Comparing Products Liability: Concepts in European and American Law

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Comparing Products Liability: Concepts in European and American Law

Introduction
The subject of products liability presents one of the most interesting current opportunities in the comparison of legal doctrines between and among systems of law.

Even apart from its natural attraction as a subject for comparative analysis, this area of the law is particularly interesting for several reasons. The goods we buy often turn out to be extensions of our personalities; we become very attached to our chattels. Added to the psychology of product purchase and use are the revolutions in technology and media that have made both products and their promotion much more sophisticated than they were just a generation ago. In this sense, American products liability decisions of the 1960s have proved prescient.

The universality of product use, and its increasing frequency in modern societies, heighten the value of the subject as an object of legal comparison. Another facet of interest across legal systems is the conditioning that widespread product use exerts on people who make and
interpret laws and who otherwise participate in the legal process—especially judges and, where they serve, jurors.

Beyond the ubiquity of product use and its everyday nature are developments particularly salient for scholarship. The evolution of products liability law in the United States since 1960 is perhaps the most interesting phenomenon in judge-made law in America during that period. Confronting a spectrum of needs and desires arising from the human condition, American judges have fashioned an increasingly coherent set of legal rules to respond to the universe of product use. This body of law is accessible, capable of analysis at several levels, and possesses an intuitive attraction that makes it both initially interesting and ultimately challenging to study.

The initial interest derives in significant measure from the empathy that consumers and business persons will bring to the facts of many of the leading cases. The challenge is to probe behind the superficially interesting aspects of the decisions to identify their legal reality and their social significance.

Lately paralleling American developments in products liability law—entirely judge-made for many years and now partially a creature of state legislation interpreted by the courts—is a most interesting legislative effort from the European Community: the European Products Liability Directive.¹

This article will compare basic concepts in European and American products liability law, inquiring into points of contact and contrast with reference to how those concepts correspond with underlying realities.

Through this medium, I aim to do at least three things:

(1) Provide American lawyers with a fresh perspective on some leading issues in the products liability law of the United States, viewed through the prism of a remarkable piece of European Community legislation.

(2) Provide Community lawyers with a forecast of potential oncoming issues in Europe. I will do this by analyzing the language of the Directive in light of the rich American experience, which constitutes a repository of ideas, arguments and potential solutions for issues likely to arise under the Directive.

(3) Isolate threads in disputes regarding products injuries that are likely to prove common across industrialized and increasingly technological societies, linked by increasing bonds of media.

To talk of universal principles in private law would be an exaggeration. But in speaking of common threads, I do suggest that there are patterns of behavior, and resultant patterns of dispute and dispute resolution, that are likely to replicate themselves often in the societies of

America and Europe. Not only our technologies and our techniques of product promotion, but also our devotion to the goods that occupy so much of our everyday lives, seem to insure that future decades will feature high levels of controversy about the law in this area.

In speaking of patterns of dispute, we should note that the controversies in this body of law arise not only from clashes between principles, but from the application of particular principles themselves. Surely in American law, and to an extent in European law, there is opportunity for lawyers to exploit both the ambiguities of language and the competition between and among the principles themselves. In the very richness of its rationales, American products liability law exhibits many of the internal tensions in bodies of law applicable to diverse communities.²

Some of the tensions within and among principles reveal themselves at the edges of doctrine. This article presents examples of conceptual overlaps and relationships among products liability theories in American law, and describes corresponding linkages in the European Directive.

I. Products
   A. Generally
   A logical place to begin this comparative article is with the definition of “product.” This is in some sense an arbitrary concept, especially in legislation like the European Directive. Yet the need to define “product” forces analysts to confront the question of what aspect of “products” has pushed courts and legislatures to separate them from other risk-creating aspects of life. Critics have suggested that from a welfare standpoint, it is foolish for the law to segregate product-caused harms from the wider, melancholy world of injuries and illnesses in general.³

   The Directive straightforwardly defines “product,” with one exception,⁴ to “mean[] all movables . . . even though incorporated into another movable or into an immovable.”⁵ Under this crisp definition, the universe of products includes chattels, and a product may be a chattel that becomes a fixture.

   B. Electricity
   Interestingly, the Directive announces, without qualification, that “[p]roduct’ includes electricity.”⁶ This issue has been a bone of con-

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³ See, e.g., Jane Stapleton, Products Liability Reform—Real or Illusion?, 6 OXFORD J. LEGAL STUD. 392, 421 (1986).
⁴ The drafters excluded “primary agricultural products and game.” Directive, supra note 1, art. 2.
⁵ Id.
⁶ Id.
tention in the United States, with decisions varying considerably in their approach to the subject. A key line of argument stems from courts that say that electricity "is not a 'product,' ... at least until [it] reaches a point where it is made available for consumer use." There have been a few decisions imposing strict liability when electricity entered a home, or at least a domestic meter, at abnormally high voltage. However, most courts have reasoned that "electricity is a service, not a product."

Despite their reluctance to adopt strict liability for the transmission of electricity, American courts have imposed on those who provide electricity an extremely high standard of care. One might also argue that the provision of electricity falls within an American version of Rylands v. Fletcher-type liability as an "abnormally dangerous activity," although electricity would not seem to fit easily into that category because of its commonness of usage. The literal language of the Directive seems to sweep these possibilities before it. However, it would appear that the provision will require interpretation, for example, as to when current becomes "electricity" for purposes of the legislation.

C. Agricultural Products

By comparison, the Directive makes an exception to the "product" classification for "primary agricultural products and game," defining "primary agricultural products" to mean "the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing." It is unclear what situations engendered the apprehension that fueled this provision. In a parallel development, American courts generally have refused to hold that an animal is a product. An Illinois appellate court, for example, reasoned that "[l]iving creatures, such as ... swine ... are by their nature in a constant process of internal development and growth and they are also participants in a constant interaction with the environment around them as part of their development."

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There has been very little litigation on that point in the United States, but it appears to have been a bone of contention in the drafting of the Directive. One of the few provisions in the document that permits local exceptions allows Member States to derogate from this exception, and the preamble speaks of the possibility that some states may believe that the exception would restrict consumer protection "unduly." With this amount of attention paid to the subject, one can only speculate that this provision represents an extremely risk-averse reaction on the part of European farmers. This is not to deny the argument that the "genesis and main objective of [the] Directive has always been to amend the law relating to industrially produced goods."  

II. Consumers

One rather remarkable lacuna in the Directive is its failure to define the crucial term "consumer." The unqualified use of the language "injured person" in some clauses may be taken to create a broad warrant for definition of this term. For example, in its creation of the general burden of proof, Article 4 speaks of "[t]he injured person" having to prove damage, defect and causation. Moreover, the contributory fault provision speaks simply of "the fault of the injured person or any person for whom the injured person is responsible," and the definition of "damage" refers to damage to property "used by the injured person mainly for his own private use or consumption."

Professor Bourgoignie has contrasted the draft directive on liability of suppliers of services with the products liability directive by saying that the services draft "sets out to cover the damage caused to any person

17. Id. pmbl. para. 15.
18. The British Minister for Corporate and Governmental Affairs articulated this idea in a statement announcing the Government's decision to retain the exemption for primary agricultural goods. The Minister noted that unprocessed farm products "are particularly prone to hidden defects caused by environmental factors beyond the control of the producer" and that "the capacity to test the goods is generally available at the point where the produce is subject to processing—at which point strict liability under the Directive would apply." Statement of the Minister for Corporate and Governmental Affairs, July 1, 1986, quoted in Catherine Blight, "What if That Snail Had been in a Bottle of Milk?" Or Product Liability in the UK—The Special Case of Agricultural Products, in ESSAYS IN LAW AND ECONOMICS: CORPORATIONS, ACCIDENT PREVENTION AND COMPENSATION FOR LOSSES 215, 224 (Michael Faure & Roger van den Bergh, eds., 1989). Blight argues that the exclusion of primary agricultural products from the Directive's strict liability rule probably produces "a socially more efficient outcome." Id. at 228. She catalogs the virtues of a negligence rule as including a reduction of "the external interference in the management of an industry which some of the more extreme forms of strict liability imply;" the flexibility it permits "in the relations of the producer and the consumer," even after litigation has begun; and the preservation of those relationships as contrasted with the alternative of "governmental regulation of production" and even of consumption. Id. at 226-28.
20. Id. art. 8(2).
21. Id. art. 9(b)(ii).
and not just to the consumer." In light of this observation, and given the lengthy struggle that has occupied American courts over the question of bystander liability, the cautious observer must await interpretation of the term "consumer" by Community courts. Yet, in thinking about the proper breadth of interpretation, one must consider the powerful commitment to relief of products injuries reflected throughout the Directive and its Preamble's frequent unqualified references to "protection of the consumer." In light of this dominant tone, it would seem that the Directive implies a broad interpretation of the protected class, surely beyond purchasers and probably beyond direct users of products.

III. Producers

A. Generally

With the definition of "product" established, and some reasonable idea of the scope of the protected class, the next logical issue concerns the meaning of "producer," since the Directive broadly states that "[t]he producer shall be liable for damage caused by a defect in his product." In line with its general aims, the Directive defines "producer" in a rather encompassing way. One set of definitions includes, consecutively, "the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part."  

B. Components and Raw Materials

The references to manufacturers of components as well as makers of finished products are logical and expectable. The reference to producers of raw material might present issues of interpretation. Taken together with the terms on either side of it, this language might be construed to refer only to raw materials incorporated into finished products. However, one might easily interpret it to mean raw materials themselves. The construction of this term could have considerable

23. See, e.g., 1 SHAPO, supra note 7, ¶ 16.02.
24. See, e.g., infra, text accompanying notes 268-75.
26. Id. art. 3(1). One oncoming, technology-driven problem of particular interest with respect to the definitions of both "product" and producer is how to classify structured electronic information. Professor Alpa has raised the particular question of how to categorize suppliers of computer software, asserting that liability should be "extended to the manufacturer of a machine which contains defective software and is therefore unsafe." Guido Alpa, Manufacturer, Importer and Supplier Liability in Italy Before and After the Implementation of the E.E.C. Directive on Damages for Defective Products, 6/7 TUL. CIT. L.F. 233, 238 (1991-92). This specific problem may yield to a solution based on the notion that the manufacturer, as an "assembler," is responsible for all components, including electronic ones. More difficult problems may arise with respect to firms that only manufacture software. Presumably these issues would arise both with respect to the definition of "product," see supra text accompanying notes 3-16, as well as that of "producer."
quantitative importance, since on it could turn the issue of liability for
the most extensive mass tort subject of the era, namely asbestos.

The Directive qualifies the liability of component manufacturers,
exonerating them when a 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." The American case law
indicates that battles may break out on the edges of this exception. Spe-
cifically with respect to the phrase "attributable to the design of the
product," one might expect litigation over situations in which a basic
product unit can be tailored in different ways.

Consider the sort of case in which Firm A makes a truck chassis that
Firm B will incorporate into truck bodies. This is the situation, for
example, in the manufacture of vehicles used as refuse trucks. In one
frequently cited decision, the Third Circuit denied recovery against the
chassis manufacturer for failure to install backup warning signals. The
court found it persuasive that the final assembler was more expert in
designing refuse trucks and could more practically have installed the
devices. This result is logical, and arguably correct as a matter of func-
tional analysis, but there is a competing logic in the language of the
Directive. One might contend, for example, that the failure to install the
backup signals was "attributable to the design of" the chassis as well as
of the truck.

C. Trademarks and Trade Names

Besides imposing liability on manufacturers of components and com-
pleted products, the Directive defines as a "producer" "any person who,
by putting his name, trade mark or other distinguishing feature on the
product presents himself as its producer." From the American per-
spective, this is a startlingly simple and sweeping pronouncement,
although it in fact may forecast the future path of the law in the United
States.

Since there has been little appellate litigation on the products liabil-
ity of mark holders in the United States, one might think that such a rule
would lead to a significant expansion of liability under American law.
However, a recent decision in a hard-fought case indicates that Ameri-
can courts might find the European rule appropriate. In that decision,
the Ninth Circuit relied on the Arizona Supreme Court's answer to a
certified question for the proposition that strict liability applies to
"trademark licensors who significantly participate in the overall process
by which the product reaches its consumers, and who have the right to
control the incidents of manufacture or distribution." This statement
of the rule largely embodies its rationale, focusing on control of the

27. Directive, supra note 1, art. 7(f).
29. Directive, supra note 1, art. 3(1).
30. Torres v. Goodyear Tire & Rubber Co., 901 F.2d 750, 751 (9th Cir. 1990),
(quotting Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 946-47 (Ariz. 1990)).
making and marketing of the product. If it should persuade a number of American courts, one would expect a rise in litigation against mark holders. That would not be a surprising development, given the ability of mark holders to shape the destiny of products, both as to form and manner of presentation to the public.

