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NEW TRENDS IN PRODUCT LIABILITY LEGISLATION IN THE UNITED KINGDOM: THE CONSUMER PROTECTION ACT*

*Aubrey L. Diamond***

INTRODUCTION

The Consumer Protection Act 1987 (1987 Act)¹ radically changed the law of product liability in Great Britain. This article describes the background to and outlines the contents of that legislation.

English law and Scottish law are substantially the same in relation to product liability, though there are differences between the English law of torts and the Scottish law of delict. The 1987 Act applies to England and Scotland alike. Where any differences between the two legal systems arise, this article deals specifically with English law.

HISTORICAL BACKGROUND

The British law of product liability as it was immediately before the 1987 Act came into force will be familiar to American readers, or at least to those with an interest in legal history. Liability for injuries or damage caused by defective goods had to be considered under two heads of the law—in tort and in contract. It will be convenient to deal first with contract.

Contract

Liability in contract arose under the Sale of Goods Act 1979. This Act re-enacted with some amendments the earlier Sale of Goods Act 1893, which was the model on which Williston based the Uniform Sales Act. The 1893 Act was an attempt to represent in statutory form the case law of contract, most of it having developed during the nineteenth century, as it existed in 1889 when the Act was first drafted.

A feature of the 1893 Act still familiar in Article 2 of the Uniform Commercial Code (U.C.C.) is the device of the implied warranty to impose responsibility for the condition and quality of the goods on the seller. The implied terms of the contract of importance in product liability cases were those in section 14 of the Sale of Goods Act relating to merchantability (substantially the same as in section 2-314 of the U.C.C.) and fitness for a particular purpose (U.C.C. section 2-315). It was established in the early years of the legislation

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1. Consumer Protection Act 1987, ch. 43 [hereinafter 1987 Act]. See *text*, Appendix I.

that damages for personal injury could be recovered under these implied terms.²

Two points need emphasis in considering these implied terms. The first is that they impose strict liability. Although strict liability is often thought of—at least by English lawyers—as a comparatively recent invention, it was from the early days of the implied terms regarded as following logically from an interpretation of the contractual promise. If the promise was to take reasonable care or to make reasonable efforts to bring something about, the liability would in modern terms be liability for negligence. If the promise was simply to bring something about, it was regarded as an obligation that imposed liability if the promised situation or event did not occur. The question whether the reason for nonperformance was the promisor's fault simply did not arise. A wide-ranging review of the law, comparing different levels of liability, was undertaken little more than ten years before the 1893 Act was drafted, in *Randall v. Newson*.³

A good example of this attitude is afforded by *Frost v. Aylesbury Dairy Co.*⁴ in 1905. The defendants regularly supplied the plaintiff with a daily supply of milk for him and his family. The plaintiff's wife contracted typhoid fever, from which she subsequently died. The jury found that the disease was caused by the milk supplied by the defendants and it was held that the defendants were liable for breaching an implied term of fitness for purpose.

Section 14 of the Sale of Goods Act, like section 2-315 of the U.C.C., speaks of the buyer's reliance on the seller's skill or judgment. This was the basis of the sellers' argument on appeal. They argued that no matter how much skill and judgment they devoted to their milk—and they claimed to have arranged every form of medical inspection, veterinary inspection, analysis of the milk and bacteriological examination then possible—they could not have detected the fault, so that the plaintiff could not be said to have relied on their skill or judgment. The English Court of Appeal rejected this contention and held that the implied term covered even defects that could not be discovered, and that the defendants were rightly held liable.

The second point to emphasize in relation to the implied terms is that they are regarded as contractual obligations and are confined to the immediate parties to the relevant contract. English law still follows rigorously the principle of privity, so that the buyer's claim is against the immediate seller only, while the seller's liability is to the buyer and to no one else. In the *Frost* case the plaintiff was the buyer of the milk and was suing for damages for the loss of his wife. Had the wife survived she would have had no claim under the Sale of Goods Act for her sickness for she was not party to the contract of sale.⁵

Tort

The third party who is injured by defective goods, not being able to sue in contract, must sue in tort. For many years it was thought that no action in tort

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2. *Wallis v. Russell*, [1902] 2 I.R. 585 (crabs); *Wren v. Holt*, [1903] 1 K.B. 610 (beer); *Preist v. Last*, [1903] 2 K.B. 148 (hot-water bottle); *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608 (milk); *Jackson v. Watson & Sons*, [1909] 2 K.B. 193 (canned salmon).
 3. [1877] 2 Q.B.D. 102.
 4. [1905] 1 K.B. 608.
 5. Cf. *Heil v. Hedges*, [1951] 1 T.L.R. 512.

would be available: the seller's contract, it was said, defined the seller's obligations and there was no room for additional obligations, outside the confines of the contract, in tort.⁶ This reasoning was discarded in 1932.

