PRODUCTS LIABILITY

Report of the Torts and General Law Reform Committee

Presented to the Minister of Justice in March 1974

REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE ON PRODUCTS LIABILITY

I. INTRODUCTION

1. Terms of reference

Products liability was one of the topics for study and report originally referred by the Law Revision Commission to the Torts and General Law Reform Committee upon its establishment in 1966. Liability for defective products has at common law developed in two areas - contract and tort. The Committee has primarily concerned itself with an examination of the scope of the liability in tort.

2. Second Business Law Symposium 1967

A valuable starting point for the Committee's deliberations arose in 1967 when the Legal Research Foundation chose products liability as the central theme of the Second Business Law Symposium.

The Symposium canvassed the tortious, contractual and statutory liabilities of the manufacturer, importer, distributor and retailer when any defective product is involved in a consumer sale.(1)

Dealing with a manufacturer's tortious liability, a paper (2) written by Mr D.S. Beattie (now Beattie J.) traced the development of the common law Donoghue v. Stevenson approach and outlined the American regime of strict tort liability. Having observed that the arguments for and against strict liability revolve around the competition between the two basic concepts of the individual's interest in security (compensation irrespective of fault) and his interest in freedom of action (liability to compensate only for negligent activity), the paper concludes

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1. Second Business Law Symposium - Papers and Proceedings.
2. Ibid, 12-26.

that the issue is one more suitable for resolution by the legislature.

The attitude towards products liability of the commercial interests at the Symposium was noticeable for the accent on non-legal measures to control the manufacture of defective products. Competition, reputation, and consumer confidence were all rated above legal factors as representing incentives for decreasing the incidence of injury from defective products. While the availability of liability insurance may allow the loss to be shifted to the defendant manufacturer as perhaps a more efficient loss distributor, the manufacturing interests pointed out that allowing an insurance company to pay does not compensate for loss of goodwill. On the other hand those espousing the consumer interest advocated a strict liability approach as able to afford the greatest measure of protection not only on the domestic market but also at the international trade level.

Attention was drawn to the existence of compulsory insurance schemes where industrial and motor vehicle accidents were involved. These schemes were seen as forerunners of a strict liability concept and as an indication of the manner in which products liability could develop.

3. Research material

A very helpful position paper was prepared for the Committee by Mr C.J. Tobin LL.M. (NZ), B.C.L. (Oxon) who had just completed a period of study at the University of Chicago Law School and who has published articles on the role of products liability both in the field of personal injuries (3) and that of compensation for property damage and economic loss. (4)

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3. C.J. Tobin, Products Liability: A United States Commonwealth Comparative Survey 3 N.Z.U.L.R. 377

4. C.J. Tobin, Products Liability : Recovery of Economic Loss? 4 N.Z.U.L.R. 36.

4. The Committee sought to evaluate the validity of a strict liability proposal in the New Zealand context by the preparation and circulation of a detailed questionnaire dealing with many aspects of the operation of the present law. The questionnaire canvassed the views of the N.Z. Manufacturers Federation. the N.Z. Retailers Federation, the Associated Chambers of Commerce, the Consumer Council, the Insurance Council of New Zealand, the N.Z. Law Society and the Departments of Health, Labour and Trade and Industry. A sample questionnaire appears in Appendix I.

The replies indicated that claims were relatively rare. The predominantly low key response meant that little new data was available to the Committee.

Response from the legal sector varied from an expression of satisfaction with the existing law to the opposite view that liability should lie on the manufacturer as the party best placed to insure against the risk of damage. Interposed between these two extremes was the suggestion that the problem of multiplicity of parties could be overcome by allowing the plaintiff to sue whichever person he or she regarded as expedient.

The response from the commercial sector disclosed so negligible a level of claims that when liability insurance was carried, the premiums were not sufficiently significant to have an impact on the pricing structure of the product.

II. Impact of the Accident Compensation Act 1972 on the scope of products liability

5. The enactment of a comprehensive accident compensation scheme has had a major impact on the scope of products liability in this country. When the scheme is implemented,

all personal injury by accident in New Zealand will be catered for by the scheme, with the corresponding elimination of any common law action.(5) The common law is supplanted by an entitlement to compensation under the statutory scheme, entitlement which is not dependent upon proof of negligence but upon establishing that personal injury by accident has been sustained. This development cuts right across the principle of tort liability, whether strict or otherwise, for defective products.

The task of the Committee was consequentially reduced to the consideration of the role and the adequacy of the common law in the residual areas of property damage and economic loss attributable to a defective product.

