Helmut KOZIOL, Michael D GREEN, Mark LUNNEY, Ken OLIPHANT, YANG Lixin (eds)
Product Liability

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Fundamental Questions in a Comparative Perspective

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Preface

The editors are proud to have supervised the present volume, which to their knowledge is the first book-length analysis of comparative product liability laws around the globe written by scholars representative of the whole world, an achievement only possible due to the efforts of the World Tort Law Society (WTLS). In 2012, at the suggestion of Prof YANG Lixin, Renmin University, Beijing, the latter was jointly founded by the Research Center for Civil and Commercial Jurisprudence of the Renmin University, Beijing, China, and the Institute for European Tort Law (ETL) and European Centre of Tort and Insurance Law (ECTIL), both Vienna, Austria. The aim of the Society is to create a forum for discussion of current developments in tort law on a global scale. The first President of the Society is Prof Helmut KOZIOL (Vienna, Austria). The executive committee consists of Prof YANG Lixin, Prof Ken OLIPHANT (Bristol, UK) and Prof Michael D GREEN (Wake Forest, USA), supported by Prof WANG Zhu (Chengdu, China). The other members of the Society – numbering up to a maximum of 30 – are tort law researchers from around the world.

The topic of the WTLS's first research project is product liability. This is an area of law which constitutes ideal subject matter for the Society's endeavours, as it plays an important practical role in various jurisdictions and, at the time of writing, there has been no other book-length legal study of global scope. The first conference took place in Harbin, China, in the autumn of 2013 and its organisation was shared by all of the partner institutions of the WTLS. During the conference, current product liability issues in the individual jurisdictions and certain basic questions were analysed – the latter through abstract questions and concrete cases – and solutions to problems were discussed. The results were already published in 2015 in Chinese. 'Product Liability' was also the topic dealt with at the second conference of the WTLS in Vienna in autumn 2015: it was organised by ETL/ECTIL and took place on 17 September 2015 at the Austrian Ministry of Justice. The conference provided the framework for the work of the WTLS. Helmut KOZIOL (ECTIL) presented his personal comparative conclusions, on which other members offered their comments: YANG Lixin (Renmin University, Beijing), Catherine M SHARKEY (New York University), Ken OLIPHANT (University of Bristol) and Anton FAGAN (University of Cape Town, South Africa).

The editing of the greater part of the English contributions written by non-native speakers has been undertaken by Michael D GREEN, Ken OLIPHANT and Mark LUNNEY (Armidale, Australia). The manuscript has been made ready for press and the publication organised by WANG Zhu and the ETL/ECTIL staff, in particular Helmut KOZIOL together with David MESSNER, Johannes ANGYAN, Fiona SALTER-TOWNSHEND, and Kathrin KARNER.

It is hoped that this book will be the first of a series published by the WTLS, with the next to concern 'Road Traffic Accidents'.

The reports have been drafted on the basis of a common questionnaire addressing general issues of policy and principle and a selection of hypothetical cases to illustrate how the law might be applied to concrete facts. The questionnaire was initially drafted by Helmut KOZIOL, and the cases by Ken OLIPHANT, in consultation with each other and then with the full executive committee. As regards the various continents, countries and authors, the book is structured in alphabetical order. For Asia, individual country reports and a comparative report have been drafted; for Europe, North America and the Rest of the World, group reports are provided. The volume closes with concluding remarks, outlining not the 'official' view of the WTLS, but the author's personal opinion and the statements of four representatives of different parts of the world.

Helmut KOZIOL
Michael D GREEN
Mark LUNNEY
Ken OLIPHANT
YANG Lixin

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List of Abbreviations

A

A 2d	Atlantic Reporter, Second Series
AC	Appeal Cases
ACL	Australian Consumer Law
AD	Appellate Division Reports
Admin Reg	Administrative Regulation
All ER	All England Law Reports
ALR	Australian Law Reports
AM	Revista de Aministração Pública de Macau
Am L & Econ Rev	American Law and Economics Review
AMR	All Malaysia Reports
Am J Comp L	American Journal of Comparative Law
Ariz L Rev	Arizona Law Review
Ark L Rev	Arkansas Law Review

B

BCJ	British Columbia Judgments
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des BGH in Zivilsachen
BMJ	Boletim do Ministerio da Justiça
BMLR	Butterworths Medico-Legal Reports
Brook L Rev	Brooklyn Law Review
Bull civ	Bulletin des arrêts de la Cour de cassation, chambre civile
BW	Burgerlijk Wetboek

C

CA	Cour d'appell
Cal L Rev	California Law Review
Cal Rptr	California Reporter
Cardozo L Rev	Cardozo Law Review
Cass	Corte di cassazione
Cass civ	Cour de cassation, chambre civile
Cass com	Cour de cassation, chambre commerciale
CBER	Center for Biologic Evaluation and Research
CCLT	Canadian Cases on the Law of Torts
CE ass	Conseil d'Etat in administrative matters
CFR	United States Code of Federal Regulations
CJEU	Court of Justice of the European Union
CLR	Commonwealth Law Reports
CPA	Consumer Protection Act
Ct App	Court of Appeal

D

D	Dalloz
Danno resp	Danno e responsabilità
DLR	Dominion Law Reports

E

ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECR	European Court Reports
EFS	Etablissement français du sang
Eng Rep	English Reports
EWHC	England & Wales High Court
Exch	Exchequer Reports

F

F 2d	Federal Reporter, Second Series
FCA	Federal Court of Australia
FCFCA	Full Court Federal Court of Australia
FDA	Food and Drug Administration
Foro it	Foro italiano
FRD	Federal Rules Decisions
F Supp	Federal Supplement

G

Gaz Pal	Gazette du Palais
Giur it	Giurisprudenza italiana
Giur mer	Giurisprudenza di merito
Giust civ	Giustizia civile
GJ	Gaceta Judicial

H

HCA	High Court of Australia
HL	House of Lords
Hofstra L Rev	Hofstra Law Review
HR	Hoge Raad der Nederlanden

I

ICBR	International Conference on Business and Economic Research

J

JBl	Juristische Blätter
JCP	Journal of Consumer Policy
JCP G	Juris Classeur Périodique Edition Générale
JJS	Journal of Juridical Studies
JLMB	Jurisprudence de Liège; Mons et Bruxelles
JLS	Journal of Legal Studies

J Pharm & L	Journal of Pharmacy and Law
JZ	Juristenzeitung
K	
KB	King's Bench
KBB	Kurzkommentar zum ABGB (Koziol/Bydlinski/Bollenberger)
L	
L & Hum Behav	Law and Human Behavior
LCBR	(Russian) Law on the Consumers' Rights Protection
Leg Stud	Legal Studies
LGUC	Ley General de Urbanismo e Construcciones / Chilean General City Planning and Construction Act
Lloyd's Rep Med	Lloyd's Law Reports Medical
LPC	Ley de Protección al Consumidor / Chilean Consumer Protection Act
LQR	Law Quarterly Review
M	
Mass giur it	Massimario dell giurisprudenza italiana
MDA	Magen David Adom
Miss LJ	Mississippi Law Journal
MLJ	Malayan Law Journal
MLR	Modern Law Review
N	
NC L Rev	North Carolina Law Review
NE 2d	North Eastern Reporter, Second Series
NGCC	Nuova giurisprudenza civile commentata
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NW 2d	North Western Reporter, Second Series
NY CA	New York Court of Appeals
NY S 2d	New York Supplement, Second Series
NYU L Rev	New York University Law Review
O	
OGH	Oberster Gerichtshof
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
Okla L Rev	Oklahoma Law Review
ONSC	Ontario Superior Court of Justice
OR	Oregon Reports
P	
P 2d	Pacific Reporter, Second Series
PD	Piskei Din

PHG	Produkthaftungsgesetz
PLA	Products Liability Act
PLD	Directive on Liability for Defective Products

Q

QBD	Queen's Bench Division

R

RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rb	Arrondissementsrechtbank
RDJ	Revista de Derecho y Jurisprudencia
RDLC	Revue des droits de la concurrence
Rep Foro it	Repertorio del Foro italiano
Resp civ	Responsabilità civile e previdenza
Rev Der Priv	Revista de Derecho Privado
Riv dir civ	Rivista di diritto civile
RSQ	Revised Statutes of Quebec

S

SA	South African Law Reports
SALJ	South African Law Journal
San Diego L Rev	San Diego Law Review
SCA	(South African) Supreme Court of Appeal
S Cal L Rev	Southern California Law Review
SCC	Supreme Court of Canada
SCL Rev	South Carolina Law Review
SCR	(Canadian) Supreme Court Reports
S Ct	Supreme Court
SE 2d	South Eastern Reporter, Second Series
So 2d	Southern Reporter, Second Series
SQ	Statutes of Quebec
Stan L Rev	Stanford Law Review
St Mary's LJ	Saint Mary's Law Journal
SUV	Sports Utility Vehicle
SW 2d	South Western Reporter, Second Series

T

TBB	Tidsskrift for Bolig- og Byggeret
Tel Aviv U Stud L	Tel Aviv University Studies in Law
Tenn Code Ann	Tennessee Code Annotated
TGI	Tribunal de Grande Instance
TPC	Town Planning Code
Tul L Rev	Tulane Law Review

U

U	Ugeskrift for Retsvæsen
UCC	Uniform Commercial Code

UCLA L Rev	University of California at Los Angeles Law Review
US	United States Supreme Court Reports
USC	United States Code

V

Van L Rev	Vanderbuilt Law Review
VersR	Versicherungsrecht

W

Wis Stat	Wisconsin Statutes
WLR	Weekly Law Reports

Y

Yale LJ	Yale Law Journal

Z

ZGH	Zeitschrift für das Gesamte Handelsrecht
Z Vgl RWiss	Zeitschrift für Vergleichende Rechtswissenschaft

Questions, Hypothetical Cases and Introduction

Helmut Koziol

Questions for Discussion

In most legal systems producers are now subject to special liability regimes which appear much stricter than the fault-based liability regime applying in general: producers are liable irrespective of fault for damage caused by defective products they put into circulation. These stricter rules on product liability originate in the USA but the concept spread rather quickly worldwide. It inspired, for example, the European Union to design its Product Liability Directive (Council Directive 85/374/EEC of 25 July 1985), which is not only influential in the EU but has also provided the conceptual basis for new laws elsewhere.

The almost worldwide tendency to provide for strict product liability raises quite a few interesting questions, which should – as far as possible – be discussed in the analyses to be provided of the hypothetical cases and otherwise in introductions to those analyses. To some extent the questions can be subdivided into those which can be characterised as fundamental insofar as they go to the reasons for introducing strict product liability and its justification, and those focussing upon the concepts employed. I will start with the fundamental questions and then go on to the conceptual issues.

