

Aspects of Scandinavian and German Product Liability - A Comparison

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A Introduction

The field of product liability has been in the focus of legal discussions at least since the Sixties, both “de lege ferenda” and “de lege lata”. Especially in Europe, initiatives were taken to achieve harmonization or, as it is defined by the title of the European Communities Council Directive of 25 July 1985, the approximation of the member states’ law on liability for defective products.¹

Besides the Council’s Directive, the Strasbourg Convention on Products Liability in regard to Personal Injury and Death of 27 January 1977 given by the Council of Europe has to be mentioned which essentially inspired the drawing up of the Directive. After the adoption of the Directive, acts on product liability have entered into force in the Scandinavian countries Sweden, Denmark (both of them are EU member states) and Norway² (not a member of the EU, but of the European Economic Space [EES]) as it has been the case in Germany.³ For natural reasons, discussions on product liability have decreased since national acts have passed the respective parliaments.

The intention of this article is to describe and to comment on aspects of the development of this field of law in Scandinavia and Germany. If it is our

¹ Council Directive of 25 July 1985 on the approximation of the law, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC); in the following referred to as the Directive.

² The three Scandinavian countries are in the following referred to as Scandinavia.

³ Sweden: Produktsansvarslag of 17 December 1991 (Svensk Författningssamling, SFS 1992: 18, 1992 : 1137); Norway: Lov om Produktansvar, Act No. 104 of 23 December 1988 (Norsk Lovtidend 1988, Avd. I, p. 1025), as amended by Act No. 40 of 24 June 1994; Denmark: Lov om Produktsansvar, No. 371 of 7 June 1989 (Lovtidende for Kongeriget Danmark, Afd. A, p. 1260); Germany: Gesetz über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz) of 15 December 1989, Bundesgesetzblatt/Federal Law Gazette, 1989, Part I, p. 2198) and amended on 27 April 1993 (Bundesgesetzblatt, Part I, 1993, pp. 512, 2436) and on 30 September 1994 (Bundesgesetzblatt, Part II, 1994, p. 2658).

common understanding that approximation of the civil law in Europe is part of the ongoing process of unification of the European continent, comparative law is of special importance in order to ascertain the status quo in the countries concerned, common features and differences of legal developments.

Moreover, it is of interest for those who are doing business within Europe which kind of liability risks they have to face, especially - concerning product liability - which duty of care the individual national laws require in respect of the marketing of a product, or - in the terms of the Directive - under which circumstances a product can be regarded to “provide the safety which a person is entitled to expect” (Article 6 of the Directive).

Due to the limited space available this article concentrates on some basic questions of product liability. Product liability has already been the subject of an article in this yearbook in 1975,⁴ i.e. more or less in the beginning of a very intense product liability debate in Scandinavia. Therefore, it may be of even greater interest to review the status of product liability today.

B The term “Product Liability”

In order to avoid misunderstandings which could easily result from diverging definitions of a seemingly commonly used term in the countries concerned, it is necessary to exactly define the actual questions covered by the legal term “Product Liability”.

The common Scandinavian notion of “produktansvar”, which is translated into English by “product liability”, has been understood in Scandinavia as the liability for damages caused by defective products. The term does not only cover the producer’s, the importers’s or the quasi-producer’s⁵ liability, but also - in general - the seller’s liability for damages caused by defective products.⁶

This definition is probably the result of the product liability debate in Scandinavia, which started in the sixties with an investigation of the seller’s liability for damages caused by defective products, the situation in which the seller and the buyer have a legal relationship based on a sales contract. The legal situation of an innocent bystander or the product’s final user’s claims against the producer who does not have any contractual relationship to the user, were not of the same interest. In 1965, the Dane Jørgen Hansen published his investigation on the “Seller’s Liability for Damages caused by Things with Dangerous

⁴ Dahl, *Product Liability in Scandinavian Law, Scandinavian Studies in Law (ScStL)* 1975, pp. 59 - 99 (referred to as Dahl, ScStL 1975, p.).

⁵ The German notion “quasi-producer” stands for persons pursuant to Art. 3 (1) of the Directive, who, by putting their name, trademark or other distinguishing feature on the product present themselves as its producer.

⁶ Sweden: Dufwa, *Produktansvar*, 2nd ed., 1983, p. 7 (referred to as Dufwa, p.); Hellner, *Skadeståndsrätt*, 5th ed., 1996, p. 309 (referred to as Hellner, p.); Karlgren, *Produktansvaret*, 1971, p. 5 (referred to as Karlgren, p.). Norway: Norges Offentlige Utredninger (NOU) 1980:29, p.12; Lødrup, *Lærebok i erstatningsrett*, 3rd ed., 1995, pp. 193/194 (referred to as Lødrup, p.); Steen-Olsen, *Jussens Venner (JV)* 1984, p. 1. Denmark: Dahl, *Produktansvar*, 1973, p. 14 (referred to as Dahl, p.); Eyben/Nørgaard/Vagner, *Lærebog i erstatningsret*, 3. ed, 1995, p. 199 (referred to as Eyben/Nørgaard/Vagner, p.); Vinding Kruse, *Erstatningsretten*, 5th ed., 1989, p. 234 (referred to as Vinding Kruse, p.).

Quality”.⁷ The producer’s liability is dealt with in the last chapter of the book primarily under the aspect of the seller’s right on recourse. Still, in 1971 the Swedish professor Hjalmar Karlgren discussed in his book “The Product Liability” (*Produktansvaret*) nearly exclusively the seller’s liability.⁸ Later on, Børge Dahl (Denmark) in 1973 and the Swede Bill Dufwa in 1975,⁹ published investigations focussing on the producer’s, not on the seller’s liability.

The Scandinavian understanding of the term is more extensive than the German insofar as the Scandinavian term “*produktansvar*” even refers to the seller’s liability vis-à-vis the buyer pursuant to the principles of contract law. The seller’s liability for damages caused by a fault of the sold goods, the product, is in Germany subject to the sales law, the seller’s liability for “*Mangelfolgeschäden*” (consequential harm caused by a defective good).¹⁰ The term “*Produkthaftung/Product Liability*” is by that restricted to the producer’s, importer’s and quasi-producer’s liability. Consequentially, product liability was debated in the beginning under the term “*Produzentenhaftung*” / “*Producer’s Liability*”, a term which stressed the person liable for damages not the item causing the damage.¹¹ In that way the German term corresponds closer than the more extensive Scandinavian term to the understanding of the Directive which concentrates primarily on the producer’s liability. Due to the fact that the Directive concentrates on the producer’s liability this article primarily looks upon concepts Scandinavian and German law have evolved for the liability of a producer not being in a contractual relationship with the injured.

C Some Aspects of the Implementation of the Directive in Scandinavia and Germany and the Future Importance of General Law of Tort besides the Product Liability Acts

Fundamental of today’s product liability are the principles of liability as they are layed down in the Directive. According to this common legislation, product liability is, in principle, strict liability:¹² The producer, as he is defined by Art. 3

⁷ J. Hansen, *Sælgerens ansvar for skade forvoldt af ting med farlige egenskaper*, 1965 (referred to as J.Hansen, p.). Cp. even Anders Vinding Kruse, *Producers’ liability in Scandinavian Law*, in “*Die Haftung des Warenherstellers*”, ed. by W. Lorenz, pp. 55-70, *Arbeiten zur Rechtsvergleichung*, Vol. 28, 1966. Contractual relationships are in the foreground of the publications.

⁸ Karlgren, *Produktansvaret*, 1971; however the last pages deal with this producer’s liability vis-à-vis the final user of the Product.

⁹ Dahl, *Produktansvar*, 1973; Dufwa, *Produktansvar*, 1975. The development has even been showed by Dahl, *ScStL* 1975, pp. 59 (62/63).

¹⁰ Palandt/Heinrichs, *Bürgerliches Gesetzbuch*, 56. Ed., 1997, § 276, note 110 (referred to as Palandt/author, §, note); *Münchener Kommentar zum Bürgerlichen Gesetzbuch/Westermann*, Vol. 3, Part 1, 2nd ed., 1988, § 463, note 26.

¹¹ E.g. v. Caemmerer, *Products Liability*, *Festschrift für Rheinsteint*, Vol. 2, 1969, pp. 659 (670); Diederichsen, *Die Haftung des Warenherstellers*, 1967; Lorenz, *Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 1970, pp. 14; Simitis, *Grundfragen der Produzentenhaftung*, 1965; Westphalen, *Produzentenhaftung*, *Jura* 1983, pp. 57, 133, 281, 348, Wussow, *Der Betrieb (DB)* 1967, p. 979; cp. on terminology Schmidt-Salzer, *Produkthaftung*, Vol. III/1st, 2nd ed., 1990, note 4.046-4.050.

¹² Agell, *Festschrift till Bertil Bengtsson*, 1993, pp. 13(14-20) (referred to as Agell, p.) shows

of the Directive, is liable for damages caused by a defect in his product (Art. 1). A product is, according to Art. 6, - in principle - defective if it does not provide the safety which a person is entitled to expect. This principle is common to all the European acts transforming the Directive into national law. It cannot be subject of this article to comment on the Directive,¹³ but it is in the scope of the article to point out differences between the various national acts in Scandinavia and Germany.¹⁴ Furthermore, it shall be demonstrated which importance the established rules on product liability as developed by legal practice, especially the jurisdiction, will have in the future.

I Aspects on the Implementation of the Directive in Scandinavia and Germany

1 Types of Products Covered by the Directive

Products - as they are defined by the Directive and the national acts concerned - are “movables, even though incorporated into another movable or into an immovable”.¹⁵ Electricity is included.¹⁶

Art. 15 section 1 (a) allowed the member states to adopt a provision regarding even primary agricultural products and game as products within the meaning of the Directive. Basic principle of the Directive was that the damages caused by this kind of products should be excluded. The solutions of the Scandinavian states and Germany were different. Germany and Denmark, on the one hand,

that strict liability according to the Swedish Product Liability Act does not differ that much from liability according to the negligence rule as it may appear at first sight.

¹³ The Directive is subject of a huge quantity of text books, monographs, articles and publications of any kind. Some important publications on this field in Scandinavia and Germany are: Schmidt-Salzer/Hollmann, *Kommentar EG-Richtlinie Produkthaftung*, Vol.1, 1986; Taschner/Frietsch, *Produkthaftungsgesetz und EG-Produkthaftungsrichtlinie*, 2nd ed., 1990 (referred to as Taschner/Frietsch, Art./§, note); Westphalen/Foerste, *Produkthaftungshandbuch*, Vol. 2, 1991 (referred to as Westphalen/Foerste, vol.2, p.); Kullmann/Pfister, *Produzentenhaftung*, first published 1980 (loose-leave edition) but permanently up-dated, chapter 3601 subseq.; Bengtsson/Ullman, *Det nya produktansvaret*, 2nd ed., 1993 (referred to as Bengtsson/Ullman, p.); Dahl in Karnovs Lovsamling, 1995, Vol. III, pp. 3835 (referred to as Dahl, Karnov, note.); Dufwa in Karnov (Svensk Lagsamling med Kommentarer), 1996, pp. 1035 (referred to as Dufwa, Karnov, note.); Nygaard in Karnov, *Kommenterte Lov*, 1995 (referred to as Nygaard, Karnov, note.); Rognlien, *Produktansvaret*, 1992 (referred to as Rognlien, p.). The implementation of the Directive in Scandinavia is described in German by Bloth, *Produkthaftung in Schweden, Norwegen und Dänemark*, 1993 (referred to as Bloth, p.).

¹⁴ For a survey on the implementation of the Directive in the EU and EES member states and an analysis of the approximations of civil law in this field, cp. Hohloch, *Zeitschrift für Europäisches Privatrecht (ZeuP)* 1994, pp. 408.

¹⁵ Cp. Art. 2 of the Directive and the respective national Product Liability Act: § 2 (1) Sweden; § 1 - 2 (1) Norway; § 3 (1) Denmark; § 2 sentence 1 Germany.

¹⁶ Please observe that electricity has been included in Norway first in connection with the amendments of the Product Liability Act due to the EES Agreement in 1994. The Act of 1988 did not cover electricity. From the legislator's point of view electricity could not be regarded as movable (Odelsetingsproposisjon [Ot prp] no 48 [1987 - 88], p. 47). In Sweden the legislator has provided for special rules on liability for defective electricity based on the Directive in the “Act on Electricity” (Ellagen, SFS 1901:71).

followed the basic principle of the Directive (exclusion), Sweden and Norway, on the other hand, exercised the option. Sweden chose to hold the producers of agricultural products and game fully liable for damages caused by any defects even if the products had not undergone initial processing.¹⁷ The same approach was taken by the Norwegian legislator, but liability for damages caused by natural - not agricultural - products¹⁸ was not placed on the producer but on the distributor. Producers of agricultural products, even if their products have not undergone any initial processing, are fully liable. From the legislator's point of view, persons providing natural products in connection with fishing, hunting or gathering of wild herbs should not bear the risks of environmental conditions as for instance of water or soil.¹⁹ However, if natural products are processed by these persons, these persons will be regarded as producers within the meaning of § 1-3 (1) (a). "Processing" - according to the legislator - includes e.g. the carving of game by a hunter.²⁰

The exemption of natural and agricultural products can only be understood as political consideration for agriculture and fishery.²¹ However, the practical importance of these exemptions may not be overestimated if the mere carving of game or the cooling down of milk²² shall already be regarded as "initial processing". According to Taschner, even measures taken to preserve such products, e.g. deep-freezing, are to be considered as "processing".²³ In any case, it will be difficult for a person injured by such products to provide proof for the product's defectiveness and it may even cause problems to trace the producer.

2 Types of Damages Covered by the Directive

Any person deemed as a producer within the meaning of the Directive shall be liable - according to article 1 of the Directive - for damages caused by a defect in his product. Article 9 defines more detailed what kind of damages are recoverable. These are damages resulting from death or personal injury and up to a certain extent property damages. However, the Directive does not define what has to be deemed as, e.g., personal injury or what kind of losses caused by a personal injury are recoverable. Insofar the Directive refers to the respective national law of the member states.²⁴

¹⁷ § 2 of the Swedish Product Liability Act.

¹⁸ Natural products are those resulting from fishing, catching of wild animals or the gathering of wild herbs, cp. § 1-3 (1)(d) of the Norwegian Product Liability Act.

¹⁹ Ot prp no 48 (1987 - 88), p. 43.

²⁰ Ot prp no 48 (1987 - 88), p. 124.

²¹ Lorenz, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 151 (1987), pp. 1 (17); Schmidt-Salzer, *Produkthaftung*, Vol. III./1st, 2nd ed., Heidelberg 1990, note 4.479; Taschner, *Neue Juristische Wochenschrift (NJW)* 1986, pp. 611 (613).

²² Cp. the Danish legislator's explanation in Lovforslag nr. L 34, *Folketingstidende (Ft)* 1988 - 89, Tillæg A, p. 1608.

²³ Taschner in Taschner/Frietsch (footnote 13), Art. 2, note 13.

