I have some sympathy with this view, but, on balance, I think it is wrong. Any Solicitor who has the least experience of acting for Insurers cannot fail but be horrified by the shameful ignorance of Court procedure shown by many Solicitors acting on behalf of Plaintiffs. This, in my opinion, is the main reason for unacceptable delay in personal injury litigation. I cannot see that the alternative suggestion put forward by the National Consumer Council would have much effect. That is to allow those Solicitors with proven expertise in personal injury litigation to advertise this fact. Two of the more disappointing aspects of being a Solicitor are (1) that so many Solicitors are prepared to take on work for which they are simply not qualified and (2) that so many Clients take less care in choosing an appropriate Solicitor for an appropriate task than they would in choosing a cabbage at a greengrocer on the completely incorrect assumption that all Solicitors are qualified to do everything. The insistence by the authorities of an equivalent qualification to F.R.C.S. or M.R.C.P. would, in my opinion, do very much to alleviate this problem.

I confess to being rather ambivalent about the proposals to reduce the limitation period and the National Consumer Council rejects this proposal on the grounds that they do not wish to see any change which makes claiming damages for personal injuries more difficult and on the grounds, also, that were long delays to occur it is often because victims are unaware of their rights or do not realise the long-term effects of their injuries. The Lord Chancellor's Review is also circumspect. They recognise that "ample allowance would need to be made for latency of injuries, the possibility of negligence by a Plaintiff's Solicitor and the extension of the period for other valid reasons." My own view is that there would be such a plethora of such claims that the reduction in the limitation period would probably be more trouble than it was worth. The difficulties encountered by the Courts in operating the present three-year system are ample evidence of that!

(To be continued.)

On 18 November 1986 we opened our 1986-87 series of lunchtime talks with a presentation entitled

"THE PRODUCT LIABILITY DIRECTIVE: TO BE OR NOT TO BE OR MUCH ADO ABOUT NOTHING."

This talk, given to another full house in Committee Room A at the ILU, 49, Leadenhall Street, London EC3, was by John G. Cowell, Deputy Secretary General of the Comité Européen des Assurances.

This is the full text of his talk, which has in the meantime assumed greater significance with the publication of the Consumer Protection Bill.

1. INTRODUCTION

There are four points I should like to emphasize at the outset. (1)

First, the directive is not so much a consumer protection measure as a citizens protection measure – covering, as it does, product accidents at home, at play, and, as far as bodily injuries are concerned, at work.

Second, by making it more difficult for the producer to avoid liability, the directive should encourage greater attention to loss prevention and loss control. (2)

Third, by reducing disputes on liability, the directive should, in the long run, have a beneficial effect on insurance costs.

Fourth, in the short term, problems of interpretation and application may, in certain circumstances, have to be referred to the Court of Justice in Luxembourg.

In the final analysis, however, much of the opposition which has surrounded the directive in its slow progress from its first draft in 1974 to its final adoption in 1985 may turn out, in Shakespeare's words, to be nothing more than "a tale told by an idiot, full of sound and fury, signifying nothing".

Let me say here what I do not intend to do.

I do not intend to discuss the American liability crisis which is very largely the product not of strict liability itself but of the system in which strict liability operates.

Nor do I intend to discuss the liability exposure of European exporters and subsidiary companies in North America.

American influence on European thinking on product liability reform has, in fact, been greatly exaggerated. (3)

What shall I do – or, more correctly, what I shall try to do – is to look at the community directive in a strictly community context.

And, in this sense, I must say I am firmly convinced the directive is home-made.

It is, if you like, a European product – not an American import, imposed on an unwilling European Community.

Its roots lie firmly in Europe and in our common European experience, particularly in France, in the field of product liability.

In France, in particular, we have seen over the years the courts progressively blurring the traditional distinction between:

– contractual liability and

– extra-contractual liability.

In other words, French jurisprudence (followed to a greater or lesser extent by jurisprudence elsewhere in the European Community) has tended in recent years to do two things.

First, to shift liability from the professional seller to the producer.

