Comparative Aspects of Product Liability

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THE comparative study of law provides no experience more fascinating or more "traumatic," in the opinion of one distinguished comparatist, than the discovery of the various legal solutions to almost identical social and economic problems, obtained by employing different legal techniques. "[U]nder similar social, economic, cultural pressures in similar societies the law is apt to change by means of sometimes radically different legal techniques. The ends are determined by society, the means by legal tradition." While frequently helpful, legal tradition sometimes raises obstacles to the process of adaptation of legal to extra-legal developments. One interesting example of this process is provided by the growth of product liability, the judicial efforts to adjust to modern economic conditions the legal protection accorded to the consuming public against manufacturers and other suppliers of goods for injuries arising from their use.

This body of law has been thrust into the foreground by fundamental changes in the processing and marketing of goods in technically advanced societies. Paralleling the leadership of the United States in production and marketing of standardized products are American innovations in finding equitable solutions for the legal problem posed. This same problem has also had to be faced by the law of Germany and France. An attempt is made here to describe the different means by which these legal systems have sought to overcome the existing legal obstacles, obstacles which reflect legal values of an earlier and different social organization.

It may be useful to begin with a summary survey of the phases of development of product liability in the United States and Britain.3

I. AMERICAN LAW

Two major distinctions can be drawn concerning the liability of suppliers of chattels: (a) between the defendant's liability to the person supplied directly by him, and the defendant's liability to a third person; and (b) between liability based on negligence, and liability based on a doctrine of strict liability, which in this field has become associated with the term "warranty." Strictly speaking, product liability is liability of the supplier or manufacturer...
of goods to third persons. Today, it may be either liability based on negligence, or it may be strict liability, i.e., liability without fault.

Initially liability to third persons based on negligence ran into difficulty. The obstacle was the requirement of "privity of contract" between the manufacturer or seller and the injured party, a requirement which originated in the much discussed case of Winterbottom v. Wright, decided in 1842. It was there held that one who had let a mail coach to the plaintiff's employer with an undertaking to keep it in repair was not liable to the coachman who was injured by the collapse of a defective axle. Narrowly construed, this only meant that A cannot ground a claim against B on the breach of a contract between B and C to which A is not a party; but Lord Abinger, C. B., went further. He said that there was "no privity of contract between these two parties," and that if the plaintiff could sue, there would follow "the most absurd and outrageous consequences, to which I can see no limit." Thus the decision was interpreted in the wider sense, that conduct which constitutes a breach of a contractual obligation to C could not concurrently furnish a cause of action in tort for breach of a duty of care owed to A. This fallacy supported the conclusion that the manufacturer of a defective article owed a duty only to those who were in contractual privity with him. The courts, however, soon found exceptions to the rule, such as the intentional concealment of a defect in an article, or its "imminent" or "inherent" danger to human safety. At last, in 1916, in the famous decision of MacPherson v. Buick Motor Co., Judge Cardozo adopted the principle of liability for articles dangerous if negligently made, and by doing so he "caused the exception to swallow the asserted rule of nonliability." This doctrine has received an ever-widening application, and was followed in England by the House of Lords in 1932. It has been applied to hold responsible the manufacturer of a component part of a product, to compensate all persons whose injury in the course of the product's use was foreseeable, and to include recovery for property damage as well as for bodily injury. The term "manufacturer" has also been greatly widened and now applies to repairers, and even to makers of tombstones!

The MacPherson doctrine is based on negligence. The duty of care relates to design, plan, structure, and specifications of the product, and to liability to liability pursuant to that duty of care. Liability is imposed if a breach of the duty of care results in injury to the plaintiff. The defendant is liable if the plaintiff can prove that the defendant was negligent, that the defendant's negligence was the proximate cause of the plaintiff's injury, and that the plaintiff suffered actual damages as a result of the defendant's negligence.

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6. Id. at 114, 152 Eng. Rep. at 405.
10. For a comprehensive survey of the present scope of the privity rule, see Annot., 74 A.L.R.2d 1111 (1960).
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for defects. The difficulties of proof of negligence—as there is hardly ever direct proof of what happened at the manufacturer’s plant—is relaxed by reliance upon the doctrine of res ipsa loquitur.\(^{15}\)

Strict liability of the manufacturer, on the other hand, is based on the theory of a breach of a warranty that the product was properly made. Here the requirement of privity is of greater relevance, since warranty is regarded as an incident to a contract of sale and is supposed to run to the benefit of the purchaser only. However, the courts have held that under modern marketing conditions privity of contract is not always a requisite for breach-of-warranty recoveries. The manufacturer, by placing goods upon the market and by promoting their purchase, represents to the public that they are safe and suitable for use; this is construed as an implied warranty to the ultimate purchaser that they are reasonably fit for use. Liability without privity of contract was first imposed where defective food and drink were involved,\(^{16}\) but in the late fifties it was applied to various products, including automobiles,\(^{17}\) airplanes,\(^{18}\) electric cables, grinding wheels, and many other articles. Although at first recovery against the manufacturer was allowed only in favor of the ultimate purchaser who, though not in a direct relationship, could be regarded as linked to the manufacturer by a chain of contracts, the courts have shown a tendency to permit recovery by persons whose use is foreseeable.\(^{19}\) The extension of warranty in a contract of sale in favor of third parties has been accepted by the Uniform Commercial Code. Section 2-318, entitled “Third Party Beneficiaries of Warranties Express or Implied,” provides:

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

It has been pointed out that recently several cases have raised the possibility that the further development of product liability may be affected and even controlled by the Uniform Commercial Code.\(^{20}\)

15. Prosser, op. cit. supra note 2, § 96, at 671. In Grant v. Australian Knitting Mills, Ltd., [1936] A.C. 85 (Austl.), where the maxim res ipsa loquitur was applied, the onus of proof was in effect shifted to the defendant; it was for the manufacturer to show that a cause outside his sphere of responsibility had intervened. As Lord Wright said, “The appellant is not required to lay his finger on the exact person in all the chain who was responsible.” (Id. at 110).


19. See cases cited supra, notes 17 and 18.

All this shows the awareness of the American courts and their quick response to problems in this field posed by the modern marketing and mass-production economy.

II. ENGLISH LAW

English law has not followed this most useful—albeit somewhat forced—extension of the implied warranty principle. It is true that by implied warranties the seller in English law has become in effect an insurer of its goods with reference to their quality and fitness. This liability for absolute warranty arises irrespective of any negligence and covers not only injury to person or property, but also economic loss. But this protection merely covers the buyer, and the privity of contract concept has prevented its extension to other consumers and, moreover, has excluded the possibility of direct recovery against the manufacturer. Such an extension would probably be considered a complete abandonment of the principle.