There is no need here to go into the great case of *Donoghue v. Stevenson*⁷ at length. The plaintiff claimed to have been injured as the result of a decomposing snail hiding in her bottle of ginger beer. She could not sue the seller, the proprietor of a cafe, because she was the guest of a friend. Her claim against the manufacturer of the ginger beer was dismissed in the lower courts for the reasons mentioned in the last paragraph. Only in the highest court, the House of Lords, was the earlier law overturned and the principle established that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."⁸

This case, of fundamental importance in the development of the law of negligence in Britain, established the manufacturer's liability to the ultimate consumer and, by extension, to any other third party injured by a defect in a product. The manufacturer's liability is less than that of the seller in contract, however, for it is not strict liability. It will be necessary to return to this concept.

LAW REFORM

In Britain, several commissions have investigated the law just described and found it to be in need of reform. The Law Commission (the statutory law reform commission for the jurisdictions of England and Wales) and the Scottish Law Commission jointly reported in 1977.⁹ Their main recommendations were summarized as follows: "Existing rights and remedies in English and Scots law, in respect of injury caused by defective products, are inadequate,"¹⁰ and "[p]roducers should, as a general rule, bear the risk of and be strictly liable for injuries caused by defects in their products. . . ."¹¹

Several reasons drove the Commissions to these conclusions. These included a number of considerations of policy, such as the propositions that loss should be borne by the person who created the risk for commercial purposes, that liability should be imposed on those in the best position to exercise control over the quality and safety of a product and that the risk should be borne by those who can most conveniently insure against possible costs.¹² The Commissions also drew attention to certain anomalies in the law.¹³

Some of the anomalies are well illustrated by the case of *Daniels & Daniels v. R. White & Sons Ltd. & Tabard*,¹⁴ to which they referred. In this case, Mr.

6. *Winterbottom v. Wright*, [1842] 10 M. & W. 109, 152 E.R. 402.

7. [1932] A.C. 562.

8. *Id.* at 599 (Lord Atkin, J.).

9. LAW REFORM COMMITTEE, CMD. 6831, No. 82 (Liability for Defective Products) (1977).

10. *Id.* at para. 125(a).

11. *Id.* at para. 125(d).

12. *Id.* at para. 23.

13. *Id.* at para. 29.

14. [1938] 4 All E.R. 258.

Daniels purchased some lemonade from a pub owned by Mrs. Tabard. The lemonade had been manufactured by the defendant company and bottled by them; for a reason never explained the sealed bottle of lemonade contained some carbolic acid which injured both Mr. Daniels and his wife when they consumed the drink. They both sued.

Mr. Daniels had no difficulty making his claim against the seller, Mrs. Tabard, under the Sale of Goods Act. She was held liable to him even though she was not responsible for the contents of the sealed bottle and was in no way at fault. As we have seen, liability in contract under the implied terms is strict. Mrs. Daniels, however, met more difficulty. Because of the strictness of the privity doctrine, she had no claim against Mrs. Tabard. She therefore sued the manufacturers of the drink under *Donoghue v. Stevenson*.¹⁵

Her claim failed. The judge emphasized that the manufacturers were not strictly liable and held that Mrs. Daniels had not been able to prove they had been negligent. Their evidence satisfied the judge that they had taken reasonable care and they were not bound to do more.