²⁴ Taschner in Taschner/Frietsch (footnote 13), Art. 9, note 1.

a) Damages Caused by Death or Personal Injury

Covered are all consequential losses caused by death or personal injury, such as, e. g., funeral costs or costs for medical treatment or loss of income. Furtheron, the Directive does not order that the injured is entitled to damages for pain and suffering or payment relating to non-material damage. The ninth recital of the Directive states expressly that it should not prejudice compensation for pain and suffering and other non-material damages. Whether or not this kind of damage is recoverable depends on the applicable national law. It is obvious that these circumstances - no definition of the kind of damages recoverable and no obligation for compensation of pain and suffering - will not contribute to an approximation of the law on product liability of the member states.

aa) Non-Material Damages

Concerning Scandinavia and Germany, the injured's right to claim compensation differs between Germany and Norway on the one hand and Sweden and Denmark on the other. German legislation does not accept - as a matter of principle - any compensation for non-material damages relating to strict liability.²⁵ Such compensation is granted according to § 847 of the German Civil Code (BGB) only in case of negligence; which means that the injured claiming damages for personal injury besides the Product Liability Act has to rely on the general rules on negligence of German tort law. It may be added that this principle of German strict liability is severely criticized.²⁶ With regard to compensation for non-material damages, the Norwegian Act on Tort Law²⁷ differentiates between compensation for "permanent and significant damages of medical nature" on the one hand and compensation for "personal injuries caused intentionally or gross negligently" on the other as satisfaction for the pain suffered or any other non-material damage. Compensation for the actual pain suffered by the injury itself can consequently not be granted according to the Norwegian Product Liability Act but by the Act on Tort Law because gross negligence or intent is required, whereas compensation for "permanent and significant damages" caused by the defect of the product, e.g. blindness, is recoverable.²⁸

The Swedish and Danish Acts on Product Liability do not contain restrictions as the German and Norwegian Acts. Non-material damages are recoverable even

²⁵ Concerning the German Act on Product Liability cp. Bundestags-Drucksache 11/2447, p. 12; Taschner in Taschner/Frietsch (footnote 13), Art. 9, note 16. Even the German Act on Liability for Damages Caused by Traffic with Motor Vehicles (Straßenverkehrsgesetz) which is of significant importance in the German every day juridical practice does not provide for compensation for pain and suffering.

²⁶ Cp. Frietsch in Taschner/Frietsch (footnote 13), § 15, note 54 refers to a former ministerial draft bill of 1967 providing for the extension of compensation of pain and suffering on the field of strict liability.

²⁷ Lov om skadeerstatning, Lov 13 june, No 26, 1969, Norsk Lovtidend 1969 (Avd. II.), pp. 419.

²⁸ For further references, cp. Bloth (footnote 13), pp. 167.

if the producer is liable according to the Product Liability Acts.²⁹ The Danish Act on Compensation³⁰ stipulates even basic amounts and computation formulas for non-material damages³¹ which differs from the law in Sweden, Norway and Germany.

bb) Limitation of Liability

In Art. 16 (1), the Directive does allow for the option of limiting a producer's liability for damage resulting from death or personal injury caused by identical items with the same defect (serial damages) to not less than 70 million ECU. Germany has chosen this option and limited the liability to 160 million DEM. However, it has to be stressed that Germany not only limited the liability for serial damages but also for personal injury caused by one individual defective item.³² According to the legislator's opinion, the introduction of such a rule of limitation corresponds to German traditions in the field of statutory strict liability. Like the exclusion of the right on compensation for non-material damages the limitation was severely criticized.³³ The application of this rule, however, onto single cases has been justified by reasoning "a maiore ad minus", i.e. if liability can be limited in case of serial damages, it can also be limited in case of a single damage.³⁴ Furthermore, § 10 (2) provides for a proportional reduction of the damages owed vis-à-vis an injured in case the total amount of damages exceeds the limitation.³⁵

All Scandinavian legislators have decided not to exercise this option. The prevailing argument against a limitation of liability was that the amount did not allow to differentiate between enterprises of different size and that the minimum amount provided by the Directive was so high that the limitation would in nearly all cases be of no practical importance.³⁶ However, the acts on law of tort of all Scandinavian countries provide a general rule according to which damages may be reduced if it is just and fair with regard to the economic circumstances of the wrongdoer. Even other aspects as, for instance, insurances or the economic situation of the injured have to be taken into account.³⁷ Swedish discussions

²⁹ Bloth (footnote 13), pp. 154, 178.

³⁰ Lov om erstatningsansvar no 228 of 23 May 1984, Lovtidende 1984, Afd. A., pp. 742 (EAL).

³¹ §§ 3, 4 EAL. Even a maximum amount has been fixed which is revised from time to time by ministerial order, cp. Eyben/Nørgaard/Vagner (footnote 6), pp. 229.

³² § 10 of the German Product Liability Act.

³³ Cp. Frietsch in Taschner/Frietsch (footnote 13), § 10, notes 1-6.

³⁴ Bundestags-Drucksache 11/2447, p. 24.

³⁵ "If the compensation due to several injured persons exceeds the maximum sum ... , the individual amounts due to each of them shall be reduced in the same proportion as that between the total amount due to all of them and the maximum sum."

³⁶ Norway: Ot prp no 48 (1987 - 88), p. 68; Sweden: Regeringens proposition (Prop.) 1990/91: 197, pp. 42.

³⁷ Cp. the respective national Acts on Law of Tort: Chapter 6, § 2 /Sweden; Denmark: § 24 (1); Norway: § 5 - 2 ; cp. for a more detailed review Bloth (footnote 13), pp. 193 - 197. However, it may be doubted that the application of this rule is in compliance with the Directive if the compensation granted according to the respective Product Liability Act by that is reduced below the limit of the Directive.

pointed out that this rule may be applicable in product liability cases if damages exceed the amount insured or the amount insured customarily by a liability insurance of the producer.³⁸ Thus, German and Scandinavian laws practically do not differ as significantly as it may appear at first sight.

b) Property Damage / Damages to the Product itself

aa) Property Items used by Consumers

Property damage is covered by the Directive and by the national Acts on Product Liability only to a certain extent. Property damage is recoverable only if the item of property is of a type ordinarily intended for private use or consumption and has been used mainly for the injured's own use or consumption.³⁹ Damage cannot be granted if the item mainly has been used for private purposes, but, in general, is intended for commercial use.⁴⁰ Even the Swedish and the Norwegian legislators - at the time they were not bound by the Directive - decided not to include damages to items mainly used for commercial purposes. The reason for this was, according to the legislators, that commercial relationships often would be ruled by contracts negotiated by equal partners ruling even product liability.⁴¹ This argument has been criticized with good reason by Anders Agell.⁴² Legal practice shows that to a great extent contracts do not deal with these questions at all or in an insufficient way. This is probably up to the fact that at the stage of concluding the contract partners, do not want to negotiate problems which do not appear to be of practical importance at the time and may be a source for conflicts preventing the parties from doing business. Furtheron, damages even occur (perhaps most often) in cases in which there is no contractual relationship between the injured and the producer. With regard to these circumstances the Austrian Act of 1988 - before Austria joined the EES - included property damage in general, i.e. even property damage of items mainly used for commercial purposes.⁴³ The retention of the Directive on the field of damages to commercial items renders the Acts a piece of Consumer legislation, not an act of general character.

³⁸ Statens Offentliga Utredningar (SOU) 1979: 79, p. 92; Bloth (footnote 13), pp. 197.

³⁹ Cp. the respective national Product Liability Acts: § 1 (2) / Sweden; § 2 (2) sentence 1 / Denmark; § 2 - 3 (2) (c) / Norway; § 1 (1) / Germany.

⁴⁰ Taschner in Taschner/Frietsch (footnote 13), Art. 9, note 9; Westphalen/Foerste (footnote 13), Vol. 2, pp. 34-36; Dufwa, Karnov (footnote 13), note 9; Nygaard, Karnov (footnote 13), note 61.

⁴¹ Prop 1990/91: 197, p. 38; Ot prp nr 48 (1987 - 88), p. 53.

⁴² Agell (footnote 12), pp. 13 (28).

⁴³ Cp. § 1 (1) of the Austrian Act on Product Liability (99. Federal Act of January 21, 1988 on Liability for a Defective Product). Austria - now a member of the EU - has adjusted the Act to the Directive even concerning property damages (§ 2 of the Austrian Act on Product Liability).

bb) Self-Risk Amount

Above that, consumers are not fully protected with regard to property damages. The Directive provides, according to Article 9 (1) (b), an amount of not less than 500 ECU's as not recoverable.⁴⁴ The Norwegian Act before implementation of the adjustments to the Directive did not contain rules on a self-risk of the injured owner. The legislator pointed out that a self-risk does not comply with basic principles of the Norwegian Law on Damages which state that damages are fully recoverable. Any cost advantages were doubted. The Norwegian legislator finally followed the Directive due to the fact that the Directive was mandatory in this point.⁴⁵

cc) Damages to the Product itself

(1) According to the Product Liability Acts

Article 9 (1) (b) of the Directive states that only damages to other items of property than the defective product itself are recoverable.⁴⁶ Anyhow, even if the wording of the Directive seems to be clear, it gives rise to discussions on the background of Art. 2 of the Directive according to which movables have to be deemed as products even if incorporated into another movable or into an immovable. If, for instance, a car is damaged due to its defective brakes it is questioned whether the owner can hold the producer of the brakes liable even if the brakes have been incorporated into the car before it was acquired by the ultimate consumer. There is no doubt that the car producer cannot be held liable according to Art. 9 (1) (b) of the Directive and that the brake producer is liable if the brakes were incorporated into the car after its acquisition, e.g. as spare part⁴⁷.

The Norwegian Act, other than the Swedish, Danish and German Acts (and the Directive), states expressly that it does not apply to damages caused by a component to a finished product if the component has been incorporated into the product before it is put into circulation (2 - 3 [2] (b)). According to that the producer of the brakes cannot be held liable for damages to the car. Even if a corresponding stipulation is not contained in the Directive the Norwegian legislator regarded the Norwegian Act in this point in line with the Directive. Owners of damaged products should be prevented from claiming damages from the seller of the product and the producer of the component at the same time.⁴⁸ However, the Norwegian rule reflects exactly the Swedish, Danish and German legislators point of view. The producer cannot be held liable for damages to the product the component is incorporated into.⁴⁹

⁴⁴ The different national Acts stipulate the following amount: Sweden: 3.500 SEK, Denmark: 4.000 DEK; Norway: 4.000 NEK, Germany 1.125 DEM.

⁴⁵ Ot prp no 72 (1991-92), pp. 27.

⁴⁶ Cp. the respective national Product Liability Act: § 1 (1) / Germany; § 2 (2) / Denmark; § 2 - 3 (2) (a) / Norway; § 1 (2) / Sweden.

⁴⁷ Frietsch in *Taschner/Frietsch* (footnote 13), § 1, note 39.

⁴⁸ Ot prp no. 72 (1991 - 92), p. 35.

⁴⁹ Bundestags-Drucksache 11/2447, p. 13; Prop. 1990/91: 197, p. 90; Lovforslag nr. L 54, Ft

Against this clear statement of legislators, in Danish literature it is stated that the producer of a component can be held liable even if the component had been incorporated into the product before its delivery to the consumer because the component despite of its incorporation has to be regarded as an individual product.⁵⁰ The Norwegian professor Nygaard even pleads for a repeal of § 2 - 3 (2) (b) of the Norwegian Act, in order to adjust Norwegian to Danish law as it is obviously (mis)understood in Danish literature.⁵¹

(2) According to the General Law of Tort

Due to the fact that damages to the defective product itself are not covered by the Directive there is room for claims based on sales law⁵² and - at least from a German point of view - based on the general law of tort. It is generally accepted in German law that - as a starting point - a defect of a product does not have to be regarded as a property damage but as diminished value of the item concerned entitling the owner mainly to a reduction of the purchase price or the cancellation of the sales contract. In 1977, the Bundesgerichtshof (BGH, Germany's Federal Court of Justice) had to decide the so-called "floating switch (Schwimmerschalter) case". A defective switch in a machine caused the machine to fully burn out. The switch which should prevent overheating did not work properly. The floating switch already formed part of the machine when it was acquired by the plaintiff. The BGH decided that the producer of the machine who did not sell the machine to the plaintiff had to compensate the total loss of the machine according to the German general rule on law of tort (Sec. 823 German Civil Code) as a property damage.⁵³ The BGH held that the problem whether or not this damage was recoverable as property damage could not be decided formally depending on the question whether the owner had acquired an already defective product or whether a defective component had been incorporated after the acquisition of the product later on. The producer had not only the duty of care to protect other property but even the product itself. There would not be any reason that a person acquiring the component separately should be in a better legal position than a person acquiring a product part of which is a defective component.⁵⁴

1988-89, Tillæg A, sp. 1616; cp. also *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 5, 3rd ed. 1997/Cahn, ProdHaftG § 1, note 10 [referred to as MünchKomm-Cahn, ProdHaftG §, note]; Frietsch in Taschner/Frietsch (footnote 13), § 1, note 39.

⁵⁰ Dahl, Karnov (footnote 13), note 24; Dahl/Rønne/Hornsberg/Levy, *Juristen* 1990, pp. 145 (163); Eyben/Nørgaard/Vagner (footnote 6), pp. 205.

⁵¹ Nygaard, Karnov (footnote 13), note 72.

⁵² Legislators refer in the first hand for these cases to the respective national sales law: Bundestags-Drucksache 11/2447, p. 13; Prop. 1990/91: 197, p. 90; L 54, Ft 1988 - 89, Tillæg A, p.1609; Ot prp nr 48 (1987 - 88) p. 56.

⁵³ BGHZ 67, pp. 359 (BGHZ=Official Digest of Decisions of the BGH in Civil Law, referred to as BGHZ, vol., p.) .

⁵⁴ BGHZ 67, pp. 359 (364/365). This jurisdiction was developed in subsequent decisions (e.g. BGH NJW 1978, 2242; BGHZ 86, pp. 256; BGH NJW 1985, pp. 194; BGHZ 117, pp. 183) and can - despite of the several criticism against it by a main part of legal literature (e.g. Deutsch, *Juristen-Zeitung* [JZ] 1984, pp. 308; Diederichsen NJW 1978, pp. 1281; *Versicherungsrecht* [VersR] 1984, pp. 797; Erman/Schiemann, *Handkommentar zum Bürgerlichen*

However, the problem is how to draw the border line between contractual and liability in tort. Today, the BGH in principle grants compensation for damages to the product itself if the defect causing the damage is not “stoffgleich”/“identical” with the damage occurred⁵⁵. The defect of the floating switch was less than the damage caused⁵⁶. It has to be stated that German jurisdiction defines the term “property damage” more extensively than the Directive which consequentially leads to a better protection of the injured. The practical importance of this jurisdiction is that the owner of the product may have claims on payment of damages against the producer even if claims according to sales law against the seller already are time barred as it was the case in the floating-switch case.⁵⁷ The period of limitation for warranty claims (Gewährleistungsansprüche) in principal is only six months from the time of delivery whereas the limitation period for claims based on tort law is three years from the date of the occurrence of the damaging event.

