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Strict Liability in the European Union—Not a United States Analog

Andrew C. Spacone*

I. INTRODUCTION

Over thirty-five years ago, the California Supreme Court in *Greenman v. Yuba Power Product, Inc.*¹ opened the floodgates of strict liability and in doing so dramatically altered the landscape of products law in the United States. Although some balance has returned to this area of tort law since *Greenman* and its progeny,²

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1. 377 P.2d 897 (Cal. 1962).

2. Perhaps the most important illustration of the restoration of some balance is the controversial Restatement (Third) of Torts: Products Liability (1997) [hereinafter Restatement (Third) Torts]. In § 2(b), the American Law Institute adopted a definition for design defect, which moves away from the “consumer expectation” test set forth in the previous Restatement, towards a test which centers on the feasibility of an alternate design. Such a test is much closer to a negligence concept than to traditional strict liability. See also General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101, (1994) [hereinafter GARA] (This Act imposes an 18-year federal statute of repose for General Aviation products). Although characterized as a “jobs bill,” GARA is tort reform. See Remarks of Edward W. Stimpson, President General Aviation Manufacturers Association Before American Bar Association Section of Litigation, 2-3 (June 28, 1996), for a discussion of the legislative history and basis upon which GARA was presented to Congress by the General Aviation Industry. See also Robert F. Hedrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. Air L. & Comm., 387 (1996). There are other examples of favorable developments from the defendants’ perspective, such as stricter requirements for the admission of expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and its progeny, and greater acceptance of the doctrine of *forum non-conveniens*, which is a frequent issue in defending product cases. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (West 1997) (recognizing the doctrine of *forum non-conveniens*). Texas is a particular hotbed of general aviation litigation, especially for non-United States’ plaintiffs involved in accidents outside the United States. For a recent decision where a Texas appellate court applied the doctrine of *forum non-conveniens* in favor of a helicopter manufacturer sued in this type of situation, see *Baker v. Bell Helicopter*

manufacturers are still subject to stringent liability requirements and potentially high judgments. In effect, many of the social, cultural and institutional forces, which caused the introduction of strict liability and shaped its application here, largely remain intact.³

After a lengthy and intense debate, in 1985, the European Community, now known as the European Union, adopted its version of strict liability with the enactment of the Directive on Liability for Defective Products (Directive),⁴ which imposed the doctrine as an alternative to the member states' existing theories of recovery. Strict liability under the Directive mirrors, in principle, its United States' counterpart. It is not surprising, therefore, to find that the supporters of strict liability in the European Union reflected the thinking of the doctrine's proponents here. From the product producer's perspective, strict liability was viewed as a means to significantly ease the burden of recovery for consumers injured by defective products. In this respect, strict liability was "fairer" than negligence and other more restrictive theories of relief.⁵ The notion that manufacturers were in a better position than consumers to spread the costs associated with product losses through such mechanisms as insurance and pricing (so-called "cost or risk spreading") was also widely offered as a justification for strict liability.⁶ Additionally, advocates of the doctrine viewed it as a deterrent to the production of unsafe products, although there is some debate as to how much weight this rationale actually carried

Textron, Inc., 985 S.W.2d 272 (Tex. Ct. App. 1999). While defendants have not been uniformly successful in invoking this doctrine to ward off product lawsuits involving foreign accidents, their chances of success are now much greater as the doctrine has gained widespread acceptance. See generally Gary B. Born & David Westin, *International Civil Litigation in the United States Courts* 289-366 (1996) (discussing the doctrine's evolution and present state).

3. For a discussion of this subject, see Andrew C. Spacone, *The Emergence of Strict Liability: A Historical Perspective and Other Considerations Including Senate 100*, 8 J. Prod. Liab. 1-40 (1985).

4. See Council Directive 85/374 EEC 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 Directive].

5. See Commission Proposal for a Council Directive (1976) [hereinafter Proposal]. This premise is incorporated as the second "whereas" clause of the preamble to the Directive. See Directive, *supra* note 4, at preamble.

6. See Proposal, *supra* note 5, at 1.

in the final analysis.⁷ To anyone who has closely studied the emergence of strict liability law in the United States, such thinking is very familiar. The advocates of strict liability in the European Union were aware of Chief Justice Traynor's seminal decision in *Greenman* and his earlier concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*⁸ and transferred his rationale wholesale to the debate over strict liability in the European Union. This thinking, at least the fairness and cost-spreading rationale, played a major role in the doctrine which emerged under the Directive.⁹

It is important to understand despite the foregoing that the advocates for the American model of strict liability did not dominate the debate over the Directive. Those who shared the perspective of the manufacturing and insurance industries also were given considerable deference. Their primary concern appears to have been that the adoption of strict liability in the European Union would have led to the "excesses" (e.g., high judgments) of products law in the United States, which would have resulted in an adverse economic impact on the European Union. Specifically, concern was expressed that high costs of products liability would translate into higher product costs and prices, which then would make products in the European Union less competitive and even lead to loss of jobs.¹⁰

7. The preamble Directive does not mention this objective. See M.C. Griffiths et al., *Developments in English Product Liability Law: A Comparison with the American System*, 62 Tul. L. Rev. 353 (1980) [hereinafter Griffiths]. Several of the working documents I have reviewed, leading up to the Directive, also do not discuss this subject in any detailed way. This is not to suggest that the deterrence rationale was not important. It certainly is on the mind of the Commission of European Communities today. See Commission of the European Communities, Green Paper: Liability for Defective Products 2, 9 & 14 (1999) [hereinafter Green Paper]. It appears, however, to have been of somewhat lesser importance than the "fairness" and cost-distribution rationales. See generally Griffiths, *supra* note 7, at 371 (citing to Directive).

8. 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). The deterrence rationale was particularly prominent in Chief Justice Traynor's opinion. It seems to have acquired lesser importance in *Greenman*.

9. See Proposal, *supra* note 5, at 1.

10. This concern continues to this day. See, e.g., Green Paper, *supra* note 7, at 6. The Commission noted that it will take into account, in determining whether any changes need be made to the Directive, the interests of "those products in avoiding distortions of competition resulting from diverging rules on liability, and reducing the impact of those differences on innovation, competitiveness and job creation." *Id.* at 10, 16-17 (discussing the impact on the industry and insurance sector).

As will be discussed more fully below, the Directive represented a compromise between the interests of consumers and business made within the larger context of what was good for the European Union as a whole. Thus, although the doctrine which emerged under the Directive embodied aspects of Chief Justice Traynor's version of strict liability, it is far from a mirror image of strict liability in the United States. Some of the important affirmative defenses provided under Article 6 of the Directive, for example, are generally not available here as absolute defenses. Moreover, as will be discussed more fully below, there are other significant differences in the structure of the Directive itself which limit plaintiffs' ability to recover. This was certainly not lost on contemporary observers of the Directive.¹¹ Nevertheless, there was still reason to believe that the Directive would result in meaningful change for those injured by defective products, including frequent use of strict liability, as well as increased product litigation in general.

General aviation¹² products litigation, which this author is most familiar with, in the European Union provides a good test of this assumption. The injuries arising from the underlying accidents are generally significant, often involving more than one person, and product manufacturers are generally large corporations likely to be well-insured. Such litigation also offers the *in terroreum* aspects and potential for significant damage awards associated with any aircraft disaster. Further, it generally involves complex technical issues, which provide manufacturers with an advantage, particularly in a negligence context (i.e., need to prove fault) because they have better access to the critical information necessary to successfully litigate, than consumers. Although the Commission of European Communities, the proponent of the Directive, did not focus specifically on general aviation products litigation, this is the type of litigation which it concluded presented the greatest hurdle to plaintiffs under prevailing negligence regimes.¹³

11. For a contemporary account, see Griffiths, *supra* note 7, at 375.

12. At the risk of oversimplification, the term "general aviation" applies to all aircraft other than public commercial (i.e., airlines) conveyances. By definition, the term includes rotary, as well as fixed wing aircraft.

13. See, e.g., Eur. Parl. Doc. (351/76) 2 (1976-1977) [hereinafter Working Documents].

The current state of general aviation litigation in the European Union, however, seems to indicate that little has changed from the plaintiff's perspective. The number of lawsuits against general aviation product defendants, at least those with which this author is most familiar,¹⁴ does not appear to have increased appreciably, if at all, since the passage of the Directive. Indeed, today the United States remains as the forum of choice for high-stakes products litigation involving Europeans injured in the European Union by aviation products made by manufacturers based in the United States. This is so, despite the fact that the barriers to successful product litigation in the United States, particularly, general aviation claims involving accidents outside the United States, recently have become more formidable.¹⁵ In fact, there has been a dramatic reduction in general aviation products litigation in the United States in the last five years because of these barriers.¹⁶ Despite this situation, if a significant general aviation lawsuit involving Europeans is not filed in the United States, it either may not be brought at all or it may be brought only after a United States' court has dismissed the action.¹⁷

Further indication of the Directive's lack of impact in this area is that the European insurance industry, at least as of 1997, has not significantly increased its premium rates for aviation products coverage in the European Union.¹⁸ This certainly may be attributable, in part, to competitive pressures in the European insurance market. This author's experience is that pricing for products coverage has been relatively stable worldwide in recent years. More telling, in a recent survey of French, German and United Kingdom aviation manufacturers, the consensus was that the Directive had

14. Exact statistics are difficult to obtain. General aviation manufacturers are loathe to disclose them for obvious reasons. In addition, there is no central repository of data in the United States, let alone in Europe. This author relies on the experience of Textron Inc., one of the largest manufacturers of general aviation aircraft and parts in the world, to support this conclusion. See *infra* note 16 and accompanying text for further evidence that this is the case.

15. See generally *supra* note 2 and text cited therein.

16. For example, Bell Helicopter and the Cessna Aircraft Company, leading general aviation manufacturers, have witnessed a dramatic decrease in litigation because of GARA. (Confidential information contained in files with author).

17. For a discussion of the doctrine of *forum non-conveniens*, see *supra* note 2. Under this doctrine, a frequent factor in dismissals is that the plaintiff is not time barred from commencing litigation in the relevant non-United States forum.

18. See Jean-Michel Fobe, *Aviation Product Liability Law in Europe-An Update*, *Aviation Q.* 159, 164 (1996-1997) [hereinafter Fobe I].

no impact on them.¹⁹ Whether this is the case for other product lines is less certain, although all indications are that there has been little increase in filings under the Directive, or even increased resort to strict liability as a cause of action.²⁰ Even in the United Kingdom, where one gets the sense that more claims are being brought than in other parts of the European Union, this may have more to do with an increased awareness of consumer rights and other developments, such as recent changes to the civil justice system, as opposed to the Directive itself. Unfortunately, there does not appear to be any reliable data to determine for certain what the impact of the Directive is across the European Union. However, this may soon change.²¹

This is not to suggest that the Directive itself is a poor piece of legislation. Many think otherwise,²² and with ample justification. It appears, however, that the Directive has had much less of an impact than its more measured advocates, or even the Commission itself, may have envisioned. The question then becomes, why? The practical explanation for this appears to involve two primary areas: the limiting provisions in the Directive itself and, more importantly, the legal (and cultural) systems of the member countries. The fact is that the procedural and substantive hurdles to successful products litigation in the European Union are considerably higher than in the United States. Equally important, the relevant damages schemes of the member countries, which apply the Directive generally, are not nearly as generous as in the United States, thus removing a powerful incentive for litigation. This disparity reflects the more generous public welfare systems for health care and wage continuation in the European Union. Simply put, in practice, and, to a certain extent, in theory, strict liability in the European Union is very different than its common law counterpart in the United States.