III. GERMAN LAW

The question of product liability has recently aroused interest in Germany, especially because as of yet no satisfactory solution has been found for the problems it raises. German law is a codified law and the principles and rules governing liability both in contract and in tort must be found in code provisions, generally in the German Civil Code, the Bürgerliche Gesetzbuch. This remarkable code, which the French legal scholar Saleilles considered the greatest legal work of the century, was the product of a society where the mill, the smithy, the brewery, and the factory were the centers of industrial activity, where agriculture was still predominant, and where not too much attention was paid to new technical developments and industrial production. This code, it was said, "seems to be rather the closing chord of the nineteenth than the overture to the twentieth century." This makes it all the more remarkable that it has proved flexible enough to respond to the challenges of modern times without the

21. The Sales of Goods Act, 1893, 56 & 57 Vict., c. 71, § 14 gives statutory force to a warranty (a) of fitness for a particular purpose where this purpose was made known by the buyer, expressly or by implication, to the seller, and (b) of the merchantable quality of goods bought by description. See 22 Halsbury, Statutes of England 993-94 (2d ed. 1950).

22. Among the textbooks only Esser, Lehrbuch des Schuldrechts has a special section dealing with the question [§ 204(5)(c) at 874 (2d ed. 1960)]. There are however several valuable studies and articles dealing with it: Lorenz, Rechtsvergleichendes zur Haftung des Warenherstellers und Lieferanten gegenüber Dritten, in Festschrift für H. Nottarp 59-89 (1961); Simitis, Grundfragen der Produzentenhaftung (Tübingen 1965); Latté, Schuldvertragliche Beziehungen zwischen Verbraucher und Hersteller (Diss. Berlin 1961); K. Müller, Zur Haftung des Warenherstellers gegenüber dem Endverbraucher, 165 Archiv für die civilistische Praxis [hereinafter cited AcP] 285 (1965); Markert, Die Schadenshaftung des Warenherstellers gegenüber dem Verbraucher, 19 Der Betriebs-Berater 231 (1964).

23. Bürgerliches Gesetzbuch vom 18 August 1896, effective 1 January 1900 [hereinafter cited BGB].


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need for fundamental reforms. This is due largely to the work of the courts, which have skillfully adapted its provisions to new conditions. Of course, it was sometimes found that the interpretative development of the law by the courts (Rechtsfindung) could not stretch the principles contained in a provision any further without abandoning them completely, and consequently some newly emerging problems have not been adequately solved. Product liability is a good example. Here we find that attempts to arrive at a just solution have been more or less unsuccessful, and that a residue of problems continues to contend with dogmatic principles.

According to German law, liability in damages, both in contract and in tort, is based on fault (Verschulden). This means that either nonperformance of a contractual obligation or an act causing damage to another must constitute a fault, a reprehensible breach of a legal duty.\(^\text{27}\) The BGB does not define fault; indeed, it scarcely uses the term, but merely refers to it circuitously.\(^\text{28}\)

When we consider the liability of the manufacturer or producer of goods for injuries caused to consumers generally, who are not in direct relation with the manufacturer but may be at the end of a chain of legal relations, the obvious remedy is a tort claim. The relevant provision for tort liability is Article 823 of the BGB, which reads as follows:

A person who, wilfully or negligently, without legal right, injures the life, body, health, freedom, property or any other right of another, is bound to compensate him for any damage arising therefrom.
A person who infringes a statutory provision intended for the protection of others incurs the same obligation. If, according to the purview of the statute, infringement is possible even without any fault on the part of the wrongdoer, the duty to make compensation arises only if some fault can be imputed to him.

In addition to this general provision, some special types of conduct are explicitly deemed to give rise to compensation: acts endangering the credit of another (Art. 824), wilfully causing damage to another in a manner contra bonos mores (Art. 826), and damage arising from neglect of certain duties of supervision or maintenance (over persons, Art. 832; animals, Arts. 833 and 834; buildings, Art. 836).

Thus it can be seen that German law represents a legal system where de-

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27. Exceptions to this general principle in contract are the liability based on insurance or warranty, and in tort, certain forms of strict liability established by special legal provisions relating to so-called Gefährdungshaftung; e.g., damage caused by railways, airplanes, etc.

28. It is used in BGB Art. 254: "If any fault of the injured party has contributed in causing the injury . . . " but in the principal provisions establishing contractual liability (Art. 276) and tort liability (Art. 823), the term is avoided and "colorless" phrases used instead; Esser, op. cit. supra note 22, at 185. Thus in Art. 276 the provision reads, "The debtor is responsible, unless it is otherwise provided, for wilful default and negligence. . . . " Art. 823 provides: "A person who, wilfully, or negligently, without legal right injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom. . . . " [Translations of BGB articles from Von Mehren, The Civil Law System (1957)].
Delictual liability is attached to specific acts, a situation which also existed in the old Roman law and early English law. This contrasts with systems which rely on a general clause of delictual liability. The draftsmen of the BGB, after some hesitation, decided not to adopt such a general clause, and instead attempted to enumerate the circumstances which would establish wrongful damage and thus give rise to a tort claim. Consequently, there are three classes of tort in German law: (1) illegal damage to the protected rights of life, body, health, liberty, property, or any other right; (2) special conduct which injures rights and interests of others; infringing statutory provisions protecting others; and (3) conduct which wilfully damages another contra bonos mores. Thus, rather than leave it to the courts to establish when injury to another is compensable within the frame of a general liability clause, tortious acts are predetermined by the code provisions.

One consequence of this approach is that the number of protected interests cannot be extended by judicial interpretation, and this rules out general liability for negligence. Another consequence is that, since a person's estate (Vermögen), his total pecuniary interest, is not regarded as a right, the effect of Article 823 is to restrict recovery largely to physical damage to person or property (which is deemed to include interferences with the liberty of the person or with the title to property). Purely pecuniary or economic damage, on the other hand, may be actionable under Article 826, but the defendant's conduct must have been contra bonos mores. Hence, if an action is brought for physical damage, mere proof of negligence is sufficient, while pecuniary damage must have been inflicted intentionally. It must also be emphasized that physical damage must be


30. Statutory protecting provisions (Schutzgesetze) are very numerous and to attempt any enumeration of them would be futile. There are numerous German penal provisions protecting individual interests (e.g., Penal Code Art. 164, false accusation; Art. 172, adultery), private laws protecting pecuniary interests (e.g., Copyright Law Art. 25, infringement of copyright), penal and police laws in the general interest (e.g., Penal Code Art. 153, false testimony; Art. 185, insult), and many more. Whenever such provisions are infringed, in addition to the penal sanctions, a tort claim arises for the compensation of the person who has been damaged by such infringement of the right or interest protected by that provision. Of course there may still be liability based on the protective provisions indicated by Art. 823, para. 2; e.g., slander, infringement of the secrecy of correspondence, or unlawful competition (The latter is also within the scope of Art. 826.).


33. Thus, for instance, the director of a co-operative society who failed to enter timely notice of the release of one member of the co-op with the court was sued by that member, who, because of this failure, had to pay a considerable sum to the trustee in bankruptcy. The director was found not liable on the basis of § 823, para. 1, "because no definite interest of the plaintiff, only his estate as such, has been damaged." M. v. B., Reichsgericht (III. Zivilsenat), 4 October 1904, 59 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter cited R.G.Z.] 49, 51 (1905).

