

THE SPANISH PRODUCTS LIABILITY ACT OF 1994

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I. INTRODUCTION

The Spanish Constitution of 1978,¹ a milestone in Spain's transition from the Franco era to the ranks of Western European democracies, has been described, in at least one respect, as "absolutely innovative on the panorama of European constitutions."² It is "the first constitution worldwide to raise consumer protection to the status of a principle of general law."³ Chapters Three and Four of the Spanish Constitution provide in relevant part:

Art. 51.1: The public authorities shall guarantee the protection [*defensa*] of consumers and users, protecting the safety, health and legitimate economic interests of same by means of effective procedures.

Art. 51.2: The public authorities shall promote the informing and educating of consumers and users, foster their organizations and attend to them on matters which may relate to the foregoing, upon the terms established by law.

Art. 51.3: Within the framework laid down in the foregoing paragraphs, the law shall regulate domestic

1. The official text was published in the BOLETÍN OFICIAL DEL ESTADO [Official Bulletin of the State] [hereinafter B.O.E.] on December 29, 1978. See *Spain*, in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1991) (also reprinting the official Spanish-language text); and George E. Glos, *The New Spanish Constitution*, 7 HASTINGS CONST. L.Q. 47 (1980). The translation contained in an appendix to Professor Glos' article appears to be based on a different text from the Spanish text reprinted in the Blaustein & Flanz collection.

2. Ignacio Díaz de Lezcano Sevillano, *La Responsabilidad del Productor: Referencia a la Directiva Comunitaria y a las Leyes y Proyectos de Actuación*, 43 ANUARIO DE DERECHO CIVIL 737, 742 (1990) (translation in the text by the Author, as are all other translations herein, except as otherwise noted).

3. Paloma Pemán Domecq, *Products Liability in Spain*, 15 COMP. L.Y.B. INT'L BUS. 137 (1993). Díaz de Lezcano Sevillano, while acknowledging that the Portuguese Constitution of two years earlier had also contained a specific reference to consumers, indicates that the concrete protections it afforded were rather more limited than those in the Spanish Constitution. Díaz, *supra* note 2 (quoting Portuguese Constitution of 1976). In its second revised form, promulgated in 1989, the Portuguese Constitution now contains a new Article 60 with more extensive guarantees than before. See *Portugal*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 1, at 7, 51, 170.

commerce and the system [régimen] for authorizing commercial products.

Art. 53.3: A recognition, respect and protection of the principles recognized in [the above-cited provisions et al.] shall inform positive law, the practice of the courts and the actions of public authorities.⁴

Adopted against a backdrop of increased sensitivity in Western Europe to matters of consumer protection generally and the issue of products liability in particular,⁵ it should be noted these provisions are neither merely hortatory, nor self-executing. Rather, they affirmatively direct public authorities, positive law, and the courts to see to their further implementation.

Both before and after the 1978 Constitution, the Spanish legal system was naturally acquainted with the matter of liability from harmful products.⁶ Until the mid-1980's, matters of civil products liability were addressed within the statutory framework provided by rather general provisions of the Spanish Civil Code, and supplemented by judicial improvisation.⁷ This regime, however, was significantly altered in 1984 with the passage, in partial fulfillment of the constitutional mandate indicated above, of a wide-ranging consumer protection act, the "General Law for the Defense of Consumers and Users" (GAC).⁸ Chapter VIII of the GAC contained a complex set of provisions dealing with liability for harm arising from the consumption or use of goods, products and services.⁹

4. CONSTITUCION arts. 51.1-3 & 53.3 (Spain) [hereinafter C.E.]. Article 51 was inspired or influenced by the Resolution of the Council of the European Economic Community of April 14, 1975; a preliminary program for a consumer protection and information policy. Díaz, *supra* note 2, at 742; Ángel Rojo, *La Responsabilidad Civil del Fabricante en el Derecho Español y en la Directiva 85/374/CEE*, in 3 LIBER AMICORUM: COLECCIÓN DE ESTUDIOS JURÍDICOS EN HOMENAJE AL PROF. DR. D. JOSÉ PÉREZ MONTERO 1253, 1256 (1988); compare C.E. art. 51.1-2 with, e.g., 1975 O.J. (C 92) 2 ("Consumer interests may be summed up by a statement of five basic rights: (a) the right to protection of health and safety, (b) the right to protection of economic interests, (c) the right of redress, (d) the right to information and education, [and] (e) the right of representation (the right to be heard)").

5. See *infra* and text accompanying notes 90-97.

6. Rojo, *supra* note 4, at 1254.

7. For a discussion of the treatment of products liability matters arising before the effective date of the 1984 legislation alluded to in the text that follows, see *infra*, text accompanying notes 20-66.

8. For a discussion of the background of this law, see *infra* text accompanying notes 67 - 73. The acronym GAC, which one encounters in some English language discussions, presumably stands for the shorthand designation "General Act for Consumers."

9. For a discussion of the operation of the much-criticized, but still pathbreaking chapter VIII of the GAC, see *infra* text accompanying notes 82-89.

Less than a year after this new consumer protection law was enacted, the Kingdom of Spain successfully concluded negotiations to join the European Economic Community, signing a Treaty of Accession on June 12, 1985.¹⁰ The very next month the Council of the European Communities, seeking to "approximate" Member States' laws on liability for defective products, issued a long-awaited Products Liability Directive with instructions that Member States implement its provisions in their domestic law.¹¹ This Directive clearly posed a problem for the not quite one year old GAC, because "Spanish lawmakers, in writing the [1984] Act, had the Directive project in mind but did not follow it."¹² Hence, Spanish lawmakers were faced with a need to revisit the matter of products liability in order to fulfill their obligations to the EEC, which included a requirement that the Directive be implemented in Spanish national law by July 30, 1988.¹³

10. For Spain's accession, see Jason S. Abrams, *European Economic Community: Entry of Spain and Portugal—Instruments Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities*, 27 HARV. INT'L L.J. 250 (1986). Under the 1992 Treaty on European Union, known as the Maastricht Agreement,

[t]he European Economic Community (EEC) was renamed the European Community (EC), and a new entity was created, the European Union [T]he European Union (EU) . . . comprises three legal persons, the EC, the ECSC [European Coal and Steel Community] and Euratom [European Atomic Energy Community]. . . . [I]n law there are still three Communities, though there is only one set of institutions. . . . [T]he European Union may be regarded as the legal and political concept which gives expression to the underlying unity.

T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 8-9 (3d ed. 1994). Hence, the practice followed herein is to refer to the "European Economic Community" as such during the period for which that designation is technically accurate, and thereafter to refer either to the "European Community" or "European Union."

11. Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29 [hereinafter Products Liability Directive]. Article 19 of the Directive provided that "Member States shall bring into force, not later than three years from the notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive." *Id.* at 33. For a discussion of the background and substantive terms of this EEC legislation, see *infra* text accompanying notes 90-118.

12. Pemán Domecq, *supra* note 3, at 155. The Preamble to the Act stated that its drafting had taken account of relevant "principles and directives of the European Economic Community in force." GAC, pmbl. para. 2. *But see* Miquel Martín Casals, *Spain: Spanish Products Liability—The Likely Impact of the New Act*, LLOYDS PRODUCTS LIABILITY INT'L, Feb. 27, 1995, available in LEXIS, Nexis Library, Reuters File ("I regret that the Spanish General Act approved in July 1984 didn't follow the already known proposals of the [EEC] P[roduct] L[iability] Directive."); *cf.* Ramón Mullerat & Sonia Cortes, *Spain*, in EUROPEAN PRODUCTS LIABILITY 339, 352 (Patrick Kelly & Rebecca Attree eds., 1992) (noting distance between the GAC and the Directive).

13. Article 19 of the Directive provided Member States had three years from the Directive's notification date to implement its provisions. For the relevant language of Article 19, see Directive, *supra* note 11. Member States were notified on July 30, 1985. *Id.* at 33 n.1.

Like most other EEC Member States, Spain did not comply with the Directive's mandate within the required time.¹⁴ Among the reasons cited for this delay were policy disagreements within the Spanish Government¹⁵ and general elections,¹⁶ the simple fact that Spain had previously opted to deal with products liability by statute, which distinguishes it from most other Member States whose national law questions of products liability were effectively left to more easily superseded case law.¹⁷ Finally, however, in 1994, the Spanish Parliament passed the "Law 22/1994 of July 6 on civil liability for damages caused by defective products (SPLA),"¹⁸ noting in the preamble that its object was "the adaptation of Spanish law to European Community Directive 85/374/EEC of July 25, 1985 concerning civil liability for damages caused by defective products."¹⁹

Part Two of this article describes the "original" state of Spanish product's liability law under the most frequently invoked general provisions of the Civil Code and the cases decided thereunder. Part Three will consider the significant changes wrought to the Spanish legal regime by the passage of the GAC in 1984. An understanding of both these states of the law is needed for a complete understanding of current Spanish law, inasmuch as portions of the legal *status quo ante* survive into the present. Part Four moves from Spain to Europe, and sketches the background history and the key substantive provisions of the 1985 EEC Products Liability Directive. Returning to Spain, Part Five provides an analysis of the 1994 SPLA, the legislation to implement the EC Directive. Part Six concludes with a number of reflections and comparative observations.

14. See discussion *infra* text accompanying notes 119-126.

15. Mullerat & Cortes, *supra* note 12, at 361 (citing disagreement between Ministry of Justice and Ministry of Health and Consumption); Abrams, *supra* note 10, at 277; see also *infra* text accompanying notes 131-36.

16. Pemán Domecq, *supra* note 3, at 159; see also *infra* text accompanying note 130.

17. Rojo, *supra* note 4, at 1254. Rojo notes the partial exception of the Federal Republic of Germany's treatment of Pharmaceutical Products through a 1976 statute. *Id.*

18. Ley 22/1994, de 6 de Julio, Sobre Responsabilidad Civil por los Daños Causados por Productos Defectuosos, B.O.E., No. 15797, July 7, 1994. See *infra* Appendix (providing a translation of the SPLA).

19. *Id.*

II. PRODUCTS LIABILITY UNDER THE SPANISH CIVIL CODE OF 1889²⁰

Commentators generally agree that the civil law of products liability in Spain has historically not been an especially highly developed area of the law.²¹ Case law has been sparse,²² largely owing to the standard practice of concurrent adjudication of both the criminal and civil liabilities to which the defective products may have given rise.²³ Other factors that have been

20. In principle, the label "products liability" can certainly be extended to include such situations as claims for lost profits by one business against another, arising from some product malfunction. Apart from the occasional sideward glance, however, this Article will focus chiefly on what has come to be regarded as the core meaning of the term, as well as the sense in which it is used in both the Directive and the SPLA: physical injuries to natural persons, along with any concomitant material damage to their property and non-material damage (in the nature of emotional distress or pain and suffering) to other protected interests of natural persons. Also, occasionally the term used will be Product Liability. Nothing significant is meant by such alternation.

21. Casals, *supra* note 12 (identifying "main reason . . . why the law of torts in general, and the law of product liability in particular, have not expanded sufficiently in Spain"); Mullerat & Cortes, *supra* note 12, at 339 (describing product liability law as "not properly developed"); GERD BRÜGGEMANN, *DIE PRODUKTHAFTUNG IM SPANISCHEN RECHT* 59 (1988) (noting the "initially rather hesitant" treatment of product liability in Spanish literature and decisions); *cf.* Santiago Cavanillas Múgica, *Práctica de la Responsabilidad Civil en la Defensa de Consumidores y Usuarios*, 45 *REVISTA GENERAL DE DERECHO* 4463 (1989) (describing Spanish Consumer Law generally as "a novelty"); Rojo, *supra* note 4, at 1254 (describing product liability as "originally an imported topic" from European and American law). *But cf.* SANTIAGO CAVANILLAS MÚGICA, *LA TRANSFORMACIÓN DE LA RESPONSABILIDAD CIVIL EN LA JURISPRUDENCIA* 17 (1987) (opining that a line of Spanish strict-liability decisions was "the equal of any of those existing in European comparative law").

22. *See* Casals, *supra* note 12 (reporting that over the last 50 years the Spanish Supreme Court averaged about one product liability decision a year, but with a "substantial increase in the late 80s"); *see also* Mullerat & Cortes, *supra* note 12, at 350 ("Decisions on product liability have been very scarce. . . . in spite of the efforts of the courts, there has been no decisive case law for product liability in Spain as in some other countries like the United States of America or the German Federal Republic."); Rojo, *supra* note 4, at 1254 (calling Spanish Supreme Court decisions "scarce"); BRÜGGEMANN, *supra* note 21, at 61 (calling the number of Spanish product liability decisions "even today still exceedingly small, particularly as regards the typical form they take, where no immediate contractual relationship between manufacturer and end-purchaser exists"); *id.* at 62 (referring to Spanish cases developing product liability as "quite paltry, right up to the present day").

23. Díaz de Lezcano Sevillano notes that under the combined effect of certain provisions of the Civil and Criminal Codes,

civil obligations arising from delicts or faults are to be governed by the provisions of the Criminal Code, which establishes that every person criminally liable is also civilly liable. Consequently, criminal courts are obligated to decide on matters of civil liability, unless the injured party expresses his wish either to waive such responsibility or reserve it for subsequent exercise before the civil courts.

Díaz, *supra* note 2, at 751-52; *see generally* 2 JAIME SANTOS BRIZ, *LA RESPONSABILIDAD CIVIL: DERECHO SUSTANTIVO Y DERECHO PENAL* 903-27 (6th ed. 1991) (discussing civil and criminal product liability actions). Casals further describes this situation as follows:

identified as contributing to the relatively low volume of products liability actions on the civil side are: (1) Spain's long-standing "paternalistic" welfare system, which effectively relegates tort law to the status of a "junior partner" as a source of compensation for personal injuries; (2) the impermissibility of contingent-fee arrangements as a means of compensating plaintiffs' attorneys; (3) the inhospitality of Spanish law to class actions; (4) the absence of presumptively proplaintiff juries in civil actions; (5) the lack of a specialized products liability bar; and (6) the minimal attention given to tort law, in general, and to products liability, in particular, in Spanish legal education.²⁴ Other commentators have noted: (1) the general caution of Spanish courts, especially courts of first instance, in allowing claims for which no unequivocal statutory basis exists;²⁵ (2) difficulties of procedure and proof;²⁶ and (3) "still too little 'social sensitivity' in the Spanish legal order [concerning the need] for manufacturers' products liability independent of contractual relations."²⁷ The argument that products liability is assigned a lower value in predominantly agricultural Spain than in more highly industrialized countries may once have been truer than it is today.²⁸

In practice, where a criminal action is available, plaintiffs prefer to sue in the criminal jurisdiction. The reason is this jurisdiction is regularly more expeditious and cheaper; the public prosecutor has the duty to follow both actions in favor of the victim, and take all the steps necessary to investigate all the relevant facts. Furthermore, his activity is charged to the taxpayer and, in most cases, the victim doesn't even need to pay for a private prosecutor. And finally, if the offender is found guilty, the victim will not have to start a new process in order to recover damages; if, on the contrary, the offender is not found guilty, this decision does not preclude a civil action, and the victim can still claim for damages before the civil jurisdiction.

Casals, *supra* note 12; see also Mullerat & Cortes, *supra* note 12, at 350 (noting, *inter alia*, that more evidence may be available to prove criminal liability than civil). On the generally restricted discovery rights of civil litigants in Civil Law countries, see generally R. SCHLESINGER ET AL., *COMPARATIVE LAW* 426-28 (5th ed. 1988). Hence, because proven criminal liability for delict or fault necessarily includes civil liability, there would be no need for a court's opinion to focus on the particulars of civil liability as such. Conversely, should a court fail to find criminal liability (or should the public prosecutor have declined to bring the criminal suit in the first place), that might tend to indicate that the underlying facts on which the plaintiff would be relying in a civil action were somewhat weak, thus diminishing the likelihood of plaintiff's prevailing therein. Against the backdrop of two standard procedural rules which Spain shares with many if not most Civil Law jurisdictions—the assessment of the prevailing party's attorney's fees against the losing party, and the illegality of contingent fee arrangements as a means of paying one's own attorney's fees—the perception of a diminished chance of success would operate as a significant disincentive to the bringing of many cases that might otherwise have provided an opportunity for the elaboration of a purely "civil" product liability case law.

24. Casals, *supra* note 12 (quoting John Fleming).

25. BRÜGGEMANN, *supra* note 21, at 62 (citing Ángel Rojo y Fernández Rio).

26. *Id.* (citing several Spanish commentators).

27. *Id.* at 62-63 (quoting Rojo y Fernández Rio and citing Arrillaga).

28. *Id.* at 63 (citing Arrillaga).

For such civil actions as did arise, the Spanish Civil Code of 1889 supplied a number of somewhat broadly worded principles of contract and tort²⁹ liability which were generally considered to govern their disposition.³⁰ To the extent certain aspects of this earlier Spanish Products Liability law continue to survive, even now that the SPLA has gone into effect, it is still worthwhile to consider the operation of these sections of the Civil Code. The relevant contract principles will be discussed first.

A. Contract-based Products Liability

Because Spanish civil law embraces the principle of privity of contract,³¹ the contractual avenue of recovery for harms deriving from products is only available when a contract relationship exists between a products liability plaintiff³² and the defendant. What this has meant in practice is that contractual liability is generally asserted when a sales contract had previously been entered into between the injured party as purchaser and the manufacturer as seller of a defective product.³³ However, nonmanufacturing retailers are also potential defendants under a contract theory.