Second, to place the buyer and other users of a defective product on the same footing before the law. (4)

And it is French jurisprudence, with its virtually irrebuttable presumption of fault, which, more than anything else, is reflected in the directive adopted by the Council of Ministers of the European Community on 25 July 1985 (85/374/EEC).

(1) Views expressed in this paper are those of the author and, unless clearly indicated, do not necessarily represent those of the CEA or its member associations.

(2) See my paper on prevention and insurance in civil liability, International Chamber of Commerce, Lisbon, 1985.

(3) For an overview of characteristics peculiar to the US see my paper "Caveat America, Caveat Europa", International Chamber of Commerce, Paris, 1986.

2. EFFECTS OF THE DIRECTIVE

Insurance is not mentioned in the directive yet the directive is predicated on the *availability and affordability* of product liability insurance in the European Community following the implementation of the directive in national law not later than 30 July 1988 (art. 19).

What we should, perhaps, stress here once again is that we are speaking of the insurance of the producer in respect of *products circulating within the European Community* and not insurance in respect of European firms exporting to or operating in the United States – even though the shockwaves of the present liability explosion in America cannot fail to be felt in Europe. (5)

(4) For developments in French law see proceedings of AIDA 1986.

(5) Certain other persons, e.g. the importer or, in certain circumstances, the supplier, are assimilated to the producer (art. 3).

One factor which must engage our attention is the degree of uncertainty which is the product of the compromise agreement of 1985 without which, for better or worse, there would have been no directive.

3. PRINCIPLE OF LIABILITY INDEPENDENT OF FAULT OF THE PRODUCER

The directive lays down on a community basis the principle of liability of the producer independent of any fault on his part.

The producer (art. 3) will be liable (art. 1) for damage (art. 9) caused by a defect (art. 6) in a product (art. 2) put into circulation after the directive comes into force in member states (art. 17) (6)

Defect is defined (art. 6) as the absence of that safety which a person (the mythical reasonable man or woman) is entitled to expect based on safety expectations at the time the product was put into circulation by the producer (art. 3) – not safety expectations at the time of damage or at the time of claim.

The directive covers both damage to persons (art. 9a) and, subject to a "lower threshold of 500 Ecu", damage to private property (art. 9b).

It covers, for examples, damage to persons not only at home or at play (domestic accidents) but also at work (workplace accidents).

But it excludes damage to property not "ordinarily intend for" and not used "mainly" for private use or consumption (art. 9b). (7)

It is for the "injured person" (art. 4) to show the damage, the defect and the causal link between damage and defect.

"Damage" and "defect" are defined (art. 9 and 6): "causal link" is not.

It is for the producer in question to show, among other things, that the injured person contributed to his or her own damage (art. 8) or that the defect did not exist or was not discoverable at the time the product in question was put into circulation (art. 7). (8)

(6) Community jurisprudence has determined that the directive will have direct effect in national law in the absence of the necessary implementing legislation after 30 July 1988 (see Commission reply to Written Question No. 1545/85 in OJ C62 or 17.3.86).

(7) Non-material damage will continue to be governed by national law provisions (art. 9).

(8) In cases involving more than one producer, liability will be joint and several (art. 5).

The question of uncertainty arises once again not only with the interpretation of "causal link" but also with the way legislators and courts are likely to interpret the defences open to the producer.

All of which is good news for the lawyers...

What I think is clear here is that the effects of the directive will be greater in some member states than in others.

And we should remember that the directive is concerned with extra-contractual or delictual (tortious) liability where differences between member states are most apparent.

We need only remind ourselves, for example, of:

- the common law system in the United Kingdom with its requirement on the plaintiff to prove fault of the producer and

- the civil law system in France with its presumption of fault on the part of the producer.

But even in France which, by general agreement, is thought closest to the regime proposed by the directive, *media attention* surrounding its implementation is expected to lead to an increase in the number of claims – not in the number of product accidents.

This, of course, is the objective of the directive to make possible the payment of claims where previously this would have been impossible.

All this will cost money – and the money will have to be found somewhere.

