

The Association recommends the Commission to investigate a system on North American lines whereby victims of accidents on the road or at work should receive compensation up to a moderate threshold and be free, if they choose, to pursue their civil remedy against a wrongdoer above that threshold.

The difficult questions for the Pearson Commission to answer are:

- 1 (a) Should fault continue to govern the amount of compensation available?  
(b) If so, does the law relating to liability and damages need modification and if so, in what respects?
- 2 (a) Is there a need for a special regime for any class or classes of accident or disablement?  
(b) If so, what form should it take and how much will it cost?
- 3 What will be the effect of any changes proposed on the vigorous development of accident prevention and rehabilitation measures?

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THE END OF CAVEAT EMPTOR?

by D J Walker

It may have escaped the notice of even the most enthusiastic Europeans that the Council of Europe has produced a draft Convention on Products Liability. The prospects, at the moment, are intriguing, not to say fascinating, for constitutional lawyers and the rest of us alike, since the Commission of the EEC, not to be outdone, has promptly produced a draft directive on the same subject (despite staunch protestations of co-operation and good communications on both sides). Since it is still possible that the results of the forthcoming referendum will take the United Kingdom out of the EEC it is anybody's guess which document, when it has finally evolved, will be adopted in this country.

Indeed, it is even possible that neither document will become the basis of this part of the law of England, since the Conventions of the Council of Europe are not binding upon member states, and our past record of adopting Conventions is to say the least, patchy. This will not, presumably, trouble those who feel, with some justification, that it would be preferable to retain the present law than to adopt a Convention in the form of the present draft.

The document, a copy of which follows this article, is admirably brief, but, as so often proves to be the case, brevity and "simplification" in law are likely to lead inevitably to greater scope for argument, increased case law and increased fees for the lawyers (I speak as a solicitor in private practice). Even Dr Golsong, the Director of Legal Affairs of the Council of Europe, at a recent meeting on this subject, made bold to say that the Council of Europe was a good friend of the lawyers! It should not pass unnoticed (albeit without further comment) that, as I am reliably informed, the grandiosely-entitled Committee of Experts held five meetings over a period of two years to produce Articles 2 to 9 of the Convention (the remainder of the Articles, as will be seen, are only suggestions by the Secretariat).

The scheme of the Convention is to place the primary responsibility for a defective product fairly and squarely upon the manufacturer - or manufacturers, if component parts are defective. Importers, and even distributors who have "caused their name, trademark or other distinguishing feature to appear on the product", are also liable in cases of death or personal injury (Article 3) - and, if Article 11 is adopted, damage to property - whereas manufacturers are afforded some very limited but somewhat amorphous defences in cases of damage to property.

It will be seen that, so far as English law is concerned, Article 2 (the first substantive Article), introduces an entirely novel form of strict liability. The criterion is not whether the product - which includes raw materials and "natural products" (sic) - is dangerous a la Rylands v Fletcher, but whether "it does not provide the safety which a person", (presumably our old and overworked friend on the Clapham omnibus) "is entitled to expect, having regard to all the circumstances (my emphasis) including the presentation of the product" (Article 2 (c)).

Article 2 is, perhaps, the most defective Article in the Convention and it seems a pity that the Committee of Experts did not adopt the principles they have expounded in the text and accept liability in damage for all the economic loss it is likely to cause.

The greatest difficulty created by Article 2 is that, in general, products are to be judged as at the point of sale, a point at which many manufacturers no longer have any control over their products. The only exceptions to this are those provided by Article 10, which relates solely to damage to property and contains the following interesting exclusion:-

"damage caused to property owing to the fact that the product does not fulfil the purpose for which it is destined".

Leaving aside, somewhat reluctantly, speculation upon the agency which is expected to decide the product's destiny, one can surmise that this clause could be deemed to exclude damage caused by the product exploding, leaking, toppling over (if its "destiny" was to stand upright), or simply collapsing.

One may further note that "all the circumstances" in Article 2(c) is an extraordinarily wide phrase, which, in this context, seems designed to encourage the introduction of red herrings and irrelevancies.

Next, it will be noted that the objective individual's expectation of safety is not limited to a reasonable expectation, and this, according to the explanatory memorandum of the Secretariat, was a deliberate omission.

The mischief of the sheer breadth of Article 2(c) is all the greater when it is realised that Article 8 forbids all contractual and quasi-contractual exclusion clauses.

The imposition of liability on the manufacturer, or "prime producer", may make it much easier for the party who suffers damage to sue and recover, as it is intended to do, but it will give rise to very serious and substantial injustices, which, it is submitted, ought not to be deliberately introduced into English law.