Even in Scandinavia, it has been discussed in how far a damage to the product itself can be compensated according to tort law. The Danish professor Dahl discussed the problem intensively in his book “Produktansvar” of 1973. The arguments put forward appear not to be very different from the reasoning of the BGH. In case of defective components incorporated into another product but not causing damages to it, only contractual liability is applicable. If the defective component had been incorporated into another property item already owned by the injured (e.g. as a spare part), any damage caused by the defective component would be recoverable according to tort law.⁵⁸ The situation in which the defective component forms part of the product acquired and causes damages on the product itself - according to Dahl - should be treated equally if “the danger of the product cannot be identified with the damage on the product” as he put

Gesetzbuch, 9th ed., 1993, § 823, note 125; Kötz, *Deliktsrecht*, 7th ed., 1996 [referred to as Kötz, note], note 66); Reinicke/Tiedtke NJW 1986, pp. 10; Schwark, *Archiv für die civilistische Praxis* [AcP] 179 (1979), pp. 57 (80); Stoll JZ 1983, pp. 499(501); Westphalen, *Produkthaftungshandbuch* Vol. 1, 2nd ed. 1997/Foerste, pp. 299 (referred to as Westphalen/Foerste, vol.1, p.). - regarded as well established (but the BGH is also supported in literature: e.g. Larenz, *Lehrbuch des Schuldrechts*, Vol. II (1), 13th ed., 1986, §§ 41 II e, 41a; Hager AcP 184(1984), pp. 413 (417); Merkel NJW 1987, pp. 358; *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol.5, 3rd ed. 1997/Mertens § 823, note 105 subseq. [referred to as MünchKomm-Mertens, §, note] supports the jurisdiction concerning the results, but suggests another reasoning; Staudinger/Schäfer, *Kommentar zum Bürgerlichen Gesetzbuch*, 12th ed., 1986, § 823, note 62 subseq. [67]). It is not possible to report on details of this discussion in the frame of this article and the huge discussion on this problem in literature. It is referred to the most recent article by Katzenmeier NJW 1997, pp. 486 with further references. Cp. for further comments on this jurisdiction the article by Steffen, *VersR* 1988, pp. 977. Steffen is former presiding judge of the VI. Senate of the BGH which is in charge of product liability law.

⁵⁵ Applied for the first time in the so-called “Gaszug case”, BGHZ 86, pp. 256 (259).

⁵⁶ Please observe that the BGH applied in the “floating switch case” (BGHZ 67, pp. 359) different criteria which have been given up since the decision in the so called “Gaszug case”, BGHZ 86, pp. 258.

⁵⁷ MünchKomm-Mertens (footnote 54), ‘823, note 105; Westphalen/Foerste (footnote 54), Vol. 1, pp. 300.

⁵⁸ Dahl (footnote 6), p. 158.

it.⁵⁹ According to Dahl, there is no good reason for different legal treatment of the cases in which the defective component has been incorporated into the item as a spare part (in cases in which the component and the item were acquired separately) and cases in which the component already formed part of the item when it was acquired.⁶⁰

In Scandinavia, this particular question, however, was most intensely discussed in Sweden. Even Sweden's Supreme Court, Högsta Domstol, had the chance to contribute to it. In a case decided in 1986, the Danish municipality Fredericia sued a Swedish component producer⁶¹ for damages on a harbour crane which had overturned due to a defect of a certain security device of the crane, a so-called "overweight indicator". The indicator failed to warn the crane operator when overweight goods were to be transported. The plaintiff had acquired the crane with the defective indicator already incorporated. The producer objected against the claim arguing that the plaintiff had acquired a faulty product, the crane. Claims should be based on sales law and be directed against the crane's seller who simultaneously was the crane's producer. According to the producer's opinion, the plaintiff had not suffered a property damage (*egendomsskada*) recoverable to law of tort, but a pure economic loss (*förmögenhetsskada*) recoverable only according to sales law. The Högsta Domstol very briefly stated that the producer was liable despite the fact that the indicator formed part of the crane⁶². The second instance court, the Hovrätt för Västra Sverige, ruled that damages on the crane had to be compensated by the component producer due to the fact that the indicator was "a specially produced security device not forming a necessary part of the crane" and the damage on the crane was "typical" and was "easily foreseeable" for the producer.⁶³

The Högsta Domstol's judgement contained a special opinion of one of Sweden's leading experts in the field of law of tort, the former judge at the Högsta Domstol and professor Bertil Bengtsson. He stated, the final user may even have claims on damages based on tort law against the producer for damages caused on the product itself. Arguments against such a liability would be of no consequence apart from the fact that such damages would not be insurable for the time being (1986).⁶⁴ Bengtsson confirmed his opinion in his book "The New Product Liability" by giving the example of an owner of a car being entitled to payment of damages based on the principles of law of tort (by the car producer) if the car is damaged due to defective brakes.⁶⁵ Anders Agell, however, opposes this opinion. He thinks Bengtsson's point of view is not

⁵⁹ Dahl (footnote 6), p. 462.

⁶⁰ Dahl (footnote 6), pp.459. Other authors in Denmark oppose to this opinion, but do not give reason for their point of view. Cp. Vinding Kruse (footnote 6), p. 264; J. Hansen, *Produktansvarets begrundelser og udvikling*, 1985, p. 134.

⁶¹ In the cases decided by the BGH claims were directed against the final producer, not a component producer. However, the cases are comparable with each other because the buyer always received a product which was defective from the very beginning.

⁶² Högsta Domstol, *Nytt Juridiskt Arkiv*, Avdelning I, (NJA) 1986, pp. 712 (720).

⁶³ Hovrätt för Västra Sverige NJA 1986, pp. 712 (719).

⁶⁴ Bengtsson, NJA 1986, pp. 712 (720).

⁶⁵ Bengtsson/Ullman (footnote 13), p. 70. This point of view is even shared by Dufwa (footnote 6), pp. 62 and to a certain extent also by Karlgren (footnote 6), pp. 180.

“recommendable”. Concerning the example given by Bengtsson, he considers - in consequence of § 1(2) of the Swedish Product Liability Act - that the damage on the car cannot be regarded as property damage. Only liability based on sales law should be applicable in these cases⁶⁶. However, this reasoning seems not to be convincing with regard to the fact that Bengtsson did not propose claims based on the Product Liability Act but on the general law of tort. The term ‘property damage’ - and the exclusion according to sec. 1(2) of the Product Liability Act - can under no circumstances be understood as a definition of the general term ‘property damage’ according to general law of tort. The Product Liability Act is special legislation in the field of consumer protection, and the Directive expressly states in article 13 that it shall not affect any rights according to the rules of non-contractual liability at the moment when the Directive is notified. Consequently, Taschner, the “author” of the Directive, says that general law of tort is not restricted by the Directive. Especially concerning damages on the product itself, he is indicating possible claims based on the law of tort.⁶⁷ Also the Swedish legislator pointed out - by reference to the harbour crane case - that in these cases law of tort can be of importance.⁶⁸ This means that the term ‘property damage’ of the general law of tort has to be defined independently.

The question of defining the term ‘property damage/sakskada’ was subject of a recent decision of the Högsta Domstol in 1996.⁶⁹ Even though the problem of the case was not whether and how far damages on the product itself were recoverable as property damages, the court remarked briefly on this problem.⁷⁰ Based on § 67(1) of the Swedish Law of Sales, according to which damages caused on other goods than the sold good are not recoverable, the court stated that component damages insofar are recoverable according to the Product Liability Act⁷¹ which excludes damages on the product itself. Without giving any reason, the court then stated that “the term property damage according to the Product Liability Act has to be supposed to have the same meaning as according to the law of tort”.⁷² It can certainly not be argued that the reasoning of the court concerning the problem “damage on the product itself” was very helpful. Certainly - it is right that according to the Product Liability Act there is no room for compensation claims concerning damages on the product itself. But nobody -

⁶⁶ Agell (footnote 12), p. 13 (36 sub); cp. also Hellner, *Speciell Avtalsrätt II, Kontraktsrätt*, 3rd ed., Stockholm 1996, pp. 221.

⁶⁷ Taschner in Taschner/Frietsch (footnote 13), Art. 9, note 15; Art 13, note 2. That is also the Swedish legislator’s point of view Prop 1990:91, p. 77. The German legislator stated expressly that the development of law of tort in this point shall not be effected by this rule, Bundestags-Drucksache 11/5520, p. 13.

⁶⁸ Prop. 1990:91, p. 90.

⁶⁹ Högsta Domstol NJA 1996, pp. 68.

⁷⁰ The court had to decide in which way a defective component not causing physical damages to another property in which it was incorporated but reducing the proper functioning of the item it was incorporated in can be regarded as property damage.

⁷¹ The Högsta Domstol did not mention the General Act on Law of Tort even though it was recognized that property damage according to the Product Liability Act is recoverable only concerning consumer products. The case itself dealt with aircraft engines which were not consumer products.

⁷² Högsta Domstol NJA 1996, pp. 68 (72).

not even the legislator of the Product Liability Act - ever stated that the term "property damage" according to the Product Liability Act coincides with the one of the general law of tort. As shown above, the opposite is the case. The legislator mentioned that for cases like the harbour-crane case, involving a component damage, law of tort may be of importance. The Directive aimed at not restricting the injured's rights according to other provisions on non-contractual liability. The unconvincing - and the subject not exhausting - argumentation of the court can be further demonstrated by the fact that, from its point of view, component damages are neither recoverable according to sales law nor according to the Product Liability Act nor, probably, according to the Act on Damages. This is due to the fact that component damages are mostly those in which an item, into which the component is incorporated, is damaged - which cannot be regarded (according to the court) as property damage.

This shows that it is time for a more detailed and intense analysis and debate of this problem in Sweden in order not to spread even wider confusion on this topic.

II The Future Importance of General Law of Tort Besides the Product Liability Acts

Even a more general analysis of the Product Liability Acts shows that the product liability debate, both in Scandinavia and Germany, has not been finished by the various national acts entering into force. This is primarily due to the fact that the acts cannot be regarded - and they do not aim at that - as generally covering the field of product liability. Damages are recoverable as far as consumers are concerned: personal injury, damages on consumer property. The practical and economic importance of this kind of damages may not be overestimated. This is especially the case for personal injury which in Scandinavia is often covered by different social security schemes either run by public corporate bodies or e.g. by collective agreements between employers and employees organizations which often do not even have a right on recourse against the wrongdoer.⁷³

In Germany, even compensation for pain and suffering cannot be awarded according to the national Product Liability Act. In all countries, a basic amount of not less than 500 ECU is not recoverable as far as consumer property is concerned. The, from an economic point of view, important group of damages on commercial property is not covered at all.⁷⁴ Damages on the product itself are excluded. Above that, from a German point of view, even liability for violation of the so-called "Produktbeobachtungspflicht" - producer's obligation to properly monitor the product once it has been marketed - with consequence of

⁷³ Cp. Bengtsson, *Torts and Insurances*, in *An Introduction to Swedish Law*, ed. Stig Strömholm, 2nd. ed., 1988, pp. 297-317; Bloth (footnote 13), pp. 148-155; 164-169; 174-180; Hellner, *The American Journal of Comparative Law*, Vol. 34 (1986), pp. 613-633.

⁷⁴ Agell (footnote 12), pp. 13 (28) points out that damages on property items used for commercial purposes are of significantly more importance than personal injury and on property used for private purposes with reference to Lindmark, *Industrins produktansvar*, Del I, 1988, pp. 169.

product recalls or warnings⁷⁵ is not ruled by the national acts or the Directive. This shows that even the consumer may have to rely on general law of tort in order to receive full compensation; a business enterprise has to. The respective Product Liability Act may in so far not be confused with the basic law of product liability, it is rather a piece of special legislation on the field of consumer protection surrounded by the general law of product liability based on the law of tort. In the future, jurisdiction and jurisprudence will have to face the challenge of developing the law in order to achieve guidance for legal practice. For that reason, jurisprudence should not decrease its efforts in the field of product liability based on general law of tort.⁷⁶ On the contrary: Due to the fact that damages on property used for commercial purposes are of greater economic importance, jurisprudence and jurisdiction are expected to contribute to the further development of law in this field in order to give guidelines for the settlement of disputes - even and especially for out-of-court settlement.

D Non-Statutory Strict Product Liability

It was subject of the product liability debate whether and how far jurisdiction was empowered to establish strict liability of the producer without a statutory foundation. There were, in principle, two arguments put forward in order to bolster the introduction of a non-statutory strict liability: questions relating to evidence and questions of allocation of risk between producer and the product's user. Neither Swedish, Norwegian, Danish nor German law know a general statutory rule on strict liability in tort as for instance for "dangerous operations or activities".⁷⁷ In Denmark and Norway, there is not even a statutory rule on negligence. However, the development of legal practice concerning the introduction of a rule on non-statutory strict product liability was different in all these countries. Most restrictive in this field was German jurisdiction, the most extensive the Norwegian. Especially in Denmark, but also in Sweden, the development is uncertain.

⁷⁵ The "Produktbeobachtungspflicht" ("product monitoring duty") is dealt with in chapter E.I.3., II.3.

⁷⁶ From this point it seems to be doubtful if textbooks on the law of tort should restrict themselves or concentrate concerning product liability on the product liability acts, cp. for instance Lødrup (footnote 6) or Nygaard, *Skade og Ansvar*, 4th ed., 1992 (referred to as Nygaard, p.); the book by Bengtsson/Ullman (footnote 13) contains only to a small extent a description on general product liability. Hellner (footnote 6), pp. 309-329, describes product liability in general. For an extensive general description of Scandinavian product liability cp. Bloth (footnote 6).

⁷⁷ Cp. concerning Germany: *Deutsch, Allgemeines Haftungsrecht*, 2nd ed., 1996, pp. 9, 405, 407, 557; Kötz (footnote 54) note 224; Sweden: Hellner (footnote 6), pp. 169-174; Norway: Lødrup (footnote 6), pp. 103-109; Denmark: Eyben/Nørgaard/Vagner (footnote 6), pp. 101-103.

I Germany

The landmark product liability judgement in Germany is the so-called “chicken-pestilence-case” decided by the BGH in 1968.⁷⁸ In this decision - which was preceded by an intensive product liability discussion in jurisprudence⁷⁹- BGH took the opportunity to express its view on problems of product liability as a matter of principle. Among other things, the court intensively discussed the legal foundations of the producer’s liability vis-à-vis final users. The decision contains even a statement on non-statutory strict product liability.⁸⁰ The court refused the introduction of such a rule holding that strict liability would not comply with the law of liability as in force. As a matter of principle, judges would be prevented from extending strict liability from certain other special legislation as for instance the acts on damages occurred in public traffic (*Straßenverkehrsgesetz*), air traffic (*Luftverkehrsgesetz*) or liability for nuclear accidents (*Atomhaftungsgesetz*) to product liability. It would be a matter of legislation whether and how far a more objective liability can be imposed on a producer. The court held that the introduction of any kind of strict liability as an exemption to the general rule on negligence has to be decided by the legislator only.⁸¹

II Sweden

Swedish jurisdiction took a similar approach. The introduction of a rule on non-statutory strict liability was subject of four decisions by the Högsta Domstol. Decisions 1982 and 1983 dealt with the questions whether strict liability can be imposed on products in case of damage to property primarily not used for private purposes.⁸² In both decisions, the court stated that there was no (in 1982/83) rule on non-statutory strict product liability in Swedish law. It was pointed out that in this time legislation was prepared on the field of product liability concerning personal injury and due to these circumstances, jurisdiction would not be entitled to anticipate such legislation, especially not with regard to damage on property used primarily for non-private purposes.⁸³

⁷⁸ “Hühnerpest-Entscheidung” of 26 November 1968, BGHZ 51, pp. 91-108.

⁷⁹ Product Liability was even one of the topics of the 47th “Deutscher Juristentag” in 1968. The “Deutscher Juristentag” is an association of German lawyers - founded in 1860 which convenes each second year. Different topics are discussed in different “Abteilungen” (sections) always prepared by a main expert opinion (Hauptgutachten) and followed by majority decisions on recommendations to legislation on the topics concerned. For a survey on the development of product liability cp. Westphalen/Foerste (footnote 54), Vol. 1, pp. 279-282.

⁸⁰ Diederichsen, *Die Haftung des Warenherstellers*, 1967, recommended a non-statutory strict product liability.

⁸¹ BGHZ 51, pp. 91 (98).

