for injuries caused by contaminated blood products: see Green & Cardi (n 43) 584 and, under the comparative perspective, see below, in this chapter, section 4; as well as Chapter III, sections 2.2 and 3.1.1. It should also be noted that the Third Restatement also provides for special liability rules in case of defective food and used products: see respectively §§ 7 and 8.

defectiveness and strict liability only for the former category. Thus, according to § 2 (a), anyone engaged in the business of selling or otherwise distributing products is liable for harm to persons or property caused by manufacturing defects, that is, "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." By contrast, liability for products that are defectively designed arises under § 2 (b) only if

> the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, and the omission of the alternative design renders the product not reasonably safe.

In other words, § 2 (b) embraces the "risk-utility" test developed by many courts and scholars since the 1970s. As illustrated in the comments, the rationale of the rule is to create

> incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices."[57]

A similar rationale governs liability for defective instructions or warnings.[58]

[57] Restatement Third of Torts—Product Liability § 2, cmt a.

[58] Restatement Third of Torts—Product Liability § 2 (c). Under § 2 (c), anyone who sells a product with inadequate instructions or warnings is liable only if:

> the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

As § 2 cmt a specifies, the balancing of risks and benefits in judging product design and marketing must be done "in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution," that is, on the basis of what was reasonably foreseeable to manufacturers when they marketed the product (it is the so-called development risk defense).

The Restatement thus retains a strict liability rule only for manufacturing defects, while it makes design defects and inadequate instructions/warnings subject to what is essentially a negligence standard. Plaintiffs bear the burden of proof regarding all the elements of liability. The Restatement, however, eases that burden conceding that plaintiffs can establish the existence of a defect and causation by pointing to circumstantial evidence,[59] and admitting, in the case of liability for defective design or inadequate instructions or warnings, that the product's defectiveness might be proved by showing the product's "noncompliance with an applicable product safety statute or administrative regulation [...] with respect to the risks sought to be reduced by the statute or regulation" (§ 4 (a)).[60]

To escape liability, defendants might of course demonstrate that the elements of liability are absent or unproven; but they might also resort to defenses barring or reducing their liability. Besides the development risk defense for defects in design and instructions/warnings and cases of plaintiff's contributory or comparative fault (§ 17 (a)[61]), the doctrine of federal preemption, which blocks state products liability law when the defendant has complied with a federal statute that is thought to reflect, expressly or impliedly, the intent of Congress, provides a shield that is as good as a defense.[62]

[59] Restatement Third of Torts—Product Liability § 3:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

[60] It should further be stressed that, according to § 4 (b) of the Restatement Third, "compliance with an applicable product safety statute or administrative regulation [...] does not preclude as a matter of law a finding of product defect."

[61] According to the Restatement Third of Torts—Product Liability § 17 (a),

> [a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

[62] See Restatement Third of Torts—Product Liability § 2, cmt e. Federal preemption is a powerful defence whose contours are as vague as debated: Benjamin C Zipursky, "Federal Preemption and Products Liability" (March 11, 2014) Jotwell, at torts.jotwell.com/

The Restatement has no direct influence over statutes, so there remains untouched the several other statutory defenses to actions for product liability that might arise, for instance, from statutes of limitations or repose or statutory caps on damages.[63]

The adoption of the Restatement Third has created a great stir around the United States. Many jurisdictions have adopted at least parts of the Restatement Third either through legislation or judicially, while many others have not aligned with the standards and definitions it outlined, insofar as many provisions (in particular § 2 (b) and its negligence-based "alternative reasonable design" test) are thought not to reflect the law.[64] Yet it is fair to say that § 402 A of Restatement Second continues to wield considerable influence on state courts' case law on products liability.

The fragmented success of the Restatement Third, coupled with the variety of causes of actions, judicial doctrines, and statutory rules applicable to products liability claims across states, are among the factors that currently make the field "one of the most complicated areas of tort law."[65] Further complications are now posed by changes in supply management and development of new technologies. For instance, products liability litigation against e-commerce providers (such as Amazon) is now on the rise, although the majority of courts have so far refused to classify such providers as retailers and to hold them liable for damages caused by the defective goods sold through the platforms.[66] Defective software or AI have not so far been subject to product liability, but they might be as might "smart"

federal-preemption-and-torts-liability/; Catherine M Sharkey, "Products Liability Preemption: An Institutional Approach" (2008) 76 Geo Wash LR 449–521; as well as, and more in general, Mark A Geistfeld, "Tort Law in the Age of Statutes" (2014) 99 Iowa LR 957–1020.

[63] Green and Cardi (n 43) 603–605, 611–612.

[64] See Dominik Vetri, "Order Out of Chaos: Products Liability Design-Defect Law" (2009) 43 U Rich LR 1373, 1406–1408; James A Henderson & Aaron D Twerski, "The Products Liability Restatement in the Courts: An Initial Assessment" (2000) 27 Wm Mitchell LR 7.

[65] Green & Cardi (n 43) 616.

[66] *Fox v Amazon.com, Inc*, 930 F3d 415 (6th Cir 2019); *Eberhart v Amazon.com, Inc*, 325 F Supp 3d 393 (SDNY 2018); *Allstate NJ Ins Co v Amazon.com, Inc*, No 17–2738, 2018 WL 3546197 (DNJ 2018); see also *Loomis v Amazon.com, LLC*, 63 Cal App 5th 466 (Cal 2021) (classifying Amazon as a seller of a third-party defective hoverboard and therefore liable for the damage caused by the hoverboard when it got fire); *Bolger v Amazon.com, LLC*, No. D075738 August 13, 2020 (Cal 2020) (holding Amazon strictly liable for the injury caused by a defective battery offered on its website by a third-party seller). See Edward J Janger & Aaron D Twerski, "The Heavy Hand of Amazon: A Seller Not a Neutral Platform" (2020) 14 Brook J Corp Fin & Com L 259–273; Catherine M Sharkey, "Holding Amazon Liable As a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives" (2020) 115 Nw U LR 339–356.

products (eg, self-driving cars). The question, still hotly debated by scholars and largely unresolved, is who and under what conditions should be liable in such cases.[67]

3. Europe before the Directive

Even more fragmented are product liability developments in Western Europe.