I. Reasons for introducing strict product liability

It appears that worldwide – with the possible exception of France – there was a prevailing impression of an urgent need to provide for the stricter liability for producers who put defective products into circulation and, therefore, the American concept spread very quickly. But was there really such a need and, if so, why did it arise? What gaps existed in the reasonable protection of both buyers and third persons and what were and are the shortcomings of the general rules? For example, was the borderline between contractual and delictual liability a source of problems? Or was the regime of liability for others (agents, employees, etc) inadequate? Or was the protection of pure economic interests at stake? Or was it the opinion that the requirement of fault in establishing liability was unreasonable? Or the difficulties in proving fault?

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II. The justification for strict product liability

The further basic question seems to be how such strict liability can be justified. The imputation of liability always needs convincing reasons and, if liability is to be independent of fault, the most widely accepted criterion, some alternative criterion must be clearly enunciated. The answer to this question is, of course, decisive in laying down the reasonable scope of product liability, in solving questions of conceptual detail and in the interpretation of legislative provisions. Last but not least: if the WTLS wants to make recommendations on the development of product liability and worldwide harmonisation, then such recommendations can only be convincing if they are based on reasonable and comprehensible arguments.

A number of possible justifications for strict product liability may be identified and evaluated.

A. Control of a dangerous thing

In many legal systems *keepers* of dangerous things are strictly liable because they have the power to exercise influence over them. Might the same idea underlie strict product liability? Or is it an objection that the producer is no longer the keeper of a product when he or she has put it into circulation and damage occurs?

In this context, is it significant that the *dangerousness* of defective products is in general qualitatively different from, for example, the dangerousness of nuclear plants, railways or motor cars, to mention the most important sources of danger for which strict liability is provided under many legal systems. A product is defective only if the product does not offer the safety that one is entitled to expect taking all the circumstances into account. In general, however, the danger emanating from the defect cannot be considered very great since many products, even in a defective state, are not likely to bring about extensive damage or to substantially increase the frequency of damage occurring. Typical examples are bent paper clips or rotten food insofar as they can only result in harmless scratches or temporary nausea respectively. In comparison, rules on strict liability which are based on dangerousness show that the high probability of causing damage and the extent of the possible damage are decisive considerations.

A more fundamental reason for doubting that the danger caused by a product defect is able to justify strict liability may also be highlighted. The general, abstract danger generated by things or facilities such as, for example, nuclear

plants or motor cars, serves the interest of the keeper; dangerousness and usefulness are thus inter-related. The specific danger arising in the individual case as the result of a defect is, on the other hand, usually not beneficial in any way to the entrepreneur; on the contrary, the product's defectiveness runs contrary to his interests. Can such concrete dangerousness nevertheless justify strict liability?

B. Protection against the risks inherent in industrial production

What about the justification for the European Directive provided by the legislator? The Directive very clearly states that liability without fault should apply only to movables which have been industrially produced. The idea that the purchaser needs special protection against the special risks of anomalies associated with *industrial mass production* seems worth discussing as, in spite of all reasonable measures, product defects can never be absolutely excluded in the case of mass production nor can inspection always prevent defective products from being placed on the market. The wording of the Directive, however, relaxes the limitation to industrial products so that the liability set out also applies to handmade and artistic, custom-made items, and since 1999 also to agricultural products. Moreover, would the idea of the inevitable risks inherent in industrial mass production really justify liability for damage deriving from defective construction or inadequate instructions for use?

C. Enterprise liability

Can the strong trend – especially in Europe but also in the USA – towards a special, more stringent liability for *entrepreneurs* ('enterprise liability') help to justify the strict liability of producers? Perhaps not, inasmuch as such liability – at least, in some conceptions – remains fault-based but with a reversed burden of proof (see eg Art 4:202 of the Principles of European Tort Law), and so would by no means be as strict as the liability on producers.

D. A risk community

Would it be possible to call on the notion of the *risk community*? If the producer serves as a clearing house for all damage caused by his products, he or she can pass on all the compensation costs to the clients in general, who are the ones who

derive advantages from the products. In particular, no-fault product liability laws have the effect that the position of the entrepreneur is approximated with that of an insurer, when seen from a functional perspective: the liability risks generated are taken into account by entrepreneurs in their price calculations, so that clients may be understood as a risk community, who from an economic perspective ultimately bear the costs of the risk-related liability regime imposed on the entrepreneur. However, this idea only applies when the acquirer of the goods suffers damage, and not when the damage is suffered by a third party.

E. Other justifications

Are there any *further ideas* – for example, insurability – which may be able to justify the producer's strict liability? Can economic analysis help to provide insight into this area?

III. Inconsistencies connected with product liability?

It may be that a convincing justification can be given for strict liability on producers, but that such justification covers only part of the scope of the liability accepted today or that it also covers some areas which are currently not under the regime of strict product liability.

Thus it could be the case that the general justification for strict product liability is not able to cover the inclusion of innocent bystanders in the circle of protected persons. On the other hand, the justification could raise the question of why fellow-entrepreneurs are not protected to the same extent as consumers or why strict liability does not arise in cases of damage caused by defective services or why only movables are subject to strict liability and not buildings or bridges or why some legal systems have a different regime for medicines, or why immaterial loss does not have to be compensated in some countries. One can imagine that quite a number of similar questions arise, varying in the individual legal systems.

IV. Conceptual issues

The rules on product liability raise many questions of detail which are important in practice. A few worth mentioning are, for example, how "defect" is de-

fined, whether a product's failure to provide protection against harm (as in the case of a drug or weedkiller) can be a defect, what is to be understood by the terms 'supply' and 'putting into circulation', and who is a 'producer'? The defences available in respect of a claim also cause not insignificant difficulties.

These conceptual issues are intrinsically linked with the fundamental questions of need and justification highlighted in Sections 1 and 2 above, because the concepts employed should be adequate to meet the deficiencies that strict product liability was intended to address, and should reflect and support the justifications provided for it.

V. Deficiencies of the rules in practice

What are the deficiencies of the rules on product liability in your legal system?

VI. Further questions

Each respondent is requested to highlight further issues he or she thinks to be of relevance.

Ken Oliphant

Hypothetical Cases for Discussion

Case 1: Brake Pad Failure

X Ltd manufactures bicycles. In 2011, it started to use a new material for its brake pads, which X Ltd believed on the basis of its testing to be a cheaper, longer-lasting and generally more effective alternative to traditional materials. X Ltd was aware of a very small risk that – given a combination of particular circumstances (temperature, surface water, oil, etc) – the new brake-pad material might suddenly be rendered ineffective, but it considered that the risk was likely to eventuate only very rarely and did not outweigh the general advantages of the new material. It included a statement about the possibility of failure in the small print of the product instructions supplied with all of its bicycles incorporating the new brake pads. A, who purchased one of the bicycles, is one of a handful of people injured in accidents attributable to the failure of the new brake pads; A's bicycle is also damaged. B, a passer-by, is injured in the same accident.

A. Analysis

What is X Ltd's liability to A and B? Pay particular attention to the various possible bases of liability (a general tortious liability for fault, vicarious liability, contractual liability, or a special strict liability regime?). Would it make any difference to your analysis if Y, who is (i) an employed researcher in X Ltd's laboratory, or alternatively (ii) an independent research contractor, had covered up the risk that the new brake-pad material might fail?

B. Commentary

What does your analysis demonstrate about the reasons for introducing strict product liability and the justifications that may be given for it? Do these justifications apply where (as in the present case) the injury is caused by a standard product and results from choices made in the design process? And where the victim is a third party rather than the purchaser? Is the resulting liability truly a strict liability or does it ultimately rest on fault?

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Case 2: Infected Blood

A is infected with Hepatitis N as the result of a blood transfusion conducted in X Hospital in 2005. The source of the infection was blood supplied to X Hospital by Y Ltd, who had collected it from a donor, Z. Unknown to himself, Z was a carrier of the Hepatitis N virus. At the time, the risk of Hepatitis N in donated blood had been identified in a single published paper in a scientific journal, but only a handful of research laboratories in the world had the capacity to test for its presence in specific quantities of blood. Furthermore, the majority of the scientific community did not believe that the condition (Hepatitis N) really existed. It was only subsequently that the condition's existence came to be generally accepted and that a test was developed that allowed hospitals and blood suppliers to screen out infected parcels of blood.

A. Analysis

What is the liability to A of X Hospital, Y Ltd and Z? Pay particular attention to the various possible bases of liability (a general tortious liability for fault, vicarious liability, contractual liability, or a special strict liability regime?). Would it make any difference to your analysis if A contracted the virus as the result of a blood transfusion conducted in 2001, but her condition only manifested itself in 2012? (In this context, consider in particular differences in the time limits applied to the various possible bases of liability.)

B. Commentary

What does your analysis demonstrate about the reasons for introducing strict product liability? In particular, why are ordinary principles of fault-based, vicarious and contractual liability considered insufficient? What does your analysis demonstrate about the justifications that may be given for strict product liability? Do these justifications apply where (as in the present case) the injury is caused by a non-standard product and results from a failure to identify a pre-existing defect in the individual product?

Case 3: Bridge Collapse

A, a pedestrian using a public right of way, is injured by the collapse of a bridge constructed by X Ltd on land belonging to Y, who commissioned the construction, on the basis of a plan drawn up by architect Z, whom Y also commissioned directly. It transpires that Z's plan was defective and caused the collapse. Y incurs the cost of instructing a different architect to redesign the bridge. Under the terms of its initial engagement, X Ltd is obliged to construct the new bridge for no additional remuneration.

A. Analysis

What is the liability to A of X Ltd, Y and Z? Is the architectural plan itself a 'product', and so subject to strict product liability, or does it merely represent the performance by Z of a service, to which some alternative liability regime applies?

What further liability, if any, does Z have to X Ltd and Y, whether on the basis of a direct claim or a recourse action?

B. Commentary

What does your analysis demonstrate about the coherence of strict product liability as it exists in your jurisdiction, paying particular attention to the limits on its scope. Identify the various alternative types of liability that could arise (including contractual liability), and highlight the main differences between them. To what extent is liability for immovables different from liability for movables, and is this justified? To what extent is liability for the supply of services different from liability for the supply of products, and is this justified?

Helmut Koziol

Introductory Lecture

Contents

I. General Remarks

We must thank Prof Yang Lixin not only for creating the wonderful idea of founding the World Tort Law Society and for inviting us to our first conference in such beautiful surroundings but also for suggesting 'product liability' as the first topic. I think that in discussing this topic we will have an opportunity to take advantage of the expertise of so many tort lawyers coming from all over the world: they are the representatives of very different legal systems – from east and west, north and south, with common law and codified law; they are used to quite different legal cultures and different legal thinking. Therefore, in our discussions we will learn about other legal systems and thus afterwards be able to understand each other better; further, we will have the opportunity to explore which differences in legal culture we have to take regard of and which largely diverging habitual ways of thinking may be influential. By this means, we will also be in a position to recognize the common bases as well as the lack of uniformity, we will receive much valuable stimulation, will be inspired by alternative solutions and discover new tools for solving problems, become more open-minded for different ideas and increase our understanding of fundamental perspectives. **1/1**

However, we will without doubt also gain the experience that to reach these goals we have to overcome quite some difficulties. First of all, it is obvious that there are language barriers as we speak many different mother tongues, many know only their own language and as far as I know no one is able to understand all the native languages spoken by our members. It is already difficult enough to take this hurdle by using only one or two 'official' languages or by translating our statements and papers. Lawyers – unlike the scholars of nearly all the other sciences – have to be aware of a more hidden and, therefore, even more dangerous source of misunderstanding each other: law and language are linked to one another in a special and very close manner; further, the terminology used by lawyers is marked by the whole legal system. Therefore, even pri- **1/2**

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vate lawyers who use the same language, such as Germans and Austrians, are exposed to the danger of misunderstanding each other: the words 'Sache' (thing), 'Besitz' (possession) or 'Rechtswidrigkeit' (wrongfulness) and 'Verschulden' (fault) have quite different meanings. I am sure that our members who speak a sort of English as mother language can provide similar examples. Therefore, if lawyers want to understand each other, they have to define the concepts and terms.