⁸² Högsta Domstol NJA 1982, pp. 380, was on chicken dying because of defective feed and Högsta Domstol NJA 1983, pp. 118, on defective horse fodder.

⁸³ Högsta Domstol NJA 1982, pp. 380 (385); 1983, pp. 118 (124). Please note that Sweden in connection with the Convention of the Council of Europe on Product liability initiated legislation concerning personal injury. A draft was proposed in 1979 by an expert commission (published in *Statens Offentliga Utredningar*, SOU, 1979:79). However, legislation was not finalized in order to wait for the development in the EC, cp. Blomstrand/Broqvist/Lundström, *Produktansvarslagen*, 1993, pp. 16-19; Bloth (footnote 13),

The Högsta Domstol imposed the same kind of self-restriction on itself concerning personal injury allegedly caused by medicine. In this field, the Swedish legislator had supported the introduction of a special insurance scheme, the “Pharmaceutical Injuries Insurance” in 1978⁸⁴ which “voluntarily”⁸⁵ was agreed on by insurers and medical industry. Even if the injured is legally not forced to direct his claims against the insurance scheme, but may also claim damages directly from the producer, the legislator made clear his preference for regulating all damages caused by drugs under the scheme.⁸⁶ For this reason, the legislator’s preference for the insurance scheme, the court held that strict liability besides this system may not be imposed on the producer.⁸⁷

However, in 1989, the Högsta Domstol decided in favour of introducing non-statutory strict product liability in a case in which the plaintiff had suffered from salmonellosis caused by a remoulade and a consequential Bechterew’s syndrome by salmonella. The plaintiff was a teacher suing the municipality of Stockholm in its capacity as the provider of school lunch. She claimed a total amount of SEK 115,494.00 which mainly consisted of compensation for pain and suffering. The court held the defendant liable according to a rule of non-statutory strict product liability stating that Swedish jurisdiction in this field had developed to a nearly strict liability⁸⁸ as far as defendants were adjudged according to rules of guarantee. It referred to international developments towards strict liability, as e.g. the (1989) ongoing process of the implementation of the Directive based on strict liability. Furtheron, it pointed out that with regard to food causing personal injury, several arguments speak for strict liability, as e.g. the severe damages which may occur, the special degree of care which has to be observed and the producer’s possibility to provide for insurance coverage.⁸⁹

Today, personal injury damages are covered by the Product Liability Act in Sweden, even those for pain and suffering which had first been claimed in the salmonella case. However, it is being discussed in Swedish literature whether jurisdiction will extend non-statutory strict liability to damages on property mainly used for commercial purposes. Such a development is recommended by Bengtsson and the Swedish professor Hellner. They both refer to the Högsta

p. 23 with further references.

84 “Läkemedelsskadeförsäkring”. Cp. on this insurance scheme Bloth (footnote 13), pp. 325-343; Hellner (footnote 6), pp. 327-329; Oldertz, *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* 1981, pp. 378-403; Voluntary Insurance schemes are criticized by Dufwa, *Konsumenträtt & Ekonomi*, no. 4/1979, pp. 23; cp. also Dufwa *JFT* 1980, pp. 1 (6-9).

85 Or, as Fleming put it, “under the gun of legislation”, *American Journal of Comparative Law*, Vol. 30 (1982), pp. 297 (301); Dufwa *JFT* 1980, pp. 1 (7). Hellner marked it as Sweden’s “most important contribution to solving the product liability problem”; Hellner, *Product Liability in Swedish Law*, in *Comparative Product Liability*, pp. 127 (133), ed. by C.J. Miller, 1986.

86 Bloth (footnote 13), p. 326.

87 Högsta Domstol *NJA* 1982, pp. 421 (491).

88 E.g. in 1985, the Högsta Domstol held the owner of a petrol station liable for damages on a car engine caused by faulty petrol. The word “premium” on a pump was regarded as a “guarantee” for faultless petrol (*NJA* 1985, pp. 641), cp. Bloth (footnote 13), pp. 235.

89 Högsta Domstol *NJA* 1989, pp. 389 (395/396). On this decision, cp. Dufwa, *Juridisk Tidskrift (JT)* 1989-90, pp. 327 (336-339). Dufwa, in principle, is positive on the judgement but criticizes the reasoning.

Domstol's decisions of 1983 when the court, due to the ongoing legislation, refrained from introducing non-statutory strict liability and point out that this argument is no longer valid after the finalization of legislation.⁹⁰ Bengtsson wants to rely on the principles behind the Directive: the risk has to be borne by the producer to the greatest possible extent.⁹¹

III Norway⁹²

Non-statutory strict liability in Norway looks back on a comparatively long history which has evolved by case law concerning so-called "dangerous operations" (ansvar for farlig bedrift)⁹³ already since the turn of the century. Liability was imposed e.g. on the operator of a power station for damages occurring due to the supply of high voltage electricity into a low voltage grid.⁹⁴ The flying sparks of a train engine of the Norwegian State Railway caused a forest fire.⁹⁵ A spectator of an icehockey game got injured by the puck which had been hurled across the unshielded barrier.⁹⁶ Jurisprudence regarded the non-statutory strict liability evolved by jurisdiction as the "natural" starting point for product liability.⁹⁷

Generally speaking, strict liability can be imposed especially in cases where possessing an object or carrying out some activity involves a risk of inflicting damage. The imposing of liability is conditioned upon a so-called "samlet vurdering" "extensive evaluation"⁹⁸ of certain criteria, in order to ascertain who, plaintiff or defendant, is "nearer to bear the economic consequences"⁹⁹ of the damage occurred. The criteria applied are as follows: The risk which realized is of permanent, not only incidental, character. It is typical of the activity or device which caused the damage and must be predictable. Furthermore, the risk must be of extraordinary character to the injured, in other words, must exceed the risks involved in everyday life. It may also be of importance whether the tortfeasor had the opportunity to take out a liability insurance or to "pulverize" the damage by the price for his services, deliveries or products. However, and this is

⁹⁰ Bengtsson/Ullman (footnote 13), pp. 57. Hellner (footnote 6), pp. 323/326. This view is also shared by Agell (footnote 12), pp. 13 (30), even though he is of the opinion that it requires special will-power of the jurisdiction to introduce strict liability in this field against the legislator's reasoning in the travaux préparatoires of the Product Liability Act. Also Bengtsson's prognosis is that courts in so far will act very cautiously.

⁹¹ Bengtsson/Ullman (footnote 13), p. 58.

⁹² For a more detailed survey on non-statutory Norwegian product liability, cp. Bloth (footnote 13), pp. 64-75; Bloth, *Recht der Internationalen Wirtschaft* (RIW), 1993, pp. 887.

⁹³ This terminology has been said to be too strict and fails to cover all aspects of this cause of liability, cp. Nygaard (footnote 76), pp. 260.

⁹⁴ Høyesterett Rt 1932, pp. 416.

⁹⁵ Høyesterett Rt 1955, pp. 46.

⁹⁶ Tune herredsrett RG 1988, pp. 583.

⁹⁷ Lødrup (footnote 6), p. 200; Steen-Olsen JV 1984, pp.1 (33).

⁹⁸ Høyesterett Rt 1936, pp. 298; Høyesterett Rt 1959, pp. 474; Lødrup (footnote 6), pp. 215; Steen-Olsen JV 1984, pp. 1 (32).

⁹⁹ Høyesterett Rt 1972, pp. 965 (969); Lødrup (footnote 6), p. 105; Nygaard (footnote 76), p.260.

probably the main difference to strict liability according to the Directive, liability is not conditional upon the failure of a technical device or a defect of a product. A technical defect is said to be nothing more than “a strong argument” for the imposing of strict liability.¹⁰⁰ The consequence of the application of such a liability rule is - as it shall be shown in the following - that producers were held liable for damages caused by their products even when a defect could not be shown or the product could not be regarded as defective. And, vice versa, producers were able to escape from liability despite the presence of a defect in a product.

Liability for a technically defective product was subject of an early decision by the City Court of Bergen. A child had been injured when a bottle of mineral water exploded due to the pressure of carbon dioxide and the bottle's brittleness. The court imposed liability on the brewery pointing out that the damage concerned was the unavoidable and statistically calculable consequence of the operation of a brewery. The special risk inherent to a bottle of mineral water had realized by the explosion. The brewery was said to be “nearer” to bear the economic consequences than the injured. Furthermore, the brewery had the chance to cover these costs by taking out a liability insurance.¹⁰¹ A decision of the Norwegian Supreme Court, the Høyesterett, of 1973 shows that a producer can escape liability despite the fact that the product which caused the damage was defective. The case concerned mink fodder infected by botulin toxin which killed a large number of minks. The Høyesterett found that the plaintiffs, the owners of mink farms, were “nearer” to bear the damages because they had had to be aware of the fact that the respective fodder could be infected. Furtheron, the court mentioned that the minks had been neither vaccinated nor insured.¹⁰²

Twice, the Høyesterett had to decide cases in which the death of a woman resp. personal injury had allegedly been caused by a contraceptive pill. The claimants maintained that the estrogen, forming substance of the pill, caused thrombosis. In the first case in 1974 (defendant was the German Schering AG), the claimants, according to the court, failed to prove that the pill had caused the death.¹⁰³

In the case decided by the Høyesterett in 1992, a woman sued the Norwegian importer of a contraceptive produced in the Netherlands for damages. She maintained to have suffered a cerebral thrombosis caused by estrogen as a substance of the pill. Even though the court found that the pill could not be

100 Lødrup (footnote 6), p. 234; Nygaard (footnote 76), pp. 259/277; Rognlien (footnote 6), pp. 65.

101 Decision of 2 May 1955 by Bergen Byrett, unpublished but reported by Nygaard, *Skade og Ansvar*, 3. ed., 1985, p. 407.

102 Høyesterett Rt 1973, pp. 1153 (1157). In another Høyesterett decision of 1972, the producer and seller of chicken feed was held liable for damages caused by lack of vitamins and loss of egg-production according to § 43 (3) of the Norwegian Sales Act of 1907. The death of the chicken was regarded as “calculable and obvious” consequence of the product defect, cp. Rt 1972, pp. 1350 (1357).

103 Høyesterett Rt 1974, pp. 1168. Please note that liability was imposed on the producer by the first instance court, the Oslo Byrett (Rt 1974, pp. 1174). For a detailed report on this case cp. Dahl, *ScStL* 1974, pp. 59 (87-89) and in Christian Bloth (footnote 13), pp. 71, 224, with further references.

regarded as defective it imposed liability in the defendant based on a mere risk evaluation. Despite the fact that the contraceptive contained estrogen and, therefore, the risk of thrombosis could be classified as a “system defect”¹⁰⁴, the importer had to bear the economic consequences of the realization of the risk inherent to the product. It was stated that this risk was created by the development of a new product (damages occurred in 1976) and was not recognizable for the product’s consumer. Even though only a small number of consumers is exposed to the risk, the consequences of risk realization would be catastrophic.¹⁰⁵

IV Denmark

It cannot be clearly recognised whether Danish courts may impose strict liability on a producer. Danish judges seem to hesitate to give extensive reasons - especially with regard to legal aspects - on their decisions. Court decisions mainly restrict themselves to the statement whether the plaintiff is liable or not. From the way the court considers the evidence in each case, authors make conclusions on which legal reasons the decision is founded. In this point Danish legal practice differs significantly from Norwegian, Swedish and especially German practice. It is a characteristic of German jurisdiction that especially the BGH extensively elaborates on the legal reasons for its decisions, expresses itself very generally and discusses statements made in jurisprudence on the questions concerned.

However, Danish literature regards the following decision of the Danish Supreme Court, the Højesteret, as based on non-statutory strict liability.¹⁰⁶ Claimants were 36 employees or their surviving dependants respectively who sued the Danish Eternit Company, who was their or the decedents’ employer. The company started in 1928 the manufacturing of Eternit building material applied as for tiling of roofs and facades. The manufacturing process involved asbestos to a significant extent. Plaintiffs or the deceased persons suffered due to the application of asbestos from asbestosis or cancer. Even if the risks connected with the application of asbestos became known in the 30’s of this century, the defendant first in 1975 started replacing asbestos by other materials step by step until in 1988 the production was free of asbestos. The court held the defendant liable because the company, as a major producer, had used asbestos for a long

¹⁰⁴ The term “system defect” or “system damage” is special for Scandinavian product liability. It is not known or used in Germany. The term classifies the cases in which damages are caused by a danger inherent in the product but known to and accepted by the public. Examples are the risk of cancer involved in smoking or dental caries due to the consumption of sweets. In this case, the Høyesterett stated the fact that the pill contained estrogen was no obstacle to the product’s licensing by public authorities and by that the risk was generally accepted. The term “system defect” was developed by the Dane Dahl, cp. Dahl (footnote 6), pp. 31, pp. 325; Dahl, ScSt 1974, pp. 59 (77). Cp. Bloth (footnote 13), p. 29 with further references.

¹⁰⁵ Høyesterett Rt 1992, pp. 64 (78).

¹⁰⁶ Eyben/Nørgaard/Vagner (footnote 6), pp. 135; Wendler Pedersen, Ugeskrift for Retsvæsen (UfR)1990 B, pp. 241 (242).

time. The company - according to the court - was aware of the fact that asbestos contained severe risks for health of persons exposed to asbestos permanently.¹⁰⁷

However, it has to be added that this case can not be regarded as a mere product liability case, but a decision concerning the employers liability for safety at work. It is an open question whether the court had decided in the same way when a final user had sued for damages due to personal injury caused by Eternit products containing asbestos. Also in Danish literature the decision is said to be a very particular one with regard to the special facts of the case.¹⁰⁸

V *The Future Importance of Non-Statutory Strict Product Liability*

The development concerning non-statutory liability was different in the countries subject of this article. The development is certain in Norway and Germany only, even if the Norwegian and German approaches towards strict liability are exactly opposite to each other. German jurisdiction refused to introduce a non-statutory strict liability as a matter of principle. The prognosis is not difficult to make that German courts are very likely not willing to introduce now - after the Product Liability Act has come into force - such a rule concerning the cases not covered by the Directive. The reason - besides the one mentioned above - is not very difficult to find either: the application of the Directive's rule on liability e.g. by analogy is not possible due to the fact that analogy requires a not intended gap in the law¹⁰⁹ which does not exist in the case of product liability: legislation restricted itself on personal injuries and damages on property primarily used by private consumers even though it was fully aware of liability in commercial relationships.

In Norway, non-statutory strict liability is generally accepted as a basic rule of liability besides negligence.¹¹⁰ It is not specifically developed in product liability. However, it will be interesting to see whether and how the concept of strict liability will be affected by statutory law or - perhaps - in which cases the injured may prefer to rely on the non-statutory rules. The concepts of Norwegian statutory and non-statutory liability differ in one essential point: Liability according to the rules formed by legal practice is a result of an extensive evaluation of certain criteria. The damage's origin in a product defect does not

¹⁰⁷ Høyesteret UfR 1989, pp. 1108 (1140).

¹⁰⁸ Eyben/Nørgaard/Vagner (footnote 6), pp. 135; The Danish judge of the Højesteret, Wendler Pedersen, pointed out it had been nearly impossible to investigate whether the defendant's had complied with his duty of care vis-à-vis each employee during the last forty years. In literature there is only a not very intense discussion on non-statutory strict liability with regard to product liability. On the one hand, there is Dahl who does not think that strict liability is of great value compared to liability based on negligence, if the producer has to bear the burden of proof concerning negligence (cp. Dahl [footnote 6], pp. 360). On the other hand Hansen pleaded for strict liability. He argued strict liability would be the consequence of that the producer has to bear the risks connected with his operation. He would be able to "pulverize" the damages by the prices for his products (cp. J. Hansen [footnote 7], pp. 126; *Produktansvarets begrundelser og udvikling*, pp. 66); for a short overview on the discussion in German cp. Bloth (footnote 13), pp. 78.