Until the adoption of Directive 85/374/EEC, product liability developed on a national basis. English courts challenged the privity doctrine in the iconic 1932 case *Donoghue v. Stevenson*,[68] holding that manufacturers of defective products are liable in negligence to bystanders for the latter's personal injuries. Since the 1950s, French courts recognized that buyers of defective products have a direct contractual claim against the manufacturer for breach of warranty.[69] Italian courts definitely established that manufacturers were liable under a rule of presumed fault in 1964,[70] and Germany followed suit with the famous *Hühnerpest* case of 1968.[71] On paper, these divergences were superseded by the 1985 Directive, which required EEC (now EU) Member States to implement rules providing strict liability for manufacturers of defective products. Yet, as we will see, the Directive has given rise to scant litigation and limited harmonization, not the least because it only partially replaced national approaches to liability for defective products. We will first analyze the historical development of special product liability rules in England, France, Italy, and Germany, and then investigate the background, contents, and effects of adoption of Directive 85/374/EEC.

[67] Cf Steven Shavell, "On the Redesign of Accident Liability for the World of Autonomous Vehicles" (2020) 49 J Leg Stud 243–285; Alexander B Lemann, "Autonomous Vehicles, Technological Progress, and the Scope Problem in Products Liability" (2019) 12 J Tort L 157–212; Mark A Geistfeld, "A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation" (2017) 105 Cal LR 1611–1694; Bryant W Smith, "Automated Driving and Product Liability" (2017) Mich St LR 1–74.

[68] [1932] AC 562. Strictly speaking, *Donoghue v Stevenson* is a Scottish case; yet English law and Scots law are identical on the subject.

[69] See the lower instance cases on damage caused by defective pharmaceuticals, household appliances, and body-care products cited by Jean-Sébastien Borghetti, "The Development of Product Liability in France," in Simon Whittaker (ed), *The Development of Product Liability* (OUP 2010) 87, 91, fn 12–14.

[70] Cass 25 May 1964, no 1270, Foro it 1965, I, 2098.

[71] BGH 26 November 1968, BGHZ 51, 91 (Chicken Pest).

3.1. England

In nineteenth-century England, harms caused by defective products were primarily regarded as a contract law issue, governed by the basic principle of the law of sales known as "caveat emptor."[72] Yet, since the middle of the century, courts started recognizing important exceptions to the principle by recourse to the technique of implication of terms. Through the notion of an "implied warranty" of merchantability—later codified by section 14 of the Sale of Goods Act of 1893—English judges imposed strict liability upon sellers for buyers' losses (including consequential damage, whether personal injuries or damage to property) arising from defective goods.[73] Outside the scope of implied warranties, by contrast, courts held to the non-liability rule of *Winterbottom v Wright*,[74] and kept affirming that, absent exceptional circumstances, manufacturers of dangerous products owed no duty of care to the final users of their products.[75] Liability was exceptionally imposed to suppliers only in cases of damage caused by chattels that were thought to be dangerous in themselves (such as guns) and by chattels that, though not dangerous in themselves, were known to be dangerous by their suppliers.[76] There were earlier attempts to overturn the rule, such as William Brett's obiter in *Heaven v. Pender*,[77] but they remained largely unsuccessful until 1932.

[72] Simon Whittaker, "The Development of Product Liability in England," in Simon Whittaker (ed) (n 69), 51, 61–62.

[73] While the doctrine of implied warranty was initially limited to recovery of economic losses, English judges rapidly extended it to property damage and personal injuries caused to the buyer by the defects: cf *Brown v Edgington* [1841] 2 Man & G 279; *Randall v Raper* [1858] EB & E 84; *Randall v Newson* [1877] 2 QBD 102 (CA). See also Whittaker (n 72) 61–69.

[74] *Winterbottom v Wright* [1842] 152 Eng Rep 402.

[75] Cf *Bostock &Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 and *Earl v Lubbock* [1905] 1 KB 253.

[76] See *Langridge v Levy* [1837] 2 M&W 519 (a seller of a gun that he knew to be unsafe was held liable for fraud to the buyer's son, who was injured by the gun being fired); *Clarke v Army and Navy Co-operative Society* [1903] 1 KB 155 (the seller of a tin of disinfectant powder was held liable to the buyer, as he knew it was likely to injure if special care was not taken and he gave no warning; since the seller had excluded warranties of quality, the buyer brought the claim in tort).

[77] In *Heaven v Pender* [1883] 11 QBD 503, a ship painter was injured at work due to the defectiveness of the ropes he was supplied with by the dock owner. He was allowed to recover against the dock owner on the basis of the latter's duty of care as occupier of land to invitees. In his opinion supporting liability, William Brett opined that the issue was whether the defendant owed a duty of care to the plaintiff. In a well-known passage (later cited by Lord Atkin in Donoghue), Brett argued that

> [w]henever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger (ibid at 509).

In 1932 a divided (3-2) House of Lords upheld the possibility of a claim for damages for personal injuries under the tort of negligence by a person injured by ingestion of a contaminated ginger beer against the beer's manufacturer, although the plaintiff was not party to the contract under which the beer was distributed. While the minority's position was to uphold the approach in *Winterbottom v. Wright*,[78] the majority treated *Winterbottom* as a contract case, which could not be considered an authority "for duties alleged to exist beyond or without contract."[79] Relying upon Brett's opinion and on American decisions that accepted manufacturers' liability,[80] the majority held that

> [a] manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.[81]

As is well known, the decision and Lord Atkin's famous invention of the "neighbor principle" not only overturned the precedents barring damage recovery to plaintiffs because of the lack of privity and established the modern foundation of English product liability law, but also influenced the development of negligence theory (in the domain of physical injuries) wellvbeyond the field of liability for defective products.

Subsequent decisions extended the subjective scope of the *Donoghue v. Stevenson* rule, applying it in favor of causal bystanders[82] and against whoever was involved in the production process (including, for instance, assemblers).[83] The rule was applied to products other than food (such as

[78] [1932] AC 562 at 577, per Lord Buckmaster.
[79] Ibid at 593–594, per Lord Atkin.
[80] Ibid at 598–599 (Lord Atkin), 603 (Lord Thankerton), 617–618 (Lord MacMillan).
[81] Ibid at 599 (Lord Atkin).
[82] *Kubach v Hollands and Another (Federick Allen & Son (Poplar) Ltd, Third Party)* [1937] 3 All ER 803 (a supplier who sold a dangerous chemical to a school without warning was held liable to a student injured when the chemical exploded in a school experiment).
[83] *Malfroot v Noxal Ltd* [1935] 51 TLR 21 (an assembler was held liable because it negligently fitted a side-car to a motorcycle. The side-car came off and injured the passenger); *Howard v Furness Houlder Argentine Lines Ltd and A & R Brown Ltd* [1936] 2 All ER 781 (an assembler was held liable because it negligently re-assembled a valve chest with the bridge upside down for a steamship. An explosion occurred in the ship and injured an electric welder).