In all fairness, it is extremely unlikely that this decision on the facts would have been upheld on appeal, but whether the decision was right or wrong, it highlights some of the effects of the law. Notably it demonstrates the striking divergence between the strict liability imposed on the seller, who could not have prevented the defect, and the lesser standard applicable to the manufacturer, who could have prevented it. Although the law could be criticized as being unfair to retailers, it should of course be borne in mind that the retailer might well have had a claim for an indemnity under the implied terms in the Sale of Goods Act against her own supplier, and that in the absence of disclaimer clauses such a claim might pass up the chain of supply until it rested on the manufacturers. It also affords a clear illustration of the bizarre consequences of the privity doctrine in the different treatments of the claims by the husband, a party to the contract of sale, and the wife, a stranger to the contract—unless she could show that she contributed to the price and that her husband bought the lemonade partly on his own behalf and partly as her agent, an argument not put up in the case itself.

As well as the two Law Commissions, the issues arising out of the law on product liability also came under scrutiny by the Royal Commission on Civil Liability and Compensation for Personal Injury chaired by the late Lord Pearson.¹⁶ The Pearson Commission was set up to consider whether a “no-fault” scheme, such as that created in New Zealand to replace the law of tort in relation to personal injury caused by accident,¹⁷ should be introduced in Britain. Except in relation to road accidents—a recommendation that has not been implemented—and vaccine damage, it came down against a no-fault scheme and favoured retention of the law of torts. On product liability, it supported the recommendations of the Law Commissions and reported that “[p]roducers should be strictly liable in tort for death or personal injury caused by defective products.”¹⁸

15. See *supra* note 7.

16. LAW REFORM COMMITTEE, CMD. 7054 at chap. 2 (1978) [hereinafter Pearson Commission Report].

17. Introduced by the Accident Compensation Act 1972 (New Zealand). N.Z. Stat. No. 43 (1972).

18. Pearson Commission Report, *supra* note 16, Recommendation No. 133. The recommendation on vaccine damage was partially implemented by the Vaccine Damage Payments Act 1979.

EUROPE

Britain was not alone in concluding that the law of product liability needed reform. In Europe, where considerable differences among the laws of product liability persisted in various countries, there was a strong tide of opinion in favour of harmonizing the law on the basis of a regime of strict liability of the manufacturer. Two important international instruments emerged.

The European Convention on Products Liability in Regard to Personal Injury and Death came out of international meetings over a period of years conducted by a committee of experts set up in 1972. The committee was sponsored by the Council of Europe, a voluntary organization of many European states, of which the United Kingdom and the other European Economic Community (E.E.C.) countries are members. However, conventions adopted by the Council of Europe carry no obligation on member states to adhere to them, and the Convention, which was adopted in 1977, has not yet come into force.

The other instrument is the more important. On July 25, 1985, the Council of Ministers of the European Communities (the E.E.C. legislature) adopted the Council's Directive "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products."¹⁹ The reason why this is of greater importance is because the adoption of a Council Directive imposes on all member states of the E.E.C. a binding obligation to bring their domestic laws into line with the Directive within the period specified in the Directive—in this case, by July 30, 1988.

The United Kingdom passed its Consumer Protection Act 1987 on May 15, 1987. The Act has five Parts. Part I deals with product liability and, according to section 1(1), has effect "for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly." This presumably incorporates the actual text of the Directive into the law and may have the effect that, in the event of a discrepancy between the Act and Directive, the Directive prevails. Part II of the Act deals with consumer safety, mainly by utilizing the criminal law, and Part III relates to misleading price indications, also invoking criminal law provisions and with miscellaneous other points. Part I, which seeks to implement the product liability Directive, took force on March 1, 1988. The remainder of this article is an account and discussion of Part I of the British legislation.²⁰

RELATION TO OLD LAW

The new Act does not replace the law already described. It provides in section 2(6) (following article 13 of the Directive) that its provisions are without prejudice to any other head of liability. Accordingly, the Sale of Goods Act and the torts of negligence remain good law in relation to product liability.

Although the United Kingdom does not yet have any reported cases arising under the 1987 Act, it seems that at least until it has experience of how the new Act operates in practice, proceedings based on product liability will, where

19. O.J. EUR. COMM. (No. L 210) 29 (Aug. 7, 1985) (Council Directive of July 25, 1985) [hereinafter E.E.C. Council Directive]. See text Appendix II.

20. See text Appendix I.

possible, claim not only under the 1987 Act, but also under the Sale of Goods Act and in negligence. As will be seen, there could be cases which would fall under the 1987 Act which might succeed in contract under the Sale of Goods Act (or even, conceivably, in negligence).