1/3 However, it must also be pointed out that besides these language problems quite a few further dangers lurk when it comes to trying to understand or seeking to draw inspiration from foreign legal systems; the risk one runs is all the greater, the more different the legal systems are. When I talk about differences, I not only refer to the differences in the part of private law which is primarily under discussion, in our context in tort law, but also in the other parts of private law. The discussion of product liability in itself will show us the inseparability of tort law from contract law. Further I refer also to fundamental divergences in the overall legal systems,[1] eg including the social security system, administrative law and criminal law. Such a broad angle of view is necessary because of the interplay with all these areas: tort law and in particular product liability law is interrelated with nearly all legal areas and therefore all of them may be of greatest influence.

1/4 The World Tort Law Society will run into all these problems and it will not be so easy to deal with them. I have experienced all this as a founding member of the European Group on Tort Law. Although most of the members came from the EU, it took years for them to become capable of understanding each other to some extent without comprehensive commentaries. The members of our worldwide society will encounter even longer-lasting and more serious difficulties.

1/5 I feel that product liability is a very suitable area for beginning our cooperation, as on the one hand we can gain experience of nearly all the difficulties and learn how to overcome them, but on the other hand we have the advantage that it is a notion well-known worldwide for some decades and that the solutions in the individual legal systems display similarities at least to some extent. However, the disadvantage of the topic is an unbelievable flood of publications all over the world and an astonishing variety of ideas; therefore, we are exposed to the danger of getting lost in details and being drowned in the flood.[2]

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1 Cf *B Markesinis*, Comparative Law in the Courtroom and Classroom (2003) 167 ff.

2 On this and presenting a highly interesting overview *M Reimann*, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?, 51 Am J Comp L 751 ff (2003). See further *M Ebers/A Janssen/O Meyer* (eds), European Perspectives

Furthermore, in my view product liability is an excellent starter as it gives us **1/6**
the opportunity to discuss fundamental issues including, in my opinion, not only basic questions for the individual legal systems but also for the Asian, American and European efforts towards harmonising the national legal systems or drafting multinational codes. I think of such questions as: What are the reasons for establishing an – at least to some extent – special kind of stricter liability? What are the legal instruments for establishing such liability? Do the provisions take into account the relationship between prerequisites for liability and legal consequences? As far as tort law is concerned: do the special rules fit into a consistent system of tort law or liability law? Do the rules on product liability take regard of the fundamental principle of equal treatment? All these questions are relevant in establishing a legal system which complies with the idea of justice and can be called a legal order rather than having to be considered a legal disorder.

It may be that such questions sound slightly strange to common law law- **1/7**
yers, who may point out that their courts only have to decide single cases and not to design a whole system. It may be true that courts and even scholars under common law do not place special emphasis on considering the whole system and its consistency. But looking at common law textbooks, one gets the impression that ultimately there is nearly no difference to continental European text books and that even the courts – although possibly in a more hidden fashion – do take regard of an overall system. I think that they do so as it is unavoidable: if, eg, English courts have to consider whether a case has to be decided in accordance with a precedent judgment although it is not identical in each and every detail, they have to ask whether it is a similar case or not. In doing that they have to investigate whether the decisive factors are the same and, therefore, they have to design a more general rule on the basis of the preliminary decision and examine whether this rule is applicable to the case at hand. Thus, in the end they also have to apply more general rules in the individual case. The difference between common law courts and courts under legal systems with codes, which begin with the general rule, only seems to be that common law courts have to take one step more. But starting with a precedent judgement on an individual case, they may tend to overemphasize the importance of single judgements and neglect the overall system. On the other hand, lawyers under a codified legal system begin on a more general level and, therefore, tend to overestimate the general rules of the overall system and to neglect the specific features of the case at hand. Nevertheless, in substance they have to do the same.

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on Producers' Liability (2009) with many special reports as well as country reports and in particular a detailed comparative report by the editors.

II. The Interplay of Contract Law and Tort Law

1/8 First of all, the range of product liability problems teaches us that we cannot restrict our look towards tort law but have to include at least contract law in our research. That has been pointed out clearly by quite a few scholars,[3] and this does not seem far-fetched if the victim is the buyer who acquired the defective product pursuant to a contract. Of course, as a rule the victim concluded the contract with the distributor and not with the producer. But contract law in the national legal systems nevertheless offers rather different instruments of protection to the purchaser and some legal systems have solved the problems even solely on a contractual basis,[4] some partly; therefore, contract law determines varying needs of protection under tort law.

1/9 To begin with common law, on the basis of an implied warranty the seller is strictly liable if the goods do not come up to the required standard. As Peel/Goudkamp underline, the purpose of developing such warranty at common law was probably to allow the buyer a remedy for the financial loss he suffered in acquiring goods of inferior quality, ie for the difference in value. However, it has been accepted for many years that it also allows recovery for consequential damage to other property and for personal injuries. Such contractual strict liability means, as Peel/Goudkamp point out, that as far as the purchaser is concerned his right of action in tort against the manufacturer, dependent on proof of negligence, may be utilised only where the seller is insolvent or cannot be sued because of a valid exemption clause. Because of the privity rule, persons other than the purchaser, ie his family members, donees, passers-by, have to claim under tort law, but most of them and also the purchaser himself enjoy the producers' strict liability provided by the Consumer Protection Act 1987. Therefore, recourse to the common law liability based on negligence is rarely necessary, eg in case of damage to property not intended for private use or when the time limitation period for a claim under the Act has expired.[5]

1/10 The import of the theory of implied warranty was more far-reaching in the USA[6] as the courts and the Uniform Commercial Code developed exceptions to

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3 See eg *M Geistfeld*, Principles of Products Liability (2006) 9 ff; *E Peel/J Goudkamp*, Winfield and Jolowicz on Tort (19th edn 2014) nos 1.004 and 11.001; *M Schermaier*, New Law Based on Old Rules: Antecedents and Paragons of the Modern Law on Producers' Liability, in: M Ebers/A Janssen/O Meyer (eds), European Perspectives on Producers' Liability (2009) 82 ff.

4 This is underlined by *K Zweigert/H Kötz*, An Introduction to Comparative Law (3rd edn 1998) § 42 V (p 676).

5 Winfield and Jolowicz on Tort (fn 3) nos 11.001 and 002.

6 See *MS Shapo*, Shapo on the Law of Products Liability (2013) § 3.

the privity rule;[7] therefore the purchaser and even his household were allowed to claim against the manufacturer. Further, contractual limitations of the manufacturer's responsibility were ignored.[8] Naturally, the main problem with strict liability under an implied-warranty theory was recognized: the term itself implies a contractual liability with privity and further contractual limitations. Therefore, the manufacturer's strict liability was shifted to tort law.[9] Australian Consumer Law[10] goes even further in providing that producers of goods and services are subject to an implied guarantee that the goods or services meet certain quality standards and it is clear that a failure to meet some of these standards is actionable not only by the consumer who purchases the goods or services but also by 'affected persons'; this includes persons who acquire title to the goods through the consumer. On the other hand, the privity rule is still respected in South Africa.[11]

1/11 Nonetheless solving the problems of product liability by a contractual warranty seems to be very popular under many legal systems; France gives a wonderful example:[12] Article 1641 Code civil provides that the seller is bound to warrant against latent defects and according to art 1645 the seller is liable – in addition to restitution of the price – for all damage caused if he knew of the defect. This rule is of highest practical importance as the courts created for consumer sales contracts the irrefutable presumption that the professional had knowledge of the latent defect, even if the defect was undiscoverable. Thus the consumer always has a claim for damages against the professional seller and thanks to an 'action directe' also against the manufacturer and any other link of the sales chain. Although an outside observer may feel that it is rather astonishing and not very convincing to solve a problem by an irrefutable presumption without any basis in reality, nevertheless, we learn a lot about different ways of thinking and the surprising uses of legal instruments which have to be taken into regard.

1/12 Last a short glimpse at those legal systems, eg the German and Austrian, under which the distributor of defective products would be rarely liable for the purchaser's damage under the general rules on contract law: if he is not at fault the purchaser can ask under the law of warranty only for reduction of the price

7 See *Shapo* (fn 6) §§ 3.03, 5.03.

8 See with more details *DB Dobbs/PT Hayden/EM Bublik*, The Law of Torts II (2nd edn 2011) § 450.

9 See Restatement Second of Torts § 402A.

10 Rest of the World nos 12/26 ff and 12/221.

11 Rest of the World nos 12/49 and 12/109.

12 See Europe no 10/51 ff.

or rescission of sale.[13] Further, because of the privity rule, the purchaser will usually also not succeed with a claim against the producer as he bears under tort law the burden of proving fault and will as a rule fail; in addition, the rules on vicarious liability under tort law are rather restrictive. Under these legal systems the special rules on the producer's strict liability for defective goods undoubtedly filled a gap.

1/13 However, I must point out that Austrian courts and scholars tried to meet the needs of the purchasers – not of innocent bystanders – even before the introduction of special strict liability rules, not by contract law but an instrument between tort and contract:[14] because of the purchaser's special reliance on the careful production as well as control by the manufacturer and because of the special contact between purchaser and producer by a chain of contracts it is said that a special relationship exists which establishes special duties of care as well as a shift of burden of proof and an extensive vicarious liability similar to that in a contractual relationship. Thus, the purchaser at least enjoys a far-reaching liability regime similar to that under contract law. German lawyers rejected such a way out.

III. The Fundamental Questions Under Tort Law

1/14 Now to the fundamental questions we have to ask regarding product liability under tort law. The starting point is – as underlined in the questionnaire – that in most legal systems producers are subject to special liability regimes which appear much stricter than the fault-based liability regime that applies in general:[15] producers are liable irrespective of fault for damage caused by defective products they put into circulation. These stricter rules on product liability origi-

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13 On this decisive difference between the common law and the European continental legal systems see *Zweigert/Kötz* (fn 4) § 36 IV, § 42 V (p 672).

14 See Europe nos 10/41f and 10/109; with further details *E Karner/H Koziol*, Mangelfolgeschäden in Veräußerungsketten (2012) 65 ff.