D. Importers

The Directive also extends its strict liability rule to importers, another class of enterprises concerning which there have been few reported decisions in America. The language is inclusive, and indeed intriguing in its potential breadth. The Directive declares that "any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer ... and shall be responsible as a producer." 31

It would appear that also in this respect, the Community may show the way to, or at least parallel, the developing American law. In upholding the imposition of strict liability on the only importer of Volkswagens in the United States, the Washington Supreme Court affirmed a decision in which its intermediate court declared that the defendant was "a significant part of the marketing enterprise of Volkswagen automobiles in this nation." 32 The intermediate court also had emphasized that the defendant was "in a position to adjust the costs of such liability with the foreign manufacturer," something that could not be done by the "plaintiff or other consumers." 33

Most of the legal action with respect to foreign products entering the United States has dealt with the jurisdictional question of whether the plaintiff has established that a defendant seller has "purposefully directed" an action "toward the forum State." 34 This was the test that Justice O'Connor and three colleagues announced in Asahi Metal Industry Co. v. Superior Court, 35 a case in which eight justices employed the abstract language of "traditional notions of fair play and substantial justice" in denying jurisdiction. 36

Asahi and many decisions that interpret it 37 are not necessarily at variance with the rationale for imposing strict liability on importers. Rather, one may view Asahi as running in the same track as the strict liability decisions. The basic question is whether the defendant bears significant responsibility for the marketing of the product in America.

31. Directive, supra note 1, art. 3(2).
33. Volkswagen of Am., Inc., 525 P.2d at 289.
35. Id.
36. See id. at 113-16 (referring to International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
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E. Suppliers

The Directive closes its broad curtilage of the definition of "producer" with a paragraph that imposes liability when "the producer of the product cannot be identified." In that case, "each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product." The same paragraph applies this rule to imported products that do "not indicate the identity of the importer . . . even if the name of the producer is indicated."

The term "supplier" in this paragraph appears to expand the definition of those liable for product defects throughout the distributional chain. It seems easily capable of a construction that embraces intermediate sellers, including wholesalers and retailers, and perhaps even other parties with distributional functions.

The evident intent of the drafters was to emphasize that the Directive extends its no-fault liability to a wide variety of firms that have a hand in the transmission of products to consumers, but also seeks to constrain liability for reasons of both fairness and economic good sense when firms do not exert the whip hand on product quality. The key to this provision appears to be a desire to pave the consumer's way to the controlling actor. The method is to place the burden on those who ought to be in a position to provide information about the identity of the controlling actor. The sub-provision on importers makes clear the important position of those firms in the Community and, indeed, in an increasingly interdependent world.

The provision finesses the problems of justice inherent in the long-running American debate about retailer strict liability. It achieves an equitable solution to the unfairness of imposing liability on retailers, especially those who sell products in sealed packages, for defects of which they could not possibly have been aware. As a practical matter, it tells such firms that if they keep records and can point the finger to the originator of the defect, they can escape liability.

The Directive places the burden on the consumer to show "the damage, the defect and the causal relationship between defect and damage." This classification scheme lines up closely with the American law, which in addition would emphasize another requirement with a strong policy orientation. Depending on the doctrinal catechism to

38. Directive, supra note 1, art. 3(3).
39. Id.
40. Id.
41. One might find ancillary support for a broad construction of this language in a provision of the preamble, apparently primarily directed at other issues, that says that "in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them." Id. pmbl. para. 5.
42. See generally 1 SHAPO, supra note 7, ¶ 12.04[2][b].
43. Directive, supra note 1, art. 4.
which the interpreter subscribes, this element would be that either of
duty or proximate cause.

IV. Damages

A. Generally

The Directive limits its definition of “damage” to “death or . . . personal
injuries”\textsuperscript{44} or “damage to, or destruction of, any item of property other
than the defective product itself, with a lower threshold of 500 ECU.”\textsuperscript{45}

The Directive preserves “national provisions relating to non-material
damage,”\textsuperscript{46} which includes, among other things, pain and suffering.\textsuperscript{47}

The property damage category contains the further limitation that
the item must be “of a type ordinarily intended for private use or con-
sumption” and that it has been “used by the injured person mainly for
his own private use or consumption.”\textsuperscript{48} The Preamble indicates that the
drafters intended the limits on recovery for property damage—both the
threshold and the requirement of private use or consumption—“to
avoid litigation in an excessive number of cases.”\textsuperscript{49}

B. Economic Loss

The damages provisions appear to settle a large wedge of problems that
have occupied American courts under the heading of “economic loss.”

For example, the Directive seems to make clear that there will be no
liability in Europe for the kind of claim the plaintiff made in East River
S. S. Corp. v. Transamerica Delaval, Inc.\textsuperscript{50} In that case, in which the United
States Supreme Court took its only direct cut at the products liability
area, a unanimous court denied recovery for damage to ship turbines
allegedly caused by defects in the turbines.

At least some of the alleged defects in the East River turbines mani-
fested themselves in component deterioration and disintegration. One
might, without more, have taken a denial of liability in that case to leave
room for claims for damages to the purchased product arising from a
traumatic accident. The Illinois Supreme Court, for example, has said it
would impose liability for damage to the purchased product in a “sud-
den and calamitous” occurrence.\textsuperscript{51} It took that stand in a case in which
an alleged defect in truck brakes caused an accident that damaged the
vehicle beyond repair.

But Justice Blackmun’s opinion for the Supreme Court made clear
that he would not draw distinctions based on the type of injury. Noting

\textsuperscript{44} Id. art. 9(a).
\textsuperscript{45} Id. art. 9(b).
\textsuperscript{46} Id. art. 9.
\textsuperscript{47} The Preamble says that the Directive “should not prejudice compensation for
pain and suffering and other non-material damages.” Id. pmbl. para. 9.
\textsuperscript{48} Id. art. 9(b).
\textsuperscript{49} Id. pmbl. para. 9.
\textsuperscript{50} 476 U.S. 858 (1986).
that damages could be either "qualitative, occurring through gradual deterioration or internal breakage," or "calamitous," he declared that "either way, since by definition no person or other property is damaged, the resulting loss is purely economic." 52

Justice Blackmun rationalized the exclusion of such cases from the protection of products liability law on the ground that they involved situations in which the vice of the product was only that it had "not met the customer's expectations, or, in other words, that the consumer has received 'insufficient product value.'" 53 The rule of the Directive appears to have accepted this position completely.

The only question that might be raised concerning this judgment, both by the Community and the United States Supreme Court, is whether it appropriately strikes the balance with respect to deterring defects that are dangerous to persons and other property rather than only to the product itself. The Washington Supreme Court, for example, has argued that the focus, even in suits for strictly economic loss, should be on "risk of harm." 54 Declaring that the "increased certainty" achieved by East River "comes at too high a price," the Washington court said that the United States Supreme Court had "unjustifiably dismiss[ed] the safety concerns attendant to product injuries caused by hazardous defects." 55

The preamble to the Directive declares that "the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property." 56 Although the plain language of the Directive excludes economic loss, one may question whether this legislative choice harmonizes with the needs identified in the Preamble.

V. Theory of Liability

The policy heart of the Directive, as is the case with American products liability law, lies in its imposition of strict liability. The text of the Directive itself does not mention the concept by name, 57 but it is implicit in the simple requirement of Article 4 that the claimant must prove—but presumably need prove no more than—"the damage, the defect and the

52. 476 U.S. at 870.
53. Id. at 872 (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 406 (2d ed. 1980)).
55. Id.
57. Portugal has gone further with its declaration that "the producer is liable in the absence of fault for the damage caused by the defects in the products that he has put on the market." Decreto-lei No. 383/89, Art. 1, quoted in Joao Calvao da Silva, Implementation of the EEC Product Liability Directive in Portugal, 1992 EUR. CONSUMER L.J. 36, 36. Professor Silva says that "[t]he reason for this explicit sanctioning of the [strict liability] principle is to erase all doubt about the 'fall of the citadel' and to emphasise the strict liability of the producer to the consumer." Id.
causal relationship." The Preamble makes clear what the text implies, saying that "liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production."

Presumably, the Preamble draws on a variety of considerations in making this assertion. The reference to "technicality" evokes concerns of the sort that Jacques Ellul discussed in his work *The Technological Society.* Together with the echoing phrase "modern technological production," this language implies legislative premises about the virtual impossibility that consumers will understand the workings of the products they buy and the difficulty of uncovering relevant information in litigation.

It is no coincidence that the first three major cases that established strict liability principles in the United States—under different labels—all involved machines of varying levels of complexity.

(1) In *Henningsen v. Bloomfield Motors,* the New Jersey Supreme Court dealt with a case in which a car ran off the road without explanation, and it was impossible to provide the explanation because of the destruction of the vehicle's front end. In this decision, just before the formal invention of the doctrine of strict liability in tort, the court employed the theory of implied warranty of merchantability.

(2) In *Greenman v. Yuba Power Products, Inc.*, the California Supreme Court used the strict liability doctrine for the first time in deciding a case that arose from injuries attributed to a home power tool.

(3) *Goldberg v. Kollsman Instrument Corp.* represented the first venture of the New York Court of Appeals into the new doctrinal territory. This case involved an allegedly defective altimeter on an airplane that crashed, with much loss of life. Feeling itself doctrinally bound to use implied warranty theory, the court said that it believed that "strict tort liability" was "surely a more accurate phrase."

Taken together, these decisions indicate why strict liability doctrine has so attracted American courts with respect to products of "increasing technicality."

It remains to ask what the drafters of the Directive meant when they
spoke of "a fair apportionment of the risks." The question of what is fair, in the sense that the drafters used the term, may relate partly to the information disadvantage that consumers frequently face. However, although the Preamble does not spell out the meaning of the word, it seems reasonable to believe that it also carries equitable content in an assumed context of mass production. The language certainly is capable of a reading that indicates that there are grounds for liability in the fact of a consumer's misfortune in situations in which the product has increased the happiness of most or all other users. If this interpretation is correct, the concept of fairness embedded in the Preamble may raise the controversial question of whether loss spreading is an appropriate rationale for liability without fault.

VI. Defect

A. General Definition

If the policy heart of the Directive resides in the idea of liability without fault, its conceptual core lies in the notion of defect.

The Directive's positive definition of defect appears in brief compass in Article 6:

A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
(a) the presentation of the product;
(b) the use to which it could reasonably be expected that the product would be put;
(c) the time when the product was put into circulation.

B. Consumer Expectations

1. Generally

The parallel language of the Preamble is also quite concise, although it implies decisions on matters that have consumed gallons of American judicial ink. The Preamble, declaring as its purpose "to protect the physical well-being and property of the consumer," says that "the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect." This paragraph specifically excludes "misuse . . . not reasonable under the circumstances."

This writer particularly approves the very first item in the Directive's catalog of factors, which speaks of "the presentation of the product." This language is capable of a variety of readings, ranging from

66. Id. art. 6(1).
67. Id. art. 6(1)(a).
advertising and product promotion in the broadest sense to the appearance of the product as it manifests itself to the consumer.

The writer has encompassed this full range of meaning under the concept of “product portrayal,” which he views as a major explanatory tool for American products liability law. It seems fitting that this should be the first consideration in a definition of the core concept of liability for product-caused injuries. This is so because a twin of “our age of increasing technicality” is the development of modern techniques of consumer persuasion.

Allied with this focus on product portrayal—which this writer believes is the logical foundation for the rest of the defect concept—is the notion of “the safety which a person is entitled to expect.” The drafters made a clear choice here. Not only did they define the concept of defect by consumer safety expectations in the text of the Directive; they underlined that point in the Preamble and in doing so they specifically eschewed the concept of “fitness for use.”

The exclusion of any idea of fitness removes the consumer protection ideal of the Directive entirely from the realm of commercial law concepts. Conspicuous by their absence are notions of cost-benefit and risk-utility analysis, and ideas of the cheapest cost-avoider and the best comparer of costs. Most remarkable, however, is the adoption of the consumer expectations test itself, in the face of the dismissiveness of its critics, who have referred to “the uninformed safety expectations” of uninformed consumers.

2. Interpretative Questions

With the inquiry thus focused on consumer expectations, the American experience indicates that several questions will arise. One issue would be whether the concept is basically an empirical one, or one primarily founded in normative considerations. The language of entitlement in both the text and the preamble indicates that the focus is more philo-

71. Directive, supra note 1, art. 6(1).
72. Id. pmbl. para. 6.
73. For a different perspective, see Jorg Finsinger & Jurgen Simon, An Economic Assessment of the EC Product Liability Directive and the Product Liability Law of the Federal Republic of Germany, in ESSAYS IN LAW AND ECONOMICS: CORPORATIONS, ACCIDENT PREVENTION AND COMPENSATION FOR LOSSES 185, 202-05 (Michael Faure & Roger van den Bergh eds., 1989). These authors develop an “informational product defect” concept that stresses the “sovereignty of the informed consumer,” and his or her ability to choose risks that have been communicated.
sophical than factual. Presumably the court must make a judgment about "the safety which a person is entitled to expect."^{75}

This judicial task may pose serious problems of interpretation, complicated by traditions differing between common law judges and civilians. As a general matter, it would seem that what one is "entitled to expect" depends on a complex set of factors, including evolving social mores, improving product standards, and how particular product categories have been presented to the public.