clothes[84] and chemicals[85]); occasionally, courts also held manufacturers liable in negligence for defective instructions and warnings and defective design of products.[86]

In appreciating the revolutionary reach of the *Donoghue* decision, one should however keep in mind at least two points. First, the *Donoghue* ruling did not prevent many courts from remaining loyal to displaced traditional doctrines of implied warranty and contractual privity, with the result that, even after *Donoghue*, many cases fell (and were rejected) under the traditional warranty-based remedial system.[87] Second, *Donoghue* established a principle of liability in negligence: in order to recover, plaintiffs had to show negligence of the manufacturer. Even though some rulings held that evidence of negligence could be inferred from the facts of the case,[88] a manufacturer could always escape liability by showing that he had taken all reasonable care in the circumstances to avoid the harmful attribute of the product in question.[89]

It was only in the course of the 1970s, after the outbreak of the Thalidomide scandal,[90] that public concern for the state of the law resulted in numerous calls for reform. In 1978, a Royal Commission on Civil Liability and Compensation

[84] *Grant v Australian Knitting Mills, Ltd* [1936] AC 85 (the plaintiff contracted dermatitis by a defective woolen underwear he bought from a retailer; both the retailer and the producer were held liable).

[85] *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88 (glass ampoules containing a chemical which combined explosively with water were unfit for their purpose when bearing a warning only of "harmful vapour").

[86] See *Vacwell v BDH Chemicals Ltd* [1971] 1 QB 88 and *IBA v EMI* [1981] 14 BLR 1 (IBA ordered a television mast from BICC; the mast was defectively designed by BICC and built by EMI; BICC was found liable in contract while EMI was liable for the negligent build).

[87] *Daniels and Daniels v R White &Sons Ltd and Tarbard* [1938] 4 All ER 258 (a man bought a bottle of lemonade—which, unknown to him, contained carbolic acid—and drank it with his wife; since the husband bought the bottle, his action for implied warranty was successful, while the absence of privity was fatal to his wife—on this case see also below, n 89). On the resistance of the pre-*Donoghue* perspective, see also Michael Lobban, "The Law of Obligations: The Anglo-American Perspective," in Heikki Pihlajamäki, Markus D Dubber & Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 1037–1043; Ken Oliphant & Vanessa Wilcox, "Product Liability in England and Wales," in Machnikowski (ed) (n 43) 174, 175–176; Whittaker (n 72) 74–77.

[88] *Grant* (84) at 101. It is however debated whether the ruling accepted the application of res ipsa loquitur. See Whittaker (n 72) 74.

[89] *Daniels and Daniels* (n 87) (a man purchased a bottle containing carbolic acid; his claim in negligence against the manufacturer of the bottle failed, since the latter proved he adopted a fool-proof method of cleaning, washing, and filling bottles; however, the manufacturer was held liable under the doctrine of implied warranty).

[90] As is well known, Thalidomide was a medication for anxiety and morning sickness released in the early fifties by a German pharmaceutical company and marketed without having been tested on pregnant women. It later resulted that the use of thalidomide in pregnant women provoked miscarriages or severe deformities in the fetuses. On the scandal, see Richard Goldberg, *Medicinal Product Liability and Regulation* (Hart 2014) 1–17; Henning Sjöström & Robert Nilsson, *Thalidomide and the Power of the Drug Companies* (Penguin 1972).

for Personal Injury, established in 1982 under the chairmanship of Lord Pearson, recommended the introduction of strict liability for defective products.[91] The suggestion was not given effect by the Parliament, but the issue was overtaken seven years later by the developments at the European level, which resulted in the adoption of the (still-in-force) 1987 Consumer Protection Act.

3.2. France

On the other side of the Channel, France took since the mid of the twentieth century a different route, firmly grounded in contract law. Before 1950s, accidents that nowadays would be qualified as products liability injuries were either accepted as an unavoidable cost associated with the benefits of industrialization, or treated as cases of custodial liability of the owners of the products (most of the time: machines) which caused injuries.[92]

In the 1950s, with the gradual development of a mass consumer society that allowed wide access to consumer goods, (what nowadays would be called) product liability claims started to multiply.[93] Under the French principle of *non-cumul* (according to which victims of contractual harms cannot sue their counterpart under tort rules),[94] such claims were not framed in tort, though. Rather, they were largely based on the idea that the seller of a defective product is liable to direct and subsequent buyers for breach of warranty, and in particular of the warranty that the product did not have latent defects (*garantie des vices cachés*, provided by art 1641 and ff. of the French Civil Code).[95] The *garantie des vices cachés* was thought to be actionable by buyers not only against their direct seller, but also against any person higher up in the chain of sales, including manufacturers. This was made possible thanks to the judicially made principle of the *action directe*, according to which, in a chain of contracts transferring the property of a thing, the latest owner was

[91] Royal Commission on Civil Liability and Compensation for Personal Injury (1978), Cmnd 7054, Ch 22.

[92] Borghetti (n 69) 89–90. Reference to custodial liability was made possible by the liberal interpretation of (former) art 1384 of the Civil Code that the French Court of cassation established in 1896, with the seminal arrêt *Teffaine* (Cass civ 16 June 1896, DP 1897.1.433), making the keeper of a thing responsible for the damages caused to third parties by the thing, regardless of any fault on her part.

[93] It is not by chance that the first article formally devoted to products liability was published in 1955: Henri Mazeaud, "La responsabilité civile du vendeur-fabricant," RTD civ 1955, 611–621.

[94] See also Chapter 3, section 2.3.