There are two distinct forms in which a contract theory may be advanced: one cause of action arises under the general law of obligations, the other under the law of sales. Article 1101 of the Spanish Civil Code, located in Book Four, Title One entitled "On Obligations," provides "those who, in the performance of their obligations, commit fraud, negligence or delay, and those who in any manner contravene the tenor of the aforesaid

29. What an Anglo-American lawyer would call tort liability would probably be referred to by a Spanish lawyer as "extracontractual" or possibly "Aquilian" liability. See, e.g., Gabriel García Cantero, *Exegesis Comparativa del Artículo 1.902 del Código Civil*, in 1 CENTENARIO DEL CÓDIGO CIVIL 875 (1990). The term "Aquilian" derives from the *Lex Aquilia*, a Roman law "of fundamental importance in the law of delict," probably dating back to the late third century B.C. See generally BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 16, 218-22 (1962). In the text, however, I shall employ the term tort, more familiar to Anglo-American readers.

30. This situation was not substantially different from those prevailing in other European countries. Prior to the mid-1980's, several European states did not have any product liability legislation. This included the United Kingdom and Ireland whose common law jurisdictions did not include any concept for product liability. If a person was injured in the United Kingdom because of a defect in a product, they had to bring the claim either under the law of contract or the law of negligence. Dai Davis, *Product Liability in the European Community: A Practical and Economic Perspective*, 15 COMP. L.Y.B. INT'L BUS. 117 (1993).

31. "Contracts only produce an effect as between the parties who make them . . ." Código Civil art. 1257 (Spain) [hereinafter C. CIV.]. This principle is usually referred to in Spanish law as the "relativity" of contracts (*relatividad de los contratos*).

32. The class of potential plaintiffs under a contract theory includes, but is not limited to, consumers.

33. Diáz, *supra* note 2, at 754.

[obligations], are subject to making indemnity for the damages and harms caused."³⁴ In meeting the required proof of the defendant-seller's negligence, which would typically be at issue, the Article 1101 products liability plaintiff may benefit from a somewhat relaxed burden of proof.³⁵

By contrast, article 1484, located in Book Four, Title Four, entitled "On Contracts of Purchase and Sale," provides:

The seller shall be obligated to make indemnity for any hidden defects the item sold may have had, if they make it improper for its intended use or so diminish its use that the buyer, had he known them, would not have acquired it or would have paid less for it; but shall not be liable for manifest defects or those which were visible, nor for those which are not [manifest or visible] if the buyer is an expert who, by reason of office or profession, ought easily to have recognized them.³⁶

Hence, under Spanish Sales law, sellers of goods are responsible for latent product defects, both known and unknown,³⁷ with no requirement to show any kind of fault. However, because of a variety of disadvantages³⁸

34. C. CIV. art. 1101.

35. BRÜGGEMANN, *supra* note 21, at 134.

36. C. CIV. art. 1484.

37. Sellers' liability for unknown latent defects is, however, subject to agreement otherwise.

The seller is liable to the buyer for indemnifying hidden vices or defects in the thing sold, even though he is unaware of them. This provision shall not apply when there has been an agreement to the contrary, and the seller was unaware of the hidden vices or defects of what has been sold.

C. CIV. art. 1485. The GAC may have made article 1485's disclaimer possibility ineffective as applied to consumer contracts, because GAC art. 3.1 provides: "Products, activities and services placed on the market so as to be available to consumers or users shall not involve risks to their health or safety [except for those permitted by custom or regulation]." Mullerat & Cortes, *supra* note 12, at 343.

38. The lack of a need to prove fraud might, at first, seem to make the sales cause of action more attractive however relaxed the burden of proof under the "Obligations" theory. Furthermore, article 1485's explicit imposition of liability for "unknown" defects would seem, *prima facie*, better suited to address questions of liability for harms resulting from so-called "development risks," i.e., from product defects which the state of science and technology at the time the product was placed in circulation did not permit to be realized. See *infra* text accompanying note 42 (discussing development risks). Any seeming advantages, however, are more than offset by other aspects of sales theory. Under sales law, the general remedy available to a plaintiff-buyer of a product with a latent defect is merely a choice between rescission (with refund and expenses) and price reduction. C. CIV. art. 1486. It is only if the seller has failed to inform the buyer of those latent defects which are actually or constructively known to him that the seller becomes liable for damages, including those for personal injury. *Id.* arts. 1486-88; Mullerat & Cortes, *supra* note 12, at 343-44; Díaz, *supra* note 2, at 754-55. This formulation would mean that his responsibility for injuries from

associated with the Sales approach, products liability actions sounding in contract were generally more likely to have been brought under the general "obligations" theory.

The damages to which a successful products liability plaintiff under an obligations theory is entitled are defined as "not merely the value of the loss suffered, but also that of the gain which the [plaintiff] has failed to obtain"39 However, this generous measure of damages is subject to a very important caveat: to be compensable, the injuries sustained have to have been foreseeable at the time the obligation arose.⁴⁰ Only in cases of the obligor's fraud does the obligee become entitled to "all [damages] which are known to derive from breach of the obligation."⁴¹ Hence, this requirement of foreseeability would exclude liability for injuries resulting from so-called "development risks," i.e., defects that, because of the state of science or technology existing at the time of the contract, were necessarily unknown to the seller.⁴²

As perhaps might be expected, because the law of obligations imposes liability only for injuries which were the "necessary consequence" of breach or "derive from" the breach,⁴³ a defendant under a contract theory

development risks, unknowable *ex hypothesi*, would still remain minimal. The major disadvantage of the sales theory, however, lies in its exceptionally short statute of limitations: six months from delivery of the thing sold. C.CIV. art. 1490. Fortunately for plaintiffs, however, case law of the Tribunal Supremo has long permitted plaintiffs to elect the Obligations theory where both were applicable. BRÜGGEMANN, *supra* note 21, at 120-23 (discussing a 1911 case); Díaz, *supra* note 2, at 755. Furthermore, there is apparently no pro-plaintiff adjustment of the burden of proof in sales law. See BRÜGGEMANN, *supra* note 21, at 133-34. Additionally, the measure of damages is generally agreed to be a "reliance" measure, rather than obligation law's "expectancy" measure, a factor certainly of significance to prospective business plaintiffs. *Id.* at 111-12, 129-30.

39. C.CIV. art. 1486. BRÜGGEMANN notes that this includes all quantifiable injuries as well as damages for accompanying non-material harms, such as loss of consortium. Only purely non-material injuries would appear to be excluded. BRÜGGEMANN, *supra* note 21, at 129; see also Mullerat & Cortes, *supra* note 12, at 344 ("Damages for personal injury are generally calculated on the basis of a particular amount per day the victim has not been able to work, in addition to any [pain and suffering] and physical damage or costs incurred (e.g., medical expenses, etc.).").

40. "Apart from cases expressly mentioned by law, and those where the obligation so states, no one shall be liable for those occurrences which could not have been foreseen or which, being foreseen, were inevitable." C.CIV. art. 1105. "The damages and injuries for which the good-faith obligor is liable are those foreseen or which could have been foreseen at the time the obligation arose and which are a necessary consequence of its breach." *Id.* art. 1107, para. 1.

41. C.CIV. art. 1107, para. 2.

42. See BRÜGGEMANN, *supra* note 21, at 91. For definitions of "development risks," see, e.g., SPLA art. 6.1(e), *infra*, Díaz, Sevillano, *supra* note 2, at 763; Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673, 674 (1991). Bernstein notes that in American law, the concept of development risks will typically surface in the context of the "state of the art defense." *Id.*

43. C.CIV. art. 1107

may defeat the claimed liability by showing the presence of such factors as victim negligence approaching or equaling 100%,⁴⁴ negligent intervention by a third party which breaks the causal chain between the defective product and injury,⁴⁵ or force majeure or act of God.⁴⁶ Spanish case law has also accepted principles of comparative negligence in reducing the size of awards.⁴⁷

Compared to the tort theory discussed below, the contract theory of products liability suffers from the perspective of injured consumers. For example, some obvious drawbacks are: availability to only a limited class of plaintiffs, i.e., those in privity of contract with the defendant; and availability only against one class of defendants, members of which will not always have the deepest pockets, i.e., nonmanufacturing retailers.⁴⁸ On the other hand, the contract theory has the obvious advantage of a considerably longer statute of limitations than tort theory; fifteen years for the former⁴⁹ versus one year for the latter.⁵⁰ Because of this advantage, legal writers have attempted to develop lines of arguments under which the contract theory may be employed against remote sellers like the manufacturer.⁵¹

B. Products Liability in Tort

For all products liability plaintiffs not in privity of contract with their defendants, the only generally accepted theory under which they might recover was, until 1984, tort theory. Article 1902, modeled after key provisions of the French Civil Code,⁵² provides, "He who, by action or omission, causes harm to another, with fault or negligence intervening, is obligated to redress the damage caused." The tort liability, thereby, created

44. Cavanillas Múgica, *supra* note 21, at 4476.

45. Mullerat & Cortes, *supra* note 12, at 345.

46. C.CIV. art. 1105.

47. Cavanillas Múgica, *supra* note 21, at 4476.

48. As will be seen, it shares the exclusion of liability for development risks with tort theory. See *infra* text accompanying note 61.

49. C.CIV. art. 1964 (providing a 15-year limitations period for general personal actions not otherwise specified).

50. C.CIV. art. 1968. The one-year period, however, is extended to 15 years when the defendant's actions also constitute a crime. Mullerat & Cortes, *supra* note 12, at 348.

51. See, e.g., Cavanillas Múgica, *supra* note 21, at 4479; Sevillano, *supra* note 2, at 757.

52. "The formula used by the legislator in Article 1902 substantially reproduces the scheme [contained in] Articles 1382 and 1383 of the French Civil Code" Diaz, *supra* note 2, at 756; cf. BRÜGGEMANN, *supra* note 21, at 66 (noting overall influence of Napoleonic Code on the Spanish Civil Code). For a discussion of the referenced articles of the Civil Code and the expansive reading French courts have made of them and other sections, see generally SCHLESINGER *et al.*, *supra* note 23, at 555-62; GERAINT HOWELLS, COMPARATIVE PRODUCT LIABILITY 101-10 (1993).

was not disclaimable.⁵³ Article 1902, “among the most frequently cited in court decisions,”⁵⁴ was described by one scholar as “the channel through which it is possible to provide a basis for redressing damages occasioned by defective products.”⁵⁵

Like its French models, Article 1902 imports into the noncontractual liability analysis a requirement of fault. “For this liability to arise, what had to come together were fault in the conduct of the manufacturer and a victim who could prove it.”⁵⁶ However, despite the formidable task that proof of fault would appear to be, Spanish courts had in fact developed a practice of inverting the burden of proof, with the result that it really was up to the defendant to prove “that he had used all required diligence, according to the circumstances”⁵⁷ or, in other words, his lack of fault. Hence, the presumption was subject to rebuttal.⁵⁸ The plaintiff, in any event, continued to be responsible for demonstrating the causal relationship between the defendant’s fault and his injury, for which no presumptions were available.⁵⁹ While the code does not provide a measure of damages for infractions of Article 1902, the common opinion of courts and scholars is that Article 1902 “includes damages for both physical and nonmaterial injury.”⁶⁰ These damages are also subject to foreseeability requirements,⁶¹ the same as

53. BRÜGGEMANN, *supra* note 21, at 175.

54. García Cantero, *supra* note 29, at 875.

55. Díaz, *supra* note 2, at 756; *cf.* Casals, *supra* note 12. If we analyze the main decisions of the 1990’s, it can be ascertained without much difficulty that the general clause of Article 1902 CC and some of the devices created by jurisprudence, such as the reversal of the burden of proof, would in most cases be sufficient to protect the victims of defective products. *Id.*

56. Díaz, *supra* note 2, at 756.

57. SANTOS BRIZ, *supra* note 23, at 948; Mullerat & Cortes, *supra* note 12, at 348; BRÜGGEMANN, *supra* note 21, at 164-73; *see also* Casals, *supra* note 55.

58. Mullerat & Cortes, *supra* note 12, at 348.

59. SANTOS BRIZ, *supra* note 23, at 948.

60. BRÜGGEMANN, *supra* note 21, at 160. Damages in tort cover all damages directly caused by the negligent act and those that may be deemed to have been caused by the act, but not those that are too remote. In particular, they include replacement of the product, damage effectively caused and an amount for compensation for damage to property and other prejudices [sic] and non-physical damage (*pretium doloris*) including pain and suffering, reputation, etc. They cover not only the damage (*damnum emergens*) but also lost profits (*lucrum cessans*) if there is sufficient evidence of the loss. In general, Spanish case law provides for a lump sum to be paid for all the heads of damage. Mullerat & Cortes, *supra* note 12, at 347-48.

61. *See supra* text accompanying notes 40-42; Mullerat & Cortes, *supra* note 12, at 347.

required for the defenses and mitigations described above for contractual liability.⁶²

Despite the courts' alleviation of the products liability plaintiff's task by inverting the burden of proof,⁶³ a number of commentators continued to feel that "great difficulties," including proof difficulties and other procedural and substantive complexities, continued to face product victims who sought compensation from the manufacturer. One feature to be highlighted here is, again, the rather short statute of limitations; one year from the date the victim discovered or ought to have discovered the injury.⁶⁴ One scholar argued that one of the main impediments to a purely case law resolution of the products liability question, and the reason so many plaintiffs' claims still ran aground, was "the persistent primacy of the fault principle."⁶⁵ Hence, such opinions concluded, "[the] system of protection for consumers deriving from these general rules was certainly insufficient."⁶⁶

III. GENERAL LAW FOR THE DEFENSE OF CONSUMERS AND USERS

The 1978 Spanish Constitution's explicit invocation of consumer rights,⁶⁷ along with Western Europe's growing engagement with the topic,⁶⁸ no doubt only served to bolster the widely shared sentiment among many lawyers that Spanish law's treatment of products liability was somewhat lacking. However, the true impetus for legal change may have been two widely reported mass torts that galvanized public opinion thereby forcing Spain's political leadership to respond. These tort incidents were the Los Alfaques campsite disaster in 1978 and the so-called "Toxic Oil Syndrome" of 1981.⁶⁹ The latter, most especially, revealed "the inadequacy of the law

62. See *supra* text accompanying notes 43-47; cf. Pemán Domecq, *supra* note 3, at 139 (describing third-party negligence, acts of God (*force majeure*) and comparative negligence as standard features of a civil liability system).

63. This judicial stratagem of inversion of the burden of proof has been described as one whereby "one slowly passes from a fault-based or subjective system to an objective system which dispenses with fault." Díaz, *supra* note 2, at 757.

64. C. CIV. art. 1968. But see Mullerat & Cortes, *supra* note 12, at 348.

65. Rojo, *supra* note 4, at 1254.

66. Díaz, *supra* note 2, at 758 (listing anti-plaintiff factors identified by Bercovitz-Caño). "A further motive for the passage of the GAC was surely the fact that the form taken by the dispositive [Civil Code] provisions on which a Products Liability claim could be grounded were still viewed as inadequate for the successful bringing of an effective claim for damages from defective products." BRÜGGEMANN, *supra* note 21, at 77 (omitting citations to Civil Code).

67. See *supra* text accompanying notes 1-4.

68. See *infra* text accompanying notes 90-99.

69. On July 11, 1978, an over-capacity tanker truck carrying more than 23,000 kilos of liquid propylene gas crashed into a campsite wall at Los Alfaques, near San Carlos de la Rapita along the Mediterranean and exploded, killing 215 campers, mostly French, German, Belgian, Dutch and

in force [and] moved the political parties . . . to prepare or, best of all, to put the finishing touches on, a piece of general legislation. In the electoral programs and campaigns of the period, consumer protection achieved the rank of a priority problem."⁷⁰

In September 1981, the center-right government of Prime Minister Adolfo Suárez sent the Cortes (the Spanish Parliament) a draft "Consumer Law," the effect of which was either to make no change at all in the legal status quo or, effectively contract the scope of protection afforded consumers by confining products liability to a contractual basis.⁷¹ The Spanish Socialist

English in nationality. See Bjorn Edlund, Untitled Report, UPI (International Section), Jan. 18, 1982, available in LEXIS, Nexis Library, UPI file; Kevin Dunn, Untitled Report, REUTERS, July 11, 1979, available in LEXIS, Nexis Library, Reuters File; Fay Wiley & Miguel Acoca, *A Scene Out of Dante*, NEWSWEEK, July 24, 1978, at 53.

Beginning in May of 1981, at least 402 people, chiefly from working class neighborhoods of Madrid, died and many more became seriously ill, generally believed to be a result of ingesting reprocessed industrial rapeseed oil marketed for cooking and consumption. The longest trial in Spanish history concluded in 1989 with a conviction of the businessmen who had imported the oil from France, tampered with it and sold it for home use. However, only two of the 37 defendants ever went to prison as a result, a verdict which outraged the public. Adela Gooch, *Court 12 Opens Hearings on Oil Scandal*, INDEPENDENT, Feb. 25, 1992, at 9; Robert Hart, *Hundreds Shut Out of Spanish Toxic Oil Hearings*, REUTER LIBRARY REP., Feb. 24, 1992, available in LEXIS, Nexis Library, Reuters File; Richard Lorant, *Mass Poisoning in Spain Still Steeped in Mystery*, L.A. TIMES, June 16, 1991, at A6.

Among the authorities who see a clear link between one or both of these events and the heightened concern with product liability matters that led, *inter alia*, to the passage of the GAC are Pemán Domecq, *supra* note 3, at 137; Mullerat & Cortes, *supra* note 12, at 369; Díaz, *supra* note 2, at 759; Rojo, *supra* note 4, at 1256; Francisco Javier Tirado Suárez, *La Directiva Comunitaria de Responsabilidad Civil, Productos y Ordenamiento Español*, 43 REV. GENERAL DEL DERECHO 4967, 4973 (1987).

