fessors Simitis, Lorenz, and Zweigert. The product liability of the manufacturer has also been the subject of the comparative law conference held in Kiel in September 1965 with discussion reports by Professors von Caemmerer, Mueller, and Graue, that provided interesting sidelights on the American law as seen through the German eye. No doubt Germany's highest courts, which always had a high regard for professional opinions, will soon weigh the application of American concepts and experiences for the development of German product liability law problems.

The deliberations of the Kiel Conference were recently published as Volume 28 of the *Studies on Comparative Law* (Metzner, Frankfurt on Main). The basic report was that of Munich Professor Lorenz, who dealt with the problems of manufacturer's liability in the German, the Roman, and the Anglo-American spheres; he also gave a comparative survey comprising, in 157 notes, a great number of pertinent references. The latter will prove helpful to the American reader. An English language report by the Danish Professor Vinding was also submitted to the Conference; it dealt with producers' liability in Scandinavian law, founded on the seller's negligence in relation to the immediate buyer and to third parties, and further with such liability based on a warranty or guaranty and also on considerations about assuming the risk.

Comparative law studies will not only clarify the rather narrow concepts still prevailing in German law but will also contribute to a more uniform treatment of an aspect of international business transactions of an ever-increasing importance.

Italy

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While in the United States the tendency of the law is to permit a person injured by an automobile to bring an action directly against the manufacturer of the vehicle, the tendency of the law in Italy is

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in the opposite direction. The few lower courts which have upheld the right of an injured party to sue the manufacturer directly have invariably been reversed, and the higher courts and commentators agree that the manufacturer's sole responsibility is his contractual one to the purchaser of the vehicle.

Despite the recognition by the courts and commentators that there is contractual responsibility, practical problems prevent actions based on contract from having any real meaning. This article will discuss the Italian attitude towards extracontractual claims against automobile manufacturers and the possible bases for contractual claims against the manufacturer.

Extracontractual Liability

Extracontractual liability is governed by Article 2043 of the Italian Civil Code (hereinafter cited as C. Civ.):

> Any fraudulent or wrongful act which causes unjust damage to others obligates the person committing such act to pay compensation for the damage.

The burden of proving negligence is normally on the plaintiff. In the case of vehicular traffic, however, the law provides for a presumption of the defendant's negligence. Article 2054, C. Civ. states:

> The driver of a vehicle not running on rails is obliged to pay compensation for the damages caused to persons or things by the moving vehicle unless he proves that he did everything possible to avoid the damage. . . .
>
> The owner of the vehicle, or in his stead the life tenant, or the buyer with reservation of title, is jointly liable with the driver, unless he produces evidence that the vehicle was used against his will.
>
> *In any case, the persons indicated in the preceding paragraphs are liable for the damages arising out of defective manufacture of the vehicle or from its defective maintenance.*

Article 2054 creates a presumption of the driver's negligence, but the plaintiff still has the burden of proving that there is a casual connection between the damage and the movement of the vehicle. To avoid liability, the driver must prove that he took all measures to prevent the accident and that the accident could not have been avoided even though he used all due care. The last paragraph of Article 2054 creates a presumption of negligence on the part of the

owner of the vehicle, the life tenant, or the buyer with reservation of title. Their negligence is a joint liability shared with that of the driver. If the plaintiff sustains his burden of proving the causal connection between the damages and the defect in manufacture or maintenance, the owner is liable even though he can show that the vehicle was used against his will.[1] Italian courts and authors agree that this provision for strict liability is an exception to the principle of "no liability without fault," which is basic to the Italian legal system.[2]

In attempting to apply the basic rules set forth above to the question of whether a manufacturer can be held extracontractually liable for damages caused by the faulty manufacture of a vehicle, we are faced with the problem that court decisions in this field are not numerous and sometimes, in the lower courts, not uniform. Recently the lower court of Turin held that a manufacturer was liable (*Alini v. Fiat,* in Foro Italiano 1960, I, 1027). In that case the Court maintained that there was both contractual liability towards the contracting party and extracontractual liability towards the injured party because the damage to both parties resulted from the same cause. The Court held:

