PRODUCT LIABILITY IN SCANDINAVIAN LAW

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I. THE PROBLEMS OF PRODUCT LIABILITY

Production and consumption constitute the economic foundation of modern industrial society. Apart from services, production provides goods which are bought by consumers. One of the problems arising from this process stems from the fact that, while being consumed, a product not infrequently causes injury to the consumer's or a third party's person or damage to their property. At times the steering mechanism of a motor car may fail, occasionally a soda-water bottle may explode in the hands of a consumer, in other instances use of the Pill may result in thrombosis. Personal injury or damage to property caused by a product during consumption—in the widest sense of the latter word—is called *product damage*.

When product damage occurs, questions arise as to whether, under what circumstances, to what extent, and from whom the victim may claim compensation. In Scandinavian law these questions are now generally labelled "produktansvar", a verbatim translation of the term *product liability* used in Anglo-American law. This term, still in 1967 alien to Scandinavian jurisprudence,[1] has today become part of its vocabulary.[2] The aim of this study, which is based upon a treatise published in Danish in 1973,[3] is to give a survey of Scandinavian law on product liability.[4]

This article was completed in December, 1974.

[1] Jørgen Hansen, *Produktansvarsforsikring,* Copenhagen 1967, p. 39.

[2] See, e.g., Arnholm, *Privatrett III, Alminnelig obligasjonsrett,* 2nd ed. Oslo 1974, p. 315, Bengtsson, "Om ansvar för läkemedel", *Norsk Forsikringsjuridisk Forenings Publikasjoner,* no. 54, Oslo 1969, p. 4, Gomard, *Obligationsretten i en nøddeskal,* vol. 2, Copenhagen 1972, p. 180, Hiekkaranta, "Konsumentskyddets behov och produktansvarets utgångspunkter", *F.J.F.T.* 1973, p. 331, Stig Jørgensen, *Kontraktsret,* vol. 2, Copenhagen 1972, p. 164, and Karlgren, *Produktansvaret,* Stockholm 1971.

[3] Børge Dahl, *Produktansvar,* Copenhagen 1973, reviewed by Bengtsson, *Sv. J.T.* 1974, p. 316, Bent Iversen, *Fuldmaegtigen* 1973, p. 138, Hiekkaranta, *F.J.F.T.* 1974, p. 44, Lyngsø, *Juristen* 1973, p. 361, and Trolle, *U.f.R.* 1973, p. 333.

[4] For a discussion in English, see A. Vinding Kruse, "Producers' Liability in Scandinavian Law", in *Die Haftung des Warenherstellers, Arbeiten zur Rechtsvergleichung,* vol. 28, Frankfurt a.M. 1966. In French a survey is given by Elisabeth Thuesen and Ole Lando, "La responsabilité du vendeur et du fabricant pour leurs produits dans le droit danois", in *Responsabilité civile du fabricant dans les états membres du Marché Commun,* Aix-en-Provence 1974. The body of writing in the Scandinavian languages is comprehensive. In addition to the works mentioned, see Andenæs, "Om selgerens ansvar for farlige egenskaper ved den leverte gjenstand", in *Festskrift til Henry Ussing,* Copenhagen 1951, pp. 9 ff., Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden,* Stockholm 1960, pp. 202 ff., *idem,* "Om strikt ansvar för skadebringande

In Scandinavian law there are no statutory provisions concerning product liability in general and therefore it has been the task of the courts to develop a body of case law. However, there exist a number of statutes on product liability covering specific areas. Most of them do not seem to lead to results different from those which would have ensued from application of rules evolved by judicial practice. Two statutes, however, deserve mention, the Danish Act of 1972 on Compensation for Injuries suffered from Vaccination[5] and the Norwegian Pharmacies Act of 1963. According to the former Act, compensation will be paid by the state for personal injury and death which may reasonably be assumed to be attributable to vaccination against contagious diseases administered in Denmark in the public interest.[6] The latter Act holds the owner of a pharmacy strictly liable for product damage caused by drugs unless the drug has been dispensed precisely as prescribed or requested and has been labelled and dispensed in accordance with current regulations. Liability is covered through a compulsory liability insurance or other coverage to be furnished by the pharmacy. As a result of the Act the shop will, when dispensing factory-made special drugs, be liable for damage caused by flawed products, but not for damage caused by generically dangerous products.[7] The report on which the Act is based assumes that, in any such case, the shop (and the insurance company) will have a right of recourse against the manufacturer.

In what follows primarily Danish, Norwegian, and Swedish law will be described. Icelandic law, in all essentials, corresponds to Danish law, and Finnish law to Swedish law. The rules on damages in contract and in tort are very much alike in all five countries. However, in Denmark and Norway the courts developed a general rule on vicarious liability in the employer–employee relationship. In Finland and Sweden this was not the case. Such liability was introduced in Sweden by the Tort Liability Act of 1972,[8] and in Finland by a corresponding act of 1974.

Previously, the discussion turned on liability for dangerous or injurious qualities in goods supplied or services rendered. The question of liability for dangerous features of goods sold was dealt with in textbooks on sales as

gods", *Sv.J.T.* 1969, p. 46, Gomard, *Forholdet mellem erstatningsregler i og uden for kontrakt*, Copenhagen 1958, pp. 319 ff., Jørgen Hansen, *Sælgerens ansvar for skade forvoldt af ting med farlige egenskaber*, Copenhagen 1965, Hellner, *Skadeståndsrätt*, Stockholm 1972, pp. 214 ff., *idem*, *Köprätt*, 4th ed. Stockholm 1974, pp. 165 ff., Sandvik, "Ansvar for skadevoldende egenskaper etter norsk rett", *T.f.R.* 1964, p. 503, Saxén, "Några synpunkter på säljarens ansvar för skada härrörande av skadebringande egenskaper hos köpegodset", *F.J.F.T.* 1962, p. 269, *idem*, "Ansvar för läkemedels skadebringande egenskaper, *F.J.F.T.* 1974, p. 159, Taxell, *Avtal och rättsskydd*, Turku 1972, pp. 404 ff., and Vahlén, "Om skadebringande egenskaper", in *Festskrift tillägnad Nils Herlitz*, Stockholm 1955, pp. 369 ff.

[5] Act no. 234 of June 7, 1972.

[6] At the moment limited to vaccination against smallpox, diphtheria, whooping cough, polio, and tuberculosis, as well as tetanus when the anti-tetanus serum is administered jointly with one or more vaccines against the other diseases mentioned.

[7] In respect of this distinction, see IV.A.5.

[8] See Hellner, "The New Swedish Tort Liability Act", 22 *A.J.C.L.* 1, 8 (1974).

a matter of the seller's duties, while the more general aspect of a debtor's responsibility for any dangerous features inherent in his performance was discussed in the general textbooks on contract law. The range under which it was viewed was limited to the seller–buyer and creditor–debtor relationship, respectively.

The introduction of the term "product liability" meant more than a change of heading. It also meant that the problems of product liability were viewed and dealt with as an independent subject. A much greater interest was taken in the producer's position than in the seller's. The study of the law of other countries and comparative jurisprudence had, once again, led to clarification.

Another element stimulating the changed approach to the problems of product damage was, of course, the explosive development within technology and science, manifested not only by the production of atomic bombs, jet planes, rockets, and satellites, but also by a complete change in the market for consumer goods. This opened the eyes of many people to the industrial risk of catastrophic damage. The rapid development in the market for ready-made consumer goods, with its constant introduction of new articles, has affected our consumption pattern. Today many people are older than the types of goods they use. The pattern of our consumption has been fixed prior to the arrearance of the goods, but nevertheless this pattern decides our selection among alternative possibilities in connection with the purchase as well as the use of the goods. The fact that the goods are younger than we are means that we use them without being fully aware of the risks involved. Let us take a simple example. Formerly, ladles used in cooking food were made of wood and always had been. Today they may be made from a great many other materials as well. It is not possible for the individual consumer to decide whether any such material, when combined with one or more ingredients of the dish which is stirred with the ladle, may become toxic. The discussion of pollution problems makes it quite clear that while technological innovations usually bring about an improvement in terms of higher standards of living and increased consumption, they may also have adverse effects which were never foreseen.

The influence of industrial development on the theoretical debate on product liability is very aptly illustrated by the differences in time and subject between the two Scandinavian monographs so far published on special products and product damage. Whereas the first of these, from 1941, dealt with contagious bovine abortion,[9] the second, from 1969,

[9] J. L. Frost, *Erstatningsansvar for smitsom kalvekastning*, Copenhagen 1941.

discussed the liability for medicine.[1] An investigation of this latter question had become particularly topical because of the thalidomide scare,[2] which had made product damage, although seldom mentioned in the law reports, front-page news, a position which it continues to hold.

The attempt to view the problems of product liability as a subject by itself has also created awareness of the limitations of product liability. Legislation on industrial injuries insurance normally makes a distinction between, on the one hand, personal injuries occurring by accident and, on the other, occupational diseases. This distinction between injuries caused by a single momentary occurrence and injuries sustained as a result of a continuous, steady, adverse action is pertinent to the law of product liability.[3] There is a distinction, albeit a vague one, between, on the one hand, *momentary product damage* resulting from an accident and caused by a single product and, on the other, *accumulated product damage* developing gradually during the constant use of one or more products of the same or different kinds. Frequently, the accumulated damage cannot be specified, nor can the causality be completely clarified. The development is slow and cumulative, so that the presence of danger and of injury may not manifest itself for many years or for generations. It will be difficult or impossible to prove any causality between the injury and its source. Who is to be held responsible when the causal factors are numerous, unidentified and anonymous? The importance of accumulated product damage may be illuminated by considering the welfare and health problems in an industrial society. In former times, death was primarily caused by infectious disease. Today it is often caused by multifactorial diseases such as cardiovascular diseases and cancer. Traffic accidents constitute the other great factor. These causes of death stem directly or indirectly from the industrial culture. Man dies from the toxic effect of industrial products, from overfeeding with a nutritionally ill-balanced conglomeration of industrial products, or from the disproportion between the human individual's reaction speed and the dynamics of the means of transport. The law of tort is not an appropriate instrument for dealing with multifactorial injuries. This, of course, does not mean that accumulated product damage will always be of such a complex nature as to prevent the application of the law of tort. Apart from a number of court decisions in respect of damage caused by contaminated fodder, the cases of product damage brought before the courts have so far mainly concerned

[1] Bengtsson, *Om ansvar för läkemedel*, 1969.

[2] In Scandinavia, too, this incident was settled out of court, see Henning Sjöström and Robert Nilsson, *Thalidomide and the Power of the Drug Companies*, Penguin Books 1972.

[3] Dahl, *Produktansvar*, pp. 36 ff.

momentary product damage. This study will, therefore, concentrate on a description of the rules applying to such damage.

Society has an obvious interest in ensuring that production is adapted in such a way that the products will not cause harm during consumption.[4] It is generally accepted that everyone has a right to safety, in the sense that as a consumer of products marketed in the community he is entitled to protection against injury to life and impairment of health. In most countries there are statutory regulations covering certain product groups which provide specific, detailed safety standards and establish public supervisory bodies. Normally a start was made with legislation on food, frequently following directly upon some public scandal. In addition to food legislation the Scandinavian countries have statutes on medicines, motor vehicles, electrical equipment, etc. There is hardly any doubt that legislation of this nature is an effective and adequate means of preventing damage. Such legislation, however, is of no great benefit to the consumer if, in spite of existing regulations, a mishap does occur. In order to safeguard the consumer, especially when damage has occurred, rules on compensation have to be introduced.

