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A DUTY TO WARN: ONE AMERICAN VIEW OF THE EC PRODUCTS LIABILITY DIRECTIVE

By ANITA BERNSTEIN

European Community Directive 85/374, titled "On the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,"¹ is known as a strict liability measure, although the phrase "strict products liability" or "strict liability" does not appear in it. Instead, "liability without fault on the part of the producer" signals its message. A detailed Preamble announces goals and explains substantive choices, later detailed in specific articles. Major provisions include a "development risks" defence (the exoneration of manufacturers for damage caused by defects unknowable to them at the time of production) as well as definitions of "producer" and "defective product," and a cap on damages.² The Commission has applied a familiar but ambiguous term, harmonization, to this effort.

Writers of academic commentary agree that the Directive brings the twelve sovereigns together in key. An expanding literature³ describes the major differences among the existing national laws, explains the need for unification, and details some of the prior debates over substance. The chords progress. Voices of experience echo the themes of melody and resolution.⁴

The sounds from European Community nations themselves, however, have been discordant in the years since the Directive was promulgated. Most nations failed to adopt a conforming statute before the 1988 deadline.⁵ Other countries passed statutes that the European Commission decided were nonconforming.⁶ As I write, more than two years after the deadline, the Community has won

1. 28 O.J. Eur. Comm. (No. L 210) 29 (1985) [hereinafter cited as Directive].
2. See Directive, *supra* note 1, art.7(e) (development risks); arts.2, 3, 6 (definitions); art.16 (1) (cap on damages). Member states are free to accept or reject the damages cap and the development risks defence.
3. See Orban, *Product Liability: A Comparative Legal Restatement - Foreign National Law and the EEC Directive*, 8 GA. J. Int'l & Comp. L. 342 (1978); Fagnart, *La Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits*, Cahiers De Droit Europeen 51 (1987); Shettler, *Products Liability: A Comparison of U.S. and EEC Systems*, Syr. J. Int'l L. & Comm. 155 (1986); Ghestin, *La Directive Communautaire du 25 Juillet sur la Responsabilité du Fait des Produits Defectueux*, D.S. Jur. 135 (1986).
4. See Thieffry, Van Doorn & Lowe, *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 Tort & Ins. L.J. 65 (1989) [hereinafter cited as Thieffry]; Taschner, *Product Liability in Europe*, in EEC Strict Liability in 1992, at 85 (Practising Law Inst. 1989) [hereinafter cited as EEC Strict Liability]; Bourgoignie, *Where We Stand on Product Liability*, 32 Beuc News 7, 10 (Feb. 1984). The English Law Commission, the Scottish Law Commission, and the Royal Commission on Civil Liability and Compensation for Personal Injury have all endorsed the harmonization goal of the Directive. See Stapleton, *Product Liability Reform - Real or Illusory?* 6 Oxford J. Legal Stud. 392 (1986).
5. Member states were ordered to implement the Directive within three years after July 25, 1985. As of August 1, 1988, Belgium, Denmark, Ireland, France, Germany, Luxembourg, the Netherlands, Portugal and Spain had not implemented the Directive.
6. See Thieffry, *supra* note 4, at 77-82.

a scant majority of compliance – eight of the twelve member nations have passed a measure implementing the products liability directive⁷ – only by relaxing its standards of what will be deemed to comply.⁸ The last five years have seen formal proceedings for nonimplementation in the European Court of Justice,⁹ attempts to compromise stalled in national governments,¹⁰ a flat refusal to cooperate with the Directive,¹¹ and pointed exchanges of correspondence between the Commission and noncomplying states.¹² Even if all of these differences were resolved, and the Directive implemented by all European Community nations, the increasing flexibility in different versions of the Directive that the Commission now condones will assure divergent national laws in perpetuity.

Whether this result means that the Commission has failed to achieve harmonization requires a definition of the term. I wish to explore two possible meanings: first, approximation, or an effort to unify; second, law reform, or reconciliation of national laws with a Community ideal rather than with one another.

Part I of this Article explores, and rejects, the approximation possibility. The Directive does not parallel the various national products liability laws: it provides for “liability without fault on the part of the producer,” although most of the people of the European Community, and the majority of the twelve nations, live under legal systems where negligence and warranty govern products liability law. As an explicitly-stated doctrine, strict liability remains an American notion, foreign to Europe.

Part II assesses the Directive as law reform. Study of the Directive supports this meaning; the Directive is linked to a consumer protection reform movement. Because the Directive is an effort at reform rather than a restatement, my criticism shifts from the descriptive to the normative: Is the Directive a good idea?

Under the Treaty of Rome, the Council may promulgate directives aimed at advancing “economic and social progress” within the membership.¹³ Although the Treaty joined two types of progress, the Directive perceives a zero-sum, bipolar conflict between “economic” and “social” factions. The last decade, however, has challenged this polarity. Although emendations went on until 1985, the Directive was formed in 1976.¹⁴ Meanwhile products

7. These nations are Denmark, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

8. Interview with Patrick Thieffry, June 13, 1990.

9. See Claveloux, *EC Charges Six Countries Over Directive*, BUS. INS., Mar. 26, 1990, p.27.

10. See, e.g., Thieffry, *supra* note 4, at 80 (deadlock among affected ministries in France).

11. *Id.* at 79 (Belgium).