> When a vehicle in traffic has caused damages because of its defective manufacture, certainly the manufacturer's liability is established. On the one hand, the manufacturer's duty not to put on the market a defective vehicle which is dangerous and unfit for use in traffic must be considered; on the other hand, the existence of a causal connection between the defects of manufacture and the damages which occurred cannot be ignored. The fact that persons other than the manufacturer used the vehicle in traffic does not usually break the causal connection. In fact, using the vehicle in traffic served to change the potentially hazardous condition created by the manufacturer into actual injury. Nor is it pertinent to cite art. 2054, par. 4 of the Civil Code, which establishes liability of the driver and the owner

[1] Court of Appeals of Naples, April 26, 1963, Mazzacchella v. Soc. F.a.t.a. in Archivo Circolazione, 1965, 850.

[2] Barassi, *Teoria generale delle obbligazioni,* Milano 1948, II, 432; Messineo, *Manuale di diritto civile e commerciale,* Milano, 1954, vol. III, 482 *e segg;* Talassano, *Riflessioni sull'art.* 2054 c.c.: vizi di costruzione del veicolo in Foro Italiano 1960, I, 1026 and 1027 and citations; Geri, "Responsabilita senza colpa per danni derivati da vizi di costruzione del veicolo," *Diritto e Pratica delle Assicurazioni,* 1961, 39. To mention several court decisions: Cassazione October 10, 1957, n. 3716 in Resp. civ. prev. 1958, 379; Cassazione September 28, 1960, n. 2054 unpublished Cass. July 19, 1957 in Rep. Foro Ital. 1957, circolazione stradale 160.

> of the car for damages arsing from defective manufacture, in any event. It is well known that this liability has an objective nature, since it is not dependent on fault. Evidently, such a provision is established for the benefit of the injured party because of the difficulties it would encounter in suing the manufacturer, or in any event, it is established for the purpose of giving a wider guarantee for compensation of damages. Certainly the article does not intend to free the manufacturer from his liability.

This decision was reversed by the Court of Appeals of Turin (January 30, 1960, in Foro Italiano 1960, I, 1026) in the following language:

> Art. 2054 places on the driver of the car and the owner (or any other party liable thereunder) the liability for damages caused to third parties by defects of manufacture of the vehicle, regardless of personal negligence. In other words, liability results from "the fact that damage was caused while the responsible party was acting in his own interest, and that it was within his power to control and prevent such damage (*cuius commoda, eius et incommoda*). If it is ascertained that the cause of the damage was a technical irregularity or abnormality, inherent in the structure of the vehicle which rendered it entirely or partially unfit for use in traffic, an irrebuttable presumption of liability falls on the driver and the owner. Such presumption, therefore, in the first place, precludes the possibility of the driver and the owner freeing themselves from liability by proving that they took all measures of control and prevention. Secondly, it also precludes their claiming, even as a pre-existing cause, the manufacturer's wrongful behavior because of the defects in the vehicle. This means that the manufacturer cannot be deemed to be liable towards a third party injured by the use of the vehicle when the damage was caused by a vehicle's technical irregularity or abnormality imputable to the manufacturer. Manufacturing defects in a vehicle, though they can create the manufacturer's contractual liability towards the buyer, can never be a source of a manufacturer's extracontractual liability for damages caused by such defects to third parties while the vehicle was being driven in traffic. That means that placing the vehicle in traffic (by the owner or any other person liable in his stead) frees the manufacturer's act from any causal connection with the damage caused by the defective car to third parties, even indirect or intermediate. Therefore, the problem of the concurrence of several material causes of the accident does not even arise. They are two different and independent facts, one of which, under the law, has a causal effect, and the other does not.