II. PRODUCT LIABILITY AND THE SCANDINAVIAN SALE OF GOODS ACT

In 1901 committees were appointed in Denmark, Norway, and Sweden for the purpose of drafting uniform bills on the sale of personal property. In the years 1905–07 Sale of Goods Acts[5] were introduced in the three countries. In secs. 42–54 of the three statutes there were virtually identical provisions on liability for defects in the goods sold. At an early stage the courts were faced with the question whether these provisions were applicable to cases of product damage also.

The Sale of Goods Act makes a distinction between two categories of contracts, namely the sale of specific goods, or goods itemized in the contract, and the sale of generic goods, i.e. goods designated by their type. The concept of defect is not defined for any of these categories. Nor does the Act contain rules on implied warranties for "merchantable quality",

[4] In his famous *Special Message to Congress on Protecting the Consumer Interest,* dated March 15, 1962, President John F. Kennedy listed four basic rights of the consumer, among which *the right to safety* was the first.

[5] Swedish Act of June 20, 1905; Danish Act of April 6, 1906; and Norwegian Act of May 24, 1907. Iceland adopted a similar act in 1911. In Finland no Sale of Goods Act has been passed so far, but in legal practice rules have developed which, in all essentials, correspond to the Scandinavian Sale of Goods Acts, cf. *Kommittébetänkande 1973: 12, Köplagskommitténs betänkande,* Helsinki 1973, p. 2.

"fitness for purpose", "consumer acceptability", or the like. The remedies available to the buyer, where the goods sold are defective, are enumerated in the Act. With regard to the right to damages compensating loss, a difference is made between sales of generic goods and of specific goods. As regards generic goods, sec. 43 of the Act imposes strict liability; only under exceptional circumstances can the seller avoid liability. In the case of specific goods the buyer may, in pursuance of sec. 42, claim damages for defects due to negligence on the part of the seller (or his employees) subsequent to the date of the formation of the contract. The buyer may, furthermore, claim damages when at the time of the sale the goods lacked qualities which must be regarded as warranted. Thus, the seller is not liable under the rule of negligence (*culpa in contrahendo*) for defects existing at the time of the sale.[6] According to sec. 54 of the Danish and the Swedish Acts, the buyer loses his claim unless he notifies the seller of the defects in the goods sold within a period of one year from the time of delivery. By an amendment of 1974 to the Norwegian Act on Sale of Goods, the period was extended to two years.

The committees which drafted the uniform bill took into consideration the question whether the provisions of the Sale of Goods Act on liability for defects should be made applicable to product damage. The committees explicitly stated that the rules in the Act that deal with damages for defects were provided for the purpose of defining the seller's obligation to compensate the buyer's loss when the goods did not have the value assumed, and were not intended to include the loss inflicted upon a buyer in cases where the goods caused damage to other things. In their reports the committees took the view that such damage should be governed by general rules on compensation and not by the Sale of Goods Act.[7]

The courts have followed the intentions expressed in the *travaux préparatoires*.[8] Some legal writers have advocated that sec. 43 of the Sale of Goods Act, stipulating strict liability for defective generic goods, should apply to product damage as well, on the ground that the consumer should be given effective protection.[9] However, the Supreme Courts of all the countries involved have rejected this idea.[1]

[6] Actually the difference is not as substantial as might have been expected considering these opposite starting points. The courts have sometimes assumed a warranty by the seller in case of sale of specific goods.

[7] See Dahl, *Produktansvar*, pp. 109 f. with references.

[8] For a detailed analysis, see Dahl, *Produktansvar*, pp. 171 ff.

[9] See, in particular, Almén, *Om köp och byte av lös egendom, Kommentar*, 4th ed. by Rudolf Eklund, Stockholm 1960, p. 636, Karlgren, *Produktansvaret*, pp. 96 ff., and Sandvik, "Ansvar for skadesvoldende egenskaper efter norsk rett", *T.f.R.* 1964, p. 503.

[1] The leading case in Sweden is 1918 N.J.A. 156. While the decisions made by the Norwegian Supreme Court in 1945 N.Rt. 388 and 1948 N.Rt. 121 were clear, the next two

It would also have been inappropriate to apply the provisions of the Sale of Goods Act to product damage.[2] *First,* this would have meant that a buyer would not have had a right of recovery in every case of negligence on the part of the seller. As is indicated by the text of sec. 42, he is not always entitled to recovery.[3] *Secondly,* the distinction between specific and generic goods is not relevant in respect of product damage. Ordinarily the seller's liability for defects in the goods is equal to the loss on the bargain, i.e. the difference between the value of the goods contracted for and the value of the goods delivered. In Scandinavian law the buyer has a right to require specific performance. The strict liability imposed by sec. 43 on the seller of generic goods is a natural consequence of this. The buyer would have been entitled to return the goods and to require a new delivery of non-defective goods. The economic burdens of replacement delivery and compensation will be identical. A difference in the fundamental rules on the liability for sales of specific goods and of generic goods in relation to the typical loss caused by defects may therefore be justified. But this reasoning does not apply to product damage. A seller's ability to carry a more or less strict liability for product damage does not depend on whether he has sold specific or generic goods; the decisive point is whether the sale has been effected in the course of his business activities, whether "the seller is engaged in the business of selling such a product", whether the goods sold are "of a description which it is within the seller's natural line of business to supply" or which have been bought "from a seller who deals in goods of that description".[4] *Thirdly,* it is a matter of chance whether an instance of product damage will affect the purchaser himself, his family, his guests or perhaps an outside third party: the innocent bystander. The typical loss resulting from a defect in the goods sold is a purely economic loss which exclusively affects the buyer and, at that, only his finances. Here, however, it is a question of liability for personal injury or damage to property that may be inflicted upon anybody. As Dr Jolowicz maintained: "Whatever the law should be, it should be the same for all."[5] *Fourthly,* problems of

decisions, 1962 N.Rt. 1163 and 1972 N.Rt. 1350, spread some confusion which, however, the decision 1973 N.Rt. 1153 has now finally dispelled, cf. Kristen Andersen, *Jussens Venner* 1973, p. 305.

[2] Dahl, *Produktansvar,* pp. 184 ff.

[3] Actually, the writers who advocate the application of the rules of the law on sales to product damage would supplement them with a rule on liability for negligent omission of warning against danger inherent in the product or of directions as to the proper handling of it, cf. Almén, *op.cit.,* p. 637, Karlgren, *op.cit.,* p. 97, and Sandvik, *T.f.R.* 1964, p. 507.

[4] This is recognized by Karlgren, *Produktansvaret,* pp. 124 f. and 126 f. Though he is in favour of applying the rule on strict liability of sec. 43 to product damage, he would hold the non-professional seller of generic goods responsible for negligence only.

[5] Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law", 32 *Modern Law Review* 1, 6 (1969).

product liability may arise wherever a product has been supplied and in whatever way it has been supplied, be it by contract or otherwise, a contract of sale, a lease, a gift or in some other way. The provisions covering product liability must be independent of the type of contract and the price paid by the receiver. *Fifthly,* the product liability resting on the seller must be considered in its relation to the liability of the producer. The questions whether the seller shall have a right of recourse against the producer or whether the buyer has a similar claim were not taken into consideration by the drafters of the Sale of Goods Act. *Sixthly,* a contractual foundation of the liability would mean that the ordinary rules on limitation of contractual claims would apply. This would be inappropriate where product damage is concerned. It would, for instance, be quite preposterous if the one-year period of limitation in sec. 54 of the Sale of Goods Act (in Norway two years) should apply to product damage.

Thus Scandinavian law has avoided the "curious and long-standing anomaly", the "quite absurd" distinction made in English law,[6] illustrated for instance by *Daniels* v. *White.*[7] On the other hand, the Scandinavian solution had certain disadvantages. Thus it became necessary to distinguish between damage for which compensation could be claimed under the provisions of the Sale of Goods Act, on the one hand, and product damage, on the other.

The basic principle of Scandinavian law is that in pursuance of the Sale of Goods Act the buyer can claim full compensation for his loss "directly and naturally resulting, in the ordinary course of events", from the defects in the goods sold, except for physical damage to property other than the goods sold.[8] As regards personal injuries, this distinction poses no problems whatever. The same cannot, however, be said unreservedly in the case of damage to property, where it may in some cases be disputed whether the defect has caused further physical deterioration or damage to the goods themselves, or whether the goods sold have caused physical damage to other property. The problem arises especially where a product fails, is destroyed or deteriorates because of a defect in a raw material delivered.

In a decision of 1960[9] the Swedish Supreme Court ruled that sec. 43 of the Sale of Goods Act was applicable in a case where breadcrumbs used by the buyer in his delicatessen store in the production of meatballs contained

[6] Waddams, "The Strict Liability of Suppliers of Goods", 37 *Modern Law Review* 154 (1974), Jolowicz, *loc.cit.*, and Atiyah, *The Sale of Goods,* 4th ed. London 1971, pp. 107 ff.

[7] 4 All E.R. 258 (1938).

[8] For a detailed analysis, see Dahl, *Produktansvar,* pp. 107 ff.

[9] 1960 N.J.A. 441.

some particles of stone, rendering the whole production inedible. In two earlier cases[1] the court likewise held the Act applicable where defective building materials which had been delivered by the defendant caused damage to the buildings for which they were used.[2] Recently, the same line was followed by the Norwegian Supreme Court in a case[3] where some lime used by the buyer for plastering contained unslaked particles, destroying the plaster. The characteristic element in these cases—referred to among Scandinavian lawyers as cases of *ingredient damage*—is that the goods sold are used as an ingredient in a product processed by the buyer and because of defects in the goods sold the product turns out to be inferior as compared with the expected result. The provisions of the Sale of Goods Act are applicable in any such case of damage.

This position seems reasonable. Apart from cases of product damage, the great majority of other types of damage may arise in consequence both of non-delivery and of defects in goods delivered. In view of the inter-relationship between the rules covering non-performance and those covering defects, it would seem natural to treat such types of loss alike. Delay in delivery or defects in goods delivered may impede the buyer's operations in exactly the same way. When applying this point of view, it is reasonable to deal with ingredient damage in line with other commercial—pure "out of pocket"—losses. Ingredient damage is more likely to be caused by poor quality than by dangerous features and will arise only in the relationship between a sub-supplier and an assembler.

Ingredient damage must not be confused with what might be called *component damage*. If, for instance, a spare part for a motor car causes the engine to break down, this damage will be assessed in the same manner as other product damage and consequently the provisions of the Sale of Goods Act will not apply.[4] Ingredient damage is damage in manufacturing, not—like component damage and other types of product damage—damage in consumption.

[1] 1935 N.J.A. 577 and 1951 N.J.A. 271.

[2] In the first case a house displayed cracks caused by defective bricks. The purchaser claimed that "the product caused damage to other property", not only to the bricks but "also to panels, wall paper, etc.", while the seller pleaded that it was "not a question of 'other property' but only of the bricks used in the construction of the house".

[3] 1974 N.Rt. 269. The court relied on its earlier decision of 1937 N.Rt. 323.

[4] Cf. judgment of the Swedish Supreme Court, 1945 N.J.A. 189, and judgment of the Danish Supreme Court, 1959 U.f.R. 870.