12. See Claveloux, *supra* note 9.

13. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. II [hereinafter Treaty of Rome], art.100.

14. 1976 was the year that the Commission offered a first draft of the Directive. In the 1970s, liability insurance sold to Americans became dramatically expensive and scarce. A government task force report explained the problems of insurance, in part, by indicting strict products liability as a betrayal of the fault principle. See Report of the Interagency Task Force on Product Liability (1977). The connexion of liability rules to insurance in this report augured the tort reform movement, a major event in American products liability law, with implications for European reformers.

liability was capturing the interest of some of the most talented legal scholars in America.¹⁵ They quickly created an important body of literature. To summarize their key insight in terms of polarity, the “economic” camp began to challenge the claim that strict products liability promoted the interests of consumers. They claimed that consumers would be better off if their present opportunities to recover tort judgments were curtailed. Changes in tort law favored by the business community, they argued, could enhance social welfare.¹⁶ The “social” camp continues to disagree, but it has abandoned its enthusiasm for the loss spreading function of strict products liability. The old dichotomy cherished by the Directive – the economic sector wants fault, the social sector wants strict liability – is archaic.

A more helpful dichotomy separates American from European strict liability. Although the American kind, justified by a loss spreading rationale, has failed in the United States, the noninstrumental type favored by some EC nations makes fine sense. Below I discuss the differences, and offer the American experience as a warning to the European Community.

I. Harmonization as Approximation

The European Community has suggested that it favors an approximation definition of the word harmonization. Its title of the Directive, which remained constant from the first revision in 1976 to the final version in 1985, used the phrase “on the *approximation* of the laws, regulations and administrative provisions of the Member States.” Approximation is a term of some ambiguity. To this native speaker of English, it implies replication. Like a restatement, an approximation would contain the terms common to all of the laws of member states; and where the laws diverged it would find a middle ground. “Approximation of the laws. . . of the Member States” suggests a search for a distinctly European synthesis.

A. *Strict Products Liability, American Style*

According to the Directive, liability “without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technology, of a fair apportionment of the risks inherent in modern technical production.”¹⁷ With no mention of defect, this statement approaches what Gary Schwartz has called “genuine strict liability” – a rule that would make manufacturers liable for all accidents caused or occasioned by their products.¹⁸ Later the Directive retreats from this pure stance, but the rationale stated applies even to the compromised, defect-based strict

15. North America would be a more exact phrase, in light of the contributions from Canadian writers. See *infra* n. 19 (Weinrib) and n. 56 (Trebilcock).
16. See R. Epstein, *Modern Products Liability Law* (1980); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521 (1987); see also Huber, *Who Owns the Cherry Pit?*, 13 *Harv. J.L. & Pub. Pol'y* 22 (1990).
17. Directive, *supra* note 1, Preamble. The Preamble to a directive is not merely introductory material: It is mandated by the Treaty of Rome as a statement of motive. See Treaty of Rome, *supra* note 13, art.190.
18. See Schwartz, *Understanding Products Liability*, 67 *Calif. L. Rev.* 435, 441 (1979).

liability ultimately adopted. Scholars of American tort law have called this rationale loss spreading, loss shifting, risk shifting, cost internalization. This rationale is independent from a shift in the burden of proof, whereby the existence of a defect in the product may imply manufacturer fault.

The divisibility of the rationale from the question of proof is crucial, because loss spreading is an idea suited uniquely to the United States. The belief that a revision of tort law can socialize the costs of injury presupposes an affluent society, yet one that does not promise to fill the needs of its citizens, especially the need for medical care. Most nations are too poor, with legal systems too rudimentary, to spread losses through litigation. Affluent nations, with one exception, ensure the health and minimum income of their members. Distinguished by its resistance to social spending and its level of wealth, the United States is the only country that fits Roger Traynor's rationale for strict products liability.¹⁹

In addition, the loss spreading rationale means that litigation becomes desirable. The phrase "products liability," blaming things rather than persons for injury, indicates a desire to make suing easier for plaintiffs. A plaintiff brings a claim for entitlement, rather than an accusation. Strict products liability spares plaintiffs some of the burden of blaming, and thereby encourages lawsuits.²⁰

Loss spreading also makes an explicitly political connexion between profits derived from the sale of products and the costs of accidents. In calling loss spreading "the only fair method" of allocating burdens, the Directive isolates producers as the class that has benefited from traditional rules of law. Thus even if, as many have said, strict products liability and negligence rules often lead to the same outcome when cases are decided, the Directive changes European products liability law. This change clashes with a long tradition in Europe.