70. Rojo, *supra* note 4, at 1256. Among the first reactions were the passage of a regional consumer protection act by the Basque Parliament in November of 1981. Portions of this Act were held to be unconstitutional by the Spanish Constitutional Court the following year as going beyond the legislative competence of the Spanish Constitution delegates to the so-called "Autonomous Regions." *Id.* at 1256-58. A discussion of the Basque Consumer Statute, BOLETIN OFICIAL DEL PAIS VASCO, Mar. 2, 1983, No. 26, and of consumer legislation by the Andalusian governments, is beyond the scope of this Article. Ley 5/1985, de 8 de Julio, de Estatuto de los Consumidores y Usuarios en Andalucía [Law 5/1985 of July 8, on the Statute of Consumers and Users in Andalusia] B.O.E., July 20, 1985, No. 173; BOLETIN OFICIAL DEL PAIS VASCO BOLETIN OFICIAL DEL PAIS VASCO, July 16, 1985, No. 71, Catalan (Ley 1/1990 de 8 de Enero, Sobre Disciplina del Mercado y Defensa de los Consumidores y Usuarios [Law 1/1990 of Jan. 8, on market controls and defense of consumers and users], B.O.E., Feb. 16, 1990, No. 41; Diario Oficial De La Generalidad De Cataluña, Jan. 17, 1990, No. 1243); Galician (Ley 12/1984 de 28 de Diciembre, del Estatuto Gallego del Consumidor y Usuario [Law 12/1984 of Dec. 28, on the Galician Consumer and User Statute], B.O.E., June 11, 1985, No. 139; Diario Oficial De Galicia, Feb. 1, 1985, No. 23); and Valencian (Ley 2/1987, de 9 de Abril, de Estatuto de Consumidores y Usuarios de la Comunidad Valenciana [Law 2/1987, of Apr. 9, on the Valencian Community's Statute of Consumers and Users], B.O.E., Apr. 29, 1987, No. 102; Diario Oficial De La Generalidad Valenciana, Apr. 15, 1987, No. 568.

71. Rojo, *supra* note 4, at 1258-59.

Workers' Party, the P.S.O.E., then the largest group in the parliamentary opposition, forwarded a response in its own draft, "Law for the Defense of Consumers and Users." From the consumer's perspective and in the opinion of at least one scholar, the P.S.O.E.'s draft was a distinct improvement over not just the Suárez government's bill which preceded it, but even over the later text of what would subsequently become the "General Law for the Defense of Consumers and Users."⁷²

The GAC was passed in 1984 after the dissolution of the Cortes and the accession of the P.S.O.E. to power under Prime Minister Felipe González.⁷³ The widely shared opinion of legal scholars is as a piece of legal craftsmanship, it was not just bad, but awful.⁷⁴ Whatever its technical defects, however, there is no doubt the GAC made significant changes in Spanish products liability law.⁷⁵

Articles 1 and 2 of the GAC, stating that its provisions were in furtherance of the Constitution's consumer protection provisions,⁷⁶ began with a broad enumeration of the basic rights of consumers and users, and a

72. Rojo opines that this may have had something to do with the fact that the Ministry of Health and Consumption went to politicians other than those who had been most directly responsible for the area of consumer protection. Rojo, *supra* note 4, at 1259-61.

73. Ley 20/1984, de 19 de Julio, General Para la Defensa de los Consumidores y Usuarios [General Law for the Defense of Consumers and Users], B.O.E. 176, July 24, 1984. For translated excerpts and a brief discussion in English see Ian S. Blackshaw, *New Spanish Law on Consumer Protection*, 5 BUS. L. REV. 290 (1984).

74. "The 1984 Act is a defective product itself; it is not only technically defective, but also incoherent." Casals, *supra* note 12. "Incomplete and technically deficient . . . reveals important shortcomings . . . incoherent and technically defective." Mullerat & Cortes, *supra* note 12, at 339, 352. "The unintelligibility of its articles 25 to 28 is so radical that, in my opinion, it cannot be overcome, not even by an interpretive effort well-meaningly bent on favoring consumers." Cavanillas Múgica, *supra* note 21, at 4464. A source of the highest legal uncertainty

[t]he result could not be worse. On the question of the manufacturer's civil liability the Law, without intending to, constitutes a front attack on *legal certainty* The system's lack of clarity and the imprecision of the terms employed has given rise to very different and contradictory interpretations of the rules in force, with grave injury to the public interest."

Rojo, *supra* note 4, at 1260. "[Article 28's strict liability régime] could not be called progressive but purely and simply irrational." *Id.* at 1272. "At many points [including the product liability regulations], the Act creates the impression that the wide sweep of the matters regulated was often at the expense of a precise working through of the details." BRÜGGEMANN, *supra* note 21, at 77; *id.* at 78 (noting "vehement" criticism in the literature).

75. See, e.g., Mullerat & Cortes, *supra* note 12, at 352; BRÜGGEMANN, *supra* note 21, at 85 (identifying GAC Article 28 as the law's "genuine innovation").

76. For the relevant constitutional text, see *supra* text accompanying note 4; see also BRÜGGEMANN, *supra* note 21, at 75 (describing GAC as rooted in Article 51.1-2 of the Spanish Constitution).

definition of the protected class under the act.” The portions of the GAC directly related to products liability appeared in chapter 8, Articles 25-31.

Article 25 sets out the general principle that consumers had a right to compensation for harms caused to them by goods or services, except insofar as the harm was their *culpa exclusiva* [own fault] or was caused by persons for whom they were civilly liable. The principle is noncontroversial, and the exception merely codified existing case law. But then chapter 8 of the GAC confusingly went on to establish not one, but two separate regimes of products liability. Articles 26 and 27 establish the “general” regime of products liability, and Article 28 a “special” regime.

Much like Article 25, the “general” regime set up by Articles 26⁷⁸ and 27,⁷⁹ in essence, also largely codifies existing law, adding a few specific rules for particular fact situations. While it is certainly possible to criticize them, as scholars have done, for faulty draftsmanship, the regime these

77. GAC Articles 1.1 & 2. Consumers and users are defined in Article 1.2. For a translation, see *infra* text accompanying note 87. The difference between them is apparently that the term “consumers” relates to goods, and “users” to services. Díaz de Lezcano Sevillano, *supra* note 2, at 773. This article, however, will hereafter generally follow standard American usage in referring simply to consumers, rather than to consumers and users.

78. GAC art. 26 provides:

Actions or omissions of those who produce, import, supply or provide products or services to consumers or users which cause damage or harm to same shall give rise to liability in the former, unless it appears or can be shown that there has been compliance with the demands and requirements established by regulation and with other [types of] care and diligence demanded by the nature of the product, service or activity.

Id.

79. GAC art. 27 provides:

a) the manufacturer, importer, seller or supplier of products or services to consumers or users, shall be liable for the origin, quality and suitability of same, as per their nature and purpose and the governing norms.

b) for products in bulk, the holder of same shall be liable, without prejudice to his ability to identify and prove the liability of the prior holder or provider. 1. In general, and without prejudice to more favorable results to consumers or users by virtue of other provisions or conventional agreements, the following criteria shall govern on the matter of liability

c) for products packed, labeled and enclosed with an unbroken seal, the company or company name appearing on the label, presentation or advertising shall be liable. It may be released from such liability by proving its falsification or incorrect manipulation by third parties, who shall be those responsible.

d) If several persons shall have come together in producing the harm, they shall be jointly and severally liable to the victims. Whoever pays the victim shall have a right to seek contribution from the other liable parties, as per their participation in the causation of the harm.

Id.

articles set up was essentially the “rebuttable presumption of fault” regime which Spanish courts had already created under Article 1902 of the Civil Code.⁸⁰ Hence, it suffered from the same major defect as the latter: rebuttable presumptions can be rebutted.⁸¹

Article 28, the “special” liability regime, was quite a different matter altogether:

28.1: Notwithstanding the foregoing, there shall be liability for damages originating in the correct use and consumption of goods and services when, by their very nature or by being so established by regulation, they necessarily include a guarantee of determinate levels of purity, efficacy or safety, under objective conditions of determination, and presuppose technical, professional or systematic quality controls until they reach the consumer or user in the proper condition.

28.2: In any event, considered to be subject to this liability regime are all food products, those of hygiene and cleanliness, cosmetics, pharmaceutical specialties and products, sanitary services, gas and electric service, household appliances and elevators, means of transportation and motor vehicles, and toys and products directed at children.

28.3: Without prejudice to what other statutory provisions may establish, the liabilities arising under this Article will have a limit of 500 million pesetas. This amount is to be periodically revised and updated by the Government, taking account of the variation in consumer price indices.⁸²

What Article 28, in fact, established was a seemingly parallel products liability regime qualitatively different from any preceding it. This regime was one of strict liability, since it did not provide that a defendant’s fault was at all relevant to the plaintiff’s case for recovery, either by way of proof or presumption.

The obvious scope questions, then, would seem to be presented: when does the “general,” more traditional products liability regime of

80. BRÜGGEMANN, *supra* note 21, at 79-80. For criticism of the draftsmanship, see, e.g., Pernán Domecq, *supra* note 3, at 141-42; Rojo, *supra* note 4, at 1265-67; see generally *supra* note 74, (citing authorities).

81. See *supra* text accompanying notes 57-59.

82. GAC art. 28.1-3.

Articles 26 and 27 apply, and when does the "special," strict liability regime of Article 28 apply? The technical conclusion of most commentators who studied the matter was, in fact, that the exceptional regime of Article 28 basically swallowed up the general regime of Articles 26 and 27, because "it is difficult to find a product that, either by inclusion in the list or by being included within the definition, is subject to the general regime and not the special."⁸³ Furthermore, the benefits of a strict liability theory were enhanced by the very limited number of defenses a liable party could assert.

Liable parties can only free themselves of the obligation to make indemnity if they prove the victim's fault (or the fault of persons for whom the victim is civilly liable). Only if the use or consumption has been 'incorrect' (art. 28.1 in connection with art. 25) is exoneration in order.⁸⁴

These liable parties apparently included almost everyone in the production and distribution chain: the manufacturer, importer, seller, or supplier of the products to consumers, any one of whom could be sued at the consumer's election.⁸⁵ Finally, as to damages available, there is no explicit limitation to those foreseeable. Hence, injuries from development risks were apparently also included within the scope of coverage.⁸⁶

83. Rojo, *supra* note 4, at 1271. "Given its great breadth, the scope of this special strict liability system seems to be greater than that of the general liability system." Pemán Domecq, *supra* note 3, at 143. "The wide scope of this Article [28] means that what was intended to be a rule applicable only in exceptional cases, turns out to be the general rule . . ." Mullerat & Cortes, *supra* note 12, at 355-56. "It [the Article 28 régime] is given such a broad substantive scope that in practice it operates with priority." María Elena Zabalo Escudero, *La Ley Aplicable a la Responsabilidad por Daños Derivados de los Productos en el Derecho Internacional Privado Español*, 43 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 75, 81 (1991). "Finding a product which does not fit into Article 28 of the GAC and which must follow the fault liability régime is rather difficult." Díaz, *supra* note 2, at 763-64. *But cf.* BRÜGGEMANN, *supra* note 21, at 86 (citing one's scholar's questioning of whether handicrafts and agricultural products in their natural state would fall under article 28).

84. Rojo, *supra* note 4, at 1272. *Cf.* BRÜGGEMANN, *supra* note 21, at 99 (citing opinion in the literature that under Article 28, principles of comparative negligence would also apply, thereby reducing a negligent plaintiff's recovery). *Id.* at 100-02 (noting some scholars' opinion that such defenses as "assumption of risk," "victim predisposition to the injury," and "fortuitous circumstances" would also be available under Article 28).

85. Rojo, *supra* note 4, at 1265; Díaz, *supra* note 2, at 761. Since article 28 itself contains no indication of liable persons, the authorities cited both argue that they must be the same as those enumerated in Article 27. *But see* BRÜGGEMANN, *supra* note 21, at 93-96 (citing with approval the line of scholarly opinions that would confine a liable party's liability to those product risks specifically arising within the latter's sphere of activity).

86. *Id.*; *see also* Díaz, *supra* note 2, at 764; *cf.* Pemán Domecq, *supra* note 3, at 154 (opining that foreseeability requirements go along with negligence-based liability); Rojo, *supra* note 4, at 1270 (noting that lack of foreseeability is a defense under the general régime of Articles 26-27); BRÜGGEMANN, *supra* note 21, at 90-92 (noting split of opinion in the literature, but opining that the

Even though the de facto generalization of a regime of strict products liability may have come about more by sloppy draftsmanship than perhaps by conscious design, the substantive result would still appear to be a major advance for consumers. But that appearance is rather deceptive, because of the definition of "consumers and users" the protected class created by the GAC. These were defined as "natural or legal persons who acquire, utilize or enjoy, as *destinatarios finales* [end-recipients], personal or real property, products, services, activities or functions, whatever may be the nature, public or private, individual or collective, of those who produce, supply, furnish or extend them."⁸⁷ Whereas, under the Civil Code it had been the limited class of persons in privity of contract with a products liability defendant who could benefit from the advantages of a contract theory over a tort theory, under the GAC, it was now only "end-recipients" or "end-users" who could benefit from the no-fault regime. Because membership in the two classes, "those in privity with the products liability defendant" and "end-users" of a product or service, would in the normal course of things, substantially overlap, it was roughly speaking, the same limited class which would benefit from the more advantageous theory of recovery.⁸⁸ All third parties and all bystanders, being neither "consumers" nor "users" for purposes of the GAC, would continue to be relegated to the Civil Code's presumed-fault tort regime under Article 1902.⁸⁹

peseta cap in Article 28.3 is a "strong indication of intentional inclusion of liability for development risks").

87. GAC art. 1.2 (emphasis added).

88. While many, possibly most, products and services will be purchased by those who will eventually use them, the GAC would protect, for example, donees or thieves from the contract-purchaser, while depriving the latter of its benefits. It would also apparently not protect a private person who uses a product and subsequently re-sells it. Another peculiarity, much criticized, is the inclusion of "legal persons" within the definition of "consumers and users." The intention was, presumably, to include such presumptively not-for-profit organizations as churches and charities within the definition. But the language of the definition does not make this clear. Hence, one business suing another might well be, in certain circumstances, a "consumer" for purposes of this Act. See the discussion in Rojo, *supra* note 4, at 1262-64.

89. *But cf.* BRÜGGEMANN, *supra* note 21, at 97 (noting the proposal of some scholars for a *contra legem* interpretation of Article 28 so as to include third parties on policy grounds).

There were other problems with the Article 28 régime as well. For one thing, there is much disagreement over how the 500 million peseta cap, apparently intended as a counterweight to the strict nature of the liability itself, was to be applied: per person, to all claims arising from the same defect, to all products made or supplied by a liable party, to each specific series of products, or per defect. Díaz, *supra* note 2, at 764; BRÜGGEMANN, *supra* note 21, at 92; Pemán Domecq, *supra* note 3, at 144; BRÜGGEMANN, *supra* note 21, at 98 (citing Bercovitz y Rodríguez Caño); Mullerat & Cortes, *supra* note 12, at 361; Rojo, *supra* note 4, at 1272. Would amounts paid out under a fault theory count towards the cap? Rojo, *supra* note 4, at 1272-73; *cf.* BRÜGGEMANN, *supra* note 21, at 105 (implying that when limit was reached there might still be additional recovery under Civil Code's fault regime).

IV. THE EEC PRODUCTS LIABILITY DIRECTIVE

A. Background

In 1968, the Commission of the European Economic Community undertook preliminary studies for the drafting of a Directive to harmonize the products liability laws of the various member states.⁹⁰ Subsequently, in October of 1972, European heads of state and government, meeting in Paris, called upon European community institutions "to strengthen and coordinate measures for consumer protection."⁹¹ That same month, a "Convention on the Law Applicable to Products Liability" was adopted under the auspices of the Hague Conference on Private International Law.⁹²

On April 14, 1975, the European Council passed its resolution on a preliminary program for consumer protection and information policy.⁹³ In September of the following year, the European Commission submitted to the Council of the European Communities its "proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the [m]ember [s]tates concerning liability for defective products."⁹⁴ This was followed, in January of 1977, by the Council of Europe's adoption of the "European Convention on Products Liability in Regard to Personal Injury and Death."⁹⁵ In turn, the latter would serve as a significant source⁹⁶ for the European Council's July 25, 1985 "Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products."⁹⁷

Another area of doubt was the limitations period for bringing an action: the standard 15 year period under the Civil Code Article 1964 for actions not otherwise specified, or the one year allowed by Civil Code Article 1968, or either, depending on whether a contractual relationship is present or the one year allowed by Civil Code Article 1968. Pemán Domecq, *supra* note 3, at 145; Tirado Suárez, *supra* note 69, at 4976; cf. BRÜGGEMANN, *supra* note 21, at 102 (arguing for one year but noting that question would ultimately have to be answered by case law); Mullerat & Cortes, *supra* note 12, at 360; cf. Cavanillas Múgica, *supra* note 21, at 4479; Rojo, *supra* note 4, at 1277 (noting silence of Spanish law on limitation period for bringing the action). A discussion of the remaining articles of chapter VIII is not necessary for the present discussion.

90. Díaz, *supra* note 2, at 771. Two years later, a special commission of the Council of Europe took on the task of proposing harmonization measures in this area as well. *Id.*

91. 1975 O.J. (C 92) 1.