III. THE DANGEROUS PRODUCT

The harmfulness of a product depends on the overall situation in which it is placed. A pistol is harmless when placed in an exhibition case in a criminological museum, whereas it is dangerous in the hands of a bank robber. It is not possible to make products full proof or even fool-proof. If sugar is put in the petrol tank of a car, the engine will stop. If a person is given an overdose of sleeping pills, he may not wake up again. Things and acts are not dangerous or harmful *per se,* but only in a certain connection.[5] There is no product which in itself is dangerous or, for that matter, harmless. Any product may, however, become part of an activity which would cause personal injury to the consumer or a third person or damage to their property. The nature and the quality of a product and the designation given it by the producer are factors of importance, as are also the information provided concerning the product, its handling, its storage, etc., on its way to the consumer, and the manner and the general situation in which it is used by the consumer. Today, in the great majority of cases the damage which occurs is product-related. Even though the damage cannot be claimed to have been caused directly by a product, it nearly always has some relation to a product. Liability for product damage will be invoked only if the damage has been caused by a *dangerous product,* and not if it is attributable to the consumer's abnormal, deviant and dangerous handling of the product. *A product is dangerous if it can cause harm in the course of a normal consumption process.*

> When the discussion in the law on tort is concerned with the subject of dangerousness, dangerous things, dangerous operations, etc., the term danger is used in a specific meaning. Generally, things which are not dangerous according to the definition just given will not cause harm if used with due attention and proper care. That a thing has been adapted to the requirements of society and of technological developments will generally mean that the element which society finds dangerous can be controlled through sensible handling of the thing. The general law on tort finds things to be more or less dangerous depending on the degree or extent of care needed to avoid damage. The greater the need for care, the more dangerous is the thing. A stick of dynamite is more dangerous than a walking-stick. If the dangerous element in the thing can be controlled through careful handling, the danger as related to a right of recovery will not lie in the thing itself but in human behaviour, i.e. danger arises because of a display of carelessness on the part of the person handling the thing.[6]

[5] Cf. Winfield and Jolowicz, *On Tort,* 9th ed. London 1971, pp. 207 ff.

[6] Cf. Weitnauer, "Die Haftung des Warenherstellers", *N.J.W.* 1968, p. 1593, Winfield and Jolowicz, *op.cit.,* pp. 378 ff.

A product is not dangerous when it is harmless if handled and consumed in a normal manner, and when it cannot cause damage in a normal process of consumption. The harmfulness of a product depends also on consumer behaviour.[7] The consumer will not regard or characterize a product as being dangerous when its harmfulness arises from his own behaviour in relation to the product. That dynamite is an explosive does not make it a dangerous product.

Comment (h) on section 402A, *Restatement of Torts, Second,* reads: "[a] product is not in a defective condition when it is safe for normal handling and consumption". At the same time Comment (i) states that in order for a product to be "unreasonably dangerous", it "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". It thus seems to have been assumed that even a "non-defective" product may be "dangerous". However, it is a case not so much of a dangerous product as of the careless use of it, a simple instance being the fact that matches may cause a fire. The terminology adopted in this study, therefore, seems to be more appropriate.[8] This is also supported by the following statement in *Fanning* v. *LeMay,* 38 Ill. 2d 209, 230 N.E. 2d 182 (1967): "It is a matter of common knowledge that shoes are more likely to slip when wet than when dry, but this provides no basis for the conclusion that a particular pair of shoes are dangerous or unsafe."

IV. THE LIABILITY OF THE PRODUCER

A. *Liability for Fault*

1. *The Necessity of Harmfulness*

A fundamental claim upon a producer is that the products manufactured and marketed by him shall be harmless. Any dangerous element in a product must, so far as possible, be eliminated by the producer. In designing the product and deciding whether it should be accompanied by operating instructions, a warning, directions for use, etc., the producer must base his decision on the situation in which the product must be expected to be placed having regard to its nature, its use, etc. Any elements of danger connected with the use of a product which are known to the consumer and which an ordinary man would try to avoid by taking them

[7] Castor oil was used under Mussolini as an instrument of torture, see Comment (i) on section 402 A, *Restatement of Torts, Second.*

[8] See, in this connection, Wade, "On the Nature of Strict Tort Liability for Products", 44 *Mississippi Law Journal* 825 (1973).

into consideration in his selection of the manner of consumption will not make the product dangerous. The criterion that the product must have been dangerous is the foundation for the imposition of liability. The fact that a person cuts himself with a knife or becomes an alcoholic from drinking whisky, does not turn knives or whisky into dangerous products, and liability will not arise from damage of this nature.

The decision of the Norwegian Supreme Court in the case 1970 N.Rt. 1427 is illustrative. The item under dispute was a potato boiler, where the feeder was cast in the form of a funnel provided with conveyer screws. In an attempt to make the potatoes pass through more quickly, a farmer jumped into the funnel and was injured. The Court held that the accident was due to deviant behaviour on the part of the farmer and could not be attributed to any inherent danger in the boiler as such and that liability should not be imposed on the producer. The decision of the Danish Supreme Court in 1910 U.f.R. 507 may also be mentioned. A shipbuilding yard had ordered a "special flexible wire" for the "rigging" of a vessel. However, a length of this wire was used for unloading purposes. During that process the wire broke and damage of various kinds occurred. The supplier was held not to be responsible, since the wire had been intended for rigging and not for unloading. An extension ladder with sufficient carrying capacity only when placed with one of its sides against the wall may be dangerous as a fire ladder, while being safe as an "ordinary" ladder, because during a fire the ladder may be used under circumstances not allowing proper examination or consideration as to how to place the ladder, cf. 1974 N.Rt. 41 (Norwegian Supreme Court). A cow afflicted with contagious bovine abortion is not a dangerous product when sold for slaughtering, cf. 1946 U.f.R. 1274 (Danish Supreme Court), and even if it is sold for non-slaughtering purposes, the purchaser may have been sufficiently informed of the risk of contagiousness so that it comes within the ordinary consumption process to take steps for the avoidance of the spreading of the disease, cf. decisions of the Danish Supreme Court 1930 U.f.R. 684 and 1941 U.f.R. 529. Nothing will last for ever, not even capital goods. Generally, inspection and maintenance are elements of the ordinary consumption process. The fact that a lift may collapse and cause damage two years after its installation does not make it a dangerous product if the collapse is due exclusively to lack of lubrication, cf. the decision of the Danish Court of Appeal, 1922 U.f.R. 21. Directions for the use of a product are also, to a certain degree, directions for its non-use. That the product may cause damage if used otherwise than directed will generally not make it a dangerous product, cf. 1955 Juristens Domssamling 41.

2. *The Duty of Care as a Duty towards the Public at Large*

Scandinavian law generally holds that the producer has a duty of care and that as a matter of principle the omission of steps to eliminate danger inherent in a product will constitute liability for fault. The producer's duty of care as a duty towards the ultimate consumer and the bystander has

never been questioned. It is a duty towards the public at large and not only towards those with whom he has dealt contractually. There has never been any "assault upon the citadel of privity", because no such citadel was ever founded. In accordance with the general rule of negligence any injured party has a right of recovery against the producer for product damage caused by a dangerous product when the dangerous feature can be attributed to a fault.

3. *Classification of Defects—the Traditional Approach*

The German fashion of classifying, in different stereotyped categories, why a product has become dangerous[9] has been adopted by most Scandinavian writers. They distinguish between defective design, defective production, defective instruction, and development defect.[1] When distinguishing between defective production and defective design, the decisive factor seems to be the number of products affected by the defect; defective design arises where a whole series of products is affected, defective production where only a single product is affected. In drawing the line between defective design and development defect another criterion seems, however, to have been applied, i.e. the principle of fault; the design is said to be defective only when it is faulty (the design is faulty when it fails to conform with the current standards of technology and science), while development defect does not involve any fault (the damage was quite unforeseeable and unpredictable as the product met the standards and therefore was considered safe). The concept "defective design" is thus determined by applying two different criteria at the same time, one of which is also used to determine the concept of "defective production" and the other to determine the concept of "development defect". Thus it cannot be a question of four coordinate concepts. The defect may, on the one hand, affect a whole series or only a single product, while, on the other hand, it may or may not be due to a fault. Consequently, to avoid confusion it seems necessary to use two systems of classification.[2]

[9] See, e.g., Lorenz, *Die Haftung des Warenherstellers, Arbeiten zur Rechtsvergleichung,* vol. 28, Frankfurt a.m. 1966, von Caemmerer, "Die Produktenhaftpflicht in der neueren deutschen Rechtsprechung", in *Ars Boni et Aequi, Juhlajulkaisu Y.J. Hakulinen,* Helsinki 1972, pp. 75 ff., *idem,* "Products Liability", in *Jus Privatum Gentium, Festschrift für Max Rheinstein,* vol. II, Tübingen 1969, pp. 659 ff., Palandt, *Bürgerliches Gesetzbuch,* 34th ed. Munich 1975, Section 823, note 16, and Opuku, "Delictual Liability in German Law", 21 *I.C.L.Q.* 230, 157 (1972).

[1] Some authors speak of development risks or damage instead of development defect.

[2] In the most recent German monograph, Schmidt-Salzer, *Produkthaftung,* Heidelberg 1973, pp. 134 f., it is suggested that the distinction between the different types of defects should be abolished. The focusing on the product and not on the producer's duty of care takes into consideration certain typical cases only and excludes the broader perspective of the delictual approach. The producer has a general duty of care. What this means depends on

4. *Classification of Faults and non-Faults*

When liability is imposed in accordance with the rule of negligence, the problem is whether the harmfulness of the product is attributable to a fault, not whether it is attributable to a defect. By classifying damage according to whether it is caused by fault or not, it will be possible to describe more precisely those patterns of conduct which will be considered faulty and thus result in liability under this heading. *Faulty design* exists when the design or construction of the product is not in line with current technology and research. There has been a fault in the design, lay-out, or construction of the product, making all products manufactured according to the original design dangerous. *Faulty instruction* exists when a product is in line with current technology and research but the producer has failed to meet current demands in terms of warnings, directions for use, etc. *Faulty production,* on the other hand, will affect only a single or a few items of an entire production; because of a fault in production one or more products may fail to turn out as intended.

In assessing whether a fault has been committed one must take into account what knowledge is available and which procedures are recognized at the particular stage of technological and scientific development. Considering that, as a matter of general principle, human knowledge is incomplete, a product may very well be dangerous without the producer's having committed a fault. A product which has been designed in the best possible manner may at a later stage be discovered to possess dangerous properties. Or it may happen that we realize quite well that the product is dangerous but do not know any way of eliminating this danger. When the harmfulness inherent in a dangerous product cannot be attributed to a fault, we have an unknown or unavoidable danger as a consequence of the level of technological and scientific development. A product damage caused by a hitherto unknown danger, that is to say a danger which could not and ought not to have been foreseen, is referred to as *development damage*. And product damage attributable to a known but unavoidable danger inherent in a product is called *system damage:* the danger is known but could not and ought not to have been avoided, for instance through a change in design, and likewise the marketing of the product in itself does not constitute a fault.

The main distinction is between product damage attributable to faulty design, production, instruction or some other type of fault, on the one hand, and development or system damage, on the other. As the boundary

the circumstances. And it does not only mean a duty to design, produce, and instruct without defects. However, it is valuable, the author submits, to carry on the fundamental ideas of the original classification approach.

must be drawn in accordance with the principle of negligence it will naturally be somewhat indistinct. In general the problem is not so much a question of deciding whether a danger could have been known and could have been avoided, but rather whether or not it ought to have been known and avoided. Furthermore, the issue is complicated by the fact that the evaluation of danger and fault is to some extent bound to overlap.