[95] See the lower instance cases on damages caused by defective pharmaceuticals, household appliances, and body-care products cited by Borghetti (n 69) 87, 91, fns 12–14.

allowed to raise a claim in contract against any of the previous owners of that thing, despite lack of privity.[96] A further step forward was taken in the late 1960s, when the *Cour de cassation* applied to sales made by professional dealers an irrebuttable presumption that the seller was aware of the product defectiveness. In case a defect in the thing caused death, injuries or other damage to the (direct or indirect) buyer, the seller was bound to compensate the (direct or indirect) buyer, even if it was materially impossible for him to discover the defect.[97]

Alongside such developments, French courts developed a different rule for bystanders, that is to say, victims who could not qualify as subsequent buyers of the defective product. Given that the latter could not avail of the *action directe*, since the 1960s French case law has been allowing them to sue sellers and manufacturers of defective products in tort under (former) Article 1382 (now art 1240) of the *Code Civil*, on the ground that the sale of a defective product constitutes negligence toward the third parties damaged by the same products.[98] Although the action was based on fault, courts alleviated plaintiffs' burden of proof by holding that the manufacturing and sale of a defective good by a professional was a sort of negligence per se, so that plaintiffs only had to demonstrate (their damage, causation and) the defectiveness of the product in order to obtain compensation from either the seller or the manufacturer of the product.[99]

At the time in which the EEC Directive was adopted, French law was therefore subjecting manufacturers *and* sellers to strict or semi-strict liability for damages caused by defective goods produced or sold, either by virtue of contractual warranties or on the basis of the formally fault-based (but de facto semi-strict, especially for manufacturing defects) tort liability.[100] As we will

[96] The principle was developed as early as the 1820s: see Cass civ 25 January 1820, S 1.171, as well as Jean-Sébastien Borghetti, "Product Liability in France," in Machnikowski (ed) (n 43) 207; Borghetti (n 69) 93–94; Vernon V Palmer & Christel de Noblet, "Case 9—France," in Mauro Bussani & Vernon V Palmer (eds), *Pure Economic Loss in Europe* (CUP 2003) 306–308.

[97] Cass civ 24 November 1954, JCP 955.II.8565; Cass com 1 July 1969, Bull civ IV, no 243; Cass com 20 January 1970, JCP 1972, II, 17280; Cass com 27 April 1971, JCP 1972.II.17280; see also Borghetti (n 96) 206.

[98] This line of reasoning, already pioneered by a few decisions by the Court of cassation in the 1930s (Cass civ 22 July 1931, GazPal 1931, 2, 683; Cass req 8 March 1937, S 1937, 1, 241), was definitely established in the 1960s: see Cass com 20 March 1961, Bull civ III, no 148; Cass civ 11 December 1961, Bull civ I, no 595; Cass civ 16 March 1966, Bull civ I, no 189; Cass civ 5 December 1972, D 1973, 401.

[99] Borghetti (n 96) 207–208; Borghetti (n 69) 96–97.

[100] As Borghetti (n 69) 98, notes, liability for failure to warn was always considered as being grounded on fault, as was liability for defectively designed products, insofar as, in order to demonstrate the existence of a defect, the claimant in the latter cases had to demonstrate that the product had not been designed as it should have been, i.e., that the manufacturer had been negligent in designing the product.

see, the French regime was under many points of view broader and stricter than the European one, since it imposed strict (contractual or tortious) liability to sellers in addition to manufacturers and did not make available to them all the defenses contemplated by the Directive (most notably, the development risk defense). Such discrepancies may explain why it took France fifteen years to transpose the Directive into (former) arts 1386-1 to 1386-18 (now arts 1245-1 to 1245-18) of the Civil Code.[101]

3.3. Italy

Italian product liability law developed along different lines than the French ones.

The Italian 1865 Civil Code mandated sellers' warranty for the hidden defects of the goods sold, provided that the defects were known or should have known to them.[102] Yet, the majority of courts and scholars always applied provisions on warranty only between sellers and buyers, thus excluding the possibility of a buyer's direct action against previous sellers (including the manufacturer) in the contractual chain, and claims by bystanders who were not involved in the contract.[103]

Equally excluded, under the empire of the 1865 Civil Code (which, at its art 1151, contained a general clause of fault liability identical to art 1382 of the French Civil Code), was a tort action against sellers and manufacturers. Both courts and scholars displayed a considerable reluctance to apply tort law rules to award compensation for losses caused by defective goods. Such a position was based on technical and policy arguments: opening up to tort liability in these cases would have, on the one hand, emptied out the scope of rules on warranty; and, on the other hand, hindered economic and industrial development.[104]

Things changed with the enactment of the 1942 Civil Code. Since the entry into force of the Code, the Supreme Court interpreted the new tort law

[101] Borghetti (n 96) 209–211.

[102] See articles 1498, 1502, and 1503 of the 1865 Civil Code; the same provisions were maintained in the 1942 Civil Code, articles 1494–1495.

[103] Cf the literature and the case law quoted by Giovanni Comandé, "Product Liability in Italy," in Machnikowski (ed) (n 43) 275, 276–277; Nadia Coggiola, "The Development of Product Liability in Italy," in Whittaker (ed) (n 69) 192–205.

[104] See, eg, App 15 April 1932, Mon trib 1932, 510 (holding that the manufacturer of a soda bottle which exploded in a restaurant and injured a client could not be held liable for the victim's injuries since no fault of the manufacturers was proved), as well as the authors quoted by Coggiola (n 103) 196–197. One of the few scholars who opposed such position was Gino Gorla, *La compravendita e la permuta* (Utet 1937) 168–169, who supported sellers' liability in tort for injuries caused to third parties.

rules (which were not very far away from the old ones) by recognizing that bystanders damaged by manufactured goods had a tort law claim against the manufacturer. Since the end of 1940s, manufacturers have been held liable, for instance, when a defective hairdressing device caused harm to a friend of the original buyer,[105] a defective toy gun's blasting injured a child,[106] a gas cylinder exploded, killing the wife of cylinder's owner.[107] A further development occurred in 1964, in the *Saiwa* case, when the Supreme Court reversed the burden of proving both the defectiveness of the product and the manufacturer's negligence. The plaintiffs, a married couple, bought a box of Saiwa biscuits from a retailer shop, ate them, and then suffered severe food poisoning. The *Corte di cassazione* excluded the retailer's liability, since he was not at fault, but held Saiwa—the manufacturer—liable under the general clause for fault liability (art 2043 of the Civil Code), insofar as plaintiffs proved they suffered food poisoning after eating the biscuits and the defectiveness of the biscuits was the only possible reason for the injury.[108] Although framed in terms of fault liability, the Court herein applied a rule of liability for presumed fault once the defect is (somewhat) proven. Subsequent case law followed suit.[109] In the 1970s, the first scholarly books on the subject of product liability appeared, devoting substantial attention to foreign experiences, and largely supported the new judicial interpretation,[110] which remained the rule until the implementation of the EEC Directive with the Presidential Decree no. 224 of 24 May 1988 (later replaced by articles 114 to 127 of the Consumer Code of 2005).

3.4. Germany

Given the wide scope and usually broad interpretation of German contract law, one might expect Germany, prior to the enactment of the EEC Directive, to have resorted to contractual rules and remedies to establish manufacturers' and sellers' liability for defective products. This was largely not the case.