B. Fault, Negligence, and Warranty

As a distinct branch of law, products liability has a history on the Continent. Long before Cardozo decided to reject contract principles that purported to limit actions for injury caused by defective products,²¹ French jurists understood the connexion between fault and the sale of defective goods. French statutory law provides that a seller warrants a chattel to be free of latent defects that make the chattel unfit for its intended use.²² The seller who knows of a defect is responsible for all damage; the good-faith, ignorant seller is responsible only for economic loss.²³ French courts have long interpreted

19. See *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 456, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); see also Weinrib, *The Insurance Justification and Private Law*, 14 J. Legal Stud. 681, 681-83 (1985).

20. One comment suggests that although the doctrinal change of the Directive will be slight, implementation will have "psychological consequences," encouraging more litigation. See Toepke & Hassels-Weiler, 1992 and the Approximation of Product Liability Law, in European Economic Community: Product Liability Rules and Environmental Policy 137 (Practising Law Inst. 1990) [hereinafter cited as European Economic Community].

21. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

22. C. Civ., art.1643.

23. *Id.*, art.1645-1646.

this law to hold even the ignorant seller responsible for all injury.²⁴

The French principle of *fait de la chose*, approved by the Court of Cassation in 1897²⁵ – a time when the citadel of privity stood firm in the U.S. and Britain – created a presumption of liability for the “act” done by things in one’s charge. French judges derived *fait de la chose* from ancient rules, recodified in the Civil Code about responsibility for damage caused by an animal.²⁶ Like traditional strict liability in Anglo-American law, *fait de la chose* linked harm to the lapse of an individual.²⁷

European courts have also revised burdens of proof. Judges in some EC countries have found liability, while respecting the fault principle, when a particular harmful occurrence could reasonably have been prevented – by a safer design, better instructions, or care in manufacture. The courts have held that the same condition of a product which would give rise to liability by a seller to a buyer constitutes fault in regard to third persons.²⁸ Liability for *fait de la chose*, which the Code Napoleon imposes on the keeper of a thing, seems on its face to attribute responsibility only to an owner. But substantial authority now distinguishes *garde du comportement*, the control exercised by an owner or carrier, and *garde de la structure*, control of the internal dynamism, finding the latter control to be a basis of liability.²⁹ Supported by these two concepts, a French plaintiff today need prove only a defect causally linked to injury. In virtually all cases this proof constitutes

24. This construction has been traced back to Celsius, who had equated lack of professional skill and knowledge with fault, and was endorsed by the creators of the Civil Code. Privity, another key element of civil-law contracts doctrine, was also interpreted creatively in France to allow lawsuits by a consumer against a manufacturer. See H. Tebbens, *International Product Liability* 84-85 (1979), citing J. Donat, *The Civil Law in its Natural Order*, I. II. XI.VII. (1737).
25. See Yntema, *The Law of Obligations*, in *Civil Law in the Modern World* 68, 69-70 (A. Yiannapoulos ed. 1965), see also V A. Tunc, *International Encyclopedia of Comparative Law* 28 (1983).
26. See *id.* at 70. The story of *fait de la chose* is a neat civil law parallel to Levi’s legal process narrative. See Levi, *An Introduction to Legal Reasoning* 9-27 (1949). It partially refutes the notion that doctrinal change through reasoning is a phenomenon that distinguishes the common law.
27. Both traditional and modern strict liability refer to liability for accidental harm based on the unusual nature of a hazard rather than negligent conduct. See Restatement (2d) of Torts §519, comment *d* (1977); *Rylands v. Fletcher*, 3 H. & C. 774 (1865), L.R. 1 Exch. 265 (1866), L.R. 3 H.L. 330 (1868). Under strict liability, an actor who has created a risk in excess of what her community tolerates is held responsible for resultant harm. See Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972) (paradigm of reciprocal risks). Although strict liability relaxes the fault requirement, activity by an individual is still the basis of liability. See *Golden v. Amory*, 329 Mass. 484, 109 N.E. 2d 131 (Mass. 1952) (no strict liability for unforeseeable act of God). Compare *Noble v. Yorke*, 490 So. 2d 29 (Fla. 1986) (strict liability based on owner’s knowledge of vicious propensity of dog) with *Rolen v. Maryland Casualty Co.*, 240 So. 2d 42 (La. App. 1970) (no strict liability because owner’s knowledge of vicious propensity not shown).
28. See Malinvaud, *Responsabilité du Fabricant*, in *Gazette Du Palais* II, 463 No. 20 (1973).
29. See Goldman, *Garde de la Structure et Garde du Comportement*, II *Melanges Roubier*, 51 Tunc. [1957].

an irrebuttable presumption of fault.³⁰

The rebuttable presumption of negligence, a less extreme movement in the direction of strict liability, is the law of a plurality of the EC nations (five) and a majority of the EC population. In Germany and the United Kingdom a plaintiff must prove the existence of a defect; thereafter the manufacturer must prove that it exercised due care.³¹ Ireland, the Netherlands, and Denmark follow a similar rule.³²

European law, in sum, has kept constant the theme of individual dereliction in its laws of obligation, preferring ingenuity like *fait de la chose*, re-interpretation of contracts, and new presumptions to the sweeping concession that marks American-style strict products liability. Favoring the American approach, the Directive rejects a contrary European tradition in the name of harmonization.