5. *Flawed Products and Generically Dangerous Products*

It has been said that the "most basic distinction in products liability cases is between cases involving manufacturing flaws and generically dangerous products".[3] A *flawed product* is a product that does not conform to the design, nor to the overall production manufactured according to that design. A *generically dangerous product* is a product which, as a group, type or class, is dangerous because of the manner in which it is designed or marketed, and not because of some mishap in the production process. This classification is in no way connected with the principle of fault. It is, however, of use when reviewing the practical results that may arise from the principle of fault, especially when comparing the law on product liability in different countries. Furthermore, this distinction may be of value to the courts in deciding what rules to apply when imposing liability, and to the legislators in formulating general rules on product liability.

6. *Flawed Products and Faulty Production*

First, a flawed product may occur if the raw materials in question have not undergone the intended processing, or if the processing has been carried out ineffectively. In such cases it is the firm's own production efforts which do not suffice when evaluated on the basis of standards set up by the firm itself. It is incumbent upon the firm to plan its production with a view to ensuring correct processing, assuming that the human element and the machinery used in the production process do not fail. The operators must take care that they themselves and their machines perform their tasks correctly, and by means of product control the firm must counteract the consequences of any failures. In these cases the very nature of the deviation constitutes a probability, almost tantamount to a certainty, that a fault has been committed. In their findings the courts, therefore, simply ascertain the presence of the deviation to be classified in this group of manufacturing flaws. An occurrence of a deviating or flawed product of

[3] Henderson, Jr., "Judicial Review of Manufacturers' Conscious Design Choices, The Limits of Adjudication", 73 *Columbia Law Review* 1531, 1542 (1973).

this nature constitutes a faulty production. The concrete circumstances leading to the deviation are not investigated, nor is the question whether they may be said to involve negligence in its traditional sense.

The decision of the Swedish Supreme Court 1961 N.J.A. 94 concerned a woman who had been injured while cleaning a sofa-bed because a spring popped up from its base. Unlike the other springs this particular spring had not been provided with an extra bend at the end. The manufacturer was held liable as he had failed to have the spring bent. 1923 U.f.R. 678 (Danish Court of Appeal) concerned the following situation. A person had bought a bottle labelled "bleach" from a grocer. The label also gave the name of the manufacturer. When the fluid was used in washing, the clothes were damaged because the bottle, in actual fact, contained diluted hydrochloric acid. The manufacturer was found liable since he had presumably furnished the bottle with the wrong label.

Not only an industrial concern but also an individual acting as workman, artisan, craftsman, or contractor may deliver inferior work. Admittedly, he will generally have entered into a contract with the consumer. The point at issue, however, is not whether the work has been carried out in close conformity with the wording of the contract but whether it has been carried out in a proper fashion. Normally, therefore, it will be irrelevant whether the customer or a third party was injured. 1919 U.f.R. 557 (Danish Supreme Court) concerned the following case. A guest went to the lavatory, and the cistern fell on his head when he flushed the toilet. The cistern had been installed two years earlier by a plumber. Considering that a lavatory cistern should be installed with such safety as will prevent its falling down even if children, or anybody else flushing the toilet, happens to pull the chain with excessive force or commit other foreseeable abuses, the cistern was found not to have been properly secured, and the plumber was held liable. In the case 1903 N.Rt. 378 (Norwegian Supreme Court) a physician had treated a patient with a fluid left by a previous patient. The bottle was labelled "Aqua chin.zinc", but actually it contained hydrochloric acid, causing serious injuries to the patient. The pharmacy which had labelled the bottle was held liable.[4]

Secondly, a flawed product may occur because the raw materials used did not contain the desired properties, or did not contain these properties exclusively. It is, of course, the producer's duty to arrange for careful

[4] The protection of the consumer was until the new tort liability acts subject to a major restriction in Finland and Sweden stemming from the rule under which an employer was not subject to vicarious liability in tort for the faults of his subordinate employees. The producer was liable for faulty production unless he proved that the fault was committed by a person in a subordinate position, and that there was nothing for which he could be blamed. In the case of a workman's or craftsman's products, the production process is normally so simple that it can be established who committed the fault in question; consequently, the employer was liable only for injury suffered by the other contracting party, not for injury suffered by third parties. In case of industrial production, however, the production process was thought to be so complicated that in practice the producer could not prove absence of fault by himself; he would be liable to anyone, even if it might seem likely that a subordinate had committed the fault. See Dahl, *Produktansvar,* p. 247.

checking of the raw materials which are delivred to him, but considering the fact that all industrial production comprises the processing of products of the extractive industries (mining, farming, etc.), it will only to a certain extent—an extent which will increase with improved knowledge—be possible to avoid the situation that some products will deviate from the rest. Whether the same strict liability will be imposed on the producer for this type of flawed products as for the type previously mentioned is a question that has not yet been brought before the courts, but probably the answer will be in the affirmative. Apart from deviating or flawed natural products which have not been subjected to any industrial processing,[5] a deviation of a product *may* be attributed to a fault, which would be sufficient ground for liability.[6]

7. *Generically Dangerous Products and Faulty Design or Instruction*

When not just a single product but a whole line of production is dangerous, the producer is liable in case of faulty design or instruction. When deciding whether a fault was committed or not, it will often appear natural to investigate first whether the producer complied with all the safety requirements laid down in statutory law or governmental regulations. If he did not, he will normally be held liable.[7] Admittedly, violation of a statutory provision does not *per se* constitute negligence—the concept of statutory negligence is unknown in the Scandinavian law of tort—but the enterprise may be so fenced in with safety standards that the answer to the question whether proper care was exercised will be influenced by statutory regulations to a point where actually the main issue will be whether these were observed or not.

In deciding whether the manufacturer will be liable or not, it is not, of course, a prerequisite that the authorities shall have laid down specifications for the design and manufacture of a product or specified the dangers against which a person should be warned.

> A housewife was seriously injured when a gas container for a camping stove, which had been filled by a supplier, exploded because of overfilling. Owing to the way in which a safety valve was designed it was possible to fill the container beyond capacity. The Court stated that "regardless of any public regulations on that point, it must be the factory's duty prior to the manufacturing and

[5] Some decisions on such products are mentioned under IV.C.2.

[6] In IV.C. below, the situation is discussed that, as opposed to the courts in the other countries, the Norwegian courts are inclined to consider this liability for flawed products as a strict liability.

[7] Cf., e.g., 1948 N.J.A. 173 (Swedish Supreme Court).

> marketing of gas containers of this nature intended for general everyday use presumably involving frequent fillings under primitive conditions, to design and equip the containers in a way preventing overfilling—at any rate when handled correctly".[8]

The producer must visualize under what conditions the product will be used and what danger might be connected with such use and he must try to meet these situations by improvements of design or instruction.

> The duty to take care may be illustrated by the Norwegian Supreme Court decision 1950 N.Rt. 1091. In a large apartment building, premises had been made available for washing and ironing. A two-year-old boy who was with his mother lost two fingers when he got his hand into the gear wheel at the bottom of the mangle. The wheel was not enclosed and the producer should have realized that when a mangle is used in private households "special requirements must be made as to its design to protect the user against unnecessary danger". The producer should have "considered that the mangle would be operated by non-professionals and mainly housewives who, while using the mangle, might very well have children running in and out or be forced to take small children along because they had nobody to leave them with while working". By simple means and at an insignificant additional cost the mangle could be made safe even for small children and this could be done without impeding the operation of the mangle. The producer was not upheld in his contention that the mangle had been designed with due care considering that mangles marketed by other firms were not provided with better safety devices than his. This claim only served to prove "that these other firms had also failed to give sufficient thought to the safety devices needed when a mangle is to be used on premises occupied by private families".

When liability is based on the principle of fault, it is a problem of major importance where to draw the line between product damage stemming from faulty design or instruction entailing liability and development damage with no liability entailed.[9] The main difficulty is not so much to decide whether the danger could have been foreseen, but to decide whether the danger ought to have been disclosed. Today man can go to the moon, when he chooses to do so, and research, investigation, examination, or testing would as a rule have revealed the danger later observed. Of course our society has its scientific limits, but it has its economic limits as well. Chasing imaginary risks is a wasteful process. The question is, whether there has been a reasonable incitation to foresee a risk so that a more thorough investigation should have been carried out. It is up to the

[8] 1965 U.f.R. 319 (Danish Court of Appeal).

[9] The duty to take care continues after the supply of the products; when danger unknown at the time of supply becomes known later, there may be a duty to warn, cf. 1941 U.f.R. 610 and 1945 N.J.A. 582.

producer to substantiate the limits that the existing state of technological and scientific developments sets to his product. The producer will escape liability only when he is able to convince the court that the danger was quite unforeseeable as no reasonable indication or incitation of a risk suggested the necessity of an investigation designed to reveal the danger.

Under a decision passed by a Danish district court[1] the producer succeeded in so convincing the court. A new insecticide for exterminating flies was put on the market, and several farmers who used it sustained loss through the poisoning of their livestock. An investigation revealed that, under certain conditions, the insecticide might be dangerous to livestock if sprayed upon the animals or their food. As soon as this became known, warnings were issued through the press and, furthermore, the labels were changed and provided with warnings. Prior to the marketing of the new product, numerous tests had been made, supervised by public authorities. The insecticide had been approved under a special procedure instituted under a completely new statute introduced for the very purpose of preventing damage of this nature.

In another Danish district court decision (1952 Juristens Domssamling 67) the producer did not succeed in this respect. He ought to have known, at the time when his insecticide left his plant, that it might be damaging to potatoes and only fit for use in cornfields, since the necessary information was published at that time. Consequently, he should have issued a corresponding warning on the label.

In 1974 Rettens Gang 681 the three judges of the Norwegian Court of Appeal differed as to their opinions. In 1964 vinyl flooring was fixed with glue to floors in a commercial building. The resin component of the glue and the vinyl combined, leading through a photochemical process to discoloration of the flooring. Two judges found "that in 1964 it was practically unknown to producers of glue that glue in combination with ultra-violet light might result in discoloration of flooring that was marketed at the time". No circumstances had existed which ought to have made the producer realize that discoloration might arise, and thus he had had no incitation to go into this question. The damage was an accident, for which liability could not be imposed on the producer. On the other hand, one judge found that it was known in 1964 that glue might cause discoloration. The fact that the problem was unknown to this producer was precisely what he was to be held responsible for.

The constant growth in the number of products and in product differentiation, together with the many product varieties, the development of brand new materials, new compositions, etc., means that the consumer becomes more ignorant. The producer's duty to educate and warn the consumers is correspondingly greater than it was in the past. Designing and producing a good product is not enough. To an ever-increasing extent a producer must ensure that his products are accompanied by directions

[1] 1953 Juristens Domssamling 17.

for their use, operating instructions, warnings, etc., in order to show the consumers how the benefits of the product may be obtained during the process of consumption without incurring risks of danger that cannot be coped with or that take the consumer by surprise. Faulty instruction may, to a certain extent, be seen as a special version of faulty design but, nevertheless, it gives rise to separate problems. However, not every potential hazard has to be "designed out" of the product. In some cases it is sufficient to issue a warning or a direction for use. The decision as to what specific facts constitute faulty instruction is normally very complex. It may be a fault not to warn against using the product in a particular way, or not to point out that the product may cause damage under certain circumstances, or not to warn of a hazard and how it can be avoided.

> In 1934 U.f.R. 707 (Danish Supreme Court) a factory, due to a misunderstanding, delivered a bottle of oxygen instead of a bottle of compressed air to be used in repairing a ship's engine. As a consequence an explosion occurred and the factory was found liable for the ensuing damage, among other things because no label had indicated the contents of the bottle, although labelling was mandatory. In 1974 U.f.R. 767 (Danish district court) a wall bar to be installed in a door case could not be used without special security fittings. The wall bar was delivered in boxes with security fittings, but the sales and advertising material referred to these only as a means of added safety and they were not mentioned in the directions for use. It was found improper to sell the wall bar without information to the effect that its use was risk-free only if the security fittings were carefully mounted.