[105] See Cass 19 February 1947, Nuova riv dir comm 1948, II, 97.
[106] Cass 21 October 1957, no 4004, Foro it 1958, 45.
[107] Cass 2 April 1963, no 819, Foro it 1963, I, 2197.
[108] Cass 25 May 1964, no 1270, Foro it 1965, I, 2098.
[109] See the cases quoted by Coggiola (n 103) 209–212.
[110] Cf Ugo Carnevali, *Responsabilità del produttore* (Giuffrè 1974); Carlo Castronovo, *Problema e sistema nel danno da prodotti* (Giuffrè 1979); Guido Alpa & Mario Bessone (eds), *Danno da prodotti e responsabilità dell'impresa: Diritto italiano ed esperienze straniere* (Giuffrè 1980).

To be sure, German courts and scholars never put in doubt that sellers were answerable in damages for personal injury and property damage caused to buyers of defective products, provided that the former knew or could have known the defect.[111] Yet, sale contracts of defective products never qualified as contracts for the protection of third parties (*Verträgen mit Schutzwirkung zugunsten Dritter*), thus denying victims of defective products the right to lodge a contractual claim against the product's manufacturer or seller in cases in which a contractual relationship was absent.[112]

Rather, since the start of the twentieth century, the few cases of (what in retrospect might be defined as) product liability were brought and adjudicated as tort law cases, either under negligence and vicarious liability rules (§§ 823 I and 831 BGB)[113] or under the general clause against intentional torts in violation of good morals (§ 826 BGB).[114]

Such cases, however, generated little interest in legal scholarship until the 1960s, when the problem of product liability suddenly exploded. In the 1960s, after years of postwar reconstruction, the downsides of economic development started to surface to the attention of the general public, as illustrated by the tragic Thalidomide scandal[115] (which led in 1961 to the approval of the *Arzneimittelgesetz*, a law imposing strict liability for injuries caused by defective pharmaceutical drugs[116]). At the same time, the ever-increasing dialogue between German and American scholars (many of which were German émigrés) made the former interested in developments

[111] See RG 9 July 1907, RGZ 66, 289 (1907), as well as the authorities quoted by Gerhard Wagner, "The development of product liability in Germany," in Whittaker (ed) (n 69) 114, 115–116. The unanimity of this interpretation existed in spite of the silence on this point of the original version of the German Civil Code of 1900, whose gap on warranties was filled only in 2002, when the German sales law was reformed.

[112] Ulrich Magnus, "Product Liability in Germany," in Machnikowski (ed) (n 43) 239; Wagner (n 111) 116.

[113] RG 25 February 1915, RGZ 87, 1 (the buyer of bath salt was injured because the salt was contaminated with glass fibers; he brought an action against the bath salt manufacturer, who was held liable for the simple reason that the product was defective when it was put into the chain of distribution).

[114] RG 17 January 1940, RGZ 163, 21 at 25 (Ford was held liable under § 826 BGB for accidents occurred because of a defective brake system in the cars sold that was known to Ford—on the flexibility shown by German case law in applying § 826 BGB see also Chapter 6, section 5.3). Of course, actions could also be brought under § 823 II BGB, whenever the plaintiff was able to prove that the defendant violated a statutory provision (for instance, regarding product safety) which specifically aimed to protect interests such as those infringed in the case at hand: Magnus (n 112) 240 (also quoting case law from 1968 onward).

[115] See above, n 90.

[116] German Medicinal Products Act (*Arzneimittelgesetz*) of 16 May 1961 (as amended by Federal Law of 16 December 2005).

in the field in the United States and gave rise to numerous studies devoted to the subject.[117]

It is against this context that the German Federal Supreme Court openly confirmed the tort law approach to product liability in the *Hühnerpest* (chicken pest) case of 1968[118] (which is usually thought to be the first German case in which product liability was expressly discussed as such[119]). The case involved a chicken farmer who had his chickens vaccinated by a veterinarian against fowl pest. The veterinarian used a serum that the defendant company produced. A few days after the vaccination, the fowl pest broke out and more than 4,000 chickens died. It was later found that the vaccine contained the active virus of the deadly (to chickens) Newcastle Disease. In affirming defendant's liability, the BGH expressly rejected contractual theories and rather resorted to §§ 823 I and 831, adding that, once the plaintiff proves the presence of a product defect, it was upon the defendant manufacturer to establish that the defect was not caused by the negligence of his business organization. The following case law reaffirmed the principle, expanding it to cover cases in which the defect became apparent only after the product was put in the market, for the manufacturer failed to monitor the performance of the product.[120] When the EEC Directive was adopted, Germany therefore already had in place a statutory strict liability regime for drugs and a judicial-made rule of tort liability for presumed fault for all other defective products.[121] German implementation of the Directive into the *Gesetz über die Haftung für fehlerhafte Produkte* (*Produkthaftungsgesetz*) in 1989 was therefore a rather straightforward process.

[117] See, eg, Werner Lorenz, "Produkthaftung," in Paul Mikat (ed), *Festschrift der Rechts- und Staatswissenschaftlichen Fakultät der Julius-Maximilians-Universität Würzburg zum 75. Geburtstag von Hermann Nottarp* (Müller 1961) 59.

[118] BGH 26 November 1968, BGHZ 51, 91 (1968). For an English translation, see Basil S Markesinis, John Bell, & André Janssen, *Markesinis's German Law of Torts* (5th edn, Bloomsbury 2019) 439.

[119] Magnus (n 112) 239; Markesinis, Bell, & Janssen (n 118) 457; Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Private Law* (Tony Weir transl, 3rd ed., Clarendon 1998) 666.

[120] Cf BGH 17 March 1981, BGHZ 80, 186 and BGHZ 80, 199 (two cases) (both cases concerned a fungicide that was sold for the protection of apples, but which failed because the organisms it was meant to kill had developed a resistance against the chemical used in the product; despite the fact that the failure of the product became apparent only after it had been put on the market, the BGH held that the manufacturer must monitor both the performance of the product and scientific progress in the field and is liable if he fails to do so).

[121] See, however, Wagner (n 111) 128, who stresses that the semi-strict nature of product liability fully applied to cases of manufacturing defects, but was less evident in cases of design and instructions defects, since in such cases plaintiffs, in order to prove the defect, were in fact requested to establish defendant's negligence.