19. *See id.*

20. *See* Sarah L. Croft & Béatrice Harichaux de Tourdonnet, *The European Product Liability Directive in Practice*, For the Defense 13 (Feb. 2000).

21. As part of its study under the Green Paper, the Commission has committed to a survey to determine whether litigation has increased since the Directive was enacted. *See* Green Paper, *supra* note 7, at 9, 17. The Commission expects its report will be presented at the end of 2000.

22. *See* Croft & de Tourdonnet, *supra* note 20, at 10. Admittedly, these authors are operating from the defense perspective. Having said this, a search of the literature does not reveal a great deal of negativism aimed at the Directive, at least not in the United States.

The purpose of this article is to explore why strict liability in the European Union has taken a different direction from its counterpart in the United States and what the future holds for the doctrine. I do not intend to pass judgment on whether strict liability in the European Union is good or bad from the injured party's perspective. My experience with the debate over federal tort reform in the United States over the last fifteen years, for example, is that ultimately it ends up being framed in this manner. In other words, the interests of the consumer dominate the debate, for better or worse. It is tempting, therefore, to criticize the Directive for not protecting injured victims to the extent strict liability does in the United States. Viewing the development of strict liability in the European Union from such a typically American perspective, however, ignores the complex and unique interplay of cultural, social and institutional forces which shaped the Directive and its application. It is my intention to place the development of strict liability in the European Union in its proper context, and in the process, explore the uniqueness of the European experience. Part II will discuss the major similarities between strict liability under the Directive and its United States counterpart. As suggested, the European Union's version of strict liability is similar in principle to strict liability in the United States. This similarity largely ends at the theoretical level, however, and even there fundamental differences exist. Part III, therefore, will address the important doctrinal differences and explore the important European social and cultural forces and institutions which account for these differences. Part IV will close with a discussion of current developments in the European Union, in general, and in the United Kingdom, in particular, which point to the potential for some change in the future. General aviation products litigation will be used as a frame of reference for the discussion as a whole.

II. STRICT LIABILITY IN THE EUROPEAN UNION

A. *The Products Liability Directive—The Theory*

Prior to the Directive's adoption in 1985, products law per se was largely undeveloped in the European Union. This is not to suggest that injured parties were without any recourse. Well-developed negligence law, for example, throughout most of the mem-

ber countries, provided a basis for recovery,²³ albeit short of the advantages offered by strict liability. In France, there was even a system for liability without fault to deal with products which approximated strict liability.²⁴ Also, prior to the enactment of the Directive, several of the member states shifted the burden of proof on liability from plaintiffs to defendants in negligence actions in an effort to ease plaintiff's recovery in product cases.²⁵ Further, in the late 1960s, there was intense debate, in Germany, for example, over whether strict liability should be adopted. In the final analysis, the *Bundesgerichtshof*, the highest court for civil and penal matters, concluded that it was a matter for the legislature to resolve.²⁶ It is also apparent that in the years leading up to the Directive, Europe was paying close attention to the developments surrounding strict liability in the United States. For example, as far back as 1970, the Council of Europe began to study the feasibility of strict liability.²⁷ Moreover, as will be discussed more fully below, social forces were laying a foundation for some form of the doctrine. In short, strict liability did not emerge suddenly with the Directive's passage in 1985. It is fair to say, however, that prior to the Directive, the doctrine was still considered revolutionary, and clearly within the province of the legislature, as opposed to the courts, to address.

Primary responsibility for the drafting and proposal of the legislation rested with the Commission, which ultimately presented the Directive to the European Council for enactment.²⁸ The debate

23. See, e.g., Griffiths, *supra* note 7, at 354-62 (discussing the state of negligence law in the United Kingdom prior to the Directive). See also Christopher J.S. Hodges, *Product Liability: European Laws and Practice* 5 (1993) (detailing specifics regarding the Directive as it pertains to individual member states).

24. See Croft & de Tourdonnet, *supra* note 20, at 10-11.

25. See Jean-Michel Fobe, *Aviation Products Liability and Insurance in the European Union* 39 (1994) [hereinafter Fobe II].

26. See generally BGHZ 51, 91 (The *Bundesgerichtshof in Zivilsachen* concluded that the concept of strict liability was not compatible with the principles of tort law as laid down by the German legislature. Thus, it was for the legislature to decide whether a producer should be subject to a strict liability standard.).

27. Griffiths, *supra* note 7, at 362.

28. See generally Croft & de Tourdonnet, *supra* note 20, at 11 (describing the roles of the European Institutions). The role of the Commission is to make proposals for legislation and oversee common policy implementation. It is the only body that can make legislative proposals. In addition to the Commission, at least four other institutions have a role to play in the enactment of legislation and its interpretation in the European Union. They are the European Parliament, the Council

over strict liability was lengthy and intense by any measure. Some have gone so far as to categorize it as "fierce."²⁹ Indeed, the first draft of the proposed Directive was presented by the Commission in 1976, nine years before it was passed. While the Directive itself contained many new and bold aspects, the most intense debate appears to have largely centered around three specific areas: the idea of a strict liability regime itself; the so-called "developmental risks" (i.e., state of the art); and, the upper limits on damages.³⁰

The Directive would undergo several iterations before it was finally enacted. Certainly, part of the delay in passage was attributable to the relative newness of the European Union legislative process and the several entities which were involved with the Directive's passage. It has taken the European Union some time to sort out its legislative process. Indeed, although the concept of a common market had been around for several years, in 1985 the idea of what a united Europe meant was still evolving in the minds of most Europeans. It was one thing for the member states to tinker with the burden of proof in negligence actions to ease plaintiffs' road to recovery. It was another thing altogether for the European Union to impose a uniform strict liability regime. There is no gainsaying, however, that the controversial nature of the subject, particularly the three aspects mentioned above, played an important, if not critical role in the length of passage.

From a legal perspective, the Commission focused on negligence, with its central concept of "fault," as the prevailing theory of recovery, which provided undue impediments to plaintiffs' ability to recover for product harm.³¹ The Commission recognized, for example, that in complex technical cases the plaintiffs were at a disadvantage in proving fault under negligence, particularly because of limits on discovery in most of the member countries which prevented access to manufacturers' production processes and records.³² The pressure for strict liability arose, in large part, from the mass injuries caused by thalidomide³³ in the 1960's, which weighed heavily on the minds of Europeans for several years, and

of Ministers, the European Council and the European Court of Justice. The latter is essentially the court of last resort for matters of community law.

29. Fobe II, *supra* note 25, at 35.

30. Griffiths, *supra* note 7, at 363-64.

31. See *id.* at 372; Directive, *supra* note 4, at preamble.

32. See Griffiths, *supra* note 7, at 372.

33. See *id.* at 362.

related occurrences. In this sense, the European and United States experiences were similar. One of the major driving forces behind the emergence of strict liability in the United States was the increased injuries associated with the introduction of mass-produced products and, thus, the need to open up for plaintiffs limiting tort and contract (warranty) theories of recovery, as well as the rise of consumerism in general.³⁴ The concern occasioned by mass torts, as well as a general increased sensitivity to personal rights and a growing pressure across Europe, in the 1970s and 1980s, in favor of some form of strict liability, provided the impetus for the Directive. Unlike the United States, however, where strict liability emerged from the common law courts, the doctrine resulted from legislation in the European Union. As previously stated, the legislative history surrounding the Directive reveals that the needs of product manufacturers and the insurance industry carried considerably more weight than in the United States. Thus, unlike the United States' experience, strict liability under the Directive was the result of legislative compromise, which would have important consequences for injured parties seeking recovery for product harm.

The Directive was adopted by the European Union on July 25, 1985 with an implementation date of essentially three years later. It is important to note that the Commission regarded the Directive as only an "initial step" in harmonizing products law throughout the European Union.³⁵ As such, the Directive provides for five-year review periods, which are intended to assess progress towards achieving the Commission's objectives and the need for change. Today, all of the fifteen member states have implemented the Directive, with France being the last to do so in 1998. It is important to note that the Directive supplements, but does not replace, the various member states' liability schemes. Thus, plaintiffs may bring causes of action for strict liability and negligence, for example, although the Commission ultimately hoped that strict liability would eventually be the predominate basis for relief, consistent with the principle of harmonization.³⁶

34. See Spacone, *supra* note 3, at 27.

35. Green Paper, *supra* note 7, at 11; Directive, *supra* note 4, at preamble.

36. See Working Documents, *supra* note 13, at art. 11 (20) ("[s]ince, however, the right bond on the directive gives the injured person a better legal position

Significantly, the Directive makes no provision which allows the member states to enact stricter rules under the Directive. The member states are, thus, theoretically not free to alter the doctrine of strict liability itself, although, in practice, this occasionally may be difficult to enforce.³⁷ Equally important, the Directive makes no changes to the member states' procedural rules which govern tort litigation. This is interesting because the Directive does not deal with conflict of law issues, which runs counter to its stated mandate of harmonizing products law throughout Europe. In fairness to the Commission, it is cognizant of this limitation.³⁸ Also, the Directive leaves the amount of "material" damages (e.g., medical expenses, lost wages and "compensatory damages") which are recoverable to the individual member states, although it does provide for an optional upper limit on these damages.³⁹ The Directive does not, however, address so-called "non-material" damages such as pain and suffering, leaving plaintiffs to rely on whether the relevant member states allow recovery for these damages. Pure economic loss (e.g., lost profits other than those arising out of personal injury or property damage) is not recoverable⁴⁰ and the damage to the product itself, which is particularly germane to general aviation litigation where there is generally severe, if not total damage to the aircraft itself, is excluded.⁴¹

The basic rule of the Directive is that product producers are liable for damages caused by a defect in their products. The term "producer" is fairly broad and includes importers and "suppliers" (e.g., distributors), although the latter may avoid liability if they can identify "within a reasonable period of time" to the consumer who the actual producer is.⁴² Significantly, Article 5 of the Directive adopts the concept of joint and several liability, which applies to "all operations in the production chain," consistent with the

under the laws of all member states, it will in due course replace *de facto* other rights which may perhaps exist").

37. See *infra* p. 367 and note cited therein. See also Croft & de Tourdonnet, *supra* note 20, at 13 (discussing the dispute between the European Union and United Kingdom over the "developmental risks" defense).

38. See Green Paper, *supra* note 7, at 11. See also Directive, *supra* note 4, at art. 21 (requiring five year reviews).