THE MAIN RULE

The basic rule in the 1987 Act is to be found in section 2(1) which, incorporating part of subsection (2), states that “[s]ubject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, [the producer of the product] shall be liable for the damage.” It does not actually say that the liability is irrespective of fault, but this is clearly the effect of the lack of any qualification on the imposition of liability—“shall be liable.”

Product

“Product” means any goods and is not limited to goods industrially produced (but see later in this paragraph). It also includes electricity. There is, however, a whole class of goods exempted from the provisions of the Act. Article 2 of the Directive, which defines “product” as “all movables,” excludes “primary agricultural products and game.” “Primary agricultural products” is then defined as “the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing.” This translated into the British Act as “any game or agricultural produce if the only supply of the game or produce. . . was at a time when it had not undergone an industrial process.”²¹ It is not known what “industrial processing” in the Directive means, what “industrial process” in the British Act means, or whether they mean the same thing. On the face of it, they appear to have different meanings, but it is to be noted that the Preamble to the Directive states that “[w]hereas liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products. . . .” Perhaps the place where the process occurs is relevant—contrast the threshing of wheat by hand in a barn and threshing (a) in a combine harvester and (b) in a factory or processing plant.

It should be added that the Directive gives member states the right to derogate from the Directive by applying the strict liability regime to primary agricultural products and game.²² As has been seen, the United Kingdom has not exercised this option.

Producer

The person on whom the Act imposes liability, called above “the producer,” is given an extended meaning. First there is a definition of “producer” as the person who manufactured the product or, in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or

21. 1987 Act, *supra* note 1, Part I, § 2(4).

22. E.E.C. Council Directive, *supra* note 19, art. 15.1(a).

abstracted it, or, "in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agriculture produce), the person who carried out the process."

Then the application of liability is imposed not only on the producer but also on any person who holds himself out to be the producer by putting his name on the product or by using a trademark or other distinguishing mark in relation to the product. This is an attempt to impose strict liability on those stores that market "own-brand" products, but it would appear to be easy to evade the application of the Act by not holding oneself out as the producer, say, by adopting words such as "Made expressly for. . . ."

Next comes a provision to catch goods manufactured outside the E.E.C. so as to impose liability on someone within the E.E.C.: the importer into the E.E.C. is made liable.

Finally, the Act contains a provision which applies where there is difficulty in identifying the producer, as in the sale of bulk products. Any supplier of the product²³ is made liable unless that person can, within a reasonable time of being asked, identify either a person liable as producer or that person's own supplier.

Defect

Liability is only imposed where damage is caused by a defect in the product. Those familiar with the expression "product in a defective condition" in section 402A of the Restatement (Second) of Torts will know that the concept of "defect" is not an easy one.²⁴ The 1987 Act defines "defect" in section 3(1): "[T]here is a defect in a product. . . if the safety of the product is not such as persons generally are entitled to expect; and. . . 'safety'. . . shall include. . . safety in the context of risks of death or personal injury."²⁵ The definition seems better suited to manufacturing faults than to design faults. Presumably, consumers are entitled to expect that normally safe products will not be unsafe, but there is much room for argument as to what one is entitled to expect of intrinsically dangerous products such as pharmaceutical drugs, whether or not the risk of a particular side effect is known. (As to hitherto unknown side effects, see the discussion of the "state of the art" defense below.)

Damage

Damage is defined in section 5 of the Act. It means death or personal injury or any loss of or damage to any property (including land) other than the product itself. The reference to land will of course include buildings and fixtures. Property damage is, however, limited to consumer property,²⁶ and to exclude petty claims there is a lower threshold of liability of 275 U.K. pounds (a conversion of the 500 European Currency Units mentioned in the Directive).

23. "Supply" is defined at 1987 Act, *supra* note 1, Part I, § 46. See text, Appendix I.

24. RESTATEMENT (SECOND) OF TORTS § 402A (1987).

25. See also 1987 Act, *supra* note 1, Part I, § 3(2); cf. E.E.C. Council Directive, *supra* note 19, art. 6.

26. 1987 Act, *supra* note 1, Part I, § 5(3).

