or perhaps unfortuitous), external visible and violent. If, however, a personal accident policy defined the payment of benefits by reference to injury resulting from an accident, then it could never be said that the contraction of AIDS resulted from a distinct accident in the sense that the event was unlooked for, even though the contraction might also satisfy the terms violent, external and visible. My clients' policies all have the expression "injury resulting from accident caused by violent, external and visible means".

Even though insurers in the United Kingdom and lawyers in the United Kingdom do not enjoy the benefits of workers' compensation legislation, it is hoped that some features of the system will be of interest to insurers generally.

THE E.C. PRODUCTS LIABILITY DIRECTIVE

To most people's surprise the seemly dormant volcano in Brussels suddenly poured forth on 25th July 1985 the so-called "Council's Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products". The first draft had been put forward by the Commission on 9th September 1976.

Now that the Directive is a reality, a reality which will lead to new legislation in the United Kingdom by July 1988, one can perhaps look back and identify a gratual trend in certain European countries at least from the traditional concept of liability based on fault towards strict liability.

In England we have progressed from a requirement on the plaintiff to establish fault to a presumption of negligence in

certain cases under application of the res ipsa loquitur doctrine. In France Article 1384 of the Civil Code, which establishes the liability of a person who has control over a product, has been applied by the courts in such a way that fault under certain circumstances will be presumed, thereby leading to a reversal of the burden of proof. Within the European Community it is, perhaps, in the Federal Republic of Germany where the most intersting developments have taken place. In 1968 the Federal Supreme Court handed down a decision which established that where an industrial product which is used for the purpose for which it was intended causes injury or damage to property, then the burden of proof is reversed with the consequence that it is then up to the manufacturer of the product to establish that he was not at fault in manufacturing the product. In 1978 the West German Parliament introduced the Pharmaceuticals Act which, following the Thalidomide/Contergan tragedies went so far as to introduce strict liability in respect of pharmaceutical products which cause death or injury. Financial limits were established under this statute, namely DM200,000,000 per drug - not per event or occurrence - or DM12,000,000 per drug whenever annuities are paid. This Act does not allow for a "State of the Art" defence i.e. even if the drug, at the time it was marketed, had been tested and found to be safe according to the state of scientific and technological developments at the time, should it later prove to be defective then the manufacturer is liable. Another interesting aspect of this statute is that it introduced compulsory insurance in respect of the liabilities which it created.

Moving outside Europe we find that in 1980 Israel passed its "Defective Products Liability Law" in 1980. This provides that: "A manufacturer shall be liable to compensate any person who incurs bodily injury as a result of a defect in a product manufactured by such manufacturer... and it shall be immaterial whether or not there was fault on the part of the manufacturer." Unlike the German Pharmaceuticals Act this Israeli statute does include a "State of the Art" defence.

The United States, of course, has known strict liability since the decision of the Supreme Court of California in Greenman v. Yuba Power Products in 1962 but in the United Kingdom, despite recommendations by the English and Scottish Law Commissions in June 1977 and in the Pearson Report in 1978 there has been no particular movement towards the introduction of a regime of strict liability.

THE PROVISIONS OF THE DIRECTIVE

The theme underlying the Directive is the harmonisation of the laws of the Member States so that the citizens of each Member State will be subject to the same laws and have the same rights as citizens in other Member States. Unfortunately, however, the Directive falls far short of this goal insofar as it grants Member States the right, in certain circumstances, to derogate from its provisions and so the degree of harmonisation actually achieved is rather more limited than many people had wished for.

The Directive opens with a simple statement in Article 1 to the effect that the producer of a product is liable for damage caused by a defect in his product. As the definition of producer includes any person who imports a product into the Community for sale, hire, leasing or some other form of distribution in the course of his business, the Directive is obviously not restricted to products which are manufactured in the Community.

Article 2 defines what a "product" is. This term includes all movables, even where they are incorporated into another movable or immovable. Primary agricultural products and game are excluded from the definition although Article 15 gives a Member State the right to derogate from this provision by introducing a law which includes primary agricultural products and game within the definition.

With regard to who the "Producer" of the product is the Commission has cast its net very wide. Not only does it include the importer of the product but also the manufacturer of the final product, the producer of any raw material or component, any person who puts his name on the product and thus holds himself out to be the producer and any supplier of the product where the actual producer can not be identified unless such supplier informs the injured party of the identity of the producer or of his own supplier.

A product is deemed to be defective, according to Article 6, when it does not provide the safety which a person is entitled to expect taking into account the way in which it is presented, the use to which it could reasonably be expected to be put and the time it was put into circulation. A product is not considered defective just because a better product has subsequently been put into circulation. Therefore, a car without safety belts and a refrigerator with a catch as opposed to a rubber-pad suction system of closing are not considered to be defective just because industry has in the meantime developed more modern and safer versions.

This Directive establishes a regime of strict liability as opposed to absolute liability. Therefore it contains certain provisions which release the producer of a defective article from liability if certain circumstances are present. By far the most significant of these cases is contained in Article 7 (e) which relieves the producer from liability if he establishes "that the state of scientific and technological 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." This is, of course, the much debated "State of the Art" defence.