92. Hague Conference on Private International Law: Convention on the Law Applicable to Products Liability [adopted Oct. 21, 1972] 11 I.L.M. 1283 (1972). For a discussion of the interaction of this Convention and Spanish law, see generally Zabalo Escudero, *supra* note 83.

93. 1975 O.J. (C 92) 2

94. 1976 O.J. (C 241) 9 (later amended by 1979 O.J. (C 271) 3).

95. European Convention on Products Liability in Regard to Personal Injury and Death (1995), 16 I.L.M. 7 (1977).

96. Pemán Domecq, *supra* note 3, at 148; Rojo, *supra* note 4, at 1255.

97. 1985 O.J. (L 210) 29.

Writing about a year after the Directive's adoption, Hans Claudius Taschner, staff member of the EEC Commission, described it as follows:

The Directive is the result of a compromise achieved with difficulty among the Member States, but also among the naturally very much opposed interests of industry and consumers. Member States' laws are quite diverse [hétérogènes]. They range from traditional liability for fault with classic burden of proof . . . to de facto strict liability, unlimited as to amount and length of time, as progressively introduced by case law's tilting of an irrefutable presumption of fault . . . passing through liability for fault with reversal of the burden of proof, with ever more rigorous conditions on making proof to the contrary. . . .

As for the social partners, industry sought the maintenance of liability for fault or, in the event of strict liability, its overall and specific limitation to as weak a level as possible, exclusion of development risks, exclusion of property damage, and limitation of liability to a duration of five years; as for consumers, they considered that safeguarding their interests would necessarily come via strict liability unlimited as to amount and duration and extending to development risks, via liability for property damage with no threshold amount, and via reversing the making of proof to make it the producer's burden as far as the causal nexus between defect and damage goes.

Given positions this far apart, it is hard to see how one could hold it against the Directive that it did not result in a *rapprochement* of national laws, but on the contrary in an accentuation of their diversity. The adoption of the Directive was only achieved at a price of temporarily maintaining a certain number of established rules. It remains no less the case that the keystone of the Directive, to wit the introduction of strict liability, which all alone justifies all the efforts and relegates all other question to the background, has been accepted without exception or reserve by all Member States.⁹⁸

98. Hans Claudius Taschner, *La Future Responsabilité du fait des Produits Défectueux dans la Communauté Européenne*, 297 REVUE DU MARCHÉ COMUN 257, 258 (1986) (omitting examples).

From Taschner's description of the genesis of the Directive, one can get a fairly good sense of both its setting and its accomplishments: (1) a pre-existing diversity of national laws; (2) opposing interests;⁹⁹ (3) attempted "harmonization" around the core idea of strict liability;¹⁰⁰ and (4) incomplete harmonization achieved.¹⁰¹ A very brief summary of some of its more important terms follows.

B. Summary of Provisions

Strict Liability: Apart from its clear embrace of strict liability¹⁰² in the recitals, the operative provisions of the Directive which embody this principle are Articles 1 and 4, which together provide for a "producer's" liability for his product's defect, if the injured person can prove damage, defect and a causal relation between the two. What this formulation leaves

99. Heinz Kröger, *Problèmes D'application de la Directive Européenne dans les Différents Etats Membres*, 32 ANNALES DE LA FACULTÉ DE DROIT DE LIÈGE 298 (1987).

The adoption of the Directive has provisionally put an end to an important part of the debate in the E.E.C. regarding future European laws on the topic of liability for damages caused by defective products. The debate which has concluded, to my mind, brought with it neither winner nor loser. By that I understand that neither the consumer organizations who actively sought the Directive, nor organizations . . . representing industry which were against certain aspects of the proposed Directive and which for that reason were reticent, indeed against the Directive, completely carried the day.

Id.

100. See Bernstein, *supra* note 42, at 676 (arguing *passim* that the purported "harmonization," in the (minimalist) sense of "approximation," "an effort to unify, with minimal change of law," was not so much what the Commission was after as harmonization in the "meliorist" sense of law reform, "reconcil[ing] national laws with a Community ideal"). But she goes on to criticize the underlying idea behind the reform: "The Community has slighted its combination of assured compensation [through Member States' social-welfare safety net] and well-developed principles of liability in favor of an alternative known chronically to fail as a source of compensation and to waste money." *Id.* at 689. She attributes this to the "sense of finitude" engendered by the rising costs of state health-care programs. "In the spirit of austerity that began in the mid-1980's, many Europeans regard universal health care as a luxury of potentially infinite expense." *Id.*

101. See generally, e.g., Wolfgang Freiherr von Marschall, *The Three Options of the EEC Directive on Products Liability and their Application in the Implementing Statutes of Member States*, 1991 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 707; cf. Bernstein, *supra* note 42, at 676 ("[T]he increasing amount of leeway that the Commission now condones will assure divergent national laws in perpetuity.").

102. The English language text does not use the term "strict liability" but rather "liability without fault." The French equivalent is *responsabilité objective*. For the use of the *responsabilité objective* to mean strict liability, see, for example, Zabalo Escudero, *supra* note 83, at 80 n.23 (noting the 1973 Hague Convention's use of French term as equivalent to American "strict liability"); see also Bernstein, *supra* note 42, at 680 ("The origins of the Directive suggest an appreciation for American-style forthright strict products liability. . . .").

out, of course, is any need to show the producer's fault. Article 2 identifies "products" as most moveables, including those that have been incorporated into something else, and electricity, but excluding unprocessed agricultural products and game. A product is defective if it does not provide the safety a person is entitled to expect under the circumstances.¹⁰³ Exculpatory clauses or limitations of this liability are not enforceable.¹⁰⁴

Protected Class: Under Article 4, prospective enforcers of this liability, i.e., products liability plaintiffs, are simply "injured persons" with no requirement of a contractual relationship with anyone. Third parties and bystanders have just as much protection under the Directive as parties to a contract. The only caveat is that the injured person's own fault, or the fault of someone legally in his charge, may, but need not, cut down or cut off his recovery.¹⁰⁵ But the negligence of all other persons, if it is a coparticipant in causing the damage, in no way affects the injured person's right to recover against the producer.¹⁰⁶

Liabe Parties: Article 1 identifies the "producer" as liable for the damage caused by product defects. As defined by Article 3, "producer" is an umbrella term, and includes: (1) manufacturers of finished products or component parts; (2) producers of raw materials; (3) "own branders," i.e., those holding themselves out as manufacturers or producers; (4) commercial importers into the EU;¹⁰⁷ and (5) provisionally, any suppliers of the product.¹⁰⁸ If, on the facts of a given case, there is more than one "producer," they are to be jointly and severally liable, with any national law rights regarding apportionment of the loss *inter sese* unaffected thereby.¹⁰⁹

Possible Defenses to Liability: Apart from the plaintiff's own fault or that of one legally in his charge, the more useful defenses¹¹⁰ available to producers are the "development risks" defense,¹¹¹ unless national law opts to

103. Directive, *supra* note 11, art. 6.

104. *Id.* art. 12.

105. *Id.* art. 8.2.

106. *Id.* art. 8.1. The producer is free to exercise any rights under national law to seek contribution from such negligent person. *Id.*

107. An importer deemed a producer and held liable as such may have certain rights against the actual producer. Directive, *supra* note 11, art. 3.2.

108. Suppliers may discharge this provisional liability by giving the injured party, within a reasonable time, the identity of the actual producer or importer or of his own immediate supplier. *Id.* art. 3.3.

109. *Id.* art. 5.

110. Davis, *supra* note 30, at 126-27.

111. Directive, *supra* note 11, art. 7(e). The "development risks" defense was apparently added in response to pressure from the European Parliament. See, e.g., 1980 O.J. (C 147) 122-23 (parliamentary resolution endorsing development risks defense). The 1979 Amended Proposal did

eliminate it, as it may,¹¹² and if one is a "producer" by virtue of having manufactured a component part, proof that the defect causing the damage is due to overall product design or to having followed the product manufacturer's instructions.¹¹³

Scope of Allowable Damages: Under Article 9, the injured person is always entitled to damages for death or personal injuries. Apparently, this entitlement refers only to the material damages, because there is a reference back to national law for the possible availability of nonmaterial damage. There is no attempt to introduce uniformity into the calculation of those damages.¹¹⁴ The injured person is also always entitled to property damage for certain property, provided the damage is over an amount of 500 European Currency Units [ECU's]. The property damaged must be consumer property. If the property was either not ordinarily intended for personal use or consumption or not mainly so used by the injured party, which basically means capital goods, there is no recovery allowed. The Directive does not affect contract and tort rights which an injured person may have under national law.¹¹⁵

The Directive allows a person to exercise their rights within three years of the date the injured person actually or constructively knew of the damage.¹¹⁶ In no event may they be exercised more than ten years from the date the individual damage-causing product was put into circulation.¹¹⁷ The total damages which a producer might be required to pay as a result of

not contain any such defense. See 1979 O.J. (C 271) 3-11 (text of Amended Proposal); see also *supra* text accompanying note 42.

112. Directive, *supra* note 11, art. 15.1(b).

113. *Id.* art. 7(f).

114. Andrew Geddes, *Difficulties Relating to Directives Affecting the Recoverability of Damages for Personal Injury*, 17 EUR. L. REV. 408 (1992) (citing DAVID MCINTOSH & MARJORIE HOLMES, PERSONAL INJURY AWARDS IN E.C. COUNTRIES (1991)).

The importance of making the correct choice [of forum] has been dramatically illustrated by a recent survey of damage awards in different Member States. Taking one example of a 40 year old male doctor who is married with two children and who suffers serious brain injury, if he brings his proceedings in Ireland he would be likely to receive something in the region of \$2 million. If he brings his proceedings in Spain on the other hand he would be lucky to receive \$250,000. As the authors of the report point out, until the Community introduces measures to iron out these disparities, forum shopping will remain prevalent, settlement will be difficult and the single market ideal of equal treatment in every Member State will be undermined.

Id.

115. Directive, *supra* note 11, art. 13.

116. *Id.* art. 10.

117. *Id.* art. 11.

identical items with the same defect may, but need not, be capped by national law at a minimum of seventy million ECU's.¹¹⁸

C. Implementation in Member States' National Law

The only three member states able to implement the Directive as of July 30, 1988, were the United Kingdom, Italy, and Greece, with the latter two only doing so by decree.¹¹⁹ In fact, "in the [European] Commission's opinion, the only Member State which had correctly transposed the Products Liability Directive into its national law was Greece," since the Commission implemented infraction proceedings against both Italy and the United Kingdom.¹²⁰ In addition, Spain, Belgium, Denmark, Ireland, France, Germany, Luxembourg, the Netherlands, and Portugal had not implemented the Directive on time.¹²¹ One commentator, writing in 1993, bluntly stated that "[t]he implementation record of most states in relation to this Directive is nothing short of scandalous. . . . [I]t is extraordinary that France and Spain have yet to implement the Directive."¹²² Another commentator a few years earlier noted, "The (interim) balance which one might have struck at the end of the period prescribed by Art. 19 of the EC Directive—the end of July 1988—was simultaneously skimpy and surprising."¹²³

In March of 1990, the European Parliament asked "[w]hat urgent action does the [European] Commission intend to take against the Spanish Government [for nonimplementation of the Directive]?"¹²⁴ Shortly thereafter, the Commission provided a written answer in which it indicated

118. *Id.* art. 16.1.

119. Willibald Posch, *Die Umsetzung der EG-Richtlinie "Produkthaftpflicht" in den Mitgliedstaaten und die beim "Autonomen Nachvollzug" durch Drittstaaten Auftretenden Probleme*, in SYMPOSIUM STARK: NEUERE ENTWICKLUNGEN IM HAFTPFLICHTRECHT 85 (Heinrich Hansell & Heinz Rey eds., 1991). This Article will not deal with the question of whether, given the failure to make timely implementation of the Directive in national law, the Directive's provisions therefore took "direct effect" therein. See Díaz de Lezcano Sevillano, *supra* note 2, at 790-92.

120. D. Struyven, *La Transposition de la Directive Européenne en Matière de Responsabilité du fait des Produits Défectueux dans le Droit des états Membres: Bilan et Perspectives*, 66 REVUE DE DROIT INTERNATIONALE ET DE DROIT COMPARÉ 140, 141 (1989).

121. Bernstein, *supra* note 42, at 675 n.13. Subsequently, the European Union was enlarged, on January 1, 1995, with the accession of new members Austria, Finland, and Sweden.

122. Christopher Hodges, *EC: The European Minefield: Looking at EC Product Liability Law*, LLOYDS PRODUCT LIAB. INT'L, Sept. 1, 1993, available in LEXIS, Nexis Library, Reuter Textline File.

123. Mathias Schubert, *Umsetzung der EG-Produkthaftungs-Richtlinie: Eine Zwischenbilanz*, 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 272 (1990).

124. EUR. PARL. DEB. (3-389) 199 (Apr. 4, 1990) (question no. 56 by Mr. Valverde Lopez, H-367/90).

that it had indeed begun "infringement proceedings" against nonimplementing member states, but went on to say:

However, the Commission took the view that Spain as a new Member State should be tacitly granted more time for full implementation. But this does not mean that the Commission could not now open infringement proceedings against Spain at any time that seems appropriate, which risks happening in the present case, as the Member State has not yet communicated to the Commission the necessary national measures for the implementation of the directive.¹²⁵

Finally, as of August 3, 1995, "[a]ll EU member states, including the three new members, have now transposed this directive except for France."¹²⁶

V. THE SPANISH PRODUCTS LIABILITY ACT OF 1994

A. Legislative History

"A directive is an EC law addressed to Member Nations of the Community. It is binding as to its result, but it leaves to each nation the choice of form and methods to implement it."¹²⁷ Writing in 1988, one Spanish commentator identified three possible implementation options open to Spain:

125. *Id.* at 200; *see also, e.g.*, EUR. PARL. DEB. (3-409) 214 (Oct. 9, 1991) (Commission's written answer to parliamentary question indicating that nonimplementation proceedings had been commenced against Ireland).

126. *EU: Infringement Procedures Continue for Non-Transposition of Directives*, AGENCE EUROPE, Aug. 3, 1995, available in LEXIS, Nexis Library, Reuter Textline File (list of the national legal provisions which EU Member States have communicated to the Commission in connection with the Directive is available in Westlaw, CELEX Library, NP file).

The Commission of the European Communities brought suit against France in the Court of Justice of the European Communities on November 21, 1991. In January 1993, the Court held that France's nonimplementation of the Directive constituted a failure to comply with its obligations thereunder and under the EEC treaty. *Affaire C-293/91, Commission c. Republique Française*, available in LEXIS, Eurocom Library, CJCE file (Jan. 13, 1993). In its filings with the Court, France admitted the facts complained of, but indicated that it was having problems integrating the Directive into existing French law, because the Directive's measures did not easily harmonize. *Id.*; *see also* Díaz de Lezcano Sevillano, *supra* note 2, at 789 (noting that French implementation of the Directive was faced with two problems: "coordination with the discipline of the Code Civil and coordination with special laws"). *But see* Rojo, *supra* note 4, at 1277 (noting that integration with the Civil Code was the method being employed by the Dutch). For a discussion of the difficulty of making changes in long-established civil codes, *see generally* SCHLESINGER ET AL., *supra* note 23, at 547-52.

127. Bernstein, *supra* note 42, at 673 n.2 (citing Treaty Establishing the European Community, Mar. 25, 1957, art. 189, 298 U.N.T.S. 11).

[F]irst, modification of the Civil Code, by introducing into the part relative to tort liability norms corresponding to the manufacturer's liability. Second, modification of [the GAC], revising articles 25 and following of said general law and squeezing the Community rules within Chapter VIII. Third, finally, the drafting of a special law.¹²⁸

That commentator recommended the third option, and that position seems to have prevailed relatively early in the process.¹²⁹ The process itself was punctuated, not to say delayed, by three national elections: in 1986, 1989, and 1993.¹³⁰

Two drafts were prepared in 1988, one by the Commercial Law section of the General Commission on Codification, in the Ministry of Justice, dated January 28, 1988,¹³¹ and the other the work of the Ministry of Health and Consumption, apparently following the issuance of a Report commissioned by the National Institute on Consumption.¹³² The Ministry of Justice's bill, which basically followed the text of the Directive, included a repeal of Articles 25 through 29 of the GAC, opted to include agricultural products within the definition of "product," opted to put a global cap of ten billion pesetas on damages from identical products with the same defect, and allowed the "development risks" defense for products other than pharmaceutical products.¹³³ The Ministry of Health and Consumption's bill instead proposed merely amending the GAC to conform, where necessary, to the Directive. It would, for example, have allowed the GAC to continue to provide for recovery of property damage below the Directive's threshold of 500 ECU's. It also opted to include "agricultural products" within the definition of "product" and disallow the "development risks" defense for both medicines and food.¹³⁴

128. Rojo, *supra* note 4, at 1277.

129. Cf. Struyven, *supra* note 120, at 154 n.28 (noting in 1989 "the Directive will be implemented by means of a special law" and referring to early 1988 draft of same).

130. Cf. *Spain*, in THE STATESMAN'S YEARBOOK 1995 1201, 1203 (132d ed., Brian Hunter ed.).

131. Mullerat & Cortes, *supra* note 12, at 361.

132. Pemán Domecq, *supra* note 3, at 158-59; Mullerat & Cortes, *supra* note 12, at 361.

133. Pemán Domecq, *supra* note 3, at 158; Directive art. 15.1 (a) (option to include "primary agricultural products" and "game" within definition of "product"); *id.* art. 16.1 (option to cap global damages for identical products having same defect).