¹⁰⁹ Cp. e.g. Larenz, *Methodenlehre der Rechtswissenschaft*, 6. ed., 1991, pp. 375, 381.

¹¹⁰ Lødrup (footnote 6), p. 99; Nygaard (footnote 76), p. 17; Rognlien (footnote 13), p. 61.

decide exclusively on liability. Liability can even be imposed on a producer if a defect cannot be ascertained. The mere weighing of risks - the question who is "nearer to bear the risk" - decides on liability, not the mere presence of a defect as it is the case according to the Product Liability Act. Furtheron, Norwegian non-statutory liability does not differentiate between damages on property items mainly used for commercial or private purposes. Non-statutory strict liability is not a special rule concerning consumer protection but one of a general character.

Before the adaptation of the Norwegian Product Liability Act to the Directive, the Act should exclusively¹¹¹ govern the questions of liability for damages caused by defective products as far as it was applicable. This rule caused the question whether private consumers were really protected in a more efficient and better way by statutory law than by non-statutory law. The plaintiff is - when relying on the Product Liability Act - obliged to prove a defect which he is not according to non-statutory law. Generally speaking, non-statutory law does not require more than providing evidence for causation of the damage by the defendant's product. Doing so, it falls into the competence of the court to evaluate the risks involved. According to the Product Liability Act, the plaintiff does not only have to prove the product's defect but also the fact that the damage was actually caused by the defect and not by the defendant in general. Applied, e.g., on the contraceptive cases, this means that evidence must be provided that the damage occurred due to a defect of the pill before compensation can be awarded. The decision of the Høyesterett of 1992 shows that damages according to the general rule of non-statutory liability can even be awarded if the product cannot be deemed defective. In this respect, the plaintiff had to show "only" causation by the contraceptive not by a defect of the contraceptive.¹¹² But even after the decision of the Norwegian legislator that both statutory and non-statutory law are applicable besides each other, time will tell which concept of liability will meet the needs of the injured best and most efficiently. It is not obvious whether this will be the Product Liability Act.

German and Swedish jurisdiction share another perspective on non-statutory product liability. Both jurisdictions look much more on the respective legislator's approach towards strict liability. German jurisdiction respects the legislators power to decide exclusively on the introduction of strict liability, Swedish jurisdiction did not (in 1982,83) want to interfere with the legislator's decision making process. First after finalization of this process in 1989, the question on legislation on the field of product liability was decided, the Högsta Domstol regarded itself as entitled to award damages on the basis of non-statutory strict liability in a case in which probably also the application of the product liability act had led to compensation: defective food caused personal

111 "Exclusively" vis-à-vis the general rules of law of tort, but not sales law, cp. Ot prp no. 48 (1987-88), p. 65; Bloth (footnote 13), pp. 39, 276.

112 This example on liability for drugs today is probably of a more theoretical character due to the fact that compensation for damages caused by drugs today are covered by an insurance scheme. Insurance coverage is not conditioned by a product defect but by a risk evaluation. Cp. Bloth (footnote 13), pp. 325-343. However, the question may be of more practical importance in case of damages caused by chemicals - not regarded as drugs - or food.

injury.¹¹³ The adherence of the Swedish courts to the legislator's approach towards strict liability gives support to Agell's statement¹¹⁴ that it requires certain will-power of the courts to develop a rule on non-statutory liability on fields not covered by the Directive. It seems not very likely that courts will set aside the legislator's opinion¹¹⁵ regarding strict liability on the field of commercial relationships.

E Liability Based on the Rule of Negligence

Liability - both in Scandinavia and Germany - can be imposed on a producer based on the respective rule of negligence. In Sweden, Denmark and Germany, it is the basic and general rule of liability in tort - in Norway it exists besides a general rule on non-statutory strict liability. The negligence rule in Germany, Sweden and Denmark provides the broadest basis for product liability claims because it does not differentiate between damages on property items used primarily for commercial or private purposes, it does not know any self-risk of the plaintiff and, in the case of Germany, compensation for pain and suffering can be awarded. Legal practice in product liability cases, especially as far as final users or so-called innocent bystanders without any contractual relationship with the producer are concerned, developed in Germany, Sweden and Denmark primarily on basis of this rule to which the Product Liability Acts today appear as special legislation.

I Germany

1 General Concept of Liability according to the Rule of Negligence

Since the BGH in its landmark decision of the chicken pestilence case discussed the foundation of product liability claims and voted for the application of the negligence rule¹¹⁶, it developed an extensive practice on this field, a more or less stringent product liability system.¹¹⁷ The development of such a system may also be a result of the allocation of jurisdiction in the BGH itself: certain court divisions, the so-called "Senate", are exclusively competent for certain fields of the law, e.g. the "VI. Senat" for the law of tort, among others "product liability law".

Even if the rules of German law of tort as they are incorporated in the civil code, the BGB, in principle remained unchanged since the BGB came into force on 1 January 1900 and by that reflect the spirit of last century's law of tort, jurisdiction can be said to have evolved a product liability system which meets

¹¹³ Even if it can be doubted that the municipality of Stockholm - which was the defendant in the decision of 1989 - as a public body would have been regarded as producer, cp. Agell (footnote 12), pp. 13 (22).

¹¹⁴ Agell (footnote 12), pp. 13 (30).

¹¹⁵ Prop. 1990/91; 197, p. 38.

¹¹⁶ BGHZ 51, pp. 91 (103).

¹¹⁷ Essential elements of this system are the special rules on evidence in product liability cases which are subject of chapter F of this article.

the requirements of a modern industrialized society. Liability tied to individual fault turned into a liability for violation of a general, objective duty of care towards the innocent bystander or final user. Product liability as it is formed by German jurisdiction is said to have approached closely to strict liability¹¹⁸, is liability for fault nominally only.¹¹⁹

In particular, jurisdiction had to face the following problem originating in the BGB's liability system. § 823 (1) - the basic rule of negligence - reads as follows:

“A person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.”¹²⁰

However, it does not need further explanation that production of goods today is the cooperation of a more or less large number of persons, may these be employees or sub-contractors of the producer. How are faults of these persons attributed to the producer? BGB as a matter of principle knows liability for own faults of the tortfeasor only. Faults of others are attributable only under certain circumstances¹²¹. This principle is expressed by § 831 (1) BGB:

“A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of this work. The duty to compensate does not arise if the employer has exercised necessary care in the selection of the employee; and, where he has to supply apparatus or equipment or to supervise the work, has also exercised ordinary care as regards such supply or supervision, or if the damage would have arisen notwithstanding the exercise of such care.”

In principle the producer is liable for any fault committed by his employee, but he may escape from liability if he can prove that he complied with his duty of care when selecting or supervising the employee.¹²²

118 Baumgärtel, *Juristische Ausbildung* (JA) 1984, pp. 660 (665); Larenz, *Lehrbuch des Schuldrechts*, Vol. II (1), 13th ed., 1986, § 41 a (p. 87); Staudinger/Schäfer, *Kommentar zum Bürgerlichen Gesetzbuch*, 12th ed., 1986, § 831, note 180.

119 Baumgärtel, JA 1984, pp. 660 (665).

120 Apart from this rule, § 823 (2) may be of importance according to which also a person who infringes upon a statute intended for the protection of others is liable, but only in the event of fault. However, this rule did not play a major part in legal practice on product liability even though there is legislation concerning safety aspects of product handling, e.g. “Equipment Safety Act” (Gerätesicherheitsgesetz); Act on Food and Goods in Daily Use (Lebensmittelgesetz) and the “Admission to Road Traffic Act” (Straßenverkehrszulassungsgesetz). For details, cp. Westphalen/Foerste (footnote 54), Vol. 1, pp. 596-616.

121 Insofar German law corresponds with Swedish law before the Swedish act on law of damages entered into force in 1 July 1972. The tortfeasor was in principle liable for damages caused by employees only if he did not observe the necessary duty of care with regard to the employee's selection and supervision. Cp. Hellner (footnote 6), p. 111; Karlgren, *Skadeståndsrätt*, 5. ed., 1972, p. 119.

122 It can be added that there were proposals on reforms of this provision in the Federal Parlia-

The problems concerning liability in modern industrial production arising from this system are today of less importance due to the by legal practice evolved concept of “Verkehrspflichten”, a general duty of taking care incumbent upon everyone who creates a source of danger for third persons. He must ensure that this danger or risk does not realize. This duty of care is applied to persons involved in the production and distribution chain of goods at the stage of designing, manufacturing, drafting instructions and warnings and monitoring of products. The various duties of care incumbent upon the producer are consequently classified as “Konstruktionspflichten, Fabrikationspflichten, Instruktions- und Produktbeobachtungspflichten”. The producer not complying with one of these duties and putting a - due to the violation of these duties - defective product into the stream of commerce may be held liable according to § 823 (1) BGB, independently whether the producer personally or his employee acted negligently.

More problematic on the other hand is the producer’s liability for defective components procured from subcontractors. In general - according to German law - no producer is liable for defects caused by self-employed subcontractors.¹²³ However, the producer has to provide for the usage of safe and non-defective components to a certain extent. He has a duty of care concerning the selection of his subcontractors¹²⁴ and if he recognizes risks for a safe use caused by the component he has to work towards vis-à-vis the supplier that risks connected with the usage of the component are removed. The supplier has to be informed about the intended use of the product and the safety requirements the component to be delivered.¹²⁵

In this point - liability for independent subcontractors - the Directive is a clear improvement to the protection of the injured. According to Art. 3 (1) of the Directive the manufacturer of the finished product has to be regarded as producer and can by that be held liable for any damage caused by a component procured from a third party.¹²⁶

The BGH succeeded due to the comparatively extensive legal practice in product liability cases to involve very detailed guidelines concerning the requirements on a producer’s proper conduct with regard to the design and manufacturing of products, product instructions and product monitoring, which shall be demonstrated concerning instructions and product monitoring.

ment which have not been realized, cp. Kötz (footnote 54), notes 301-304. For further details of this provision and liability for third persons cp. MünchKomm-Mertens (footnote 54), § 831; Kötz (footnote 54), notes 266 - 311. Please observe that a legal entity always is liable always for any damage which an organ (as for instance a managing director) caused a third party (§ 31 BGB).

123 Cp. in general on liability for independent subcontractors BGHZ 42, pp. 374 (375); Kötz (footnote 54), notes 272-274; MünchKomm-Mertens (footnote 54), § 823, note 224-226; Palandt/Thomas (footnote 10), § 831, notes 6-8.

124 BGH VersR 1972, pp. 559 (560).

125 BGH NJW 1994, pp. 3349 (3350).

126 Cp. Taschner in Taschner/Frietsch (footnote 13), Art. 3, note 6.

2 Instructions and Warnings

In general, it is the producer's duty to properly instruct users on how to safely employ the product and to warn against possible hazards or risks.¹²⁷ General principles for the set-up of such instructions and warnings have been developed by case law. They are, however, not laid down in general provisions, neither in private nor public law. The Directive does also not provide for any explicit rules so far. It refers only indirectly to the product's presentation as one of the factors determining whether all safety requirements were met.

a) When do Instructions and/or Warnings Have to be Given?

As it is pointed out by the BGH, the purpose of proper warnings is to make "self-responsible monitoring of risks" possible for the consumer.¹²⁸ Whether and how far instructions or warnings are necessary depends on two aspects: On the nature of risks or hazards involved in the product's employment and on the background information, knowledge and experience of the group of prospective users.

Especially in cases in which hazards for life or health are involved in a product's employment, proper warning must be given in order to protect the product user.¹²⁹ BGH, e.g., had to deal with three cases in which babies and toddlers were injured by the consumption of sweetened tea and fruit juice served in little plastic bottles. Defendants were different producers of the bottles, the tea and the fruit juice. The teat of the bottle directed the jet of the fluid behind the front teeth so that the palate was constantly washed. Due to the sugar content of the fluids, the children developed dental caries, in some cases to such an extent that their teeth had to be removed. Against the producer's intention, the sweetened tea or fruit juice had been used excessively as pacifier because the bottle design allowed the babies and toddlers to hold the bottles by themselves. Due to the severe risks involved in this use of the beverages, producers were obliged to give proper warnings.¹³⁰

However, BGH holds that the purpose of the instructions also is to protect the integrity of the product which is subject of the instructions concerned. In a case decided in 1992, the court stated that it was the producer's duty to inform about the proper handling of a product. It goes without saying, so BGH, that the producer was obliged to recover any damages to the product (as property damage) incurred in consequence of inadequate instructions.¹³¹

The necessity to properly warn against hazards involved in the use of a product further depends on the group of prospective consumers for which the product is intended. Different users may have different backgrounds and knowledge. Products intended for the use by experts or professionals may not

¹²⁷ BGH NJW 1992, pp. 560/561.

¹²⁸ BGH Betriebsberater (BB) 1994, pp. 597/598.

¹²⁹ BGH NJW 1992, pp. 560, 561.

¹³⁰ BGH NJW 1992, pp. 560; BGH BB 1994, pp. 597; BGH NJW 1995, pp. 1286. In the following referred to as the 'Bottle Syndrome Cases'.

¹³¹ BGH NJW 1992, pp. 2016/2018.

have to be accompanied by general instructions and/or warnings or their instructions/warnings may differ from those required for products intended for employment by private consumers.¹³² If a product is addressed to different profiles of consumers, both professionals and private persons, instructions must be designed for the least informed and most endangered group of consumers, especially if the product is marketing through common channels.¹³³ However, even if warnings cannot be regarded as sufficient, the defendant may escape liability by providing evidence that the injured had, indeed, been informed about the risks and hazards connected with the use of the product and about ways to avoid the damage.¹³⁴

b) Contents of Proper Instructions and Warnings

If the duty to properly instruct and warn the prospective consumers is imposed on a producer, the instructions/warnings generally have to cover all hazards involved either in the product itself or in its use within the intended range of employment.¹³⁵ In so far, the producer's duty to inform is limited.

In this respect, it was subject of a decision by the BGH whether the producer had to warn against the possible misuse of a product. An apprentice, aged 15, died due to the misuse of a refrigerant. He had inhaled the substance's odours in order to get intoxicated. BGH dismissed the parents' action for damages stating that there was no duty to warn against possible use outside the scope of or alien to the product's intended function when the misuse had nothing to do with the product's purpose. Only where misuse is foreseeable or close to the intended use may it be subject of a warning. Misuse alien to the intended use may be subject of a warning if it is known to the producer that the product is qualified or popular for the misuse concerned.¹³⁶

In the 'bottle syndrome cases', the use of the sweetened tea or fruit juice as pacifier¹³⁷ or the use of the plastic bottle not only for consumption of tea but also of fruit juice¹³⁸ was regarded by the BGH as a misuse 'closely related to the proper usage'. In the 'bottle syndrome cases', BGH took the opportunity to discuss how instructions must be formed in order to meet the requirements of a proper warning. The risks and hazards connected with the use of the product must be described as well as the way to avoid damages. Consequences, i.e. the kind of damage which may occur if instructions are not observed, must be part of the warning. Furthermore, the likeliness of a possible consequence must be

132 Cp. BGH BB 1981, pp.1966 and BGH NJW 1996, pp. 1863/1864 stating that the requirements for instructions and warnings for products addressed to professionals are less than those for products addressed to private consumers.