39. See Directive, *supra* note 4, at art. 16.

40. See *id.* at art. 9(a) & (b).

41. See generally *id.* at art. 9 (setting forth the definition of "damage" for the purpose of article 1).

42. *Id.* at art. 3(3).

Commission's goal of achieving fairness for product users. Contribution among joint tortfeasors is left to the laws of the individual member states. What constitutes a product ("movables") is more limited than the definition which has evolved here. This is basically irrelevant for purposes of this discussion because it encompasses all manner of aircraft including component parts, although the latter may avoid liability by proving that the part complied with the design specifications of the manufacturer of the product.⁴³ The all important term "defect," includes within its ambit, manufacturing, design and failure to warn allegations, as in the United States. Strict liability under the Directive also relieves plaintiffs from the requirement of having to prove negligence ("fault") or foreseeability.⁴⁴ Finally, similar to the United States model, the plaintiff need only prove "the damage, the defect and the causal connection between the defect and the damage in order to recover."⁴⁵ Plaintiffs must, however, identify with specificity the product which caused the harm. Of greater importance, the plaintiff has the burden of proof on liability and damages, which is interesting because this marked a departure from the practice in several member states under negligence. Finally, the Directive does not provide for so-called "market share" theories of liability, which are available in some jurisdictions in the United States. Again, this was a somewhat curious development in light of the fact that much of the impetus for the Directive came from mass harm caused by pharmaceutical products which often present difficult manufacturer-identification problems.

The critical aspect of strict liability under the Directive, as it is here, is the definition of defect. The Commission opted for a test which is similar to the "consumer expectation" test adopted by the minority of courts here and set out in § 402 A, Restatement (Second) of Torts. The Directive provides:

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
 - (a) the presentation of the product;

43. *See id.* at art. 7(f).

44. *See id.* at art. 4. One should examine the preamble to the Directive in conjunction with the test for the defective included in art. 6.

45. *Id.*

- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.⁴⁶

The Directive goes on to state that a product "will not be considered defective for the sole reason that a better product is subsequently put into circulation."⁴⁷ The important word in this definition is *safety*. As will be discussed below, it has important implications for how "defect" is ultimately determined by the court. Moreover, under the Directive, a product that does not provide the safety which a person is entitled to expect, "taking all circumstances into account," is defective. As will be seen, this aspect of the definition would appear limitless, and, thus, allow for an expansive application of the test. Before discussing the test for determining whether a product is "defective," it is helpful to briefly discuss the change which the Directive brought to products liability. In an article which appeared in the *Tulane Law Review* in 1988, two British commentators analyzed the impact of strict liability compared to the negligence ("reasonable duty of care") standard in English Law.⁴⁸ They make it clear that the Directive significantly eased plaintiffs' burden of recovery. For example, they point out that under the English law of negligence, even manufacturing defect cases (which present the least problematic issue in products cases governed by strict liability) were often difficult for plaintiffs to win.⁴⁹ In this regard, the preamble to the Directive specifically states, as a justification for strict liability, that the plaintiff "normally has no access to the manufacturing process" and, therefore, faces a significant obstacle to recovery.⁵⁰ This point is particularly relevant in the European Union, because with the exception of the United Kingdom until recently, discovery is much more limited than in the United States. Concerning design and warning cases, the authors concluded that "in English law before the implementation of the Directive, liability for design and failures to warn, determined on ordinary principles of negligence, have caused no particular problems" for defendants.⁵¹ Under the

46. *Id.* at art. 6.

47. *Id.*

48. See Griffiths, *supra* note 7, at 377.

49. See *id.* at 377.

50. Directive, *supra* note 4, at preamble.

51. Griffiths, *supra* note 7, at 377.

Directive, however, product manufacturers would face a more vigorous challenge.

In sum, strict liability under the Directive would provide injured victims with an easier road to recovery than was available under negligence theories in the United Kingdom and most of the other member states.

B. *The Consumer Expectation Test Versus the Risk-Utility Test*

There has been considerable debate in the United States as to exactly what the "consumer expectation" test is, let alone whether it is a test at all,⁵² which probably explains why many of the states courts opted for a more objective measure, the so-called "risk-utility test"⁵³ or some variation of it (e.g., "unreasonably dangerous").⁵⁴ Under this later test, the plaintiff must prove that the danger of the product is outweighed by the cost of avoiding the danger, taking several "neutral" criteria into consideration.⁵⁵ Critical to this analysis is often the need for the plaintiff to prove that an alternate, "feasible" design was available. Much of this criticism of the consumer expectation test centers on the uncertainty of the test's limited parameters, which is magnified by the premise that juries are prone to engage in subjective decision-making.⁵⁶ In effect, the argument (one that I and others have made) is that the jury has virtually unlimited discretion to decide whether a product is defective. If you accept the premise that juries can be unpredictable and arbitrary, it is understandable why product defendants would prefer the more objective risk-utility test to the consumer expectation test, although ultimately one wonders whether it

52. For a general discussion of this subject, see Restatement (Third) Torts, *supra* note 2, at 77-79 and cases cited therein. For a favorable treatment of the consumer inspection test, see Heafy & Kennedy, *Product Liability Winning Strategies and Techniques* § 2.06(1) (1999) and cases cited therein. For an analysis of the practical problems with applying the test within the context of the European Union, see Marianne Corr, *Problems with the EC Approach to Harmonization of Product Liability Law*, 22 Case W. Res. J. Int'l L. 235, 238-39 (1990). This analysis forms the basis for my discussion at *infra* p. 356.

53. See Restatement (Third) Torts, *supra* note 2, at 77.

54. See *id.* at 77 for a discussion of the various tests for defect across the states.

55. *Id.*

56. See *id.* For a contemporary discussion, see Griffiths, *supra* note 7, at 379-80 and cases cited therein. In fairness to the authors, they appear to conclude that the test under the Directive is an objective one.

makes any difference in the United States what test juries are presented with.⁵⁷

The Directive and its legislative history provide little insight as to exactly what the test means, other than that the Commission certainly believed that it was objective.⁵⁸ In fairness to the Commission, the Directive did change the central focus of the inquiry under negligence, i.e., the conduct of the parties, to the condition of the product and whether it was defective. In this sense, it is certainly arguable that strict liability is more objective than the negligence standard. Moreover, as pointed out by one scholar:

The wording of Article 6 is strictly objective and impartial as between producer and consumer . . . [T]he test should be that of a neutral, independent person and this is consistent with . . . [Article 6], which refers to the . . . [level] of *safety* which the public at large is entitled to expect. Certainly, defectiveness is not to be judged by the expectation of the particular person who has suffered the damage. Courts are familiar with this distinction between subjective and objective tests.⁵⁹

The Commission itself noted in an early study that “[t]he measure of safety must be judged according to objective criteria on the basis of circumstances in each individual case” and that it was the responsibility of the courts to apply it in an objective manner.⁶⁰

It is apparent, therefore, that the Commission considered the test to be objective because it focused on safety (as opposed to the

57. See Spacone, *supra* note 3, at 39-40. One of the central premises of this article is that regardless of whether the test for defect is one of reasonableness or strict liability, juries in the United States (and perhaps judges in the European Union) are going to find liability under either test if that is the result they wish to achieve. In other words, either test is sufficiently “flexible” to allow for liability, if the trier of fact is disposed towards such a finding. Having said this, there is some reason to believe that juries are not as “arbitrary and unpredictable” as some might believe. See generally Harvey Berkman, *Want Big Bucks? Try With a Jury*, Nat’l L.J., Sept. 27, 1999, at A1-A11 (Although the statistics Berkman cites do not specifically cover products litigation, they do point to some interesting trends, particularly in verdicts, which cast some doubt on the proposition that defendants are without hope in tort lawsuits.).

58. The Commission certainly believes it is an objective test today. See Green Paper, *supra* note 7, at 6. Interestingly, the Commission seems to be saying that the elimination of fault in favor of the condition of the product (i.e. expected level of safety) *ipso facto* makes the test objective. See also Working Documents, *supra* note 13 (discussing the proposed article 4 of the Directive).

59. Hodges, *supra* note 23, at 52 (emphasis added).

60. Working Documents, *supra* note 13, at 13 (discussing article 4 of the proposed Directive).

conduct of the manufacturer), taking numerous factors into account and intending that the courts would ensure that it was applied objectively. The courts, therefore, appear to have leeway to consider many of the factors involved in the risk-utility test. For example, the cost and feasibility of an alternate design may be very relevant to determining what the expected level of safety should be. In this sense, the test takes on aspects of the risk-utility test. Having said this, applying the test still raises several practical problems within the context of the European Union. This becomes particularly critical when one considers that there are currently fifteen member states in the European Union. Thus, there are potentially fifteen different "definitions" of what level of safety is expected or, perhaps more accurately, what the judge determines is the level of safety the consumer is entitled to expect.

The following example, while oversimplified, illustrates the practical difficulties in applying the test. Assume a German court is faced with a suit involving a French-made business jet with passengers from three different countries. The Directive provides no guidance as to whether the relevant liability factors (e.g., regulations and relevant consumer for purposes of determining the expected level of safety) are those of the place where the aircraft was manufactured, those of Germany, where the accident occurred, or those of the countries where the passengers resided. Moreover, the Directive provides no insight as to what standard of proof for defect is required, leaving this decision, apparently, to the individual member states. When one starts adding variables such as component parts (made in another country) and the various aviation regulations and related matters that are present in the typical general aviation case, the situation becomes even more unclear. In fairness to the drafters, however, it can certainly be argued that even a risk-utility or cost-benefit test presents similar challenges because it too entails several considerations, albeit ostensibly more "neutral" ones.

In many ways, whether the test for defect under the Directive is objective or subjective is academic. What is apparent, however, is that the definition allows for expansive interpretation, if the various courts of the member states, including the European Court of Justice, which basically functions as the court of last resort for disputes under the Directive, are inclined to do so. Unfortunately, the case law under the Directive is too sparse to draw any firm conclu-

sions as to how the definition will be applied, let alone how the other aspects of the Directive work. There appears to be no case law involving any major issue relative to general aviation products. What case law does exist generally involves less "exotic" products and centers on issues other than the definition of defect. For example, a recent decision in Belgium⁶¹ was favorable to the defendant on the so-called "developmental risks" defense, which will be discussed below. The Belgian decision also is instructive on the issue of proving defect because the court seems to have adopted *res ipsa loquitur* as a means for proving defect.⁶² In a more recent decision, the French *Cour de Cassation*, albeit in the context of a blood transfusion scandal, gave effect to the Directive by expanding the universe of plaintiffs to include the families of the victims, for "non-material" (i.e., pain and suffering) damages.⁶³ There is at least one decision by the Court of Justice, however, which is potentially adverse to plaintiffs on the developmental risk defense.⁶⁴

It is premature to draw any hard conclusions from these and other decisions. There is a sense, however, which is shared by some defense counsel in Europe, with whom I have spoken, that judges in the European Union are increasingly willing to accommo-

61. See *Riboux v. S.A. Schweppes Belgium*, 21.11.96 Civ. Namur, 5e ch (1996); Green Paper, *supra* note 7, at 23 n.44. *But see*, BGH 9.5.95, VI VR 158 and NJW 1995, 2162, for a contrary decision.