II. Economic and Social Progress

Art.100 of the Treaty of Rome, which provides for the issuance of directives, opens a chapter of the Treaty called Approximation of Laws. Literally read, art.100 authorizes only minimal encroachment on the laws of member states. But a literal reading is not foreordained. Partisans who cannot show that their directive would "directly affect the establishment or functioning of the common market,"³³ the formal criterion of jurisdiction, may contend that the directive would promote economic and social progress, and thus advance the broader purpose of the Community.

A. Economic Progress

1. *Decisions to Move Goods.* According to promoters of the Directive, differences of products liability law have potential influence on the decision to market goods. This claim demands the assumption that the Directive will send a clear signal to consumers, lawyers and judges. Strict products liability, it is assumed, will have the same meaning in all EC nations. Goods will move more evenly into each country, as producers stop worrying about divergences in product liability laws.

This speculation overstates the existing divergences and understates the level of divergence that would exist under the Directive. A look at the American federal system is in order, although supporters of the Directive

30. See Whincup, *Product Liability Laws in Common Market Countries*, 19 Comm. Market L. Rev. 521, 530-31(1982). A Belgian plaintiff is similarly favored, except that in contract lawsuits the presumption of fault by the seller or producer is rebuttable, and the courts uphold some exculpatory agreements and disclaimers of liability. See Orban, *supra* note 3, at 350.
31. To this end Germany uses a rebuttable presumption of fault upon the showing of defect. Judgment of Nov. 26, 1968, Bundesgerichtshof [1969], *Neue Juristische Wochenschrift* 269, 274. Britain reaches a similar result with its common-law reliance on *res ipsa loquitur*.
32. See Taschner, *supra* note 4, at 84. The remaining nations keep a traditional approach to the burden of proof, requiring plaintiffs to prove a failure to exercise due care, which failure is not inferred from the presence of a defect.
33. Treaty of Rome, *supra* note 13, art.100.

generally disdain this comparison. They see no lesson in the experience of producers in the U.S., who have never made decisions to ship goods based on state products liability laws. All American jurisdictions are equally lawless, goes their response, because juries assess liability and set verdicts.³⁴ Under the Directive a judge will dispense strict liability. This judge, however, will have little relevant expertise. The implemented Directive will remain unstable at least in the short term, according to its own requirements of perpetual reevaluation;³⁵ and even when stability is achieved the Directive will be flexible. The judge will become in effect a learned juror, able to apply her own opinion of the facts against a background of law derived secondhand. Producers would find this system, at least initially, no more predictable than the American jury trial, unless they can use pre-Directive experience to predict how each judge will apply the Directive: in such a situation, they are no better off with the Directive than without it.

2. *Predictability.* American business leaders have complained that the worst aspect of U.S. tort law is its uncertainty. High costs can be anticipated, but unpredictable costs defy planning and burden such decisions as pricing and risk management.³⁶ Although this complaint has focused on American vagaries, as a general rule any business will approach a more profitable level of production when it obtains better information about costs.

The Directive will diminish predictability, however, because its crucial rules are open-ended. The Directive does give consumers crisp and unequivocal information about the claims they may bring. An injured European consumer, even one in privity with a potential defendant, has a tort cause of action in strict products liability. In addition, the Directive broadens and clarifies the accepted definition of "producer."³⁷ For potential defendants, however, almost any potential source of certainty about liability exposure is kept obscure.³⁸

Whether the Directive mandates defences based on a plaintiff's conduct is also obscure. One article in the Directive contains a defences clause, but that clause does not mention contributory negligence, assumption of risk, or product misuse. The Directive says that recovery "may be reduced or disallowed" when the injured person is at fault,³⁹ and the Preamble apparently disapproves of product misuse and contributory negligence,⁴⁰ but a reader is hard pressed to determine what this language means. The Directive appears to endorse, but not require, plaintiff's-conduct defences.

Altogether avoided is the question of liability for patent defects. The adoption of a consumer expectation test for defect suggests that a producer might not be liable for injury caused by an obvious hazard: a reasonable

34. See Whincup, *supra* note 30, at 538.

35. See Directive, *supra* note 1, art.15(e) (review of development risk defence scheduled for 1995); art.16 (review of cap on damages); art.21 (review of Directive every five years by Commission).

36. See McGovern, *The Impact of Product Liability*, 708 Conference Board Rep. vii, 1-2 (1988).

37. See Stapleton, *supra* note 4; Thieffry, *supra* note 4, at 69.

38. But see Directive, *supra* note 1, art.11 (10-year rule of repose).

39. *Id.*, art.8 (1).