134. Pemán Domecq, *supra* note 3, at 159. *But see* Casals, *supra* note 12 (stating that food products were excluded from the "development risks" defense only in 1993). The National Institute on Consumption's report, also proposing the amendment of the GAC, would apparently have also used the latter to supplement the Directive's ten year period after which consumers' rights were extinguished. It also accepted the global cap, and the exclusion of capital goods from coverage.

Another draft was prepared in early 1991. It excluded primary agricultural products, game and fish from the definition of "product," as long as they had not undergone any processing. It would have required for a supplier to discharge himself of his provisional liability as "producer" under Article 3.3, he would have to inform the injured person of the identity of the producer or his own immediate supplier within one month of receiving a request therefor. The Directive had merely specified "within a reasonable time." The bill permitted the "development risks" defense, a cap on global damages of 10.5 billion pesetas, and allowed the injured person's own contributory negligence affect his recovery.¹³⁵

Finally, in 1993, there was another bill from the Ministry of Justice. It declared Articles 25 through 28 of the GAC inapplicable to damages covered by the Directive. It apparently accepted the exclusion of game, fish and primary agricultural products from the definition of covered products, the global cap of 10.5 billion pesetas, and set the threshold amount for recoverable property damage at 75,000 pesetas.¹³⁶ The 1993 Justice Ministry Bill appears to have served as the basis for the eventual 1994 Act.

B. Summary of Key Provisions of SPLA

The SPLA was promulgated on July 6, 1994 and published the next day in the Official State Bulletin.¹³⁷ The Preamble to the Act states that its purpose is the adaptation of Spanish law to the Directive which it describes as, the opinion of many commentators to the contrary notwithstanding, "aim[ing] to achieve a substantially homogeneous legal regime within Community boundaries," and refers to the "format" decision of opting to draft a new law to take the place of the GAC.¹³⁸ The details which the Preamble highlights are: (1) a regime of "strict but not absolute" liability and the limited defenses available to the manufacturer; (2) coverage of

There was some question about whether the Article 13 of the Directive, a savings clause for "rights [under] a special liability system existing at the moment when this Directive was notified," would technically permit the maintenance of the GAC. The specific situation the Commission had in mind was apparently Germany's Pharmaceuticals Law. But some argued that the GAC also qualified as such a "special liability system." See Rojo, *supra* note 4, at 1279-81.

135. Mullerat & Cortes, *supra* note 12, at 361-62. The authors do not make clear to what extent the "development risks" defense was to be permitted.

136. Pemán Domecq, *supra* note 3, at 159.

137. For the reference to the official publication, see *supra* note 18. An English translation of the SPLA appears in an Appendix *infra*. For a brief discussion in English, see Ramón Mullerat, *New Product Liability Law in Spain*, 22 INT'L BUS. LAW 418 (1994).

138. See *infra* Appendix. All other quoted language in this section is taken from the translation of the SPLA in the Appendix, unless the context indicates that it is taken from the Directive and/or a footnote further identifies the source.

physical injury and property damage over 65,000 pesetas; (3) designation of "those harmed by the defective product," or injured persons, as the protected class, whether or not they qualify as "consumers in the strict sense" (presumably that of the GAC); (4) the ten-year duration of the strict liability created, accompanied by the curious *apologia* that "it is a reasonable period of time if one takes into account the Bill's objective range of application, which is limited to movable goods and gas and electricity"; and (5) the exercise of the option to put a global cap on damages a manufacturer may have to pay for "personal" damages caused by identical articles having the same defect.

Strict Liability: Article 1 of the SPLA follows Article 1 of the Directive, making "manufacturers" and "importers" (Directive: "producers") liable for damages caused by the products they manufacture or import. Article 5 of the Act, tracking Article 4 of the Directive, states that the injured party who seeks to recover must prove "the defect, the damage and the causal relation between both." Adhering to the text of Article 2 of the Directive, SPLA Article 2 defines "product" as all moveables except primary agricultural products and game, plus gas and electricity. In other words, the option under Article 15.1 (a) to count primary agricultural products and game as "products" was not exercised. The addition of "gas" goes beyond the text of the Directive, but is arguably within its spirit.

Most of SPLA Article 3, "Statutory Definition of Defective Product," follows Article 5 of the Directive by defining a defective product as one "not offer[ing] the safety that might legitimately be expected" under the circumstances, and also by eliminating the argument that an item is defective because it subsequently appears in an improved version. However, accepting an amendment proposed by Izquierda Unida, the ex-Communist party in the Cortes, SPLA 3.2 departs from the text of the Directive by adopting verbatim a feature of the Italian Products Liability Decree, to the effect that "[i]n any event, a product is defective if it does not offer the safety normally offered by other examples in the same series." By side-stepping the possibly complicated task of having to show what degree of safety might "legitimately" be expected of a product, this provision facilitates plaintiff's proof.¹³⁹ Article 14 of the Act reproduces the substance of Article 12 of the Directive, to the effect exculpatory clauses and clauses limiting liability are "inoperative."

Protected Class: As highlighted in the Preamble, the protected class under the SPLA is identified by Article 6 as "the injured person." Following the option provided by Article 8.2 of the Directive, SPLA article

139. Casals, *supra* note 12 (criticizing SPLA Article 3.2 for impeding the Directive's aim of developing "a unified concept of defect").

9 permits the contributory negligence of the injured person, or of one for whom the latter is civilly liable, to reduce or eliminate the manufacturer's or importer's liability. Like the Directive's Article 8.1, the SPLA's Article 8 makes the intervention of a third party, other than the one mentioned in the previous sentence, although a joint cause of the damage together with the product defect, ineffective to reduce the manufacturer's or importer's liability to the injured person. The manufacturer or importer, may, however, subsequently seek a proportionate contribution from the third person after having satisfied his obligation to indemnify the injured person.

Liable Parties: As mentioned above, whereas Article 1 of the Directive makes "producers" liable for the damage done by their defective products, the Act's Article 1, still following the Directive's substance, breaks up that umbrella term into its basic components, "manufacturers" and "importers," probably for linguistic reasons. Counting as "manufacturers" are manufacturers of finished products, manufacturers of component parts and "own-branders," as well as producers of raw materials. For "producer," the Spanish text uses the same word, *fabricante*, that with the others is translated "manufacturer." The "importers" who are liable under the act are commercial importers into the EU.

Under Article 4.3 of the SPLA, a supplier of the product is provisionally deemed a manufacturer unless he informs the injured person within three months of the identity of the unknown manufacturer or importer, or of his own immediate supplier. The Directive has a "within a reasonable time" requirement. However, an "additional provision" of the Act, appearing towards the end, further provides that any supplier who supplies a product knowing of the existence of the defect is liable as though he were the manufacturer or producer. But if he is held so liable, he has a claim against the manufacturer or importer. There is no parallel to this provision in the text of the Directive.

Article 7 of the Act, following Article 5 of the Directive, provides for joint and several liability of more than one liable person under the Act.

Possible Defenses to Liability: Besides the injured person's own fault under SPLA Article 9, Article 6 of the Act, in keeping with Article 7 of the Directive, includes the two useful defenses of "development risks"—except as to "pharmaceutical products, foodstuffs or food products intended for human consumption" and the "sub-component" defense, where a component part is incorporated into a defectively designed product or the manufacturer or importer of the part has simply followed the product manufacturer's instructions. The exception to the "development risks" defense is a partial exercise of the option provided by Article 15.1 of the Directive, which allowed reinstatement of liability for "development risks" in implementing legislation once the member state followed a notification

procedure.¹⁴⁰ The Directive itself neither prohibits nor endorses such partial reinstatements of development risks liability.

With respect to the elimination of the “development risks” defense on “pharmaceutical products, foodstuffs, or food products,” Professor Casals stated:

The practical consequences of the new provision go much further than the German Pharmaceutical Act [of] 1976. Thus, in comparison to the German Act, there is no distinction between prescription and over-the-counter drugs; liability refers both to physical injury and to property damage, and the concept of drug established by Spanish law is much wider.¹⁴¹

The definition of “food” is found in the Spanish Food Code. The same Code defines the concept of “food product” (*producto alimentario*), which includes additives and other substances without any nutritional value used in food processes.¹⁴²

Scope of Allowable Damages: Paralleling article 9 of the Directive, SPLA Article 10.1 allows recovery of damages for death and bodily injury and for damages to noncapital, consumer goods—objectively so intended and subjectively, in the main, so used—over a threshold amount of 65,000 pesetas. Following the tenor of Article 13 of the Directive, Article 10.2 of the Act is a savings clause which preserves the right to be compensated for other damages and injuries, including pain and suffering, under the general civil law. Under the “third final provision” of the SPLA, this amount may be changed by the Government in accordance with periodic revisions by the Council of the European Union.

Article 12 of the SPLA sets a three-year statute of limitations on the bringing of an action, “from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him, provided the party liable for such injury is known.” Presumably the quoted language is meant to indicate, in a roundabout sort of way, what Article 10.1 of the Directive stated: “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.”¹⁴³ Article

140. None of the sources consulted indicated whether Spain followed the notification procedure outlined in Article 15.2 of the Directive with respect to this provision.

141. Casals, *supra* note 12.

142. *Id.*

143. 1985 O.J. (L 210) 31.

12 of the Act goes on to insert a one-year limitation period on actions by a liable party seeking contribution from another.

As instructed by Article 11 of the Directive, Article 13 of the SPLA extinguishes all rights of injured persons "ten years from the date the specific product causing the injury was placed into circulation."

The Act's Article 11 places a global cap of 10.5 billion pesetas on damages stemming from deaths or personal injuries caused by identical products showing the same defect. This exercises Article 16.1's option with respect to the capping of damages. Under the "third final provision" of the SPLA, this amount too may be changed by the Government in accordance with periodic revisions by the Council of the European Union.¹⁴⁴

Partial Repealer of GAC: The "first final provision" of the Act makes Articles 25 through 28 of the GAC inapplicable to civil liability for damages caused by "defective products" within the meaning of the Act. Further discussion and observations on the SPLA will be made in Part VI.

VI. THE SPLA COMPARED

A. *The SPLA and Post-Directive European Products Liability Law*

One explicitly stated rationale for the Directive was "because the existing divergences [in member states' laws] may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer."¹⁴⁵ The antidote administered by the Directive was a self-described "approximation" of member states' laws.¹⁴⁶ The very word chosen, "approximation," or "drawing closer," suggests that substantive 'equalization' of member states' laws, which perhaps alone could truly eliminate market distortions and differential protections, was not in sight, nor intended to be.

That having been said, two policy questions then surface: How close do member states' laws need to be brought in order to achieve significant diminution of market distortions; and should the desired degree of proximity ever properly be achieved at the cost of diminishing the protection

144. *Quaere* whether this language establishing the cap means that the damage to non-capital consumer property which accompanies a death or personal injury is uncapped. Furthermore, since neither the Act nor the Directive states that death or personal injury is a prerequisite to the recoverability of damages to noncapital consumer property, *quaere* whether consumer property damages occurring apart from death or personal injury are equally uncapped. One could argue that since the cap provisions only speak to "damage resulting from a death or personal injury," both kinds of property damage are uncapped. Whether this was intended, or is sensible policy, is another matter. The interpretive question is posed by the language of the Directive as well as of the implementing legislation.

145. Directive, *supra* note 11, pmb1. para. 5.

146. *Id.*

afforded to consumers by member states whose antecedent products liability regime had progressed further, from a consumer perspective, than the Directive's? The likely answers to these global questions would tend to point each in a different direction on the permissible contents of post-Directive national products liability laws. On the one hand, because of the concern with advancing consumer interests, evidenced by the text of the Directive and its pre-history,¹⁴⁷ the latter should certainly not be construed so as to leave some European consumers effectively worse off than before. On this interpretation, the Directive would be taken only as establishing a minimum, a guaranteed "floor" of protection, below which the national law of any member state might not fall.¹⁴⁸ Member states would be free to make their products liability laws more generous to consumers than the terms mandated by the Directive.¹⁴⁹ On the other hand, it might be argued that because undesirable market distortions will only be removed the closer to parity, member states' laws are brought, no more "divergences" should be tolerated other than those the Directive explicitly permits. Ideally, those divergences would eventually disappear. On this view, the Directive would be both minimum and maximum, floor and ceiling, for European consumer protection against defective products.¹⁵⁰

As a general matter, the precise quantum of legal approximation necessary for significant diminution of market distortions is probably not ascertainable *ex ante*. But even on the most restrictive reading of the Directive; *i.e.*, one that would yield the maximum possible "approximation" of national laws, it is quite clear that the post-Directive products liability regime in Europe has still had to tolerate a significant amount of divergence.¹⁵¹ The latter emanates from a variety of sources:

147. The Preamble to the Directive states that "insofar as [existing contract and tort provisions of national law] also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive." 1985 O.J. (L 210) 30. For the pre-history of the Directive, see *supra* text accompanying notes 90-101.

148. "The Directive only compels . . . a uniform minimum level of protection of the injured 'consumer' *vis-à-vis* that liable party who is a 'manufacturer.'" Gerhard Hohloch, *Produkthaftung in Europa*, 2 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 408, 430 (1994).

149. Cf. Pemán Domecq, *supra* note 3, at 157 (opining that post-directive Spanish law might continue to allow for recovery of damages to defective goods themselves or to capital goods).

150. See, e.g., Rojo, *supra* note 4, at 1273. "What is involved is not a Directive of minimums, expandable at the will of every State. In it is contained a special *closed* system of civil liability . . ." *Id.*

151. Hodges, *supra* note 122.

[T]he much vaunted 'level playing field' has not been created in relation to product liability. Indeed, the [national divergences] could be said to reveal a playing field which not only undulates but is peppered with unpleasant pitfalls for the unwary. Depending on the viewpoint which is adopted, this is to the disadvantage of manufacturers, importers, distributors, retailers and consumers.

Some problems arise from the fact that the Directive contains a number of optional provisions, which lead to divergencies between the national laws of the Member States. Other problems arise from the inherent nature of legislating by directive, particularly that its terms do not have direct effect but need to be implemented into national legislation, which therefore allows for divergencies of implementation, whether intentional or accidental. Other problems arise from matters which are explicitly not dealt with in the Directive, such as relevant aspects of national law, practice, the legal systems and funding of litigation in Member States.¹⁵²

The three options explicitly provided for¹⁵³ are: (1) whether to include "primary agricultural products"¹⁵⁴ within the definition of "product;" (2) whether to permit the so-called "development risks" defense;¹⁵⁵ and (3) whether to include a global cap of at least seventy million ECU's on damages payable by a producer "for death or personal injury . . . caused by identical items with the same defect."¹⁵⁶ Besides perpetuating a "differing degree of protection of the consumer" to one extent or another,¹⁵⁷ these

Id. "It can be said that, far from harmonising laws within the EU, the implementation of the Directive has added a further layer of liability in the national law." Casals, *supra* note 21. See also Struyven, *supra* note 120, at 151; Posch, *supra* note 119, at 113-14 ("The implementation of the EC-Directive does not in fact lead to standardization of law, but merely to a limited approximation that, due to highly relevant divergences in border-straddling products-liability cases, makes the private international law in this area not obsolete even among Common Market Member States."); Kröger, *supra* note 99, at 300 (Member States' options under the Directive "obviously do not favor harmonization"); cf. Hohloch, *supra* note 148, at 434-35 (opining that while what has been standardized predominates, Article 13 of the Directive "undoubtedly is also leading down the road to renewed diversification and separate development of [national] laws outside the core area [of standardization]").

152. Hodges, *supra* note 122.

153. Actually, there are four options. On the canonical three options, see generally Hohloch, *supra* note 148, at 426, 431-32; Hodges, *supra* note 122; von Marschall, *supra* note 101, at 708 & 712; Rojo, *supra* note 4, at 1273; Struyven, *supra* note 120, at 148-50; and Kröger, *supra* note 99, at 300-02.

154. Primary agricultural products are defined by the Directive as "the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing." Directive, *supra* note 11, art. 2. The Directive's default position is to exclude them from the definition of "product." *Id.* Article 15.1(a), however, allows Member States the option of including them within said definition.

155. See BRÜGGEMANN *supra* note 21, at 111-12.

156. Directive, *supra* note 11, art. 16.1.

157. See, e.g., Geddes, *supra* note 114, at 417 (noting the "still . . . very substantial differences in Member States' laws governing personal injury awards arising out of product liability claims [left by] the Directive").

options and other divergences may well pose a threat to the goal of eliminating market distortions.¹⁵⁸ This result was probably preordained, given the character of the Directive as a compromise agreement.¹⁵⁹

1. The Three Options

Primary agricultural products: As for "primary agricultural products," the SPLA does not choose to include them within its definition of "product."¹⁶⁰ Earlier drafts of the law had, however, included them,¹⁶¹ which would tend to indicate this was a subject of some controversy. Such an exclusion was prospectively criticized by one Spanish commentator, who noted "European agriculture has nowadays largely become rather more of an industrial process. The exclusion of primary agricultural products and game is inspired more by political than legal reasons rooted in the support and protection [given] to the agricultural sector, traditionally well protected by Member States."¹⁶²

In this respect, Spain is among the majority of member states, inasmuch as only three states, Luxembourg and two new member states, Finland and Sweden, have opted to include primary agricultural products, although a draft French law would apparently also include them.¹⁶³ Even so, one scholar has opined that the divergence of national laws on this point may in any event not be terribly significant, since processed foods are always subject to liability and any additional liability imposed by an expanded definition would not in practice extend to "spoilage [of fresh food products] *en route* to the consumer." This is presumably because such spoilage would not be a "defect" whose absence the consumer is reasonably entitled to expect but the liability would only relate to the "narrowly construed . . . growth phase" of such products.¹⁶⁴

158. See Hodges *supra* note 122. *But cf.* Bernstein, *supra* note 42, at 681-82 (wondering whether the legal changes implemented pursuant to the Directive will have any effect at all on decisions relating to the movement of goods, and if so, whether goods will be moved in a non-desired direction).

