Products Liability in Ethiopia*

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FOREWORD

The intricacies of the report below, submitted at the Congress to the experts in our subject, may baffle readers not familiar with it. For their benefit, this Foreword attempts to expose the gist of the matter in simple (indeed simplifying) terms.

"Products Liability" is a new and controversial legal concept concomitant with economic development, on which Ethiopia is now embarking. Industrialization brings benefits, but is inseparable from risks of damage from its otherwise useful products (such as, e.g., motorcars or drugs). One of the tasks of *Administrative* law is to ensure, by preventive regulation of manufacturing and licensing processes, that products supplied to the public satisfy safety standards. Obversely, one of the tasks of *Civil* law (which concerns us here) is to ensure that where, despite such preventive administrative measures, if any, a person is injured by the product normally used, he is compensated by the producer, subject to the conditions exposed later in this paper. In this connection, the purportedly dominant role of the products liability provision of Art. 2085 Civil Code may be illustrated as follows:

1. A consumer injured by rotten tinned—food can sue its producer in *contract* (Art. 2287 ff.) in the *unusual* case where he purchased it directly from the producer.

2. In the absence of such direct purchase, the consumer can sue the producer in *tort* (extra-contractual liability):

   a. in the *unusual* situation where he is able to prove a *fault* (Art. 2028 ff.) in the producer's manufacturing process.

   b. in the *usual* situation where he is only able to prove that his injury resulted from his *normal use* (eating) of the defective product (the tinned-food). Our report is concerned with this remedy, which is provided (with some qualifications) by Art. 2085. It is criticised in the report's Conclusion.

In this Journal, our report appears with some improvements.

PART I consists of Introductory Notes which, after setting forth the text of the

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products liability provision, reproduce comment-extracts from our prior work and deals with the introductory aspects of the subject. This is followed by PART II, which discusses the basic (positive and negative) requirements for the products liability claim. The marginal part III is omitted. Part IV, now renamed Part III, contains our conclusion and is followed by an ADDENDUM on foreign trends and a POSTSCRIPT *de lege ferenda*.

Since the outline-questionnaire of the Academy's General Reporter (Professor W. Gray), based on American case law, did not fit the Ethiopian legal system, some redundancies could not be avoided in the report, despite that we did not follow his outline closely. The report's present version includes some improvements not affecting substance. This Foreword, the Addendum, and the Postscript were *added in* 1980.

PART I

INTRODUCTORY NOTES

1. THE PRODUCTS LIABILITY RULE OF ART. 2085 CIV. C.

MANUFACTURED GOODS

(1) A PERSON WHO MANUFACTURES GOODS AND SUPPLIES THEM (indirectly)[1] TO THE PUBLIC FOR PROFIT IS LIABLE FOR DAMAGE TO ANOTHER PERSON RESULTING FROM THE NORMAL USE OF THESE PRODUCTS.

(2) NO LIABILITY IS INCURRED WHERE THE DEFECT WHICH CAUSED THE DAMAGE COULD HAVE BEEN DISCOVERED BY A CUSTOMARY EXAMINATION OF THE PRODUCT USED.

2. THRESHOLD GULDELINES[2]

We shall call "mixed" the criterion of strict liability (for damage) provided by Article 2085 because it uses both the "type of thing" and the "type of activity" tests. The instrument of harm must be a *manufactured*, i.e. man-made thing (not merely one produced by nature and collected by man). The activity must have been, on the defendant's side, that of *manufacturing* that thing and supplying it to the public[3] for profit,[4] and on the plaintiff's side that *of using* it in a

1. "Indirectly" by necessary inference, since "direct" supplying for profit creates contractual relations which exclude extra—contractual (tort) remedies; see Arts. 2088 and 2037 Civ. C.
2. See olso G. Krzeczunowicz, *The Ethiopian Law of Extra-Contractual Liability* (Addis Ababa 1970), "Doctrinal Introduction" The English version of Art. 2085 Civ. C. is taken from the Appendix D to this work.
3. The "supplying to the public" test excludes "strict" extra-contractual liability for products that were supplied not to ultimate users but to another manufacturer for additional transformation (e.g. steel to a motorcar producer).
4. The "profit" test excludes, e.g., strict liability of the Ethiopian Rehabilitation Center for defects in the crutches it supplies for invalids without profit.

normal way. So far from being the liable defendant, as in the aforementioned cases (of strict liability), the "owner" or "holder" is here usually the plaintiff, claiming against the person (physical or corporate) whose "manufacturing" activity had produced the instrument of his harm. This harmful thing cannot be an animal, which is produced by nature, but it can be a building[5] or machine which are manufactured. Indeed, the owner of a normally used motorcar liable to a victim of its invisibly defective steering gear may, in turn, recover damages from the manufacturer...