Talassano, First President of the Court of Cassation (the Italian

Supreme Court), agreed with the opinion of the Court of Appeals of Turin in a commentary on such decision (*Riflessioni sull'art.* 2054, Foro Italiano 1960, I, 1026). Later in the same year, the Court of Cassation in its decision of July 15, 1960, (Massimario Foro Italiano 1960, 424, n. 1929) held that while the manufacturer is contractually liable towards the buyer of the vehicle, he cannot be considered extra-contractually liable towards third parties injured in an accident due to defective manufacture of the vehicle. There are no more recent decisions on this matter, and therefore this may be considered the present tendency of Italian courts on this subject. Alhough some dissent has been expressed,[3] authors generally agree with this tendency which is thought to represent the unique logical interpretation of Article 2054 of Civil Code.[4] Geri writes:

> There cannot be any doubt that the said action (extracontractual for damages by the injured party against the manufacturer) is inadmissible. In fact, if we consider that the movement of the vehicle interposes between the accident and the defect in manufacture, to which the occurrence of the damage is attributed, as a direct and immediate cause without which the accident would not have occurred, we must infer that the defect represents a condition necessary, but insufficient to the occurrence of the event. Therefore, the manufacturer (or the maintenant) merely created a situation of potential danger, the nature of which is inert, and the transformation of which into a dynamic situation of damage is uncertain without the active and efficient intervention of other persons. Therefore, the law preferred to neglect it, as a remote and equivocal antecedent, giving exclusive causal effect to the movement of the vehicle into traffic, and fixing an exclusive liability on the driver and the owner, the sole persons to whom such determinative fact directly or indirectly is connected, toward the injured parties.
>
> Thus, between the trading activity (sale of a defective vehicle)—the consequences of which are abstractly uncertain as regards the damage that is perhaps avoidable because of other concurrent or subsequent elements—and the event no causation is established, but only a conditional or occasional relation. Or perhaps the causation exists, but according to an explicit legal provision it is interrupted by the subsequent movement in traffic which

[3] E. Ondei, "La responsabilita' del proprietario e del costruttore di veicoli per i danni prodotti dalla circolazione," Foro Padano, 161, I, 1001. Ondei holds the extracontractual liability of the manufacturer arises outside article 2043 and consequently he faces the possibility of being sued for damages directly by the injured party.

[4] Talassano, *supra* note 2; Geri, *supra* note 2.

> is considered and defined, per se, as sufficient to cause the accident. This is in accordance with the rationale of the law, which seeks to protect third parties injured by the moving vehicle not by applying the general principles relevant to unlawful acts, but by specifying which persons have to be considered liable, and this specification is made by a strict rule having objective and exclusive nature. The purpose of the rule is to spare the injured party the useless attempt of determining the negligence (often elusive and fading) of the manufacturer-seller, and of identifying among so many people, the one actually liable.[5]

The courts and commentators have based their conclusion on the absence of a right to sue the manufacturer. Because of this limitation, they have not discussed the problem of design defects. It is unlikely, however, even if the problem of the right to sue the manufacturer could be overcome, that Italian courts would apply the provisions of Article 2054 to design defects since the basic attitude of Italian courts seems slanted toward protecting the automobile manufacturer.

It is clear from the foregoing that an action in Italy against an automobile manufacturer by any person other than the original purchaser of a vehicle stands little or no chance of success. The original purchaser of the vehicle, however, has the right to bring an action against the manufacturer. This right, however, is of little practical importance.

Contractual Liability

The question of the owner of a vehicle suing the manufacturer for damages depends to a large extent on the nature of the agreement between the parties. Italian law provides for two types of guarantees—one *guaranteeing* against defects and the other guaranteeing that the article sold is in good working order. The guarantee against defects is implied in law. Article 1490 of the Civil Code provides:

> *Guarantee against defects of the goods sold.* The seller is obliged to guarantee that the goods sold are free of defects which make them unsuitable for the purpose for which they are intended or which considerably reduce their value.