DEFENSES

Section 4 of the Act (based on article 7 of the Directive) lists a number of defenses which may be proved by the defendant. Since some of these resemble defenses canvassed, and sometimes enacted, in the United States, it will be worth mentioning each of them. They will be dealt with in their order in the Directive, not the Act.

Article 7, section (a) of the Directive (which is section 4, paragraph (b) in the Act) provides this defense: That there was no "supply" of the product by the defendant. This would exclude a defendant manufacturer's liability under the Act where the injury was suffered by the defendant's employee, for example, in the factory or store-room, or exclude an "own-label" seller's liability where the injury was suffered in a supermarket before the goods reached the check-out, as by the explosion of a cola bottle. The policy behind this defense is not easy to discern; it was at one time thought that this policy intended to avoid the imposition of liability where goods were stolen from the manufacturer, perhaps before the final inspection was made.

Article 7, section (b) (which is section 4, paragraph (d) in the Act) provides this defense: That the defect did not exist in the product at the time the defendant supplied it. If the product was safe at the time a defendant manufacturer supplied it to a wholesaler, presumably the manufacturer could avail himself of this defense if the product deteriorated and became unsafe at a later date—unless the claimant could, with hindsight, say that in the case at hand the product must have been unsafe at the time of supply although it seemed to be safe.

Article 7, section (c) (which is section 4, paragraph (c) in the Act) provides this defense: That the product was not manufactured in the course of a business and was not sold for profit.

Article 7, section (d) (which is section 4, paragraph (a) in the Act) provides this defense: That the defect is attributable to compliance with any requirement—the Directive uses the phrase "mandatory regulations"—imposed by statute (or subordinate legislation) or by the E.E.C. It is thought that this defense would be interpreted narrowly and would apply only where compliance with the mandatory provisions inevitably led to the defect. Even then, it is probable that the defense could only work once; after the dangerous effect of compliance with the law was made known, it would probably be incumbent on the producer to cease manufacturing the product in question. In the alternative, if manufacturing continued, liability for negligence might well arise.

The defense as it appears in the British legislation seems to be stricter than that which appeared in chapter 27, section 6.2 of the Washington Products Liability Act of 1981: "When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design or warnings, this compliance shall be an absolute defense."²⁷ The effect of this defense depends on the meaning given to "the injury-causing aspect of the product." It is not clear that the defense is only available if the defect is a necessary consequence of compliance, whereas

27. WASH. REV. CODE ANN. § 7.72.050 (West Supp. 1988) (codifying the Washington Products Liability Act of 1981, chap. 27, § 6.2).

this seems to follow from the word "attributable" in the British Act.

Article 7, section (e) (which is section 4, paragraph (e) in the Act) provides the "state of the art" defense, or the "development risks" defense as some prefer to call it. Despite the fact that the objective of the Directive is to harmonize the laws of E.E.C. member states, this defense is available to member states of the E.E.C. on an optional basis: the Directive permits any country in implementing the Directive to omit this defense, thereby enacting a stricter level of liability for defective products. France has considered eliminating the defense, and is currently expected to do so.²⁸ This defense is dealt with in more detail below.

Article 7, section (f) (which is section 4, paragraph (f) in the Act) provides this defense: If the defect is in a component, the manufacturer of the component has a defense if he can show that the defect is attributable to the design of the main product or to the component-manufacturer's compliance with instructions given by the manufacturer of the main product.

STATE OF THE ART

The state of the art defense appears in different words in the two pieces of legislation, so it is necessary to set it out in full. First, as it appears in the Act, a defense will be possible if "the state of scientific and technical knowledge at the relevant time²⁹ 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. . . ."³⁰

The provision as it appears in the Directive states that a defense shall exist 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."³¹

The difference between these two formulations is a matter of considerable controversy. When the legislation was going through Parliament, an amendment to replace the words now in the Act by those in the Directive was carried by the House of Lords against the Government, but at a later stage the Government secured a return to the original wording by a majority in the House of Commons, and the House of Lords accepted the position.

The current controversy centers on the question whether the two versions mean the same thing. One school of thought holds that there is no material difference between the two in practical terms,³² while the other believes that the British version amounts to a wider defense and hence a lower standard of liability.

It is far from clear what exactly the Directive version demands of the manufacturer. The manufacturer must show that the state of knowledge "was not such as to *enable* the existence of the defect to be discovered."³³ Does this

28. So far only three countries have incorporated the Directive into their law: Greece, Italy and the United Kingdom. Each has included the state of the art defense.