34. Negligence is defined by the BGB as not using ordinary care (Art. 276).
caused by an act that is actually unlawful, whereas under Article 826 the defendant's conduct need only have been contra bonos mores.

An unlawful injury may be caused either by an act or by an omission on the part of the defendant. An omission, however, can constitute a ground for liability in tort only if the defendant had a duty to act. It was at this point that the German courts started to broaden the scope of tort liability by establishing various duties of conduct which made it possible to find a defendant liable if by an omission, by neglect of the required care, he endangered and caused damage to the public. The rationale for the establishment of these duties was found in the judge-made principle that everybody who enters into relations with the public must take into consideration the position of the members of the public and must take all precautions to avoid dangers which might result from his relations with them. These duties to avoid dangers to the public are called Verkehrssicherungspflichten. They may arise either from permitting access to property or traffic through it by the public, from control of a thing which can cause damage to the public (such as a house from whose roof ice or snow may fall), or from exercise of a calling which requires special skills and care. While all of these duties contributed to the development of product liability, it was this last—the duty to exercise the special care and skill of one's calling—about which the liability of the producer for injuries caused to members of the public by defective products crystallized.

The original basis of the Verkehrssicherungspflichten was the idea that one who makes land, streets or bridges accessible to the public must see to it that they should be safe and not cause harm to the users. This duty was first extended to owners of shops, restaurants, and houses, and since then has spread in various directions: the manufacturer or dealer is liable, if negligent, for harm caused to users or third parties by defects in design or defects in manufacture; one who manufactures or sells machinery or implements must take care that these should be safe and is liable for harm caused to third parties if he neglects this duty; one who places on the market goods which may be dangerous when used

35. Thus it must not have been rendered lawful by various grounds which may justify the defendant's act (e.g., rules of self-defense and self-preservation).
37. Causation according to German law requires "adequacy of causation" (adäquater Kausalzusammenhang); that is, a showing that, according to the normal rules of life, a situation such as the one produced by the act or fact should have resulted in the damage that has actually been caused. Cf. Esser § 60/1; Enneccerus-Lehmann § 15.
38. See Esser § 204; Enneccerus-Lehmann §§ 234 II 2, at 946.
39. S. Sch. v. Stadtgemeinde W, Reichsgericht (VI. Zivilsenat) 23 February 1903, 54 R.G.Z. 53, at 56 (one of the early decisions concerning the requirement to keep a road clear of ice).
40. H.E.M. Comp. m.b.H. v. B., Reichsgericht (II. Zivilsenat) 17 January 1940, 163 R.G.Z. 21, at 26 (liability for injury to third parties by motor car established, because of faulty construction of its brakes).
41. This duty does not, however, extend to persons who come to harm by inappropriate use of the product involved. Thus where an adjustable hoist collapsed and the falling bucket killed a man below, it was found that the hoist was safely constructed, but that it had been improperly attached to the window. The court found the manufacturer not
must take all precautions to safeguard against such dangers, and especially to warn of possible danger in the course of use; one who produces foodstuffs must take care that nothing harmful to health should be placed on the market. The duty is imposed not only upon persons who have brought about a possible source of danger, but also upon those who permit the danger to persist. Moreover, the exercise of a trade may establish special duties beyond the general duty of care towards persons with whom the defendant may come in contact in the course of his trade. Finally, the liability of the manufacturer (Hersteller) is imposed not only upon the producer of the end-product, but also upon the manufacturer of component parts.

From all this, it can be seen that what actually happened was that the courts made creative use of the code sources, and established what may be considered a general duty to avoid negligently causing harm to others. Indeed, the Bundesgerichtshof stated not long ago that "the judicial practice has long ago gone beyond these duties to make commerce secure (verkehrssicher) in the responsible, because when machinery is put on the market, the construction of which is unobjectionable, the manufacturer cannot be expected to warn the customers against its improper use; Judgment of Bundesgerichtshof (VI. Zivilsenat), 14 April 1959, Versicherungs-Recht [hereinafter cited Vers. R]."

42. With regard to certain goods (usually chemicals), it is not always possible to establish in advance the eventual harm they may cause. In such circumstances it is at least the duty of the manufacturer or distributor not to assure the consumer about the harmlessness of the product, of which he cannot then be certain.

In a case involving a defrosting device, fire was caused as a result of overheating produced—partially at least—by extensive rust damage in the pipes. The distributor was found liable because, on the basis of the manufacturer's description, he had assured the somewhat anxious users that no fire could result from the use of the device; Judgment of Bundesgerichtshof, 30 April 1963, Vers. R. 1963, at 860.

43. It has been held that the manufacturer is obliged to inform the user of a floor sealer which produces inflammable gases of the dangers which may arise; the simple note "inflammable" was insufficient. The manufacturer was held liable for damage caused by fire to a third party as a result of careless use of the sealer; Judgment of Bundesgerichtshof, 20 October 1959, Vers. R. 1960, at 342.

44. An oil factory has been held liable for poisoned oil which got onto the market; Judgment of Bundesgerichtshof, 1 April 1953, Lindenmaier-Mähring, Nachlagewerks des Bundesgerichtshofs [hereinafter cited L.M.] No. 12 to Zivilprozessordnung § 286(C).

45. Where a silo was erected by defendant, but before it was properly secured it was arbitrarily put to use by the owner, and the silo collapsed as a result of vibration, killing several persons beneath, it was held that the manufacturer was liable to the third parties. The grounds for the decision were that he had created a source of danger, and although he knew or ought to have known of this danger, he did not take the necessary steps to avoid it, but permitted it to persist; Judgment of Bundesgerichtshof, 8 July 1960, Vers. R. 1960, at 856.

46. Where people were infected with typhoid by milk from a dairy, the dairy was held liable, even though there was no law requiring the pasteurization of milk. The court said:

Although there is no legal obligation of pasteurization, the duty arises from running a dairy-establishment for its director or owner not to let milk pass for consumption without pasteurization, if he knows of circumstances giving rise to the suspicion the typhoid bacilli might have gotten into the milk. It is established by judicial practice that the exercise of a profession or trade brings about special duties of care towards third parties who come within the scope of his trade ... beyond the general duties of care towards all.

Judgment of Bundesgerichtshof, 16 December 1953, L.M. § 832 (Eh) No. 3.


proper sense and has developed the general principle that one who creates a
source of danger must according to the circumstances undertake the security
measures necessary to protect third parties.49

But here a problem arises: This seemingly comprehensive duty of care of
the manufacturer towards the consumer contains a flaw which renders it largely
ineffective with regard to products manufactured by large enterprises. This flaw
is caused by a gap in the German law of vicarious liability. Strict liability of a
master for damage committed wrongfully by his servant in the scope of his
employment was not accepted by the German Civil Code. The draftsmen did
not want to abandon the principle of the earlier law that delictual liability is
justified only if the responsible person is himself at fault; this was in contrast
to contractual liability where, according to BGB section 278, an obligor is re-
ponsible for the fault of persons whom he employs in fulfillment of his obliga-
tion.50 Responsibility of a master for his servant's acts in the course of employ-
ment has been based on the principle of underlying fault in selection and
supervision of the employee. Article 831 of the BGB provides as follows:

A person who employs another to do any work is bound to compensate
for any damage which the other unlawfully causes to a third party in
the performance of this work. The duty to compensate does not arise if
the employer has exercised ordinary care in the selection of the em-
ployee, and, where he has to supply appliances or implements or to
superintend work, has also exercised ordinary care as regards such
supply or supervision, or if the damage would have arisen, notwith-
standing the exercise of such care.