15 *H Kötz/G Wagner*, Deliktsrecht (13th edn 2016) no 614 are of the opinion that the EU Directive provides only a liability based on violation of Verkehrssicherungspflichten (duties to protect others against risks one has established by one's activity or property). I think that this cannot be true because breach of duty of care is no requirement and the manufacturer also has no defence by proving that his activities complied with all duties of care. Further, in the typical cases which should be solved by the special product liability, namely the 'Ausreisser' or 'runaways', it is presupposed that such defects cannot be avoided and that therefore no misbehaviour is at stake.

nate from the USA,[16] but the concept spread rather quickly worldwide. It inspired, for example, the European Union to design its Product Liability Directive (Council Directive 85/374/EEC of 25 July 1985), which is not only influential in the EU but has also provided the conceptual basis for new laws elsewhere;[17] eg also for the new Chinese Tort Law.[18] It seems highly interesting that in the USA – after encouraging the whole world to make product liability more stringent – the development went in the opposite direction, moving away from strict liability.[19] The widespread tendency to provide for strict product liability as well as the countermovement in the USA raise fundamental questions.

A. Reasons for Introducing Strict Product Liability

It appears that worldwide – with the possible exception of France – there was a prevailing impression of an urgent need to provide for the stricter liability of producers who put defective products into circulation and, accordingly, the American concept spread very quickly. But was there really such a need in all legal systems and, if so, why did it arise? What gaps existed in the reasonable protection of both buyers and third parties and what were and still are the shortcomings of the general rules? **1/15**

As to the need, there is one fundamental question which I want to touch on because it illustrates the relevance of taking into regard not only tort law and not only private law but the whole legal system. In the area of personal injury, insufficiencies in tort law are levelled out largely by the social security systems. This seems to be true for all EU member states, at least for the German speaking countries[20] as well as for the United Kingdom,[21] France[22] and the Scandinavian countries,[23] in contrast to the much less exhaustive American social security system. The fact that most legal systems provide for the victim's extensive compensation for losses caused by personal injuries via the social security systems **1/16**

16 See *Shapo* (fn 6) § 7.01 and 02.

17 It seems that the South African Consumer Protection Act of 2008 has not been influenced; see Rest of the World no 12/16 ff.

18 See art 41 CTL and *H Koziol*/*Yan Zhu*, Background and Key Contents of the New Chinese Tort Liability Law (2010) 1 JETL 328, 350 ff.

19 *Dobbs*/*Hayden*/*Bublik* (fn 8) § 450 p 897 f.

20 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 2/74 ff.

21 *R Lewis*/*A Morris*, Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation (2012) 3 JETL 230, 232 ff.

22 *J-S Borghetti*, The Culture of Tort Law in Europe (2012) 3 JETL 158, 164 f.

23 *H Andersson*, The Tort Law Culture(s) of Scandinavia (2012) 3 JETL 210, 219 f.

makes the provision of comprehensive compensation under tort law less urgent in such countries.[24] Therefore, the popular argument that the highest ranking protected interest deserves the most extensive protection by tort law seems no longer to apply as another legal instrument already makes sure of such protection. From the victim's perspective in this area, intensive protection under tort law is required only as far as social security does not provide full compensation. Probably, such loopholes do not concern primarily the most important interests of the victim. Seen from the compensation perspective we, therefore, come to the conclusion that the principle that 'the highest ranking interests deserve the highest grade of protection under tort law' is no longer as convincing as it seems at first sight. But is the victim's perspective really the only or at least decisive aspect? Do we not also have to take regard of the fundamental ideas for attributing liability and, therefore, have to say that it is more reasonable to establish the entrepreneur's liability and to concede the social insurer recourse to the producer rather than to shift the financial burden from the tortfeasor to the social security system?[25] At any rate, such discussion shows us that the interplay of tort law and social security law is of great importance when designing tort law provisions. Further, the question as to which reasons can justify such comparatively strict producer's liability, seems to gain even more importance.

B. The Justification for Strict Product Liability

1/17 Therefore, we must emphasize the question of how such strict liability fits into a consistent overall liability system. The answer to the question as to which criteria justify establishing liability is, of course, also decisive in laying down the reasonable scope of product liability, in solving questions of conceptual detail and in the interpretation of legislative provisions.

1/18 I would like to illustrate some of the relevant aspects by the example of product liability in the European Union;[26] I refer to the Directive 85/374/EEC. Due to this Directive, product liability is very strict, being independent of any breach of duty of care and – apart from the development risks and statutory or-

24 It is highly interesting that in the USA strict liability is no longer thought to be a necessity although the social security system provides less protection than in those countries which tend to strict liability.

25 However, the legal systems in Scandinavian countries and in Poland have abolished the recourse against the offender.

26 In Israel the Liability for Defective Products Act, which was enacted in 1980, provided strict liability even before; see no 12/10 ff.

dinances – because of the lack of any grounds for exemption from liability, in particular of force majeure.

The objective justification for such strict liability for producers is by no means self-evident and neither does it present itself from the genesis of the rules.[27] In fact, the Directive was neither based on a well-thought out and recognised overall concept for producer-liability nor on any theory-based, understandable justification of the legislators: in the recitals to the directive, it very clearly states: 'Whereas liability without fault should apply only to movables which have been industrially produced.' Thus, the non-fault based liability provided for by the Directive for defective products was only intended to offer – as is also shown by the prior academic discussions – the purchasers protection against the special risks of 'anomalies' associated with *industrial mass production*. This could indeed be justified by the argument that in spite of all reasonable measures, product defects can never be absolutely excluded when it comes to mass production nor can inspection always prevent defective products from being placed on the market, the problem of the so-called 'Ausreißer' or 'runaways'. The wording of the directive, however, drops the limitation to industrial products so that the liability set out also applies to defective products of craftsmen, landlords, farmers and artists. Moreover, the idea of the inevitable risk of anomalies in the case of industrial mass production does not justify the liability for damage deriving from defective design or insufficient instructions.[28] The lawmaker has never even attempted to justify the extended application of strict liability and it seems difficult to find any convincing arguments in favour of such broad and very strict liability. **1/19**

Most strict liability rules are justified by the idea that the keeper of a dangerous thing or someone who carries out dangerous activity should not only enjoy the advantages but also bear the risk. However, the producers' stringent liability can *not* be justified, or at least not solely, by the notion of *dangerousness*: product liability takes as its starting point the fact that the damage is brought about by a defect of the product. As the description of defectiveness shows, the crux is that the defectiveness leads to a dangerousness which is not generally a common feature of suchlike products; specifically, a product is defective only if the product does not offer the safety that one is entitled to expect taking all the circumstances into account. The dangerousness emanating from the defect can *not*, however, in general be classified as very high since many products are not likely even in a defective state to bring about extensive damage or to substan- **1/20**

27 See on this eg *M Lunney*/*K Oliphant*, Tort Law. Text and Materials (5th edn 2013) 588 f.

28 See on the objections to strict liability in this area in the USA *Dobbs*/*Hayden*/*Bublik* (fn 8) § 450 p 897.

tially increase the frequency of damage occurring. Typical examples are bent paper clips or spoilt food, which can only bring about harmless scratches or temporary nausea. Therefore, unlike the general, abstract dangerousness presented by things or facilities, the specific dangerousness of defects required under the product liability rules is not enough to justify a liability completely regardless of any misconduct, ie a real and, due to the lack of any possible defences, extremely strict liability based on dangerousness. A further argument is, as recently highlighted by *BC Steininger*,[29] that the general dangerousness generated for example by the high speed of motor vehicles, serves the interest of the keeper; dangerousness and usefulness are thus inter-related.[30] The specific dangerousness presented in the individual case due to a defect is, on the other hand, usually not at all beneficial in any way to the entrepreneur as the defectiveness runs contrary to his interests. It must also be considered that when it comes to product liability, different ideas are behind the affiliation to someone's sphere than may otherwise be. In the case of buildings, roads and vehicles, the defective things are imputed to their keeper's sphere; the keeper is the person whose interests are served by the thing and who has the power to exercise influence on them.[31] Neither criterion applies to the producer once he places the thing at issue on the market. He could only exercise influence in advance on the production process and thus in this sense towards the product being as free as possible from defects.

1/21 Also, the material ideas behind the often heard[32] suggestions in favour of a more stringent *enterprise liability* cannot on their own justify such strict non-fault based product liability. Relevant for such enterprise liability is, on the one hand, the principle that the *advantages and risks* should fall to the same party and thus be concentrated in the enterprise. But this element alone does not seem sufficient to establish strict liability and there is only one *additional factor* which speaks in favour of tightening liability: the idea that the victims of an enterprise are confronted on the opposing side with a complex organisation and typically have considerable difficulties in proving the facts that are material in relation to any carelessness that ensued within the company.[33] Specifically, the

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29 Verschärfung der Verschuldenshaftung. Übergangsbereiche zwischen Verschuldens- und Gefährdungshaftung (2007) 35 ff.

30 Cf on that *R Müller-Erzbach*, Gefährdungshaftung und Gefahrtragung, AcP 106 (1910) 301, 365 ff; *J Esser*, Grundlagen und Entwicklung der Gefährdungshaftung (1941) 97 ff; *H Koziol*, Haftpflichtrecht I (3rd edn 1997) no 6/11.

31 See *Koziol* (fn 30) no 6/11.

32 See for the USA *Dobbs/Hayden/Bublik* (fn 8) § 450 p 895; *Shapo* (fn 6) § 7.02 [E].

33 *BA Koch/H Koziol*, Comparative Conclusions, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 411; *BA Koch*, Enterprise Liability, in: European Group on Tort

victim has no insight into the organisation, the deployment of auxiliaries and technical equipment, the maintenance of machines and control processes. However, this all speaks in favour of a reversal of the burden of proof in this respect, but not of strict liability, cf art 4:202 of the Principles of European Tort Law. Therefore, even if the idea of such enterprise liability should be accepted, it would on its own not be enough to justify the very strict producers' liability.

Therefore, we have to ask whether the extremely stringent liability for de- **1/22**
fective products could be justified at least partly by the interplay of the already mentioned ideas with the generally decisive criteria for enterprise liability, namely with the notion of the *risk community* of entrepreneur and buyers[34]: when consumer goods are produced, economic factors dictate that the highest technical safety and quality standards are not observed, but this does not mean that the processes involved are wrongful. The lower production costs resulting from the lowered safety standards lead to lower prices for the products but also to an increased risk of damage. However, the idea is that the consumer who is injured by a defective product is otherwise asked to bear the harm while the other consumers are beneficiaries because they were able to purchase the goods at lower prices precisely because of the lower safety requirements. If all purchasers enjoy the advantage of the lower prices, the few purchasers who suffer damage due to defects should not be left alone to bear the damage sustained. Their harm should be compensated by the producer as he is in a position to shift these costs via price changes on to all clients and thus all beneficiaries.[35] This means that all purchasers bear the disadvantages jointly as a kind of risk community. In particular, the non-fault based product liability law has the effect that the position of the entrepreneur is approximated with that of an insurer, when seen from a functional perspective: the liability risks generated by this legal area are taken into account by the entrepreneurs in their price calculations, so that the clients may be understood as a risk community, who from an economic perspective end up bearing the costs of the provisions for liability risks on the part of the entrepreneur.[36] However, this rationale does not justify the liability of the producer towards external third parties; the idea only applies when the *acquirer* of the goods suffers damage. Given the fact that the element

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Law (ed), Principles of European Tort Law (2005) 94 f; *G Wagner* in: Münchener Kommentar zum BGB V (6th edn 2013) § 823 no 83.