6. Range of interests to be protected

The courts have traditionally classified the range of interests protected by tort law into the three following categories: personal injury, property damage and economic loss. In the context of the scope of products liability this conventional arrangement is not entirely suitable. The property damage category must be further subdivided into cases in which the defect in question has damaged another object and cases in which it has damaged the product containing the defect. The courts refer to the former as property damage and the latter as economic loss. But economic loss itself requires refinement. It may refer to the harm the defective product has done to itself which may be referred to as "repair loss". Alternatively, the term may refer to the damages caused to the owner over and above the actual repair value of the product, for example loss of use of the product in business. This may be called "expectation loss".

Finally, the product may not be defective in the sense that it is unmerchantable, yet the buyer may suffer "economic loss" when the product does not perform the

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5. Accident Compensation Act 1972 - section 5.

specific task for which it was bought. This may be referred to as "fitness loss".

III. The common law method of protecting these interests

7. Introductory

Liability for defective products has at common law developed in two areas - contract and tort. While the doctrine of privity of contract rendered the traditional contractual remedies of limited effect as a measure of consumer protection, contractual type remedies were developed where an immediate relationship of buyer and seller existed. The Sale of Goods Act 1908 protects the buyer by importing into each transaction a warranty as to fitness or quality. In the absence of such a relationship, tort law has attempted to achieve a similar measure of consumer protection by utilising the standard of care in negligence. The strong notion of social policy inherent in any measure of consumer protection has been responsible for the dilution of the negligence requirement where defective products cause harm, by the use of the plea res ipsa loquitur. This rule assumes the existence of negligence without proof of the specific act of negligence thereby causing the standard of responsibility demanded of manufacturers to assume something of a strict liability dimension.

8. The theory of liability in predominant use

This is of course negligence (Donoghue v. Stevenson [1932] A.C. 562, 599). The narrow rule is stated as follows by Lord Atkin:

> ".... a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

9. The standard of care

When assessing the standard of care demanded of a manufacturer the Courts have treated the plea of res ipsa loquitur in such a way that strict liability is in effect imposed on a defendant. The maxim is a summary way of describing a situation in which it is permissible to infer from the occurrence of an accident that it was probably caused by the negligence of the defendant. However the ultimate or legal burden of proof of negligence rests upon the plaintiff.

It was said by the Privy Council in Grant v The Australian Knitting Mills [1936] A.C. 85, 101 (the underpants case):

> "If excess sulphites were left in the garment, that could only be because someone was at fault. The Appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in conjunction with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so."

In the ordinary case what amounts to a strict liability is imposed on the manufacturer through res ipsa loquitur. In rare cases the manufacturer may be able to escape liability by establishing the precise cause of the defect and showing that it occurred without his negligence.

There will be frequent cases where the manufacturer can show that it was a component part manufactured by some other party which caused the defect and thus escape liability. Even if the plaintiff can establish that the defect existed when the manufacturer launched the product into the stream of distribution, res ipsa loquitur will not guarantee the plaintiff a remedy where the defect is traced to a component part procured from a subcontractor.

A manufacturer is responsible for the condition in which he released the article but not for defects which occur in the marketing process. It is incumbent on the plaintiff therefore to eliminate the possibility of such external causes of the defect before recourse to res ipsa loquitur may be had.

10. Class of product

The common law applies to all kinds of products but no duty may lie where there is a probability of intermediate examination. The making of an examination by the plaintiff which ought to have discovered the defect, and the probability of such an examination by reference to some aspect of the chattel or the consumer's relation with it and - by a parity of reasoning - some adequate warning or notice by the manufacturer, may exclude this liability.

A defence advancing exclusion of liability on these grounds will receive close scrutiny by the Courts:

> "In my opinion such a person [manufacturer] cannot shelter behind a reasonable expectation of intermediate inspection unless the expectation was strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm." (6)

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6. Per Richmond J, in Jull v. Wilson & Horton [1968] N.Z.L.R. 88, 97.

11. Class of defendant

Liability in negligence is imposed on many - these include erectors and assemblers, repairers, distributors, suppliers and contractors. The law of negligence does not create a different theory of liability for the manufacturer from that for the other parties mentioned although it may impose a stricter duty through res ipsa loquitur.

The courts have extended the class of defendants from the "manufacturer" referred to in the narrow rule of Donoghue v. Stevenson, either by a liberal interpretation of Lord Atkin's formulation or by having recourse to the broad general principle of Donoghue v. Stevenson - the 'neighbour' principle.

The manufacturer's liability imposed however does not carry forward as a delegation on successive sellers of the product down to the retailer. The liability of these parties by reason of their having shold the chattel (as distinct from liability for statements they may have made) is one in contract only.