4. The European Directive and Its Aftermath

In the mid-1970s, following mass tragedies such as the one caused by defective drug Thalidomide, and especially under German pressures, works for drafting a European directive on product liability commenced.[122] Officially, the initiative had the twofold aim of ensuring adequate levels of protection for consumers and of limiting legal divergences within the internal market, so as not to distort competition and affect the movement of goods.[123] As noted by commentators, however, the real driving force behind the Directive was to provide some states willing to enact reforms on the subject with "the confidence [...] to take the bold move of introducing strict product liability in the knowledge that they were not exposing themselves to a disadvantage

[122] A quick glance to the state of the art of product liability in other European countries before the enactment of the Directive (many of which, in 1985, were not part of the then EEC) confirms both an increasing trend toward the establishment of product liability, and the remarkable variety in time and space of the rules and doctrines applicable to such claims. Since the end of the 1930s Danish courts had established the principle that producers and suppliers were liable in negligence to buyers and bystanders for physical damage caused by dangerous/defective products (Marie-Louise Holle & Peter Møgelvang-Hansen, "Product Liability in Denmark," in Machnikowski (ed) (n 43) 155–156). Around the same period, Dutch case law too subjected manufacturers of defective products to fault liability in tort; a step further was taken in 1973 by the *Hoge Raad*, holding that, once the damage and defect were proven, fault was to be presumed (HR 2 February 1973, NJB 1973, 315; see also the case law collected by Ivo Giesen, "The Development of Product Liability in the Netherlands," in Whittaker (ed) (n 69) 152, 155–160). Since the 1960s, Austrian scholarship and courts by contrast preferred to resort to contract law, qualifying contracts between manufacturer and distributors as contracts with protective effect vis-à-vis third parties and thus entitling products' users to pursue contractual warranty and liability claims, even though they were not parties to the sale contract (cf Franz Bydlinski, "Vertragliche Sorgfaltspflichten zugunsten Dritter," JBl 1960, 359 and OGH 4 February 1976, 1 Ob 190/75, SZ 49/13; see also Bernhard A Koch, "Product Liability in Austria," in Machnikowski (ed) (n 43) 111, 113–114). In Eastern Europe, Polish and Hungarian case law established, respectively in the 1960s and in the 1970s, that sellers of defective products were not only contractually liable to buyers, but also liable under the general rules of fault liability in tort vis-à-vis third parties (see the cases quoted by Magdalena Tulibacka, *Product Liability Law in Transition: A Central European Perspective* (Ashgate 2009) 191–201; see also, as to Poland, Ewa Bagińska, "Product Liability in Poland," in Machnikowski (ed) (n 43) 377, 378–380. In Hungary, liability was based on the general fault rule, which put upon the defendant the burden of showing that he was not to blame: see art 339 of the Hungarian Civil Code of 1959. The same rule is now maintained under art 6:519 of the Civil Code of 2014. A similar reversal of the burden of proof, by contrast, was never included in the general provisions of Polish codifications: neither in articles 134 and 135 of the Polish Code of Obligations of 1933, nor in article 415 of the Polish Civil Code of 1964). By contrast, the gradual establishment in Sweden and Finland, from the 1970s onward, of public compensation schemes covering personal injuries—including, in the 1980s, schemes on injured caused by defective pharmaceuticals—rendered products liability claims in tort interstitial (Goldberg (n 90) 14–15). In Spain, only at the beginning of the 1980s the Tribunal Supremo admitted that producers could be liable in tort for negligence under Article 1902 of the Civil Code in case of damage suffered by persons who were not the direct buyers of the product (see the cases quoted by Miquel Martín-Casals & Josep Solé Feliu, "Product Liability in Spain," in Machnikowski (ed) (n 43) 407, 408–411; Miquel Martín-Casals & Josep Solé Feliu, "The Development of Product Liability in Spain," in Whittaker (ed) (n 69) 234, 237–248).

[123] This twofold aim will be later stated in recitals 2 and 1 of the final text of the Directive.

compared to other Member States."[124] Negotiations over the text lasted almost ten years because of political disagreement on many technical issues, such as the availability of a development risk defense and the provision about a ceiling on liability for death or personal injury.[125] The final text was approved on 25 July 1985 as "Council Directive 85/374/EEC on the approximation of the laws, regulations and administration provisions of the Member States concerning liability for defective products."

Under the partial influence of German law, as well as of American development at that time (as enshrined in the Second Restatement),[126] the Directive obliges Member States to implement a strict liability scheme under which "the producer shall be liable for damage caused by a defect in his product" (art 1), provided that plaintiffs "prove the damage, the defect and the causal relationship between defect and damage" (art 4). The ensuing provisions clarify that (i) "producer" only means the manufacturer of a product;[127] "damage" means death, personal injuriesm and damage to property exceeding 500 euros and affecting property other than the product itself;[128] "defect" means that a product does not provide the safety which a person is reasonably entitled to expect,[129] whereby "product" means any tangible and movable goods, including electricity[130] (but apparently excluding software and smart applications not included in physical products).[131] In other

[124] Duncan Fairgrieve, Geraint Howells, Peter Møgelvang-Hansen, Gert Staetmans, Dimitri Verhoeven, Piotr Machnikowski, André Janssen, & Reiner Schulze, "Product Liability Directive",in Machnikowski (ed) (n 43) 17, 26; see also Piotr Machnikowski, "Conclusions," in Machnikowski (ed) (n 45) 670, 680–681.

[125] At the end, the state-of-the-art defense was included in art 7 (e) of the Directive, but states were allowed to exclude it under art 15 (1) (b). The Directive provides no cap on liability, but states may adopt a ceiling, provided that it is above 70 million Euro: art 16 (1).

[126] Ulrich Magnus, "Some Thoughts on Germany's Contribution to European and Comparative Law" (2006) 38 Bracton LJ 87, 93; Geraint Howells & Mark Mildred, "Is European Products Liability More Protective than the Restatement (Third) of Torts: Product Liability?" (1997–1998) 65 Tenn LR 985–1030.

[127] Art 3 of the Directive.

[128] Art 9 of the Directive. As the Court of Justice of the European Union (CJEU) later specified, the 500 euro sum is a threshold that, when reached, opens up the right to compensation for damage to property in its entirety: see ECJ 10 May 2001, C-203/99, *Veedfald v Århus Amtskommune* [2001] ECR I-3569.

[129] Art 6 of the Directive.

[130] Art 2 of the Directive. Included in the definition are to be considered also pharmaceuticals, medical devices, and vaccines (CJEU 21 June 2017, C-621/15, *NW et al v Sanofi Pasteur MSD*, ECLI:EU:C:2017:484; CJEU 5 March 2015, C-503/13 and C-504/13, *Boston Scientific Medizintechnik v AOK Sachsen-Anhalt*, ECLI:EU:C:2015:148), as well as blood and blood-derived products (cf *A v National Blood Authority* [2001] 3 All ER 289; Rb Amsterdam, 3 February 1999, NJB 1999, 621).