It is scarcely necessary to point out to the readership of this journal that very many manufacturers who sell their products in bulk to wholesalers neither have, nor can have, any control whatsoever over the product at this point of sale, even for such matters as packaging, display and advertising, and instruction for use. A particularly serious situation will arise for those producers of chemicals whose products are marketed through a chain of "middle-men", each selling to the next upon whatever contractual terms he cares to devise. Instructions for safe storage and usage may never reach the retailer, let alone the purchaser, and a third party claim against someone in the 'chain of distribution' is of little consolation to the manufacturer, especially if he has no direct contact with the offending party.

At first sight, Article 5 might appear to cater for manufacturers in this situation, but, on careful examination, it will be seen that any protection it appears to afford is illusory. In the first place, Article 5 1(a) can only relate to stolen goods, given

the very comprehensive definition of "put into circulation" in Article 2(d), and much of the protection afforded by 1(b), - which is presumably alternative to 1(a) - is promptly snatched back. The sudden quickening of the defence lawyer's pulse when he reads "having regard to all the circumstances, it is probable (my emphasis) that the defect which caused the damage did not exist at the time when the product left his control" suddenly slackens when he reads "liability..... shall not be reduced when the damage is caused by a defect in the product and by the act or omission of a third party". This will not avail manufacturers of a product which is intrinsically dangerous, although not when packaged, stored and used in the proper manner.

All may not be quite lost, however, as it might be possible to argue that the "defect", under this subjective test, did not "cause the damage" if someone in the chain of distribution ignores the manufacturer's warnings and conditions of sale. Moreover, it will be noted that Article 5.1. says that a producer "shall not be liable" rather than that his liability be reduced, and it would appear from the notes that the second paragraph was not intended to qualify the first, although the time has not yet come when our judges can refer to such notes to assist them in interpreting the written law.

Thus the principal shortcoming of the draft Convention lies in the fact that defectiveness is judged at the point of sale, and according to criteria which comprehend cases in which the manufacturer was in no way at fault, whilst he is, in most cases, the first in line to be sued, and is given insufficient safeguards against those whose act or negligence may have really been responsible for the damage.

Turning to Article 3, which deals with compensation for death or personal injury, paragraph (4) which provides that the manufacturer of a component part shall not be liable if he proves that a defect in that part did not contribute to the damage, gives to component manufacturers a defence which may also prove largely illusory in practice, especially having regard to the definition of 'defect' in Article 2(c). The worst feature of this paragraph is that the onus is on the manufacturer to prove that his component did not contribute - not to the defectiveness of the product - but to the damage. Thus the manufacturer of a perfectly good tin used as the pack for a cleaning fluid so defective that it subsequently explodes, is unlikely to find exemption here and, indeed, could well be liable for the whole of the damage with no redress against the fluid manufacturer.

Article 6 provides an apparently familiar 3 year limitation period which could, nevertheless, provide a regrettable complication in our recently simplified law of limitation by substantially extending the

period after death within which proceedings must be commenced, if the death can be said to have been the consequence of a 'defect' in a product. Moreover, in all cases time will not begin to run until the claimant is, or should reasonably have been, aware of all three of the following:-

- (a) the damage
- (b) the defect
- (c) the identity of the producer

and even the last-mentioned could take some little time to establish at any time, and particularly in view of the procedure specified in Article 3.3.

The limitation period is, in some cases, further complicated and restricted by Article 7, which limits claims to those becoming apparent within ten years of the product being put into circulation. This may be more important than appears at first sight when it is recalled that, by Article 2(d) a product is put into circulation when the producer has voluntarily relinquished it, and the effect of stockpiling is borne in mind.

In closing, one cannot forbear from comment upon the somewhat curious Article 11, which specifies that the provisions of 2, 3 and 4 of Article 3, and numerous other Articles, shall apply to Article 10. Save for the specified paragraphs of Article 3 this would seem to be otiose. However, one cannot help wondering why the Secretariat, having suggested Article 11, should omit from it any reference to Article 5.2, their own Article 12 (which is in direct conflict with Article 8 which the Committee of Experts have already adopted), and even the interpretation Article, Article 2!

One thing, at least, is clear from the draft Convention and that is that if a Convention in these terms is ever ratified by the United Kingdom, manufacturers and prime producers will face very large increases in their premium rates for products liability insurance.

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## DRAFT EUROPEAN CONVENTION ON PRODUCTS LIABILITY

### Preamble

The member States of the Council of Europe, signatories of this Convention,

Considering that the aim of the Council of Europe is to achieve a

greater unity between its Members;

Considering that there is a general trend of national case law towards greater liability of producers necessitated by a desire to protect consumers taking into account the new techniques and marketing and sales methods;

Desiring to ensure better protection of the public, but also taking producers' interests into account, particularly in respect of legal security and yet achieve a fair balance between the various interests;

Aware of the importance of introducing special rules on the liability of producers worked out at European level, since the question of liability of producers goes beyond national frontiers,

Have agreed as follows:

#### Chapter I - Duties of Contracting States and definitions

##### Article 1

1 Each Contracting State shall make its national law conform with the provisions of this Convention not later than the date of the entry into force of the Convention in respect of that State.