A main problem is where to draw the line between product damage stemming from faulty instruction, on the one hand, and system damage, on the other. A warning against road works should be designed for ordinary road traffic, rather than for, e.g., emergency landing of planes. Similarly, the producer's duty to provide instruction must fundamentally be aimed at the normal consumer and the normal circumstances of consumption. In many cases a product may, however, during a normal process of consumption, cause damage because of specific circumstances affecting the individual consumer, as for instance in the form of an allergy. In a certain case[2] where it was proved that the marginal group thus affected was not identified and comprised an extremely small, non-significant part of the total population and that no serious damage was done, the court held that the omission to warn against the danger did not constitute faulty instruction.

In some cases, e.g. where the marginal group can be identified, a

[2] 1947 U.f.R. 656 (Danish Court of Appeal).

warning will make the product safe. In many cases, however, our knowledge will be limited to the fact that damage will occur, and it will not be known who will be affected. For instance, it is known that vaccination against smallpox will cause post-vaccinal encephalitis in one child out of every 40,000. Information about the statistical risk will not make the product harmless, but it will enable the consumer to decide whether, in view of the risk, he will use the product or not. A warning will not prevent the injury from occurring. Even though the risk is statistically low, a warning must be given if the injuries inflicted upon persons are very serious. The question then remains if there is any justification at all for the marketing of the product, i.e. whether the benefits outweigh the risk. If so, the injury will come within the category of system damage and not incur liability.

> A decision by the Danish Supreme Court, 1936 U.f.R. 1061, will illustrate this point. After unsuccessful attempts with other treatments, a physician gave a patient afflicted with severe facial neuralgia an alcohol injection in a nerve centre, and as a result there was a marked deterioration of vision in both eyes. Supported by professional opinions, the court held that the injection had been "administered in close conformity with the technique contemporarily recommended for such administration, in Denmark as well as abroad", and that consequently the complications suffered by the patient must be assumed "to come within the category of risks which having regard to the present state of science were necessarily attached to any such administration", and they must therefore "be characterized as incidental".

The problem of weighing the benefits against the risk does not arise solely where a marginal group is threatened. Some products are dangerous to every consumer. The smoking of cigarettes may cause cancer of the lungs; addiction to sweets may result in dental caries. In Scandinavia there has been no such litigation against manufacturers of cigarettes as has occurred in the United States. When the production and the marketing of the product are not condemned *per se,* injury of this nature will be classified as system damage and not incur liability. When the danger inherent in the product is known to the public, ordinarily the individual consumer must decide whether the benefits outweigh the risks. In certain cases, however, it would be wrong to let the consumers decide for themselves.

B. *Liability for Warranty*

Although the producer and the ultimate consumer of the product are not parties to a sales agreement, nevertheless normally some sort of social

contact will be established. Mass production and mass distribution are interlocked with mass communication. The manufacturer establishes contact with the consumers through advertising and other means of unilateral communication. Depending on the circumstances of the case, the information distributed by the producer to the consumers may constitute a promise to the public whereby the producer is committing himself to compensate all potential consumers for product damage.

> 1954 U.f.R. 818 (Danish Court of Appeal). A pressure cooker exploded, seriously injuring the person who used it. The accident was given publicity by the press, whereafter the manufacturer of another make advertised as follows in several dailies: "Can a pressure cooker explode? 5,000 kroner reward offered. The more than 70,000 housewives daily using the 'Trumf'[3] may find comfort in the fact that the pressure cooker exploding last Sunday was not a 'Trumf'. The 'Trumf' is fitted with a fully automatic safety device. The 'Trumf' is not cast but is pressed from 99.4 % pure aluminum plate. Our firm is the oldest and largest in Scandinavia. We offer a reward of 5,000 kroner in cash to the first party succeeding in exploding a 'Trumf', with its fully automatic safety device." Shortly thereafter a "Trumf" pressure cooker exploded, scattering rice and milk all over the kitchen, while the person using the cooker received a severe blow from the lid. A friend drew the consumer's attention to the advertisement and the consumer claimed payment of the reward offered; the court found for the consumer.

In other words, a contractual relationship may be established between the consumer and the manufacturer through the latter's advertising in the mass media, through his personal contact with potential customers, distribution of pamphlets, labelling of the product, directions for use, etc. It is, however, an exception for a manufacturer to express himself—as he did in 1954 U.f.R. 818—in terms so definitely assuming liability for the safety of his product. If such statements are to establish a contractual relationship between the manufacturer and the consumer, on which liability can be based, it will normally be necessary to fall back on the construction of an implied warranty. In practice the problem is what importance should be attached to the information given by the producer on the nature, the application and the effect of the product. The author submits that thinking in terms of contract and warranty will not prove helpful. The problem, in all simplicity, is to determine whether the producer should be strictly liable for particulars which do not tell "the truth, the whole truth and nothing but the truth" or whether he should be liable only for fault. If strict liability is to be imposed on the producer, that rule should be laid down. There should be no need for the formal

[3] The corresponding English name would be "Trump".

legitimation of such a rule by imposing an implied warranty on the producer. Furthermore, it is doubtful whether following the avenue of warranty will in any way extend the consumer's possibility of obtaining damages. Where specific statements as to the durability, applicability, harmlessness, etc., of a product have been incorrectly made, they will constitute misrepresentation, and liability will follow under the rule of negligence.[4] In the case of development damage it seems unlikely that any Scandinavian court will assume an implied warranty. But here, as in other cases, an express warranty constitutes a basis for the imposition of liability.

C. *Strict Liability in Tort*

1. *Danish and Swedish Law*

Apart from the social contact between producer and consumer described under IV. B. above, which may lead to warranty liability, a producer is, under Danish and Swedish law, responsible for product damage caused by a dangerous product only if the dangerous feature of the product is attributable to a fault.[5] When that is the case, the damage could have been avoided. However, today the question of liability according to the rule of negligence, as opposed to strict liability, is not a question of either-or to the same extent as was previously the case. This sharp distinction has been abandoned by the courts in favour of a more varied set of liability rules, a development which may be attributed, *inter alia,* to the fact that there is no precise conception of what types of damage could and should be avoided at all times and within all areas. Nor has it been exactly defined upon which persons the duty to avoid damage should be imposed. The more the courts disregard the individuality of the wrongdoer, and the more they extend avoidable types of damage by demanding specific qualifications, the further they release themselves from the traditional concept of negligence and the closer they will get to strict liability. For one thing, the tendency to specialize, the increase in the requirements as to qualifications and the growth of the public administration in modern society have resulted in an objectivation of the rule of negligence. Today the law of tort is based, to a greater extent than was previously the case, on abstract general standards, and liability can no longer depend solely on the application of the reasonable-man test. As long as law provides compensation solely for

[4] The courts have in a few cases held the producer liable in accordance with the implied warranty approach. In all the cases the producer had sold directly to the injured party and liability for fault might have been imposed on him. In 1964 Rettens Gang 784 both reasonings are set forth: the statement was a faulty instruction and involved an implied warranty.

[5] Cf. Dahl, *Produktansvar,* pp. 360 ff., Karlgren, *Produktansvaret,* pp. 162 ff.

damage that could and should have been avoided, it will be most in line with Scandinavian tradition to talk of a rule of negligence. This would be the case even when the determination of the types of damage that are avoidable was not based solely on the reasonable-man test. When the courts, in pursuance of the rules described under IV. A., hold that a fault has been committed, they are actually establishing a standard of conduct. When a court assesses a fault in a case at bar, it is rather a comparison of a certain behaviour with a standard of conduct approved by the courts than the weighing of risks. The term strict liability should be reserved for those cases in which the courts impose liability without, at the same time, establishing a behavioural standard.[6] However, the point at issue, of course, is not the phraseology used in characterizing the rules of liability. If Kessler[7] is correct in claiming that, under the American rule on strict liability, the production and marketing of unavoidably unsafe goods do not entail liability, and that this is true even for goods which, on the basis of all available knowledge, are regarded as safe, the outcome is the same as according to the rule of negligence discussed under IV. A. above: the producer is not liable for system damage and development damage. To an outsider the fault principle seems to provide better guidance for the assessments to be made in a given case in order to achieve this result than does the principle of strict liability as formulated in sec. 402 A of the American Restatement of Torts.[8]

2. *Norwegian Law*

While the Danish and Swedish courts have accepted no general principle on strict liability in tort, the Norwegian courts have evolved a general rule on strict liability for so-called dangerous operations.[9] It is not entirely clear what is the philosophy behind this liability and, consequently, it is far from easy to predict in what instances the courts will apply this model.[1] In spite

[6] It is certainly disputable whether it is more appropriate to speak of liability for faulty production as liability for negligence, instead of strict liability for flawed products, cf. Hellner, *Skadeståndsrätt,* pp. 91 and 218. In his review of Dahl, *Produktansvar,* J. Trolle, Chief Justice of the Danish Supreme Court, held it most realistic to speak of strict liability, see *U.f.R.* 1973, pp. 333, 338 f.

[7] Kessler, "Products Liability", 76 *Yale Law Journal* 887, 938 (1967).

[8] Wade, *op. cit.*, pp. 836 f., seems to be of the opinion that it would be "much more sustainable" if the strict liability approach were confined to flawed products, this leaving the design and warning cases to be handled under the negligence techniques.

[9] In practice there is no great difference, however, since the Danish and Swedish courts are inclined to impose liability for fault in the fields where the rule of strict liability would have been applied by Norwegian courts.

[1] See *Danish and Norwegian Law, A General Survey,* edited by the Danish Committee on Comparative Law, Copenhagen 1968, pp. 104 ff., and Kristen Andersen, *Skadeforvoldelse og erstatning,* Oslo 1970, pp. 301 ff.

of the terminology "dangerous operations", it is probably more decisive whether the accident is only a normal result of the risk inherent in the particular enterprise than whether the enterprise can be classified as dangerous. Liability is not conditioned upon the failure of some technical device. However, if there were such a failure, it would strengthen the position of the injured party. The rule would seem to cover technical or professional activities in fields where the risk inherent in the activity is "constant and distinctive"—i.e. results from time to time in inevitable accidents, to be distinguished from "isolated mishaps"—so that the risk may be calculated on some popular statistical or determinable average basis, with the consequent possibility of insurance coverage. It is not entirely clear whether an additional requirement of reasonableness should be made or whether compliance with the said conditions would satisfy the conditions for strict liability. In some cases, however, where the risk is known to the injured party also, he may be the one who should calculate the risk.

This rule on strict liability has a clear affinity to the argument advanced by Mr Justice Traynor in *Escola* v. *Coca Cola Bottling Co.*[2] and it is agreed that the principles behind the rule may lead to strict liability for product damage.[3] Thus, there seems to be a tendency to impose strict liability on a producer for damage caused by flawed products.

> A consumer broke a tooth because a piece of pastry contained a pebble. In 1951 Rettens Gang 521, the City Court of Oslo held that it could not be established that this was a case of faulty production, since the production seemed to have proceeded in a normal, justifiable manner. The presence of the pebble came within "those accidents that experience shows will occur now and then even if the production process is quite proper". Strict liability was imposed upon the bakery. In an unpublished decision of May 2, 1955, of the Bergen City Court a brewery was held liable when a bottle of soda water exploded. A boy had shaken it over a perambulator in which his six-month-old sister was lying, resulting in injury to one of her eyes. The explosion was due to the pressure of carbon dioxide combined with the fact that this particular bottle was brittle from shock. The court found that such damage was an unavoidable element in the operation of a brewery, but that the carbon-dioxide content in bottles constituted a special risk which could be calculated statistically. Therefore, it seemed more equitable that the loss should be carried by the industrial enterprise than by those who happened to be affected by the element of risk mentioned. The enterprise was also the stronger party financially and had the possibility of including this type of damage in its cost accounting.