12. Class of plaintiff

Donoghue v. Stevenson made reference to "consumers". There seems no reason in principle why any party who is within the purview of the wider rule of Donoghue v. Stevenson as a person who ought reasonably to have been foreseen as likely to be affected by the defect should not recover.

Despite the lack of difference in principle the Courts have not yet merged the general principles of negligence and the narrow rule applying to manufacturers referred to in paragraph 8 above. The plaintiff's opportunity of intermediate examination may be a defence to a claim for negligent manufacture but not to a claim based on a wider duty of care. Similarly no duty is owed under the narrow rule where the plaintiff knows of the defect in the chattel, but in general negligence the knowledge of the plaintiff does not exclude a duty but may show contributory negligence.

IV. American Approach

13. In the United States products liability operates under a regime of strict liability.

The remedy of strict tort liability, developed on a case by case basis primarily in the field of personal injuries, has now crystallised into the following paragraph of the Restatement of Torts 2d:

> "Para 402A Special liability of Seller of Products for Physical Harm to User or Consumer
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> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applied although -

(a) the seller has exercised all possible care in the preparation and sale of his product; and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller."

14. Interests protected

It is notable that both the Restatement enunciation of this principle and many of the decisions make indiscriminate reference to personal injury and property damage. How far the remedy extends beyond personal injury and property damage is open to debate. Strict tort liability lies for personal injury and physical property damage. Repair loss, expectation loss and fitness loss have been excluded from the ambit of the remedy on the grounds that these categories of loss are more appropriately catered for by the warranty provisions of the Uniform Commercial Code.(7) The attitude of the judiciary has been that the strict tort liability was not designed to undermine the warranty provisions of the Sales Acts of the various States or of the Uniform Commercial Code. Thus the categories of repair, expectation and fitness loss fall to be adjudicated in the commercial forum whereas physical property damage, like personal injury, falls more appropriately in the realm of tort law.

15. Class of plaintiff

The Restatement refers to "consumers or users". Cases prior to the Restatement had all involved a party who had either purchased or was directly involved in the use of the product. Notes to the Restatement expressly reserve

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7. Seely v. White Motor Co. 63 Cal. 2d 9,403 P.2d 145, (1965) per Traynor J.

the question of extension outside this class of person as one for the Courts to develop pragmatically case by case.

Little thought is required to conclude that if the remedy is not confined to purchasers, there is no logical ground for limiting the class of plaintiff to persons who are actually using the product. Any person so closely affected by the product as to be injured by the defect is no different in principle from a user. This has been the argument that has finally been accepted by the American Courts.(8)

16. Class of defendant

There is no room for debate that the remedy is indiscriminately applied against both manufacturer and retailer. Most of the cases involving defective cars have included the dealer as a defendant and he has been held liable along with the manufacturer.

17. Type of defect

The remedy has not been defined by reference to a class of products as such but rather words "defective" and "unreasonably dangerous" used in the Restatement allow ample scope for pragmatic creation of the appropriate limits. While the tort liability is strict in the sense of founding liability without negligence, it is not absolute; the manufacturer does not thereby become an insurer for all categories of defects but only those within the limits of the definition.

18. Nature of remedy

A word is required concerning the meaning of "strict tort liability". In the first place the absence of negligence on the defendant's part is no defence. Secondly, the

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8. Elmore v. American Motors Corporation 451 P.2d 84 (1969).

cases have held that neither manufacturer nor retailer may contract out of this liability.(9) It may be seen the remedy runs counter to the relevant rights of purchaser and vendor at retail under our present law of sale of goods. These are the senses in which it is described as a tort of strict liability.

The area of assumption of risk has not received attention in the United States' cases. Our negligence cases suggest that the probability of examination and certainly the carrying out of an examination may reduce or limit a plaintiff's damages on account of contributory negligence. Equally, some classes of situation of a comparable kind may lead a Court to hold the plaintiff should have discovered the defect or ought not to have relied on its absence. Again the words "unreasonably dangerous" as used in the Restatement preserve room for this class of argument.

V. The shape of products liability in the accident compensation era

19. Functions of tort law

Tort law has three broad functions -

- compensation of losses;
- allocation of the burden of losses;
- deterrence.

The emphasis on the compensation function is necessarily strong in the personal injury field. The failure of the common law action based on the notion of fault to attain this function has led to its displacement by a statutory accident compensation scheme. The guiding principles of the new compensation system were formulated

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9. Seely v. White Motor Co. 63 Cal. 2d9, 403. P2d 145 at 150 (1965).

in the Woodhouse Report as follows:

- community responsibility
- comprehensive entitlement
- complete rehabilitation
- real compensation
- administrative efficiency.