Full circle, this seemingly normative standard may even draw on data concerning what people do expect. Because of America's almost universal use of juries in injury cases, interesting grist for the mill of comparative law appears in judicial efforts to establish distinctions between the role of judge and jury. Illustrative is Justice Goodwin's opinion for the Oregon Supreme Court in *Heaton v. Ford Motor Co.*,^{76} in which he was at pains to distinguish two issues. The first was the question of "what reasonable consumers do expect from the product," which he said was a "basically factual question" for the jury.\(^7\) The other was the question of "how strong products should be," which he said that courts had decided was "strong enough to perform as the ordinary consumer expects."^{78}

In the European Community, which generally lacks the jury tradition of the United States, courts will have to decide how they will separate, and integrate, these questions of "fact" and philosophy.

It is relevant to note a difference between the language of Article 6 and the preamble as to whose expectations the court must assess. The preamble speaks of "the safety which the public at large is entitled to expect." Article 6, however, refers to "the safety which a person is entitled to expect."

If the language of the preamble colors the text, then the question would appear to be a relatively objective one, or at least one dependent on the opinions of substantial majorities. Dr. Hans Taschner, a leading figure in the drafting of the Directive, has said that the question is not one "of the individual injured party with his subjective expectations," nor even of "the expectations of a specific group of consumers," but of "what the community as a whole considers to be right."^{79} If we focus on the language of Article 6 alone, however, we must consider a potentially subjective interpretation centering on individual claimants.

The point is no quibble. It links up with a range of issues tied in with the question of whether to judge consumer conduct on an objective or subjective basis. Embodied in that question is the classic distinction

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75. Directive, supra note 1, art. 6(1).
76. 435 P.2d 806, 809 (Or. 1967).
77. Id.
78. Id.
between the doctrines of contributory negligence and assumption of risk in their traditional American applications. More relevantly to the plaintiff's case in chief, the point relates to issues involving duties to warn, which in the American law have often focused on the knowledge of the individual claimant.

C. Potential Defect Issues
The Directive does not speak specifically to a flock of other issues concerning defect that have arisen in the American decisions. We shall discuss here some of the most salient ones, which may provide a basis for reference in controversies arising under the Directive.

1. Time and Character of Knowledge
An important set of questions has to do with the time and character of the defendant's knowledge of the hazardous aspect of the product. An American judicial pronouncement that captures the unadorned concept of strict liability focuses on whether a reasonable person would have marketed the product "if he had knowledge of its harmful character."80 Using this idea of deemed knowledge, the Oregon Supreme Court defined the question as whether the "seller would be negligent if he sold the article knowing of the risk involved."81

Dean Keeton put the question as one of whether the product would "subject someone to an unreasonable risk in fact."82 Defining the issue that way, one presumably would test the question of defect on the basis of information available at the time of trial, rather than only on the basis of knowledge obtainable at the time of marketing.83

These formulations of the issue draw a rather sharp line between negligence and liability without fault. They would be relatively noncontroversial in practically all products cases involving defects principally associated with the manufacturing process. The matter generates more spirited theoretical argument with respect to "unknowable" risks of products, which we discuss below.84

2. Ordinary Products
Another cluster of issues arises around a set of intuitively appealing ideas related to the general notion that consumers must take life as they find it. Some of the simplest of these cases concern dangers built into the most ordinary kinds of products. A homely example appears in the Illinois Supreme Court's declaration that shoes that become slippery when wet are not defective as a matter of law.85 An analogous holding

81. Id.
83. See id. at 407.
84. See infra text accompanying notes 129-44.
involving a technological product came from another Illinois court, which declared that "the fact that all vehicles will skid (and are subject to uncontrollable skidding) on ice or other slippery surfaces does not per se make them an unreasonably dangerous product." 86

3. Obviousness

A conceptual cluster that recently has occupied a growing niche in the American case law is evident in another observation in the decision just quoted. Saying that "[s]kidding on ice is a phenomenon necessarily known to anyone after he first walks or rides on it," that court referred to a "common propensity of the product which is open and obvious." 87

Variations on the "obviousness" defense have come to the fore in a range of product contexts. Courts have employed them under a variety of doctrinal labels, including not only defect but duty to warn. Another Illinois decision invoked obviousness in refusing to impose liability in favor of a plaintiff who was thrown off a motorcycle. 88 When a stack of glass cooking bowls and lids tumbled out of a cabinet, the Rhode Island Supreme Court thought it "obvious that a consumer or user should be aware of the potential hazards of stacking glass or cookware objects in a pyramid." 89

Denying recovery on claims brought under the rubric of duty to warn, courts have utilized "obviousness" locutions in a group of cases involving dives into shallow water in residential swimming pools. In one of the most fiercely contested of these cases, a majority of the Michigan Supreme Court said that "[t]he danger involved in diving into shallow water" was "obvious to the reasonably prudent user" of an above-ground pool, observing that "[t]he admonition 'feet first' is a matter of common knowledge where shallow water or water of an unknown depth is involved." 90

Courts also have frequently applied an obviousness defense in cases involving industrial machines. For example, in a case in which the operator of a press brake had both hands crushed in the machine, the court said that "it was obvious to him that if a person placed any part of his body between the moveable ram and the press brake bed, and the foot pedal was pressed, that person would be injured." 91 Another court

87. Id. at 512.
90. Glittenberg v. Doughboy Recreational Indus., Inc., 462 N.W.2d 348, 358 (Mich. 1990) (plurality). The court reaffirmed this view in Glittenberg v. Wilcenski, 491 N.W.2d 208 (Mich. 1992), referring repeatedly to obviousness terminology. Id. at 213-18. For example, the court invoked "the well-established rule that there is no duty to warn of dangers that are open and obvious," id. at 214, and declared that "the obvious nature of the danger serves the exact function as a warning that the risk is present." Id. at 215.
applied the concept to low ceilings, finding no duty to warn a worker who was riding a mobile car that he could hit his head on an overhead platform.\footnote{Hart v. FMC Corp., 446 N.W.2d 194 (Minn. Ct. App. 1989).}

With factual and doctrinal variations like these, the idea of obviousness becomes a surrogate for a set of legal intuitions. Whether the question emerges theoretically as one of defect, duty to warn, or contributory fault, courts that use this terminology seem to be centering on the moral strength of the plaintiff’s case, which they find wanting. Presumably European courts could fit all of this into the concept of what “a person is entitled to expect.”\footnote{Compare Alpa, supra note 26, at 254 (“[t]he Italian text . . . insists on the manifest characteristics of the product, in order to avoid the user, once aware of the inherent dangers of the product, making claims against these said dangers”).} The rubric of obviousness provides one linguistic avenue into the normative aspects of that entitlement.

4. Dangerous “Good” Product

Two other concepts, somewhat overlapping in their defensive trenchworks, may commend themselves to the courts of the Community states. These are the idea of the dangerous “good” product and that of the “unavoidably unsafe” product.

Comment i to section 402A of the Second Restatement of Torts captured the first idea with its observation that “[m]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption.”\footnote{Restatement (Second) of Torts § 402A cmt. i (1965).} Setting as the standard a consumer contemplation test, the comment referred to “[g]ood whiskey”—“not unreasonably dangerous merely because it will make some people drunk”; “[g]ood tobacco”—“not unreasonably dangerous because the effects of smoking may be harmful”; and “[g]ood butter”—“not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks.”\footnote{Id.}

Although the case law of the time indicated that the concept of “good tobacco” would prevail,\footnote{See, e.g., Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970).} some recent decisions have at least challenged that notion. In the most discussed of these cases, the Third Circuit refused to affirm a denial of a claim based on a “generic risk-utility” theory.\footnote{Cipollone v. Liggett Group, Inc. 893 F.2d 541 (3d Cir. 1990).} It thought that, in the context of state law, there was insufficient evidence “that the ‘inherent[ly] [dangerous] characteristics’ of cigarettes were known to the ‘ordinary consumer or user’ ” before the time of the federal cigarette labeling legislation.\footnote{See id. at 578. But cf. Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 236 (6th Cir. 1986) (plaintiffs “offered no proof that [defendant’s] cigarettes were ‘improperly manufactured’ or contained ‘dangerous impurities’ ”).} The United States
Supreme Court’s review of the case produced a decision permitting claims for “express warranty, intentional fraud and misrepresentation, or conspiracy.”

The new clouds over this issue have shadowed the intuition in comment i, formerly so seemingly secure. The language of Article 6 of the Directive on consumer expectations roughly parallels that of comment i’s consumer contemplation test. But we must await judgment about how Community courts will put flesh on the bones of that rather bare language.

At least prospectively, the question may depend on regulatory choices that the Community makes concerning the labeling and advertising of tobacco. The issue of liability for injuries due to smoking in the past will also require policy choices. Will Community courts bow to a history in which the question has not been litigated, to their own administrative convenience, and to a suspicion that, after all, most smokers know that tobacco is deadly? Or will the Directive’s repeated references to consumer protection provide an opening wedge for consumers to sue for tobacco-caused illness? At this point, we can only ask the questions.

5. Unavoidably Unsafe Product

The related defensive earthwork is that of the “unavoidably unsafe product.” Restatement comment k provides the basis for discussion here. Focusing on drugs and vaccines as examples, the comment declares that certain products are, “in the present state of human knowledge, . . . quite incapable of being made safe for their intended and ordinary use.”

Numerous issues have arisen in American litigation focusing on this problem. One, linchpinned to American use of the jury, is the question of when courts should allow jurors to make a factual determination under that Restatement test. Another is the question of where the burden of proof lies.

With many products for which a comment k defense would be offered, it might be difficult to apply a test based on actual consumer expectations because of the technology involved in product formulation. However, the reference in Article 6 to “the safety which a person is entitled to expect” seems fairly plastic with reference to this problem.

If, in fact, a product is “incapable” of being made safer “in the present state of human knowledge,” then presumably a consumer is not entitled to expect more. Moreover, the language of comment k aligns it
6. Expected Use

a. Generally

Among the few specific guidelines that the Directive provides for defining defect is "the use to which it could reasonably be expected that the product would be put."\textsuperscript{105} Besides opening up a possible defense of misuse, this language presents a rich set of definitional issues.

One of the more intricate sets of questions in this regard arises concerning products specifically designed for multiple purposes. In this connection, we already have discussed some potential applications of Article 7(f) of the Directive, which exonerates component manufacturers when a defect is attributable to the assembler's design or instructions.\textsuperscript{106} The language of Article 6 on reasonably expectable use may also apply in such cases.

In an illustrative case, the defendant made limit switches used in a die casting machine. Although the defendant argued that it had never sold its product directly to the plaintiff's employer, the court focused on evidence that the defendant was aware that its switches were being provided to the employer. Drawing on an affidavit by a mechanical engineer that the defendant should have warned users about the dangers involved in the use of limit switches in die casting machines, the court held that the plaintiff had created a fact question on the defendant's "knowledge of the particular purpose" for which the employer used the switches.\textsuperscript{107}

Another decision about type of use in a typical industrial setting focused on the manufacturer of the completed product. In this case, a worker sued the maker of a press. An Illinois appellate court held against the plaintiff, who had given no evidence that the machine "could have reasonably been fitted with safety guards at the point of operation."\textsuperscript{108} The Illinois Supreme Court disagreed, however. It drew on testimony by an expert to the effect that the defendant "should have ascertained whether [the industrial user] intended to use the press for a single purpose or for multiple purposes."\textsuperscript{109} Challenging the appellate court's declaration that "the press was a general purpose machine," the supreme court said that the issue "of whether the press was multifunctional or unifunctional . . . was a question of fact for the jury to resolve."\textsuperscript{110}

\textsuperscript{104} See infra text accompanying notes 123-44.
\textsuperscript{105} Directive, supra note 1, art. 6(1)(b).
\textsuperscript{106} See supra text accompanying note 27.
\textsuperscript{110} Id. at 824.
b. Balancing of Factors

In civilian proceedings as well as common law litigation in which the issue of expected use arises, essentially factual questions of this sort will arise to complicate judicial life. The issue will depend on many factors related to the specificity of knowledge of both sellers and purchasers, and to particular industrial and domestic realities.

The issue of expectable use itself overlaps with two categories discussed above—those of the dangerous "good" product\textsuperscript{111} and the "unavoidably unsafe" product.\textsuperscript{112} In all these cases, the law must resolve tensions between the desire of the consumer to obtain a product that will do a particular job at a certain price, and the competing requirements of safety.