40. See *id.*, Preamble.

consumer would expect a patent hazard to pose a risk.⁴¹ But the consumer expectation test in America has not been linked reliably to a patent-danger exculpation.⁴² The patent-danger defence, which used to exonerate American manufacturers before strict products liability took hold, would tend to reduce the level of litigation. A repudiation of the defence in the Directive would tend to increase litigation. Ambiguity keeps the issue unpredictable.

The preservation of contractual remedies means that member states may permit some products liability actions that will not be governed by the Directive. This preservation would have little effect in the United States, where strict products liability has superseded implied warranty; but in Europe contract and tort have coexisted more equally in products liability actions. The relative strength of contract law means that a producer cannot depend on the Directive to occupy the field of products liability.⁴³

The Directive also squanders the benefits of lower insurance premiums that probably would have resulted if there had been no Directive. The post-1992 single market is expected to create intense competitive pressure, pushing down the price of premiums; but the uncertainty of the Directive will exert a counterpressure. Insurers foresee an increase in the number and size of products liability claims.⁴⁴ Although self-serving this forecast is plausible, and commentators have accepted projections of a 5-20% increase in the cost of premiums.⁴⁵

The Directive actually adds uncertainty to aspects of national law that had been relatively predictable: for example, within the EC debate England is known to favor a strong development risks defence,⁴⁶ but implementation of the Directive may change this stance.

3. *Competitiveness.* The relationship of liability rules to competitive strength in world markets is so tenuous that neither proponents nor critics of the Directive can resolve the point. But at least one proponent has tried. Thierry Bourgoignie, a leading defender of the Directive, argues that the change to strict products liability will not "do damage to the competitiveness of European firms on the international level." In support of this statement, he adds that "the principle of responsibility with fault is being abandoned by Member States," and has been rejected by other nations, namely the United States,

41. See Priest, *Products Liability and the Accident Rate*, in *Liability: Perspectives and Policy* 184, 210 (R. Litan & C. Winston eds. 1988).

42. See *Lovell v. Marion Power Shovel Company, Inc.*, 909 F.2d 1088 (7th Cir. 1990); *Seattle-First National Bank v. Tabert*, 86 Wash. 2d 145, 542 P. 2d 774 (Wash. 1975).

43. See Report of the legal Affairs Committee, 1978-1979 EUR. PARL. DOC (No. 246) 11, 27 (1978).

44. See Drag, *Managing Risk in 1992*, *Bus. Ins.*, Oct. 9, 1989, p.43.

45. See *id.*; Whitehead, *Product Liability and European Integration*, in *European Economic Community: Product Liability Rules and Environmental Policy* 83 (Practising Law Inst. 1990). See also Dielmann, *The European Economic Community's Council Directive on Products Liability*, 20 *Int'l L.* 1391, 1400 (1986) (predicting price increase for insurance premiums because Directive "tightens" and expands liability).

46. See 991 House of Commons Debates, Col. 1110 (statement of Sally Oppenheim, Minister of Consumer Affairs).

Japan and New Zealand.⁴⁷

This assertion is unjustified for it overlooks the existence of trade relations between EC countries and nations other than the three mentioned. It defies such rare but significant experiences as the Bhopal case, where the prospect of a strict products liability forum shaped the litigation and raised its stakes.⁴⁸ That strict products liability will injure competitiveness as long as other countries defer more abjectly to business interests is an argument that in the U.S. has come from explicitly partisan sources. Disinterested writers have not proved a connexion.⁴⁹ All other things being equal, however, European manufacturers would compete better in world markets under a products liability law that affirmed the principle of fault-based responsibility. Inasmuch as strict products liability foments litigation, costs to manufacturers increase. The U.S. and Japan, important competitor nations, function in domestic markets with liability rules that are either stable or moving in favor of defendants. To keep up with whatever advantage this stability offers, European producers would be better off with no directive.

B. Social Progress

Social progress may justify a directive that would not promote economic progress. Proponents of strict products liability have relied on this notion. According to the strict products liability rationale, it is socially optimal to reduce the rate of accidents and, where accidents cannot be avoided, to impose a burden of compensation on the manufacturer. The burden of compensation is an insurance rationale; a safety rationale maintains that charging costs of injury to a manufacturer will lower the accident rate.

1. *The Insurance Rationale.* With medical care, income maintenance and disability protection guaranteed at a high level, a typical user of products in Europe is *ab initio* more protected than his American counterpart. All member states of the EC have state-administered health insurance schemes.⁵⁰ Observers are often struck by the lack of stigma attached to public social services in Western Europe; citizens partake of what they need as a right.⁵¹

47. Bourgoignie, *supra* note 4. Japan and New Zealand have actually "abandoned" tort litigation in favor of a compensation scheme, *see* Bill of Consumer Product Safety Laws of 1973 (Japan); Accident Compensation Act of 1972 (New Zealand); and the principle of responsibility with fault is if anything renescent in the United States. *See* Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. Rev.* 479 (1990).
48. *See In Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 809 F. 2d. 195 (2d Cir. 1987). Access to a jury, of course, encouraged those plaintiffs and lawyers who sought to try Union Carbide in the United States. But strict products liability, in the loose sense of liberal recovery that the Directive endorses, was at least as great an inducement.
49. *See, e.g.*, P. Reuter, *The Economic Consequences of Expanded Corporate Liability: An Exploratory Study* 34-42 (1988) (little evidence of effect on competitiveness).
50. *See* Report on Social Developments - Year 1986, Addendum to the 2d General Report on the Activities of the Community at VII-1 (1987).
51. *See* A. Kahn & S. Kamerman, *Social Services in International Perspective* 316, 331 (1985).