The same responsibility attaches to a person who, by contract with the
employer, undertakes to take charge of any of the affairs specified in
paragraph 1, sentence 2.

Thus the master is presumed to be responsible for the tort of his servant if he
cannot prove that no fault in selection or supervision is attributable to him.

The courts have established strict rules regarding the evidence necessary
for the exculpation of the master.51 These severe rules have been of no avail,
however, in larger industrial undertakings. As early as 1911, the Reichsgericht
came to the conclusion that in such enterprises the master cannot be expected
personally to select and control all his employees. If the functions of selection
and of control have been transferred to one or more higher employees, it is
sufficient if the master proves proper selection and supervision of the latter.52
This judicial practice has been adopted by the Bundesgerichtshof.53 The chain

50. The draftsmen of the code rejected the proposal to follow Article 1384 of the
French Code civil partly for the reason that such unqualified responsibility would be
inequitable towards enterprises, and especially so towards artisans, carriers, etc.; see 2
Mugdan, Die gesammten Materialien zum Bürgerlichen Gesetzbuch 1300 (1899).
52. Allgemeine Berliner Omnibus-Aktiengesellschaft v. L., Reichsgericht (VI. Zivil-
53. S.C. v. B., Bundesgerichtshof, 25 October 1951, 4 B.G.H.Z. 1 (selection of super-
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of command must still be established to the court's satisfaction. The burden is on the master to find and name the person responsible for the harm and to show his proper selection and supervision, or at least to show adequate selection and supervision of all those persons who may have caused the damage. Furthermore, the manufacturer must also show that his undertaking has been organized for efficient control and for avoidance of possible dangers (so-called Organisationspflicht). Thus a manufacturer of soda water was held liable where the procedure for checking pressure in the bottling process was inadequate, because the workers were relieved at overlong intervals, permitting their attention to flag.

The courts also differentiate, from the standpoint of vicarious liability, between defective design or plan of mass-produced goods, and a defect in their manufacture. Where the design is defective and a whole series of dangerous goods is put on the market as a result, the manufacturer cannot exculpate himself by proving proper control of the manufacturing process; upon him rests the direct responsibility for ascertaining that the product will be safe. A manufacturing defect, on the other hand, is a fault in the individual product, and the manufacturer may exculpate himself by proving proper selection and supervision. In fact, the courts seem to have gone even further and require the plaintiff to produce proof of negligence on the part of either the manufacturer or his employee.

Even considering the various inroads upon the manufacturer's power to exculpate himself for faults of his employees, it is apparent that the consumer's chances of showing the manufacturer responsible for defective planning or supervision, if careful and under proper control, held sufficient to excuse owner of plant; not necessary to prove that there was no fault committed by supervisor).

54. S.E.S. v. H.C., Reichsgericht (VI. Zivilsenat), 25 February 1915, 87 R.G.Z. 1 (faulty control; glass in packaged medicinal salt); S.W. v. V.-M., Bundesgerichtshof, 4 November 1953, 11 B.G.H.Z. 151 (employer liable if his employees unlawfully fail to stop systematic pilferage of owner's property during working hours); see also Judgment of Bundesgerichtshof, 20 October 1958, Vers. R. 1959, at 104; Judgment of Bundesgerichtshof, 13 December 1960, Vers. R. 1961, at 139.

55. Soergel-Siebert, Bürgerliches Gesetzbuch § 831, Nos. 1, 45 (1962).

56. Judgment of Landgericht Hanau, Vers. R. 1956, at 785 (I was unable to read this decision; see Simitis, op. cit. supra note 22, at 25; Markert, op. cit. supra note 22, at 233 n.49).


58. Where the purchaser of a bicycle was injured because a spoke was defective, the defendant was held not to be responsible, the court saying: Where the purchaser of one piece of a mass-produced article which showed an individual defect in manufacture suffered damage in the course of its use, in an action the entire burden of proof is upon him either to show that the manufacturer was negligent, or that an employee of the manufacturer had caused the accident (BGB Art. 831). If he wants to show the negligence of the management he must assert and in the given case prove the existence of faults (defective assembly, use of inadequate machines, inadequate supervision of workmen, and inadequate examination of products before they are put on the market). But he cannot rely on the mere fact that a single defective piece of an assembled product, on the basis of a mistake of a workman, has got on the market, as a proof of first impression that the management was at fault.

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inadequate organization are not particularly promising. This has been much criticized in legal literature, and a draft was recently put before the legislature for a revision of BGB Article 831. 59

This inadequacy of the tort remedy has led also to attempts to ground the claim of the consumer or third party on contractual liability of the manufacturer. This means bringing the third party within the orbit of protection provided by the contract between the manufacturer and the purchaser. The primary purpose is to take advantage of the rule already mentioned that, where a party to a contract employs an agent (his employee) in the fulfillment of his contractual obligations, he becomes liable for the agent's fault without being able to exculpate himself by proof of proper selection or control. Various means have been looked to to bring about this result: the "liquidation of damages to the benefit of a third party," the implied contract for the protection of a third party, 60 and the implied extension of the seller's warranty.

German commercial law does not recognize a direct right of action by the last buyer against his immediate seller in the chain of transactions for warranty for hidden defects. However, in certain cases the courts have upheld the right of one contracting party to sue the other contracting party for damages suffered by a third person who was not a party to the contract. This situation is known as "liquidation of damages to the benefit of a third party" (Drittschadens-liquidation). It is generally held that an agent may demand compensation for damage suffered by the principal on whose behalf he entered into a contract. 61

This rule has been expanded to permit a party to claim compensation for damage suffered by a third party in cases where, although the contract was not made on the latter's behalf, the interests of the claimant are connected with those of the third party in such a manner that the claimant must look after the third party's interests, and this fact should have been reckoned with by the defendant. 62 This interpretation has also been accepted by the Bundesgerichtshof in a

59. Referentenentwurf des Bundesministers der Justiz (3430/11-11 549/59), which would render the master equally responsible with his employee.

60. In addition to the works cited in note 21, supra, we may mention Gernhuber, Drittwirkungen im Schuldverhältnis kraft Leistungsnähe, in Festschrift für Arthur Nitsch 249 (1958); Tagert, Die Geltendmachung des Drittschadens (1938); Reinhardt, Der Ersatz des Drittschadens (1933) (unfortunately the last two were unavailable to me).