62. See *id.* For a discussion of this decision, see Green Paper, *supra* note 7, at 21.

63. Cass. Civ. I, 1998. For a discussion of this decision, see Green Paper, *supra* note 7, at 19.

64. See *Commission v. United Kingdom*, 1997 E.C.R. 481. Here, the European Court of Justice sustained the United Kingdom's definition of "developmental risks" derived from the UK's Consumer Protection Act of 1987. What is interesting about the decision is that the definition incorporated a subjective element—the "ideal" producer—as the standard of measuring whether or not a defect could have been discovered according to the state of scientific and technical knowledge, thereby arguably allowing judges in the UK to apply negligence standards. In effect, the Court appeared to conclude that it was up to the courts of the member states to interpret the defense, and in the case before it, the Court focused on the fact that the Commission failed to present a decision from a UK court on the defense which was counter to its intent and purpose under the Directive. It would be a stretch, therefore, to conclude that the Court approved of the defense *per se*. See also Marieke van Hooijdonk, *Liability for Defective Products: Product Liability Law and Product Safety Law*, 4 Sept. 8, 1999 (discussing the 1997 decision of the European Court of Justice) (on file with author); Croft & de Tourdonnet, *supra* note 20, at 13.

date plaintiffs in products cases. As previously discussed, the shifting of the burden of proof in negligence cases would seem to bear this out. More important, one also gets the sense from case law prior to the Directive that some jurists are wary of aircraft in general, and possibly inclined to rule against aviation defendants on technical issues because of a basic misunderstanding, some would say distrust, of how aircraft work.⁶⁵ Whether all this will add up to more plaintiffs' verdicts in products cases across the board, let alone in general aviation cases, remains to be seen.

In sum, the definition of defect under the Directive allows for an expansive application of strict liability. There is some indication that judges in the European Union would be willing to accommodate this, particularly for general aviation incidents. Moreover, it is apparent that the drafters of the legislation intended that the plaintiffs' burden to recovery would be eased; thus, there would be more successful products litigation. The reality, however, would seem to be otherwise. With minor exception, as suggested, there has been little evidence that strict liability in the European Union has had any real impact on products law, at least in terms of increased claims, or even increased resort, to the theory as a basis of recovery, as it relates to general aviation products. It would not be much of a stretch to conclude that this situation is the same for all product lines.⁶⁶

65. For more information, see materials provided, during a private presentation to the insurance community, by a member of a London insurance company (on file with author).

66. See Croft & de Tourdonnet, *supra* note 20, at 13:

In fact, there have been very few claims based solely on the Act [Directive]; most products cases are pleaded in the alternative with negligence . . . [c]laims made in contract and in tort are still far more common, although the total number of civil litigation claims in the United Kingdom is far, far less than in the United States; of these, only a small percentage are product liability claims.

In 1995, a survey was conducted in the United Kingdom by the National Consumer Council, which further confirmed the dearth of cases. Possible reasons cited by the Council were the relative newness of the Directive, lack of awareness by consumers and even lawyers, the problems associated with the developmental risks defense and the under-reporting of claims, among others. See van Hooijdonk, *supra* note 64, at § 2.4.

III. THE PRODUCT LIABILITY DIRECTIVE—THE REALITY AND WHY

To understand the Directive's limited impact on plaintiffs' recovery, we must examine the Directive itself, and more importantly, the legal systems of the member states in which it is applied. Necessarily, such a discussion can not ignore the major cultural and social forces at work in Europe. The relatively small number of lawsuits under the Directive, and, hence, paucity of judicial interpretation of strict liability, may partly be attributed to the fact that the Directive is relatively new. As previously stated, implementation of the Directive was not required until 1988 and several of the member states missed this deadline by more than a few years. Thus, there is merit to the argument that strict liability in the European Union is still a new concept of which the public is largely unaware. The Commission itself seems to have reached this same conclusion. In 1995, it conducted the second five-year review of the Directive, but failed to recommend any changes, largely because the data (e.g., case law) was "very limited."⁶⁷ Also, at least in the general aviation context, it appears that the number of accidents in Europe is significantly lower than in the United States. This probably is attributed to the fact, although statistics are difficult to find, that there are significantly fewer general aviation aircraft in the European Union. Also, because damage to the aircraft itself is not recoverable under strict liability, plaintiffs must rely on negligence theories, which present more onerous burdens to recovery. Further, because of their relatively high cost to buy, as well as operate aircraft (fuel is much more expensive in the European Union than in the United States), more of the aircraft are operated by businesses, as opposed to private parties; thus, aircraft are better maintained and operated, resulting in fewer accidents. As a consequence, there is less societal pressure, if not individual need, for litigation. The fact remains, however, that general aviation accidents in the European Union which involve significant injuries are far from infrequent, and, as previously mentioned, there is no shortage of European Union citizens availing themselves of the United States civil justice system for accidents occurring in Europe.⁶⁸ Finally, there is an indication that in

67. Green Paper, *supra* note 7, at 7.

68. Again, exact statistics are not readily available. My experience has been that roughly five to ten percent of the aviation products cases in the United States involve foreign plaintiffs.

some member countries recent changes in the law of negligence, particularly in the area of burden of proof, make it more attractive as a means of recovery than strict liability. Germany, for example, is such a country. It is, therefore, conceivable that in some circumstances plaintiffs are inclined to seek relief outside of strict liability. Finally, one very practical explanation for this situation may be traced to Article 17 of the Directive, which excludes products put into circulation before adoption of the legislation by the member states. This would exclude a large number of General Aviation products because most of them in operation today, at least fixed wing aircraft, were built before 1988, the date for adoption by the member states.

Based on the foregoing, it may very well be that combination of the relative newness of strict liability under the Directive and the restricted pool of potential affected products (including relatively few accidents) explains why there has been little activity under the Directive. This is hardly the complete story. However, in the final analysis, these explanations are of relatively minor importance because they do not get at the root causes of the difference between the United States and European experience. It is these differences which largely explain the state of products law under the Directive in the European Union today, and which will no doubt govern the future of strict liability, at least in the short term.

A. *The Directive-Limiting Provisions*

As previously mentioned, the history surrounding the passage of the Directive reveals the competing interests which the Commission sought to balance. It is important to understand that the *raison d'être* of the European Union is the desire to ensure fair economic competition among the member states.⁶⁹ This is not to suggest that human rights, for example, is not an end in itself for the organization. The European Union does have a social aspect to it, in addition to the obvious economic one. The critical point is that market considerations form the backdrop for much of the legislation which emerges from the European Union. This was very ap-

69. See Directive, *supra* note 4, at preamble. See also CCH European Union Law Reporter 164 (1997 European Union in Profile § 123) (discussing the objectives of the European Union); Green Paper, *supra* note 7, at 10 (articulating that one aim of the Directive is to determine whether it is jeopardizing the "competitiveness of European business").

parent in the debate surrounding strict liability. The Commission ultimately weighed not only the interests of consumers, but those of manufacturers and the insurance industry in making its final decision. Such a balanced approach was decidedly not the case in the common law courts of this country. The Commission's sentiment here was summed up, in its own words, when it recently stated, "the political resolve . . . to have a balanced framework of liability governing the relationship between business and consumers should not be underestimated."⁷⁰ In particular, in 1985 the Commission was reacting to the perceived excesses of products law in the United States and its potential impact on European business interests if strict liability was enacted. For example, in discussing the potential impact of punitive damages, it has again concluded that the availability of such damages would adversely affect the competitiveness of European Union manufacturers.⁷¹ Equally troublesome was the high compensatory damage awards which are commonplace in the United States. Specifically, today the Commission still takes seriously the argument that high damage awards would deter research and development in the European Union and adversely affect job creation.⁷² Similarly, and this is a more subtle aspect to the debate, the Commission also appears to have seen a competitive advantage to European Union manufacturers, in not having to build into their product pricing the high costs of products liability, such as insurance premiums and high deductibles, which prudent United States manufacturers do. Indeed, many of the leading manufacturers of general aviation aircraft in the United States cited "exorbitant" products liability costs as the primary reason they discontinued or significantly curtailed the production of piston engine aircraft in the 1980s.⁷³ In sum, the

70. Green Paper, *supra* note 7, at 3.

71. *See id.* at 13.

72. The Commission appears to be particularly concerned about the excesses of tobacco litigation in the United States. Interestingly, in 1996 two injured parties commenced litigation in France against a French tobacco company. *See* Green Paper, *supra* note 7, at 13 n.22 (discussing this litigation). It appears that the plaintiffs have recently won a preliminary victory in this litigation. *See* David Woodruff, *French Court Rules Tobacco Firm Shares Blame for a Smoker's Death*, Wall St. J., Dec. 9, 1999, at A21.

73. The debate on the proposed legislation in both the Senate and House of Representatives contains numerous references concerning the adverse economic impact of strict liability on the General Aviation industry. *See, e.g.*, Cong. Rec., (daily ed. Mar. 6, 1994; June 27, 1994); House Comm. on Public Works and Trans-

Commission had no interest in erecting, or at least contributing to, a strict liability regime which would easily lead to high damages awards and related costs that would handicap business and, ultimately, the overall economy within the European Union.

It is tempting to conclude that the concern with the United States tort system expressed by the Commission, not to mention the many in the business community who predicted dire consequences, was exaggerated. Granted, some part of this can be attributed to the hyperbole which normally accompanies any political debate. Indeed, there appears to have been a consensus among the more neutral observers that the Directive would not have a dramatic impact on products law in the European Union; certainly not to the same extent as in the United States.⁷⁴ To illegitimatize the concern over strict liability, however, would ignore the profound distrust of the American tort system which many Europeans have, particularly, members of the business and insurance industry. They tend to view the excesses, real or perceived, of products law in the United States as the norm. Given the state of products law in the United States, including frequent huge compensatory and punitive damages awards, which continue today, this is certainly not an unreasonable concern. The recent multi-billion dollar punitive damages award against General Motors in California⁷⁵ and recent multi-million dollar compensatory and punitive damages awards against the Torrington Company, a United States bearing manufacturer,⁷⁶ for example, greatly influenced the perception Europeans have of what goes on in the United States' civil justice system. At a minimum, verdicts such as these enforce

portation, 103d Cong., 2d Sess., pt. 1. As discussed above, GARA was proposed as a jobs creation bill, as opposed to tort reform, by its proponents. This explains, in large part, why it was willingly signed into law by President Clinton, who has consistently disapproved of and even vetoed, proposed federal tort reform legislation. See *supra* note 2 and sources cited therein.

74. See, e.g., Griffiths, *supra* note 7, at 368.

75. See *Andersen v. General Motors Corp.* No. BC-116926 (Cal. Super. Ct. 1999). On August 26, 1999, the trial judge reduced the \$4.8 billion punitive damages award to a mere \$1.09 billion, but let stand the \$107 million compensatory damages award.