Despite this protection, the Directive favors litigation as a source of payment for injury. The Community has slighted its combination of assured compensation and well-developed principles of liability in favor of an alternative known chronically to fail as a source of compensation, and to waste money. Why? A ready explanation is that the health systems in Western Europe face deficits. For several years the national governments have confronted increases in the cost of health care, and discussed ways to reduce spending. Studies undertaken by the Organization for Economic Cooperation and Development reveal an array of deficit-reducing measures, designed by each national government to match its health care scheme.⁵² A more conservative political climate, the growth of expensive health-care technology, and an increase in non-European ethnic populations have combined to create a sense of finitude. In the spirit of austerity that began in the mid-1980s, many Europeans regard universal health care as a luxury of potentially infinite expense.

Strict products liability may have looked attractive to a Commission preoccupied with health-care deficits. For all its shortcomings, strict products liability buttresses a welfare system in a country that lacks universal health coverage. Under American-style liability, private insurers pay much of the medical costs for which European governments assume responsibility. The many flaws of American health insurance do not include government deficits, as the government has not undertaken the obligation of comprehensive medical care. Beleaguered national governments, and their representatives in Community institutions, would be tempted by a liability rule that shifts part of this expense to corporation insurers and shareholders. To proponents of the Directive, endorsement of loss spreading looked like a chance to save governments some money.

Unfortunately for the Directive, its gestation coincided with what became known as the insurance crisis in the United States. The appeal of strict products liability as reducer of deficits has lessened: defenders of the Directive have been forced continually to argue that the Directive will not precipitate an American-style crisis in Europe.⁵³ A change in academic language may have affected the Directive as well. The "fair apportionment" justification for the Directive, written in the 1970s, reflects a time when strict products liability was viewed as a loss-spreading mechanism. In the U.S. today the term loss

52. The three major devices tried in Europe have been the introduction of market competition forces, the implementation of user payments and the narrowing of health plan coverage. Britain has tried to create more competition for the National Health Service by allowing private physicians to perform elective surgery under NHS subcontract, and by adding incentives to the compensation of NHS physicians. 1988-1989 Survey, Organization for Economic Cooperation and Development 79 (1979). France has retreated from paying for all drugs, and tried to curb the supply of physicians. *Id.* at 78, 127. In its scheme of insurance-fund health care, Germany has narrowed the coverage of medical expenses, refunded a part of contributions to consumers who do not file a claim during the year, and made other reforms leading to an estimated saving of DM 12.4 billion. *Id.* at 95. In the Netherlands, the Dekker Commission recommended several reforms in a 1988 report, some of which have been implemented. *Id.* at 46-47.
53. See Thieffry, *supra* note 4, at 88-90; Stiefel, *The Advantages of a 'Civilized' Procedure in Civil Law Product Liability* (notes for speech sent to author, Dec. 14, 1989); Bourgoignie, *supra* note 2.

spreading is in disrepute: strict products liability is now said to offer "insurance," and those who use this word deem it very poor insurance. The shift in discourse has changed the progress of the Directive.

In a landmark paper on the insurance crisis,⁵⁴ George Priest moved the polarized tort reform debate to a new conjunction. Whereas debaters had argued in behalf of either plaintiffs or defendants, Priest, long identified with defendants, argued that expansive liability justified as loss spreading was bad for all consumers and worse for low-income consumers. This conclusion came from the insight that liability does not simply shift a cost from point P to point D but rather creates an insurance apparatus – an apparatus bloated by transaction costs, administrative waste and the paired ills of adverse selection and moral hazard. As is well known, the American tort system pays this insurance money inefficiently: about half the total cost of the system is retained by claimants, and only half of this sum represents compensation for economic loss.⁵⁵

Priest expanded these familiar arguments to claim that the liability system has had three major retrogressive effects. First, expansive and unpredictable liability rules discourage insurers from selling liability policies. When insurers refuse to issue or renew policies, or raise their prices, municipalities and civic organizations are burdened. Playgrounds, organizations for children and other sectors of public recreation become casualties to the crisis. Second, hard-to-insure products are no longer profitable, and consumers suffer a reduced supply of things they need. Finally, Priest noted that a plaintiff's economic status, gender, occupation, and race correlate with the measure of her damages awarded by a jury. All consumers must pay higher prices for their goods and services as the result of greater liability, but this increase hurts poorer consumers more. The insurance of civil liability thus charges equal premiums to all consumers, but pays the highest benefits to white middle-aged affluent men.⁵⁶

