INTRODUCTION

What is product- or products liability? Simply, it means liability for harm caused by a product. But this is where the American consensus ends and the legal fun begins.

- Whose liability? The manufacturer’s, the carriers, the seller’s? Can one successfully sue the “mom and pop” bicycle shop that unknowingly sold a defective bicycle helmet? [Yes in the United

---

1 Juris Doctor, University of California, Berkeley; Dr. jur, Universität Bonn. Professor of Law, Westfälische Wilhelms-Universität Münster, German; Adjunct Professor (European Law), California Western School of Law, San Diego. Assoziiertes Mitglied, Ostseeinstitut für Seerecht und Umweltrecht der Universität Rostock, This paper is based on a lecture delivered at the Rechtswissenschaftliche Fakultät, on July 5, 1996.

• Harm to whom and to what? Just to the ultimate consumer (and his or her property), or also to the person whom the ultimate consumer injures with the product? For example, is the commercial fertilizer used to make the bomb that destroyed the Federal Building in Oklahoma City a defective product? [Probably not, but a case is pending.]

• Must the product be defective? [Yes.]

---

2 E.g., Walker v. Maxwell City, Inc., 117 Ill. App. 3d 571, 453 N.E.2d 917 (1983) (suit alleging defective helmet also maintained against retailer). In the United States, carriers and retailers too are strictly liable. RESTATEMENT (SECOND) OF TORTS § 400 (1965). According to the European Directive, each supplier of the product is also treated as its producer but only where the producer cannot be identified and the supplier fails to inform the injured party within a reasonable time of the identity of the producer or of his own supplier. European Directive Art. 3.3. Any person who imports a product so that he may supply it to another in the course of his business is also responsible as a producer. European Directive Art. 3.2. For an overview of the long-standing American debate on retailer strict liability, see 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 12.04[2][b].

3 The classic bystander problem involves a plaintiff who is struck by an automobile that was manufactured by the defendant. A paradigm case is Elmore v. American Motors Corp., 451 P.2d 84, 89 (Cal. 1969), in which the California Supreme Court correctly pointed out that the plaintiff was not "a user." Nevertheless, this person was entitled to the protection of products liability law.

4 N.Y. Times, Nov. 2, 1995, section B, p. 12, col. 5, reporting that the number of plaintiffs had swelled to 384.

5 Although one often employs the term "strict liability", a plaintiff must prove more than that his injury was caused by the defendant's product. Even in its earliest formulations, strict products liability purported to apply only to defective products. See James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. REV. 1263, 1263-76 (1991); Gary T. Schwartz, Foreword: Understanding Products Liability, 67 CAL. L. REV. 435, 493-496 (1979). Product liability has never been synonymous with "absolute" or "enterprise" liability. Thus, an automobile manufacturer is not liable to all victims of accidents involving its automobiles, even though the accidents would not have occurred but for the automobile. In order to recover, a plaintiff must prove that the automobile was defective and that the defect caused the injury. William C. Powers, Jr., The Persistence of Fault in Products Liability, 61 TEX. L. REV. 777 (1983).