An evocative decision dealt with a pipe-hook, a product used in loading pipe from a ship into a barge. The pipe-hook at issue did not detain some pipe when it was let down, and a 7,000-pound pipe rolled into the plaintiff after it was mislaid by a crane. Rejecting the argument that "ease of removal of a pipe-hook" was a design defect, the court said that that quality was a "desirable" one "in some uses, especially for tier-stacking of pipes so high that workers would have to climb upon the pipes to release a hook that was not easy to remove."\textsuperscript{113}

Given that a design alternative proposed by the plaintiff would not have given workers the flexibility provided by the defendant’s product, the court concluded that there was no design defect. It said that the risks of the defendant's product were “not shown to be unreasonably disproportionate to the risks avoided (and other benefits obtained).”\textsuperscript{114}

The decision underlines the fact that when there are certain jobs to be done, the opportunity for safety is often severely constrained. An important question for Community courts, as for American courts, is what conceptual focus to bring to bear on such questions. Given the language of the Directive, the question often will be phrased as one of reasonably expected use. But in many cases, the defendant may really be arguing, in effect, that the product is unavoidably unsafe in the context of its use, \textit{a la} comment k, or that it "cannot possibly be made safe for all consumption," \textit{a la} comment i.

Behind all such cases there is a question that is unavoidably normative: how far should the law go in deciphering bargains about product safety, and in judging their fairness?

7. Crashworthiness

We can only hint at the complexities of another set of questions that arguably fall under the heading of expectable use. These are the issues

\begin{itemize}
\item \textsuperscript{111} See supra text accompanying notes 94-99.
\item \textsuperscript{112} See supra text accompanying notes 100-04.
\item \textsuperscript{114} Id. at 819.
\end{itemize}
classified as those of "crashworthiness" in American law, usually arising in the motor vehicle context.

Two decisions by United States courts of appeals in the 1960s cabin the main argument. In one, the Seventh Circuit denied liability for injuries to auto passengers that allegedly were enhanced by the failure of the vehicle to protect its occupants adequately in a collision. The court reasoned that it was not "the intended purpose of an automobile" to "participat[e] in collisions."115

The Eighth Circuit took the opposite position, and prevailed, setting up a virtual cottage industry of crashworthiness litigation. Although it conceded that "automobiles are not made for the purpose of colliding with each other," that court focused on the fact that "a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts."116 In that statistical context, the court could find no reason to distinguish injuries involving "the so-called 'second collision' of the passenger with the interior part of the automobile" from those occurring when "the defect in design or manufacture was the causative factor of the accident."117

Although European courts may decide that they do not wish to involve themselves in crashworthiness jurisprudence, the fact is that the language of the Directive is capable of housing the view of reality of either the Seventh Circuit or the Eighth Circuit. It certainly is "reasonable" for a manufacturer to expect that a driver will not "put" a vehicle to the "use" of a collision. But any automotive designer who hears the morning traffic reports knows that he or she "reasonably" must expect that vehicles will be "put" "to" the test of collisions.

D. Impact of Technological Improvement

A major set of problems that confronts courts in products liability cases, combining features of both fairness and incentives, arises from technological improvement. On the one hand, we wish to goad manufacturers of risky products to do the very best they can from a safety standpoint, including research into ways to make their goods safer. On the other hand, we must account for the benefits conferred by the early units in a developing product line. The problem is to strike a balance, one whose incentives drive the manufacturer far enough to inspire safer products, and also one perceived as fair. Fairness in this sense includes the manufacturer's perception that the law does not call upon it to do the impossible, and the consumer's belief that the law is not accepting a level of safety just because it was the standard of a lazy industry.

The drafters of the Directive evidently recognized this as a major problem, for no fewer than three substantive provisions speak to it. One

115. Evans v. General Motors Corp., 359 F.2d 822, 825 (7th Cir. 1966).
117. Id.
of those provisions proved so controversial that the Directive allows member States to opt out of its stricures.

1. Time of Marketing; State of the Art

Article 6 includes two related declarations on the subject. One clause, in Article 6(1)(c), describes one of the "circumstances" for consideration of "the safety which a person is entitled to expect" as being "the time when the product was put into circulation." Immediately following that, the Directive announces in Article 6(2) that "[a] product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.""

Taken together, these provisions give the manufacturer a split message: You will not be penalized only for doing better on later attempts, but you had better be rigorous on the first try. There is a decided undertone of fault in these provisions, one with moral harmonics. The Directive seeks to insure that just doing better in later models is not grounds for liability. At the same time, it may be read to indicate that "the safety which a person is entitled to expect" refers to the ability of the manufacturer, at any time in the process of design, to visualize the product in use and to formulate safety improvements.

The language of the Directive may not have the crispness of a quantitatively stated classification system. However, before strict liability became an articulated standard for products cases—and indeed presently—this level of abstraction has been a hallmark of negligence law. Indeed, the specificity of reference to temporal considerations in the Directive is more precise than the general negligence standard in the United States.

It would appear that these two provisions comprise an analogue to what is popularly called the "state of the art" defense. Since there are several different meanings for the term in American law, the effort to get to the root of the problem to which that label refers is commendable.

The Directive seems to eschew the meaning most likely to appeal to product makers, that of "customary industry practice." Yet the elastic character of the language in Article (6)(1)(c), "the time when the product was put into circulation," appears to give more room for maneuver to entrepreneurs than the definition of "state of the art" as "the aggregate of product-related knowledge existing at any point in time."

118. Directive, supra note 1, art. 6(1)(c).
119. Id. art. 6(2).
120. See 1 SHAPO, supra note 7, ¶ 10.01 at page S10-1 (1992 Supp).
122. See id. at 946.
2. The "Development Risk" Defense

a. Generally

The most controversial feature of the Directive that is related to temporal considerations is the so-called "development risk" defense in Article 7(e). That clause exonerates a producer if "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."123

There is a potential corner for "state of the art" argument in the "development risk" clause. Illustrative is a 1990 decision of the Sixth Circuit in a case involving DTP vaccine. The plaintiff in this case attacked the defendant's use of a whole cell design at a time when another, acellular vaccine was "in wide use in Japan."124 The court granted summary judgment to the manufacturer, however, pointing out that "[t]he relative effectiveness of the acellular design is only beginning to be understood."125 The court also noted that the acellular vaccine was not recommended for children under two, "the time of greatest risk."126

One might classify this holding under the rubric of "state of the art."127 However, it would seem that the decision also fits comfortably under the concept that "the state of scientific and technical knowledge at the time" of marketing did not "enable the existence of the defect to be discovered."128 The case is an interesting one conceptually, since...

123. Directive, supra note 1, art. 7(e). In what reportedly was a "last-minute revision," the Greek legislature opted to exonerate producers who "justifiably did not know or could not know" of a defect. See Elisa Alexandridou, The Greek Consumer Protection Act 1991, 1992 EUR. CONSUMER L.J. 20, 23 (commenting that "[t]his definition is . . . inconsistent with the Directive in that it establishes a subjective criterion, making the defence much broader than the state-of-the-art defence").
125. Id.
126. Id.
127. In an important early analysis of the Directive, Simon Whittaker flatly referred to "the state of the art defence of Article 7(e)." See Simon Whittaker, The EEC Directive on Product Liability, 5 Y.B. of Eur. L. 233, 254 (1985), elaborating the idea that Article 7(e) "is a version of what has become known, particularly in America, as the defence of the state of the art." See id. at 257-60.
128. Cf. Christopher Newdick, Risk, Uncertainty and "Knowledge" in the Development Risk Defence, 20 ANGLO-AMERICAN L. REV. 309, 325-26 (1991), analyzing the United Kingdom's development risk clause in section 4(l)(e) of the Consumer Protection Act 1987. This Section provides for a defense if the producer shows "that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control." Newdick comments that, "given the danger presented by many products, the duty to research across a broad spectrum of literature ought not to be difficult to establish." He observes that "[a] wide range of scientific disciplines may possess information that ought reasonably to be known to a particular producer." Id. at 325. Newdick concludes that "[i]n effect the producer ought to be familiar with and sensitive to the foremost scientific developments in his field" and that "given the time it takes for research findings to be verified and accepted by the..."
although an alternative product existed, the knowledge of its comparative effectiveness was, in fact, in a state of "development."

b. Question of Unknowable Risks

At the heart of the controversy surrounding Article 7(e) is the question of whether product makers may be held liable for risks unknowable at the time of marketing. The idea that they should be liable is perhaps the most striking theoretical implication of the pure conception of strict liability. One might argue, indeed, that such a case is at the heart of the concept. If the "existence of the defect" could be "discovered," then the case begins to have a smell of negligence. Therefore, the quintessential strict liability case is the one in which there was no way, at the time of marketing, to search out information that, later discovered, gave a color of defect to the product.129

The Illinois Supreme Court fully recognized this point in its decision in *Cunningham v. MacNeal Memorial Hospital.*130 The court in *Cunningham* applied a strict liability principle to a case of transfusion hepatitis. Though since overruled by the Illinois legislature, the decision stands as one of the principal formulations of strict liability for unknowable risks. The court specifically rejected the defendant's argument that it should escape liability because in "the state of medical science...there are absolutely no means by which the existence of serum hepatitis virus can be detected in whole blood."131

The court drew on the plain language of Restatement section 402A, applying that section's rule that imposes strict liability "although...the seller has exercised all possible care in the preparation and sale of his product."132 The nub of the court's argument appeared in its declaration that "[t]o allow a defense to strict liability on the ground that there is no way, either practical or theoretical, for a defendant to ascertain the existence of impurities in his product would be to emasculate the doctrine and in a very real sense would signal a return to a negligence theory."133

As a matter of the logic of the doctrine, *Cunningham* enforces a truly strict liability. By contrast, the development risk clause drives a substantial theoretical wedge into strict liability. Some of the most interesting questions about the potential effects of the clause are empirical, but they are linked closely to the ultimate judgmental issue.

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129. Cf. W. Page Keeton, *Products Liability—Inadequacy of Information,* 48 Tex. L. Rev. 398, 407-09 (1970) (proposing rule imposing liability when "the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact," regardless of whether the defendant was "excusably unaware of the extent of the danger and had not committed any negligent act").
130. 266 N.E.2d 897 (Ill. 1970).
131. Id. at 902.
132. Id. at 899.
133. Id. at 902.
One important question is whether, in practice, the development risk would make very much difference in the cases that actually come up for decision. It is not clear that it would. The tempest over the New Jersey Supreme Court's decision in *Beshada v. Johns-Manville Products Corp.*\(^{134}\) indicates why.

*Beshada* provoked a storm of criticism with its holding of strict liability, under the heading of failure to warn, in an asbestos case. The court emphasized that "[f]ailure to warn of a risk which one could not have known existed is not unreasonable conduct."\(^{135}\) It was not "saying what defendants should have done"; that was an issue of "negligence."\(^{136}\) What the court was saying was "that defendants' products were not reasonably safe because they did not have a warning. Without a warning, users of the product were unaware of its hazards and could not protect themselves from injury."\(^{137}\)

To the uninitiated, the court had created a conundrum. It had imposed a tort liability for failing to do something that could not have been done. But that is not the logic of *Beshada's* liability for "duty to warn." The "duty to warn" theory is simply a vehicle for the imposition of a true strict liability. The principal vice of the manufacturer's marketing of the product might be its failure to convey information. But the point is that, under strict liability, the manufacturer must be held liable for injuries caused by the product's hazards, even though it exercised "all possible care" in the entire process of marketing, including the provision of information.

To those whose tort world pivots on a fault-based morality, *Beshada* would have effected the miscarriage of justice of which critics complained, and which the adoption of the "development risk" defense implied. Yet in the particular context of the asbestos decisions that have taken the *Beshada* position,\(^{138}\) it would seem that the criticism is overstated and perhaps even misplaced.

Though these decisions have applied a strict liability theory, they have done so in a setting where there has been plenty of evidence of culpability. Illustrative is *Fischer v. Johns-Manville Corp.*,\(^{139}\) a decision just three years after *Beshada* in which the New Jersey Supreme Court affirmed a punitive damages award. The court emphasized "that in a strict-liability, failure-to-warn case involving exposure to asbestos or asbestos products, plaintiffs are not precluded from introducing evidence relating to defendants' knowledge or conduct as it may be relevant to other aspects of the case, including punitive damages."\(^{140}\)

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134. 447 A.2d 539 (N.J. 1982).
135. Id. at 549.
136. Id.
137. Id.
139. 512 A.2d 466 (N.J. 1986).
140. Id. at 473.
Other courts have referred to the increasing evidence of knowledge available to asbestos firms as long ago as the 1930s. A Maryland decision, for example, adduced an article on pulmonary asbestosis in a 1930 issue of Asbestos Magazine, a publication in which Johns-Manville advertised, to support the claim that "Johns-Manville knew or should have known of the contents of this article." The court also invoked a report to employees of a defendant firm by one of the company's salesmen, who described an article on asbestos and said that "[i]f you think mineral wool is dangerous you should read this." An important legal conclusion appears in a Fifth Circuit decision, dealing with the admissibility of the so-called Sumner Simpson Papers, which declared that "the scientific knowledge of one manufacturer may help the plaintiff prove that the dangers of asbestos were discoverable at the time of the plaintiff's exposure."