34 Cf also the idea of loss spreading mentioned by *Dobbs/Hayden/Bublik* (fn 8) § 450 p 895.

35 See *I Gilead*, Israel 194 and 197, as well as *BA Koch/H Koziol*, Austria 20, both in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002).

36 *K Wantzen*, Unternehmenshaftung und Enterprise Liability (2007) 84 ff.

of dangerousness due to the simple existence of a threat posed by the defect in the product is not present to the same degree as in other cases of strict liability, however, defences (eg force majeure) should be admitted to a greater degree.

1/23 However, MD Green/WJ Cardi[37] point out that it seems rather doubtful whether the idea of risk community can in fact justify producers' strict liability: in case of personal injuries, victims of defective products who have high earnings will suffer high losses and receive high compensation; those who earn nearly nothing will receive nearly no compensation but have to pay the same price for the products. As a result, the group of purchasers who earn less have to support those who earn more. Such redistribution via product liability would not seem to be very just or desirable. But I am not so sure that Green/Cardi's objections are justified: This argumentation is convincing only if you solely take regard of one and the same product; however, rich people usually buy products which are more expensive and I assume that they therefore pay all in all a higher contribution to the entrepreneur's 'liability funds'. Therefore, I feel that it is – at least roughly – a justly designed risk community.

1/24 In considering the different approaches in the individual legal systems I think that one idea should be more emphasised, as it seems to have the potential to help to justify the producers' liability in interplay with the already mentioned arguments: One may be sceptical about the common law idea that the producers' liability is based on a warranty because it ignores the privity rule. Nevertheless, the idea that the producer declares explicitly or implicitly that his products comply with the reasonable consumer's safety expectations seems quite convincing; even if it can not be understood as a warranty in favour of the purchaser it is at least a piece of information for all potential buyers which aims to influence their decision.[38] On the other hand the buyer will and often has to rely on such declarations as he will be not able to inform himself.[39] These are exactly the prerequisites in establishing so-called *Vertrauenshaftung* (liability based on principles of reliance) which has been designed above all by CW Canaris[40] and enjoys widespread acceptance at least in the German speaking countries. This theory is insofar of importance as because of the special con-

37 USA, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 6/160.

38 Cf *Shapo* (fn 6) § 6.

39 This idea may have influenced the Dutch Supreme Court to introduce in 1989 the 'reasonable safety expectation' into the general principles of Dutch tort law; see Europe no 10/77. It seems that Chilean law also underlines this aspect, see Rest of the World no 12/7.

40 *CW Canaris*, Die Vertrauenshaftung im deutschen Privatrecht (1971); *id*, Die Vertrauenshaftung im Lichte der Rechtsprechung des Bundesgerichtshofs, in: CW Canaris/H Andreas/KJ Hopt/C Roxin/K Schmidt/G Widmaier (eds), 50 Jahre Bundesgerichtshof I (2000) 129.

tact between the declaring and the relying party far-reaching duties of care are established and vicarious liability is as strict as under contract law. Naturally, I have to confess that such liability based on reliance is nevertheless a fault based liability. But it seems worth closer reflection whether this idea could support the other arguments in establishing producers' strict or at least stricter liability.

Although it seems that certainly not one reason alone – I am really not a be- **1/25**
liever in mono causal theories – but a bundle of reasons can justify the producers' strict liability at least partly, neither should we omit a discussion of arguments against such conclusion, eg the ideas of David Owen.[41] He points out that since the costs of product liability will be passed on to the manufacturer's shareholders and to other consumers, their interests must be counted equally with those of the victims. However, I feel that this argument is not convincing, as those who are injured by a defective product suffer damage to high ranking interests, ie body, health or property, whereas the shareholders suffer pure economic loss. Further the victim would have to bear his loss alone, whereas the burden of product liability is spread among a great number of shareholders and other consumers. Owen further stresses that the injured consumers not only choose products but may contribute to their own injury by the way they use the goods. But this is a counterargument which can be ignored as the general rules on comparative negligence take regard of the victim's misbehaviour. Therefore, all in all I think that these objections will not be able to overrule what has been said before.

Summarizing some of the questions which seem worthy of discussion: Must **1/26**
Europeans really come to the conclusion that the product liability rules provided by the EU can be justified – if at all – only in part, as their strictness appears unreasonable and there is no justification for including innocent bystanders in the circle of protected persons? On the other hand: is it not inconsistent that those entrepreneurs who offer services or who design or build immoveables, eg skyscrapers or bridges, are not burdened by strict liability? Further, is it true that such strict liability causes a rather unjust redistribution and that there is no real need for such strict liability as social security systems provide far-reaching compensation?

I feel that by discussing all these problems and doubts we can learn a lot. **1/27**

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41 The Moral Foundations of Products Liability Law: Toward First Principles, 68 Notre Dame L Rev 427 (1993).

Asia and Russia

Yang Lixin and Yang Zhen*

Product Liability in China

Contents

Part I: General Questions

I. The Dual Principle of Imputation Applied in Product Liability in China

Articles 41 to 43 of the Tort Liability Law (TLL) state the basic principles of Chinese product liability law. The understanding of these three articles is broadly the same throughout the academic community, though there are still different interpretations of particular aspects. **2/1**

According to art 41 TLL, a manufacturer's liability for harm caused by a defective product is a non-fault liability. It arises so long as there is a causal link between the product defect and the harm to the victim. Article 41 TLL states:[1] **2/2**

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> 'If a product defect causes harm to another, the manufacturer shall be subject to tort liability.'

2/3 According to art 42 TLL, the liability of the seller of a defective product is a fault-based liability. The seller is liable only if the defect in the product is caused by his fault. Article 42(1) TLL states:

> '(1) If due to seller's fault a product defect exists and causes harm to another, the seller shall be subject to tort liability.'

2/4 However, if a seller cannot identify the defective product's manufacturer or supplier, then the seller is liable and the liability under such circumstance is a non-fault liability, as art 42(2) TLL provides:

> '(2) If a seller cannot identify the defective product's manufacturer and cannot identify the defective product's supplier, the seller shall be subject to tort liability.'

2/5 Article 43 makes it clear that the victim may claim compensation from either the manufacturer or the seller, and provides for rights of recourse whereby the party initially held liable can claim an indemnity from the party who bears ultimate responsibility for the defect:

> 'If a product defect causes harm, the victim may claim compensation from the product manufacturer, and may claim compensation from the seller.
>
> If a product defect is caused by a manufacturer, after the seller paid compensation to the victim, it has the right to claim indemnity from the manufacturer.
>
> If a seller's fault causes a product defect, after the manufacturer paid compensation to the victim, it has the right to claim indemnity from the seller.'

2/6 As can be seen, the basis of imputation of liability under these provisions differs according to the identity of the defendant. The ultimate liability borne by the manufacturer is a non-fault liability, while the ultimate liability borne by the

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1 Translation of the Tort Liability Law is by Wang Zhu. Translations of other Chinese laws are by PKULAW with amendments by Wang Zhu unless otherwise specifically indicated.

seller is a fault liability. The intermediate liability[2] borne by either manufacturer or seller is a non-fault liability.[3]

Some scholars think that there should be only one principle governing li- **2/7**
ability, that is, that the principle of imputation applied to both the manufacturer and the seller should be liability based on danger (a non-fault liability).[4] However, that is not a mainstream opinion, and it is not accepted by many scholars.

In addition to the TLL, there are other statutes that provide rules applicable **2/8**
to product liability in China. These include The Product Quality Law (PQL), the Law on Protection of Consumer Rights and Interests (LPCRI), and The Food Safety Law (FSL). The relationship between the TLL and the other statutes is that of general law and special laws. According to art 5 of TLL, 'In the event that there are other statutory provisions governing tort liability, such statutory provisions must prevail,' which means that the special law prevails over general law, and the newer statute prevails over the old one. In addition, the General Principles of the Civil Law (GPCL) is an early statute, enacted in 1986, that contains basic provisions relevant to product liability claims. All of these statutes are discussed in this report as appropriate.

Because the GPCL was promulgated early, the explanation of product liabil- **2/9**
ity in art 122 is very simple.[5] When the PQL was enacted in 1993, the legislature added more detailed statutory provisions. The LPCRI was enacted later in 1993 but it just contained a general provision requiring safety in goods and services, as well as a provision for punitive damages, It did not address the more detailed rules about product liability contained in the PQL. In 2009, the TLL was enacted and it provided more detailed rules for product liability. But its provisions do not completely replace the provisions of the PQL. With regard to the definition and categories of product, the definition and categories of defective product, exemptions and defences, the PQL rules still apply. By contrast with the GPCL, the TLL has more rules about specific aspects of product liability, including compensation for the defective product itself, post-sale warning and recall requirements, and punitive damages. The LPCR, which was revised in 2013, still addresses the rule of product liability, but it provides compensation for damage

2 'Intermediate liability' is explained below no 2/12.

3 *Wang Liming*, Studies on Tort Liability Law, vol II (Beijing, China Renmin University Press 2011) 238 f; *Zhang Xinbao*, Tort Liability Law (Beijing, China Renmin University Press 2010) 254; *Cheng Xiao*, Tort Liability Law (Beijing, Law Press China 2011) 372.

4 *Zhou Youjun*, Tort Law (China Renmin University Press 2011) 318.

5 Art 122 GPCL states: 'If a substandard product causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability according to the law. If the carrier or warehouseman is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.'

caused by services and provides for punitive damages for fraud in providing goods or services. The FSL, which was enacted in 2009 and revised in 2015, focuses on application of the rule of product liability to harm caused by foods.

II. Joint Liability (with indemnity)

2/10 Articles 41 to 44 TLL prescribe that the manufacturer and seller incur joint liability (with indemnity), as regards both the compensation payable to the victim and the indemnity payable by the ultimately liable person. In addition, initial liability applies to any third party whose fault contributed to the accident.

A. Compensation to the Victim Under the Framework of Joint Liability (with Indemnity)

2/11 As noted above, art 43 TLL specifies that the victim may claim compensation from either the manufacturer or the seller. Each party is obligated to pay full compensation to the victim who makes the claim. This liability is referred to as an 'intermediate liability.'

B. Indemnity Under the Framework of Joint Liability (with Indemnity)

2/12 If the victim brings a claim against the seller, the seller bears the non-fault liability stipulated in art 43(1) TLL. In that event, even though the liability of a seller under art 42(1) is fault-based liability, the seller's lack of fault does not provide any basis of exemption from art 43 liability. After compensating the victim, however, the seller may seek indemnity from the manufacturer. The right to indemnity is grounded on whether 'the defect of the product is caused by the manufacturer', as stipulated in art 43(2) TLL. This article impliedly refers to art 41 TLL, under which the manufacturer is subject to non-fault liability for the defective product.