2 Each Contracting State shall communicate to the Secretary General of the Council of Europe, not later than the date of the entry into force of the Convention in respect of that State, any text adopted or a statement of the contents of the existing law which it relies on to implement the Convention.

##### Article 2

For the purpose of this Convention:

- (a) the expression "product" shall include all movables, natural or industrial, whether raw or manufactured, even though incorporated into immovables;
- (b) the expression "producer" indicates the manufacturers of finished products or of component parts and the producers of natural products;
- (c) a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product;

- (d) a product is "put into circulation" when the producer has voluntarily relinquished it.

Chapter II - Compensation for death or personal injury

Article 3

1 The producer shall pay compensation for death or personal injuries caused by a defect in his product.

2 The importer of the product and any person who has caused his name, trademark or other distinguishing feature to appear on the product shall be liable as a producer.

3 When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be liable according to this Convention unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product.

4 Where there are several producers of the same product each shall be liable in full (in solidum). However, the producer of a component part of a product shall not be liable if he proves that a defect in that part did not contribute to the damage.

Article 4

1 If the injured person or the person suffering damage has by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.

2 The same shall apply if an employee of the injured person or of the person suffering damage has, in the scope of his employment, contributed to the damage by his fault.

Article 5

1 A producer shall not be liable under this Convention if he can prove:

- (a) that the product had not been put into circulation by him;
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product left his control or arose after it was put into circulation.

2 The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party. The act or omission of an employee of the producer acting in the scope of his employment shall never constitute a defence.

#### Article 6

Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer.

#### Article 7

The producer shall not be liable under this Convention if the injury has become apparent more than ten years after he put into circulation the actual product causing the damage.

#### Article 8

The liability of the producer under this Convention cannot be excluded or limited by any exemption or exoneration clause.

#### Article 9

There are left to the law of each Contracting State:

- (a) the heads of damage and the form of compensation;
- (b) the liability of producers both inter se and with any other person.

### Chapter III - Damage caused to property

#### Article 10

The producer is liable for damage caused by a defect in his product to property and the resulting economic loss. There are however excluded from this Convention:

- (a) damage caused to the product itself;
- (b) damage caused to property owing to the fact that the product does not fulfil the purpose for which it is destined;



- (c) damage caused to a finished product by a component part;
- (d) economic loss resulting from damage referred to in (a), (b) and (c) above.

#### Article 11

The provisions of Article 3 paragraphs 2, 3 and 4, of Article 4, of Article 5 (1), of Article 6, of Article 7 and of Article 9, apply mutatis mutandis to damage referred to in Article 10.

#### Article 12

There should be left to the law of each Contracting State:

- (a) the possible limitation of the amount of compensation;
- (b) the possibility of avoiding or limiting the liability of a producer by exclusion or limiting clauses.

#### Chapter IV - Final provisions

#### Article 13

1 This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2 This Convention shall enter into force six months after the date of deposit of the third instrument of ratification or acceptance.

3 In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force six months after the date of the deposit of its instrument of ratification or acceptance.

#### Article 14

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite non-member States to accede.

2 Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect six months after the date of its deposit.

### Article 15

1 Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory to which this Convention shall apply.

2 Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3 Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 17 of this Convention.

### Article 16

1 No reservation shall be made to the provisions of this Convention except that mentioned in the Annex to this Convention.

2 The Contracting State which has made the reservation mentioned in the Annex to this Convention may withdraw it by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

### Article 17

1 Any Contracting State may, insofar as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

### Article 18

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

(a) any signature;

- (b) any deposit of an instrument of ratification, acceptance or accession;
- (c) any date of entry into force of this Convention in accordance with Article 13 thereof;
- (d) any reservation made in pursuance of the provisions of Article 16, paragraph 1;
- (e) withdrawal of any reservation carried out in pursuance of the provisions of Article 16, paragraph 2;
- (f) any communication received in pursuance of the provisions of Article 1, paragraph 2, Article 15, paragraphs 2 and 3;
- (g) any notification received in pursuance of the provisions of Article 17 and the date on which denunciation takes effect.

In witness whereof, the undersigned being duly authorised thereto, have signed this Convention.

Done.... in English and in French, both texts being equally authoritative, in a single copy, which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the Signatory and acceding States.

#### ANNEX

Each of the Contracting States may declare, at the moment of the signature or at the moment of the deposit of its instrument of ratification or acceptance of the Convention, that it reserves....(1).

- (1) NB Pro memoria - Two delegations stated that their governments might decide to reserve themselves the right to limit the amount of compensation for injury to persons in the case of "development risks" i.e. in the case of injury resulting from a cause which could neither be foreseen nor avoided, taking into account the state of scientific knowledge at the time the product was put into circulation.