133 BGH NJW 1994, pp. 932 (933).

134 E.g. BGH BB 1994, pp. 597(598) (bottle syndrome case): The BGH remitted the case to the court of the second instance because this court had not adopted the producer's motion to take evidence that the claimant's parents (the claimant was aged two when consuming the tea) had been informed about the hazards of using the fluids as pacifier.

135 BGH BB 1981, pp.1966; BGH NJW 1992, pp. 560; 1992, pp. 2016 (2018).

136 BGH BB 1981, pp. 1966.

137 BGH NJW 1992, pp. 560 (561).

138 BGH NJW 1995, pp. 1286 (1288).

made plausible to the consumer in order to understand the true risks involved.¹³⁹ Applied onto the ‘bottle syndrome cases’, this means that the producer has to explain the consequences or the effect of using the beverages as pacifier. The kind of damage, dental caries, and the way it can realize, must be clearly expressed. Moreover, BGH made a statement on the warnings’ graphical presentation. Warnings must not be hidden between other information, e.g. on the product’s consistence or preparation.¹⁴⁰ However, BGH regarded it as sufficient for warnings to be presented as a separate part of the instructions in general by emphasizing them by means of underlining or framing.¹⁴¹

3 Product Monitoring / Produktbeobachtung

Another duty (“Verkehrspflicht”) of growing importance imposed on producers, and under certain circumstances even on distributors, is the so-called “Produktbeobachtungspflicht” or product monitoring duty. As already stated by the former Reichsgericht in a decision of 1940, the producer’s duty to avoid hazards and risks connected with the product’s employment does not end when the product has been launched into the stream of commerce.¹⁴² If it turns out that a product - due to a defect - may harm human health or life or may cause property damage, it may be the producer’s duty to take appropriate measures to avoid the occurrence of damages. Such measures may be subsequent warnings or even a product recall. A producer who fails to observe this duty and to take the necessary measures or who is taking them too late or in an insufficient way may have to recover all damages occurring due to the non-compliance with his duty.

In its decisions of 17 March 1981, BGH hold that a producer has to see that he is being kept well-informed about possible risks, hazards and damages resulting from the employment of his product (so-called “active product monitoring”). He may not rely on mere accidental information on risks.¹⁴³ Producers marketing large quantities of products have to establish an information system, e.g. via dealers, distributors and parts of their sales and service organization in order to ascertain that all complaints made by consumers with regard to the product are reported to them for review and analysis.¹⁴⁴ Furthermore, the court pointed out that each producer has to monitor the technological development in the field he is engaged in. Enterprises of a certain size - distributing their products worldwide - even have to pay attention to international congresses and seminars and have to evaluate the complete international literature.¹⁴⁵

139 BGH NJW 1992, pp. 560 (561/562); BGH BB 1994, pp. 597; BGH NJW 1995, pp.1286 (1287).

140 BGH NJW 1992, pp. 560 (561).

141 BGH NJW 1995, pp.1286 (1287).

142 RGZ 163, pp. 21 (26) [RGZ=Official Digest of Decisions of the Reichsgericht in civil law]; BGHZ 80, pp. 199 (202).

143 BGHZ 80, pp. 199 (202); BGHZ 80, pp. 186 (191).

144 Westphalen/Foerste (Footnote 54), Vol. 1, pp. 427-429.

145 BGHZ 80, pp. 199 (202).

The producer may be further obliged to monitor even other products - not manufactured and marketed by himself but by others - if they can be combined with his product, e.g. as accessories. The BGH had to decide a case in which the sole and exclusive German distributor of the Japanese motor-cycle producer Honda and Honda itself were sued for damages due to the violation of their product monitoring duties. Another producer - completely independent from the Honda organization - had marketed in Germany a certain accessory, a handlebar covering, which negatively affected the motorcycles' stability at high speeds. Even if Honda had launched an information campaign on the risks after the German TÜV¹⁴⁶ had called Honda's attention to this problem and after Honda had initiated own investigations, the BGH held even the distributor liable for damages. According to the BGH the warnings had been issued too late. Both producer and distributor may - according to the court - be obliged to investigate whether accessories affect the motorcycles' safety. This may be of importance in the following three cases: if accessories (or other complementing products) are necessary for the use of the product, if the producer of the main product allows for the combination by providing devices for their installation or if certain accessories are widely used in combination with his product.

In these cases, the producer has to test and to analyse the safe use of the combination products and - in case hazards and risks become known or cannot be ruled out - to warn the users of his products. The BGH mentioned that this duty is not only imposed on the producer and distributor of the main product but also on the producer of the accessory.

Another interesting aspect of the decision was that the product monitoring duty may not only be imposed on the producer but also on the distributor at least if he exclusively represents the foreign producer on the German market, i.e. if he is responsible for providing product information to subdistributors and final users.¹⁴⁷

Another point of importance is at which point in time the producer has to give proper warning or has to recall a product when realizing the potential risks or hazards of his product. Necessary measures tend to be extremely costly and may have a bad will effect on the market.¹⁴⁸ As was stated by the BGH, the correct point in time can be determined only cautiously. In this respect, guidelines were already given by the BGH in a decision back in 1981. The producer must not wait for major damages to take place, the potential danger must not even be "concrete". The time for and the character of the measures to be taken are, on the one hand, essentially determined by the right which is endangered by the product - human life, health, or property - and on the other hand by the severeness of the impending danger. If human life or health is endangered, measures are urgent and a mere 'serious suspicion' must suffice as reason for

146 "Technischer Überwachungsverein" = Technical Control Board (TÜV). TÜV is an authorized body for compulsory inspection of motor vehicles, industrial plants and other technical equipment.

147 BGHZ 99, pp. 169.

148 Practice of product warning or recall, however, shows that most producers take the opportunity to demonstrate their consciousness in terms of product safety, thus trying to strengthen the goodwill of their products.

taking immediate measures.¹⁴⁹ E.g., the producer must not wait until technical directives or standards have been adapted.¹⁵⁰ If, however, the use of the product may result in mere property damages, there may be less requirements concerning time and character of appropriate measures. If it is open whether and when danger may realize, the producer may even restrict himself to further investigations and research.¹⁵¹

II Scandinavia

1 The Rules of Negligence

Swedish and Danish product liability law is, despite the respective national Product Liability Acts, like the German one, mainly based on the rule of negligence. As already pointed out above, the Norwegian law accepts two basic rules of liability in tort - a rule of negligence and a non-statutory strict liability.¹⁵² However, only the Swedish legislator has incorporated the rule of negligence in the Act on Damages.¹⁵³

The rule's definition in Denmark and Norway is left to legal doctrine which defines it more or less unanimously:

“One is liable for a damage which has been caused by an action, which is attributable to the tortfeasor as committed wilfully or negligently, if interests are interfered with protected by the law of damages.”¹⁵⁴

An obvious difference between Danish and Norwegian definitions on the one hand and the Swedish rule on the other is that neither the Norwegian nor the Danish law clearly defines the kind of legal interests that are protected whereas the Swedish law explicitly refers to personal injury and property damages as recoverable.

It goes without saying that modern industrial development and its production of goods is part of a process in which not only the producer himself, but also employees and independent sub-contractors are involved. As was explained above, the German Civil Code, BGB, section 831, imposes liability for faults committed by employees only if the employer failed to comply with his duty of care when selecting or supervising the respective employee.¹⁵⁵ Scandinavian law of tort does not share this problem. Any fault committed by an employee is attributable to the employer if the action or omission falls within the scope of

¹⁴⁹ BGHZ 80, pp.186 (191).

¹⁵⁰ BGH NJW 1994, pp. 3349 (3350).

¹⁵¹ BGHZ 80, pp. 186 (192).

¹⁵² Cp. chapter D. V.

¹⁵³ Skadeståndslag of 2 June 1972 (Svensk Författningssamling 1972:207; 1975:404); Chapter 2, § 1 of the Swedish Act reads as follows: “Who willfully or negligently causes any personal injury or property damage, shall recover the damage, if not otherwise stipulated by this Act.”

¹⁵⁴ Denmark: Eyben/Nørgaard/Vagner (footnote 6), p. 57; Vinding Kruse (footnote 6), p. 30; Norway: Hagstrøm, *Culpanormen*, 3. ed., 1981, p. 9; Lødrup (footnote 6), p. 112.

¹⁵⁵ Cp. chapter E, I.1. above.

actions or omission the employer has to reasonably expect with regard to the employee's kind of work.¹⁵⁶ Whereas the roots of this principle, in Denmark and Norway, can be traced to the so-called "husbondansvaret"¹⁵⁷, it was first introduced to Swedish jurisdiction by the Act on Damages in 1972. Before this time, the employer was liable only if he had committed a fault in selecting, instructing or supervising his employees.¹⁵⁸ In other words, the rules of liability for employees corresponded to German law.

2 Liability for Independent Subcontractors

As in German law, faults of independent sub-contractors are generally not attributable to the producer. The producer cannot, in principle, be held liable for defects of a component part manufactured by an independent sub-contractor if he did not act negligently in selecting, instructing or supervising the sub-contractor.¹⁵⁹

a) "Non-Delegable Duties"

However, Scandinavian law - other than German law - knows an exception to this principle which is discussed under the term "non-delegable duties" - an exception which may have gained importance in Swedish product liability. "Non-delegable duties" are mainly defined as specified duties imposed on the principal in the interest of general safety.¹⁶⁰ In this respect, especially Danish law provides for considerable legal practice, e.g. concerning house owner's or public body's liability for keeping street and basement free from snow and ice, even if this work has been carried out by independent sub-contractors.¹⁶¹

The decision of the above mentioned Swedish "harbour crane case" is said to be based on this rule of "non-delegable duties".¹⁶² The damage on the harbour crane was caused by a defective component of an overweight indicator which had been incorporated into the indicator by the defendant. He had procured the defective component from its producer, an independent enterprise. The defendant stated that it had not been possible for him to recognize the metal splint in the component. Witnesses even testified that it was doubtful whether the splint was recognizable at all and that a risk regarding the quality of the indicator would have remained if the indicator had been opened for further investigation. None of the three instances of courts discussed whether and how

156 Cp. chapter 3 §1 (1) of the Swedish, § 2 - 1 (1) of the Norwegian Act of Damages. Danish jurisdiction still today relies on the rule of the so-called "husbond-ansvar" ("Master of the House Liability") of the "Danske Lov" ("Danish law") of 1683, cp. for the historic development in Denmark Vinding Kruse (footnote 6), pp. 182.

157 Cp. footnote 5 above and Bloth (footnote 13), pp. 84/85 with further references.

158 Hellner (footnote 6), pp. 150/151; Karlgren, *Skadeståndsrätt*, 5. ed., 1972, pp. 118.

159 Hellner (footnote 6), pp. 157, 163; Lødrup (footnote 6), pp. 161/164; Nygaard (footnote 76), pp. 253/254; Vinding Kruse (footnote 6), p. 186.

160 Hellner (footnote 6), pp. 165/166; Lødrup (footnote 6), p. 163; Vinding Kruse (footnote 6), p. 187.

161 Cp. Eyben/Nørgaard/Vagner (footnote 6), pp. 108; Vinding Kruse (footnote 6), p. 187.

162 On this case, cp. chapter C. I.2. b) cc) (2).

far a producer may have reason to rely on quality checks by their sub-contractors.¹⁶³ Sweden's Högsta Domstol, merely stated that the defendant was liable irrespective of the fact whether the fault was committed by him or the independent component producer. The overweight indicator had to be regarded as an "essential safety device" intended for the protection from severe personal injury and property damage.¹⁶⁴ In his special opinion - part of this judgement - Bertil Bengtsson explained that the defendant's liability generates from "certain general principles" of law of tort with regard to liability for faults committed by independent sub-contractors.¹⁶⁵ There is good reason to assume that the court relied on the principles of "non-delegable duties" in this point.¹⁶⁶

b) Norway and Denmark, especially the Danish 'Hæftelseansvar'

The question of liability for faults committed by independent sub-contractors is not of the same importance in Norway and Denmark. Norwegian law has developed non-statutory strict liability in tort as a main rule of liability besides the rules of negligence.

There is no doubt - according to Norwegian literature - that by application of this principle - the producer can be held liable for faults committed by a component manufacturer. This is due to the fact that non-statutory strict liability is liability for risks inherent to the business concerned.¹⁶⁷ The Høyesterett awarded a judgement in favour of the plaintiff in a case in which an importer was sued for damages caused by contraceptive pills imported from the Netherlands. The court stated that the importer is - with regard to this rule of liability - in the same way responsible as the producer himself.¹⁶⁸

Denmark, however, knows a general rule, the so-called "hæftelseansvar", according to which distributors "or any other supplier" (in Danish commonly referred to as "mellemandler"¹⁶⁹) can be held liable for damages caused by "faults committed in previous links in the chain of production and distribution".¹⁷⁰ In consequence of this rule - the historical development of which was first demonstrated by Dahl and explained in English in this yearbook already in 1975¹⁷¹ - an assembler may be held liable for a fault committed by a

¹⁶³ Cp. Göteborgs tingsrätt, Hovrätten för Västra Sverige NJA 1986, pp. 712. Please observe that the testimonies are not published. For further references cp. Bloth (footnote 13), p. 92, footnote 26.

¹⁶⁴ Högsta Domstol NJA 1986, pp. 712 (720).

¹⁶⁵ Bengtsson in NJA 1986, pp. 712 (721); also cp. Bengtsson in Bengtsson/Ullman (footnote 13), p. 57, pointing out that it is "very uncertain" whether liability can be imposed if a sub-contractor has caused a defect in a less important safety device.

¹⁶⁶ Cp. Ullman, Nordisk Försäkringstidskrift (NFT) 1989, pp. 189 (194). For a comparison to German law, cp. Bloth, *Produkthaftpflicht International* (PHI), 1987, pp. 209 (214/215).

¹⁶⁷ Cp. Bloth (footnote 13), pp. 130/131; NOU 1980:29, p. 18; Rognlien (footnote 6), p. 64; Steen-Olsen JV 1984, pp. 1 (35).

¹⁶⁸ Høyesterett Rt 1992, pp. 64 (78).

¹⁶⁹ Cp. Dahl/Rønne/Hornsberg/Levy, *Juristen* 1990, pp. 145 (167); Vinding Kruse (footnote 6), p. 235.

¹⁷⁰ Dahl, *ScStL* 1975, pp. 59 (91); Eyben/Nørgaard/Vagner (footnote 6), pp. 203.

¹⁷¹ Dahl, *ScStL* 1975, pp. 59 (91-94); previously Dahl described it in his monography

component producer, an importer or another distributor for a producer.¹⁷² E.g. the importer of a heat exchanger for the application in a district heating plant had to recover damages which were caused by defects of products imported from Sweden. Due to soldering defects, oil had penetrated into the heating water cycle which led to damages within the consumers' radiator system. The importer was held liable "as producer".¹⁷³ This liability can be imposed on parties distributing the defective product or the product in which a defective component has been incorporated for commercial purposes. Furtheron, the distributor is liable only if liability can be imposed on the producer as well. If, e.g., the producer did not act negligently, the distributor cannot be held liable either.¹⁷⁴

This kind of liability has, therefore, been characterized as a "guarantor's"¹⁷⁵ or "special form of vicarious liability"¹⁷⁶ and has been incorporated as section 10 into the Danish Product Liability Act:

"As regards product liability, a distributor or seller shall be directly liable to the injured party and to any other distributors or sellers in the chain of distribution."¹⁷⁷

The term "mellemandler/distributor/seller" is defined by Section 4 (3) of the Product Liability Act as a "person putting a product into the stream of commerce not having to be regarded as the producer". Producers within the terms of the Product Liability Act are not only manufacturers, but also persons importing products into the Common Market (Section 4 (2)) or so-called "quasi-producers" (section 4 (1)). Section 10 of the Product Liability Act gains practical importance especially concerning imports from other member states of the European Union for which the importer can be held liable in Denmark. According to Article 3 (2) of the Directive, importers can be held liable only in case of imports from countries outside the European Union.¹⁷⁸ Section 10, however, covers not only the distributor's and seller's liability for defects the producer may be held responsible for according to the Product Liability Act, but even in case the producer is liable according to the rule of negligence.¹⁷⁹ It can

Produktansvar of 1973, pp. 372. Today, it is generally accepted in Danish literature: Hansen, UfR 1986 B, pp. 266 (270.); Vinding Kruse (footnote 6), p. 235. For a more detailed report in German, cp. Bloth (footnote 13), pp. 132-137.