2/13 If the victim brings the claim against the manufacturer, the manufacturer's intermediate liability arises on a non-fault basis under art 43(1) TLL. If the product defect is caused by the fault of the seller, then, after compensating the victim, the manufacturer may seek indemnity from the seller. In this respect, the basis of the ultimate liability borne by the seller is the fault liability specified in art 42 TLL.

2/14 The fact that either the manufacturer or the seller who has borne intermediate liability has the right to seek indemnity from the other party serves to secure

the fulfilment of ultimate liability. In other words, the liability is finally imposed on the party required to bear the loss according to law.

C. Indemnity for the Manufacturer and the Seller from the Liable Third Party

Article 44 TLL states: **2/15**

> 'If a transporter, warehouseman, or other third party's fault causes a product defect, which causes harm to another, after the product manufacturer or seller pays compensation to the victim, it has the right to claim indemnity from the third party.'

According to this article, if the defect is caused by the fault of a transporter, **2/16** warehouseman or other non-selling third party, the victim should not bring a direct claim against such person, but against the manufacturer or seller. After compensating the victim, the manufacturer or seller may then seek indemnity from the third party. The rule that allows the manufacturer and seller to seek indemnity from the third party after they pay compensation to the victim is known as a rule of 'initial liability'.[6] However, in certain circumstances it may lead to a 'claim deadlock'. That is to say, when the manufacturer or seller is unable to fully or partly compensate the victim, the 'initial liability' rule means that the victim cannot get the compensation to which he is entitled by directly suing the liable third party. To solve this problem, we suggest that, when the party bearing initial liability is unable to fully or partly pay the compensation, the victim should be allowed to sue the third party at fault on the basis of art 6(1) TLL (the general liability for fault). The third party should bear the obligation to pay for any gap in the victim's compensation.

III. Categories of Defects

Chinese scholars have different opinions about the categories of defect that **2/17** should be recognized in Chinese law. Some scholars advocate a four-fold classi-

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6 'Initial liability' refers to a defendant who is sued initially based on joint liability (with indemnity) but who bears no ultimate liability after indemnity is awarded between the seller and producer. See *Yang Lixin*, On the Categorization and Regulation of Non-Substantial Joint and Several Liability, Comtemporary Law 2012(3).

fication of defects: defects of design, defects in manufacture, defects in warning and instruction, and tracking defects (referring to defects resulting from the failure to take timely or adequate remedial measures such as warning and recall as defined in art 46 TLL[7]).[8] Other scholars advocate a three-fold classification, omitting tracking defects from their scheme.[9] The former theory is generally accepted by most scholars, while the latter is supported only by a minority.

IV. Manufacturers' Defences

2/18 Product liability is a non-fault liability but not an absolute liability. There are a number of statutorily recognized circumstances under which the manufacturer's liability can be exempted or reduced. These arise not under the TLL but under the Product Quality Law (PQL) 2009.[10]

2/19 Article 41(2) PQL states:

> 'Producers shall not be held responsible if they can prove one of the following facts:
> 1) The products have not been put into circulation;
> 2) The defects are non-existent when the products are put into circulation;
> 3) The defects cannot be found at the time of circulation due to scientific and technological reasons.'

2/20 Pursuant to art 4(1)(i) of the Provisions of the Supreme People's Court on Evidence in Civil Procedures, it is for the producer of the product to provide evidence to establish the above-stated defences.

2/21 If the manufacturer establishes a defence that the defect did not exist when the product was put into circulation, there may still be a duty to issue a post-sale warning, recall the product or take other remedial measures in timely fashion (art 46 TLL). Liability for failure to take timely and adequate remedial meas-

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7 Article 46 TLL provides: 'If a defect is discovered after the product is put in circulation, the producer and seller should take timely measures to warn, recall or take other remedial measures. The producer or the seller who fails to take timely or adequate remedial measures and causes harm shall bear tort liability.'

8 *Wang Liming* (fn 3) 248; *Zhang Xinbao* (fn 3) 250–252; *Yang Lixin*, Tort Liability Law (Beijing, Law Press China 2012) 303–305.

9 *Cheng Xiao* (fn 3) 390 f.

10 The PQL was adopted by the National People's Congress on 22 February 1993, and became effective as of 1 September 1993. It was amended in 2000 and 2009. Arts 41–43 TLL are very similar to arts 41–43 PQL, except that they do not include provisions equivalent to those in art 41(2) PQL.

ures which might have avoided the harm may be incurred by either the manufacturer or seller.

V. Compensation for Harm to the Defective Product Itself (pure economic loss)

In most other countries, product liability does not extend to compensation for harm to the defective product itself. However, such compensation is available under the TLL in China. This results from a difference in the language used in art 41 TLL and art 41(1) of PQL.[11] **2/22**

The damage required to establish product liability under art 41 TLL is different from that contemplated by art 41(1) PQL. In the former context, the damage is 'harm to another', while in the latter context, damage is the 'harm done to the person or to property other than the defective products themselves (hereinafter referred to as "property of others").' It is clear that the framers of the TLL intended to make a distinction between the damage required in the two provisions. Consequently, property damage under art 41 TLL refers to both harm done to other property and harm to the defective product itself. This may be considered consistent with the general objective of the TLL of protecting legitimate rights of consumers and other users in a timely and convenient fashion.[12] A majority of scholars agree that the harm remedied by product liability law should include harm done to the defective product itself, in addition to personal injury and damage to other property.[13] **2/23**

Certain scholars offer a different interpretation whereby loss attributable to the mere defectiveness of a product is pure economic loss, which they argue, on the basis of art 4 PQL and relevant provisions of the Contract Law (CL), should not be compensated by product liability law.[14] In their view, damage refers only to death, personal injury and property loss and other consequential losses caused by the defective product, but the loss of value of the defective product itself should not be included. They argue that the approach taken in the PQL is reasonable in that respect.[15] **2/24**

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11 Art 41(1) PQL states: 'Producers shall be responsible for compensating for harm done to the person, or to property other than the defective products themselves (hereinafter referred to as 'property of others') due to defects in products.'

12 *Wang Shengming* (ed), The Interpretation of the Tort Liability Law of the People's Republic of China (Beijing, Law Press of China 2010) 226.

13 *Wang Liming* (fn 3) 252.

14 *Zhang Xinbao* (fn 3) 253.

15 *Zhang Xinbao* (fn 3) 252 f.

2/25 The authors of this report share the opinion of the framers of the TLL and the majority of scholars on this issue. They believe that this was one of the controversies that the TLL sought to settle through the legislative process. In product liability law, if the defective product suffers damage – meaning that the purchaser's prospective contractual interest in the purchased product is harmed – it is better for the victim to bring a consolidated action under the TLL for both the harm to the product and for any other harms that occur. The benefit is obvious, as it protects the victim from an overload of actions. In other words, victims would not have to bring actions separately for tort liability and liability for breach of contract when the harms happen simultaneously. This consolidated practice was impossible according to the old litigation procedures, which was the reason that arts 40 and 41 of the PQL make a distinction between the two. On the one hand, based on traditional theories and principles, the victim might fully vindicate her rights by bringing two separate actions; on the other hand, it is considered that the civil interests of the victim may be better protected by making litigation more convenient. Chinese legislators chose the latter. It is with this consideration in mind that art 41 TLL gives a new definition of the 'harm' that may be compensated. It is only in the light of this understanding of 'harm' that we can accurately divine the true meaning of the article.

2/26 For this reason, the 'harm' stated in art 41 TLL refers to personal and property harm caused by the defective product, as well as damage to the defective product itself. Furthermore, when considering the classical harms that result in product liability, harm to the person or other property, it is of more substantial concern than harm to the product itself. Notwithstanding this resolution in art 41, the two kinds of harms are different: the former is the preserve of tort liability and the latter is the preserve of liability for breach of contract. This interpretation of the relevant harm not only applies to art 41, but also to all the product liability provisions in Chapter 5 TLL.

2/27 The People's Court should support victims' efforts to bring a consolidated lawsuit to recover for both personal injury and property loss and for damage to the defective product itself. The court should not force a victim to bring separate lawsuits. But it should be pointed out that this is a consolidated suit, not a single suit. When the two suits are under different jurisdictions,[16] according to the

16 Art 23 of the Civil Procedure Law (CPL) 2012 states: 'An action instituted for a contract dispute shall be under the jurisdiction of the people's court at the place of domicile of the defendant or at the place where the contract is performed.' Art 28 states: 'An action instituted for a tort shall be under the jurisdiction of the people's court at the place where the tort occurs or at the place of domicile of the defendant.' According to these two articles, the jurisdiction for contract dispute and tort dispute may be different.

majority view, art 41 TLL allows for the suits to be consolidated into one and brought to one court instead of two different courts. Naturally, the law does not bar the victim from bringing two separate lawsuits in different courts.

VI. Punitive Damages

In terms of product liability, civil law systems generally do not recognise any liability to pay punitive damages. But it is worth pointing out that punitive damages are provided for in consumer protection laws of both Mainland China and Taiwan. More than 20 years of legal practice has demonstrated that punitive damages have played an important role in protecting the consumer and the victim of defective products. **2/28**

The awarding of punitive damages in China originates from art 49 of the Law on Protection of Consumer Rights and Interests in LPCRI (1993), which provides for punitive damages for fraudulent activities in supplying goods and services.[17] The scope of application of punitive damages has progressively expanded. Paragraph 2 of art 96 of the Food Safety Law promulgated in 2009 has a specific stipulation for punitive damages for knowing violations of food safety: 'Besides claiming damages, a consumer may require the producer who produces food which does not conform to the food safety standards or the seller who knowingly sells food which does not conform to the food safety standards to pay 10 times the money paid.' Article 47 TLL, enacted in the same year states: 'Despite knowledge that a product is defective, if the manufacturer or the seller still manufactures or sells the product, and it causes death or serious harm to the health of another, the victim has the right to claim corresponding punitive damages.' **2/29**

Article 47 TLL does not state how to determine the amount of punitive damages. After an amendment, para 2 of art 55 of LPCRI (2013) states: **2/30**

> 'Where business operators knowingly provide consumers with defective goods or services, causing death or serious damage to the health of consumers or other victims, the victims shall have the right to require business operators to compensate them for losses in accordance with arts 49 and 51 of this Law and other provisions of laws, and have the right to claim punitive compensation of not more than two times the amount of losses incurred.'

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17 Art 49 LPCRI (1993) states: 'Business operators engaged in fraudulent activities in supplying commodities or services shall, when required by the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers paid for the commodities purchased or services received.'