61. Deutsches Reich v. G. & H., Reichsgericht (I. Zivilsenat), 15 January 1927, 115 R.G.Z. 419, at 425 (in this case, the forwarding agent sued for the loss of goods belonging to his principal, which he had deposited).

62. Thus it was held that the hirer of a barge which was sunk because of the negligence of a tug-boat contractor could sue the latter for damage, irrespective of whether he himself had been sued by the owner of the barge; S.D. v. B., Reichsgericht (I. Zivilsenat), 11 May 1918, 93 R.G.Z. 39. In another case the defendant, a contractor, had to make repairs in a municipal refrigerating plant, and through the fault of defendant's employee, the plant was destroyed by fire; meat supplies belonging to local butchers, stored in the plant, were lost. Although the municipality was not liable to the butchers for this damage, it was held entitled to claim compensation for the loss. The Reichsgericht found here an implied agreement for the "liquidation of damages in the interest of a third party" although the municipality was not liable, and the third party had no contractual claim against the defendant. Gerling-Konzern v. Maschfabr. G., Reichsgericht (VII. Zivilsenat), 18 December 1942, 170 R.G.Z. 246.
case which did not involve product liability; in this case, it was held that when someone has received into his possession, by contract or as a favor, a thing belonging to another, and has made use of it in the performance of a contract made with a third party, it will be presumed—unless the contrary is established by the special circumstances of the case—that the contractual liability of the (third) contracting party extends to the protection of the thing used in the performance of the contract. It is not necessary that the contracting party know that the thing used in performing the contract belonged to another.\textsuperscript{63}

This principle of “liquidation of damages to the benefit of a third party” was only once applied to a situation which bears a superficial resemblance to a case of product liability. A manufacturer of lubricating oils sold oil to a spinning mill for its textile machinery. According to the manufacturer’s representations, the oil could be removed by washing. The mill produced thread for a textile factory which, in turn, used the thread to weave fabrics which were soiled and from which the oilstains could not be removed. The spinning mill successfully sued the oil manufacturer for the damages suffered by the textile factory.\textsuperscript{64}

It appears, however, that the Bundesgerichtshof has refused to apply the remedy of liquidation of damages to the benefit of a third party in product liability cases. In a recent decision,\textsuperscript{65} the defendant sold some green buckskin to the plaintiff, from which the plaintiff made ladies’ belts which it in turn sold to two garment factories. The belts were used on dresses and sold to garment shops. It was found that the leather had been defectively colored and had soiled a number of the dresses. The plaintiff beltmaker sued the defendant for the damages suffered by his customers although he had not himself been sued by the latter. The action was dismissed, the court stating that in principle a buyer cannot sue the seller for the damages suffered by his customers. In a careful judgment the court considered the cases where third-party damages can be liquidated, namely, the cases discussed above, and it held that in the product liability situation no implied contractual term could be found without extending the subject matter of the contract beyond the proper scope of interpretation.

This history of the action for liquidation of damages to the benefit of a third party shows that it has little prospect of success in product liability cases. Moreover, it seems that the courts restrict the applicability of this action to damages done to property only.\textsuperscript{66}

\textsuperscript{63} S. Fa. Rh. v. H., Bundesgerichtshof, 23 November 1954, 15 B.G.H.Z. 224, at 229.

\textsuperscript{64} Judgment of Bundesgerichtshof, 7 October 1959, Der Betrieb 1959, at 1083. This important decision has not been reported elsewhere, and I have had only second-hand information from: Markert, \textit{op. cit. supra} note 22, at 235; Simitis, \textit{op. cit. supra} note 22 at 32; and Lorentz, \textit{op. cit. supra} note 22, at 80. The case is not typical, inasmuch as the damage to the thread had already been done by the spinning-mill, but became manifest in the plant of the third party. Apparently the manufacturer had also undertaken to indemnify plaintiff for all damages suffered by third parties.

\textsuperscript{65} S.R. v. S., Bundesgerichtshof (VII. Zivilsenat), 10 July 1963, 40 B.G.H.Z. 91.

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Another possible solution is based on an implied contract for the protection of a third party who has suffered a personal injury as a result of defective performance of a contract. Larenz called this the "contract with a protective effect for third parties" (Vertrag mit Schutzwirkung für Dritte), a name which has been adopted by the courts. This type of contractual liability toward third parties was established by the Reichsgericht in reliance on BGB Article 328 which deals with third-party beneficiary contracts. The first cases were those where by necessary implication the subject matter of the contract was intended to extend to third parties, like a lease of an apartment, which covered members of the leaseholder's family who lived with him, or a contract of a parent with a doctor, which was made for the benefit of the child to be treated. These narrow holdings were extended by the Reichsgericht in 1930 when it held that a contractor who had installed a gas meter so negligently that it exploded and injured a cleaning woman working in the household was contractually liable to the injured person on the basis of an implied contract in favor of third parties. The implied relationship of protection was based by the court on BGB Article 618, paragraph 1, which provides that in a contract of service the master has a duty to see that the rooms and implements to be used by his servants should be safe. In view of this duty it must be implied that a contract of labor is to be carried out in such a manner that neither the contracting master nor the members of his family nor his servants shall be injured. This implied stipulation was established by the courts exercising their power of suppletive interpretation (BGB Art. 157, ergänzende Vertragsauslegung).

This case law was also adopted by the Bundesgerichtshof, retaining the requirement of special connection between the injured party and the obligor. The circle of protected persons must therefore remain limited and ascertainable. This can be illustrated by a case involving the flywheel of a threshing machine. The wheel was defectively adjusted by the contractor's employee and it came off, injuring the plaintiff. At the time of the accident the machine was operating not on the owner's land but on that of one J who had employed the plaintiff as

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68. Art. 328 reads:
An act of performance in favor of a third party may by contract be stipulated for in such a manner that the third party acquires a direct right to demand the performance.
In the absence of express stipulation, it is to be inferred from the circumstances, especially from the object of the contract, whether a third party shall acquire the right, whether the right of the third party shall arise forthwith or only under certain conditions, and whether any right shall be reserved to the contracting parties to take away or modify the right of the third party without his consent.

But see text following note 73.
71. E.g., the lessor's duty toward his lessees, the creditor's relation to members of his household or family, and the employer's duty toward his employees are based on BGB Art. 618.

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a helper. The claim was dismissed.\textsuperscript{72} The court pointed out that the owner had the right to expect a safely-mounted machine; that the seller could not exculpate himself for the negligence of his employee, who was his contractual agent (BGB Art. 278); and that the buyer's contract extended to protect his workmen, to whom he was obligated to provide safe implements and working conditions (BGB Art. 618). But the court went on to say that the plaintiff did not belong to the protected group because he worked for another employer who had borrowed the threshing machine, and at the time the contract was made, the buyer had not revealed an intention to lend his machine to another. Consequently, the plaintiff was beyond the ascertainable circle and had no valid claim.