While contracting parties may by agreement avoid the effect of the guarantee against defects, "a clause excluding or limiting the

[5] Geri, *supra* note 2, at 165.

guarantee is void if the seller fraudulently failed to call the defects to the buyer's attention." (Article 1490, para. 2.)

The guarantee that the articles sold are in good working order is generally a matter of contract. Such a guarantee, however, may be implied under certain circumstances. Article 1512 of the Civil Code sets forth the law as follows:

> *Guarantee of good working condition.* If the seller has guaranteed the good working condition of the goods sold for a specified period, unless otherwise agreed to, the buyer must give notice to the seller of the defective functioning within thirty days from its discovery, or [he] is debarred from the right to make claim. The action is subject to the statute of limitations of six months from the discovery.
>
> The Court may, under some circumstances, give the seller a period of time within which to substitute or repair the article and put it into good working order, always holding the seller liable for damages.
>
> Customs to the effect that the guarantee of good working condition is due even if there is no explicit clause therefore are valid.

If we assume that the manufacturer of the motor vehicle has included in the contract of sale all of the expected protective clauses, it is unlikely that any action may be maintained except for defective manufacture under the provisions of Article 1490. Article 1490, however, offers very little practical protection. While a broad interpretation of the statute could include within its ambit design defects, the present tendency towards narrow interpretation makes it unlikely that an Italian court would extend the statute beyond operational defects. Even if the court accepted a broad interpretation, the purchaser would still be faced with problems of statutes of limitations and causation. Claims under Article 1490 must be asserted within eight days of the discovery of the defect and an action must be started within one year of delivery. The short statute of limitations makes defects discovered after the one year period non-actionable. Assuming the statute of limitations problem can be overcome, the purchaser in stating his case would not only have to prove causation, but also show that the defect was either hidden or fraudulently concealed from him. Proof of causation and fraudulent concealment relieve the purchaser from proving fault since fault is presumed and the seller has the burden of proving the absence of fault. (Cass. November 30, 1962, No. 3239, in 1962 Giust. Civ., Massimario, 1514.)

If the purchaser can survive all of the foregoing hurdles, there should be no problem with regard to damages whether he is suing for injuries suffered by him personally or for reimbursement of a judgment he was forced to pay as a result of injuries suffered by a third person. As a general principle, compensation for damages includes the actual damages resulting from the accident, as well as loss of profits (Article 1223, Civil Code). Article 1223 restricts damages to those constituting a direct and immediate consequence of the breach of obligation. On the other hand, Article 1494 provides that compensation must include damages caused as a result of defects in the car. Accordingly, under the circumstances covered by Article 1494, the consequential damages include compensation paid by the buyer to the injured party.[6] In fact, it causes the buyer to suffer a loss which he would not have incurred if the car had not been defective.

Conclusion

The paucity of Italian cases dealing with the problem of manufacturers' liability for defective manufacture of the automobile results from the fact that in the event of an accident the injured party prefers to sue the persons who are unquestionably liable under the law, without having to face the difficulties of proving the existence of collateral liability on the part of the manufacturer. On the other hand, from the few precedents in the field, it is apparent that there is a reluctance to hold a manufacturer liable.

While Italian law recognizes a limited contractual liability of the manufacturer towards the purchaser, it is still far from recognizing an extracontractual liability towards persons other than the purchaser. It is difficult to anticipate how long the law will continue to close its eyes to the facts of an increasingly motorized life. It is widely felt today that the manufacture of a defective car amounts to a tort towards the user and not only a breach of warranty towards the purchaser. Italian courts, however, do not seem ready or inclined to interpret the present law to recognize a casual connection between the manufacturer's act of producing a defective car and the damage to the user. Article 2054 is strictly interpreted as limiting liability to the driver and the owner of the car. While Article 2043 could give the courts a legal basis for holding the manufacturer liable, judges

[6] Geri, *supra* note 2 at 167, 168.