A defender of the Directive might reply that little of this criticism applies to the EC. Civil damages are set by judges, which means that European judges

54. Priest, *supra* note 16.

55. See Tillinghast, *Tort Cost Trends: An International Perspective* 15 (1989) [hereinafter cited as Tillinghast Study]. By contrast, workers' compensation returns 70% of its total cost to beneficiaries; private health insurance 85%, and public social security 99%. *Id.* at 16. Joan Claybrook, a tort reform critic, has called the Tillinghast study "discredited" for attributing too much cost for the tort system. But the point that compensation schemes return more money to claimants than the tort system is sound. For a reminder that defence interests have not always preferred the efficiency of workers' compensation to the process-heavy tort system, see *Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431 (N.Y. 1911).

56. This version of the liability story rests in part on the idea that the insurance industry has acted in good faith, a premise that Priest does not question. Others have suggested that the insurance industry might have canceled policies or withheld coverage for contingencies that were profitable to insure, in a conspiracy to influence legislatures and public opinion. See Hearings Before the Subcommittee on Economic Stabilization, 99th Cong., 2d Sess., No. 98 at 13 (1986) (statement of Joan Claybrook); Comment, *Rumors of Crisis: Considering the Insurance and Tort Reform in an Information Vacuum*, 37 Emory L. J. 401, 409 (1988); Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 San Diego L. Rev. 929, 936 (1987) (conspiracy unlikely).

would have to be as prejudiced as American jurors to sustain Priest's point of damages discrepancy.⁵⁷ Because damages are so much lower in Europe, the overall impact of discrepancies is less. The liability systems throughout Europe run much more cheaply than their American counterpart, undermining the argument about transaction costs.⁵⁸

But this response fails. Priest confined his lament to the United States not because of conditions unique to the western hemisphere but because the U.S. is the only country that has accepted the loss-spreading approach to compensation. The criticism will apply to all future takers. Insurance companies, playgrounds, racism, disregard for women's economic contributions and moral hazard are not American quirks. They will affect any legal systems that links strict products liability to compensation. In its Preamble, announcing the appropriate allocation of technological risks, the Directive forges this link.

The need to separate liability from compensation is familiar in American writing about torts. Civil liability can never compensate injured persons adequately, because liability is a function of fault, or responsibility, rather than need.⁵⁹ The Directive is correct in saying that fault-based liability is the wrong way to compensate for injury caused by defective products. It errs in finding liability *without* fault an appropriate measure – let alone the “sole means” – to the end of paying for product injury. Even with “fault” postulated away, the private-law litigant faces barriers (in the U.S. and more so in Europe) that keep her out of court, and even unaware of her claim. Some kind of social welfare system is the only way to express a meaningful commitment to compensation. Although the Directive does not call for health-care reductions, its timing coincides with these calls. A new reliance on tort liability for compensation would hurt Europeans.

2. *The Safety Rationale.* In the years before promulgation of the Directive, American writers became interested in the question of whether the shift from negligence to strict liability for product-related injuries had enhanced safety. A theoretical model of strict products liability won the approval of economic analysts in the 1970s. They maintained that a strict liability rule was as amenable as negligence to the task of bringing the accident rate to a efficient

57. To the extent that the American discrepancies can be attributed to factors other than prejudice by the jury – for example, more zealous advocacy for certain plaintiffs by their attorneys, or biased supervision by the trial judge – comparisons with Europe remain valid.
58. The Tillinghast study, using estimates and other private information, has calculated the cost of the tort system as a percentage of gross domestic output for several nations. The U.S. percentage is 2.5. The EC countries studied by Tillinghast – Denmark, Spain, Italy, the United Kingdom, West Germany, Belgium, and France – all spend about 0.5% of their GDP on their tort system. Tillinghast Study, *supra* note 55, at 12.
59. See Abel, *A Critique of Torts*, 37 *UCLA L. Rev.* 785, 796 (1990). For elaboration on the poor fit between liability and compensation, see E. Bernzweig, *By Accident Not Design: The Case for Comprehensive Reparations* (1980); Sugarman, *Serious Tort Law Reform*, 24 *SAN DIEGO L. Rev.* 795 (1987); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 *VA. L. Rev.* 774 (1967).

level.⁶⁰ Some writers, both economists and noneconomists, made normative arguments for the expansion of a producer's liability.⁶¹ These arguments reinforced a view that strict products liability ought to increase safety; when manufacturers pay for a greater share of the costs of accidents, they will invest in measures that make products safer.