Shortly thereafter, the court affirmed the view that the contractual duty of care and protection should extend not only to the contracting party, but to other ascertainable persons.\textsuperscript{73} This later decision is also interesting because the court adopted the view of Professor Larenz that it was erroneous to assimilate this contract to the third-party beneficiary contract. In the latter, the third party immediately acquires a right to demand performance of the contract, whereas in the former only the duties of care and protection arising out of the contractual relationship are stipulated in his favor. This institution, as Larenz pointed out, unlike the other, is not provided for in the code, but has been created by judicial practice.

Considering the scope of contractual protection for the benefit of third parties from the point of view of product liability, it is obvious that this offers only a limited and partial solution. It is a remedy available to employees of the purchaser or an equally narrow circle, but not to the general consumer of goods at the end of a chain of transactions.\textsuperscript{74}

A third attempt to establish a contractual liability of the manufacturer has been made on the basis of warranty. This possibility was considered in one of the earliest cases by the Reichsgericht, where medical salt, sold in the original wrapping by a pharmacist, contained glass. The court indicated that in addition to the contract of sale with the original purchaser, there may be an implied contract of warranty with the consumer for the unadulterated and careful preparation of goods in their original wrapping. However, it held in this case that the mere fact that the product was in the original package and that the contents were indicated thereon was insufficient to establish an implied contract of warranty.\textsuperscript{75} The idea of establishing the manufacturer's responsibility on the basis of warranty (\textit{zugesicherte Eigenschaften}) has been very popular with

\textsuperscript{72.} Judgment of Bundesgerichtshof (VI. Zivilsenat), 25 April 1956, 9 N.J.W. 1193 (1956).
\textsuperscript{73.} Judgment of Bundesgerichtshof (VI. Zivilsenat), 15 May 1959, 12 N.J.W. 1676 (1959). In this case the seller failed to warn against the inflammable nature of an anti-rust paint, and a workman in a mining establishment was burned while using it. In this case too, the court relied on BGB Art. 618, since the workman was within the circle of persons for whose safety the owner (buyer) was responsible.
\textsuperscript{74.} Markert, \textit{op. cit. supra} note 22, at 234; Simitis, \textit{op. cit. supra} note 22, at 28-32; 1 Larenz, Schuldrecht § 11 III at 126-29 (7th ed. 1964).
\textsuperscript{75.} S.E.S. v. H.C., Reichsgericht (VI. Zivilsenat), 25 February 1915, 87 R.G.Z. 1, at 2.
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doctrinal writers, who discuss a variety of possibilities for development of product liability on this foundation.76

In practice, this approach does not seem to have been particularly successful. One of the reasons is the language of the warranty itself. Where a manufacturer gives an express warranty, it is generally limited to a defect in the object itself, and excludes further liability.77 Another reason is found in the practice of the courts: warranted qualities cannot be implied from mere statements concerning the serviceability or purpose of the goods, but must be sought in an express undertaking by the seller that the goods sold are fit for a particular purpose, or in circumstances extraneous to the description of the product.78 The Bundesgerichtshof, although somewhat less exacting, requires something more than general praise or permissible advertising in order to spell out a warranty.79 So far, there has been one important case—decided in 1921—where the mere description of quality was considered to be a warranty: seed was sold as summer wheat and turned out to be winter wheat.80

Even where a warranty can be established, the problem still remains whether it is an independent warranty—that is, a promise for the future, which will ultimately benefit the consumer—or a dependent warranty (unselbständige Garantie), which refers to the contract of sale alone.81 In case of doubt, it will be presumed to be the latter. Even where the warranty is dependent, however, there is of course the possibility of a chain of recoveries for each purchaser against his immediate seller, but we will not discuss here either the special nature of these remedies, or the short period of limitation accompanying them.82

To sum up, then, the establishment of a liability of the manufacturer on the basis of promises made in the description of the goods on the original package or, to go a step further, by the act of putting on the market mass-produced goods under his trademark, is a future development not yet seriously considered by the courts.

IV. FRENCH LAW

Product liability in French law does not have to face the difficulties which have arisen in German law. It is true that here also we find a curious interplay

76. Simitis, op. cit. supra note 22, at 37 passim; Müller, op. cit. supra note 22, at 304; and Markert, Haftung des Warenherstellers ohne Verschulden, 19 Der Betriebs-Berater 319 (1964) contain discussion of and references to these suggestions.
77. Clauses restricting responsibility to immediate (direct) damage are generally enforceable, unless they are contra bonos mores (BGB Art. 138) or against good faith (Art. 242).
82. The chain of recovery may easily be broken, if one of the intervening distributors is not at fault. In this respect German law is rather lenient concerning the distributor's duty of inspection of the goods. See BGH 15.3. 1956; Der Betrieb 1956, at 348.
of tort and contract, but this affects the relationship of the manufacturer to the purchaser rather than the claim of the ultimate consumer.

French law, in a few broad provisions, adopted a general theory of tort (or, rather, "delictual") liability. There are a mere five articles in the Civil Code on delictual liability, the most important of which is Article 1382: "Every act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage." A similar responsibility arises for damage caused by a wrongful omission (responsabilité quasi-delictuelle, Art. 1383). The code also imposes vicarious liability upon parents, employers and teachers, and a kind of strict liability on persons who have in their care things which cause damage. Finally, it establishes the strict liability of the owners of animals and buildings, respectively (Arts. 1385 and 1386).

Thus we see that it is a fundamental principle of French law that liability for damages is based on fault (faute). Consequently, a plaintiff must show that he suffered damage, and that this was caused by a wrongful act or omission of the defendant. A third-party consumer who suffers harm as a result of a defect in a product can recover damages in a tort action against the manufacturer if he can prove that the manufacturer's negligence caused the injury. Since in French law the employer is liable for the fault of his employees, he will also be responsible for the negligence of his workmen. Nevertheless, to furnish affirmative proof of negligence and of causal connection will not always be easy.

The task of the injured party would be much simpler if he could sue the seller of the defective product on the basis of the presumption of fault established by Article 1384, paragraph 1, as a "person... responsible... for the damage... which is caused by the action... of things in his care." At this point, however, the law of contract comes into play because of the contractual relationship between seller and consumer. We must pause to consider two matters relevant to our problem.

One is the so-called "principle of non-cumul" by which the law refuses to permit a person to cumulate contractual and delictual remedies. Although a breach of contract may also consist in a negligent act causing injury, if the defective execution of an obligation arose out of a contract, the injured person can only rely on a contractual remedy. The question of non-cumul is somewhat confused because of a number of decisions in borderline cases where different courts have evaluated similar facts differently, but there is no doubt that the

83. Code civil [hereinafter cited C. civ.].
84. The fundamental principle of liability for fault has been abandoned by the courts. Judicial practice has established a kind of strict general liability for things in one's care, on the basis of Art. 1384, para. 1: "A person is liable not only for the damage he causes by his own act, but also for that caused... by things that he has under his guard." This form of liability is a form of presumption of fault for injury caused by things under his care, which can only be rebutted by defendant by proving affirmatively that the cause of the injury was the fault of the victim or of a third party, or of cas fortuit or force majeure. This type of strict liability is the responsabilité du fait des choses.
85. A plaintiff in a self-service market put the selected goods before the cashier, and
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The present trend excludes the possibility of a tort action where there is a contractual relationship between the parties.86

The second preliminary observation concerns the remedies available as a consequence of warranty arising from the law of sales. The seller, according to a provision of Article 1641 of the Civil Code, impliedly warrants that the goods have no hidden defects which would render them inappropriate for the use for which they were purchased. The remedies against the seller for hidden defects are found in two articles of the code:

Article 1645: If the vendor knew of the defects of the thing, he is bound not only to return the price which he has received, but he is also liable to the purchaser for all damages.