These observations do not refute the arguments made against pure strict liability on unfairness grounds, or indeed on economic grounds. They simply point out that as applied in the controversial setting of asbestos cases, a strict liability articulated to cover unknowable risks has turned out to be liability for extremely culpable conduct.

One might add that the application of strict liability for allegedly unknowable risks may, in some cases, embrace conduct where the risks were knowable but it would be prohibitive for the plaintiffs to prove that. This presents another empirical question, which would be difficult to answer: whether the application of strict liability will principally catch those cases or will penalize a substantial number of manufacturers who are truly faultless.

c. Derogation Provision

The sum of this discussion, perhaps, is that the "development risk" defense may be more thunder than lightning. Yet the defense was sufficiently controversial that the Directive allows states to derogate from it, recognizing that some states might believe that it "restrict[s] unduly the protection of the consumer." The Directive indicates the seriousness of such an action by specifically requiring any state that wishes to do so to "communicate the text" of its derogation to the Commission, which "shall inform the other Member States."

The Directive further requires that a State attempting to derogate must submit to a nine-month waiting period, unless the Commission

142. Id.
143. King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1025 (5th Cir. 1990).
144. See, e.g., Finsinger & Simon, supra note 73, at 207 (making manufacturers liable can prevent damages only if their "assessment of the advantage of greater safety and the disadvantages of greater costs takes place under a situation of better information than the assessment by the buyer").
146. Id. pmbl. para. 16.
147. Id. art. 15(2).
presented to the Council “a proposal amending this Directive on the relevant matter.” However, it allows the derogating state to implement its proposed measure if the Commission does not advise it within three months that “it intends submitting such a proposal to the Council.” If the Commission does submit an amendment to the Council, the State proposing to derogate must wait for 18 months.

d. Review Provision

Accenting the Council’s cautious approach to the question is the fact that the Directive specifically mandates a review after ten years of the development risk provision, any derogating provisions, and relevant judicial decisions. The standard for review is the effect of this body of law “on consumer protection and the functioning of the common market,” and the Directive provides that the Council shall utilize the Commission’s report on the subject to “decide whether to repeal Article 7(e).” The Preamble expresses the belief—is it a hope?—that subjecting a derogation to “a Community stand-still procedure” would be done “in order to raise, if possible, the level of protection in a uniform manner throughout the Community.”

If there should develop a substantial body of case law on the subject, the Council will have to decide whether the defense causes more unjust results than just ones. If the American experience is instructive, however, it may be that the Council will find that the “development risk” defense is a partygoer that is all dressed up with no place to dance.

VII. Warnings

A. Definitional Questions

One rather remarkable lacuna in the Directive is the lack of specific reference to liability for failure to warn of product hazards, although a principal drafter of the Directive has suggested that the language concerning “presentation of the product” in Article 6(1)(a) provides a basis for liability based on lack of warnings. At least one other clause in Article 6(1), referring to “the safety which a person is entitled to expect,” may provide an interpretative basis for decisions on warnings issues. It is true that the text of Restatement section 402A itself does not refer specifically to warnings, but the adoption of that section preceded the principal body of American judicial decisions on the subject. In any event, the development of the American case law makes it evident that this will continue to be a prominent set of issues. If any-

148. Id.
149. Id.
150. Id.
151. Id. art. 15(3).
152. Id. pmbl. para. 16.
153. See Taschner, supra note 79, at 95-96.
154. Directive, supra note 1, art. 6(1).
thing, litigation on warnings problems has increased in the last few years.155

B. Potential Issues

Certainly, it appears that Community courts will have to consider the application of the Directive to suits based on failure to warn. In this Article, we can begin to identify only some of the issues that may arise. In our discussion of the development risk defense above,156 we hinted at one important issue. This is whether states derogating from the defense would apply a true strict liability for failure to warn in situations in which the defendant could not have known at the relevant time the information on which a warning should be based.

We may briefly advert to some other warnings issues, salient for Europe, on which the American experience provides points of reference:

(1) European courts, or amendments to the Directive, should make clear the distinction between instructions and warnings.

(2) Community lawmakers will have to confront questions involving the duty to warn the so-called “sophisticated user.”

(3) Numerous problems will arise with respect to the locus of the duty among members of the distributional chain. An illustrative question, tied in with the “sophisticated user” problem, relates to the extent of the obligation of firms like chemical suppliers to provide direct warnings to employees of companies that are the direct purchasers of their products. The Community presumably will also have to formulate rules for the division of legal responsibility between pharmaceutical manufacturers and providers of medical care.

(4) Community judges will face many issues concerning adequacy of warning that are irreducibly questions of fact. Some of these questions will lie in the overlap between the traditional requirement that a failure to warn must be material to the consumer’s decision and the Directive’s mandate that the plaintiff must show “the causal relationship between defect and damage.”

(5) There also will arise issues in another potential area of conceptual overlap: between questions about the “duty to warn” and problems of what American courts call “misuse.” We have indicated above some language in the Directive that might ground a “misuse” defense.157

C. Modes of Argument: The Uses of Power and Information Costs

Two sets of discourse frequently run parallel to one another, but sometimes cross paths, in the duty to warn area. One concerns the use of

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155. Decisions on this question have constituted one of the biggest sets of additions to recent Supplements to the writer’s products liability treatise. See 1 SHAPO, supra note 7, ch. 19 (in Supps. 1991, 1992).
156. See supra text accompanying notes 123-44.
157. See supra text accompanying note 105.
power. It entails the argument that, from an ethical standpoint, the possession of information itself imposes obligations.

A seemingly more precise sort of dialogue deals with information costs. The focus here is at least implicitly quantitative: on weighing the costs of providing information against the costs of products injuries. This approach to the problem has generated competing lines of argument.

Some judges have focused on the relatively trivial monetary cost of adding cautionary words or symbols to product labeling or literature. Illustrative is an Alaska case in which an infant became severely dehydrated after being fed a glucose and water solution, intended principally as a food supplement, which was dangerous to infants if it was not sufficiently diluted. The manufacturer sold other products, meant for infants, in the same kind of bottle. The retailer placed the solution on its baby product shelf. Holding that there was a fact question of whether there should have been a warning that the product should not be fed to infants, the Alaska Supreme Court said that “[t]he cost of giving an adequate warning is usually so minimal, i.e., the expense of adding more printing to a label, that the balance must always be struck in favor of the obligation to warn where there is a substantial danger which will not be recognized by the ordinary user.”\(^{158}\)

A decision by the Court of Appeals for the District of Columbia presented a contrasting point of view on an allegation that a firm should have put a more explicit warning on propane cylinders about their “explosive, as well as flammable” nature.\(^{159}\) Analyzing the argument that it is very cheap to include extra bits of information in warnings, the federal court emphasized that “[t]he primary cost is, in fact, the increase in time and effort required for the user to grasp the message.”\(^{160}\) Each time one adds an extra item, the court said, it “dilutes the punch of every other item” and pieces of information “get lost in fine print.”\(^{161}\)

These two cases, taken together, provide a sense of the parameters of the problem. The decision in the gas cylinder case provides a counterweight to the food supplement case. Community courts will have to take both points of view into account. Yet, in considering the “dilution” argument, they must also reflect on its ramifications. For, carried to its fullest implications, the argument would appear to suggest that the more dangers a product presents, the less likely it may be that the manufacturer will be liable for injuries caused by those hazards.

VIII. Defenses

In addition to the concept of the “development risk,”\(^{162}\) and defenses

\(^{160}\) Id. at 937.
\(^{161}\) Id.
\(^{162}\) See supra text accompanying notes 123-44.
based on the consumer's conduct, the Directive provides several discrete defenses focused on the product.

A. Product Not Put in Circulation

A threshold point is that producers will escape liability if they "did not put the product into circulation." Though this may seem a most obvious point, there still may be room for interpretation. For example, the question would arise whether a demonstration of a product constitutes putting it into circulation. In a case dealing with the demonstration of a defective aircraft, the Alabama Supreme Court applied its specialized products liability doctrine. Emphasizing the existence of the "profit motive," the court said that the manufacturer was "in a better position to know and correct defects in his product and as between him and his prospective consumers should bear the risk of injury . . . when . . . defects enter the market uncorrected."

When the injured user of a product has a professional interest in its development, courts are likely to exonerate the manufacturer. This category would include people who aid in the actual process of product development, for example, a man who ran a glass manufacturing business in his garage and contracted to help in the development of a glass-spinning machine. A New Jersey court, confronted with this claimant's allegation that the machine did not have adequate safety devices, said it would be "senseless" to apply strict liability and that it would "deter the development of new products and processes."

Another decision denied recovery when a test driver for a tire producer was killed by a tire blowout. What made this Texas case a close one was that the defective tire was what is called a "non-interest spare," a tire used on the test vehicle from the manufacturer's ordinary consumer stock but one that was not being tested. The Texas Supreme Court, saying that "the product must be released in some manner to the consuming public" in order to justify liability, emphasized that the sued-upon tire, "although not itself the subject of the test, always remained within the industrial, testing process."

This case appears to stand at the margin, because the tire in question was of a kind sold across the country for general use. Arguably, the question essentially is one of consumerhood. Given the pervasive emphasis of the Directive on "protection of the consumer," such a decision would seem justifiable in Europe on the basis that a test driver simply is not a consumer.

One might argue the case the other way, for the test driver's position relative to the non-interest spare was exactly that of any purchaser.

163. See infra text accompanying notes 204-14.
164. Directive, supra note 1, art. 7(a).
from a tire store, both as to his possession of information and his ability
to protect himself against injury. But the premise underlying the deci-
sion seems to be that one must consider all the tires, including the non-
interest spare, as a package within the test driver’s job. Working from
that foundation, it would be illogical to call a test driver a consumer
relative to a package of automotive products involved in his work.

B. Defect Not Existing When Product Marketed
The Directive also protects a producer from liability when “it is prob-
able 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.”168 These overlapping clauses appear sim-
ply to reinforce the basic opposition to arbitrary liabilities that one finds
in most legal systems.

C. Not Manufactured for Sale or Distribution
A more potentially controversial provision is the Directive’s exoneration
of a producer when “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.”169

American law offers a conceptually interesting set of arguments rel-
levant to this language under the heading of the “dual capacity” doc-
trine. The California Supreme Court set the stage for dispute in a
decision focusing on injuries attributed to defects in a tank truck con-
taining flammable gas, which the plaintiff was delivering to a customer
of his employer. The employer, defendant in this tort action, had
assembled about 200 bulk delivery trucks and used all but four of these
in its own operations. The plaintiff claimed that various products, other
than the tank truck, were involved in his accident, including “storage
tanks, valves, couplings, hoses and other equipment” used in the stor-
age and transportation of gas.170

The employer defended on the ground that its exclusive liability
was that imposed by the state workers’ compensation act and that thus
its employee could not sue it in tort for injuries occurring in the course
of employment. The California court, however, found a basis for liabil-
ity outside the workers’ compensation legislation in relationships “dis-
tinct from that of employer-employee,” which “invoke[] a different set
of obligations.”171 In this “dual capacity” situation, the court thought
that to bar the employee from a tort action would deny him the “protec-
tion granted to every other user of manufactured products.”172 The
court declared that there was “naught to commend a rule . . . which
would encourage manufacturers to do less in the area of product safety

168. Directive, supra note 1, art. 7(b).
169. Id. art. 7(c).
171. Id. at 272.
172. Id. at 273.
if by chance the product is to be used by their own employees."\textsuperscript{173}

This position, though logically argued, has not commanded widespread assent. Illustrative of judicial opposition to "dual capacity" thinking are the views of the Ohio Supreme Court. That court denied a tort claim by an employee of Firestone Tire & Rubber Company for injuries caused by the blowout of a Firestone tire, mounted on a truck used in the plaintiff's employment. Although recognizing the "strong public policies underlying the law of products liability," the court declared that to allow a tort recovery would "elevate" those policies over the "constitutional imperative" of the Ohio constitution's provision that makes workers' compensation an exclusive remedy for employees injured on the job.\textsuperscript{174}

Ironically, the language of the Directive could produce results opposite from the contrasting outcomes in each of these two leading American cases. With respect to the case of the tank truck, it would appear that the exact product at issue was not "manufactured by" the defendant employer "for sale." It is a closer question whether it was "manufactured . . . by him in the course of his business."\textsuperscript{175} It was "manufactured," but arguably only in the course of the business of gas delivery, rather than the business of manufacturing trucks.

By contrast, the Firestone tire, as a generic product, was indeed "manufactured . . . for sale."\textsuperscript{176} Being a fungible item, it could as well have wound up on the truck of any buyer from a Firestone outlet as on the plaintiff's vehicle. It would seem that, putting aside any statutory provisions in Community states that parallel the exclusivity requirements of American workers' compensation statutes, a strong case would exist for liability under the language of the Directive. For these purposes, one might argue that the Firestone driver in the Ohio case was more a "consumer" of a consumer product than was the driver of the tank truck in the California case.