29. "Relevant time" is defined at 1987 Act, *supra* note 1, Part I, § 4(2); it generally means the time of supply by the defendant to another person, not necessarily the plaintiff.

30. 1987 Act, *supra* note 1, Part I, § 4(1)(e); *see text* Appendix I.

31. E.E.C. Council Directive, *supra* note 19, art. 7(e); *see text* Appendix II.

32. *See, e.g.,* Newdick, *The Development Risk Defence of the Consumer Protection Act 1987*, 47 CAMBRIDGE L.J. 455 (1988).

33. *See supra* note 31 (emphasis added).

mean that the state of knowledge was not such as to enable the producer (the defendant) to "discover" (foresee? predict?) the defect, or not such as to enable anyone in the world to discover it? How wide must the search for knowledge be? One writer has said of the proof to be adduced by the manufacturer in showing the state of knowledge that "[i]t would be impracticable to insist on proof that all the libraries of the world had been scoured and all the unpublished theses in universities, in every language, had been read."³⁴ This is no doubt true, but it leaves open the position where, after the accident has occurred, it is discovered that in a specialist journal with a small circulation in a foreign language an article had appeared a few years earlier drawing attention to the relevant facts. Such a case might exclude the defense in the Directive version but fall within the defense in the British version. Ultimately, it may be for the European Court of Justice to decide what the Directive means and whether the United Kingdom has complied with the Directive. The effect of section 1(1) of the Act, as cited, may be that any divergence is automatically resolved in favor of the Directive since the Act is to be construed in accordance with the intention of Parliament to comply with the Directive.

Of course, there is no accepted meaning of what is meant by the state of the art defense. The expression itself has been criticized because it may lead one to think that the defense is open to a defendant who claims that his standards are in accordance with the state of the art in the sense of the practices adopted by other manufacturers in the same industry. This seems to be the meaning given to the expression in the Kentucky Product Liability Act of 1978, where under section 3(2) proof that the product "conformed to the generally recognized and prevailing standards of the state of the art in existence at the time" raises a presumption that the product was not defective.³⁵ It is difficult to distinguish this from negligence, and it has been said that, "[e]ssentially, [state of the art] is a negligence defense."³⁶

In contrast, relevant legislation in the state of Colorado,³⁷ where proof also raises a presumption against defect, refers to conformity with "the state of the art, as distinguished from industry standards. . . ."³⁸ Some states refer to feasibility or availability. Thus, Arizona provides that the defendant is not liable if he proves that "the plans or designs for the product or the methods and techniques of manufacturing, inspecting, testing and labeling the product conformed with the state of the art at the time the product was first sold by the defendant."³⁹ This defense is supplemented by a definition of "state of the art" as "the technical, mechanical and scientific knowledge of manufacturing, designing, testing or labeling the same or similar products which was in existence and reasonably feasible for use at the time of manufacture."⁴⁰ This seems again to relate the term to industry standards, as perhaps does the Nebraska version: "State of the

34. Newdick, *supra* note 32, at 459.

35. KY. REV. STAT. § 411.310(2) (1988) (codifying the Kentucky Product Liability Act of 1978, § 3(2)).

36. Beshada v. Johns-Manville Products Corp., 447 A.2d 539, 546 (N.J. Sup. Ct. 1982).

37. COLO. REV. STAT. § 13-21-403(1) (1987).

38. *Id.*

39. ARIZ. REV. STAT. ANN. § 12-683.1 (West 1982).

40. *Id.*, § 12-681.6.

art as used in this section shall be defined as the best technology reasonably available at the time."⁴¹ The legislation in Michigan and Washington also refers to conformity with generally prevailing standards.⁴² Other states have made conformity with the state of the art a defense without providing any definition.⁴³

CONCLUSION

Insofar as one of the wishes of the Law Commissions was to amend the law in Britain to eliminate anomalies arising out of the differences between liability in contract (strict liability) and liability in tort (negligence), it seems clear that this desire has not been achieved by the enactment of the Consumer Protection Act 1987 with the incorporation of the state of the art defense. It has already been demonstrated by reference to the case of the typhoid-infected milk that compliance with the state of the art is not a defense to contract liability under the Sale of Goods Act.⁴⁴

It follows that producers' liability under the 1987 Act will in some cases be a lesser liability than is imposed upon sellers by the earlier law—the Sale of Goods Act—and, accordingly, the most serious of the anomalies remains. Given acceptance of the policy of reducing anomalies and, in cases where the injured plaintiff is not the buyer and so cannot sue under the contract of sale, of the policy of placing liability on the person best able to insure, the arguments for narrowing the operation of the state of the art defense seem strong.