159. *Cf. supra* text accompanying notes 98-101; von Marschall, *supra* note 101, at 707 (describing the Directive as "a compromise which was achieved after long discussions and negotiations").

160. SPLA art. 2.1.

161. See *supra* text accompanying notes 133-34.

162. Díaz de Lezcano Sevillano, *supra* note 2, at 777; see also Rojo, *supra* note 4, at 1281 (recommending inclusion of primary agricultural products in definition of "product"). The European food-processing industry was also in favor of the expanded definition, in light of Article 5 of the Directive's provision regarding joint and several liability of two or more parties liable for the same damage. Kröger, *supra* note 99, at 302.

163. These statistics are tabulated in Hodges, *supra* note 122.

164. Hohloch, *supra* note 148, at 432.

Development Risks: Article 6.1 (e) of the SPLA makes a “development risks” defense generally available, but Article 6.3 later eliminates it with respect to “pharmaceutical products, foodstuffs or food products.” Such a limited acceptance of the defense was apparently an agreed feature of the Spanish legislation from a rather early stage.¹⁶⁵ But, by partly allowing and partly disallowing the “development risks” defense, Spain’s position is an anomaly among EU member states.¹⁶⁶ The great majority of the latter, and France in draft form, have opted to permit the defense; only Luxembourg and Finland have excluded it.¹⁶⁷

One commentator described the legal differences in member states’ products liability laws on development risks as “more significant” than the differences over primary agricultural products.¹⁶⁸ Recently, a Spanish scholar further opined that Spain’s difference from other EU member states would be especially pronounced in the area of pharmaceutical products.¹⁶⁹ By contrast, another writer indicated a belief that cases involving development risks would be “extremely rare,”¹⁷⁰ and this is seconded by a commentator who observed “[t]he Directive’s critics tend to overestimate the scope of development risk liability.”¹⁷¹ Under the terms of the Directive, a report was due to be filed by the Commission in 1995 on the development risks defense, with a view to its possible complete elimination from the Directive.¹⁷²

Global Cap on Damages: Article 11 of the SPLA institutes a cap of 10.5 billion pesetas on “overall civil liability for death and personal injuries caused by identical products showing the same defect.” Such a cap was a feature of the Ministry of Justice’s draft as early as 1988,¹⁷³ and the idea of a

165. See *supra* text accompanying notes 133-35. The elimination of the defense doubtlessly owes something to the “Toxic Oil Syndrome.”

166. “To date, it seems that Spain has been the only country to answer [the development risks question] with a peculiar ‘No, but’” Casals, *supra* note 12.

167. Hodges, *supra* note 122; Hohloch, *supra* note 148, at 432. Hohloch wrongly reports that the Swedish law has imposed development risk liability on manufacturers.

168. Hohloch, *supra* note 148, at 432.

169. See *supra* text accompanying note 141.

170. von Marschall, *supra* note 101, at 712.

171. Kathleen M. Nilles, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT’L L. 729, 761 (1985); see also von Marschall, *supra* note 101 at 764.

172. Directive, *supra* note 11, art. 15.3.

173. See *supra* text accompanying note 133. It was apparently not a feature of the Ministry of Health and Consumption’s bill of the same year, which, however, would presumably have retained the GAC’s ambiguously applied 500-million cap. See *supra* text accompanying notes 89, 134.

cap was explicitly endorsed by at least one Spanish expert in the area.¹⁷⁴ Here again, Spain is in the minority. Only three other member states, Germany, Greece, and Portugal, have also exercised this option, while the other eleven states, including France in draft, have not added such a provision. What these numbers may reflect is a general tradition of uncapped liability in European law¹⁷⁵ and the surprisingly weak support of European industry for the idea of a cap.¹⁷⁶ Under the terms of the Directive, the effects of the cap on consumer protection were likewise due for decennial review in 1995.¹⁷⁷

Effect of Injured Party's Fault: Apart from the three widely discussed options indicated above, the Directive expressly provides for an additional option. Article 8.2 permits, but does not require, member states' national laws to reduce or disallow a producer's liability when "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." SPLA Article 9 exercises this option.

2. Nonuniform Implementation

Definition of "Product": While having chosen to exclude "primary agricultural products" from coverage, the SPLA went on to state that "gas and electricity are [also] considered products."¹⁷⁸ The Directive, however, had only specified that "[p]roduct' includes electricity."¹⁷⁹ This addendum may be a reflection of the still rather widespread use of gas canisters, called *bombonas*, to provide, for example, hot water in many Spanish households,

174. Rojo, *supra* note 4, at 1281.

175. Kröger, *supra* note 99, at 301; cf. Díaz, *supra* note 2, at 785 (noting "different traditions among the member states").

176. Cited as reasons for this are the fact that "the proposed ceiling was so high that businesses scarcely saw any advantages it might hold for them" and the fear some businesses in fact felt that they might be "driven to insure themselves up to the ceiling even though their risks were in fact less significant." Kröger, *supra* note 99, at 301-02. The basic theory behind the Directive's cap has also been criticized on policy grounds: The choice of any figure as a financial cap is, of course, entirely arbitrary.

The financial ceiling might be more justifiable if it were related mathematically to factors such as the number of a given type of products in circulation in a country and the size of the population of individual states. There is little justifiable correlation here between the widely fluctuating population sizes of different states.

Hodges, *supra* note 122.

177. Directive, *supra* note 11, art. 16.2.

178. SPLA art. 2.2.

179. Directive, *supra* note 11, art. 2.

as well as the fact that a number of leading decisions by the Tribunal Supremo on products liability had involved gas explosions.¹⁸⁰

Definition of 'Defect': The Directive's basic definition of a defective product is "not provid[ing] the safety which a person is entitled to expect."¹⁸¹ However, the SPLA superimposes another, more objective test: "In any event, a product is defective if it does not offer the safety normally offered by other examples in the same [product] series."¹⁸² As indicated previously, this more objective test was apparently added to facilitate plaintiff's ability to meet the burden of proof, inasmuch as the Directive's general test of defectiveness is a rather more open-ended and, hence, less predictable inquiry.¹⁸³

Suppliers' Liability: Where a producer or importer could not be identified, the Directive made any supplier of the product provisionally liable just as though he were a producer, unless he informed the injured person "within a reasonable time" of the identity of the actual producer, importer, or of his own supplier.¹⁸⁴ The SPLA, instead, chooses to draw a bright line and specifies that the supplier has three months to provide such information.¹⁸⁵ In an earlier draft of the Spanish law, the period had been set at one month.¹⁸⁶ There is wide divergence here among the national laws of member states.¹⁸⁷

In another nonuniform provision, the SPLA additionally provides for the nonprovisional liability of suppliers who "suppl[y] [a] product knowing of the existence of the defect."¹⁸⁸ For all that, such scienter liability may be good policy, it has no basis in the text of the Directive.

180. See, e.g., Casals, *supra* note 12.

181. Directive, *supra* note 11, art. 6.

182. SPLA art. 3.2. The test was copied from the Italian Products Liability Decree.

183. See *supra* text preceding note 139.

184. Directive, *supra* note 11, art. 3.3.

185. SPLA art. 4.3.

186. See *supra* text preceding note 135.

187. By way of comparison, the Italian and Portuguese product liability laws also set a three month period and the German law sets a one month period, whereas the Greek, Danish, English and Austrian legislation followed the more open-ended "reasonable time" approach. By way of non-binding interpretive aid, the Austrian government's commentary on the relevant section of its law stated that normally a one to two week period is sufficient. Posch, *supra* note 119, at 97-98. Posch also notes an opinion to the effect that such more precise definitions of the available time period as that contained in the Spanish act contravene the Directive, going on to observe: "Here, precisely, is it particularly clearly shown how far from complete is the approximation of laws within the Common Market that the Directive aimed for." *Id.* at 96-97.

188. SPLA "Additional provision (one only). Supplier's liability."

3. Subsistence of Background Law

Directive References to National Law: The Directive explicitly states that national law continues to govern in the following five areas:

- (1) contribution or recourse rights among two or more jointly and severally liable persons;¹⁸⁹
- (2) contribution or recourse rights between a liable producer and a contributorily negligent intervening third-party;¹⁹⁰
- (3) recovery for nonmaterial damage such as pain and suffering;¹⁹¹
- (4) tolling of the statute of limitations;¹⁹²
- (5) rights under rules of contract or tort [noncontractual] liability and rights under any pre-existing "special liability systems"¹⁹³

Contribution and Recourse Rights: Article 7 of the SPLA establishes joint and several liability for those persons, manufacturers, importers, or suppliers, the Act makes liable for the same injury. Article 8 further provides that a person found liable under the SPLA who has satisfied the obligation to pay compensation to the injured party may then bring a claim against a negligent third party for "the portion corresponding to his intervention in causing the injury."¹⁹⁴ In principle, it seems likely that such rights would not vary widely from one member state to another.

Nonmaterial Damages: In light of the SPLA's repeal of Articles 25 through 28 of the GAC as to damages caused by defective products, the background Spanish law on compensation for nonmaterial damages, such as pain and suffering, will hence revert to the Civil Code's contract and tort provisions discussed earlier. Both of them, as interpreted by the courts, generally permitted recovery for nonmaterial damages.¹⁹⁵ But a reversion to the Civil Code to recover such damages will obviously entail the reinstatement of some sort of fault analysis in Spanish products liability

189. Directive, *supra* note 11, art. 5.

190. *Id.* art. 8.1.

191. *Id.* art. 9.

192. *Id.* art. 10.2.

193. *Id.* art. 13; *see also supra* note 134.

194. Additional provisions regarding joint and several liability and contribution rights can be found in Civil Code Articles 1137-48, 1195-1202.

195. *See supra* text accompanying notes 39 & 60.

litigation.¹⁹⁶ Such divergences as may exist on a theoretical level among the various member states in their treatment of nonmaterial damages were assessed by one commentator as often being merely apparent differences which, to his mind, really had no discernible distorting effect on competition.¹⁹⁷

Tolling of the Three-Year Limitations Period: The Directive dictates a three year limitations period for the bringing of an action, which begins 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."¹⁹⁸ In an awkwardly worded provision,¹⁹⁹ Article 12.1 of the SPLA provides that an action must be brought "within three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him, provided the party liable for such injury is known." It goes on to provide "[t]he tolling of the limitation period is governed by provisions of the Civil Code."²⁰⁰

From the rather opaque language used, it is hardly crystalline that the second part of the disjunctive phrase "three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him" is meant to cover subsequently discovered injuries. Presumably, the SPLA intends to cover such situations; for it not to do so would be extraordinarily regressive.²⁰¹ However, in the unlikely event that Article 12.1 of the SPLA is found not to extend to such subsequently discovered injuries, however, it is clear that the referenced civil law provisions tolling the statute of limitations would not be adequate to bring them within the Act, whatever other lacunae they could be used to fill.²⁰²

196. See *supra* text accompanying notes 34, 56-59.

197. See Hohloch, *supra* note 148, at 437-39.

198. Directive, *supra* note 11, art. 10.1.

199. See *supra* text accompanying note 142.

200. Directive, *supra* note 11, art. 12.2.

201. Cf. C.Civ. art. 1968.2. The general statute of limitations for fault or negligence under Civil Code article 1902 states that the same have to be brought within one year "from [the time] the aggrieved party discovered it."

202. The general provisions on tolling are found in the Civil Code Articles 1973-1975. They do not deal with the problem of after-discovered injury. Where American legal theory uses the one umbrella term "tolling," Spanish legal theory distinguishes between the "suspension" of a Statute of Limitations, which prevents its ever starting to run in the first place, and its "interruption" once it has started running. Hence, it is the text of SPLA Article 12.1 itself which needs to contain rules regarding the "suspension" of the three-year statute, since Article 12.2's reference to civil law only relates to its "interruption." For a general discussion of tolling of the statute of limitations in the context of the Civil Code Articles 1902, see SANTOS BRIZ, *supra* note 23, at 1045-68.

Savings of Contract and Tort Rights: In addition to the just mentioned possibility of contract or tort rights to recover nonmaterial damages, the following eight types of damages have also been identified as falling outside the scope of national legislation implementing the EEC's Products Liability Directive:

1. Damage caused by products which were put into circulation before the implementing date of the legislation and which remain in circulation.
2. Damage [from development risks]. . . .
3. Damage to the defective product itself.
4. Damage to commercial property.
5. Damage to personal property not in excess of 500 ECU.
6. Damage for which proceedings are not commenced within three years from the plaintiff's date of actual or constructive knowledge of the damage, the defect and the identity of the producer.
7. Damage caused by a product which has been in circulation for more than ten years.
8. Pure economic loss not caused by death or personal injuries.²⁰³

As for defective products already in circulation when the new law went into effect, the SPLA's single "transitional provision" provides that the Act is inapplicable. Liability for such products latter "shall be governed by the provisions in effect at said time." For such situations, then, the GAC or the Civil Code will continue to provide the governing law.

With respect to the other items on the list, Article 15 of the SPLA provides that actions brought thereunder "have no effect on other rights the injured person may have as a result of the contractual or noncontractual [tort] liability of the manufacturer, importer or of any other person." As a result, it would appear that most, if not all,²⁰⁴ of the listed damages may

203. Hodges, *supra* note 122. Hodges opines that manufacturers' continuing uncertainty about non-Directive based liability for development risks is particularly regrettable.

204. Liability for development risks was excluded under both the contract/obligations and tort regimes. See *supra* text accompanying notes 42 & 61. However, there was a minimal development-risk liability under the Sales theory. See *supra* text accompanying note 38. Damages not sought within three years from the plaintiff's date of actual or constructive knowledge of the damage, the defect and the identity of the producer would continue to be available only under a

continue to be sought under the Civil Code's contract and tort provisions. Of course, those damages may not be sought under the GAC since the SPLA repealed its products liability provisions.²⁰⁵ Once again, as with nonmaterial damages, this means that these damages are still recoverable, though only upon proof, or unrebutted presumption, of the defendant's fault. Hence, one Spanish scholar has indicated that he regards the continued vitality of the civil code regime as assured: "[I]n practice it is likely that future claims under the SPLA will be made with causes of action which would previously have been used, pleaded in the alternative."²⁰⁶

Most of the member states, except France, have effectively preserved contract and tort rights.²⁰⁷ From a theoretical perspective, the Directive's permitted savings of such rights should not result in a wide degree of divergence among member states because most had previously followed some sort of mixed contract-tort approach to products liability questions in the time preceding the Directive.²⁰⁸ As a result, one scholar calls the practical consequences of such differences "small" and "tolerable."²⁰⁹

Other Features of the Legal System: Far from inconsequential, at least as it relates to the "bottom line" of compensation, are differential practices of national court systems in measuring damages. Spanish courts have at times been cited for the conservatism of their products liability awards, as compared with other EU member states.²¹⁰ On the other hand, Spain was identified by one commentator as belonging to a group of countries making legal aid available, "particularly where there is no assessment of the merits of a claim."²¹¹ The high level of availability of legal aid is a factor which may make it easier in Spain to bring products liability lawsuits.²¹²

contract/obligations theory, which has a 15-year statute of limitations, but not under a tort or a sales theory, which have limitations of one year and six months, respectively. See *supra* text accompanying notes 38, 49-50, 64.

205. See *supra* text following note 144.

206. Casals, *supra* note 12.

207. Hohloch's attempted differentiation of Great Britain and Italy in this respect seems open to question. See Hohloch, *supra* note 148, at 428, 429 n.93. Both the British and Italian laws have explicit savings clauses. See Consumer Protection Act [United Kingdom], § 2(6) (1987) and *Decreto del Presidente Della Repubblica n. 224 del 24/05/88, Supplemento Ordinario Alla Gazzetta Ufficiale n. 56 del 23/06/88* [Italian Products Liability Decree 1987], § 15.1.

208. See, e.g., *supra* note 30; Hohloch, *supra* note 148, at 413.

209. Hohloch, *supra* note 148, at 429, 430.

210. See Geddes, *supra* note 114 (contrasting Spain and Ireland).

211. Hodges, *supra* note 122.

212. Another theoretically "anti-consumer" feature of the Spanish legal system, one which it shares with other Civil Law countries, is a lack of easy access to extensive documentation on discovery. See SCHLESINGER ET AL., *supra* note 23, at 426-28. "Ease of access to extensive

B. *The SPLA and the GAC*

Prior to the passage of the SPLA, many Spanish commentators agreed that a comparison of the GAC with the legal regime set up by the Directive would show consumer interests better protected by one over the other. Hence, they saw a simple replacement of the GAC with the Directive as a simultaneous improvement and worsening of consumer protection in Spain.²¹³ But if this was so, why not, when implementing the Directive, adhere to the policy stated in the Directive's Preamble²¹⁴ and maintain the GAC "to the extent it implies a plus in protection?"²¹⁵

While the Spanish government was considering how best to implement the Directive, one option some were arguing for was in fact the maintenance in force of an amended GAC.²¹⁶ This option, however, was ultimately rejected, and it is not hard to find compelling reasons to have rejected it. Quite apart from the savage criticism of the GAC's draftsmanship and its very intelligibility,²¹⁷ there may have been a feeling that the lavishly pro-consumer regime instituted by Article 28 was beyond what was tolerable at that stage of development of Spanish society,²¹⁸ having been perhaps something of an overreaction to the Toxic Oil Syndrome. Hence, one commentator argued, any attempt to have the best of both worlds, *i.e.*, to keep the most attractive, pro-consumer, features of both, would lead to a relative weakening of Spanish industry *vis-à-vis* its European competitors.²¹⁹ Ultimately, the SPLA did in fact repeal Articles 25 through 28 of the GAC as they related to "civil liability for damages caused by defective products [as defined by the SPLA]."

documentation on discovery" is cited by Hodges as one of a number of features which are generally regarded as "major risk factors" in product liability from a defendant's perspective. Hodges, *supra* note 122 (singling out Denmark, Ireland and the United Kingdom (less Scotland) as presenting this risk factor). On the other hand, under the SPLA parsimonious discovery is less likely to prove a problem to injured Spanish consumers, inasmuch as the question of fault, whose access to such documents would be most relevant, should not surface except at the margins.