D. Compliance With Public Regulations

Another Directive provision that exonerates producers corresponds with a rich lode of American case law. This is the clause that bars producer liability when "the defect is due to compliance of the product with mandatory regulations issued by the public authorities."\textsuperscript{177}

The American law appears to line up with the rule of the Directive. For example, when a jeep manufacturer exactly complied with government specifications, which omitted a seat belt in the vehicle, a New Jersey appellate court affirmed a summary judgment for the defendant

\textsuperscript{173} Id.
\textsuperscript{174} Schump v. Firestone Tire & Rubber Co., 541 N.E.2d 1040, 1044 (Ohio 1989).
\textsuperscript{175} Directive, supra note 1, art. 7(c).
\textsuperscript{176} Id.
\textsuperscript{177} Id. art. 7(d).
on a strict liability claim.\textsuperscript{178} The trial court had referred to the fact that the Government's bid contract had required the manufacturer to omit seat belts and roll bars,\textsuperscript{179} which the appellate court described as representing "a conscious, intentional determination by the United States Government that the installation of seat belts would be incompatible with the intended use of the vehicle."\textsuperscript{180}

In another case, involving a highway exit sign pole into which the plaintiff's car crashed, the Illinois Supreme Court declared broadly that "[a]n independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow."\textsuperscript{181} The opinion of the Illinois appellate court in that case provides an interesting parallel to the body of federal law that recently has developed on the subject. The state appellate court expressed concern that if suit were allowed, there would be no bidders for government contracts because of fear of litigation.\textsuperscript{182}

The analogous body of federal law, classified under the heading of the "government contract defense," stems from the decision of a closely divided Supreme Court in \textit{Boyle v. United Technologies Corp.}, which focused on the crash of a military helicopter. Saying that the "selection of the appropriate design for military equipment . . . is assuredly a discretionary function" under the Federal Tort Claims Act, the majority emphasized that such choices "involve[] not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."\textsuperscript{183}

The majority in \textit{Boyle}, speaking through Justice Scalia, set out a tripartite test for immunizing manufacturers for "design defects in military equipment." The defense would apply when (1) the Government "approved reasonably precise specifications" (2) to which the equipment conformed and (3) the supplier warned the Government about dangers known to it but not to the Government.\textsuperscript{184}

Justice Scalia's emphasis, by comparison with that of the state appellate court in the sign pole case, was on the potential burden on the Government itself. He was apprehensive that the cost of injuries under a liability rule "would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices" against the possibility of "contingent liability for the Government-ordered designs."\textsuperscript{185}

\textsuperscript{180} Sanner v. Ford Motor Co., 381 A.2d at 806.
\textsuperscript{182} Hunt v. Blasius, 370 N.E.2d at 621-22.
\textsuperscript{184} Id. at 512.
\textsuperscript{185} Id. at 511-12.
With respect to the Directive’s exception for compliance with regulations, Dr. Hans Taschner has declared that producers “cannot be placed between disobedience and liability.”\(^{186}\) This philosophical point runs in tandem with a combination of the economic concerns to which American courts have adverted, as they might become relevant in European member states: the fear of reduced bidding because of liability against contractors and apprehension that the burden of that liability will simply be passed on to governments.

E. Defect and Defenses: Competing Values

It may be useful to consider together the definition of defect in Article 6\(^ {187}\) and the exceptions to liability in Article 7, at least one of which—the development risk defense\(^ {188}\)—directly affects the definition of defect. Collectively, these provisions reflect the competing concerns that must have weighed on the drafters as they sought to fashion a substantive definition of the sort of product profile that would occasion liability.

The definition is a complex one because consumers themselves harbor competing desires, within groups and even within themselves as individuals, and because society as a whole reflects that competition.

The Directive reflects a perception that the image the product presents is an initial and powerful influence on consumers, whose minds have been seeded by a variety of subtle portrayals as well as relatively blatant advertising messages.

The Directive embodies common sense, as well as fairness, in recognizing that manufacturers cannot plan for the financial consequences of liability unless they can predict what kinds of product uses will occasion liability. It is worth noting, however, that one of the most difficult conceptual aspects of the limitation to reasonably expected use lies in the crashworthiness conundrum.\(^ {189}\)

Perhaps the most accurate reflection of competing consumer demands in these sections of the Directive inheres in their references to the effects of technological advance. The principal thrust of the Directive’s references to this phenomenon\(^ {190}\) is that Europe does not want the threat of liability to impede product development. Rather, it wishes to encourage manufacturers to continue improving their products without fear that improvements will occasion damages awards.\(^ {191}\) Implicit in these provisions are the ideas that the acquisition of information is

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\(^{186}\) Taschner, supra note 79, at 91.
\(^{187}\) See supra text accompanying note 66.
\(^{188}\) See supra text accompanying notes 123-44.
\(^{189}\) See supra text following note 117.
\(^{190}\) See Directive, supra note 1, arts. 6(1)(c), 6(2), and 7(e).
\(^{191}\) A concise, recent description of the way that tort liability may create net disadvantages to safety appears in Stephen F. Williams, Second-Best: The Soft Underbelly of Deterrence Theory in Tort, 106 HARV. L. REV. 932 (1993). Judge Williams notes, for example, “tort law’s uneven imposition of burdens” on goods on which it imposes liability—“its failure to penalize the net drawbacks of their substitutes.” Id. at 940.
costly and that, in some cases, consumers must bear the cost of acquiring the information necessary for product improvement. Subject to opting out by individual states, who must face waiting periods if they choose to derogate from the development risk defense, the Directive also makes a fairness judgment against liability for unknowable risks. Yet, the derogation alternative itself reflects the fact that fairness has two sides with respect to this issue: the other side relates to the equity of spreading the loss of unknowable risks among the many who benefit indirectly from the pain of the few.

The other substantive provisions associated with the defect idea seek to require that the plaintiff falls within the consumer class. They also aim to insure that the defendant is a proper economic actor on which to pin liability, either within traditional civilian distributional chains or when the Government is itself the consumer.

One should not carry reductionism of rationales too far in this area, especially having underlined the complexity of consumer desires and the conflicts they create. Yet one can discern these broad threads of policy: The Directive aims to provide consumer protection, to assure that it is consumers who are the object of this protection, and to advance the powerful consumer interest in product innovation. In pursuing these goals, the Directive embodies a recognition that fairness is a many-splendored concept.

IX. Proof of Causation

A crucially important element of a plaintiff's products liability case, on both sides of the Atlantic, lies in the requirement of proof of causation. The Directive expresses this quite simply as a demand that the claimant "prove . . . the causal relationship between defect and damage."192

A. Role of Experts

This requirement will often engender arguments about scientific fact. In the United States, the controversy frequently focuses on the so-called "battle of the experts." A paradigmatic and fierce set of confrontations on this issue has come in litigation over alleged causation of birth defects by the drug Bendectin, which was prescribed for morning sickness in pregnant women.

The early decisions on the subject tended to favor the defendant manufacturer on the grounds that the plaintiff had presented no evidence of a causal relationship between Bendectin and limb deformities in children born to women who took the drug. In one case, the plaintiff offered an expert who testified, in the First Circuit's characterization, that the drug "could cause limb reduction on the basis of in vivo animal studies, in vitro animal studies, and the study of 'analogous' chemi-

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192. Directive, supra note 1, art. 4.
A contrast appears in a Third Circuit holding that plaintiffs could avoid summary judgment with the testimony of a single expert that "the available epidemiological data" would support a finding that Bendectin caused limb defects. The Court expressed its sympathy with "concerns . . . over the costs and inequities that flow from inconsistent outcomes in Bendectin cases," and the potential impact on the supply of drugs. However, the court did not think it could rule that the testimony of the plaintiff's expert "would be unhelpful" under the standards of the Federal Rules of Evidence.

The resolution of such issues may proceed differently in Europe, especially under the inquisitorial systems that prevail there. If the court relies on its own experts, and indeed on its own ability to determine the facts, it will not have to confront the problem of whether a single dissenting expert's testimony should be allowed to go to a nonprofessional factfinder. This will not, however, obviate the need for courts to consider the force of a lone expert's testimony. That is especially so if one assumes that the Directive's powerful commitment to "protection of the consumer" embodies a stance that is risk-averse to harms whose source is uncertain.

B. Product Identification

The question of whether the defendant's product was involved in disease etiology has occupied an increasing amount of judicial time in America. Typical of the kind of case in which a plaintiff lacks sufficient evidence is one in which a worker claims that he was exposed to a product made by a defendant because he worked on a job site where it was used but does not show that he personally worked with the defendant's product nor that he had "personal knowledge of the products used around him." By contrast—and sometimes by thin slicing of distinctions—plaintiffs may survive summary motions when they specifically identify products to which they were exposed, or even when a co-worker identifies

194. Id. The Supreme Court has granted review of a similar holding by the Ninth Circuit. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (9th Cir. 1991), cert. granted, 113 S. Ct. 320 (1992).
196. Id. at 951-52.
197. Id. at 956-57.
specific materials made by defendants. The decisions mentioned in the notes to this paragraph, and many others on this question, deal with asbestos litigation. Given the ubiquitousness of man-made fibers in the workplace environment, and even in domestic and educational settings, one may expect this issue to recur on both sides of the Atlantic. An inquisitorial system will not preclude the need for factual decision.

C. Overlap of Causation and Defect Issues

Some of the most interesting issues that may confront European courts are those that arise when the "causation" and "defect" issues overlap. Courts should try to keep these issues separate when possible.

A California decision presents a subtle mix of issues. The case arose from an injury to a bus passenger when the driver negligently caused the vehicle to lurch. The claimant asserted that the bus manufacturer was negligent because it did not put a grab bar in front of her seat, as it had done above the back of other forward-facing seats. There was evidence that, as she was thrown forward, the plaintiff reached for something to grab but found nothing. The court said that "[t]he need for a 'grab bar' or pole to steady oneself" in such circumstances was "a matter within the common experience of lay jurors." To this conclusion, it joined the finding that although the matter may not have been "capable of mathematical proof," the jury could have found that a handrail in the plaintiff's reach would have prevented the injury.

This decision illustrates the conceptual complexity that may arise from a very simple fact situation. A court confronted with such a case must entangle reality from a thicket of locutions that include design defect, factual causation and materiality. The decision, for European as well as American judges, will require an assessment of the cost of the proposed design feature and of the fact that the manufacturer had used it in other places in the same vehicle, as well as of probabilistic inferences from a fact situation where there are unavoidable gaps.

Causation is not usually an easy matter when cases have proceeded to trial; it may be doubly difficult when the issue becomes entwined with policy questions concerning the desirable level of consumer protection. Confronted with such a case, a European court must attempt to untangle, while considering in tandem, the questions of whether the bar-less seat did "not provide the safety which a person is entitled to expect" and whether there was a "causal relationship between defect and damage."  

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202. Id. at 230.
203. Directive, supra note 1, art. 6(1); see supra text accompanying notes 66-79.
204. Id. art. 4.
D. "Proximate Cause" and Policy Questions

We should advert briefly to a set of issues that have consistently made their way into American legal discourse, frequently under the misnomer of "causation." One modern prototype of these questions concerns the responsibility of manufacturers for injuries associated with product tampering. To be sure, one might put the question as whether the manufacturer's failure to make a product tamper-proof, or at least revelatory of tampering, was the "proximate cause" of a consumer's injury.

This writer, influenced by the penetrating scholarship of Leon Green,\(^{205}\) would suggest that the more appropriate statement of the issue is whether the defendant owed a duty to the plaintiff. Judge Goettel of the Southern District of New York adopted such an analysis in denying recovery for the death of a young woman who had swallowed Tylenol capsules laced with cyanide. Saying that duty was "bound up with notions of public policy and the realities of everyday life," he saw it as "a tool by which society places controllable limits on actions and inactions for which parties may be answerable in damages."\(^{206}\) Relative to the case before him, he concluded that "[s]uch a duty, once created, could not possibly be cabined."\(^{207}\)

The Directive does not, on its face, provide a conceptual matrix for dealing with such issues. Inevitably, however, they will present themselves to European courts. It would be well if Community judges recognize them for the policy questions they are rather than force them into the mold of "causation," "proximate" or otherwise.

X. Apportionment of Liabilities

Another important cluster of issues involves the apportionment of liability among parties causally connected with an injury. In addition to firms that are initially the subject of suits, these parties may include claimants themselves and third parties, including other sellers, who have contributed to an accident or illness.

A. With Plaintiffs

1. Directive Provision on Claimants' Fault

The Directive straightforwardly sets up a comparative responsibility defense, declaring that producer liability "may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible."\(^{208}\)

This author surmises from private conversation that there were serious reservations among drafters and advisers concerning the wisdom of

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207. Id.
208. Directive, supra note 1, art. 8(2).
this provision. For example, one argument against any defense based on the plaintiff's conduct was that such defenses would undercut the policies supporting the Directive's fundamental theory of liability without fault.