While the Accident Compensation Act 1972 gives a desirable emphasis to the purpose of achieving the compensation function, it does not allocate the costs of accidents in a way which makes the best use of the market as a means of reducing accidents. Rather than isolating a wide range of accident producing activities and assessing the costs according to their involvement in accidents, the scheme singles out the industrial accident and the motor vehicle accident and levies these two activities so that the earners scheme and the motor vehicle scheme will be self-supporting. Some regard is had to deterrence as the levies are structured at varying levels with power to impose a penalty where a person's accident record is significantly worse than average. (10)

Dangerous and defective products produce a number of injuries, yet once the accident compensation scheme is in force, those enterprises whose products cause injuries will not be directly liable to finance the risk in the same manner as the industry operator is called upon to finance the risk of injuries to earners.

20. As the Committee sees it, their task is to consider whether the common law action fulfils the three functions of tort law in the areas of property damage, repair loss and economic loss. Each category of loss will be considered in turn.

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10. Accident Compensation Act 1972 - ss. 73, 100.

It will become clear from the more detailed analysis to follow that the majority view favours no change in the present system whereas the minority opts for the American approach of strict liability. The majority bases its view on various practical considerations, such as the smallness of the area of uncompensated loss and the problems of proof of causation which remain the same whether there be negligence liability or strict liability.

The minority advocates a rationalisation of the present system on the principle that a manufacturer who releases a defective product should be primarily responsible for any property damage. Although the area of uncompensated loss is small there is much to be said for introducing a rational basis of liability.

21. Property damage

While it may be purely fortuitous whether a defective product is instrumental in causing personal injury or property damage the compelling interest in human health and safety created the demand and justification for a new legal approach in the personal injury field and hence the accident compensation scheme. The Committee acknowledges that policy arguments supporting the compensation of personal injury are less persuasive when property damage is involved. An assessment of the adequacy of the negligence action will be made by reference to the three functions of tort law.

22. Compensation and allocation of loss - the impact of insurance

Traditionally the insistence on fault as a criterion of liability has meant that the presence or absence of insurance has been considered irrelevant. One consequence

has been an unwillingness to extend strict liability beyond its present narrow field. The House of Lords has recently reaffirmed this traditional view in Morgans v. Launchbury[11] although a chink in its armour may be discerned from the speech of Lord Wilberforce[12] that "liability and insurance are so intermixed that judicially to alter the basis of liability without adequate knowledge (which we have not the means to obtain)as to the impact this might make on the insurance system would be dangerous and, in my opinion, irresponsible." This was to counter sentiments expressed in the Court of Appeal by the Master of the Rolls, Lord Denning, who sought to make liable the defendant who was most strategically placed to bear the risk - that is he who is, or ought to be insured.[13] The House of Lords recognised that the adoption of risk as opposed to fault as the criterion of liability was a direction for Parliament not the Courts to take.

Nevertheless while all members of the Committee acknowledged the crucial impact of insurance, there is a division on the question how far the advantages of loss insurance outweigh those of liability insurance.

A principal reason widely accepted for shifting losses from consumers to manufacturers is that those engaged in the manufacturing enterprise have the capacity to distribute the losses of the few among the many who purchase the products. The assumption is that the manufacturer can shift the loss to the consumers by charging higher prices for the products.

In the majority view it would be undesirable to shift losses from property damage caused by a defective

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11. [1972] 2 All E.R. 606
12. Ibid at 611b.
13. Launchbury v. Morgans [1971] 1 All E.R. 642 at 645, 646.

product to the manufacturer without regard to the widespread use of loss insurance. Such insurance enables the users of the product to assume and distribute the loss.

Again it may be more appropriate to shift the loss to the consumer even where the damage is due to a miscarriage in the manufacturing process. This would eliminate the time-consuming and expensive task of deciding whether the accident was due to external factors, the manufacturing process or conduct of the user. Why determine whether an accident was due to a miscarriage in manufacturing or in use if the consumer is ultimately to bear the cost through higher prices?

On the other hand the minority is reluctant to see undue reliance placed on the consumer's voluntary choice to carry loss insurance. There is always the danger of injustice to those consumers who for one reason or another are either not covered or not adequately covered by insurance.

23. Deterrence

Tort liability has no substantial deterrent value. Other deterrents or incentives to care seem far more significant than tort liability.

Indemnity cover against liability for tort claims is widespread, as was demonstrated in the survey conducted by the Committee.