76. See *Torrington Co. v. Stutzman*, No. 09-97-059CV, 1999 LEXIS 1288, at *1-2, 25 (Tex. Ct. App. Feb. 25, 1999). The troubling aspect of this case is that the jury awarded \$50 million in punitive damages on a highly questionable record. It is fair to say that the defendants as well as the insurance carriers were totally unprepared for such a result. The trial judge remitted the jury award to \$5 million. The case is currently on appeal before the Texas Supreme Court.

the belief that products law in the United States is unpredictable, which for the insurance industry, in particular, is anathema. The fact that product defendants in the United States win the majority of products cases that go to verdict, that punitive damage awards are relatively rare and that when punitive damages are awarded, they are often greatly reduced on appeal,⁷⁷ is of small consolation. One may reasonably argue that the fears expressed by the Commission were a "straw man," particularly when the existing legal systems which would apply strict liability were considerably more limiting than in the United States. In any event, the Commission was not prepared to take the chance that the strict liability regime erected by the Directive would come anywhere close to approximating the experience of the United States. There is every reason to believe that this remains a concern today.⁷⁸

It is tempting to conclude that the Commission weighed the interests of business too heavily. To do so, however, would be to ignore a critical factor which greatly influenced its final decision on the Directive. Unlike this country, the social welfare systems throughout most of Europe are extensive and provide substantial coverage for many of the losses which arise from a product-related accident. The various welfare schemes in the European Union provide generous, at least by our standards, benefits for medical and rehabilitation costs and even lost wages. Thus, the State as a whole bears most of the cost of product-caused harm; whereas, in the United States, products liability is the primary mechanism for compensation in this area. As the Commission has noted: "[i]n this respect, producer liability is regarded as an instrument of compensation which is *complementary* to the other ways in which a victim can obtain redress."⁷⁹ There is even a sense that what the Commission really had in mind was to provide a mechanism to address significant losses, even catastrophic ones, which required more

77. See Berkman, *supra* note 57, at A1 (This article discusses a recent Department of Justice statistical study of the United States' civil justice system. The study also seems to conclude that there has been a decline in the median amount of punitive damages awarded in several important counties.). Nevertheless, there is no shortage of huge compensatory verdicts in products case in the United States today. See generally Margaret Cronin Fisk, *Verdicts are Very High but Also Very Volatile*, Nat'l L.J., at C7-C28 (Feb. 22, 1999) (Supp.) (providing examples of huge compensatory verdicts in malpractice cases in the United States).

78. See *supra* note 75.

79. Green Paper, *supra* note 7, at 16 (emphasis added).

than the social safety net.⁸⁰ Thus, it is fair to say that while the Commission certainly wanted to make injured parties "whole," which is one, if not the most important, goal of the tort system in the United States, it did so within the context of a system where medical care, rehabilitation and even basic economic subsistence were the priority of the state. Moreover, the various social safety schemes are financed by a combination of tax dollars and contributions from industry. Subrogation by the state or direct providers also appears to be virtually non-existent across the European Union, with the possible exception of Germany. This would appear to be the ultimate "risk-spreading" mechanism. To have manufacturers contribute yet again through tort suits arguably amounts to a double tax, which would further increase the cost of doing business.

In light of the foregoing, the Commission's decision on strict liability is understandable. As a practical matter, there was no need to replicate United States products law in its entirety because to do so would create redundant compensation for those injured by defective products. At the same time, the Commission recognized the need to create an easier means of recovery for injured parties, for those damages which could not be taken care of by the various social welfare systems. Equally important, the Commission did not want to erect a compensation scheme which unnecessarily disadvantaged the interests of business to the point where the overall economic well-being of the European Union itself would be affected.

In sum, the Commission sought to strike a balance between the interests of business and consumers which made economic sense from an overall market perspective. The outcome of this process is reflected in the adoption of strict liability itself and the other factors which have been discussed. Balanced against this are several procedural and substantive defenses, which generally are not available in the United States or, at least, are greatly restricted.⁸¹ For example, the Directive provides for a ten-year statute of repose which runs from the date the product is put into circulation.⁸² While some states in the United States have stat-

80. See *id.* at 16-17.

81. See Directive, *supra* note 4, at art. 7. For a fuller discussion of these defenses, see Fobe II, *supra* note 25, at 44-52 and Hodges, *supra* note 23, at 70-86.

82. See Directive, *supra* note 4, at art. 11.

utes of repose, they are relatively rare. The eighteen-year federal statute of repose for general aviation products under GARA is generous from the plaintiff's perspective when compared to ten years under the Directive. When one considers that more than seventy percent of the United States manufactured general aviation aircraft worldwide are over eighteen years old, it is clear that general aviation product manufacturers are even better positioned in the European Union under the Directive's lesser limitation period. The Directive also provides an affirmative defense for compliance with "mandatory" government regulations, which also is not generally available under strict liability in the United States.⁸³ Again, general aviation manufacturers, in particular, are well-positioned to take advantage of this defense because their industry is highly regulated, both here and in Europe;⁸⁴ although there is reason to question whether this defense is nearly as strong as defendants would like it to be.⁸⁵ The Directive also permits the reduction of awards by the plaintiffs' comparative negligence, which is more common in the United States, but not universal, under strict liability.

The most controversial defense, which was one of the major stumbling blocks to the Directive's passage, is the so-called "developmental risks defense" which is similar to the state of the art defense in the United States. This defense is generally unavailable in the United States as an absolute defense in strict liability cases. The debate surrounding this defense was particularly intense. Not only was the business community opposed to it,⁸⁶ even the Euro-

83. See *id.* at art. 7(d) (stating that "the defect is due to compliance of the product with mandatory regulations issued by public authorities").

84. For a thorough discussion of the regulatory regimes which govern the aviation industry in the Europe, see Fobe II, *supra* note 25, at 11-34. Fobe makes the point that along with attempting to harmonize products law, the European Union is moving in the direction of unifying the regulatory scheme for the aviation industry. It appears that the United States system under the FAA will be the model.

85. See *id.* at 46. See also Hodges, *supra* note 23, at 75 (concluding that "mere compliance with regulations or mandatory standards . . . is no defence to liability for a defective product"). He argues that the defendant will be required to show that the defect itself was "caused by such compliance or was its inevitable result." *Id.* He does conclude, however, that compliance with regulations may still be relevant to the issue of defect, particularly in design defect cases. *Id.* at 75 n.90-91.

86. Not surprisingly, the aviation industry was particularly vocal in support of a strong defense. See Fobe II, *supra* note 25, at 49 and text accompanying note 57. Indeed, as Fobe indicates, the aviation industry was strongly opposed to strict liability itself. *Id.* For the insurance industry's position on the developmental risk

pean Parliament took the somewhat unusual step of intervening late in the process to ensure it was not too restrictive.⁸⁷ Again, a compromise was struck between competing interests: the defense was permitted, but made optional.⁸⁸ The defense provides that the manufacturer may use this defense when "the state of the scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."⁸⁹ Most of the member states have chosen to adopt it.⁹⁰

Why product manufacturers considered this defense important is obvious. While it has little relevance to manufacturing defect cases, it is very germane to design and failure to warn cases, which make up the vast majority of products litigation. Cases involving allegations of design or failure to warn defects are generally more complex and, thus, tend to involve more subjective factors. Given the subjective nature of the test, manufacturers are at a disadvantage. The general aviation context illustrates how the defense benefits manufacturers. Aircraft manufacturers have an inherent advantage in cases which involve highly technical issues such as design decisions because they know the product and the industry as a whole much better than consumers and their counsel. Given the limited discovery available throughout the European Union, it is highly unlikely that the plaintiff is going to be

defense, which was similar to that of the aviation manufacturers, see Green Paper, *supra* note 7, at 24 n.49. On the other hand, Belgium, Denmark, France, Ireland and Luxembourg were in favor of excluding the state of the art defense. See Fobe II, *supra* note 25, at 50.

87. Their recommendation was that "[t]he producer shall not be liable if he can produce evidence that the article cannot be considered defective in light of the scientific and technological development at the time when the article was put into circulation." 1976 O.J. (C241) 11, as quoted in Griffiths, *supra* note 7, at 389. The Parliament expressly sought to counter the language proposed by the Commission which sought to open the inquiry to the state of scientific and technological knowledge after the product was put into circulation. *Id.* (emphasis added).

88. See Directive, *supra* note 4, at art. 15(1)(b).

89. *Id.* For a discussion of the iterative process which led to the final version, see Griffiths, *supra* note 7, at 388-89. For a cogent analysis of the parameters of the defense, see Hodges, *supra* note 23, at 75-80. Hodges concludes that the defense may not be nearly as strong as defendants think it is. *Id.* at 79-80.

90. Luxembourg, Finland and Norway are the only member states which have chosen not to adopt the defense in any form. See Green Paper, *supra* note 7, at annex 1. France appears to have excluded it, not surprisingly, for "products derived from the human body," an obvious reference to the problems it faced recently with HIV contaminated blood. *Id.*

able to make all or part of his case from the defendant's own documents, which is more common here. Equally important, the absence of juries and the wide use of court appointed or controlled experts, significantly reduces the subjective element in the liability decision-making process. The defense is nevertheless susceptible to expansive application not unlike the definition of defect. It is far from clear on several important issues and there is even some suggestion that it is not as powerful a weapon as manufacturers would like.⁹¹ The fact remains, however, that on its face the defense offers product manufacturers a powerful weapon to ward off liability. Moreover, as long as injured parties perceive it as such, it will be a disincentive to commence litigation, particularly in those countries which present other substantial hurdles to recovery.

The controversy surrounding this defense did not end with the Directive. The United Kingdom has its own version of this defense which is more favorable to the product defendant.⁹² The United Kingdom was sued in the European Court of Justice because the Commission concluded that the United Kingdom's version of the defense was in conflict with the Directive's and, thus, violated the principle of harmonization of law. Surprisingly, the Court upheld the United Kingdom's position.⁹³ As will be discussed presently, the debate over the developmental risks defense is still very much alive today.⁹⁴ Indeed, it remains controversial precisely because on its face, if not in practice, it presents a formidable hurdle to plaintiffs, particularly in cases which involve complex technical cases.

In sum, the Directive itself presents those injured by products with several obstacles, which although not insurmountable, are nonetheless daunting. The full impact of the Directive becomes clearer when one takes into account how it is applied by the various members' legal systems.

91. See generally Hodges, *supra* note 23, at 75-80 (describing the state of knowledge and discoverability aspects of the defense).

92. See *supra* note 64 and discussion therein.

93. See *id.*

94. See Green Paper, *supra* note 7, at 22-23 (quoting that this was "one of the most controversial aspects of the debate").