Part II: Cases

Case 1: Brake Pad Failure

X Ltd manufactures bicycles. In 2011, it started to use a new material for its brake pads, which X Ltd believed on the basis of its testing to be a cheaper, longer-lasting and generally more effective alternative to traditional materials. X Ltd was aware of a very small risk that – given a combination of particular circumstances (temperature, surface water, oil, etc) – the new brake-pad material might suddenly be rendered ineffective, but it considered that the risk was likely to eventuate only very rarely and did not outweigh the general advantages of the new material. It included a statement about the possibility of failure in the small print of the product instructions supplied with all of its bicycles incorporating the new brake pads. A, who purchased one of the bicycles, is one of a handful of people injured in accidents attributable to the failure of the new brake pads; A's bicycle is also damaged. B, a passer-by, is injured in the same accident.

What is X Ltd's liability to A and B? Pay particular attention to the various possible bases of liability (a general tortious liability for fault, vicarious liability, contractual liability, or a special strict liability regime?). Would it make any difference to your analysis if Y, who is (i) an employed researcher in X Ltd's laboratory, or alternatively (ii) an independent research contractor, had covered up the risk that the new brake-pad material might fail?

A. The Bicycle is Defectively Designed

2/31 Considering that 'X Ltd was aware of a very small risk that – given a combination of particular circumstances (temperature, surface water, oil, etc) – the new brake-pad material might suddenly be rendered ineffective, but it considered that the risk was likely to eventuate only very rarely and did not outweigh the general advantages of the new material', the defect in this case is a design defect according to Chinese law. Scholars propose the following criteria to determine whether or not a design is defective: 1) the design has unreasonable risk that may cause harm to person or property; or 2) the design does not meet the national or industry standards to safeguard physical health, personal and property safety.[18] The situation stated in the case fits into the above criteria.

2/32 Since the bicycle manufactured by X has a defect in design, which is a latent defect, it is neither necessary nor possible to apply the criterion of defects of warning and instruction (warning defects). The criterion to determine a warn-

18 *Zhang Xinbao* (fn 3) 250.

ing defect is whether the product poses risk which may be avoided or reduced by a warning by the merchant.[19] Since the risk of the defective brake-pad cannot be avoided by a warning, the claims by A and B based on design defect will not be affected by the fact that the brake-pad risk is explicitly mentioned. Article 46 PQL states:

> 'For the purpose of this law, defect means unreasonable danger that threatens the safety of the human body or property exists in the product. If there are standards to protect personal health, the safety of the human body and property which has been set by the State or the specific trade, defect means the product does not conform to that standard.[20]'

In this case, even if the product has met national standards or the compul- **2/33**
sory standards of the industry, it is arguable that X has still put consumers at the risk of unreasonable hazard, which, even though the possibility is low, makes the bicycle defective. Chinese courts have not yet developed a majority view on this question, however.

No defences or other means for X to avoid liability exist in this case. **2/34**
First, the defective brake-pad would not qualify for the developmental risk defence provided by Item 3 of para 2 of art 41 PQL. The basis for a developmental risk defence is that '[t]he defects cannot be found at the time of putting the product into circulation due to scientific and technological reasons.' As is mentioned in the case, before the bicycle was about to be put on the market, X 'was aware of a very small risk that – given a combination of particular circumstances (temperature, surface water, oil, etc) – the new brake-pad material might suddenly be rendered ineffective', but 'considered that the risk was likely to eventuate only very rarely and did not outweigh the general advantages of the new material.' Therefore, X was fully aware of the defect, and thus the developmental risk defence will not exempt X from liability. Second, when a product poses inevitable risk, the manufacturer can avoid liability through an adequate warning. In this case, X was aware of the fact that the material of the brake-pad might be rendered ineffective and explained the possibility of failure in small print in the bicycle's instruction manual. According to Chinese law, the design defect is a latent defect, therefore the manufacturer is unable to avail of the exemption provided by an adequate warning.

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19 *Yang Lixin* (fn 8) 263.

20 The translation of art 46 PQL is by Prof *Wang Zhu*.

2/35 Third, even if such defect is indeed an inevitable risk, the warning adopted by X does not meet the requirement of the LPCRI. Paragraph 1 of art 18 LPCRI (2013) states:

> 'Business operators shall guarantee that their provided goods or services meet the requirements on personal and property safety. For goods and services which may endanger personal or property safety, business operators shall provide consumers with true explanations and clear warnings, explaining and indicating the correct methods of using goods or receiving services and the methods for preventing damage.'

2/36 In this sense, X failed to fulfil its duty of warning, and will bear tort liability.

B. Legal Remedies

2/37 To clarify X Ltd's liability to A and B, and their right to claim compensation for the damage they suffered, it is necessary to identify the legal relationships among the parties in this case. Logically, Z, a seller, should also be added to the parties in question and consideration given to the relationship of supply linking Z with manufacturer X. That relationship may be one of buyer-seller or an agency relationship. Z also has a contractual relationship with A, the purchaser. Conversely, there is no contract between B, the unspecified third party, and A, X or Z, so B's only claim is in tort.

1. Remedies available to purchaser A

a) Contract

2/38 Since A has a contractual relationship with Z, he may seek remedies according to the Chinese Contract Law (CL). Article 112 CL states:

> 'Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement, and the other party still suffers from other damage after the performance of the obligations or adoption of remedial measures, such party shall compensate the other party for such damage.'

Article 113 CL states: 2/39

> 'Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement and cause losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract.
>
> The business operator who practises fraud in providing to the consumer any goods or services shall be liable for paying compensation for damages in accordance with the Law of the People's Republic of China on Protection of Consumer Rights and Interests.'

A may bring a lawsuit against Z according to the above, requiring Z to pay compensation for losses attributable to his breach of contract. 2/40

Article 122 CL states: 2/41

> 'Where the breach of contract by one party infringes upon the other party's personal or property rights, the aggrieved party has the right to choose whether to demand that the breaching party bear the liability for breach of contract according to this Law, or to claim the assumption by the violating and infringing party of liabilities for infringement according to other laws.'

On this basis, since A suffered physical damage, which amounts to the infringement of an 'absolute right', he may claim either for breach of contract or for tort, depending on which remedy is more favourable to him. 2/42

Conversely, due to the lack of contractual relationship between A and X, it is not possible for A to hold X liable for breach of contract. 2/43

b) Tort

As a consumer, A may also seek to impose liability on Z, the seller, or X, the manufacturer, under the Chinese Tort Liability Law (TLL). If A claims against Z, arts 42 and 43 TLL apply, while if A claims against X, arts 41 and 43 TLL apply. 2/44

Article 41 states: 2/45

> 'If a product defect causes harm to another, the manufacturer shall be subject to tort liability.'

2/46 Article 42 states:

> 'If due to seller's fault a product defect exists, and causes harm to another, the seller shall be subject to tort liability.
>
> If a seller cannot identify the defective product's manufacturer and cannot identify the defective product's supplier, the seller shall be subject to tort liability.'

2/47 Article 43 states:

> 'If a product defect causes harm, the victim may claim compensation from the product manufacturer, and may claim compensation from the seller.
>
> If a product defect is caused by a manufacturer, after the seller pays compensation to the victim, it has the right to claim indemnity from the manufacturer.
>
> If a seller's fault causes a product defect, after the manufacturer pays compensation to the victim, it has the right to claim indemnity from the seller.'

2/48 If A's claim is successful, the compensation covers the losses he suffers as a result of his physical injury in the accident. The costs of repairing or replacing the bicycle damaged in the accident are also within the scope of the compensation payable in respect of product liability under art 41 TLL.[21]

2. Remedies available to passer-by B

2/49 Under the TLL, B may bring a product liability claim directly against X. Of course, B may also bring a tort claim against A, which A may defend on the basis of his lack of negligence. The court also has the right to add X as an additional defendant on its own motion. The court may rule that X should be liable for the defective product as the party ultimately responsible for the accident. If B should sue A for negligence but fail in his claim, he may bring another claim against X.

2/50 Suing X on the basis of product liability seems to be the more convenient and appropriate choice for B. According to art 41 TLL, the party that claims

21 *Wang Shengming* (fn 12) 225.

compensation on the basis of product liability is not necessarily the user of the product, but may be any person ('If a product defect causes harm to another…'). B, as a further victim of the defective product, is also within the class of persons covered by the same article. Therefore, B may also bring a suit against product manufacturer X or seller Z for product liability (art 34[1] TLL).

In this case, the manufacturer of the product is known; therefore, Z will not have to bear the ultimate liability. 2/51

Case 2: Infected Blood

A is infected with Hepatitis N as the result of a blood transfusion conducted in X Hospital in 2005. The source of the infection was blood supplied to X Hospital by Y Ltd, who had collected it from a donor, Z. Unknown to himself, Z was a carrier of the Hepatitis N virus. At the time, the risk of Hepatitis N in donated blood had been identified in a single published paper in a scientific journal, but only a handful of research laboratories in the world had the capacity to test for its presence in specific quantities of blood. Furthermore, the majority of the scientific community did not believe that the condition (Hepatitis N) really existed. It was only subsequently that the condition's existence came to be generally accepted and that a test was developed that allowed hospitals and blood suppliers to screen out infected parcels of blood.

What is the liability to A of X Hospital, Y Ltd and Z? Pay particular attention to the various possible bases of liability (a general tortious liability for fault, vicarious liabiliy, contractual liability, or a special strict liability regime?). Would it make any diffeence to your analysis if A contracted the virus as the result of a blood transfusion conducted in 2001, but her condition only manifested itself in 2012? (In this context, consider in particular differences in the time limits applied to the various possible bases of liability.)

One thing that should be clarified is that the TLL was passed in December 2009 and became effective on 1 July 2010. Before that date, blood infection liability was different from art 59 TLL. This report is based on current Chinese law (art 59 TLL) even though it would not have governed a transfusion in 2001.[22] However, if damage due to A's Hepatitis N did not manifest itself until af- 2/52

22 Before the TLL was promulgated, art 33 of The Regulation on the Management of Medical Accidents, which came into force in 2002, stated: 'Any of the following circumstances shall not be deemed as a medical accident: … 4) unfavourable consequences caused by infections resulting from faultless blood transfusions.' Article 49(2) stated: 'If a medical accident has not been proved, the medical institution is not responsible for making any compensation.' In this sense, the medical institution bears no tort liability for transfusions in the absence of fault. But scholars and legal practitioners generally argue that such practice would leave the interests of the patient unprotected, which defies the equity of the law. Therefore, in practice, the courts would base their judgment on art 132 of the General Principles of Civil Law, which states that 'if none

ter 1 July 2010, then art 59 TLL would apply even though the transfusion occurred before it came into effect.

2/53 In China, there is only one type of blood supplier, namely a 'blood station'. A blood station is a government-run institution in charge of collecting and providing blood. So there is no profit-making blood supplier, such as company Y in China. Nonetheless, the blood station has the same legal responsibilities as a blood supplier.