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41. NEB. REV. STAT. § 25-21,182 (1985) (codifying the Nebraska Product Liability Act of 1978, § 4).
 42. MICH. COMP. LAWS ANN. § 600.2946 (West 1986); WASH. REV. CODE ANN. § 7.72.050 (West Supp. 1988); *see supra* note 27.
 43. *See, e.g.*, IND. CODE ANN. §§ 34-4-20A-1 to 34-4-20A-8 (Burns 1986); N.H. REV. STAT. ANN. § 507-D:4 (1983).
 44. *Frost*, [1905] 1 K.B. 608 (1905); *see supra* note 4.

APPENDIX I: CONSUMER PROTECTION ACT 1987*

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I PRODUCT LIABILITY

[Section] 1.

(1) This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly.

(2) In this Part, except in so far as the context otherwise requires—

“[A]gricultural produce” means any produce of the soil, of stockfarming or of fisheries. . . .

“[P]roducer,” in relation to a product, means—

(a) the person who manufactured it

(b) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it;

(c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process;

“[P]roduct” means any goods or electricity and

(subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise; and

“[T]he product liability Directive” means the Directive of the Council of the European Communities, dated 25th July 1985. . . on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products.

(3) For the purposes of this Part a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised.

[Section] 2.

(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.

(2) This subsection applies to—

(a) the producer of the product;

(b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;

* Consumer Protection Act 1987, ch. 43 (1987).

(c) any person who has imported the product into [an E.E.C.] member State from a place outside the member State in order, in the course of any business of his, to supply it to another.

(3) Subject as aforesaid, where any damage is caused wholly or partly by a defect in a product, any person who supplied the product (whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person) shall be liable for the damage if—

(a) the person who suffered the damage requests the supplier to identify one or more of the persons (whether still in existence or not) to whom subsection (2) above applies in relation to the product;

(b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and

(c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him.

(4) Neither subsection (2) nor subsection (3) above shall apply to a person in respect of any defect in any game or agricultural produce if the only supply of the game or produce by that person to another was at a time when it had not undergone an industrial process.

(5) Where two or more persons are liable by virtue of this Part for the same damage, their liability shall be joint and several.

(6) This section shall be without prejudice to any liability arising otherwise than by virtue of this Part.

[Section] 3.

(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes “safety,” in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.

(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including—

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another; and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.

[Section] 4.

(1) In any civil proceedings by virtue of this Part against any person (“the person proceeded against”) in respect of a defect in a product it shall be a defence for him to show—

- (a) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation; or
 - (b) that the person proceeded against did not at any time supply the product to another; or
 - (c) that the following conditions are satisfied, that is to say—
 - (i) that the only supply of the product to another by the person proceeded against was otherwise than in the course of a business of that person's; and
 - (ii) that section 2(2) above does not apply to that person or applies to him by virtue only of things done otherwise than with a view to profit; or
 - (d) that the defect did not exist in the product at the relevant time; or
 - (e) 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; or
 - (f) that the defect—
 - (i) constituted a defect in a product ("the subsequent product") in which the product in question had been comprised; and
 - (ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.
- (2) In this section "the relevant time," in relation to electricity, means the time at which it was generated, being a time before it was transmitted or distributed, and in relation to any other product, means—
- (a) if the person proceeded against is a person to whom subsection (2) of section 2 above applies in relation to the product, the time when he supplied the product to another;
 - (b) if that subsection does not apply to that person in relation to the product, the time when the product was last supplied by a person to whom that subsection does apply in relation to the product.

[Section] 5.