213. Pemán Domecq, *supra* note 3, at 155; Mullerat & Cortes, *supra* note 13, at 363; Rojo, *supra* note 4, at 1282.

214. See Directive, *supra* note 11, pmbi., para. 13.

215. Rojo, *supra* note 4, at 1280.

216. See *supra* text accompanying note 134; Díaz de Lezcano Sevillano, *supra* note 2, at 773 n.95 (citing opinion of Sequiera that GAC already provided and exceeded the level of protection required by the Directive); cf. Rojo, *supra* note 4, at 1279-80 (arguing that the substance of GAC Article 28 could be maintained under Article 13 of the Directive).

217. See *supra* text accompanying notes 74 & 89.

218. Rojo, *supra* note 4, at 1260-61, 1272.

219. *Id.* at 1282.

One Spanish commentator has recently described his own and a portion of the public's response to the SPLA as follows:

I thought the implementation of the EC Directive on Products Liability would be an important step towards more effective protection for consumers in Spain without burdening manufacturers with unreasonable costs. Today I doubt it. The editorial of last October's [1994] issue of *Dinero y Derechos* (Money and Rights), a magazine published by a Spanish consumer organisation, states that the new Spanish Products Liability Act (SPLA) "will end by creating more problems instead of offering solutions to the victim"; it adds that judges were already showing the right path to adapt Spanish law to the EC Directive, and questions whether this new Act will mean a backward step or not.²²⁰

What accounts for the pessimistic tone of these reactions? Underlying it must be a perception that the overall net position of Spanish consumers who are products liability plaintiffs is worse under the SPLA than it had been under the GAC. Is such a conclusion warranted by a comparison of the key features of the two Acts?²²¹

1. Improvements in the Consumer's Position Under the SPLA

Under the GAC, it was only "*destinatarios finales*," end-recipients or end-users, who were defined as "consumers." Only "consumers," so defined, could benefit from the virtually absolute liability of the GAC Article 28 "special" regime. All others were relegated to the Civil Code's fault-based liability system with causes of action sounding either in contract or tort.²²² Given the SPLA's preservation of contract and tort rights, those products liability plaintiffs whom the GAC had effectively confined to the Code theories of liability are clearly not harmed by the passage of the SPLA. They can now, in essence, choose between Civil Code and SPLA-based causes of action or, as Professor Casals predicted, argue them in the

220. Casals, *supra* note 12.

221. For the sake of discussion, the following analysis adopts an avowedly partisan, purely "pro-consumer" perspective as opposed to the more self-consciously "balanced" perspective of one interested in the overall equilibrium and well-being of Spanish society. It assumes, then, that increases in consumer rights and protections are social goods, without more, and vice versa. This is done, however, solely to throw certain aspects of the SPLA into high relief. It is in no sense an attempt to obviate a society's need to weigh consumers interests against others, to the possible detriment of the former.

222. See *supra* text accompanying notes 87-89.

alternative.²²³ As a class, then, they can only be benefited from the SPLA. It is only those plaintiffs who would previously have been eligible to sue under the GAC, “consumers” narrowly defined, who may now be adversely affected by its repeal. Alternatively, such plaintiffs may have been benefited by the SPLA, to the extent that the latter’s provisions are more advantageous than the ones they replace.

Protected Class Broadened: There is one obvious feature of the SPLA which may represent an improvement over the GAC for consumers. This relates to the scope of the protected class under each. Whereas under the GAC it was only “consumers” who could benefit from the virtually absolute liability of the GAC Article 28 “special” regime, the SPLA by contrast defines the protected class much more broadly as “injured persons.”²²⁴ Consequently, the no-fault protection afforded by the latter Act extends well beyond the confines of the GAC’s “consumers.” All prospective products liability plaintiffs who would previously have been slotted into the category of nonconsumers have now been benefited by their admission to the SPLA’s no-fault liability regime. Thus, to the extent that the Civil Code regime continued to prove problematic even after judicial establishment of a rebuttable presumption of defendants’ fault,²²⁵ plaintiffs who are ineligible for “consumer” status under the GAC are clearly better off under the SPLA regime which largely dispenses with the fault inquiry. By the same token, to the extent that the GAC’s absolute liability provided an even higher degree of protection to certain consumers than the SPLA’s strict liability, those plaintiffs who could previously have sued under the GAC have clearly been harmed by being deprived of the latter. As a matter of policy, the legal treatment of end-using and non-end-using products liability plaintiffs no doubt ought to have been largely equalized. Whether that equalization ought to have come about by lowering the protection of the one and then raising the protection of the other to the same new level is another matter.

On a statistical level, if the subset of product liability plaintiffs who are not end-users is larger than the subset of plaintiffs who are, more people would be benefited by the improved position of the former than would be harmed by the worsened position of the latter. Hence, if this assumption is correct, one might well say that, in this respect, there is a net improvement in the position of Spanish consumers. On the other hand, if this statistical assumption is incorrect, and end-users in fact preponderate among products liability plaintiffs, then a greater number of Spanish consumers will have

223. See *supra* text accompanying note 206.

224. See *supra* text following note 139.

225. See *supra* text accompanying notes 63-66.

been harmed by the relative contraction of their legal rights as compared to the *status quo ante* under the GAC.

Without statistical data, of course, it is impossible to give anything more than impressions about which of these assumptions is correct. To the author, however, it appears intuitive, though no more than intuitive, that "end-users" would constitute the great majority of products liability plaintiffs. If so, then this aspect of the repeal of the GAC is obviously a setback to the interests of more consumers than not. Nonetheless, it indubitably provides a clear-cut benefit to some consumers, even if they turn out to be numerically in the minority.

To this clear-cut benefit for those consumers previously disadvantaged under the GAC, we may now perhaps add two rather speculative benefits of the SPLA to the other consumers, those who would have been entitled to sue under the 1984 Act. The first benefit relates to the statute of limitations; the second to the cap on damages. These benefits must perforce be viewed as speculative, owing to the lack of clarity in the GAC itself.

Statute of Limitations Lengthened: Article 12 of the SPLA provides for a three-year statute of limitations. Characteristic of its inartful drafting, the GAC was silent on the limitations period. If the latter's limitation period was in fact one year as some commentators argued,²²⁶ then those who would previously have been "consumer" plaintiffs under the GAC as well as those non-end users suing in tort,²²⁷ were clearly benefited by the SPLA'S increase of the limitations period to three years; even non-end-users suing in contract probably benefited thereby.²²⁸ On the other hand, if the GAC's limitations period was in fact fifteen years, as one commentator claimed,²²⁹ then those who previously would have been consumer plaintiffs under the GAC were obviously harmed by the SPLA's reduction of the time period for bringing an action. However, since the weight of opinion, however, appears to be with the one-year interpretation, one can venture a qualified judgment in this

226. See *supra* text accompanying note 89.

227. See *supra* text accompanying notes 50, 64.

228. Plaintiffs under a contract/obligations theory, which had a fifteen-year limitations period, would not necessarily lose out if SPLA Article 15, which saves contract rights, is read as giving a product-liability plaintiff the option of suing either under the SPLA or under the contract provisions of the Civil Code (assuming he meets the factual predicates for the latter status). See *supra* text accompanying note 49. Of course, if he chooses the latter route, that would come only at the cost of re-instating a fault analysis. Should this prove too high a price to pay, the SPLA's apparent option to sue in contract might well only rarely be exercised. In that case, those plaintiffs having the theoretical option to sue in contract might be viewed as having had a trade off made for them: a shorter limitations period in exchange for a lack of need to prove defendant's fault. In the calculus of net benefit or loss, those plaintiffs would probably still be better off under the SPLA.

229. See *supra* text accompanying note 89 (opinion of Pemán Domecq).

respect the SPLA's three-year period represents an advance in consumer protection.

Higher Cap on Damages: Article 11 of the SPLA, exercising the option provided under Article 16 of the Directive, implemented an overall cap of 10.5 billion pesetas on liability "for death and personal injuries caused by identical products showing the same defect." The GAC, for its part, had a cap of 500 million pesetas on liability arising under Article 28's special regime, with no indication of how it was to be applied.²³⁰ There are at least four different ways the GAC's cap has been interpreted.²³¹ If the GAC's cap was (a) the same kind of cap as the SPLA's, i.e., a cap on all claims arising from the same defect in the same product series; or (b) a cap on all claims stemming from the same product series, albeit from more than one defect; or (c) a cap on all no-fault damages payable by a given defendant, then the SPLA's raising of the cap amount and/or making it a per defect cap, is a major legal improvement. If, on the other hand, the GAC's 500 million pesetas is simply a per person cap—which seems to be the best-reasoned interpretation—then the SPLA's 10.5 billion peseta cap is, at least on a theoretical level, a drawback for consumers. Once all claims totaled 10.5 billion pesetas, the SPLA's cap would be reached and no-fault liability would be extinguished, whereas under the GAC there could have been an infinite series of claims each totaling less than 500 million pesetas. Where this difference could conceivably rise above the merely theoretical, of course, would be in the area of mass torts.

2. Setbacks for Consumers Under the SPLA

Need to Prove Existence of Defect: Article 5 of the SPLA requires that the injured person prove "the defect, the damage and the causal relation between both." The defect that must be proven, according to Article 4, is a failure to provide either "the safety which might legitimately be expected" or "the safety normally offered by other examples in the same [product] series." Article 28 of the GAC, by contrast, only required consumers to prove "correct use [or] consumption of goods" and the damages it caused, a formulation which totally dispensed with proof of product defect, as well as defendant's fault.²³² That the need to prove defectiveness was felt to be a setback for consumers is probably indicated by the Cortes' adding to the

230. See *supra* text accompanying note 89.

231. See *supra* text accompanying note 89.

232. See *supra* text accompanying note 82. Pemán Domecq, however, notes that the product's defectiveness is clearly implied by the fact that its correct use or consumption caused injury. Pemán Domecq, *supra* note 3, at 144.

Directive's definition of defectiveness a second, nonuniform way to prove it.²³³

Noninclusion of Agricultural Products: Article 2.1 of the SPLA excludes from its definition of a "product," which could potentially give rise to no-fault liability, "primary agricultural and livestock materials, and products of hunting and fishing which have not undergone an initial transformation."²³⁴ Under the prevailing interpretation of the GAC, by contrast, such products would most likely have been covered under the special regime of article 28.²³⁵

Less Generous Calculation of Damages: SPLA Article 10.1 excludes liability for damage caused to the defective product itself and to the plaintiff's nonconsumer capital goods.²³⁶ That same article also allows compensation for damage "consumer property" only to the extent it exceeds 65,000 pesetas. Under the GAC, virtually all types of damage were covered,²³⁷ including those excluded by the SPLA.

"Development Risks" Liability: With the exception of "pharmaceutical products, foodstuffs or food products intended for human consumption," Article 6 of the SPLA excludes liability for development risks. Article 28 of the GAC, however, was generally interpreted as creating liability for such risks.²³⁸

Contraction in Suppliers' Liability: Along with manufacturers and importers, the SPLA also provides for provisional liability of suppliers pending their timely identification of the manufacturer, importer or own supplier, and nonprovisional liability of suppliers who supply a defective product with scienter.²³⁹ Article 28 of the GAC, though it contained no list of liable parties, was interpreted to include as liable parties the manufacturer, importer, seller, or supplier of a product to a consumer.²⁴⁰ The portion of

233. See *supra* text accompanying notes 182-83.

234. See *supra* text accompanying notes 160, 2.

235. See *supra* text accompanying note 83. There is perhaps an argument to be made here to the effect that, since the SPLA technically only repealed Articles 25 to 28 of the GAC as they related to "civil liability for damages caused by defective products within the meaning of article 2 [of this Act]" (emphasis added), the GAC remains in force with respect to "products" not included in Article 2. Whether the argument would succeed, in the face of clear legislative intent to exclude primary agricultural products and the like, seems unlikely, but it is at least a possibility.

236. For the sense in which the term "capital goods" is used, see *supra* text preceding note 115. Damages to the defective product itself and to non-consumer property may, of course, still be sought under the appropriate Civil Code provisions. See *supra* text accompanying notes 202-05.

237. Pemán Domecq, *supra* note 3, at 148; Rojo, *supra* note 4, at 1276.

238. See *supra* text accompanying note 86.

239. See *infra* Appendix arts. 1, 4, "additional provision."

240. See *supra* text accompanying note 85.

the GAC's liability system which the SPLA thus eliminated, is a supplier's liability for unknown defects.

Statute of Repose: Article 13 of the SPLA provides that an injured person's rights are in any event extinguished ten years from the date the injury-causing product was put into circulation. There is no comparable provision under the GAC:

3. Partial Continuance of the GAC

The SPLA does not include liability for defective services.²⁴¹ Article 28 of the GAC, by contrast, explicitly included "services" within the scope of the special system it set up. But inasmuch as the SPLA only repealed Articles 25 to 28 of the GAC as they related to "liability for damages caused by defective products," that portion of the GAC regime relating to liability for services still continues in legal effect.²⁴²

4. Summary

Viewed at the micro level, the only relatively clear benefit to the seeming majority of Spanish products liability plaintiffs from the SPLA is an extended statute of limitations, though even that benefit is not free from doubt. In every other respect the new Act represents a contraction of protection for that group. On the other hand, another group of plaintiffs is clearly benefited by the newly conferred ability to invoke a theory of strict liability in seeking to recover for product injuries. While it is technically true, as many commentators predicted, the GAC is better in some areas and the SPLA in others, the GAC, for all its defects in craftsmanship, is the superior text from a consumer's perspective.

At the macro level, how important are these consumer setbacks in the governing statutory text? If the paternalistic Spanish welfare system continues to provide a safety net at the level it long has, most cases of product injury will probably go on never becoming "products liability cases" in the first place.²⁴³ Those that, even despite this safety net, might otherwise proceed to litigation, will mostly continue to be deterred by the persistent structural features of the Spanish legal system identified by Professor Casals.²⁴⁴ Presumably, it will still be only the most extreme situations that

241. In 1991, the European Commission proposed a directive which would have imposed Community-wide standards for the liability of service providers. 1991 O.J. (C 12) 8. This proposal was subsequently withdrawn. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 1132 (1993), 225 (Supp. 1995).

242. Such an outcome was prospectively criticized by Rojo, more for its inelegance than anything else. Rojo, *supra* note 4, at 1278.

243. See *supra* text accompanying note 24.

244. See *supra* text accompanying note 24.

come before the Spanish civil courts. On the other hand, if the safety net is removed or its benefits significantly altered, which does not seem impossible,²⁴⁵ the lowering of protection represented by the SPLA may acquire somewhat greater practical significance in a universe in which more Spanish product victims become forced to seek effective compensation for their injuries through the civil law.

C. Spanish and United States Products Liability: Some Comparisons

Perhaps one reason for the Directive's rejection of the term "strict liability" is its unsavory association with the products liability regime of the United States, the experiences of European manufacturers with which had frequently been met with "incredulous astonishment" or "ascribed to the realm of fable."²⁴⁶ But now, in fact, the observation might be made that, with the implementation of the Products Liability Directive, the products liability laws of the member states have been brought into closer alignment with the law generally prevailing in the United States, in which strict products liability has been a key feature since the early 1960s.²⁴⁷ Spain, of course, has had a strong variant of strict products liability, in some aspects no doubt stronger than that in the United States, on the statute books since 1984. Although the SPLA weakens Spain's earlier form of strict liability, the new act is still an embodiment of that theory, and thus Spain's law in this area may still be said to be close to that in the United States, certainly closer than it would be if its only products liability laws were those of its Civil Code.

Such an observation, however, would obviously be open to the charge of formalism, a comparison of two varieties of "law in books," when what is really much more at issue is a comparison of "laws in action."

Comparison of laws should never be limited to juxtaposing legal norms or institutions viewed in isolation. Rather, it must display whatever rules are to be compared in their social context. Only the depiction of the socio-cultural background of a legal norm enables us to get an insight

245. See *supra* text accompanying note 100.

246. Peter Borer, *Bringt uns die EG-Richtlinie "amerikanische Verhältnisse"?*, in US AND EEC PRODUCT LIABILITY: ISSUES AND TRENDS 105, 124-25 (Roger Zäch ed., 1988) [hereinafter ZÄCH COLLECTION]. Borer, writing about Germany, notes that, when the Directive project first began to be discussed, there was a fear that the United States doctrine of strict liability would necessarily entail the American experience with that liability. *Id.* at 125.