The market into which products are distributed has a significant deterrent value. Where the market is subject to a system of price control such as prevails in New Zealand the emphasis on non-price competition creates a strong incentive to maintain the public image of the product.

In the personal injuries field the Woodhouse Report considered injury arising from accident to demand attack on three fronts the most important of which was prevention followed by rehabilitation and compensation. Effective education, adequate inspection and firm enforcement were all recognised as means by which the risk of injury could constantly be tackled in advance of the accident. Hence s.45 of the Accident Compensation Act 1972 charges the Commission with establishing a safety division whose functions will include considering the extent to which safety may be promoted and accidents, personal injuries by accident and deaths resulting therefrom, and occupational diseases prevented, by fiscal and other measures in relation to training in safety, the cost of safety equipment, and similar matters, and making such recommendations as it considers desirable through the Minister of Labour to the appropriate authorities on such matters - s.44(4). Although the Commission has only the power to recommend, the upshot will be safety regulations, inspection testing and criminal sanctions that are all more reliable as deterrents than tort liability.

The financial relief from tort liability which will follow the implementation of the accident compensation scheme should not therefore lead to less attention being paid to adequate testing and safety precautions.

24. Repair loss

Repair loss is the harm the defective product may do to itself and may occur at two stages. Expense may be incurred in averting or reducing the threatened risk of damage: the "repair loss" is the cost of making the necessary repairs before any accident happens. Alternatively the loss may result from the cost of repairs to the defective article itself which has actually sustained some damage. The distinction is relevant at

common law which treats claims for economic loss consequent upon physical damage on a different basis from claims for economic loss per se. In the present context the "repair loss" on a defective product which had itself been damaged comprises partly property damage and partly economic loss. However if the "repair loss" is sustained in order to remedy a defect which has been discovered before any damage occurs, this is classified as solely economic loss. The recent developments in the recovery of economic loss may be traced by two extracts from judgments of Lord Denning in the English Court of Appeal. In S.C.M. (U.K.) Ltd v. W.J. Whittall & Son Ltd [1970] All E.R. 245 at 248 Lord Denning makes the following statement:

> "It is well settled that when a defendant by his negligence causes physical damage to the person or property of the plaintiff in such circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim, in addition, for economic loss consequent on it."

Lord Denning then went on to deal with counsel for the defendants' argument that if there was a duty of care it meant that economic loss would be recoverable as well as material damage, no distinction in logic or common-sense being able to be made between the two kinds of damage. Lord Denning however perceived that -

> "there may be no difference in logic, but I think there is a great difference in common-sense. In actions of negligence, when the plaintiff has suffered no damage to his person or property but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy." (at p. 250)

Two years later Lord Denning threw all distinctions on grounds of duty or remoteness of damage to the wind and concluded in Spartan Steel Ltd v. Martin Ltd [1972] 3 All

E.R. 557 at 561 as follows:

> "At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds as to the damages recoverable - saying they are or are not too remote - they do it as a matter of policy so as to limit the liability of the defendant."

The Committee is at one in its view that whatever approach is taken to products liability, repair loss should be dealt with on the same basis as property damage. Despite its classification at common law as economic loss, the Committee considers repair loss to be of the same species as physical property damage.

The Committee is also influenced in this recommendation by the apparent inability of the consumer to insure against repair loss. A survey of 8 leading insurance companies in 1968 indicated that none of the 6 who replied had available appliance insurance against defects occurring in the appliance itself. The General Secretary of the Insurance Council of New Zealand has confirmed (in December 1973) that this position has not altered. Insurance cover continues to extend only to damage caused by and external to the product and not to any inherent defect in the product itself. The questionnaire appears in Appendix II.

25. Economic (expectation and fitness) loss

In paragraph 6 economic loss is broken down into the three categories of 'repair loss', 'expectation loss' and 'fitness loss'. The term 'expectation loss' is used to refer to loss of use of the product in business or loss of profit. 'Fitness loss' is used to describe the failure

of the product to perform the specific task for which it was bought even though it may still be merchantable.

The Committee rejects unanimously the inclusion of expectation loss and fitness loss within the range of interests to be protected by any system of products liability. It is considered that such loss is more appropriately a matter of bargain between the parties.

26. Burden of proof and sufficiency of evidence

Whether loss is allocated under a strict liability doctrine or by liability based on negligence, the plaintiff must still prove that his loss was caused by a defective product and res ipsa loquitur will be of no assistance to him until he has done so.