B. *Applying Strict Liability in the European Union—Further Limitations*

It has long been this author's contention that two of the primary influences on products law in the United States are activist state court judges who are willing to shape the common law to meet perceived societal needs, and juries imbued with a wealth distribution and anti-business mentality.⁹⁵ Place these factors in a civil justice system, which allows for virtually unlimited discovery, contingent fees, experts as "hired guns," and most importantly, damage schemes which invite huge awards, and the results are hardly surprising. Most of these factors either do not exist or are minimized in the European Union.

For all intents and purpose, punitive damages are not available in the typical product suit in the European Union. Some of the legal systems, such as France and the United Kingdom, do allow for the possibility of such damages or damages similar in concept, but the defendant's conduct normally would need to approach the criminal.⁹⁶ Moreover, the underlying accident would have to involve injuries which would attract the attention of society as a whole, if not the government, which in Europe often ends up pushing the matter into the criminal context, which tends to make damages of any kind the least of the product defendant's worries.⁹⁷ In any event, it is not uncommon in the United States for plaintiffs to add punitive damages' counts to product litigation, if only to raise the stakes; thereby, prompting a favorable settlement.

Compensatory ("material") damages are also generally less high throughout the European Union, although the United King-

95. See generally Spacone, *supra* note 3, at 2, 28-31 (discussing how the judiciary appears to have taken the role of activist when shaping the common law in this area and how juries are embodied with "the values and beliefs of America").

96. See, e.g., Hodges, *supra* note 23, at 678 (discussing the availability of punitive damages in the United Kingdom). See *id.* at 176-77 [Table 4] (for a survey of punitive damages across the European Union).

97. See, for example, arts. 121-1, 223-1 of the French Penal Code (1992), which provided criminal sanctions against product manufacturers, *inter alia*, who expose someone to risk of death, injury, etc., by "clearly intentional violation" of a specific duty of care or safety imposed by a law or regulation; Fobe I, *supra* note 18, at 169-70. As Fobe states, this provision would clearly apply to aviation manufacturers. See *id.* It would also appear to apply to any product manufacturer covered by the European Union's consumer protection legislation.

dom appears to be an exception in this regard.⁹⁸ "Moral damages," such as pain and suffering, while allowed in many jurisdictions, are generally much lower than in the United States.⁹⁹ Equally important, at least two of the member states require that the plaintiff either opt out of the social welfare program before commencing litigation¹⁰⁰ or apply any benefits as an offset to recovery obtained in litigation.¹⁰¹ Both instances are extremely rare in the United States, if they exist at all. As a general rule, plaintiffs in the United States can recover medical costs, for example, even if they are covered by insurance or some other means. While subrogation by insurance providers, for example, is available to restore some balance to the equation, its application is uneven and it has been my experience that full repayment is rare. Not surprisingly, the Commission seems to endorse the concept of setting off damages from covered social welfare programs, against damages awarded in litigation; this is consistent with its notion that strict liability is "complementary" to other means of recovery.¹⁰²

The disparity between damages in the European Union and this country is only one factor which tends to deter injured victims from pursuing litigation, at least in the European Union. Equally important is the absence of juries in the European Union for civil suits, even in the United Kingdom which most closely resembles

98. See, e.g., Margaret A. Jacobs, *Swissair Crash Test Relations with Insurers*, Wall St. J., Feb. 15, 2000, at B1 ("Courts outside the United States typically award a third less of what United States courts do in wrongful death cases."). For a survey of the damage schemes across the European Union, see Hodges, *supra* note 23, at 180 [Table 6]. Perhaps, the European Union country which comes closest to the United States in terms of the size of awards is the UK. For a discussion of the damage regime in the UK, see *id.* at 678-83. Recently, there has been a decision by the House of Lords and a change to the Social Security (Recovery of Benefits) Act of 1997 which raise considerably the amount of compensatory damages available to injured parties. See *Insurance Update: Personal Injury Multipliers—The End of the Uncertainty?* (Aug. 1998) (prepared by members of the London insurance market) (on file with author).

99. For a discussion of "moral damages" in the European Union, see Hodges, *supra* note 23, at 163-66; for a survey, see *id.* at 176-77 [Table 4].

100. Griffiths points to UK legislation which was in effect in 1988. See Griffiths, *supra* note 7, at 392. The author has not determined as of the date of this article whether this legislation is still in effect.

101. See Belgian Legislation of 1991 (Article 14) ("[b]eneficiaries of a social security scheme must first take advantage of rights deriving from such a scheme. If there is any damage not covered, the victim must then enforce his rights against the producer under liability"); Green Paper, *supra* note 7, at 16.

102. See Green Paper, *supra* note 7, at 16.

our civil justice system. The impact of this is obvious, particularly given the open-ended nature of the test for defect. The plaintiff again has lost a powerful tool for recovery. This leaves the judge or magistrate to make the liability determination. It would be incorrect to conclude that judges are immune from subjective thinking. This is human nature. We have already seen some evidence that some jurists in the European Union may be disposed towards plaintiffs in products lawsuits, particularly those involving aircraft. This is only speculation, but it may very well be that they are willing to expand the parameters of liability (e.g., shift the burden of proof on liability from the plaintiff to the defendant) and even find liability in the first instance, while at the same time they are unwilling to award sizeable damages. If a recent study of United States judges is to be believed, this is the case in the United States.¹⁰³ Moreover, while it is fair to say that jurists in Europe are not nearly as activist as their counterparts in the United States, they can be independent in their decision-making. It is fair to say, however, that in the main, judges in the European Union approach decision-making in a more constrained way than their counterparts in the United States do, and certainly than most juries do. It is also hard to imagine that they would engage in the activist practices which occasioned the development of strict liability in the United States and continue to this day. There is little historical precedent for this. Most of the civil justice systems are not based on the common law, but on statutory jurisprudence, which constrains their creativity. The Directive itself greatly limits their ability to "experiment" by laying out several ground rules or guidelines, including the defenses discussed herein. As pointed out previously, the Directive itself prevents the member states from changing the parameters of strict liability.

With the exception of the United Kingdom (and there is strong indication that this is about change to some degree, as will be discussed below), judges play a very active role in the overall management of litigation. For example, in several of the member states the presiding judge appoints the expert to assist with fact gathering and the liability analysis. Even in those jurisdictions, such as the United Kingdom, which until recently have allowed the parties to select their own experts free of any court intervention, the

103. See Berkman, *supra* note 57, at A1.

judges will exercise some control over their conduct. Thus, the expert as a "hired gun," while not entirely unknown in the European Union, carries less influence on the trier of fact than in the United States. Similarly, judges in the European Union exercise more (some would say total for Continental Europe)¹⁰⁴ control over the discovery process, which in itself is vastly more limited than in the United States. Depositions are almost unheard of in Germany.¹⁰⁵ For example, it would be the rare lawsuit (with the possible exception of the United Kingdom) that witnesses the use of discovery as an *in terrorem* weapon, a not infrequent occurrence in high stakes products litigation in the United States. Again, an important aid to recovery is largely unavailable to potential plaintiffs in the European Union.

Three other important procedural factors merit brief mention. With the exception of the United Kingdom and a few other member states which allow a limited form, contingent fees do not exist in the European Union.¹⁰⁶ Rightly or wrongly, many products lawsuits in the United States would never see the courthouse without the contingent fee system. The situation is not improved from the plaintiff's perspective when you add to the mix that in many member countries, the loser runs the risk of paying all or part of the court costs, and in some instances all or part of the winner's legal fees.¹⁰⁷ It should be noted that in some countries plaintiffs may avail themselves of legal aid in products, as well as other litiga-

104. See, e.g., E. Blake Redding, *A Comity of Errors-Europeans Discover Discovery*, 18 ACCA Docket 47 (Jan. 2000). See also Hodges, *supra* note 23, at 174-77 [Table 4], for a survey of discovery across the European Union. Hodges' survey seems to conclude that the widespread practice is that discovery is at the discretion of the parties. Moreover, several of the member states require that "all relevant" documents be produced. This would seem to contradict to some degree the conclusion of the author in the ACCA article. The reality, however, is that document discovery is very limited across the European Union. It certainly is no where near as burdensome as in the United States. Depositions are even more restricted in scope as well as number. The UK, at least until recently, has been the exception to this rule.

105. For a general discussion of discovery in Germany, see *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for S.D. Iowa*, 482 U.S. 522, 558 (1987).

106. See Hodges, *supra* note 23, at 162 (stating that "contingency fees are rare"); see *id.* at 174-75 [Table 4], for a survey of contingency fees in the European Union.

107. See *id.* at 162, 174-77 [Table 4], for survey of the European Union on this topic.

tion.¹⁰⁸ It would appear, however, that because of certain restrictions on such aid, it is not much of a factor in deciding to bring a products lawsuit. Given the high hurdles to products litigation discussed, the absence of a well-developed contingent fee system and the "loser pays" principle provides further disincentive to litigation. Finally, with the exception of Portugal, class actions per se also do not exist in the European Union.¹⁰⁹ This is not to suggest that certain types of claims can not be aggregated or grouped for litigation purposes. France has procedures which allow this.¹¹⁰ The fact remains, however, that the general unavailability of the class action device lessens the likelihood that massive asbestosis litigation of the type in the United States, for example, will occur in the European Union. Again, plaintiffs do not have available to them a potentially powerful weapon against product manufacturers.

The final factor which merits attention is cultural. By any test, Europeans are not nearly as litigious as Americans. Some might argue that this is so because the various legal systems are more restrictive and, thus, deter litigation in all but extreme cases. Such thinking is flawed because it ignores the fundamental fact that the legal systems, as in the United States,¹¹¹ are the product of the prevailing social and cultural forces in Europe and not the other way around. There certainly is no evidence that Europeans are more docile about asserting individual rights than Americans. Anyone who is knowledgeable concerning the social and labor history in France, for example, would quickly realize that the French are not shy about expressing their displeasure with institutions, to put it mildly. Yet, it was France which was the last country to implement the Directive, and that was not without a struggle. While the answer to this question is complex, there is no gainsaying that the presence of a well-developed social welfare program,

108. *See id.* Hodges seems to suggest that the "loser pays" principle is not as important a consideration in deciding to commence litigation as some might think. Given the historically high cost of litigation in the UK, caused in large part by freewheeling discovery on the part of defense lawyers, it would certainly seem that a major factor is whether to bring a products suit in that country.

109. *See id.* at 161, 174-75 [Table 4].

110. *See Green Paper, supra* note 7, at 33.

111. *See generally* Spacone, *supra* note 3, at 2 (stating that strict liability is a doctrine firmly rooted in the United States and is unlikely to be changed unless American values and beliefs change).

which embodies the principle that the state is the primary protector of citizens who suffer economic misfortune of any type, plays a major role in shaping how Europeans approach litigation. These programs provide a safety valve for compensation, if you will, which is not available in the United States. In short, the tort system is not perceived to be the primary means of compensation for product harm. Americans tend to forget that the European political experience, at least on the Continent, has a significant socialistic aspect to it. The citizens of these nations give up certain rights in exchange for the State's more paternalistic role in their lives. This explains in large part why the transfer of Chief Justice Traynor's rationale for strict liability was not given the same reception in Europe: the governmental systems and cultural and social predicates are very different.