¹⁷² Dahl/Rønne/Hornberg/Levy, *Juristen* 1990, pp. 145 (154/155).

¹⁷³ The judgement of the qstre Landsret (18 May 1981, 11. Afd. no 420/1978) is not published but reported by Dahl/Rønne/Hornberg/Levy, *Juristen* 1990, pp. 145 (155).

¹⁷⁴ The Vestre Landsret dismissed an action brought against a distributor holding that the product instruction, which the claimant regarded as insufficient, was given correctly by the producer; UfR 1954, pp. 1013 (1016).

¹⁷⁵ Lovforslag no L54, Ft 1988-89, Tillæg A, p. 1606; Kønig/Hansen, *Produktansvaret i Danmark - efter lovens ikrafttræden i 1989*, 1989, p. 69; Vinding Kruse (footnote 6), p. 235.

¹⁷⁶ Dahl, *ScStl* 1975, pp. 59 (92).

¹⁷⁷ For the reasons of the legislator, cp. Lovforslag no L54, Ft 1988-89, Tillæg A, pp. 1606, 1637. The Danish discussion is reported on by Bloth (footnote 13), pp. 135/136.

¹⁷⁸ Cp. Lovforslag no L54, Ft 1988-89, Tillæg A, p. 1638.

¹⁷⁹ Cp. Dahl/Rønne/Hornberg/Levy, *Juristen* 1990, pp. 145 (167) and Bloth (footnote 13), pp. 136-137 with further references.

be stated that the Danish rule of “hæftelseansvar” was more extensive concerning a distributor’s liability than the Directive. The opinion in Danish literature - according to which the respective rules of the Directive were not necessary concerning Danish product liability¹⁸⁰ - can be agreed with.

3 The Producer’s Duty of Care concerning Product Liability

Compared to German law, Scandinavian product liability practice according to the rule of negligence seems to have developed less systematically and stringent. This is probably due to the fact that even the Scandinavian Supreme Courts, which is particularly true for the Danish one, seem - from a German lawyer’s point of view - to be reluctant to give extensive legal reasons for their decisions. Reasoning on a more abstract level - seeking to give guidelines to the handling of similar cases - is comparatively rare. However, an analysis of judgements in this field reveals that the following aspects seem to be of importance for defining the duty of care to be imposed on a producer.¹⁸¹

Courts in Sweden and Norway have looked upon product liability as part of consumer law and have defined the duty of care to be observed by the producer from this point of view. It has been said that there was a tendency to strengthen consumer protection which - according to the courts - justified a tightening of the producer’s duty of care. By this reasoning, the Swedish Högsta Domstol found an importer liable to pay damages to a person injured by defective haircurlers. Defects were caused by the foreign producer of the products.¹⁸² Consumer protection formed also part of a decision dealing with the requirements to proper product instructions.¹⁸³ A Norwegian court stated that the consumer in general is not in a position to protect himself against defective products originating from industrialized manufacturing processes. On the other hand, the court pointed out the duty of care may not be tightened in a way that liability according to the negligence rule turns out to be strict liability.¹⁸⁴

Other criteria are the prospective types of consumers of the product. There may not be the same requirements for product safety if a product is intended for use by experts only or if it is meant to be used by private consumers. This has been clearly expressed by the Högsta Domstol in connection with product instructions.¹⁸⁵ The Norwegian Høyesterett held a producer of a rotary iron liable for paying damages to a child who had put its hand into the open toothed gear of the iron and lost two fingers in consequence thereof.¹⁸⁶ Another producer escaped liability due to the reasoning of the Høyesterett that a product warning was not necessary in a case in which it was reasonable to expect the expert using

180 Lett, *Lov on produktansvar* (Forsikringshøjskolens Kompendier 10), 2nd ed. 1991, p. 20.

181 For a detailed overview of these arguments, cp. Bloth (footnote 13), pp. 88-92 (Sweden), 96-100 (Norway); 104-106 (Denmark).

182 Högsta Domstol NJA 1977, pp. 538 (544).

183 Högsta Domstol NJA 1987, p. 417 (425).

184 Eidsivating Lagmannsrett RG 1974, pp. 681 (683/684). For further references concerning this argumentation, cp. Bloth (footnote 13), pp. 88/89, 96/97.

185 Högsta Domstol NJA 1987, pp. 417 (425).

186 Høyesterett Rt 1950 pp. 1091 (1093).

the product, a fire extinguisher, to be aware of the risk involved which had led to the injury.¹⁸⁷

It is common opinion in Scandinavia that neither the mere compliance of a product with branch standards or provisions of public authorities nor a product's approval by a public authority can release the producer from liability.¹⁸⁸ The approval of pharmaceutical products, e.g., does not necessarily lead to an action's dismissal - which was confirmed by a Swedish court concerning X-ray treatment¹⁸⁹ and by a Norwegian court concerning contraceptive pills.¹⁹⁰ It is the producer who knows the risks of his product best and is informed at the earliest point of time that standards given by safety provisions may not be sufficient.¹⁹¹ Danish decisions, however, show that public approval may be an argument for dismissing an action¹⁹². A decision by the Högsta Domstol states that the producer may have to change the safety devices of a press already before it is stipulated by the law. In this case, an employee was injured by a press supplied in 1970 which was in compliance with valid safety provisions at the time. Due to other accidents of the same kind, the Court stated, the producer had to be aware of the risk inherent to the press and had to adapt the machine's design accordingly already before the safety provisions concerned were amended in 1974.¹⁹³

a) Instructions and Warnings

The Högsta Domstol in the so-called "tile decision" of 1987 explained more detailed the requirements for proper product instructions. A house owner had sued the producer of tiles for damages stating that product instructions did not contain information concerning necessary ventilation conditions of house roofs when applying the tiles. Due to the fact that the claimant had not provided for correct ventilation, damages on houses were caused by melted snow. The Court, who regarded the action as well-founded, stated that the omission of proper warnings has the same effect as misleading instructions. Whether instructions or warnings are necessary and to what extent depends on the prospective consumers. Information directed to experts may have to be less extensive than information directed to private consumers. Failure to issue warnings may justify claims for damages if the information concerned regards the 'natural usage of the product' and it is unreasonable to expect prospective consumer to know how

187 Høyesterett Rt 1957, pp. 985 (987). For further references, cp. Bloth (footnote 13), p. 97, footnote 8.

188 For a detailed overview cp. Bloth (footnote 13), pp. 89-92 (Sweden), 99/100 (Norway), 104-106 (Denmark).

189 Hovrätt över Skåne och Blekinge NJA 1982, pp. 421 (470). The limited resources - as the court put it - make the approving authority dependent on information by the producer. Cp. Dufwa (footnote 6), pp. 74/75.

190 Eidsivating Lagmannsrett Rt 1974, pp. 1196 (1213).

191 Steen-Olsen JV 1984, pp. 1 (17).

192 Vestre Landsret UfR 1954, pp. 1013 (1016). But even the opposite can be the case: Vestre Landsret UfR 1949, pp. 112 (121); Dahl (footnote 6), pp. 288, 295/296.

193 Högsta Domstol NJA 1977, pp. 788 (795). For further references, cp. Bloth (footnote 13), p. 89, footnote 9.

to prevent foreseeable damages.¹⁹⁴ Proper warnings must deal with risks connected with the natural use of a product and foreseeable damages.

There is no considerable legal practice on product instructions in Norway and even no published decision according to which a producer was held liable due to insufficient instructions. On the contrary, published decisions seem to require a good knowledge of risks connected with the use of the products on the part of the consumers. That can be demonstrated by a decision of the Høyesterett of 1974 concerning personal injury caused by a collapsing ladder. The claimant substantiated his action by referring to insufficient product instructions. The court stated expressly that the ladder did not have to be ‘foolproof’.¹⁹⁵

Danish literature requires that instructions should be concise, concrete and precise and in Danish. Any danger connected with the use of a product and the way to avoid it have to be described.¹⁹⁶ Instructions have to refer to the ‘normal user’ and to ‘normal usage’.¹⁹⁷ Generally known danger does not have to be subject of warnings. Product misuse does not have to be covered if correct usage is obvious to the average consumer.¹⁹⁸ Danish courts dismissed actions in which they regarded danger as not foreseeable. In one case, a consumer suffered from allergic reactions when applying a certain lotion for a foot-bath. Due to the fact that 70.000 bottles of this lotion had already been sold without even one such injury having become known, the producer escaped liability.¹⁹⁹

b) Product Monitoring Duty

Other than in Germany, there seems to be no published case in Scandinavia which focusses on the producer’s monitoring duty. Even a term corresponding to the German “Produktbeobachtungspflicht” does not seem to have evolved yet.²⁰⁰ However, that a producer may be obliged to control products once they have been put into the stream of commerce is not unknown to legal practice or literature.

A Swedish court of second instance, the Hovrätt över Skåne och Blekinge, had to decide in how far a producer of pharmaceutical products had to become aware of collateral effects of his product which were reported in French and German publications. The court stated a producer could not reasonably be expected to follow the medical literature from all over the world. He may restrict himself onto generally accepted and spread journals from countries with a well developed pharmaceutical industry and supervisory authorities, especially in

¹⁹⁴ Högsta Domstol NJA 1987, pp. 417 (424).

¹⁹⁵ Høyesterett Rt 1974, pp. 41 (42/43). Please observe that the first instance court and a minority of judges in the Høyesterett did not share this point of view. For further references, cp. Bloth (footnote 13), p. 101/102.

¹⁹⁶ Dahl (footnote 6), p. 312.

¹⁹⁷ Dahl, ScStL 1975, pp. 59 (80).

¹⁹⁸ Dahl (footnote 6), p. 310; Dahl/Rønne/Hornsberg/Levy, Juristen 1990, pp. 145 (152).

¹⁹⁹ Østre Landsret UfR 1947, pp. 656 (659/660); similar reasoning by Vestre Landsret UfR 1954, pp. 1013 (1016).

²⁰⁰ Cp. Hellner (footnote 6), p. 315 who introduces the term ‘iakttagelseplikt’ which corresponds to ‘Beobachtungspflicht’.

countries where the product concerned is marketed.²⁰¹ Also Norwegian decisions ‘touched’ the problem whether and how a producer had to pay attention to scientific publications on risks connected with products of the type marketed by him.²⁰² Also, literature very rarely describes this topic and restricts itself to the statement that the producer may be liable to recall the products or to warn the consumers properly when risks become known to him.²⁰³

III Resumé

Scandinavian and German product liability law, though based on the respective rule of negligence, has developed differently. Even the starting points in all countries differ to a certain extent. In Norway, the importance of the negligence rule for product liability is less pronounced than in the other countries due to the existence of a non-statutory strict liability. Norwegian jurisdiction is not forced to apply the negligence rule as a semi-strict liability by strict definitions of the duty of care to be imposed on the producer. German jurisdiction, however, had to rely on the negligence rule as a matter of principle and was, above that, confronted with the problem of producers easily escaping liability for faults committed by employees. This was not a problem for Scandinavian law according to which faults committed by employees are attributable to the producer.

All countries share the problem that producers, according to the rule of negligence, cannot be held liable for damages caused by defective products procured from independent sub-contractors unless they had acted negligently in the sub-contractor’s selection or supervision. In the modern industrialized world, which is characterized by decentralization and diversification of production, this turns out to be a clear disadvantage towards strict liability as it can be imposed according to the national Product Liability Acts. The assembler is liable for any defect of his product irrespective of the fact who is responsible for the lack of safety. The product’s defectiveness itself triggers liability, not a fault committed by the producer. Especially in Sweden and Germany, the Product Liability Acts in this respect lead to an improvement of the injured’s protection. Norwegian non-statutory strict liability allowed already to cope with the problem before the Product Liability Act came into force. The same was true for Danish jurisdiction which could rely on the so-called ‘hæftelseansvar’ according to which an assembler could be liable for faults committed by a component producer. However, liability requires negligence on the part of a previous link in the chain of production, the product’s defectiveness alone is not sufficient. Compared to Norwegian and Danish legal practice, liability based on the non-compliance with “non-delegable duties”, as in Sweden, has not evolved as a rule which can contribute in a more general way to a solution which is in line with developments in modern industry. This rule covers only liability for damages caused by certain safety devices.

201 Hovrätt över Skåne och Blekinge NJA 1982, pp. 465 (471).

202 Eidsivating Lagmannsrett Rt 1974, pp. 1196 (1215/1214) - contraceptive pills; Eidsivating Lagmannsrett RG 1974, pp. 681 (684/685) - glue.

203 Cp. Dahl (footnote 6), pp. 282, 297, 335; Steen-Olsen JV 1984, pp. 1 (18).

The greatest achievement of German jurisdiction may be the development of the so-called “Verkehrspflichten” concerning product safety in combination with special rules on evidence to be described in the following chapter. The concentration of product liability at one senate of the BGH, the quantity of cases brought to the court and the fact that the court is inclined to give extensive reasons, even in a more general way, has contributed to a consistent development of product liability law which is of utmost importance in legal practice and for the industry itself in order to avoid liability to the greatest possible extent. The court’s jurisdiction on product instructions and warnings is a good example for this.

F Problems of the Production of Evidence

It needs no further explanation that the effectiveness of the injured’s protection in a product liability case depends to a great deal on his possibility to produce evidence for the product’s defect, the damage’s causation by the defect - and as far as liability for negligence is concerned - the defendant’s fault. The claimant mostly has no insight in internal procedures, production and development processes on the defendant’s side. Product damages are often caused by complicated chemical and/or physical processes. Jurisdiction has to find reasonable solutions to these problems in order not to make the injured’s protection a mere theoretical one.

I According to the National Product Liability Acts

The Directive expressly provides rules for the burden of proof. According to Art. 4 the injured person is required to prove the damage, the defect and the causal relationship between defect and damage.²⁰⁴ The producer, however, can escape liability by proving in his defense according to Art. 7, among others, that the state of scientific and technical knowledge did not allow the defect’s discovery.²⁰⁵ The German and Danish Acts repeat the general rule of evidence,²⁰⁶ whereas the Swedish and Norwegian Acts do not contain any corresponding provisions. According to the respective Swedish and Norwegian “travaux préparatoires”, the general rules of burden of proof have to be applied according to which the preconditions of the claims made have to be proved by the claimant²⁰⁷ so that, in principle, Swedish and Norwegian law comply with the Directive.

²⁰⁴ Taschner, author of the Directive, has called the rule that the claimant has to prove the causal risk between defect and damage the “Magna Charta of Protection of Industry”, Taschner NJW 1986, pp. 611(613).