Meanwhile, the question of uncertainty is complicated by the fact that the focus of attention has shifted from Brussels to the member states where the political complexity of the national legislature must inevitably influence the transposition of the directive into national law.

And this is further aggravated by the fact that member states are free to opt. in accordance with community procedures:

a) for an extension of liability to include liability for primary agricultural and game products (art. 15.1a) and development risks (art. 15.1b)

b) for a monetary limitation of liability (art. 16.1).

The trouble is, of course, that these options (without which the directive would not have been adopted) do exactly what the directive was intended to avoid, namely, encourage differences between member states and, as a consequence, forum shopping.

In this sense, the directive has effectively abandoned any hope of approximating national law on key points – something which could emphasize rather than reduce differences between member states in the transitional period up to 1995.

4. OPTION ON PRIMARY AGRICULTURAL AND GAME PRODUCTS

The directive presently excludes liability for primary agricultural and game products (art. 1) – thanks to the efforts of the powerful European agricultural lobby whose votes still count in member states like France and Germany.

Primary agricultural products are defined as products which have not undergone "initial processing". And the third preamble explains that this should be understood as "processing of an industrial nature which could cause a defect in these products".

Where does this leave, for example, large-scale spraying of pesticides, insecticides and fertilisers?

The chances are that the farming lobby will be successful in resisting any attempt to extend liability to include primary agricultural and game products – something which may well encourage litigation in the early years after 1988.

It remains to be seen whether the industry lobby will be equally successful in resisting attempts by consumers to extend liability to include the so-called development risk.

5. OPTION ON DEVELOPMENT RISKS

More discussion, more heat, has been generated about the development risk than about any other aspect of the directive.

So much so that one cannot help feeling sometimes that there is indeed "much ado about nothing".

The text of the directive provides that the "producer shall not be liable as a result of this directive if he proves (...) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered" (art. 7e).

Now what does this mean?

The view of the Commission is clear. A distinction must always be made between:

- latent defects: (unsafe qualities) which are present but unknowable at the time the product was put into circulation and

- subsequent defects which can only be attributed to the product at a later date in the light of improved knowledge after the product in question was put into circulation. (9)

An example of the latent defect is the pharmaceutical product whose harmful qualities only become apparent after a lapse of many years – something which would rule out late claims which risk being time-barred under the ten-year rule on the extinction of liability (art. 10).

An example of subsequent defect is the two-point car seat belt which was considered perfectly safe according to the state-of-the-art at the time it was put into circulation but is subsequently shown to be defective in the light of improved technical knowledge which favours the three-point seat belt.

Subsequent defects are wholly excluded from the directive. Latent defects are excluded to the extent that the producer can avail himself of the defence under art. 7e.

I am not at all sure that this distinction has necessarily been reflected in discussion in Parliament or, for that matter, in the DTI explanatory and consultative note (November 1985).

The industry view, as expressed in the note (para. 21), is that "it would be wrong in principle, and disasterous in practice, for businesses to be held liable for defects that they could not possibly have foreseen".

I am not sure what evidence there is for such a sweeping assertion but HMG clearly shares the industry view (according to a preliminary analysis of the Consumer Protection Bill announced in the Queen's Speech on 12 November 1986 and published on 20 November 1986).

Now the idea that it would be unfair to make producers liable for defects they could not have foreseen may cause wry smiles among insurers – not least because the question of foreseeability goes to the heart of the matter.

(9) See my paper on development risks, Rijksuniversiteit, Cont, 1984

The idea of excluding liability for risks that cannot reasonably be foreseen does, to say the very least, raise questions about the basis of liability insurance which excludes events which are neither accidental nor unforeseen!

The inclusion or the exclusion of liability for development risks is, of course, a political decision which affects all sectors of the community.

The position of insurers on this matter is a delicate one which merits careful consideration.

This is why I use my words advisedly when I say that CEA, as the representative organisation of professional insurance associations at a community level, has never argued in favour of liability for the development risks but has always said that if governments feel that producers should, in the interests of improved consumer protection, be liable for the development risk, then insurers could expect to be in a position to offer cover, subject to an appropriate premium loading which would be left to the appreciation of the individual underwriter (see CEA doc. MC 14.769 – 3/86 and MC 14.523 – 10/85).