There is one other important consideration which is not easily susceptible to documentation and which is certainly controversial. It has been my experience that Americans, for whatever reason, are more comfortable under strict liability than Europeans are because whether the product manufacturer is at fault is largely irrelevant. The tendency here is to place responsibility for product-caused harm on the manufacturer, regardless of whether they are at fault morally or legally. The manufacturer produced the product; it failed; the user was hurt; the manufacturer (or its insurer) can more than afford to pay; end of story. Europeans appear to have a somewhat different sense of personal responsibility. It is not apparent that they are willing to jump to the conclusion that simply because they were injured by a product, the manufacturer should pay absent some indication of fault. Similarly, they appear to be more willing to accept responsibility for their conduct when it contributes to the accident (admittedly easier to do when you have a well-developed social welfare system to fall back on for compensation). Incorporating comparative negligence under strict liability, for example, appears never to have been a debatable point for the Commission, unlike in the United States. Also, in dealing with a variety of legal issues in the European Union, I have come away with the impression that Europeans also have more respect for business than people in the United States do. The foregoing leads to the conclusion that Europeans are willing to give manufacturers a free pass when they are injured by their products. It also suggests, however, an attitude which is less likely to spawn wide-

spread product litigation, absent other compelling reasons. Whether this attitude will change is unknown, but as long as it exists, it will be an additional factor which limits the expansion of strict liability in theory as well as practice.

In summary, the social, cultural and institutional forces aligned in the European Union have produced a much more limited form of strict liability than in the United States. This is reflected in the structure of the Directive itself and in the various legal systems which apply this doctrine. It is not surprising, therefore, that strict liability has taken such a different course in the European Union. There is some indication, however, that changes, although not dramatic, may be underway, which could influence the direction of strict liability in the European Union.

IV. THE FUTURE OF STRICT LIABILITY IN THE EUROPEAN UNION

A. *The Directive: Time for Change?*

As previously mentioned, the Commission does not regard the Directive to be the final answer on the shape of strict liability. This would seem to imply that revisions in favor of injured parties are contemplated, or at least, subject to study. To date, however, there has been little change of any consequence to manufacturers. In 1995, the Commission's five-year review resulted in no recommendations for change, in large part because the data was limited. In response to the "mad cow crisis," the Directive was applied to unprocessed agricultural products in 1999.¹¹² Again, the Commission was responding to a situation which involved mass exposure to injury that clearly caught the attention of Europeans.

In March of 1999, the Commission issued its "Green Paper," which established the guidelines for the most detailed study of the Directive to date.¹¹³ The introduction to the Green Paper makes it evident that the Commission has not abandoned its over-arching goal of balancing the needs of consumers and business (including the insurance industry) in order to achieve an overall market solution which makes economic sense.¹¹⁴ It is also clear that the body

112. See Green Paper, *supra* note 7, at 7.

113. See generally Green Paper, *supra* note 7, at 2, 7-9 (discussing the scope of the study).

114. See *id.* at 3. The terms "balanced" and "compromise" are used numerous times throughout the document.

does not wish to engage in a debate dominated by hyperbole, a frequent hallmark of the debate surrounding federal and state tort reform in the United States. As part of this process, comments from all interested parties have been requested. The Commission has made it clear, however, that it wants only "facts," as opposed to "positions of principle."¹¹⁵ This would seem to indicate that it has moved from a debate, which heavily involved theoretical considerations, to one centered on quantitative data involving the cost of strict liability to business, as well as benefits to consumers. One cannot help wonder whether the Commission is reacting to the state of the debate on tort reform in the United States. It has been my experience that the proponents of tort reform here have failed in large part because they have been unable to make a quantitative case. The major exception to this has been GARA, which although not characterized as tort reform per se, was successful because the General Aviation industry was able to make precisely the type of economic case that the Commission appeared to be interested in.

The Commission has targeted several major aspects of the Directive for study. These include the issue of shifting the burden of proof from plaintiffs to defendants, the ten-year statute of repose, including "its possible modification," and "implementation of the execution in the case of the 'developmental risks' and assessment of its possible abolition."¹¹⁶ The Commission also appears to be interested in amending the Directive to include class actions.¹¹⁷ In keeping with its aim of gathering hard data, the Commission intends to compile an "index" of the "number and content of judgments, proceedings settled out of court, number of claims made," etc.¹¹⁸ Similarly, it is looking for input from the business community on the impact of strict liability on research and development, production, selling prices and even insurance premiums.¹¹⁹

115. *See id.* at 9-10. The Commission appears to want to avoid the hyperbole, on both sides of the issue, which has characterized the debate surrounding federal tort reform in the United States for at least the last fifteen years. This is a desirable objective, and it should be interesting to see what reception the Commission gives to traditional "fairness" arguments, which it is bound to receive despite its admonishment to the contrary.

116. *Id.* at 3.

117. *See Green Paper, supra* note 7, at 32-33.

118. *Id.* at 9.

119. *See id.* at 2.

It will be interesting to see what the Commission ultimately learns from this process, particularly because there does not appear to be any existing compendium of the "costs" or effects of strict liability today. What the Commission will do with the data is another question altogether. If it shows that there is no material increase in litigation, or even claims under the Directive, this may support expanding strict liability. At the same time, a modicum of impact in these areas (at least in the general aviation context, it is highly unlikely that significant activity will be shown) may be enough for the Commission to conclude that no changes need to be made. It is hard to imagine that the manufacturing or insurance industries will be able to demonstrate that strict liability has had an adverse impact on them. If the data should result in the conclusion that there has been little activity under the Directive, this will certainly support the position of those who want to expand the scope of strict liability. On the other hand, just because there is little activity under the Directive does not necessarily mean that it is not working. In the final analysis, the answer may be that the Directive simply has not had enough time to work itself into the consciousness of consumers, and even the legal community, to assess its full impact.

Another important consideration is that the Green Paper states that one of the aims of the Directive is to discourage the marketing of unsafe products.¹²⁰ This would seem to belie the conclusion of some observers that the deterrence rationale was relatively unimportant to the Commission.¹²¹ On the other hand, there appears to be an acceptance, at least in the United States, that products are safer today,¹²² and that the presence of sophisticated "Consumer Product Protection" legislation, which was enacted in 1992 and is similar in scope to the Consumer Protection

120. *See id.*

121. *See supra* note 7.

122. Apparently, the European Parliament has recently taken the position that the Directive is not sufficiently effective in promoting the manufacture of safe products. *See id.* at 15. This is a curious position given that the European Union has fairly tough consumer protection legislation similar to the United States Consumer Protection Act. This legislation provides for criminal remedies and recalls, as opposed to civil damages for personal injuries. In the United States, the presence of consumer protection legislation carries little weight in the debate over the parameters of product law. My sense is that this is not the case in the European Union, which tends to view the courts as less of a tool for achieving societal goals than in the United States.

Act in the United States, renders unlikely the need to strengthen strict liability as a deterrent. Several of the member states have also enacted similar legislation.¹²³ If this is so, the primary focus will be on whether consumers are benefiting from a recovery perspective, balanced against the burdens on the business community.

Accurately predicting whether the Commission will recommend major changes to the Directive is almost impossible from the perspective of an outsider, especially an American observer. The Green Paper, with the exception of some of the points discussed above, gives little indication of the direction in which the Commission is heading, other than recognizing that there are controversial issues which need to be dealt with. Clearly, if the Commission concludes that the social welfare programs of the member countries are being reduced, a fundamental premise behind its thinking will have changed. There is an indication that some change is underway. There is intense pressure throughout Europe, particularly in France and Germany, whose economies have stagnated in recent years, to reduce costly social welfare programs and, thus, increase their competitiveness. There is no indication, however, that the French government is interested in material changes. It is even more problematic in Germany; even there, however, popular resistance makes significant reductions unlikely any time soon. It is hard to imagine, therefore, in the short run, that the Commission will recommend any major changes to the Directive in the near future because the social safety net is in jeopardy.

The ten-year statute of repose and the developmental risks defense present interesting challenges for other reasons. As previously mentioned, most general aviation aircraft and many of their component parts, such as engines, are considerably more than ten years old, both in the United States and the European Union. Thus, all things being equal, general aviation manufacturers in the European Union, like in the United States, have available to them an important means of reducing costs. Statutes of repose are the most effective type of "tort reform" because they bar the plaintiff from the courtroom in the first instance. It is important to consider that the major "selling point" of GARA in the United States was that it would provide thousands of jobs in the general aviation

123. See, e.g., Hodges, *supra* note 23 (defining the individual member states' legislation regarding product liability).

industry by freeing up the huge costs associated with products liability for manufacturing, which for some companies such as the Cessna Aircraft Company, had been severely limited prior to GARA.¹²⁴ While the situation in the European Union from the general aviation industry is not tantamount to the United States experience (e.g., high damage awards are rare), there is sufficient similarity to get the Commission's attention. Moreover, the general aviation industry in the European Union is not insubstantial. Eliminating the statute of repose would *ipso facto* make European aviation manufacturers less competitive with their United States counterparts who operate under GARA. More important, if the elimination of the statute of repose were to result in more frequent litigation against manufacturers along with higher damage awards, it would increase their costs. This in turn could result in decreased manufacturing with attendant loss of jobs. A safe course for the Commission would be to lengthen the statute of repose, as opposed to eliminating it altogether. It could certainly point to some states in the United States which have adopted such measures,¹²⁵ although they generally are in the ten year range. If it only had to deal with the general aviation industry this would be one thing. But the potentially adverse consequences for those product manufacturers, whose products have a much shorter life, is quite another. The automotive industry, for example, would no doubt look askance on any lengthening of the statute of repose. While the general aviation industry may be important to the European Union, it pales in comparison to the automotive industry.

The developmental risks defense is another matter entirely. It would seem to be more of a target for change. It has certainly been controversial from the outset, which the Commission itself acknowledges.¹²⁶ Moreover, redefining its scope would have less of a direct impact on product manufacturers than jettisoning the statute of repose. Product manufacturers would still have several other defenses available to them, not to mention the advantages provided by the various legal systems. If, as previously discussed,

124. See GARA, *supra* note 2.

125. See Response of the Defense Research Institute to the Green Paper: Liability For Defective Products, As Issued By the Commission of The European Communities on 28.07.1999, at 17 n.29 [hereinafter Response of the DRI] (providing examples of states which have statutes of repose).