The manufacturer's "strict" liability to ultimate users (i.e. consumers) of his product seems hardly known in Romanist legal systems. In the common law, it seems to have its remote and still "negligence-coloured" roots in the English "Donoghue v. Stevenson" case (1932).[6]

It is only in the U.S.A. that the manufacturer's liability to ultimate consumers is becoming clearly "strict" although both its scope (which products?) and its legal ground are still widely controverted. A fashionable "ground" is that of the original contractual "sales" warranty "running with the goods" (by legal implication) to the ultimate consumer.[7] Prosser[8] deplores this by saying that "it would be far simpler if it were said that there is strict liability in tort, declared outright, without an illusory contract mask" This is precisely what the Ethiopian legislator has done for us (his "scope" test is also a simple one):

(1) Although ... Article 2085(2) is similar to Article 2293(2) ("discoverability" of defects), our tort provision under Article 2085 is inddpendent of and incompatible with the remedies of contract law.[9] We have no need for fictional reasonings.

(2) What is the material scope of Article 2085? Which man-made products are contemplated by it? The answer is clear. They are all within the purview of Article 2085. None of the controversial and uncertain distinctions made in the U.S.A. in this respect[10] are part of our law. A man-made product (manufactured goods) is everything that is produced, transformed or processed (e.g. foods cooked or pickled) by man ...

3. SCOPE OF THEME

The expression "products liability" is of American origin. An equivalent Ethiopian term cannot be looked for before the original term is itself defined and delimited. This, in turn, is hardly possible if the following statement is apt:

5. The using of Article 2085 against the builder may, however, be excluded by the existence of a contractual remedy under Article 3039; see Article 2088.
6. Quoted in H. Street (*The Law of Torts*, London, 1963) p. 172.ff.
7. See W.L. Prosser (*Handbook of the Law of Torts*, St. Paul Minn, 1964), pp. 543 and 678.
8. *Ibid.* p. 681.
9. Which, where available, *exclude* application of the tort remedy against the same defendant, e.g. against the manufacturer who sold the product to the plaintiff: see Article 2088....
10. See, again, Professor.

> "I am not quite sure whether the American expression 'products liability 'implies an aspect of delict or of contract or whether it is sui generis or perhaps all three" [11]

Consequently, we must start from the readily ascertainable Ethiopian definition of *manufactured goods* (i.e. products) *liability*[12] (and leave to others the finding of equivalent foreign terms, if any). In the Ethiopian system, products liability can be based *neither on contract nor on fault*:

a. Products liability is *extra-contractual* it can arise only in tort law (Art. 2088). Contractual "breach of warranty of quality" liabilities:
   (i) are governed by the distinct rules of contract law (Art. 2287 ff.) and
   (ii) concern not only man-made products but also non-manufactured goods (hereinafter, *products* will be used in the narrow sense of "manufactured [man-made] goods").

b. Within tort law, the products liability provision is part of the Section on liability not-based-on-fault, i.e. strict liability. In our system, therefore, liability based on a manufacturer's "fault" should not be called "products ('manufactured goods') liability" [13] Incidentally, within the section on strict liability, our products liability provision (Art. 2085)[14] follows the provisions relating to dangerous activities, animals, buildings, machines, motor-vehicles (Arts. 2069-2084), and precedes rules common to all. These *common* rules exclude any purported general defences to strict liability from affecting any of the above provisions, except for the defences raising a "fault of the victim" (Art. 2086), or a "contractual relationship" (Art. 2088), or a "disinterested relationship" (Art. 2089).[15] [16]

4. WHO CAN CLAIM? AGAINST WHOM?

Products liability claims can arise only between the product's *user* (plaintiff) and its *manufacturer* (defendant).[17] "User" includes "consumer", i.e. the person who "uses up" the product (e.g. eats the processed food).