2. American Comparisons

a. Generally

Given the existence of the defense, however, an American analyst should suggest that a crucial question is whether European interpreters of the Directive will allow defenses based on such claimant fault as a failure to discover information, or only those based on conduct that foolishly persists in the face of a known danger. This is the principal line of demarcation concerning claimants' conduct in American law. In products cases, United States courts have tended to prefer the latter defense, usually cast in terms of "assumption of risk," to the traditional doctrine of contributory negligence.209

In a few states, courts have gone even further to abrogate the defenses altogether in a particular environment: the workplace. For example, the New Jersey Supreme Court initially held that assumption of risk will not provide a defense against a strict liability claim for industrial injuries. The court reasoned that manufacturers "should not be permitted to escape from the breach of . . . duty to an employee while carrying out his assigned task . . . when observance of that duty would have prevented the very accident which occurred."210 In a later decision that barred the defense in negligence cases, the New Jersey court declared that "[a] factory worker pursuing his assigned task on a plant machine has no real choice," with "[t]he practicalities of the workaday world" enforcing a situation in which "the employee works 'as is' or he is without a job."211

This view is not likely to persuade most American courts, but European analysts may wish to consider it in light of the Directive's stated goal of "a fair apportionment of the risks inherent in modern technological production."212

The effort to define defenses based on claimant conduct has generated a waterfall of terminology, featuring such concepts as "obvious danger" and "misuse." The "obviousness" idea, as explained above, overlaps substantially with judicial intuitions that there is no defect or no duty to warn. I need only reemphasize that the use of this language appears to embody a moral judgment.213

209. See, e.g., 2 SHAPO, supra note 37, ¶ 20.01[13][a] (summarizing precedents).
212. Directive, supra note 1, pmbl. para. 2.
213. See supra text accompanying note 93.
b. "Misuse" Concept

The defense denominated "misuse" in the American law intersects with the clause in the Directive's definition of defect that refers to "the use to which it could reasonably be expected that the product would be put." Without denying that there may be some independent vitality in the "misuse" concept under the "defect" heading, this writer thinks that when courts say a product has been "misused," usually they believe that the plaintiff was foolish, and probably very foolish. Generally speaking, this writer suggests that under the Directive, the basic question is at what level of plaintiff carelessness to set the definition of "the fault of the injured person."214

214. Directive, supra note 1, art. 6(1)(b).

215. For commentary on this point in the context of American law, see 2 SHAPO, supra note 37, ¶¶ 20.03[1], 21.08[6][c][i].


217. See, e.g., 2 SHAPO, supra note 37, ¶¶ 22.03[3][b], 22.08.


c. Comparison of Responsibility: Doctrinal Contrasts

One should note that the Directive appears to sweep before it some theoretical questions that have fascinated American courts and commentators, with respect to comparison of defendants' and plaintiffs' conduct. This set of issues relates to the doctrinal mixture of liability without fault on the defendant's side and reduction of damages for fault on the plaintiff's side. One statement of the theoretical difficulty appeared in a separate opinion in a California case in which Justice Jefferson criticized the attempt to "reduce" to a common denominator the "two noncomparables" of negligent plaintiff conduct and a defective product.215 Although the drafters of the Directive seem to have decided that this was not a problem, how one compares the two elements may present something of a puzzle in Europe as well as the United States. The difficulty of sorting out the issue is evident in the smorgasbord of opinions in American law about what to compare, including "causation," "liability," and, most broadly, "responsibility."217 The key, for the drafters of the Directive, appears to lie in the notion of "fair apportionment of risk between the injured person and the producer."218

B. Among Third Parties

The other major segment of apportionment questions relates to the division of responsibility among producers and suppliers. The Directive's mandates on this subject seek to effectuate a maximum liability to the plaintiff, leaving apportionment rights to be sorted out among responsible parties.

The Directive makes plain that multiple causes of an injury will not prevent a plaintiff from recovering all of his or her damages from one contributing party. It says specifically that when "two or more persons
are liable for the same damage, they shall be liable jointly and sever-
ally.”\textsuperscript{219} Moreover, it declares that a producer's liability “shall not be
reduced when the damage is caused both by a defect in the product and
by the act or omission of a third party.”\textsuperscript{220}

Accompanying both of these provisions are statements that each
shall operate “without prejudice to the provisions of national law con-
cerning the rights of contribution or recourse.”\textsuperscript{221} If the American
development is predictive, one may expect that under this broad lan-
guage, European courts will develop analogues to doctrinal distinctions
like those between “primary” and “secondary” negligence or “active”
and “passive” conduct in an effort to achieve a fair allocation of
responsibility.\textsuperscript{222}

\section*{XI. Repose and Limitations}

\subsection*{A. Limitations; Discovery Rule}

The Directive provides periods of both limitation and repose, in a way
generally familiar to American products law. The limitation period is
three years,\textsuperscript{223} and the Directive specifically builds in a discovery rule.
This provision, which is relatively liberal toward plaintiffs, begins the
limitations period on “the day on which the plaintiff became aware, or
reasonably should have become aware, of the damage, the defect and
the identity of the producer.”\textsuperscript{224}

The requirement that the plaintiff be aware of the damage is the
foundation stone of a discovery rule. It expands the limitations period
for the general class of cases, many involving chemicals, fibers and
drugs, in which plaintiffs do not become aware of harm until many years
after exposure.

In declaring that the plaintiff should reasonably be aware of the
defect, the Directive settles an important and controversial issue in favor
of claimants. In the background of this question are the many situations
in which a plaintiff knows of a harm, such as an illness, but is not aware
that a product is a cause of the harm. In that context, arguably the
requirement of knowledge of defect could be interpreted to include
knowledge of causation.

A case that illustrates this point involved the prescription hormone
DES, to which the plaintiff ascribed adenosis because of her mother's
ingestion of the product during pregnancy. The plaintiff admitted that

\textsuperscript{219} \textit{Id.} art. 5.
\textsuperscript{220} \textit{Id.} art. 8(1). The Preamble reemphasizes the point, saying that the “protec-
tion of the consumer requires that the injured person should be able to claim full
compensation for . . . damage from any one of” several liable persons. \textit{Id.} pmbl.
para. 5.
\textsuperscript{221} \textit{Id.} arts. 5, 8(1). I have used the orthography of art. 5, with which art. 8(1)
varies slightly.
\textsuperscript{222} See, e.g., 1 Shapo, \textit{supra} note 7, § 14.04[1], [2], [5].
\textsuperscript{223} Directive, \textit{supra} note 1, art. 10(1).
\textsuperscript{224} \textit{Id.}
she knew about “the possibility of a causal nexus” as early as 1973.\footnote{225} However, in applying the discovery rule, the court pointed out that as late as 1981 the defendants were claiming that there was “no certain relationship between ingestion of DES by pregnant women and adenosis . . . [in] their offspring.”\footnote{226}

Unavoidably, the requirement of plaintiff awareness of the defect will confront European courts with the same kind of difficult factual issues that have arisen under American discovery rules. Another DES case demonstrates the factual knottiness of the cases. A majority of the Third Circuit barred the action of a teenage “DES daughter” who had read a magazine article and had a conversation with a physician that raised the possibility of an association between her mother’s ingestion of the hormone and her cancer.\footnote{227} The court did not think the discovery rule saved the plaintiff’s case even though her mother denied to her, over a period of three years, that she had taken the drug.\footnote{228} Judge Higginbotham’s dissent acidly etched the factual controversy. He said that to hold that the plaintiff’s information constituted discovery was to take “[a] rigid view of what is the permissible rational conduct of a teenager who has read in a general magazine, a two-column, six paragraph article which is not written by anyone purporting to be a physician or medical expert of any type.”\footnote{229}

As loath as European courts may be to balance policy considerations, the factual issues that will arise under the Directive’s discovery rule may require them to undertake that task. The Maryland Court of Appeals did so in declaring that “an action accrues when the plaintiff knew or should have known he had a cause of action,” in response to a certified question in a case involving paralysis alleged to be caused by an anesthetic.\footnote{230} It spoke both of the “predicament” of plaintiffs “who cannot discover manufacturer wrongdoing or product defect through a reasonably diligent investigation,” and the burdens of “keep[ing] a defendant shackled to long past liabilities,” which “hinders a defendant’s ability to plan for the future.”\footnote{231}

The Directive’s requirement that the plaintiff have reasonable opportunity for knowledge of the producer’s identity settles an issue that has split American courts.\footnote{232} Especially in the case of products that cause multiple injuries over a period of time, it would seem that this rule is a just one. As a federal court noted in another DES case, a producer of such goods cannot argue that a delayed suit has prejudiced its ability to defend itself.\footnote{233}

\begin{itemize}
\item \footnote{226} Id.
\item \footnote{228} Id. at 707-11.
\item \footnote{229} Id. at 714 (Higginbotham, J., dissenting).
\item \footnote{230} Pennwalt Co. v. Nasioc, 550 A.2d 1153, 1167 (Md. 1988).
\item \footnote{231} Id. at 1166-67.
\item \footnote{232} See generally 2 SHAPI, supra note 37, ¶ 30.07[4].
\end{itemize}
Though the problem of cancers in "DES daughters" is one peculiar to a specific product and a closely defined population, it is no accident that some of the most interesting cases involving the discovery rule have arisen from litigation on that question. The DES problem symbolizes the latency period issues that will continue to arise from chemical and biological agents. It also is highly symptomatic of the irreducibly factual nature of the questions likely to arise under the Directive's rule, particularly under the heading of discovery of defect.

B. Repose Period

A more stringent boundary to plaintiffs' actions under the Directive appears in its statute of repose, which requires member states to provide that rights to sue "shall be extinguished . . . 10 years from the date on which the producer put into circulation the actual product which caused the damage." The Preamble in effect identifies a linkage between this provision and other parts of the Directive that deal with advances in product development. It also observes that products "age in the course of time, higher safety standards are developed and the state of science and technology progresses." For those reasons, the Preamble declares, "it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product." The repose period appears to admit no exceptions. An American observer may simply remark that if one or more DES-type episodes sweep through the Community, the Council may decide to reconsider the balance it has struck, at least with a time limit that is relatively short in a world of biologicals and chemicals. The problem of justice is that in achieving certainty for producers, a repose period literally can bar a right of action "before it ever existed."

XII. Contracting Out

The Directive settles very crisply the question of disclaimers and limitations of liability: it does not allow them "in relation to the injured person." The drafters thought that the Directive needed a provision outlawing "contractual derogation" for the "effective protection of consumers." Given the strict liability underpinnings of the Directive, this accords with the American law. An illustrative pronouncement, from an Illinois court, stressed that "liability in a strict liability action is imposed independent of contractual considerations." The fact that there has been little effort by American companies to enforce such provisions

234. Directive, supra note 1, art. 11.
235. Id. pmbl. para. 11.
236. Id.
238. Directive, supra note 1, art. 12.
239. Id. pmbl. para. 12.
against claims for personal injuries may indicate corporate recognition of the moral force of this principle.

XIII. Remedies
A. Directive's Preservation of Remedies
The Directive makes clear that its liabilities are cumulative to, rather than replacing, other remedies. Specifically, it preserves "any rights" under "the rules of the law of contractual or non-contractual liability or a special liability system existing" when the Directive becomes effective\(^{241}\)--the reference to special liability systems being explained as pertaining to pharmaceuticals.\(^ {242}\)

The broader reservation of rights evokes mention of a blossoming of American case law around the coexistence of tort and warranty-based theories. Some American jurisdictions have tended to equate the concepts. The Colorado Supreme Court, for example, declared that "all considerations governing the appropriate burden of proof" in strict liability and warranty actions are "identical."\(^ {243}\)

Other American courts have stressed that strict liability creates a "new tort,"\(^ {244}\) or a "new theory of recovery," the effect of which is that a defendant could claim that the addition of a claim based on the strict liability theory constitutes unfair surprise.\(^ {245}\) It is not evident what analogous effect the novelty of the Directive's theory may have on Community litigation. However, it does appear that even in member states that have enforced virtually strict forms of liability, the theory is a distinct one and certainly different from any contractual doctrine.

It seems clear that the Directive would not permit the result that obtains in some American jurisdictions: the holding that the Uniform Commercial Code preempts the field, as against tort theories, for product-caused injuries.\(^ {246}\) The drafters emphasized that to the extent that other theories of liability "also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive."\(^ {247}\) The provision preserving other remedies thus dovetails with the anti-disclaimer clause to assure a broad field of maneuver for consumers.