The CEA position on this point has always been clear. The development risk is, by definition, an *unknowable risk* and, therefore, an *unquantifiable risk* (doc. MC 14.769).

But – and I think this has to be said with respect to our friends in industry – the fact that a risk is *unknowable* (in the sense of one which is outside the normal parameters of risk assessment) does not mean that it is necessarily *uninsurable*.

The fact that CEA has indicated to the Commission that development risks are not, in themselves, uninsurable, does not mean that CEA has ever given a blanket committment on behalf of European insurers to offer development risk cover in each and every case.

What it means is that insurers will continue to exercise freedom to accept or decline risks as at present.

There will obviously be cases where insurers will neither refuse cover or will wish to impose special terms: in this sense there will be no charge in current practice.

There may even be cases where a producer with a poor track record may be unable to buy cover – not altogether a bad thing if it helps to keep defective products off the market. (10)

(10) Something which appears to have happened in France according to information at Sorbonne symposium on product liability, Paris, 1986.

I think we need to be clear on one point here.

The inclusion of development risk liability is likely to have a greater initial impact on insurance costs in a country like the United Kingdom which has clearly lagged behind legal developments in France and elsewhere.

But even if insurance costs do go up these will have to be carried, in the final analysis, by the consumer – and the consumer, through his representative organisations, has indicated that he is willing to pay the price of improved protection.

The value of the development risk defence may, in fact, have been seriously over-estimated by producers' representatives.

I would even go so far as to say – and this is a personal view – that the option under art. 15.1b may create less uncertainty than the present wording of art. 7e since the availability of the development risk defence may encourage producers to resist claims where, in fact, there are no real grounds for doing so.

Insurers' files, incidentally, reveal no cases where the development risk has so far been used as a successful defence. (11)

We should remember that liability for the development risk already exists in France and, to some extent, in Belgium (case law) – and is not excluded from the standard product liability policy.

Liability for the development risk also exists in the Federal Republic of Germany (statute law) – and is covered by compulsory insurance backed up by a special pooling arrangement.

And liability for the development risk equally exists in the United Kingdom (Sale of Goods Act) – and is covered without fuss or add under the standard public liability policy.

(11) Two cases may be cited here in support of the Commission's view that there are no known cases of the true development risk: DES (Diethylstilbestrol) and Thalidomide (Disterval). In both cases, the Commission argues the harmful qualities were known long before they were put into circulation (doc. MC 14.769 – 3/86)

To summarise what we have said so far.

Industry in France and Germany has long learned to live with liability for the development risk – and is certainly far from being at a competitive disadvantage compared to the United Kingdom.

And there are no indications of any serious differences in insurance costs between France and Germany, on the one hand, and the United Kingdom, on the other (doc. MC 14.422 – 7/85)

Even in the absence of development risk liability in the United Kingdom a British producer could well find himself requiring extended liability insurance in countries like France or Belgium which are likely to opt for the deletion of the development risk defence.

6. OPTION ON A MONETARY LIMITATION OF LIABILITY

In principle, liability under the directive is unlimited – this does not imply, of course, unlimited insurance cover (doc. MC 13.045 – 3/83).

Insurers in CEA have always argued that a distinction must continue to be made between:

– limits of liability (legal limits) and

– limits of indemnity (insurance limits).

The directive allows member states to opt for a limitation of the liability of the producer for damage to persons (but not for damage to property) in an amount which may not be less than 70 million ECU for damage "caused by identical items with the same defect" (art. 16.1).

This option was included in the directive on the insistence of the Federal Republic of Germany which, almost alone in the European Community, sees a monetary limitation of liability as the necessary corollary of liability independent of fault.

The option may, in fact, cause more problems than it solves. (12)

(12) The option may well stimulate exaggerated claims and, therefore, higher insurance costs (doc. MC 14.769 – 3/86).

Apart from the problem of knowing what is meant by "identical items with the same defect", no one can say how insurers should go about settling mass claims where the limit of liability could easily be exhaused, e.g. by a large pharmaceutical or aviation claim.