27. The Majority View

Once the accident compensation scheme comes into force the ambit of products liability will be reduced to property damage and economic loss. In the field of property damage the widespread practice of loss insurance leaves a very small residual area where the consumer may have to bear his own loss. In the view of the majority legislative modification of the present law governing products liability is not warranted.

28. The majority advances the following specific reasons in support of its rejection of a move to strict tort liability:

(a) The merits of the arguments advocating strict tort liability in the United States are centred on the compensation of life and limb. These arguments lack force when property damage is involved.

(b) In light of the widespread practice of insuring there is good administrative reason for allocating the costs of any property damage to the insured individual. Payment from his own insurance company is likely to be quicker than payment by the manufacturer's insurer. In the latter case the loss has to be investigated by two insurance companies involving duplication of work and extra cost.

(c) A system of strict tort liability would not place a sufficient economic burden on the manufacturer to create an incentive to produce non-defective goods. Negligence liability and strict liability have a similar economic effect on the community. Where the individual bears the loss he pays through his insurance premium; where the manufacturer bears the loss the level of his insurance premium is incorporated into the price of the goods which is passed on to the community.

(d) The attitude of the courts concerning questions of proof and sufficiency of evidence is as important as are the substantive rules for defining the risks to be borne. Under either system of products liability the link between the defective product and the harm must be established. This means in practice that the plaintiff must not have caused his own injuries, and that the product must have been defective when sold by the defendant rather than having become unsafe

due to the intervening conduct of someone else in the distributive chain on the way to the consumer.

A system of strict liability would not relieve this burden of proof.

(e) The practical difficulties that might otherwise face a plaintiff under the present law are substantially eased by the doctrine of res ipsa loquitur.

(f) The plaintiff under the present law is further assisted by the tendency in many cases for the manufacturer to settle in order to avoid publicity and to protect his standing with his wholesalers and retailers.

(g) The experience of the Committee confirmed by the its enquiries shows that claims for property damage caused by defective products in which the plaintiff does not obtain reasonable compensation are rare.

(h) In many cases the plaintiff will have a remedy under the law of contract.

29. The Minority View

The minority favours the adoption of the theory of strict liability that has swept through the United States. It believes this would provide better protection for the New Zealand consumer by expanding the incidence of recovery to include cases where hardship could result under the present law. These encompass, in particular, cases where the person who suffers property damage is uninsured or

inadequately insured and where the failure of the product stems from a defect in design or in a component part manufactured by someone other than the defendant manufacturer, perhaps overseas. It could be impossible to prove negligence on the manufacturer's part in cases involving this type of defect. It is also of significance that many products sold in New Zealand are entirely manufactured overseas.

The minority acknowledges that the cogent arguments in favour of strict liability where personal injury is in question lose some of their force when applied to property damage and that the residual area in which strict liability could operate would be rather small. However, personal hardship is never a minor matter for the individual who suffers it. It is no consolation to him to be told that because his case falls into an unusual category redress is not available.

The reasons advanced by the minority for favouring strict tort liability are as follows:

(a) The use of res ipsa loquitur which appears adequate to secure recovery for most plaintiffs is justified by reasons of policy. These reasons of policy could be expressed in different ways but the minority's view is that a manufacturer who puts goods on the market in the course of a profit-making enterprise and does his best to induce the public to buy them should in fairness accept full responsibility for unsafe or otherwise defective goods. After all, the consumer is usually in no position to know when goods are unsafe or defective.

This rationale would however apply equally to the small range of cases in which plaintiffs would

fail to recover under existing law. Impsoition of strict liability would accordingly give full and rational recognition to the policy reasons in question. It is preferable as a matter of principle to adopt openly, directly and consistently a rule which comes close to being achieved in practice anyway.

(b) The imposition of strict liability would avoid cases of hardship that could arise under the present law. The minority believes it is not a satisfactory answer to an unsuccessful plaintiff that a prudent man would have protected his property by taking out insurance. It is wrong in principle to restrict the manufacturer's liability for defective products on the assumption that consumers will be covered by insurance they are under no obligation to carry. Moreover there could be situations in which the consumer's insurance is irrelevant, e.g., if a defective motor launch explodes and causes a fire which burns down a wharf.

A further point about insurance is that in these times of rapid inflation people will tend to be under-insured. This could be particularly relevant in cases where serious property damage is done, e.g., a house is burned down because of a fire caused by a defective heating appliance. The actual financial damage done to the plaintiff may far exceed the sum assured.