A. Remedies Available to Victim A

1. Legal issues relating to medical products and blood – Is blood a product?

2/54 Article 59 TLL addresses product liability in the medical field. With regard to the issues in this case, the most controversial question is whether blood should be considered a product. As for whether blood, which is part of the human body, should be determined to be a product, there are three different opinions in the academic community. Some scholars believe that blood is a product, and the blood station is the manufacturer and the hospital the seller. Their argument is grounded on the fact that blood has to be processed and manufactured before it is supplied to hospitals and that it is supplied to hospitals at a price, which involves an exchange of equal value.[23] Some other scholars argue that blood does not fall into the category of product, because blood is not processed and manufactured for sale; the nonprofit process does not fit into the characteristics of a product defined in the PQL and therefore blood is not a product.[24] The third opinion proposes that blood is a quasi-product, to which specific regulations may apply.[25]

2/55 The real purpose of these arguments is to determine whether non-fault liability based on product liability should be applied to the harm caused by blood transfusions. The reporters agree that art 59 TLL has put substandard blood and defective medical products in a parallel position, where non-fault liability ap-

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of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances', and rule that the medical institution must pay reasonable compensation to the patient. After the TLL was enacted, it became unnecessary to apply art 132 GPCL because the blood supplier and the hospital performing the transfusion bear non-fault liability.

23 *Wang Liming* et al, The Textbook of China Tort Liability Law (Beijing, People's Court Press 2010) 524.

24 *Liang Huixin*, The Consumer's Law and Its Improvement, Industrial and Commercial Administrative Management 2000(21).

25 *Yang Lixin*, Three Opinions Concerning Medical Product Liability, Hebei Law 2012(6).

plies. Therefore, whether blood is a product or not, it is generally accepted that product liability applies to the harm caused by transfused substandard blood.[26]

2. Elements for non-fault liability for harm caused by blood transfusion

Article 59 TLL lists the necessary factors for liability for harm caused by a blood transfusion: **2/56**

a) The blood transfused is substandard

Substandard blood refers to defective blood that may cause the blood to be ineffective for assisting in treating the patient's disease or even to threaten the health of the patient. These defects are: 1) the blood collected does not meet the criteria for medical use and transfusing it will not provide a benefit for the patient; 2) the blood collected, supplied and used is harmful, that is, it contains pathogenic bacteria or a virus; 3) the blood itself is safe, but was polluted during processing, storing, transporting or packaging.[27] **2/57**

Chinese scholars have different opinions about the relationship between the terms 'defective product' in arts 41–43 TLL and 'substandard blood' stated in art 59 TLL. **2/58**

Some scholars think that 'substandard' is different from 'defective'. As for blood, suppliers and medical institutions have to follow the collecting, testing, processing, storing, transporting and packaging procedures regulated by the Basic Standard for Blood Stations (2000 no 448) and the Basic Standard for Aphaeresis Plasma Centres (2000 no 424) promulgated by the Ministry of Health as well as other administrative and technical standards. If the medical institution's and blood supplier's practice meets these standards, the blood supplied by them is considered 'acceptable'. However, 'acceptable' does not necessarily mean 'defectless'. Only when the blood supplied is 'substandard' do the supplier and medical institution bear liability. Here 'substandard', according to these scholars, means the blood supplier or medical institution is at fault for the defect in the blood. In other words, ostensibly, 'substandard' refers to the quality of the blood, but actually it constitutes a judgement about the practices of the supplier and medical institution. The liability for harm caused by blood defined by art 59 TLL is in fact fault-based liability. But because of difficulties of proof for the victim, **2/59**

26 Ibid.

27 *Wang Liming* (fn 3) 388 f.

the burden of proof is shifted to the blood supplier and the medical institution to prove that the blood supplied was 'acceptable' and not 'substandard'.[28]

2/60 Other scholars believe the difference between 'substandard blood' and 'defective product' is just a matter of phrasing. Article 59 put substandard blood and defective products in a parallel position, which means that the medical institution or blood supplier should bear the same non-fault liability as the manufacturer of a defective product. Therefore, there is no need to distinguish what causes the blood to be substandard.[29]

2/61 The reporters are of the opinion that the essence of this argument is to decide whether the medical institution and blood supplier should assume the risk of scientific development. Such risk originates from the following circumstances: 1) due to the limitations of medical technology, there is a possibility that bacteria or a virus which are known to medical professionals may not be detected; 2) certain bacteria or viruses may be unknown to the scientific community, as in this case.

2/62 According to art 59 TLL, the medical institution is liable for any harm done to a victim by substandard blood. The medical institution cannot assert the developmental risk defence (ie that the defect was one that current science and technology cannot detect or avoid). This regulation aims at strengthening the protection of the patient and providing incentives for the medical institution and blood supplier to take effective measures against potential harms.[30]

b) Harms to the patient

2/63 Since there are different reasons that make blood substandard, harms to the patient can include: delays in treatment as a result of the medical ineffectiveness of the blood transfused; infection caused by a virus or bacteria in the blood transfused; and harm to the patient's health or life caused by polluted blood. Compensable harm includes personal injury and mental harm.

c) Causal relationship between substandard blood and harm

2/64 The ordinary rules of adequate causation apply in determining if the requisite causal relationship exists.

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28 *Yang Lixin*/*Yue Yepeng*, The Legal Principles of Medical Product Liabity – A Rethinking of the 'Qi Er Yao' Case and the Interpretation of art 59 of the Tort Liability Law, Politica and Law 2012(9).

29 *Wang Liming* (fn 3) 388.

30 Ibid, 417.

3. The liability relationship between the medical institution and blood supplier

a) Liability should be determined referring to art 43 of the Tort Liability Law

It is the reporters' opinion that, by virtue of art 59 TLL, the medical institution and blood supplier bear non-fault liability for harm caused by a blood transfusion. As for the liability relationship between the two entities, art 59 states that 'the patient may claim compensation from…the blood supplying institution, and may claim compensation from the medical institution.' It also provides: 'If the patient claims compensation from the medical institution, after the medical institution paid compensation to the patient, it has the right to claim indemnity from the liable manufacturer or blood supplying institution.' In this sense, the medical institution is jointly liable (with indemnity) with the blood supplier. In other words, the patient may seek compensation based on intermediate liability from either of the two parties, and either the medical institution or the blood supplier will bear ultimate liability. This is different from the apportionment of ultimate liability among parties with joint and several liability. Such joint liability (with indemnity) is the same as that imposed on product manufacturer and seller as defined in art 43 TLL.[31] Nonetheless, art 59 only provides one-way indemnity in that the medical institution has the right to claim indemnity from the 'liable' (meaning in this context 'at fault') supplier of the blood, whereas it does not specify that a blood supplier, after compensating the patient, has the right to claim indemnity from a medical institution that is at fault. To solve this problem, art 43 might be invoked to permit the blood supplier to claim indemnity from the medical institution. **2/65**

b) Neither the medical institution nor blood supplier is at fault

According to the second clause of art 59, after the medical institution pays compensation for harm caused by substandard blood, if the blood supplying institution is not 'liable' (ie not at fault), the TLL does not stipulate the result. In such circumstances, since neither the medical institution nor the blood supplier has any fault, it is obviously unfair for the medical institution alone to compensate the patient. The reporters think it is appropriate for the two parties to bear the ultimate liability on a pro rata basis. To be specific, after paying compensation, the medical institution should have the right to claim 50% indemnity from the blood supplier. **2/66**

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31 *Yang Lixin*, The Success and Unfinished Task of the Law of Tort Liability, China Renmin University Journal 2010(4).

c) Both the medical institution and blood supplier are at fault

2/67 It is possible that there is a joint and several liability of the medical institution and blood supplier based on each acting with fault. For instance, the blood supplier supplied substandard blood, and at the same time, the medical institution had some fault in the process of the blood transfusion. These two causes led to a single harm. According to art 8 TLL, if such circumstances exist, then the medical institution and blood supplier bear joint and several liability. Therefore, according to art 13 TLL, the patient may claim compensation from the two parties or either party. Apportionment of liability between the medical institution and blood supplier is determined by the respective degrees of their fault and their causative potency relating to the harm. If it is difficult to decide this share, the two parties should each bear 50% of the liability. If one party pays more than its share, it has the right to claim indemnity from the other party.

4. Justification for non-fault liability for harm caused by blood

2/68 In the case of medical negligence, the TLL insists on fault liability for the medical institution, but in the case of harm caused by medical products and blood transfusions, it introduces non-fault liability. This is designed with regard to the consideration that, in cases where the harm is caused by a medical product, the interests of patients are not well protected. The patient does not have the capability to identify, control and prevent the substandard blood from being transfused. The patient received blood transfusion treatment only because he or she had trust in the professional capacity of the blood supplying institution and medical institution. Compared with the patient, the medical institution and blood supplier, as professional organisations, have greater capacity to control the risk. It is expected that non-fault liability imposed upon medical institutions will incentivise them to better perform their respective duties and minimise risk. In addition, in cases where the harm is caused by blood, in particular in cases of infection caused by blood transfusion, the harm done to the patient can be extremely severe. If the harm is borne solely by the patient, it may jeopardise his or her basic survival right, which is against the principle of social equity and justice.

2/69 Subjecting blood transfusions to non-fault based liability transfers the risk involved in blood transfusions from the patient to the medical institution and blood supplier, relieves the patient of the burden of proving fault on the part of the blood supplier and medical institution, protects the patient against risks of medical development, and thus guarantees the legitimate rights of the patient. It is a demonstration of legal spirit – equity and justice. Of course, while protect-

ing the patients' legitimate interests, non-fault liability for the harm caused by blood may inevitably increase the burden on the medical institution and blood supplier, especially the burden attributable to developmental risks. To solve this problem, it is recommended that the introduction of liability insurance and/or a compensation fund should be considered.

5. Medical malpractice defences are not applicable to harm caused by blood

Article 60 TLL states: **2/70**

> 'If a patient is injured, in any of the following circumstances, the medical institution shall not be subject to compensatory liability: 1) The patient or his close relatives fail to cooperate with the medical institution for the purposes of diagnosis and medical treatment in accordance with the applicable standards regarding diagnosis and medical treatment; 2) If medical personnel act reasonably in diagnosing and treating in an emergency such as saving a patient on the verge of death; 3) Because of the limitations of the state of medical treatment 'then and there' (at the relevant time and place), it is impossible to diagnose and cure the patient's condition. In the circumstances of item 1 of the preceding paragraph, if the medical institution or its medical personnel is also at fault, the medical institution shall be subject to corresponding compensatory liability.'

Items 1 through 3 are defences to medical malpractice. Item 1 means that **2/71** the fault of the victim (and/or his or her family) is a cause of the harm; items 2 and 3 clarify that the medical institution is free from fault because of 'the state of the medical treatment then and there' defined in art 57. Since for blood transfusions non-fault liability applies, the medical institution, even though not at fault, is not exempted from liability. Therefore, items 2 and 3 are not applicable in blood transfusion cases. Because the basis of compensation is substandard blood, which cannot possibly be caused by the patient or his or her relatives' failure to cooperate with the medical institution, item 1 is also inapplicable.

6. X's liability to A

a) Contractual liability

Due to the characteristics of the current systems of medical care and blood col- **2/72** lection and supply in China, the hospital-patient relationship and blood sup-