Article 1646: If the vendor was ignorant of the defects of the thing, he shall only be bound to return the price and to reimburse the purchaser for the expenses occasioned by the sale.

The scope of the warranty arising from a sale is especially relevant where the manufacturer is also a vendor, and his product has injured the purchaser indirectly by causing damage to the third party who may sue the purchaser on the basis either of a contract or of a delictual claim. The warranty distinguishes between the vendor who knew of the defects,87 and the vendor ignorant of them. Where the vendor knew of the defects, he is liable to the purchaser for all the damages which he has suffered, that is, for injuries suffered not only by the purchaser but those suffered by others, for which the purchaser is responsible.88 The vendor's gross negligence is assimilated to actual knowledge of the defects, because Article 1645 aims at the bad faith of the vendor.

If the vendor acted in good faith, which means he did not know of the hidden defects, he is liable only for restitution of the price and for expenses while these goods were being put into a bag a bottle of soda-water exploded and injured plaintiff's eye. The court had to decide whether there had been a contract of sale, in which case there was, in addition to warranty, an obligation of security (obligation de sécurité) (which in French law is a form of strict liability, as to which see note 98 infra), a breach of which would establish defendant's liability, unless there had intervened an extraneous cause. In this case the court found that selection of the articles was sufficient to establish a sale. Sté. des Eaux minérales Vittel v. dame Morel D'Arlieux, S.A.R.L. Supermag-Rennes et Scé. des Verreries de Gironcourt, Cour de Paris, 14 décembre 1961, [1962] Jurisclasseur Périodique [hereinafter J.C.P.] II. 12547 et note Savatier.

86. See, e.g., Judgment of Cour de Cassation (Ch. Civ.), 6 Avril 1927, [1927] Sirey Recueil Générale [hereinafter cited S.] I. 207 (Fr.), et note H. Mazeaud. In this decision the Cour de Cassation clearly stated the point: "It is only in matters of delict and quasi-delict (negligence) that any fault obliges the person who caused it to repair the damage resulting from his act; articles 1382 et. seg. of the Code civil are not applicable when it is a question of a fault committed by non-performance of an obligation arising out of a contract." See I Mazeaud-Tunc, Traité théorique et pratique des responsabilité civile [hereinafter cited Mazeaud-Tunc] Nos. 173-207, at 226-59 (6th ed. 1965) for detailed discussion and case references.

87. It is always a question of hidden defects, because defects which are known to or easily discoverable by the purchaser do not result in liability of the seller.

incurred in the course of the sale (les frais occasionnés par la vente). This
would mean expenses of transport, transfer fees, expenses of sale to sub-pur-
chasers, and the like. The courts have, however, extended the scope of expenses
to "sums which the purchaser has been condemned to pay," an interpreta-
tion which has been much criticized. This extensive interpretation of warranty
becomes especially severe when it concerns a manufacturer or distributor as
vendor. According to the old adage unusquisque peritus esse debet artis suae,
a vendor who is a manufacturer or a professional merchant is supposed, by
reason of his experience, to know of the hidden vices of the goods. This
principle has been accepted by French judicial practice and is considered an
irrebuttable presumption which will always render the manufacturer or pro-
fessional merchant responsible for all damages suffered by the buyer, including
the costs the latter has had to pay in damages to the injured sub-purchaser or
third parties.

The obligation of warranty of the vendor, however, can be excluded by
express stipulation under Art. 1643. If a clause excluding responsibility is con-
tained in the contract of sale, will it be effective? In general, there are two
exceptions to the validity of such a clause in a contract: the clause is ineffective
if the cause of damage is a fraudulent (dol) act of the vendor, and if bodily
injury is caused by the vendor.

If a vendor knew of the hidden defects of the object sold, he is acting in bad
faith, his act is fraudulent, and he cannot rely on the clause of non-responsibility.
The courts equate gross negligence and fraud, and consequently gross negligence
will also nullify the effectiveness of the clause. It is not yet settled whether the
courts include the presumption of knowledge on the part of the manufacturer
and trader within the scope of fraud for the purpose of the above rule, but the

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90. Pothier, Traité du contrat de vente, No. 214, at 89 (1861).
91. Thus in Judgment of Cour d'Appel de Chambery, 23 novembre 1908, 1912 D. II. 103, the court said: "The merchant or manufacturer, who sold a thing which is an object of his trade, will be considered to have known the defects of the subject of litigation. Because he knew the vice he has to pay damages." And in Gaz et Électricité de France v. Établissements Jacob Holtzer, Cour de Cassation (Ch. Civ., 1ere sect.), 24 novembre 1954, J.C.P. II. 8565, it was said: "As a result of provisions of art. 1645 ... the vendor who knew the defects is obligated to purchaser for all damages which he suffered; assimilated to such vendor is one who on the basis of his profession ought to have known the defects."
92. 10 Planiol-Ripert-Hamel 153. It seems that Belgian courts permit the vendor to exculpate himself by proving all necessary care on his part; see Judgment of Cour de Cassation, 13 novembre 1959, J.T. 59 (Bel.). And see Van Haecke, La responsabilité du fabricant, 14 Revue Critique de Jurisprudence Belge 212-23 (1960).
94. 3 Mazeaud-Tunc No. 2523, at 671-72 (5th ed. 1960). The courts have, however, established two exceptions; they give effect to the clause excluding liability in contracts of carriagé by rail and of marine transport in spite of gross negligence.
tendency of the judicial practice is to hold non-responsibility clauses inapplicable to manufacturers and traders. 

The second exception to clauses of non-responsibility is based upon the principle that a person cannot dispose of his life or his body. Consequently, the clause cannot be applied in the event of harm to life or limb.

It may also be pointed out that, as far as third parties are concerned, these clauses obviously cannot come into play for two reasons: there is no contractual relation between these persons and the vendor, and the courts will not enforce clauses of non-responsibility in claims based on tort.

In the light of what has been said above, we turn again to the scope of liability of manufacturers and sellers. Several situations may be examined. A defective product injures a person who has purchased it from the manufacturer or intermediate vendor. His remedy is in contract; he cannot rely on a tort claim. On the basis of the strict liability arising out of warranty, he will be able to recover all his damages. It is important, however, to distinguish the case where the injury was not due to any defect in the product, but occurred because the product was used improperly by the purchaser, as a result of inadequate instructions or lack of warning by the manufacturer. In this case the manufacturer has failed in his obligation of security and he will be liable in tort if he is at fault.