[131] Report from the Commission on the application of the Council Directive 85/374/EEC (COM(2018) 246 final), 7 May 2018, at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri = CELEX:52018DC0246&from = EN, no 5.1. See also Fairgrieve, Howells, Møgelvang-Hansen, Staetmans, Verhoeven, Machnikowski, Janssen, & Schulze (n 124) 46–47. The Commission has

words, the Directive does not concern the liability of suppliers (who might be sued only if the producer remains unknown[132]), rejects the American distinction between manufacturing, design, and instruction/warning defects, and embraces the consumer expectation test as the only standard for evaluating any kind of defect—although national courts are free to take other circumstances into account.[133]

The Directive provides products' manufacturers with several ways to escape liability. Producers are exempted from liability if they prove one of the six circumstances mentioned by art 7 of the Directive, which includes compliance with mandatory regulations, the non-defectiveness of the product when it was put into circulation, and changes in the state of scientific and technical knowledge after the product was put into circulation.[134] In particular the last mentioned defense makes a producer's liability similar to that for negligence, insofar as it allows the producer to free himself from

already announced that the Directive will be revised to adjust it to new technologies: see Report from the Commission on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics (COM(2020) 64 final), February 19, 2020, at ec.europa.eu/info/publications/commission-report-safety-and-liability-implications-ai-internet-things-and-robotics_en.

[132] Art 3 (3) of the Directive. Yet, even in such a case, art 3 (1) allows the supplier to escape liability if he informs the victim within a reasonable time of the identity of the producer (or of the other supplier who supplied him with the product: ECJ 2 December 2009, C-358/08, *Aventis Pasteur SA v OB* [2009] ECR I-11305).

[133] Fairgrieve, Howells, Møgelvang-Hansen, Staetmans, Verhoeven, Machnikowski, Janssen, & Schulze (n 124) 56. Actually, the practice of European courts seem to be that the consumer expectation test is applied as a stand-alone test to manufacturing defects, while it is complemented with other tests when it comes to design and instruction defects: see Daily Wuyts, "The Product Liability Directive —More Than Two Decades of Defective Products in Europe" (2014) 5 JETL 1, 10–13; Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 428–429.

[134] According to art 7 of the Directive,

> The producer shall not be liable as a result of this Directive if he proves:
> (a) that he did not put the product into circulation; or
> (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
> (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
> (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
> (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
> (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Contractual limitation of producer's liability, by contrast, are not admissible. See art 12 of the Directive.

liability by demonstrating that, while in possession of all knowledge objectively and subjectively available at a given moment, the defectiveness of the product could not be avoided (and conversely shifts the risk of injury caused by the marketization of a product whose externalities are unclear from the producer onto the injured person).[135] Liability is further disallowed or reduced if (the defendant proves that) the damage is totally or partially caused "by the fault of the injured person or any person for whom the injured person is responsible."[136] Producers may escape liability also if the plaintiff does not act within three years from the date on which the latter "became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer"[137] and anyway if the action is brought after ten years from the date on which the producer put into circulation the product.[138]

As clarified by subsequent interpretation by the Court of Justice of the European Union,[139] the directive aims at producing "maximal harmonization," that is, the text mandates enactment by Member States of national rules conforming to the Directive[140] and the repeal of any rules which, in the matters covered by the Directive's scope, provide for a different (whether lower or higher) level of protection than the Directive itself, except in cases where there is an express permission in the text to do so. While the Directive obliges Member States not to maintain any general system of product liability different from the one laid down in the Directive, it however does not preclude the application of rules based on other grounds and otherwise applicable to product liability cases. A rather ambiguous provision, art 13, provides that

[135] Fairgrieve, Howells, Møgelvang-Hansen, Staetmans, Verhoeven, Machnikowski, Janssen, & Schulze (n 124) 78; Simon Whittaker, "Introduction to Fault in Product Liability," in Whittaker (ed.) (n 69) 1, 35.

[136] Art 8(2) of the Directive.

[137] Art 10(1) of the Directive.

[138] Art 11 of the Directive.

[139] Cf ECJ 25 April 2002, C-52/00, *Commission v France* [2002] ECR I-3827; ECJ 25 April 2002, C-154/00, *Commission v Greece* [2002] ECR I-3879; ECJ 25 April 2002, C-183/00, *González Sanchez v Medicina Asturiana SA* [2002] ECR I-3901.

[140] Acts implementing the Directive took a variety of form. For instance, the United Kingdom and Germany transposed the Directive in ad hoc statutes (the Consumer Protection Act 1987 and the *Produkthaftungsgesetz* of 1989), France inserted the new rules in the Civil Code (former articles from 1386-1 to 1386-18 of the Civil Code, inserted in 1998, and nowadays renumbered as articles 1245-1 to 1245-18); Italy first adopted the Presidential Decree no 224/1988 and then transferred its content into articles 114–127 of the Italian Consumer Code of 2005.

> this Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.

Article 13 is commonly interpreted as referring, for instance, to warranty for latent defects, fault liability under general tort law rules, and even special laws establishing deviating regimes for some products and injuries (such as the German and Scandinavian laws on pharmaceuticals[141]). This means that national rules providing remedies to victims of defective products might survive—which is exactly what happened. In the majority of European countries, the acts implementing the Directive were superimposed upon legal systems which, as we saw in sections 3.1-3.4, had already developed from general liability rules by their own responses to damages caused by defective products, giving rise to a dual track for compensation—one European-inspired and one grounded in national contract or tort law (or both).[142] Quite unsurprisingly, the coexistence of these two parallel regimes, if on the one hand smoothed down the process of reforming national laws, on the other hand allowed lawyers and judges to continue to rely upon the domestic and more familiar set of preexisting remedies.[143] It has been calculated that, between 2000 and 2016, only 798 cases under the EU-inspired regime were brought before European courts.[144]

The persistence of older regimes is only one of the factors explaining the limited harmonization reached by the Directive. Further reasons include the linguistic and technical divergences between national implementing acts and the number of issues which the Directive left to states' discretion or utterly unregulated (such as the requirement of causation and quantification of damages).[145] Therefore, anyone interested in knowing operative rules in

[141] See above, section 3.4 and n 122.

[142] Machnikowski (n 124) 673–687.

[143] Machnikowski (n 124) 673–687. See also the variety of national answers given to cases dealing with product liability in Miquel Martín-Casals, "Comparative Report," in Miquel Martín-Casals (ed), *The Borderlines of Tort Law: Interactions with Contract Law* (Intersentia 2019) 711, 815–820.