During the nine year gestation period of this Directive there has been a lot of debate and lobbying about this defence. Consumers have demanded that it should not be included on the grounds that if a product causes damage then the producer

should be made to compensate the injured person even if he could not be faulted in any way with regard to his pre-marketing research, development and testing activities. Industry, on the other hand, has asserted that without the defence innovation would be stunted and especially the automobile industry has continued over the years to make very strong representations along these lines. The outcome of all the lobbying was a compromise. Article 15(1)(b) gives each Member State the right to derogate from this defence i.e. by introducing legislation in which it is specified that the producer shall be liable even if he proves that, according to the "State of the Art" at the time the product was put into circulation, a defect could not be discovered.

The commission is clearly very concerned about this whole question and Article 15(3) goes on to state that the Commission must report to the Council after ten years on the working of this "State of the Art" defence and any derogations therefrom.

The whole situation is, however, rather unsatisfactory. On the one hand the underlying philosophy of the Directive is to harmonise the laws of the Member States "because the existing divergencies may distort competition... and entail a differing degree of protection of the consumer against damage caused by a defective product", whilst on the other hand Article 15 (1)(b) creates a situation which positively invites divergencies in the approach to the question of liability for defective products. The fact of the matter is therefore that producers in some states will be at a great disadvantage as against producers in certain others.

Article 8 contains a contributory liability provision in those cases where damage is due not only to a defect in the product but also to the fault of the injured person or of any person for whom he is responsible. However, where the damage is due to the defective product and the act or omission of a third

party as opposed to that of the injured person then the producer is not relieved of his liability. The injured person has his right to compensation and it is then up to the producer to take whatever steps he can to obtain contribution from the person who is partially responsible for the damage.

Another area of debate was whether the concept of "damge" should be restricted to death and bodily injury or also include property damage. As it is Article 9 defines "damage" as being both personal injury and also property damage, but the latter only in such cases where the property damage is of a type ordinarily intended for private us or consumption and was used by the injured person mainly for his own private use or consumption. Damage to large commercial items of property appear therefore not to be covered.

On the question of pure economic loss Article 9 goes on to say that its provisions "shall be without prejudice to national provisions relating to non-material damage". It will therefore be a question of time as to whether the principles developed in the field of negligence in Junior Books v. Veitchi and, more recently, in Muirhead v. Industrial Tank Specialities Limited will be extended to the field of strict liability.

The period of limitation established by the Directive is three years from the day upon which the plaintiff became aware or should have become aware of the damage, the defect and the identity of the producer. Article 11 then goes on to establish a final "cut-off" ten years from the date the product was put into circulation.

Exemption clauses will not help the producer of a defective product. Article 12 clearly lays down that the producer of a defective product shall remain strictly liable, so long as the relevant conditions are fulfilled, despite any provision which he might have imposed with regard to the defective product.

Yet another point which has been debated at very great length over the past nine years is the question of possible financial limits. The German Pharmaceuticals Act of 1978, as we have seen, does contain upper limits but all we have in this Directive, in Article 16, is a provision that a Member State may introduce a minimum limit of liability amounting to not less than 70,000,000 ECU (approximately £40,000,000). This means, incidentally, that the limit of liability under the German Pharmaceuticals Act of DM200,000,000 (approximately £60,000,000) may still stand.

As in the case of the "State of the Art" defence the Commission is clearly very interested to see how things develop with regard to this limit of liability situation. It is therefore provided that the Commission shall report to the Council of Ministers on the effect on consumer protection of this Article and the Council is even given the specific right to repeal the limit of liability provision if it so decides in the light of the report. The report by the Commission is to be submitted ten years after the date of notification of the Directive.

THE DIRECTIVE IN PRACTICE

In November 1985 the DTI published a consultative document on proposed changes in our laws relating to liability for defective products and there is obviously going to be a lot of debate within the United Kingdom over the course of the next couple of years as we move towards the introduction of legislation which will implement the provisions of the Directive.

For the moment, however, one can perhaps make the following observations:

1. The degree of hamonisation achieved by the Directive is not as great as had been hoped for. This is obviously the result of the Commission having to yield to the demands of

certain Member States who would doubtless have refused to compromise at all if certain concessions had not been made.

2. The Commission has reserved the right to review certain key aspects of the working of the Directive after ten years, obviously with a view to taking steps which will hopefully lead to a greater rather than a lesser degree of harmonization. The two chief points of concern here are the "State of the Art" defence and the question of limits of liability.

3. The Directive will doubtless lead to an increased awareness amongst consumers as to what their rights are and it must therefore be expected that this increased awareness will lead to an increased volume of actions for compensation.

4. There is a very wide range of persons caught by the definition of "producer" and this means that it should be relatively easy for a person who has suffered damage to find a defendant and start an action. The fact that the range of persons caught by the definition will be so wide will doubtless mean that in some cases a relatively innocent party in the chain of distribution is held liable to pay damages and it may not be particularly easy for that party to take steps to obtain either contribution or full compensation in turn from the party who was actually liable for the presence of the defect in the product.

5. "Producers" are obviously going to have to be very careful about how their products are marketed and will have to pay close attention to such matters as advertising and the directions for use. However, the much-reported products liability cases in the United States should already have put the great majority of producers well on their guard in this respect.

6. Bearing in mind the fact that the Commission is required to report on certain specific aspects after ten years and on the general application of the Directive every five years we will obviously be hearing a lot about the Directive and the effects it is having over the coming years. Unlike a Directive which requires implementing legislation and then leaves it to each Member State to proceed with the job this Directive promises to be a rather more alive and dynamic creature. But then bearing in mind that this whole field of liability for defective products is so sensitive world-wide it is probably not unwise for the Commission to keep its finger on the pulse for at least many years to come.

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