Insurance limits must continue to be negotiated freely between insurer and insured – something which becomes very difficult where all parties are aware of a legal limit which may be more than adequate for some industries and quite inadequate for others (doc. MC 8.790 – 9/75).

It may be, however, that this discussion is rather academic – since the majority of states are likely to adopt the directive as it stands.

The likely exceptions:

- Germany for a limitation of liability and the inclusion of development risks for pharmaceutical products;

- France, Belgium and Luxembourg for the inclusion of development risks for all products... (13)

The Commission is required to report to the Council in 1995 on the advisability of abolishing any exclusion of the development risk (art. 15.3) and any limitation of liability (art. 16.2) in the light of their impact on consumer protection in the period 1985-1995.

7. INSURANCE

Insurers and insureds are naturally concerned about the likely effect on insurance costs of the implementation of the directive in national law.

And there is no doubt that insurance costs will go up – although how far they will go up is anyone's guess at the present time.

(13) Only three countries (Denmark in April 1986, The Netherlands in September 1986 and the United Kingdom in November 1986) have so far published draft laws. The Danish and British proposals offer an alternative means of redress (in accordance with the provisions of art. 13) but the Netherlands proposal to incorporate the terms of the directive in the revised Civil Code suggests that only one means of redress will be available in that country.

But I think we must keep in mind the fact that the purpose of the directive is to spread the net of compensation wider.

Claims will have to be paid which previously might well have remained unpaid. And even those claims which are subsequently declined (e.g. because of the absence of a causal link between damage and defect) will have to be defended.

At present the majority of claims in all member states are settled out of court. And there is no reason to suppose that this will not be the case once the directive has become law and once the initial flurry of litigation regarding its interpretation has died down.

Insurance costs will continue to be passed on to the consumer – but the effect of any increase on unit costs will be measured in pennies rather than pounds.

Compared to the cost of labour and raw materials, any increase – and we have to anticipate an increase even in the absence of liability for the development risk – will, in fact, be minimal, particularly at the level of the primary layer.

The fact remains, however, that it is quite impossible in 1986 in the highly-competitive conditions of western Europe where every underwriter is looking over his shoulder to see what his competitor is doing, to make any meaningful forecast on a community basis of likely increases in 1988.

Attempts to make insurers do so may well backfire with insurers feeling obliged to err on the side of pessimism.

It may well be that the move away from cash-flow underwriting, the hardening of rates and the drying-up of surplus capacity (or, more correctly, the drying-up of excess reinsurance capacity), particularly in the United States, may have a salutary but beneficial effect in Europe where neither insurer nor insured has an interest in maintaining volatile markets which lack long-term stability.

We can, however, be sure of one thing.

The good times are over.

The days of cheap liability cover are behind us. And insurance buyers are complaining bitterly that they are having to pay much more premium for much less cover.

But it can be argued that until recently liability rates had been kept artificially low by unbridled competition.

Current difficulties are, at least in part, the result of action by the insurance buyer who has contributed to the very crisis of which he now complains.

He has, in fact, been only too ready to buy more cover than he has really needed at the cheapest possible price – and so contributing to mounting underwriting losses and excessive reliance on investment income.

8. CONCLUSION

My own view is that the system of liability under the directive can be expected, in the long term,

- to have a beneficial effect on insurance costs by eliminating disputes over who is liable and

- to speed up the settlement of claims by enabling the injured person to address himself, in normal circumstances, to a single person – the producer.

I think we must keep things in perspective. We should not, for example, use the implementation of the directive in national law as an excuse for increasing premiums which have been kept artifically low by what we can only describe as cut-throat competition – economic darwinism gone wild.

And I believe that we must ensure that insurers recognise their wider responsibilities to the community at large which go beyond (but do not necessarily conflict with) their obligations to their policyholders, their shareholders or their employees.

This, it seems to me, is particularly true of liability insurance where insurers have a very real duty to third parties not only to pay claims that are justified but to pay them both speedily and efficiently.

And that, I believe, is the very purpose of insurance.