[144] Commission Staff Working Document, "Evaluation of Council Directive 85/374/EEC of 25 July 1985 accompanying the Report from the Commission on the application of the Council Directive 85/374/EEC" (COM(2018) 246 final) at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri = CELEX:52018SC0157&from = EN, 10–14.

[145] For an evaluation of the limited harmonizing effect of the Directive, cf Machnikowski (n 124) 673–687; Simon Taylor, "Harmonisation or Divergence? A Comparison of French and English Product Liability Rules" (2007) 70 Mod LR 241, 242; Whittaker (n 135) 477–529; Mauro Bussani & Vernon V Palmer, "Comparative Comments to Case 9," in Bussani & Palmer (n 96) 325–326; Stapleton (n 46) 53–55.

Europe is still required to verify how, in each legal system, the Directive is implemented and interpreted vis-à-vis preexisting general contract and tort liability rules.

That being said, the Directive may be credited with having established the field as a subject in its own right[146] and as a burgeoning field for comparative studies.[147] Outside Europe, probably thanks to its easy-to-travel packaging, the Directive has provided the blueprint for special product liability rules in many countries in the Far East and in Latin America[148]—although the very low rates of litigation in all these countries call for further analysis on the effectiveness of the legal transplant.[149]

5. A Story of Convergence and Divergence

When looked at in the historical and comparative perspective, American and European development of product liability rules show remarkable lines of convergence. On both sides of the Atlantic, the need of special legal regimes for damages caused by defective goods arose from mass consumer societies and growing levels of consumers' awareness. The same pressures that, since the beginning of the twentieth century, led American courts to overturn English precedents and develop rules based on res ipsa loquitur first and strict liability then, drove a few years later European countries toward a similar direction, partly spontaneously, and partly under inspiration from the American experience. In both the United States and Europe, the new stricter-than-ordinary rules have been coexisting with a variety of other causes of

[146] Simon Whittaker, "Introduction to Fault in Product Liability," in Whittaker (ed) (n 69) 1, 3–9, 50.

[147] Cf the national reports collected in Whittaker (ed) (n 69); Martin Ebers, André Janssen, Olaf Meyer (eds), *European Perspectives on Producers' Liability: Direct Producers' Liability* (Sellier 2009); Whittaker (n 135); Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (CUP 2005), as well as the forthcoming Monika Jozon & Markus Pilgerstorfer (eds), *Products Liability* (Intersentia 2020). See also, in a broader geographical perspective, Martín-Casals (ed) (n 143); Helmut Koziol, Michael D Green, Mark Lunney, Ken Oliphant, & Lixin Yang (eds), *Product Liability: Fundamental Questions in a Comparative Perspective* (de Gruyter 2017); Machnikowski (ed) (n 43); Christian Campbell (ed), *International Product Liability* (Yorkhill Law Publishing 2007); Reimann (n 45) 751–838; Geraint G. Howells, *Comparative Product Liability* (Dartmouth Pub 1993); Christopher J Miller (ed), *Comparative Product Liability* (BIICL 1986).

[148] This is, for instance, the case of Australia, China, Japan, as well as Brazil, Chile, and Peru: Mathias Reimann, "Product Liability in a Global Context: The Hollow Victory of the European Model" (2003) 11 ERPL 128, 136; Reimann (n 45) 761–762. The same holds true for Israel: Israel Gilead, "Product Liability in Israel," in Machnikowski (ed) (n 43) 523, 525.

[149] Reimann, "Product Liability in a Global Context" (n 148) 145–148.

actions and remedies, such as negligence and breach of warranty, and have been the object of struggles between domestic and supranational interpretations (led by the Restatements and federal rules in the United States and by the 1985 Directive and CJEU's case law in the EU). In the United States as in Europe, debates about product liability have given rise to intense public and scholarly discussions, often charged with ideological ammunition and more or less in touch with the real world, about the aims of tort law and the interests it should protect; the place and role for negligence and strict liability; the effects, risks, and fears that are associated to each regime; and so on and so forth.

Yet, as hinted at the beginning, the Euro-American history of product liability law is also a story of divergence. Many differences relate to technicalities of the United States and European models of product liability per se: retailers are generally liable under American law, while European law tends to focus on manufacturers; the American clear tripartition of manufacturing, design, and warnings/instructions defects, as well as the reliance upon the risk/utility test, are largely ignored in Europe. Other, perhaps deeper, reasons for divergence stem from differences in the wider legal, procedural, and institutional settings: from different understanding of notions of causation and recoverable damages, to the presence, in the United States, of juries, an entrepreneurial plaintiffs' bar (relying on contingent fee arrangements), and effective mechanisms of collective redress; from the extensive (in the United States) and limited (in Europe) focus on legal cases in the media, to the existence, in Europe, of solidarity schemes; social and public health insurances, which partially remove the space and the need for civil liability.[150] It is probably these differences that explain why litigation rates, to the extent that they are known,[151] have followed diverse patterns in the United States and in Europe. The alleged litigation explosion that has affected the United States after the approval of the Second Restatement has never produced anything comparable in Europe, neither before nor after the adoption of the EEC Directive.[152]

All the above makes it clear why product liability provides a privileged standpoint for observing the dynamics of contemporary tort law developments. The study of the history of products liability shows the relentless and nonlinear cycle between legal demands; hopes and fears; and legal

[150] Reimann (n 53) 244–246, 257–261; Reimann (n 45) 810–835; Stapleton (n 46) 70–75 and 82–84.

[151] The lack of reliable data (also) in the field of product liability law is sadly noticed, among others, by Mauro Bussani, *L'illecito civile* (ESI 2020) 120–122; Reimann (n 53) 257–258.

[152] Reimann (n 45) 803–809. See also Chapter 3, section 2.1.

answers, which in turn feed new demands, hopes, and fears. But the partial import of United States law into European national jurisdictions first and in the EU then, the forced transplantation of EU law into European laws and its spontaneous imitation outside Europe, also demonstrate how rules might experience a shift of meaning when they travel across borders, how they might end up being detached from their origins as well as from the context in which they live, and how they might nonetheless retain a symbolic value whose forms and functions might well deserve further study.[153]

[153] For similar conclusions, see Stapleton (n 46) 358–359; Mauro Bussani, "European Tort Law—A Way Forward," in Mauro Bussani (ed), *European Tort Law. Eastern and Western Perspectives* (Stämpfli 2007) 365–382.