(c) The minority has also given some consideration to the theory that strict liability provides a greater deterrent than negligence liability against the production of defective products, by placing responsibility on the party best able to promote the safety of the product. The minority agrees that this argument is of no great weight in the conditions prevailing in this country, particularly having regard to the imminent removal of personal injury claims from the ambit of consideration. However the very fact that manufacturers will shortly be absolved from financial liability for injury caused by their products may be some justification for imposing on them strict liability for property damage and repair loss. Such deterrent effect as there is in this approach would then operate at least in this residual area.

I.L. McKay
Chairman

MEMBERS:

Mr I.L. McKay (Chairman)
Mr R.G. Collins
Mrs J.E. Lowe
Mr B. McClelland
Mr P.D. McKenzie
Mr J.P. McVeagh
Dr D.L. Mathieson
Ms R.M. Richardson (Secretary)

APPENDIX I

QUESTIONNAIRE ON PRODUCTS LIABILITY

The Torts and General Law Reform Committee has been asked to examine the law relating to liability for injury or damage caused by defective products marketed in New Zealand. The Committee is inquiring into the adequacy of the present law and is considering whether any changes in the law are necessary.

The scope of the Committee's investigation covers cases of personal injury caused by defects in the products and also damage to property including the product itself. The class of persons affected includes not only purchasers and consumers of the products, but also third parties who are injured as a foreseeable result of the defect, e.g. a heater which explodes may injure the purchaser and members of his family and also third parties who are visiting his home. The type of products concerned include all consumer goods, food, drink and drugs, means of transport, machinery and tools used in any work place.

Short statement of the present law

In general terms, the law places on the supplier of products (whether manufacturer, wholesaler or retailer) a duty to exercise reasonable care in the manufacture and marketing of the goods to guard against the goods reaching the consumer in a form which will result in their doing injury to the consumer's life and property. This duty has been extended in certain cases to a third party who is injured, where it could reasonably be expected that that person would be within the area of risk.

The essential element in the claim is negligence, i.e. failure to exercise reasonable care in the manufacture of the goods or in their inspection for defects where an intermediate examination by a supplier could reasonably be expected. The Courts have placed a form of strict liability on the manufacturer by the application of the maxim res ipsa loquitur, i.e. the fact that a defective product reaches the market itself bespeaks negligence somewhere in the chain of manufacture, and it is not necessary for the plaintiff to establish any specific act of carelessness in the manufacturing process.

Despite this strict liability the manufacturer of a defective product that causes injury may be releived of liability in a number of circumstances:

(a) if he can prove that he exercised all possible care, e.g. by setting up a "fool-proof" type of manufacturing process;

(b) if he can show that the defect was contained in a component part manufactured by some other reputable company;

(c) if he could not reasonably have anticipated the kind of injury which has resulted, e.g. unexpected side effects from a drug;

(d) if the manufacturer is an overseas company which is not readily amenable to suit in New Zealand, and there is no reasonable possibility of intermediate examination by the local wholesaler or retailer.

In addition, liability may be placed on the vendor of goods under the Sale of Goods Act 1908 for breach of the implied conditions that the goods are merchantable. In some circumstances liability may be placed on a manufacturer

towards a purchaser if representations made by the manufacturer (e.g. in advertising) have induced the purchaser to buy the goods.

Reform advocated by some commentators

It has been argued by several commentators on the law that the present rules operate in an arbitrary manner and that the law should recognise that the manufacturer or supplier of goods is in the best position to guard against the risk of injury from defective goods and is best placed to insure against this risk. The advocates of this view refer to legislation adopted in several of the States of the United States where a strict liability is placed on the person who is engaged in the business of selling a particular product, for any injury caused by defects in the product to the ultimate consumer or user of the product, if it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Need for further information

In evaluating such a proposal the Committee considers it essential that more information be available on the operation of the present law in this area. It is particularly interested to know whether many claims are made and whether in a significant number of cases the injured person fails to receive compensation. The role of insurance in this area is potentially an important one and the Committee is interested to know whether it is normal practice for manufacturers or suppliers to insure, and whether such insurance covers damage to property as well as personal injury. In view of New Zealand dependence on imported goods it is important to know whether arrangements exists whereby overseas manufacturers or suppliers reimburse local

suppliers for any claims met locally. The position of the retailer gives rise to particular concern. Is it normal for retailers to refer such claims to wholesalers or are there a significant number of cases where retailers carry the loss incurred in meeting such claims? Do retailers normally insure against this risk.

A detailed questionnaire has been prepared to cover some of these matters of information. The first five questions on the questionnaire have been prepared with the manufacturer and supplier particularly in view, but any general view on these questions which other parties are able to express would be appreciated. The Committee would also welcome any additional comments which any party would like to make.