There may be cases where the consumer has remedies against both the manufacturer and the seller, the one delictual and the other contractual. It


97. The only problem which may arise here is the short statute of limitations (bref délai). The law does not fix the time limit but merely states (C. civ. Art. 1648) that it should be a short delay according to the nature of the defect or the usage of the place where the sale was made. The courts of first instance have discretion concerning local customs and the diligence of the purchaser; 10 Planiol-Ripert-Hamel No. 136, at 155-57.

98. The obligation of security (obligation de sécurité) is a specific obligation, whenever in the course of performance of a contract there is a probability that the promisee may be exposed to injury. In such cases it is a burden on the promisor to see to it that the promisee should remain safe and sound. Thus in contracts of carriage, the promise is to the effect that the promisee shall arrive at his destination safe and sound; if this does not happen the promisor has failed in his obligation of security and is presumed to be at fault and responsible for any harm done, unless he can rebut this presumption. See 1 Mazeaud-Tunc Nos. 150-62 (6th ed. 1965).

99. Judgment of Cour de Cassation (Ch. req.), 5 mai 1924, [1924] D.H. 433 (absence of instructions for handling explosives); Judgment of Cour d'Appel de Douai, 4 juin 1954, [1954] D.J. 708 (absence of instruction for adjusting vegetable mixer). No liability arises, however, where the purchaser in consequence of his profession should have known the necessary precautions, or if he did not know them, should have taken steps to find out about them. See Judgment of Cour de Cassation (Ch. civ., sect. comm.), 4 décembre 1950, [1950] Bulletin des arrêts de la Cour de Cassation Ill. 261; see also H. Mazeaud, at 618.

100. Thus where a chemical (dermite) used in making permanent waves for ladies caused a serious dermatitis, the court held the hairdresser contractually liable in damages to his client on the basis of his obligation of security, and held the manufacturer liable in
may also happen that the seller will be held liable even though he has no
redress against the manufacturer or vendor. Where the injury is caused to a
third party, his remedy, if he can prove negligence, will be against the manu-
facturer and the vendor, but he may also have a claim in strict liability against
the purchaser who had the thing under his control when it caused injury to the
third party; in this case, the purchaser will also have redress against the
vendor if he can prove a hidden defect or other non-performance of a contractual
duty.

Finally, we may consider the relations among the chain of purchasers.
"Where there has been a series of sales of the same thing, the last buyer may
invoke . . . the warranty against hidden defects, . . . either against his immediate
seller or against any previous seller in the chain, until he finds one that is solvent.
He may either employ the action oblique, or bring an action directe, relying
upon the doctrine that each successive sale implies a transfer of all rights of
action relating to the thing sold. The action directe is an interesting and
peculiar institution of French law, which has aroused much interest. It seems,
however, that where a sub-purchaser brings a claim for damages against the
manufacturer, the present trend of the courts is to consider him a third party,
and hence he will have only a tort action, and cannot rely on the action directe.

contract for the damages suffered by the hairdresser, for providing a product which he (the
manufacturer) knew or ought to have known was capable of causing harm, and further held
the manufacturer liable in negligence to the client for not having warned the users of his
confirmé, Cour de Cassation (Ch. civ.), 5 mai 1959, [1959] J.C.P. II. 11159.

101. This happened in the case where a bottle in a self-service market exploded and
injured the consumer; see note 85, supra. The seller was found responsible on the basis of
his obligation of security. The manufacturer was in no contractual relation to the consumer,
and could only have been held liable if the latter could have proven a fault; he was not
liable in strict liability because the bottle was no longer in his care. The vendor (market)
failed to produce the pieces of the bottle, and thus could not prove any hidden defects; the
market thus lost the possibility of redress against the manufacturer; Sté. des Eaux minérales

102. It would be going too far to consider the whole area of who is in control of the
thing which caused damage, but the owner is generally considered to be in control, unless he
has relinquished his control in such a manner that the latter is capable of preventing all harm
caused. Thus where bottles of liquid oxygen were refilled, the bottles remaining the property
of the vendor while transported, and they exploded at the moment the transporter delivered
them to the purchaser, injuring several persons, the owner was held liable; he controlled the
bottles which exploded as a result of some unexplained internal cause (probably corrosion);
note Esmein.

103. By the action oblique creditors are entitled to take advantage of all the rights
and causes of action of their debtor except those which are purely personal; see C. civ. Art.
1166.

104. Amos & Walton, Introduction to French Law 362-63 (2d ed. 1963); cf. 10 Planiol-
Ripert-Hamel No. 104.

105. See Ficker, op. cit. supra note 88, at 118-37 for an excellent description of this;
see also Wahl, Vertragsansprüche Dritter im französischen Recht unter Vergleichung mit
dem deutschen Recht dargestellt an der Hand der Fälle der action directe (1935).

106. 1 Mazeaud-Tunc No. 181, at 235 (6th ed. 1965); see also Sté. des Eaux minérales
Vittel v. dame Morel d'Arlieux, S.A.R.L. Supermag-Rennes et Scé. des Verreries de Giron-
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CONCLUSION

We have now considered the problem of product liability in three different legal systems. The law in the United States makes the boldest and most successful approach. It is true that this law may be considered an "open system," not too much hampered by systematic and conceptual niceties, and free to reach policy decisions. English common law, by contrast, has been more hesitant to abandon fundamental principles, as in the case of extension of implied warranty beyond the scope of contract.

German law, with its careful and precise code definitions and its adherence to principles, has had to face more obstacles than the others. The principle of personal fault as a basis of liability established by BGB Article 831 has been a barrier to the satisfactory solution of the manufacturer's responsibility for defective products. Possibly this principle will be abandoned by new legislation, but the laborious attempts to fill the gap by implied contractual obligations have not been notably successful, again because of conceptual obstacles or, rather, because the fundamental principle of "privity" in a contract relationship cannot easily be disregarded in a legal system which is truly systematic.

French law has been able to find a more-or-less satisfactory solution because of the broad and loose concept of tort liability, which reflects the optimism of the Enlightenment. The broad and far-reaching remedies available are made even more so by the perhaps overly severe interpretation of warranty against manufacturers and traders.

It is one thing to show how a problem is solved by "radically different techniques," and another to find a satisfactory explanation, deeper than the somewhat superficial differences of principles and codified definitions. This can only be attempted by an intensive historical and sociological analysis, which is beyond the scope of this article and probably also beyond this writer's qualifications.

court, Cour d'Appel de Paris, 14 decembre 1961, [1962] J.C.P. II. 12547 et note Savatier; [1962] Rev. trim. droit civ. 314 where it is said by A. Tunc: "Although eminent authors have expressed contrary opinions and in spite of the alleged principle of the relativity of contracts . . . it seems, in effect, that the action of a sub-purchaser against a manufacturer can only be a delictual action."

107. These very general provisions have led, however, to an extensive case law, which to some extent has become chaotic; see 1 Mazeaud-Tunc, Avant-propos de la sixième edition, at 1 (1965).