Given the emphasis on economic theory in a wing of American products liability scholarship, it is notable that the Directive concedes little to the idea that modern products commerce involves traditional bargains. We may link this discussion to a point made earlier, that the Directive does not specify rules relating to products warnings. Although

\(^{241}\) Directive, \textit{supra} note 1, art. 13.
\(^{242}\) See \textit{id.} pmbl. para. 13.
\(^{244}\) Wansor \textit{v.} George Hantscho Co., 252 S.E.2d 623, 624 (Ga. 1979).
\(^{246}\) \textit{See, e.g.}, Cline \textit{v.} Prowler Indus., 418 A.2d 968, 979 (Del. 1980).
\(^{247}\) Directive, \textit{supra} note 1, pmbl. para. 13.
the contributory fault provision implies an assumption that consumers exercise choice in confronting products in particular situations, it appears that the drafters viewed consumer choice in the modern world as being relatively constrained. Arguably, this is a message conveyed by the tri-cornered combination of the anti-disclaimer clause, the preservation of remedies provision and the lack of specificity about warnings.

B. Damages Limitations

The Directive provides member states with the option of limiting damages for multiple injuries caused by the same product, one of the principal fonts of "mass tort" liability. It allows a ceiling of 70 million ECU "for damage resulting from a death or personal injury and caused by identical items with the same defect." The drafters made clear that their default rule was one of unlimited liability, saying that given "the legal traditions in most of the Member States, it is inappropriate to set any financial ceiling on the producer's liability without fault." However, because of "differing traditions," they did allow member states to "derogate from the principle of unlimited liability." At the same time, re-striking a dual policy motif that runs through some parts of the Directive, they declared that the limit must be "at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market."

These provisions are not unfamiliar to observers based in a federal union and evoke some of the problems of limiting total liability that have arisen from multiple injuries cases in the United States. For producers that sell widely throughout the European Community, the Directive may not effectively constrain liability, since presumably most member states will follow their "legal traditions." In that case, it would seem that a question of equity would arise for consumers in derogating states.

This is not to ignore the problem, sometimes extending to corporate ruin, created by unlimited liabilities. The principal controversy on the subject in America has centered on multiple punitive damages. This problem has bedeviled American judges and observers. But even if one believes there should be a limit placed on multiple punitive awards,

248. Id. art. 16(1). Germany is said to have insisted on this clause "against the majority of the Member States," arguing that only a limitation on damages would make it possible to insure product risks. Criticizing this position, two commentators say that with unlimited liability, "insurance with limited cover will be more easily available and most likely be cheaper, because the producer bears the upper tail of the risk and thus has an incentive to avoid large losses." These observers ask why one should limit "liability principles ... by the extent to which the associated risk of being held liable can be insured?" Finsinger & Simon, supra note 73, at 208.


250. Id.

251. Id.

it seems more difficult to rationalize a regime that enforces a limitation on compensatory damages in some states but not others.

Unlike the derogation rules concerning the development risk and primary agricultural products, the damages option focuses on the medium of compensation and not substantive legal theory. To this commentator, at least, to provide an alternative of limiting damage amounts appears seriously to compromise the principle of uniformity. The Directive itself recognizes the tensions inherent in this provision. It requires that, after ten years, the Commission submit a report to the Council on the effect of the damages option. The policy standard is the dual one of "the effect on consumer protection and the functioning of the common market," and the Commission is to refer to Article 100 of the EEC Treaty when deciding whether to repeal the option provision.

XIV. Assessment
A. A Law Being Born
The Directive is relatively spare in presentation and style. It is dotted with provisions implying that it is a law being born, rather than a full grown product. Even with its long process of gestation, and the relevant legal experience of both the member states and the American law, that is what one would expect.

This writer has indicated in various forums his skepticism about proposals for comprehensive federal legislation on products liability in the American context. That skepticism arises partly out of a concern that legislation would chisel solutions into an unmalleable material that would be very difficult to change, given the labyrinthine character of the federal lawmaking process. The writer is wary of the general, supranational solution achieved by the Directive for the same reason, even putting aside concerns about linguistic differences and different judging traditions. Moreover, the failure of several states to enact legisla-

253. See supra text accompanying notes 145-50.
254. See supra text accompanying notes 14-18.
255. Directive, supra note 1, art. 16(2).
257. See, e.g., Alpa, supra note 26, at 246-47 (noting, for example, that "[t]he Italian term 'danno' corresponds to the French 'dommage' (though in French it is generally found in the form 'dommages-interests') but not entirely to the English 'damage' which indicates the pecuniary consequences of what, at least in this Directive, is translated as 'injury'").
258. See id. at 261 (asking "whether judges of different cultures, who have different rules to observe, will all react, when faced with a text of this kind, in the same manner, arriving at the same decision."). Illustrative of what one assumes will be a flock of complex ancillary issues on various intra-European aspects of the subject is a holding by the European Court of Justice in a suit by a French firm that bought metal polishing machines from Firm A, to which were attached suction systems made by Firm B, a German company, and sold by Firm B's French subsidiary. According to a summary of the decision, the court held that the claimant, as a "secondary pur-
tion implementing the Directive in timely fashion suggests that recalcitrance may work to sabotage uniformity, although a very recent decision by the European Court of Justice has upheld a private claimant's suit for damages for failure to enforce a Directive.259

Yet the authors of the Directive have made clear that they expect review of their product in the future, both in the general and the particular. At a general level, the Directive's last substantive article mandates that the Commission submit a report to the Council every five years "on the application of this Directive and, if necessary . . . submit appropriate proposals" to the Council.260 We have referred above to the Directive's more specific requirements that the Commission report to the Council after ten years on the effect of the derogation option on the development risk defense261 and of the option concerning damage limits.262 The Preamble specifically refers to the need for "a period of sufficient length to gather practical experience on the effects of [the] derogations"—presumably including that on primary agricultural products and game—"on the protection of consumers and on the functioning of the common market."263

B. Policy Goals: Balancing and Thrust

Beyond the particularized issues that this Article has identified in the specific provisions of the Directive, some of the long-term questions for the Community's lawmaking bodies will arise at the intersection of policy preferences expressed in the document.

The Preamble identifies several goals, which do not necessarily conflict in particular applications, but which exhibit certain tensions among them. It declares that "approximation of the laws of the Member States . . . is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property."264

chaser," could not sue Firm B in France under Article 5(1) of the Brussels Convention, which permits suits on contractual claims in the country where the contract was performed. The ECJ held that the suit did not involve a "contractual matter," overturning the judgment of a French court that had held it had jurisdiction. Reportedly, the court said that in most Brussels Convention States, a "manufacturer's relationship with a secondary purchaser is not considered contractual." See EC Ruling May Limit Choice of Courts for Parties in Product Liability Cases, 20 PROD. SAFETY & LIAB. REP. (BNA) 692 (July 3, 1992).


261. See supra text accompanying note 151.

262. See supra text accompanying notes 253-55.


264. Id. pmbl. para. 1.
Beyond the language of the Directive itself, scholars and practitioners in Europe have emphasized to this writer that those who promulgated the Directive were at least as interested in uniformity as they were in the substantive principles that such legislation would contain. A strong version of this view asserts that at least one member state whose products jurisprudence came close to strict liability was concerned with the relatively less stringent form of liability in other member states. According to proponents of this position, a germinating seed for the Directive came more from a desire to enforce equal protection for manufacturers in states with stricter liability than a desire to achieve strict liability itself.

The Directive's references to distortion of competition and effects on the movement of goods tend to validate this view. The tone of those phrases is essentially neutral as between producer and consumer, and the reference to competition seems to imply an assumption that consumers routinely and actively strike bargains for products—an assumption that is not so apparent in other parts of the Directive.

A similar balancing of goals is evident in the Directive's twinned references to "consumer protection and the functioning of the common market" in the clauses providing for review of the derogation provision on the development risk defense and of the option provision on limited liability. It also appears in the paragraphs of the Preamble that focus on the latter provision and on the need to reexamine the derogations after experience has accumulated on the operation of the Directive.

At least one reference in the Preamble to fairness makes clear that the question of what is fair is a two-way street on which producers as well as consumers may travel. This is the language declaring that "a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances." At the same time, the Preamble's reference to "a fair apportionment of the risks inherent in modern technological production," taken together with the basic choice of a theory of liability without fault, indicates that the desire for consumer protection was a fundamental and motivating force in the promulgation of the Directive.

The Preamble's frequent and unqualified references to "protection of the consumer" confirm that conclusion. Early on, to be sure, that language is pinned to the problem of lack of uniformity. The unqual-

265. Id. art. 15(3).
266. Id. art. 16(2).
267. Id. pmbl. paras. 17, 19.
268. Id. pmbl. para. 19.
269. Id. pmbl. para. 7.
270. Id. pmbl. para. 2.
271. See id. pmbl. para. 1.
ified phraseology, however, includes the use of consumer protection language in these clauses of the Preamble:

1. Language dealing with the need to cast the liability net across the entire production process;\(^{272}\)

2. The declaration that the producer's liability should be unaffected by the contributing causation of others;\(^{273}\)

3. The reference to the need for compensation for death, personal injury and property damage;\(^{274}\)

4. The clause dealing with the prohibition of contractual derogation;\(^{275}\)

5. The paragraph that explains the Directive's preservation of other theories of recovery and liability systems;\(^{276}\)

6. The clause referring to the derogation provision on the exception of primary agricultural products from the Directive's liability rule;\(^{277}\)

7. The language rationalizing the provision that permits member states to derogate from the development risk defense.\(^{278}\)

C. Consumer Protection: Definitional Issues and Basic Commitments

As is the case with many pieces of significant legislation, the Directive presents many opportunities for interpretative argument. The language of the document reveals a complex group of philosophical underpinnings.

As it must under Article 100 of the Treaty, the Directive seeks to improve the functioning of the common market. Uniformity thus is a principal goal.

Yet the key informing principle appears to be that of consumer protection. The Directive does not ignore the fact that consumers bear responsibility for their conduct. But its references to the risks of modern technology, and its repeated use of unadorned consumer protection language in the Preamble, together with the designation of liability without fault as the operative doctrine, indicate that the consumer is the primary beneficiary of the legislation. Even the rather convoluted language of the Preamble's reference to the derogation option on the development risk defense indicates that the goal of the "Community stand-still procedure" is "to raise, if possible, the level of protection in a uniform manner throughout the Community."\(^{279}\)

\(^{272}\) Id. pmbl. para. 4.
\(^{273}\) Id. pmbl. para. 8.
\(^{274}\) Id. pmbl. para. 9.
\(^{275}\) Id. pmbl. para. 12.
\(^{276}\) Id. pmbl. para. 13.
\(^{277}\) Id. pmbl. para. 15.
\(^{278}\) Id. pmbl. para. 16.
\(^{279}\) Id. pmbl. para. 16.
The strength of this commitment leads us to inquire as to the characteristics of consumerhood that led the Community to adopt the Directive. It appears the drafters believed that in a technological world, the principal locus of control lies with the producer. Although the idea that consumers themselves make bargains is not entirely absent from the document, it appears to view their ability to choose as relatively constrained.

Although it refers in a macro sense to the functioning of the Common Market, the Directive does not speak boldly or often about the trade-offs inherent in the development of consumer products. Even the choice of the development risk defense manifests a recognition that producers control the very process of development.

In the face of a growing American legal literature inspired by a commitment to efficient solutions, the Directive's reliance on economic theory appears only in a single reference in the Preamble to the need to avoid distortion of competition and in such language as abstract references to the "correct functioning of the common market," which usually are cabled to phraseology about protection of the consumer.

By contrast, the Preamble's repeated, unqualified references to consumer protection indicate that, in adopting the Directive, the Council must have viewed the primary moral responsibility for product injuries as resting with producers. It is not clear how much of the Council's motivation stemmed from a generalized assumption about the inability of consumers to make meaningful choices or from a commitment to risk-spreading. It does appear, however, that the Directive embodies a judgment about where control typically resides.

A tantalizing question that remains concerns the sort of "consumer protection" the Directive envisions. Does the repeated use of that phraseology indicate a sense that Community judges should generally tilt toward producer liability in order to achieve greater deterrence of products injuries, as well as transfers of wealth to injury victims? Or does "consumer protection" imply a primary commitment to a utilitarian-based notion of consumer welfare?

It appears that, despite its references to distortion of competition and the movement of goods within the Community, the Directive does not seek a utilitarian solution. Its focus clearly seems more on a market subject to uniform rules, with a discernible bias toward consumers, than on an efficient market under the strictures of microeconomic theory. Read in its entirety, the document exhibits a policy preference for the fixing of financial responsibility on producers. The Directive does not explain how much of this preference arises from a generalized social deterrence theory and how much reflects a desire to compensate injured persons.

What is particularly remarkable to an American observer is the force of the Directive's commitment. With American courts in a holding

280. *See, e.g., id. pmbl. para. 17.*
pattern on the development of strict liability theory, and Congress confronting repeated appeals to cut back on producer liability, the Community has made a firm, supranational decision favoring "liability without fault." The economic wisdom of that decision is open for argument. So is the choice of a moral framework, but it would appear that the Community has made that judgment its foundational one.