- (1) Subject to the following provisions of this section, in this Part "damage" means death or personal injury or any loss of or damage to any property (including land).
- (2) A person shall not be liable under section 2 above in respect of any defect in a product for the loss of or any damage to the product itself or for the loss of or any damage to the whole or any part of any product which has been supplied with the product in question comprised in it.
- (3) A person shall not be liable under section 2 above for any loss of or damage to any property which, at the time it is lost or damaged, is not—
 - (a) of a description of property ordinarily intended for private use, occupation or consumption; and
 - (b) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.
- (4) No damages shall be awarded to any person by virtue of this Part in respect of any loss or damage to any property if the amount which would fall

to be so awarded to that person, apart from this subsection and any liability for interest, does not exceed [275 U.K. pounds].

.....

(4) Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 and section 5 of the Fatal Accidents Act 1976. . . shall have effect as if the defect were the fault of every person liable by virtue of this Part for the damage caused by the defect.

.....

(7) It is hereby declared that liability by virtue of this Part is to be treated as liability in tort for the purposes of any enactment conferring jurisdiction on any court with respect to any matter.

.....

7. The liability of a person by virtue of this Part to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by any other provision.

.....

46.

(1) Subject to the following provisions of this section, references in this Act to supplying goods shall be construed as references to doing any of the following, whether as principal or agent, that is to say—

- (a) selling, hiring out or lending the goods;
- (b) entering into a hire-purchase agreement to furnish the goods;
- (c) the performance of any contract for work and materials to furnish the goods;
- (d) providing the goods in exchange for any consideration (including trading stamps) other than money;
- (e) providing the goods in or in connection with the performance of any statutory function; or
- (f) giving the goods as a prize or otherwise making a gift of the goods;

and, in relation to gas or water, those references shall be construed as including references to providing the service by which the gas or water is made available for use.

(2) For the purpose of any reference in this Act to supplying goods, where a person (“the ostensible supplier”) supplies goods to another person (“the customer”) under a hire-purchase agreement, conditional sale agreement or credit-sale agreement or under an agreement for the hiring of goods (other than a hire-purchase agreement) and the ostensible supplier—

- (a) carries on the business of financing the provision of goods for others by means of such agreements; and
- (b) in the course of that business acquired his interest in the goods supplied to the customer as a means of financing the provision of them for the customer by a further person (“the effective supplier”),

the effective supplier and not the ostensible supplier shall be treated as supplying the goods to the customer. . . .

APPENDIX II: COUNCIL DIRECTIVE [OF JULY 25, 1985]*

[The Council of the European Communities. . . . has adopted this Directive]:
Article 1

The producer shall be liable for damage caused by a defect in his product.

Article 2

For the purpose of this Directive "product" means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. "Primary agricultural products" means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. "Product" includes electricity.

Article 3

1. "Producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, 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 within the meaning of this Directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, 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 shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

Article 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

Article 5

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

Article 6

1. 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.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

* O.J. EUR. COMM. (No. L 210) 29 (Aug. 7, 1985) (footnotes omitted). This Directive was notified to E.E.C. member states on July 30, 1985.

Article 7

The producer shall not be liable as a result of this Directive if he proves:

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

Article 8

1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

2. The liability of the producer 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.

Article 9

For the purpose of [a]rticle 1, "damage" means:

- (a) damage caused by death or by personal injuries;
- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 [European Common Units, or 275 U.K. pounds], provided that the item of property: (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption. This [a]rticle shall be without prejudice to national provisions relating to [nonmaterial] damage.

Article 10

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

Article 11

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of [n] years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Article 12

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Article 13

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

Article 14

This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Article 15

1. Each Member State may:

(a) by way of derogation from [a]rticle 2, provide in its legislation that within the meaning of Article 1 of this Directive ‘product’ also means primary agricultural products and game;

(b) by way of derogation from [a]rticle 7(e), maintain or, subject to the procedure set out in paragraph 2 of this [a]rticle, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

....

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of [a]rticle 7(e) and of paragraph 1(b) of this [a]rticle have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of [the treaty creating the E.E.C.], shall decide whether to repeal [a]rticle 7(e).

Article 16

1. Any Member State may provide that a producer’s total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million [European Common Units].

....

Article 19

1. Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. . . .

....

Article 20

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.

Article 21

Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.

Article 22

This Directive is addressed to the Member States.
Done at Brussels, [July 25, 1985]. . . .