1. How many claims have been received by members of your association, during any of the years 1968, 1969 or 1970 for which figures are available, relating to defects in goods (including food, drink and drugs but excluding tools while in use in a place of employment,* and motor vehicles) manufacturer or supplied which have caused <u>either</u>
   (a) personal injuries to any person? or
   (b) damage to property of any person?

2. In the case of manufacturers, or wholesale suppliers are such claims normally brought by the retailer or directly by the ultimate consumer?

3. In the case of retailers, are such claims normally referred on to the manufacturer or wholesaler who supplied the goods concerned?

4. In the case of wholesale suppliers or manufacturers are claims normally referred to the overseas exporter or supplier of a defective component part? Is reimbursement normally made by them for claims paid out locally?

*Figures relating to tools while in use by home handymen should be included.

5. Do the members of your association normally take out insurance cover against the risk of a successful claim being brought for injury or damage caused by a defective product? Do such policies cover property damage as well as personal injury?

6. Are the costs of meeting such claims (whether by payment of insurance premiums, or settling direct) as sufficiently significant item to be taken into account when calculating the price of the goods concerned?

7. What percentage of such claims are:
   (a) resisted and not pursued further;
   (b) litigated;
   (c) settled directly with the complainant.

8. Are you aware of any cases where a large batch of a particular product has given rise to several complaints? If so, do these complaints represent a significant proportion of the claims arising from defective goods?

9. In cases coming under question 8 would the goods concerned be withdrawn from the market?

10. Where the goods have been imported, do any arrangements exist for returning defective goods?

11. Do you regard the existing law relating to liability for defective products as satisfactory? If not, is liability on the manufacturer or wholesale supplier too stringent or too lax? Is liability on the retailer desirable?

APPENDIX II

QUESTIONNAIRE ON PRODUCTS LIABILITY INSURANCE

Currently New Zealand tort law provides a remedy to one whose person or property are injured by a manufactured product against the manufacturer on proof or inference of negligence. In a spectacular development by the U.S. Courts since 1960, suit may now be maintained in the same situation even in the absence of negligence merely because the product is on the market and the maker can distribute the cost through insurance and price increases. It is possible the personal injuries aspect may become academic should New Zealand adopt the report of the Royal Commission on Compensation for Personal Injuries in New Zealand. Damage to property, loss in product value, and perhaps consequential economic loss remain. The questions are designed to find out what insurance is currently available in these areas to householders and some businesses, as the answers seem pivotal to any reformers' decisions in the field.

I suspect no insurance can at present be bought for loss in product value, and in that case the effect of reform will be to create new business for the insurance industry in covering manufacturers for that consequence. My point is that cooperation is likely to benefit the industry rather than the reverse. The Law Revision Commission has agreed to do the paper work for me in New Zealand and it is hoped to have the paper ready for publication before the end of 1968, so that your prompt cooperation would be appreciated. If it is not possible for you to determine the effect of any policy without legal advice, please let me have a cancelled copy of it. I undertake that the information will be used only for publication and law reform. The premium figures are secondary, but important, and I certainly will not publish figures identified to their source. Your assistance will help the cause of law reform.

QUESTIONS

1. Does your household policy, or any other policy available for general household goods, insure against the risks of damage from defective manufacturerd products, e.g. destruction or damage by scorching, fire, explosion traced to defect in some appliance?

2. Premium rate expressed as a figure per unit value of goods insured? Indicate if this is not a separate element.

3. Does your policy covering homes as opposed to contents cover the same risk?

4. Premium rates?

5. Does the same or any other policy insure against a drop in value of appliances by reason of mechanical defect therein; e.g. a $600 high fidelity set becoming worth $150 by reason not of damage, but of irreparable defect appearing in new equipment?

6. Does any motor vehicle policy insure against loss in value for reasons set out in 5?

7. Premium rates for 5 and 6?

8. Can business interruption insurance be purchased from your company for the following:

   (a) Crop or harvest losses caused to farmer by reason of mechanical breakdown or malfunction of harvesting or other equipment?

   (b) Loss of custom for a butcher who installs a computer to do the accounting and billing for his business caused when the computer makes a hash of it?

(c) A small carrier business suffers loss of profits through one of its trucks having a defect which keeps it off the road a substantial time for repairs?

(d) A taxi owner driver, operating his one car licence loses profits for the same reasons as in (c)?

9. Can a travelling salesman dependant for income on commissions from sales obtain cover for reductions in commissions for reasons such as 8(c)?

10. Premiums for 8, 9?

11. Is it possible without special trouble to provide premiums to cover liability reflected back to the manufacturer through a products liability remedy for all or any of these losses?