247. *Id.* at 124.

into a country's or a culture's multilayered process of making and applying laws.²⁴⁸

As discussed above, one Spanish scholar has identified the unchanged features of the Spanish legal landscape that he believes will prevent Spain's experience with strict liability from ever comparing to that in the United States.²⁴⁹ Similarly, a German writer identifies the following features of the United States legal and social system as primarily responsible for the peculiarly American experience with the doctrine of strict products liability: much lower levels of social insurance and welfare schemes; the attorney system, particularly with respect to compensation by contingent fees; extensive pre-trial discovery; jury trials; lack of rules for shifting attorneys' fees; and punitive damages.²⁵⁰ He also notes the research done by another German writer, predicting that the effect of introducing American-style strict liability through the Directive would only be to increase risks, presumably of manufacturers, by ten to twenty percent.²⁵¹

Hence, it may well be that Spanish products liability law may never really be like American products liability law in any but the narrow sense of "formal rules." That having been said, however, one might still venture a number of comparisons between the two systems at that admittedly formal level. These comparisons shall assume that § 402A of the Restatement (Second) of Torts, "a veritable Everest among a few other relatively tall peaks and hundreds of foothills,"²⁵² is generally representative of United States law in this area:

Special Liability of Seller of Product for Physical Harm to User or Consumer

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product, and

248. *Id.* at 125.

249. *See supra* text accompanying note 24.

250. ZÄCH COLLECTION, *supra* note 246, at 129-46.

251. *Id.* at 146-47.

252. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 636 (1995).

- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.²⁵³

To this statement of the rule itself must be added the accompanying caveat:

The [American Law] Institute expresses no opinion as to whether the rules stated in this Section may not apply

- (1) to harm to persons other than users or consumers;
- (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
- (3) to the seller of a component part of a product to be assembled.²⁵⁴

Strict Liability: The first obvious point of comparison is the plain exclusion of fault from the Restatement's inquiry, inasmuch as § 402A(2)(a) makes the seller's due care no defense to liability. All the plaintiff need show is a defective product in an unreasonably dangerous condition²⁵⁵ and the physical harm, to the consumer/user or his property, thereby caused. This is very much on a par with the SPLA's Article 5: "The injured person attempting to obtain redress for the damages will need to prove the defect, the damage and the causal relation between both."

Another feature of U.S. law, both as represented by the Second Restatement as well as by the most recent draft of the Restatement (Third) of Torts, is to omit any explicit consideration of product presentation and marketing in the context of determining whether a product is defective, an

253. RESTATEMENT (SECOND) OF TORTS § 402A (1977). This provision was first approved for inclusion in the Restatement in 1965. MICHAEL GREENFIELD, CONSUMER TRANSACTIONS 279 (2d ed., 1991).

254. RESTATEMENT (SECOND) OF TORTS § 402A caveat (1977).

255. It has been argued that "defective condition" and "unreasonably dangerous" are both aspects of one and the same inquiry. See, e.g., James R. Adams, *Product Liability Law in the United States: An Overview, in PRODUCT LIABILITY: PREVENTION, PRACTICE AND PROCESS IN EUROPE AND THE UNITED STATES* 3, 5 (Rudolph Hulsenbek & Dennis Campbell eds., 1989).

omission strongly criticized by Professor Shapo.²⁵⁶ Article 3 of the SPLA, by contrast, makes “presentation” the first of the attendant circumstances to be considered in judging whether a product offers “the safety which might legitimately be expected.”

Scope of Protected Class: One striking feature is the former parallel between the Restatement’s grant of protection to the “user or consumer” and its agnosticism about all others, on the one hand, and the narrowly defined protected class under the GAC, consumers or users in the sense of “final recipients,” on the other. Comment o to the Restatement (Second) notes that “there may be no essential reason why such [other] plaintiffs should not be brought within the scope of the protection afforded,” but states that the limitation in the rule reflects the social pressure for a rule of strict liability coming from consumers.²⁵⁷

Liable Parties: Another point of comparison is the Restatement’s imposition of liability on all “sellers” of the defective product, whether or not there is a contractual relationship between the seller and the consumer/user. Such a formulation encompasses the entire chain of distribution between the manufacturer and purchasing consumer/user, and the liability of each to the consumer is not provisional or subsidiary; though, naturally, one “link” in the chain may have recourse rights against another. The great breadth of this formulation may reflect the large geographic size of the United States, and the difficulties of obtaining long-arm jurisdiction or bringing a lawsuit in a distant forum. The situation under Spanish law is certainly comparable, but not precisely the same: manufacturers and importers are the normally liable parties, with “suppliers” only occasionally liable. While the United States law is more “pro-consumer” by providing more potential defendants, doubtless it makes better general sense²⁵⁸ to try, as the Spanish law does to some extent, to concentrate liability on the party, the manufacturer, who was best able to avoid the injury, with the liabilities of the importer and supplier being concessions to the practical difficulties occasionally involved in holding a manufacturer liable.

While Section 402A is also agnostic on the liability of manufacturers of component parts, it is nonetheless generally true that component

256. Shapo, *supra* note 252, at 664-65.

257. RESTATEMENT (SECOND) OF TORTS § 402A cmt. o (1977).

258. Cf. David W. Leebron, *An Introduction to United States Products Liability Law: Origins, Theory, Issues and Trends*, in ZACH COLLECTION, *supra* note 258, at 36 (describing the products liability of middlemen as “perhaps the least defensible application of the warranty heritage of strict products liability”).

manufacturers, "after some initial hesitation," can now be held liable.²⁵⁹ Article 4.1b of the SPLA makes that liability explicit.

Development Risks: The text of the Restatement does not explicitly speak to the important question of liability for development risks, and comment k to § 402A speaks only to the conceptually related "unavoidably unsafe products," which deal, however, with known risks that cannot be eliminated.²⁶⁰ One leading American products liability scholar recently opined that it is impossible to predict how an American court would respond to a claimed "development risks" defense.²⁶¹ Another writer described the law here as "both murky and unsettled," though noting a trend in favor of the state of the art defense.²⁶² This is to be contrasted with the clarity of Spanish law on this issue: a "development risks defense" is permitted, except as to pharmaceutical products, foodstuffs or food products intended for human consumption.²⁶³ But if there is indeed a United States trend towards a state of the art defense, there may in fact be occurring a convergence of United States and Spanish law in this anti-consumer direction.

Scope of Allowable Damages: It is also worth noting that United States law, as represented by the Restatement, allows recovery for damage to the consumer's "property," without any requirement that it be "consumer property" in any narrow sense, and also allows recovery for such injuries "from the ground up," *i.e.*, without any deductions. The SPLA contains both these "anti-consumer" features.

It should also be noted, though Section 402A does not speak to the issue, that a United States plaintiff may also recover noncompensatory punitive damages, a possibility that does not exist in Spain.²⁶⁴ On the other hand, however, an award of punitive damages in a United States proceeding is frequently a means of providing covertly what the Spanish legal system allows directly: recovery of the prevailing party's attorneys fees.

Services: One last issue, closely related if not directly on point, is liability for defective services. By its only partial repealer of the GAC,²⁶⁵ the SPLA preserved a clear statutory basis for the imposition of strict liability for defective services. No comparably broad statutory basis exists for imposing

259. *Id.*

260. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1977).

261. Shapo, *supra* note 252, at 679.

262. Leebron, *supra* note 258, at 19, 23. For "state of the art" defense as the American label for the "development risks" defense, see Bernstein, *supra* note 42.

263. See *supra* text preceding note 140 and accompanying note 141.

264. Casals, *supra* note 12.

265. See *supra* text accompanying notes 240-41.

such liability on services in the United States; where liability for defective services in fact exists, it is essentially a creature of case law or narrowly targeted statutes, and in any event “the consumer recovers only upon proof of negligence”.²⁶⁶

What Spanish commentators said when comparing the GAC with the Directive could be applied, with greater justification still, to this comparison of the formal rules of United States and Spanish products liability law: one is better protective of consumer interests in some areas, the other in others. But when these two bodies of rules are put into their institutional and social setting, then which of the two systems, taken as a functioning whole, better provides for the well-being of its consumers, let alone of the other competing interests at stake, is very much a separate question.

266. GREENFIELD, *supra* note 253, at 342-58.

APPENDIX²⁶⁷

JUAN CARLOS I

KING OF SPAIN

LAW 22/1994 of July 6, on civil liability for damages caused by defective products.

To all those who shall see and have knowledge hereof, KNOW YE: that the Cortes Generales have approved and that I grant my assent to the following law:

STATEMENT OF REASONS [PREAMBLE]

This law has as its object the adaptation of Spanish law to European Community Directive 85/374/EEC of July 25, 1985, concerning civil liability for damages caused by defective products. The fruit of a long and complex drafting process [*proceso de elaboración*], the Directive aims to achieve a substantially homogeneous legal regime within Community boundaries on a subject especially delicate by reason of the conflicting interests [involved].

Given that neither the scope of the protected class [*ámbito subjetivo de tutela*] nor the objective contemplated by the Directive coincide with those of General Law 26/1984 of July 19 for the Defense of Consumers and Users, it was opted to draft a special Bill.

Pursuant to the Directive, this law establishes a regime of strict [*objetiva*] though not absolute liability, allowing the manufacturer to absolve itself of liability under the circumstances enumerated.

Contemplated as compensable damages are personal injuries and property damage with, in the latter case, a threshold amount of 65,000 pesetas.

The persons protected are, in general, those injured by the defective product, independent of whether or not they hold the status of consumer in the strict sense.

267. This translation is by the Author. See also *Product Liability in Spain—The Recent Legislation*, LLOYDS PRODUCT LIABILITY INT'L, Dec. 31, 1994, available in LEXIS, World Library, TXTLNE File (translating the same legislation into English).

The manufacturer's objective liability lasts ten years from the time of placing in circulation of the defective product causing the damage. It is a reasonable period of time if one takes into account the bill's objective range of application, which is confined to movable goods and gas and electricity.

Finally, the law makes use of the option offered by the Directive of limiting a manufacturer's overall liability for personal injuries caused by identical articles having the same defect.

ARTICLE 1. GENERAL [STATEMENT OF] PRINCIPLE

Manufacturers and importers shall be liable, in conformity with the provisions of this law, for damages caused by defects in the products which they respectively manufacture or import.

ARTICLE 2. STATUTORY DEFINITION OF PRODUCT

1. For purposes of this law, "product" means any movable good, even when it is affixed to or incorporated into another movable good or real property, except for primary agricultural and livestock materials, and products of hunting and fishing which have not undergone an initial transformation.

2. Gas and electricity are considered products.

ARTICLE 3. STATUTORY DEFINITION OF DEFECTIVE PRODUCT

1. By "defective product" it is meant that one does not offer the safety which might legitimately be expected, keeping in mind all the circumstances and, in particular, its presentation, the foreseeable reasonable use of same and the time of its placing in circulation.

2. In any event, a product is defective if it does not offer the safety normally offered by other examples in the same [product] series.

3. A product is not to be considered defective by the mere fact that said product is subsequently placed in circulation in an improved form [*de forma más perfeccionada*].

ARTICLE 4. STATUTORY DEFINITION OF MANUFACTURER AND IMPORTER

1. For purposes of this law, "manufacturer" means:
 - a) the [manufacturer] of a finished product.
 - b) the [manufacturer] of any component part integrated into a finished product.
 - c) one who produces a raw material.
 - d) anyone who holds himself out to the public as a manufacturer, placing his name, company's name,

trademark or any other sign or distinguishing feature on the product or the packaging, wrapping or any other component of the [product's] protection or presentation.

2. For these same purposes, "importer" means one who, in the exercise of his entrepreneurial activity, introduces a product into the European Union for sale, rent, lease, or any other form of distribution.

3. If the product's manufacturer cannot be identified, anyone who provided or supplied the product shall be regarded as its manufacturer, unless within a three-month period the person shall have indicated to the person damaged or injured the identity of the manufacturer or of whomever provided or supplied to the individual the said product. The same rule is to be applied in cases of imported products if the product does not indicate the name of the importer, even though the manufacturer's name is indicated.

ARTICLE 5. PROOF

The injured person attempting to obtain redress for the damages caused will need to prove the defect, the damage, and the causal relation between both.

ARTICLE 6. EXONERATING CAUSES

1. The manufacturer or importer shall not be liable if they show:
 - a) that they did not place the product in circulation.
 - b) that, on the circumstances of the case, it may be presumed that the defect did not exist at the time the product was placed in circulation.
 - c) that the product was not manufactured for sale or for any other remunerative type of distribution [*cualquier otra forma de distribución con finalidad económica*], nor manufactured, imported, provided or supplied in the context of any professional or entrepreneurial activity.
 - d) that the defect was due to the fact that the product was made as mandated by existing rules [*conforme a normas imperativas existentes*].
 - e) that the state of scientific and technical knowledge existing at the time of [the product's] placing in circulation did not allow the existence of the defect to be ascertained.

2. The manufacturer or importer of a component part of a finished product shall not be liable if either shows that the defect is ascribable to the design [*concepción*] of the product into which it was integrated, or to the instructions given by that product's manufacturer.

3. In the case of pharmaceutical products, foodstuffs or food products intended for human consumption, the persons liable hereunder may not invoke the exonerating clause contained in subparagraph e of paragraph 1 of this Article.

ARTICLE 7. JOINT AND SEVERAL LIABILITY

The persons [made] liable for the same injury by the application of this law shall be jointly and severally liable.

ARTICLE 8. INTERVENTION OF THIRD PARTIES

The manufacturer's or importer's liability shall not be reduced when the injury was jointly caused by a product defect and the intervention of a third party. Notwithstanding, the person liable hereunder who has satisfied [the obligation to pay] compensation may claim of the third party the portion corresponding to that person's intervention in causing the injury.

ARTICLE 9. INJURED PERSON'S FAULT

The manufacturer's or importer's liability may be reduced or eliminated based on the circumstances of a case if the injury caused was jointly due to a product defect and the fault of the injured person or [the fault] of one for whom the latter is civilly liable.

ARTICLE 10. SCOPE OF PROTECTION

1. The regime of civil liability envisaged hereunder encompasses cases of death and bodily injury, as well as damages caused to things distinct from the defective product itself, provided that the item damaged is found to have been objectively intended for private use or consumption and was principally used in such manner by the injured person. In the latter event, a threshold amount of 65,000 pesetas shall be deducted.

2. Other damages and injuries, including pain and suffering, shall be compensable in conformity with the general civil law.

3. The present law shall not apply to recovery of damages caused by nuclear accidents, provided such damages are covered by international conventions ratified by European Union Member States.

ARTICLE 11. LIMITS ON TOTAL LIABILITY

For the liability regime envisaged hereunder, the manufacturer's or importer's overall civil liability for death and personal injuries caused by identical products showing the same defect will be limited to the amount of 10,500,000,000 pesetas.

ARTICLE 12. LIMITATION PERIOD FOR ACTIONS

1. An action seeking redress of damages and injuries described herein must be brought three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned the individual, provided the party liable for such injury is known. An action by one who has satisfied [the obligation to pay] compensation against all others liable for the injury must be brought one year from the date the compensation is paid.

2. The tolling of the limitation period is governed by provisions of the Civil Code.

ARTICLE 13. EXTINGUISHMENT OF LIABILITY

The injured person's rights recognized herein shall be extinguished upon the lapse of ten years from the date the specific product causing the injury was placed into circulation, if the corresponding judicial claim has not been commenced during that period.

ARTICLE 14. EXCULPATORY CLAUSES, OR CLAUSES LIMITING LIABILITY, INOPERATIVE

As against the injured person, exculpatory clauses or clauses limiting civil liability hereunder are inoperative.

ARTICLE 15. CONTRACTUAL OR NONCONTRACTUAL LIABILITY

The actions recognized hereunder have no effect on other rights the injured person may have as a result of the contractual or noncontractual liability of the manufacturer, importer, or of any other person.

ADDITIONAL PROVISION (ONE ONLY). SUPPLIER'S LIABILITY

The supplier of the defective product will be liable as though the individual were the manufacturer or importer if the individual supplied the product knowing of the existence of the defect. In that event, the supplier may bring an action claiming over against the manufacturer or importer.

TRANSITIONAL PROVISION (ONE ONLY). PRODUCTS IN CIRCULATION

This law shall not apply to the civil liability arising from injuries caused by products placed in circulation before its entry into effect. Said liability shall be governed by provisions in effect at said time.

FIRST FINAL PROVISION. CERTAIN PROVISIONS REPEALED

Articles 25 through 28 of General Law 26/1984 of July 19 for the Defense of Consumers and Users shall be inapplicable to civil liability for damages caused by defective products within the meaning of Article 2 hereof.

SECOND FINAL PROVISION. NEW TEXT OF ARTICLE 30 OF LAW 26/1984 OF JULY 19

Article 30 of General Law 26/1984 of July 19 for the Defense of Consumers and Users is amended to read as follows:

The Government, after having heard from interested parties and consumer and user groups, shall have the power to set up a mandatory insurance system for civil liability deriving from damages caused by defective products or services, and a guarantee fund covering, in whole or in part, damages consisting of death, poisoning or bodily injury.

THIRD FINAL PROVISION. MODIFICATION OF AMOUNTS

The Government is authorized to modify the amounts established hereunder, in conformity with the periodic revisions made by the Council of the European Union, under the terms established by community norms.

FOURTH FINAL PROVISION. EFFECTIVE DATE

This law shall go into effect the day after its publication in the "Official State Bulletin."

Wherefore,

I command all Spaniards, private citizens and [the public] authorities to observe and make observed this law.

Madrid, July 6, 1994

JUAN CARLOS R.

The President of the Government

FELIPE GONZALEZ MARQUEZ