[2] 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944).

[3] Cf. Selvig in *Knophs Oversikt over Norges Rett,* 6th ed. Oslo 1973, p. 346.

It is doubtful, however, whether strict liability will be imposed in connection with deviations caused by strange natural phenomena, where the deviating products have not been subjected to any extensive industrial processing. The decision 1945 N.Rt. 388 of the Norwegian Supreme Court concerned some frozen whale meat that was infected. It was not considered equitable to impose liability on the dealer for such unpredictable damage as that in question. Infected whale meat seldom occurred, but, when it did the damage might become very extensive. "To calculate with this risk when fixing the price of the product . . . is probably not possible." The case 1973 N.Rt. 1153 concerned mink fodder infected by botulin toxin. The Supreme Court made the point that the risk of botulism was known to mink farmers and that it would be up to them rather than to the manufacturers of the mink fodder to take out insurance against this risk.[4]

As mentioned previously, it is not of great importance whether the liability for flawed products is called "strict". The practical results reached by the Norwegian courts by applying a rule of strict liability do not differ from those reached by the Danish and Swedish courts under the rule of negligence. The interesting point is whether the arguments behind the Norwegian rule may lead to liability for development damage and system damage.

As far as development damage is concerned, this must be considered out of the question. The occurrence of development damage will always take all parties by surprise. Coverage of a risk which only the future can reveal is connected with consumption of something which is considered absolutely harmless at a particular juncture would be in the nature of gambling rather than of insuring. The risk in this case is unknown, and it is a crucial element of the rule of strict liability that the "risk is known".

It is a different matter when it comes to system damage.[5] The fact is that

[4] Perhaps the lesson to be learned from the cases concerning flawed products is that difficulties in obtaining complete command over industrial processes are no defence, while difficulties in obtaining such command over nature are. This interpretation has, at least, support in other cases. As a matter of curiosity there may be mentioned the Norwegian Supreme Court decision, 1966 N.Rt. 351, on the question of the liability of a marine hydrographer, a problem discussed theoretically in *Candler* v. *Crane*, 2 K.B. 164 (1951). A vessel suffered total loss when it foundered on an unknown shoal in a channel. On the chart published by "Sjøkartverket" (the Norwegian Hydrographic Department) in 1924, the channel was indicated as one of the navigable waters leading into a port. The "Sjøkartverket" could not be blamed for the non-charting of this shoal. It was not a fault that measurements in the channel had not been performed at sufficiently close range to discover a shoal which, after a further 50 years of navigation, was still unknown to local people familiar with these waters, nor could strict liability be imposed. Charts are aids, not directions for use. They do not guarantee objective accuracy. Even with modern aids and methods it is possible to overlook such shoals in hydrographic measurements.

[5] As for the group of cases of system damage attributable to a generically dangerous product, one which is dangerous to any consumer, such as cigarettes for instance, it will probably not be considered justifiable to impose strict liability on the producer.

the Norwegian courts seem to consider damage caused by flawed products as coming under system damage.[6] As mentioned, system damage may in some cases arise because of the deviating character of a consumer. Whether or not an instance of system damage is attributable to a deviating product or a deviating consumer, the argumentation behind the rule of strict liability seems to be applicable. In both cases the damage is the result of a known, but unavoidable risk, i.e. a risk that cannot be eliminated. The existence of a marginal group of deviating products or of specially allergic consumers is known to the producer. Especially in cases concerning modern products the risk will be known only to the producer, not to the consumer. The producer will normally be in the best position to evaluate the risk. In most instances the risk is calculable and insurable.[7] In such cases the producer must according to Norwegian law probably face a strict liability towards the allergic consumer. In *Hudecz* v. *Schering A. G.*,[8] the first judgment in Europe about the pill, the Supreme Court did not answer the question. According to the Court the facts and evidence presented did not afford a reasonable basis for the conclusion that it was more likely than not that the pill had been a substantial factor in bringing about the death of Mrs Hudecz.

> A 32 year-old woman died in November 1964. Alleging that she had died from using the pill Anovlar as a contraceptive, Hudecz (her husband and children) claimed damages from the producer, Schering A.G., Berlin. The case was extraordinary and atypical. The concrete facts of the case were subject to greater uncertainty than were the medical assessments. On Mrs Hudecz's use of the pill the only pieces of information were the following: (i) she had received a prescription in March 1964, (ii) she had bought one box in

[6] See also Henderson, Jr., *op.cit.*, p. 1543: "Manufacturing flaws are imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process."

[7] If these conditions are complied with where compulsory vaccination results in injury, the state is strictly liable to the allergic consumer, cf. 1960 N.Rt. 841 (Supreme Court). Because of compulsory vaccination against smallpox an 18-year-old person was afflicted with cerebrospinal meningitis. On the basis of available statistics it was decided that though serious injuries seldom happen, they must be expected to occur now and then. There was an extraordinary, specific risk. It appeared just and equitable that the state, which had decreed that vaccination should be administered in the interest of the public, should also assume the economic risk for any consequential injuries. It could make no difference that the vaccine might protect against danger more serious than the risk of complications in connection with the vaccination.

[8] 1974 N.Rt. 1160, Oslo City Court, Jan. 29, 1971; Court of Appeal (Eidsivating), Jan. 16, 1973; the Supreme Court, Oct. 14, 1974. The judgment of the City Court is mentioned by de Boer, *Products Liability of Medicine Manufacturers under Dutch Law*, Dutch Information Centre of the Pharmaceutical Industry 1973, pp. 3 f. and 34, Dahl, *Produktansvar*, pp. 285 ff., 330 f. and 363, Roesch, "Norwegische Rechtssprechung zur Haftung für schädliche Nebenwirkungen von Östrogenpräparaten", *Versicherungsrecht* 1971, p. 594. The judgment of the Court of Appeal is mentioned by Roesch, "Norwegische Rechtssprechung zur Produktehaftpflicht des Pharmaherstellers", *Versicherungsrecht* 1974, p. 16.

September 1964, and (iii) 9 pills remained in that box when it was found after her death. The prescription could not be found, but the doctor who had issued the prescription testified that it enabled Mrs Hudecz to buy up to 4 boxes of 20 pills each. The two doctors who participated in the autopsy had stated various periods of time during which she was said to have taken the pill. Their information was based upon the same source, namely Mr Hudecz, who, however, had testified on the subject through a third doctor, inasmuch as he suffered from hallucinations after the death of his wife. It was, in other words, possible that she might have taken 71 pills but perhaps she had taken only 11. According to the ovaries findings death occurred at least 6 weeks after the last pill had been taken, and an interval of this length would normally suffice to terminate the effect of the pill upon the coagulability of the blood. Experts disagreed whether death was caused by coronary thrombosis or myocarditis (infection of the heart muscles). The disagreement referred not only to what could be deduced from the findings but also, to some extent, to the analysis of what was demonstrated by the pictures. Thus it was possible, but not certain, that Mrs Hudecz had died from coronary thrombosis. It was possible, but had not been scientifically proven, that this type of blood clotting, like embolism in the veins or brain, might be linked to the use of contraceptives containing oestrogen. It was not considered likely that a causal relation existed in the particular instance of Mrs Hudecz, in the light of the special features of the case in terms of the extent of the use of the pill and the time of the use. Notwithstanding this, the City Court as well as the Court of Appeal had found that Anovlar had caused the death. It was found likely, although not unequivocally proven, that generally there was a relation between the use of the pill and coronary thrombosis, and concretely no other causes disposing Mrs Hudecz to thrombosis were found. The Supreme Court does not disassociate itself from this ruling on the evidence to be required regarding the causal relation but, partly on account of additional information, the Supreme Court merely attached greater importance to the particular nature of the case as far as the uncertainty regarding the time and the extent of Mrs Hudecz's use of the pill was concerned.

The Court of Appeal as well as the City Court had found that the pill had caused the death. Since the producer was not at fault both courts had to pronounce themselves on the problem of strict liability. Although only the City Court's decision imposes strict liability on the producer, both judgments support the position that the general principles on strict liability of Norwegian law are applicable in this sphere.

The City Court stated that, in view of the information already available at the time, it could hardly be surprising to the producer that cases of coronary thrombosis as a consequence of using Anovlar could occur in the autumn of 1964. Mrs Hudecz, for her part, had no possibility of learning the suspicion which gradually grew up. Had that been the case she could have made an informed choice between the pill and other contraceptive methods. The producer was the one who had the possibility of gathering the experience necessary to assess the risk which gradually materialized. Since the risk was not

unforeseeable, it would not be equitable that the consumer with whom this risk happened to manifest itself should carry the economic burden of this special risk inherent in the particular production. While the risk was not of deterrent proportions on an overall basis, it would be a heavy burden to the individual hit by it. The individual consumer had no possibility of protecting herself against the risk, while any damages for which the producer might be held liable could easily be covered either by means of insurance or through the producer's own price policy. One of the judges on the bench dissented.

The Court of Appeal did consider the general principles on strict liability also applicable in relation to product damage. Contrary to the City Court, however, the Court of Appel did base itself upon the view that in 1964 it was not expected that the pill could cause a thrombosis in women not previously disposed to thrombosis. Using the terminology proposed by the present author at the 26th Session of Nordic Lawyers in Helsinki in August, 1972, the Court classified the damage inflicted upon Mrs Hudecz as development damage. The Court argued that a producer could not be held strictly liable for development damage since the damage was unforeseeable: "Strict liability for development damage could have financial consequences of catastrophic proportions for the producer and possibly for his liability insurance company. It is impossible to calculate the risk in advance; in other words, there is no element of risk which 'on the basis of a statistical assessment of likelihood necessarily leads to particular specified accidents from time to time'."

The outcome of the case differed in the two instances because, contrary to the City Court, the Court of Appeal found that a fatality of the type in question as a consequence of using the pill was unforeseeable in 1964. The issue just what is to be foreseeable in order to make the general principles of Norwegian law on strict liability applicable is additionally elucidated by the judgment of the Court of Appeal. The Court stressed, on the one hand, that it was unexpected that Anovlar "could cause thrombosis in women not previously disposed to thrombosis" and, on the other hand, "that unforeseen side-effects are a very common phenomenon in drugs". In other words some damage was, on the one hand, to be expected but, on the other hand, damage such as that in question could not be expected. Thus the Court found it relevant that the specific risk was unknown although the risk was of a type foreseeable as such.[9]

[9] James, "The Untoward Effects of Cigarettes and Drugs: Reflections on Enterprise Liability", 54 *Cal. L. Rev.* 1550, 1557 (1966) is of the opinion that there is a "fatal flaw" in this type of reasoning: "That the specific risk is unknown and unknowable in advance is not . . . significant . . ., where the risk is of a *type* which is foreseeable". See also, e.g., Keeton, "Products Liability—Drugs and Cosmetics", 25 *Van. L. Rev.* 131, 141 (1972), and Schattman, "A Cause of Action for the Allergic Consumer", 8 *Huston L. Rev.* 827, 851 (1971).