²⁰⁵ Please observe that the defense of a development risk is optional to the member states (Art. 15 sec 1(b)). While the German, Swedish and Danish Acts know this defense, the Norwegian legislator has decided to place liability for development risks on the producer. For Scandinavian law cp. Bloth, pp. 48/55 with further references, for German law cp. Taschner/Frietsch, Einführung, note 95 subseq.; § 1, note 98 subseq.; MünchKomm-Cahn (footnote 47) ProdHaftG § 1, note 47-52; Westphalen/Foerste (footnote 13), Vol. 2, pp. 51.

²⁰⁶ Germany: § 1 (4); Denmark: § 6 (2).

²⁰⁷ Prop. 1990/91: 197, p. 64; Ot prp nr 48 (1987-88), p. 75. In the Swedish discussion on

Even though the allocation of the burden of proof is clearly stipulated, this does not mean that the production and consideration of evidence must be corresponding in each member state.²⁰⁸ It is most likely that jurisdiction of the member states in this point will rely on national practice developed in general law of tort or product liability.

II Rules of Evidence in German Product Liability

1 Fault

The German landmark decision on product liability, the chicken pestilence case of 1968, not only clearly founded product liability on the rule of negligence, but also was essential with regard to the allocation of burden of proof. The decision is based on the understanding of the BGH that the plaintiff's chances to prove fault depend on his possibility to clarify details of the occurrence of the damage. In most cases, the claimant does not - and cannot be expected to - have the insight into the producer's production and development processes. Therefore, BGH held that the producer has to show that he has not acted negligently if the plaintiff shows that the damage was caused by a defect with origin in the producer's sphere.²⁰⁹ In other words, not the plaintiff has to prove fault on the producer's side, but the producer has to show the absence of such fault, that he has not violated the duty of care imposed on him. Also if the decision of 1968 was on a manufacturing defect the BGH has developed this rule in subsequent decisions. In a decision of 1976 e.g. this rule was even applied on defective design.²¹⁰ This jurisdiction was founded on the assumption that defects originating in a product design or its manufacturing process cannot be proven by the plaintiff for lack of insight in the product design and manufacturing processes. However, it was doubtful, whether these principles could be applied on product instructions and warnings. It could be argued that even from an external point of view the insufficiency of given instructions can be proven.²¹¹ In the "bottle syndrome case" of 12 November 1991, BGH held that the same rule as applied on fault of production and design was also valid for faults in instructions if they reasonably can be expected when putting the product into the stream of commerce. The plaintiff has to prove that instructions were necessary. The defendant on his side has to show that it was impossible to anticipate the danger and that, therefore, no instructions were required.²¹²

However, this rule slightly diverges in cases related to instructions or warnings resulting from the producer's monitoring duty. As explained above,²¹³

legislation it was proposed to introduce a special rule concerning causation saying that a causal connection is proved if a dominant probability can be shown, cp. for further details Bloth (footnote 13), pp. 216.

²⁰⁸ Cp. Taschner in Taschner/Frietsch (footnote 13), Art. 4, note 3.

²⁰⁹ BGHZ 51, pp. 91 (104).

²¹⁰ BGHZ 67, pp. 359 (362).

²¹¹ Among others: Baumgärtel, JA 1984, pp. 660 (668).

²¹² BGH NJW 1992, pp. 560 (562).

²¹³ Chapter E. I.3.

the producer may be obliged to give proper warnings if - after the product has been put out on the market - it turns out that certain risks are involved in the employment of the product. In these cases, the BGH stated that a shift of the burden of proof is justified only to a certain extent. It cannot be said, so the BGH, that in cases in which the producer should have become aware of dangers e.g. because of publications or experience by the product's users, the plaintiff has to prove circumstances merely in the sphere of the producer. In these cases, according to the BGH, the plaintiff has to prove that the producer has set aside the duty of care imposed on him in general. The plaintiff, however, can be exonerated from the burden of proof concerning the "individual fault" of the producer, that is whether he, the producer, was aware or ought to have been aware of the risk.²¹⁴

2 Causation

It may be problematic for a plaintiff to prove that the damage could have been avoided if proper warnings had been given. The defendant may plead that the plaintiff would probably not have paid attention to the instructions. In this point, the BGH hold that it can be presumed that proper instructions would have been followed so that the damage would not have occurred.²¹⁵

Also, in general, a so-called "prima face" evidence may help the claimant. If facts have been proven which according to general experience allow conclusions on a certain process or occurrence the judge may regard this as proven, unless the defendant shows that the damage may have occurred in another way as according to general experience.²¹⁶

3 The Product's Defect When Put into Circulation

It is also a defense according to the Directive - Art. 7(b) - that the producer can escape liability when he proves that the product's defect first has come up after the product has been put into circulation. In other words, the burden of proof in this point is shifted. The plaintiff is exonerated from the burden to prove that the defect was present when the product was put into circulation. These questions came up for instance in connection with cases in which damages were caused by exploding refillable glass bottles filled with carbonated beverages. The claimant in such cases had to face the problem that his main evidence - the bottle - was destroyed. The problem was here to find out whether the defect of the bottle came up before the refilling or subsequent to delivery, e.g. when storing the bottles at the retailer. Also in these cases BGH shifted the burden of proof from the claimant to the defendant. The claimant does not have to prove that the bottle had already been defective when it was put into circulation. The court stated that due to the fact that the risk of explosion is typical for the product, the producer

²¹⁴ BGHZ 80, pp. 186 (196-199); critical against this jurisdiction, Westphalen/Foerste (footnote 54), vol.1, pp. 577; Kötz (footnote 54), note 458. Kötz is of the opinion that the same rules have to be applied in this case as in cases of insufficient instructions in general.

²¹⁵ BGH NJW 1992, pp. 560 (562).

²¹⁶ Baumgärtel, JA 1984, pp. 660 (663); Kötz (footnote 54), note 259.

has to make sure that bottles are not damaged before refilling. If he does not succeed in producing evidence that the bottles are free from defects e.g. by sufficient documentations or showing a sufficient mechanism of inspection, he cannot escape evidence by alleging the product's defectlessness. In order to avoid liability, the producer must provide for technical devices or even visual inspections in order to warrant that defective bottles are not being refilled.²¹⁷

III Rules of Evidence in Scandinavian Product Liability

1 Causation

In all Scandinavian countries the burden of proof concerning the damage's causation in principle rests with the claimant.²¹⁸ However, at least Swedish and Norwegian jurisdiction have eased the burden of proof under certain circumstances.

a) Sweden

The Swedish Högsta Domstol for instance ruled in a decision concerning product liability of 1982 that causation may be regarded as proven if the claimant's assertions are "clearly more likely" than those of the opponent and the assertions even as such are likely with regard to the circumstances of the individual case.²¹⁹ However, the court decided this for a case in which "hardly comprehensible and complicated processes of technical or economic nature" were concerned, as for instance causal links between the usage of drugs and injuries.²²⁰

However, this rule is not restricted to product liability, but has been evolved by jurisdiction in cases on environmental liability and liability in traffic²²¹ and corresponds to the rules of the Swedish "Pharmaceutical Injuries Insurance". According to the conditions of the insurance a "dominant probability" of a causal connection is sufficient evidence.²²² Such a rule has been incorporated in the Act on Environmental Damages of 1986 which stipulates that causation of damages by immissions can be regarded as proven when the claimant can show

²¹⁷ BGHZ 104, pp. 323 (333); BGH NJW 1993, pp. 528 (529); BGH, Zeitschrift für Wirtschaftsrecht (ZIP) 1995, pp. 1094 (1098).

²¹⁸ Sweden: Prop. 1990/91:197, p. 64; Dufwa (footnote 6), pp. 75; Norway: NOU 1980:29, p. 139; Lødrup (footnote 6), p. 276; Rognlien (footnote 6), p. 210; Denmark: Eyben/Nørgaard/Vagner (footnote 6), pp. 82, 210, 280; Vinding Kruse (footnote 6), pp. 143, 352.

²¹⁹ Högsta Domstol NJA 1982, pp. 421 (482).

²²⁰ Please observe that the action brought by the claimant was dismissed despite the application of this rule. In literature, it has been said that the strict application of this rule has not really eased the claimant's burden of proof; Dufwa, *Läkartidningen* 1983, pp. 4381 (4382); Dufwa JT 1989-90, pp. 327 (329).

²²¹ Högsta Domstol NJA 1977, pp. 176 (traffic); NJA 1981, pp. 622 (environmental liability). Cp. for a more detailed survey Bloth (footnote 13), pp. 220.

²²² For further details cp. Blomstrand/Broqvist/Lundström, *Produktansvarslagen*, 1993, pp. 189; Bloth (footnote 13), pp. 333.

a “dominant probability” of a causal link.²²³ The legislator expressly stated that this rule can even be applied by analogy on product liability.²²⁴

b) Norway

Proof of causation is a frequently debated topic in Norway as well.²²⁵ Norwegian jurisdiction has not only eased the burden of proof, but under certain circumstances shifted it. Proof of causation was for natural reasons of certain importance in the above reported contraceptive pill cases.²²⁶ In the case decided 1992, the defendant denied that estrogen as a substance of the pill had caused thrombosis by stating that the injured was a smoker, had consumed alcohol shortly before the injury occurred and had suffered from an infection. The Høyesterett ruled that evidence is produced sufficiently if it is more likely that the contraceptive was the necessary cause for the injury than it was not. The requirements on the production of evidence may not be as strict as in science.²²⁷ This means that the claimant does not have to produce a 100 % evidence in order to obtain damages, a “predominant probability” is sufficient; even if the court has some doubts, damages can be awarded. This has been expressed by a first instance court decision concerning a motor lorry when it was - according to the plaintiff - damaged due to a welding defect. The court stated that it regards causation as proven despite some doubts.²²⁸ However, this practice is not a special development in product liability but is a main rule of Norwegian law on evidence according to which a fact can be regarded as proven once “a predominant probability” can be shown.²²⁹

However, jurisdiction also has, under certain circumstances - but not limited to product liability - shifted the burden of proof with regard to causation. In one case it was controversial whether chickenfeed was defective and had caused diseases and a significant decrease in egg production. The claimant alleged that these effects were caused by lack of vitamin E. The Høyesterett decided that the evidence produced by the plaintiff was not sufficient to regard this alleged cause as “predominantly probable”. But it decided that the burden of proof in this case rested with the defendant who did not preserve the evidence when he was informed on the occurrence of damages. The claimant had made samples of the feed available to the defendant who, however, restricted his investigations to the product’s appearance and smell. The Høyesterett was of the opinion that the defendant as producer and expert had been obliged to analyze the product’s

223 Cp. on the Act on Environmental Liability, Bloth, *Natur und Recht* (NUR) 1991, pp. 372 (in German); Eriksson, *Rätten till Skadestånd vid miljöskador*, 1986; Hellner (footnote 6), pp. 331.

224 Prop. 1985/86:83, pp. 29.

225 For a more detailed survey, cp. Bloth (footnote 13), pp. 224-227, with further references.

226 Cp. Chapter D. III.

227 Høyesterett Rt 1992, pp. 64(69-78). For further details and a report on the decision of 1974 (Schering AG) and discussion in literature cp. Bloth (footnote 13), pp. 224 with further references.

228 Tinn og Heddal Herredsrett RG 1983, pp. 834 (839).

229 Engström JV 1981, pp. 122 (136); Lødrup (footnote 6), pp. 276 (278); Nygaard (footnote 76), p. 340; Rognlien (footnote 6), pp. 209.

vitamine contents. Because he had failed to fulfill this obligation he had to pay damages.²³⁰ This jurisdiction mirrors a well established opinion in Norwegian literature that the burden of proof can be shifted to the party who had the best reason to preserve evidence.²³¹ It may be doubted whether this rule can be applied under the Product Liability Act, even if this Act does not - according to the Directive - contain an expressive provision on the burden of proof. Due to the fact that according to the Directive the burden of proof is with the injured, Norwegian courts should be prevented from the application of this rule.

c) Denmark

Also in a decision on the effects of contraceptives the Danish Høyesterett refused to ease the burden of proof concerning causation resting with the claimant. Also, here the plaintiff alleged that estrogen, as substance of the contraceptive, had caused a thrombosis and relied on general investigations and experience on this question. She could not produce evidence in her individual case. The court of second instance - the Østre Landsret whose decision was confirmed by the Høyesterett - held that the general risk itself cannot be regarded as sufficient evidence in legal terms. According to the court, there was no reason to diverge on this field of the law from generally applied principles in law of tort.²³²

2 Negligence

a) Sweden

As far as it can be seen, no (published) decision of any Swedish court has made an express statement on the production of evidence with regard to negligence, even though some authors have pleaded for shifting the burden of proof.²³³ Very carefully it may be concluded from Swedish legal practice that it is sufficient if the plaintiff can show circumstances especially for a product defect which make negligence obvious. In the above reported "harbour crane case"²³⁴ the plaintiff alleged deficiencies in the inspections of the products which if they had been carried out properly would have prevented the damage. The plaintiff did not

230 Høyesterett Rt 1972, pp. 1350 (1356). In other decisions the Høyesterett denied to shift the burden of proof. In one case due to the fact that the producer had done all what could reasonably be expected of him (Rt 1973, pp. 1153/1156) in the other because the plaintiff had not made available to the producer all information on the circumstances of the case (Rt 1974, pp. 1160/1165). For further details, cp. Bloth (footnote 13), pp. 225-227.

231 Cp. Bratholm/Hov, *Sivil Rettergang*, 1973, pp. 303; Lødrup (footnote 6), pp. 285; Rognlien (footnote 6), p. 213.

232 Østre Landsret UfR 1989, pp. 135 (144); Høyesteret UfR 1989, pp. 135 (145).

233 Bengtsson, *Om ansvar för läkemedel*, 1969, pp. 30; Karlgren (footnote 6), pp. 179; Saxén JFT 1974, pp. 159 (164). The two latter ones refer also to the jurisdiction of the German BGH.

234 Chapter C. I. 2 b) cc) (2).

prove in detail how the inspection was carried out and why it was insufficient. On the contrary, it was the producer who explained the inspection procedure.²³⁵

b) Norway

The same rules are applied as concerning causation. The burden of proof, in principle, is with the plaintiff.²³⁶ Evidence may be regarded as sufficiently produced if negligence is more likely than any other circumstance.²³⁷ Even if there is no published law court decision, burden of proof may be shifted if the defendant has not preserved evidence as far as it may be reasonably expected.²³⁸

c) Denmark

In Denmark, there is no express court statement, either, regarding the requirements for the production of evidence or the burden of proof. However, literature understands legal practice so that the burden of proof is shifted concerning negligence. If the plaintiff has shown a product defect, negligence could be presumed which means that the defendant has to prove that he did not act negligently.²³⁹

235 Högsta Domstol NJA 1986, pp. 712 (715) and the unpublished record of the proceedings in the first instance court, Göteborg Tingsrätt, dom nr. DT 74 of 2 March 1982, pp. 7/10.

236 NOU 1980:29, p. 141; Lødrup (footnote 6), p. 153; Rognlien (footnote 6), p. 216.

237 Lødrup (footnote 6), p. 153.

238 NOU 1980:29, p. 141; Rognlien (footnote 6), p. 216.

239 Dahl (footnote 6), pp. 400; Dahl, ScStL 1975, pp. 59 (79); Dahl/Rønne/Hornsberg/Levy, *Juristen* 4/1990, pp. 145 (152); Kønig/Hansen (footnote 24/4.Teil), pp. 103; Vinding Kruse (footnote 6), p. 235: "possibly shifted burden of proof".