Whether American strict liability has indeed resulted in safer products and fewer accidents is a subject of disagreement. An empirical study reports, on the one hand, several declines: in the accidental death rate, the rate of accidental deaths at home, and the rate of injuries on the job, all in the last three decades.⁶² On the other hand, a product-by-product breakdown of workplace injuries shows an increase in the rate of injury caused by particular products.⁶³ It is undisputed that liability rules have affected the work of manufacturers, who devote more time and resources to questions of safety and liability.⁶⁴

Thus recent years have brought increased product safety, but only to a disputed degree, and not across the board. There are several explanations for the lack of dramatic benefit. The threat of damages encourages producers to minimize only the amounts they will have to pay, not the total accident rate. It would be rational for them to make greater investments where the user is more likely to sue, and more likely to prevail. For the liability-lawsuits-safety incentive sequence to function victims must sue, and most do not.⁶⁵ Strict products liability precludes a defence based on breach of duty but not on causation, and therefore producers can shift their resources (which are generally greater than those of a plaintiff) to a causation defence.⁶⁶ Organizational anomalies, employee ignorance and incompetence, small penalties and most of all liability insurance all combine to reduce the responsiveness of manufacturers to the effects of expanded liability.⁶⁷ It has also

60. See R. Posner, *Economic Analysis Of Law* 342 (1972); Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1 (1980). The theoretical model diverges from strict products liability as it is applied. Because the model requires an effective defence of contributory negligence (to impose incentives of care on the consumer) and because strict products liability developed into a rough equivalent to negligence for many situations, economic analysts have adjusted their claim that strict products liability is efficient. See R. Posner, *Economic Analysis of Law* 164 (3d ed. 1988); Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. Legal Stud. 553 (1985).
61. See Calabresi & Hirschhoff, *Towards a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. Rev. 1109 (1974).
62. See Consumer Federation of America, *The Benefits of the Modernization of the Tort Law in the Context of the Social Movement for Improved Safety and Quality in the National Economy* 14-18 (1987) [hereinafter cited as *Consumer Federation*].
63. See Priest, *supra* note 41, at 184, 192. Priest also reports an increase in the total number of product-related injuries requiring hospital treatment, *id.* at 192, but does not control for the increase in population and increased distribution of products.
64. See Weber, *Product Liability: The Corporate Response*, 893 Conference Board Rep. 21 (1987). A consumer poll taken in 1987 reports that a majority of Americans think that product safety and quality have improved in the past ten years. *Consumer Federation, supra* note 62, at 10-11.
65. See Abel, *supra* note 59, at 809-10, 814.
66. See H. P. Glenn, *Judicial Authority and the Liability of the Manufacturer*, or *Jusqu'on Peut-on Aller Trop Loin?*, - AM. J. COMP. L. - (1990) (forthcoming).
67. See Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. Rev. 555, 564-73 (1985).

been suggested that expanded liability makes consumers more careless.⁶⁸

The better explanation of why slight improvements in safety have been made in recent years for increased product safety is the rise of consumerism, not shifts in doctrine; and consumerism by tradition in Europe has remained separate from litigation.

Conclusion

A last point remains. In criticizing a European choice, I appear to have breached the convention of comparative law that calls for deference to the perspective of the other. Having learned from foreign wisdom, the comparative critic generally takes aim at her own institutions.

As indeed I have tried to do. I wish earnestly that the United States will follow the leadership set by Western Europe in its care for injured and weak persons. Tort law offers no succor. The tort system began as pure private law, permitting actions by individuals for injuries done them by other individuals. American theorists argued for the manipulation of tort law to achieve the public goal of socializing the costs of injury.⁶⁹ This attempt has broken down. Tort law, a poor instrument for loss spreading, has retained its private-law purposes. It did not, and cannot, bring the United States to the social-welfare level that Western Europe achieved long ago.

The Directive disparages the achievement of Western Europe. Offered as a palliative for strained welfare programs, it would put national economies in an even more strained position, at least because of the transactional expenses of litigation as a loss-spreading device and possibly because of a harmful effect on producers' decisions to move goods, the predictability of law, and the competitive position of European industry. The Directive would undermine the important cultural norm of favoring consensus over conflict.⁷⁰ Its importing of strict products liability evokes a bygone day, when Europe looked to the United States for inspiration on how to build a powerful economy.

But American experience is still of some use. As the Community has done with the Directive, the United States once undertook a self-conscious and deliberate experiment in strict products liability. That experiment and its sequellae are described in a literature. In this paper, I have offered some insights of that literature to the makers of European policy, with the hope that you will learn more from us than we have learned from you.

68. See W.K. Viscusi, *Regulating Consumer Product Safety* (1984). *But see* Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Calif. L. Rev. 677 (1985) (disputing Viscusi argument).

69. See G. White, *Tort Law in America: An Intellectual History* 146-53 (1980); Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 1 (1959).

70. According to a German historian, "already in the Middle Ages public opinion praised one principle - which applied to all economic and social measures - that it was better to prevent than to heal, in other words, that as a matter of principle one should combat everything that might possibly lead to conflicts." H. Bechtel, *Wirtschaftsund Sozialgeschichte Deutschlands* 91 (1967) (translated by D. Gerber).