V. LIABILITY OF THE DISTRIBUTOR OR THE SUPPLIER

The great majority of industrial products leave the producer in the same state in which they reach the ultimate consumer. Frequently, the distributor or supplier has no possibility of discovering by means of an examination any danger inherent in the products.[1] And in practice it seldom happens that he causes an otherwise harmless product to become harmful.[2] Therefore, the rule of negligence leads only to a modest extent to liability on the part of a distributor or supplier of new industrial products.[3] If a fault has been committed in his enterprise,[4] however, the distributor or supplier will, like a supplier of other products, be liable to everybody concerned.[5]

Liability may, moreover, be based on an express warranty. The warranty must in unambiguous language cover product damage. That specific properties are guaranteed is not sufficient; the question of consequential damage in the form of product damage must, in some way or other, have been discussed by the parties during the negotiations. The decisive point is whether there are objective indications that the supplier had intended to undertake such wide and unpredictable liability for loss suffered from product damage as to justify the purchaser in interpreting the warranty accordingly.

This is quite evident in judicial practice in connection with the sale of domestic animals suffering from contagious disease. It is an established rule

[1] In respect of a number of products the duty to examine them is stipulated in governmental regulations, cf., e.g., the decision of the Swedish Supreme Court in 1920 N.J.A. 403.

[2] In a number of judgments liability is imposed on a supplier for negligence, where he mistakes one product for another. See, e.g., the Danish case 1942 U.f.R. 984 (Court of Appeal). A guest in a restaurant was, instead of bicarbonate of soda, given a highly poisonous cockroach powder.

[3] In some cases it would be reprehensible to hand out a product to children, cf. 1958 N.J.A. 550 (Swedish Supreme Court). A store selling explosive toys sold a firecracker to a boy whose playmate was injured. The shopkeeper violated current regulations on age, which the court found aimed at protecting children against injury, and the store was therefore held liable.

[4] E.g. by overestimating the fitness for purpose, cf. 1974 U.f.R. 936 (Danish Court of Appeal).

[5] Any dealer who in connection with the sale of new capital goods allows the buyer to trade in a used product is under obligation to examine the product before reselling it, cf., e.g., 1944 N.J.A. 83 (Swedish Supreme Court). A large number of cases deal with the duty of rendering information about the risk that a domestic animal sold might suffer from a contagious disease. See 1941 Højesteretstidende 130 (Danish Supreme Court). A. had sold some cattle to B., who some days later resold them at an auction, where the animals were bought by C., who some months later sold them to D., whose livestock was infected with contagious bovine abortion; A. and B. were held jointly and severally responsible, since they were both aware of the occurrence of cases of abortion among A.'s cattle and had failed to provide information in this respect.

that, even if the animals sold are guaranteed to be sound and healthy, this is not sufficient.[6] There must be an express warranty that the animals do not suffer from a specific contagious disease.[7]

The courts, however, have not stopped at this point. In some cases they have imposed a more rigorous or an increased liability on the professional supplier. This development is hardly final, however, and the lines followed in the different countries are not absolutely uniform.

In Denmark the courts have evolved a special rule under which a professional or commercial distributor or supplier is held responsible for any faults committed in previous links in the chain of production and distribution.[8] In judicial practice this is particularly illustrated by a number of decisions on liability imposed on the dealer of industrial products.

The leading case is 1939 U.f.R. 16. A farmer bought a drum of molasses from a merchant and had it delivered, sealed, direct from the railway. Some of the farmer's livestock became ill and died after having been fed with the molasses. The merchant had received the drum from the grocer who, in turn, had received it from the manufacturer of the molasses. Previously, the drum in question had contained tetrachloride or trichloride. The drum had subsequently been used by the manufacturer for the molasses without first having undergone any cleaning process. It was assumed that poisoning was due to the drum's having contained chloride. With the extremely brief reason "in the circumstances", the Supreme Court held the merchant liable. The *commentary*[9] by Justice Rump in *T.f.R.* 1939, p. 112, is more elucidating. It states: "As usual the judgment is not explicit on the theory on which this liability can be based. It does not invoke the Fertilizer and Feedstuffs Trade Act of March 26, 1898, and it is, in fact, quite dubious whether sugar molasses comes within the scope of the act. On the other hand, molasses is a synthetic product, and it is difficult for the manufacturer to avoid liability to a buyer for specially harmful features of the product, since such features must normally be a consequence of negligence. Where the goods pass through several hands, it goes without saying that—as in the case at hand—a middleman need not have any knowledge of the condition of the goods, but it would be unfair if he could not be held liable, since he can exercise recourse against the manufacturer". The commentary further states that it is only of academic interest whether this liability is to be subsumed under a sort of implied or assumed warranty, under a sort of an extended rule of negligence or under a special rule on evidence.

[6] See, e.g., 1930 U.f.R. 4 (Danish Supreme Court).

[7] Cf. 1949 N.J.A. 664 (Swedish Supreme Court), 1942 U.f.R. 26 and 1941 U.f.R. 61 (Danish Supreme Court).

[8] This may not have been stated expressly in any judgment, but seems, as first demonstrated by Dahl, *Produktansvar*, pp. 372 ff., to be the rule applied in the judgments passed so far, a fact which now seems generally accepted.

[9] A commentary is a semi-official amplification and interpretation of the grounds on which a judgment of the Supreme Court is based, drafted by one of the participating justices.

As it is a liability for faults committed for instance by the producer, the supplier is no more liable for development damage[1] and system damage[2] than is the producer. The supplier will be excused when he can convince the court that the damage was not attributable to fault but was of the nature of development damage or system damage. The liability, which might be considered a special form of vicarious liability,[3] rests only on the party operating a commercial enterprise that constitutes a link in the chain of production, distribution, and supply which the product has followed, and not, for instance, on the private consumer who sells a product.[4] If the supply, however, is made in the course of business, it makes no difference whether it is by way of sale, gift or bailment,[5] or forms part of a service;[6] it is the business position or purpose, not the kind of contract, which decides the outcome. It is no condition that the supply shall be by way of contract; it makes no difference whether the damage occurs on the one or the other side of the check-out point in a self-service store. It does not matter whether the product is supplied in the literal sense of the word. It is enough that the product is used in supplying something else.[7] In the case of theft, no supply at all has taken place, and the dealer from whom the goods were stolen is not liable according to this rule.[8] It is irrelevant whether damage was caused to personal property or to real property.[9] The

[1] Cf. the Danish case 1954 U.f.R. 1013 (Court of Appeal) on the same type of damage and product as the case 1953 Juristens Domssamling 17 mentioned under IV.A.7.

[2] Cf. the case 1931 U.f.R. 1044 (Danish Supreme Court) concerning the allergic consumer.

[3] The practical results of this rule will hardly differ much from the results which would arise from the "intermediate standard of liability, somewhere between liability for negligence and strict liability, such as a warranty that the goods were as safe as [anyone's] reasonable skill and care could make them" as suggested by Waddams, "Strict Liability, Warranties, and the Sale of Goods", 19 *U.Toron.L.J.* 157, 173 (1969).

[4] Cf. the Danish case 1923 U.f.R. 727 (Court of Appeal). A rifle was bought by a private person from a dealer in weapons and resold by him to another private person. Liability was imposed on the weapon dealer, but not on the private person. In 1974 U.f.R. 767 a consumer had bought a wall bar. When installing the wall bar he had followed the directions for use, which proved insufficient. An injured guest was not entitled to damages from his host but did have a claim upon the firm which had sold the wall bar to the latter. A seed firm which buys seed from one farmer and resells it to another farmer is responsible for the faults committed by the first farmer, cf. 1964 U.f.R. 450. A farmer who buys and resells a cow is not responsible, cf. 1947 U.f.R. 100, because the transaction does not form a link in a chain of production and supply, but corresponds to the sale made by a factory of a machine used by it as operational equipment to another factory or to a private consumer's sale of a refrigerator to another consumer.

[5] 1929 U.f.R. 953.

[6] 1959 U.f.R. 870.

[7] 1957 U.f.R. 109. The case concerned the responsibility of the owner of a boat swing whose back rest failed; cf. also 1971 U.f.R. 331. When a fully automatic washer for motor cars was used at a service station the brush fell down and damaged the car.

[8] The thief, however, is not excluded from recovery under the rule of negligence. Why should the manufacturer, who has marketed a dangerous cosmetic, be liable towards the mistress, but not towards the maid, who fraudulently used the cosmetic?

[9] Dahl, *Produktansvar*, pp. 420 f.

liability rests not only on the last link in the chain but on all links subsequent to the one at fault. The assembler, for instance, is responsible for faults committed by the subproducer.[1] Normally, a link in the chain cannot be held responsible for fault committed by a person in a subsequent link. If, however, the assembler, as is the case in the motor industry, lets the dealer perform work which forms an integral part of the production process, the assembler will be liable for faults committed by the dealer in his servicing or finishing of the production process.[2]

It is obviously a major advantage to the consumer that he can hold his supplier responsible. This applies, in particular, in connection with imported products but, apart from that, it holds good in all instances where the producer is not known to the ultimate consumer, whose only chance of learning who is the producer lies in finding all links in the chain and having the danger identified as stemming from a specific link. In many cases the fact that a fault has been committed somewhere along the line will be beyond doubt, but there may be doubt as to exactly where. If the consumer had a claim only against that link in the chain where the fault was committed he would, in many instances, have to run from pillar to post with his claim. In view of the trend towards increasing specialization and the consequently growing need for cooperation, the question at issue should not be which single link in the chain was too weak but whether the chain, as a whole, was strong enough. In order for a link in the chain not to be able to evade responsibility by "passing the buck", some sort of vicarious liability will be required.[3] An alternative to the liability for faults committed in previous links would have been to hold the economically dominating link in the chain liable for faults committed both in previous and subsequent links. However, it would have been very difficult for the courts to establish such a rule on the basis of some more or less recognized principles in the law of compensation, and almost impossible to follow a firm and steady course in the application of such a rule. The production and marketing structures vary a great deal from one line of trade to another and are in no way stable; it may, therefore, be quite difficult to identify the strongest link. The middleman's effort and financial standing as compared with those of the manufacturer vary a great deal. Sometimes

[1] 1928 Assurandør-Societetets Domssamling 190.

[2] Cf. Dahl, *Produktansvar*, pp. 337 ff. Compare *Vandermark* v. *Ford Motor Co.*, 61 Cal. 2d 256, 391 P. 2d 168 (1964).

[3] Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)", 69 *Yale Law Journal* 1099, 1116 f. (1960), seems to be of the opinion that even though the negligence issue remains under the strict liability approach in the United States, this approach is necessary because there are other sellers than the manufacturer of the product. The arguments put forward in support of this view, however, are in favour of nothing more than the rule under discussion here.

the factory is a large concern and the middleman small and financially weak. In other cases the situation may be the reverse. With a view to securing compensation for the consumer, it would seem advisable to impose liability on the middleman for fault committed by the producer. In general, the burden of the liability will not be too heavy to be borne also by the small middleman. He has a right of recourse and may transfer the loss to the producer, the importer or the wholesaler. As a rule, the loss will be transferred to a link in the chain that has a financial standing such that "the risk-spreading argument" may justify placing the risk of insolvency in accordance with the rule under discussion.