126. See *supra* note 94.

the defense is not as strong as some believe it to be, the Commission may conclude that it should remain intact but clarify its scope. To remove it entirely from consideration in determining whether a product is defective would seem extreme. As stated, many of the jurisdictions in the United States which do not view it as an absolute defense, recognize that at a minimum it should be a factor in determining defect.¹²⁷ Moreover, elimination of the defense would make product manufacturers responsible for technical changes which were unknowable at the time their products were put into circulation. This outcome would come very close to imposing absolute liability, a concept which the Commission has already rejected. The Commission also could theoretically take away some of the defense's advantages, real or perceived, by changing some of the limiting aspects of the legal systems (e.g., limited discovery, allowing for higher damage awards, permitting recovery for "moral damages"). For example, the Commission might consider expanding discovery of product manufacturers to allow plaintiffs greater access to certain critical information (e.g., manufacturing processes). It would seem that the European Parliament, through the established principle of harmonization, would have the jurisdiction to achieve such results. While this may be simplistic, if the European Union can impose a common currency among its members, why not a common strict liability scheme which deals with many of the procedural barriers of the member states' legal systems in a manner consistent with affording more opportunity for injured parties? Whether the Parliament has the power to do this is largely irrelevant, however, because there is little evidence that there is a need for such a radical step at this time or that given the numerous other controversial issues it faces, that it would be inclined to embark on such a course today.

Finally, shifting the burden of proof from plaintiffs to defendants on the issue of liability and damages may present an easier "fix" for the Commission. As previously discussed, many of the member states have already accomplished this as part of their negligence schemes. Incorporating this change in the Directive, therefore, would certainly not be without precedence. The business community is certain to be opposed to this, however, because it is

127. For a cogent argument in favor of returning to the state of the art defense, as well as the developmental risks defense itself, see Response of the DRI, *supra* note 125, at 9-15.

one thing to shift the burden of proof in negligence, where proving fault is the overriding consideration, as opposed to strict liability, where it has been eliminated as a factor.

In summary, whether the Commission will recommend fundamental changes is problematic absent some compelling evidence that the Directive is not achieving the Commission's stated objectives. The Commission will certainly consider whether the welfare programs of the member states are continuing to provide an acceptable level of compensation for product caused harm. It is also likely to focus on the impact of existing consumer protection legislation on the production of unsafe products. Without more information, one gets the sense that it will be difficult to convince the Commission that this legislation is not working. Even if major changes are made to the doctrine itself, they would have impact absent fundamental changes to the civil justice systems of the member states.

B. *The United Kingdom Civil Justice System—Potential Changes?*

Historically, the civil justice system in the United Kingdom has closely resembled the United States model. Our system of jurisprudence is essentially based on the English common law system, although there have been some significant differences, such as the contingent fee system and jury trials. In essence, until recently, the civil justice system in the United Kingdom basically has followed the "party-control" model of jurisprudence, which tends to relegate the judge to a secondary role and leaves it to the parties to largely control the litigation, subject of course, to the prevailing procedural rules such as discovery, evidence and the like. Not surprisingly, unlike most of the other members of the European Union, litigation in the United Kingdom can be expensive. Indeed, discovery is often used as a device by defendants to prolong the litigation, if not to inflict high costs on plaintiffs. This becomes a particular problem for plaintiffs because of the "loser pays" principle. Moreover, the dominant basis for recovery for product harm, at least before the introduction of strict liability under the Directive, was negligence. As previously noted, negligence law placed several difficult hurdles in the path of plaintiffs seeking recovery. It should come as no surprise, therefore, that products litigation in the United Kingdom, has historically been limited. There is some

indication, however, that this is about to change because of the so-called "Woolf Reforms, which applied to the country's civil practice rules."¹²⁸

Enacted into law in 1999, these changes essentially seek to reform over 100 years of civil jurisprudence in the United Kingdom. The impetus for these changes was prompted, in part, by a concern that recovery for consumers was too difficult, costly and time consuming, particularly in matters which did not involve significant sums.¹²⁹ Lord Woolf and his supporters were also motivated by the sense that incentives needed to be provided to avoid litigation in the first instance, not only for the benefit of plaintiffs, but also for the courts themselves, which were becoming burdened with litigation. While the reforms were not aimed at products suits specifically, they certainly sweep this area of the law within their scope.

Under the new Civil Procedure Rules, the claimant is required early in the process (actually, pre-suit) to set out his or her position on recovery and deliver this to the prospective defendant.¹³⁰ The defense, in turn, is required to state its position in a fairly detailed manner. Failure to do so can result in the imposition of costs by the court or other forms of prejudice.¹³¹ Discovery is significantly curtailed, at least initially, and personal verification of all responses by the defendant is required with penalties for "untruthfulness."¹³² Also, the use of a single expert, as opposed to each party retaining their own, is "encouraged," and it is made clear

128. Civil Procedure Rules (Jan. 29, 1999), effective Apr. 26, 1999 [hereinafter CPR]. These rules were the culmination of a lengthy study by Lord Woolf, Master of The Rolls (most senior civil judge), which were presented in 1996 as the "Access to Justice." For a thorough discussion of the Rules, see *The Civil Procedure Rules of 1999: The Details and Some Key Issues* (1999), prepared by Allen & Overy, an international law firm based in London, England. This is an unpublished paper prepared for clients of the firm, which is on file with the author.

129. In an article that appeared in *The Economist* in 1996, contemporary with the release of Lord Woolf's report, the author concluded: "If Lord Woolf's changes are implemented, he will have brought about by far the biggest revolution in the civil-justice system in Britain this century." *More Justice is More Just*, *Economist*, July 27, 1996, at 15.

130. CPR, *supra* note 128, at pt. 7, § B.

131. *Id.* at pt. 12.

132. Part 22 of the CPR introduces the concept of the "Statement of Truth." This is a signed statement incorporated at the end of key court documents, by which the content of those documents is verified to be true and accurate. See CPR, *supra* note 128, at rule 22.1. Rule 32.14 sets out the consequence for making a false statement.

that any expert permitted by the court owes his or her primary allegiance to the court.¹³³ Another significant change is the option (and strong incentive) for the parties to resolve disputes through a variety of Alternative Dispute Resolutions.¹³⁴ The Rules also allow for "offers to settle" all or part of the dispute by both sides, again with potentially significant consequences in terms of costs for the failure to accept such offers.¹³⁵ Further, consistent with the objective of ending litigation early, the test for summary judgment, now available to either party, has been changed to "no real prospect of success," which is a far cry for the test of "no material issue of fact" in the United States.¹³⁶ Finally, it is apparent from the Rules that the judge will have greater control over the actual conduct of the litigation. Whether this spells the end to the traditional party-controlled model remains to be seen. It is clear, however, that it is considerably weakened.

It is too early to tell what impact the Woolf Reforms will have on general aviation products litigation, let alone any products litigation, in the United Kingdom. It will be interesting to see how quickly the judiciary and bar accept such a radical departure from over a century of jurisprudence. On their face, however, these changes do provide opportunities as well as pitfalls for both sides to a products dispute involving strict liability. Many manufacturers in the United States would welcome the availability of a lessened test for summary judgment, increased reliance on a single court appointed expert, the potential of less intrusive discovery and even more control of the parties by the trial judge. Offers of settlement could also be a useful tool in resolving cases earlier and, thus, reducing transaction costs. At the same time, the goal of early dispute resolution, coupled with the more favorable definition of defect under the Directive and aggressive judges seeking to resolve litigation early, could result in increased pressure on manufacturers to settle, which they would prefer not to do. Also, given the relative dearth of general aviation products litigation in the United Kingdom, one wonders whether litigation, which otherwise

133. *Id.* at pt. 35.7, 35.3.

134. CPR, *supra* note 128, at rule 1.4(2)(e). The CPR contemplates a wide variety of ADR mechanisms including early neutral evaluation, non-binding dispute resolution and mediation.

135. *Id.* at pt. 36.20.

136. *Id.* at pt. 24.2.

may not have been brought, or claims, which otherwise may not have been made, will occur. It is difficult to imagine, for example, that the procedure for dealing with claims pre-suit, which (as indicated) requires the defendant to provide a fairly detailed list including documents, helpful or not, would not result in more claims than under the old system. Moreover, the Reforms place a premium on early fact-gathering by the defendant, including early access to accident investigation reports, which often provides critical information relative to liability, which may or may not be a problem for defendants. Finally, the distinct possibility exists under the early disclosure provisions that injured parties will be provided with "cheap" discovery that they otherwise would not be able to obtain, or, if they were able to obtain it, would be at great cost.

It is difficult to predict whether the Woolf Reforms will result in increased products litigation under the Directive. As suggested, the reforms are fairly radical and will no doubt meet with some resistance, particularly by the more traditional members of the bar and judiciary in the United Kingdom. It will also be interesting to see whether the populace will continue a perceived trend of being more litigious. Indeed, many, particularly members of the insurance industry, have predicted that the new rules will significantly increase claims filings, as well as cause other problems.¹³⁷ Whether this will carry over into increased products lawsuits under the Directive is an open question.

V. CONCLUSION

That strict liability in the European Union is different than its counterpart in the United States is understandable. The Directive emerged from a very different perspective. Strict liability in the European Union is neither the primary mechanism for compensation for injuries arising from product harm, nor is it viewed as a primary means of deterring unsafe products. Other factors, such as the extensive social safety net, largely unavailable in the United States, and sophisticated consumer protection legislation, play an equal, if not paramount, role in the doctrine's configuration. Moreover, strict liability resulted from a legislative process which

137. See, e.g., Carolyn Aldred, *Woolf's Approach, No Time to be Sheepish: U.K. Litigation Reforms May Catch Risk Managers Unprepared, Attorneys Warn*, *Bus. Insur.*, Feb. 22, 1999, at 17 ("Observers believe that hundreds of claims are being stored up by plaintiff lawyers to be filed in court after the new rules take affect.").

sought to balance the needs of consumers against those of industry for the overall economic well-being of the European Union. This need for a balanced approach is still very much in evidence today. Also, the legal systems, including damage schemes of the member countries, are in the main very different from the system of civil justice in the United States. There is little indication that they will change dramatically, at least in the short run.

Nevertheless, it will not be a surprise if some change occurs. The Commission's current study offers the potential for important changes in favor of claimants. Also, recent amendments to the civil justice system in the United Kingdom point to the potential for increased activity by consumers who suffer product harm. Moreover, there is a sense that Europeans are continuing to become more aware of personal rights that could lead to an increased resort to litigation. As the doctrine of strict liability becomes better known, both by the public and the legal community, it should be used more frequently. In the final analysis, however, the major social, cultural and institutional forces which shaped the doctrine of strict liability and control its application, remain intact and are not likely to change in the near term. If, for example, the social welfare programs undergo substantial reduction, strict liability may move closer to its counterpart in the United States. At the same time, it would be a curious development if the European Union adopted some of the more pernicious aspects of strict liability in the United States, at a time when some balance and sanity has begun to be restored to product law in this county.

As previously suggested, it is difficult to predict what the Commission will propose, let alone what ultimately will be adopted. For the reasons discussed herein, dramatic change, at least in the short run, is unlikely. This may disappoint those who view strict liability from a purely American perspective. To do so, however, ignores the uniqueness of the European social, cultural and institutional forces which shaped the introduction of strict liability into the European Union. Given the diverse, yet important, objectives which the Commission has set out to achieve since the Directive's inception, the enactment of moderate changes to the Directive would not be an irrational outcome.