In Sweden the courts have not gone nearly so far. In 1918 N.J.A. 156 the Supreme Court stated that *even* a professional supplier is not liable if he has neither acted negligently nor issued a warranty, and ever since that time this has been held to be the law.[4] If, for instance, a motor repair workshop uses in connection with a repair job a spare part which turns out to be a flawed product, the workshop, in principle, is not liable for any product damage caused in this connection.[5] Subsequently to this decision an understanding has emerged that in many cases it would be equitable to impose liability on the dealer for faults committed by the manufacturer. The 1918 decision does not exclude the basing of liability on an implied warranty, and this latter course has, as a matter of fact, been followed by the courts. Cases where a product is marketed under a designation belonging to entirely different products lend themselves particularly well to the construction of an implied warranty. On this basis liability was imposed by the Supreme Court in the case 1945 N.J.A. 676.[6] From the inclusion of an implied warranty in the producer's product designation it is not very far to the inclusion of an implied warranty in his product information. Actually this was done in the case 1968 N.J.A. 285.[7] The court, however, made reservations on one point. Liability was imposed in pursuance of an implied warranty in so far as no information had been produced which, irrespective of the warranty, might vitiate the liability. This reservation probably means that liability in pursuance of the warranty

[4] A possible explanation of this difference between Danish and Swedish law is that the Swedish courts did not create a general rule on the vicarious liability of the employer for the faults committed by the employee.

[5] Cf. 1945 N.J.A. 189.

[6] A family contracted lead poisoning, because a store—owing not to its own fault but to a fault committed in a previous link of the distribution—delivered sugar of lead, instead of baking powder, to the housewife.

[7] A firm commercially administering advice on weed control and undertaking such control by means of chemicals entered into a contract with a farmer covering the control in his dill field by means of spraying; upon the recommendation of the firm it was agreed to use a particular brand which had first been recommended by the manufacturer; the spraying led to serious damage to the crop; the firm had not acted negligently.

does not include completely incalculable damage or extraordinary and unexpected damage situations,[8] and, finally, the supplier will not be held liable for development damage and system damage.[9]

Basically, this approach is unsound. If a fault has been committed by the producer, it may relate to the nature of the product or to information provided about the product. It is difficult to see why the dealer should be held responsible for the correctness of product information given by the producer and not for the general quality of the product. The real problem is not whether the supplier should be assumed to have given an implied warranty but whether he should be held responsible for faults committed by the producer. The fictitiousness of the implied warranty is clear when one takes into account to what extent a dealer can be held liable on this basis, not only to the buyer but also in relation to any consumer.[1] Whatever may be the case, the less stringent the requirements of assumption of implied warranty, the greater the similarity with Danish law so far as the practical results are concerned. There seems to be a tendency towards a constant lessening of the demands, but it is doubtful whether progress is in sight as long as the courts do not realize that liability should not be based on fictitious contractual engagements but should be imposed by law.

The legal position in Norway is not quite clear. The main trend seems to be in the direction of a rule on some sort of vicarious liability identical to that developed in Danish law by the general application of the implied warranty approach known from Swedish law. A decision of a court of appeal[2] illustrates the situation. The court held that a dealer in fodder "must guarantee that the goods delivered are of average merchantable quality, fit for the purpose for which they were sold, and at least not directly injurious to the animals". In contradistinction to Swedish law, the implied warranty was not based on the designation of the product, product information, or similar objective and specific clues.[3] The judgment seems intended to impose an implied warranty on the dealer that the goods sold are safe—which, for all practical purposes, is tantamount to imposing strict liability on the dealer for product damage. The anomaly which exists in Swedish law because of the limited use of the "implied-warranty approach" has thus been avoided. On the other hand, the Supreme Court has definitely established that there is no general rule on strict liability on the

[8] Cf. Bengtsson, *Sv.J.T.* 1969, pp. 49 f.
[9] Cf. Dahl, *Produktansvar,* pp. 243 f.
[1] Cf. 1945 N.J.A. 676.
[2] Frostating lagmannsrett October 10, 1940, *Domregister over 500 erstatningssaker* no. 530, on the subject of mites in powdered fodder.
[3] This procedure, however, was applied in 1972 N.R.T. 1350, where the vitamin E content in fodder was less than was shown on the declaration.

part of a professional or commercial distributor or supplier. On the contrary, the case 1945 N.Rt. 388 mentioned under IV. C.2 might be taken to mean that strict liability can be imposed only when indicated by the considerations on which the rule on strict liability for dangerous operations is based.[4] However, a case against a dealer concerning a product that was dangerous owing to a fault committed by the producer has not yet been decided by the Supreme Court. In such a case it would be no surprise if the Supreme Court imposed liability on the dealer just because a fault was committed by the producer. It is to be regretted that, so far, only a few lower courts have considered the possibility of imposing on the professional supplier a sort of vicarious liability by holding him responsible for faults committed by previous links. This rule has been applied expressly only in one judgment, viz. the decision of the City Court of Oslo, 1966 Rettens Gang 443.[5] In 1974 N.Rt. 41, however, the City Court of Oslo found for the dealer in spite of the fact that the producer was held liable because of faulty design. Unfortunately, only the case against the producer was brought before the Supreme Court. However, this in-between liability offers the best basis for a thoroughgoing harmonization of the judgments passed by the lower courts.

VI. DEFENCES IN PRODUCT LIABILITY CASES

When a party is held liable in accordance with the rules described, he may invoke the conduct of the plaintiff as a defence. Contributory negligence and assumption of risk on the part of the plaintiff are defences in product-liability cases both when the liability is a strict one and when it is based on negligence or warranty. Assumption of risk is a complete bar to recovery, while contributory negligence involves a distribution of liability depending on the degree of negligence displayed by either party or—in case of strict liability—displayed by the plaintiff.[6] In some cases it is difficult to decide whether a careless manner of handling the product

[4] Thus also 1973 N.Rt. 1153, 1962 N.Rt. 1163 and 1948 N.Rt. 121.

[5] Without any fault having been committed by the repair man, he was held responsible for damage caused by a spare part which must be assumed to have been defectively constructed. In 1935 Rettens Gang 59, where it was obvious that the dealer's supplier had committed a fault, liability was imposed upon the dealer without any comment in the court's opinion.

[6] This is a question of a fractional distribution. If the plaintiff has committed only a small fault, damages will not be reduced, cf. 1956 U.f.R. 543. Conversely, the defendant may become free from liability if his fault is a minor one and the damage in question must, in all essentials be attributed to the consumer's behaviour, cf. 1954 U.f.R. 124. Between these two extremes an adjustment is made, cf. 1966 U.f.R. 794.

constitutes abnormal use which bars recovery,[7] or is a way of handling which should have been foreseen and avoided by the producer or supplier,[8] or involves contributory negligence. In Scandinavian law the borderline between contributory negligence and assumption of risk is vague.[9] The consumer's right to compensation will not be affected because he has noticed something unusual during the consumption of the product in question, so long as his observation has not led him to suspect that the product was dangerous.[1] If the consumer has, or ought to have, suspected that continued use would be dangerous, his compensation will be reduced.[2] If there can be no doubt at all in the consumer's mind that continued use will be dangerous, but he neglects such obvious danger and continues to use the product, his conduct constitutes assumption of risk, which bars recovery.[3] Moreover, the courts seem not to allow recovery in accordance with the "assumption of risk" approach when the plaintiff, because of his general professional knowledge or because of experience derived from consumption of corresponding products, should have realized, already when receiving the product, (i) that danger might be involved in the use of the product, (ii) that such danger might be avoided by a more or less thorough examination of the product, and (iii) that failure to undertake an examination would involve a risk.[4] The practice of the courts may be based upon considerations similar to those upon which we base the rules on abnormal use. It may be claimed to be a part of the normal consumption process that one should avoid the use of an obviously dangerous product in an otherwise normal way, and in connection with certain products it comes within the usual consumption process to safeguard against an obvious risk of danger, inherent in the nature of the product, by taking certain precautionary measures.[5]

It is no defence that the plaintiff has not acted in accordance with his contractual obligations to examine and to notify. The rules in secs. 51–53

[7] Cf. 1968 N.Rt. 257.
[8] Cf. 1919 U.f.R. 557.
[9] In certain cases of assumption of risk the courts seem to make a distribution when a sanction is deemed necessary irrespective of the conduct of the plaintiff, cf. 1953 U.f.R. 503.
[1] Cf. 1932 U.f.R. 144.
[2] Cf. 1924 U.f.R. 800.
[3] Cf. 1951 Højesteretstidende 1015.
[4] Cf. 1932 U.f.R. 33.
[5] While an express disclaimer combined with an explicit agreement that the defendant shall not be liable for some specified features of the product may be a defence, the prevailing generally-worded disclaimers will be no defence in the ordinary case, where there is a difference in the strategic positions of the parties. Rules of construction have played the largest role in judicial practice restricting the legal effect of a disclaimer. Although the courts have not actually coined a principle of invalidity to the effect that liability based on fault cannot be disclaimed, the courts none the less seem to be so strict in their assessment of the unequivocalness of a disclaimer that, for all practical purposes, it amounts to such a principle so far as the prevailing wordings are concerned.

of the Scandinavian Sale of Goods Act on the duties of the buyer to examine and notify within a reasonable length of time and the one-year (in Norway two-year) period of limitation in sec. 54 are not applicable in cases concerning product damage.[6] The protection of the seller may be "a sound commercial rule" in so far as commercial losses are concerned, but "it becomes a boobytrap" in regard to personal injury.[7] While the loss on bargain may grow as time passes, owing to a change in market prices, the length of time does not give the plaintiff a possibility of speculating at the expense of the defendant in the case of product damage. Another matter is the fact that non-inspection may be a defence as contributory negligence or assumption of risk. Likewise, the very fact that the plaintiff has allowed some length of time to pass after damage has occurred may, according to general rules on lack of vigilance (the Scandinavian counterpart to the law of latches), mean that the court should give the defendant the benefit of doubt in case of insufficient evidence.[8]

The rule of avoidable consequences is a defence in all product liability cases in the same way as is contributory negligence. In fact, the rule differs from contributory negligence only in the assessing of damages, since no distribution is made on the basis of the degree of negligence: the plaintiff is simply allowed no compensation for that part of the damage which could have been avoided if reasonable steps had been taken to prevent any spreading of and repercussion from the damage.

The rules on product liability apply to personal injury, and also to damage to property, caused by a product during consumption. Under these rules there is no recovery for purely economic "out of pocket" loss; it is a different matter when it comes to economic loss consequential on physical injury.[9] This is but a point of departure. In exceptional cases the danger inherent in the product may in itself cause a permanent depreciation of the value of other things. A depreciation of this nature, attributable to the risk that damage may occur, is dealt with in the same manner as loss actually caused by damage to property.[1] As mentioned, the plaintiff cannot recover for avoidable consequences; he is forced to take reasonable steps to avoid damage. In respect of costs and losses incidental to such immediate, specific, preventive measures, compensation may be

[6] 1951 N.J.A. 271. See also 1960 U.f.R. 451.

[7] Cf. Prosser, *op.cit.*, p. 1130. See also Schlechtriem, "Abwicklungsschutz des Verkäufers und Deliktsrecht', in *Jus Privatum Gentium, Festschrift für Max Rheinstein*, vol. II, Tübingen 1969, pp. 683 ff.

[8] Cf. 1969 Assurandør-Societetets Domssamling A.11.

[9] Cf., e.g., 1934 U.f.R. 707.

[1] Cf., e.g., 1971 U.f.R. 722. A supply of seeds contained wild oats; even though a spreading had not been ascertained the mere risk of such a spreading led to a depreciation in the value of the buyer's property.

claimed according to the same rules as could have been applied had the damage occurred.[2] It has not yet been decided by the courts whether the rules on product liability apply to damage caused to an article by its own harmfulness, as where a motor car is wrecked because of a defective braking system. There seems to be a tendency to apply the rules in cases where the danger of the product cannot be identified with the damage to the product.

[2] Cf. 1947 N.J.A. 82 and 1942 N.J.A. 542 on losses caused by the necessity of slaughtering some newly bought cows in order to avoid the spreading of disease among the purchaser's livestock.