11. T.B. Smith "Law Reform in a Mixed ... Jurisdiction", *Louisiana Law Review*, Vol. 35, 1975 Special Issue, p. 956.
12. See its analysis under 2, above.
13. This very expression is foreign to all provisions (Arts. 2028-2065) of the Section on liability based-on-fault.
14. Where not otherwise qualified, "Section" or "Article" (and "Sec." or "Art.") stand, respectively, for sections or articles of the *Ethiopian Civil Code*.
15. But this last defence is irrelevant to products liability, since it is available only against "owners or holders" of the things mentioned under Arts. 2071-2084.
16. The Ethiopian *tort provisions* (Arts. 2027-2161 of Title XIII Civ. C.) are largely distorted in the published English version of the Ethiopian Civil Code. For this reason, we refer the reader to their *revised translation* in G. Krzeczunowicz, *The Ethiopian Law of Extra-Contractual Liability* (Addis Ababa 1970) Appendix D, or *The Ethiopian Law of Compensation for Damage* (Addis Ababa 1977), pp. 316-354.
17. Contrast contract law, where in "warranty of quality" actions the plaintiffs need not be "users", and the defendants need not be "manufacturers" of the product: the contractual relation alone matters.

Products liability "cannot be invoked" by such users as are "connected with" the product "by virtue of a contract made with" the manufacturer (Art. 2088).[18] Other users (e.g. sub-purchasers, sub-lessees, licencees, invitees) can invoke the products liability provision. But a non-authorized user's claim against the product's manufacturer may be defeated by the "fault of the victim" defence (Art. 2086(2)).

5. WHAT HARMS ARE RECOVERABLE?

Where pursuant to Art. 2085 a products liability is incurred, the corresponding claim lies for *any* damage (whether to person or property) *resulting* from a normal use of the product. Thus, it is not the harm's nature but its origin (whether or not it resulted from a normal use of the product) that may support or exclude products liability claims.[19]

6. CLASSIFICATION OF PRODUCTS LIABILITY

In the Ethiopian system, product liability:

(a) is part of the Book on Obligations of the 1960 Civil Code,

(b) within the law of obligations, is based on tort law,

(c) within tort law, is based on the strict liability section,

(d) within the strict liability section, is defined in a special products liability provision (Art. 2085).

The classifications (b), (c) and (d) entail respectively — inter alia - the following *effects* regarding products liability:

(b) the contract law's "warranty of quality" concept is irrelevant to products liability; on the other hand, the tort law rules on compensation[20] and on action for compensation are common to all torts and, consequently, apply to products liability;

(c) the defendant's "fault" is irrelevant to products liability;

(d) the rules (concerning defences) common to all strict liability categories mentioned under 3.b. above, apply to products liability (but see ftn. 15).

18. For example, by users connected with the product (e.g. as testers) by virtue of participating in its production as *employees* of the manufacturer. Instead of "products liability" they should invoke Article 2549 ff. Civil Code and any relevant Labour legislation.

19. The situation is of course different under contract law in warranty of quality cases where, regardless of use or nonuse by the plaintiff, a defect affecting only the *value* of the product bought by him can support his claim for compensation against the seller.

20. Regarding compensation, contrast the tort rule of Art. 2091 with the contract rule of Art. 1799.

PART II[21]

REQUIREMENTS FOR THE PRODUCTS LIABILITY CLAIM

A. POSITIVE REQUIREMENTS

The following is the text of *sub -article* (1) of the products liability provision *of Art.*2085:

> "A person who manufactures goods and supplies them (indirectly) to the public for profit is liable for damage to another person resulting from the normal use of these products" [22]

In light of the above sub-article and of prior comments, the "positive" requirements for the products liability claim (on the "negative" requirements see B, below) may be stated as follows:

(i) The claimant must have sustained a damage;

(ii) the damage must have resulted from the normal use of a product (a thing "manufactured", i.e. made, transformed or processed by man);

(iii) only the user of the product can invoke product liability a "non-user's" claim cannot be based on products liability, but on the manufacturer's "fault", if any;[23]

(iv) the claim must be brought against the manufacturer (maker, transformer, processor) of the product;

(v) the latter's manufacturing activity must be aimed at obtaining profits from making such products available to the public.

While points (i), (iii), (iv) and (v) lend themselves, in some degree, to convincing elaborations, this is not the case with the essential *point* (*ii*). This point deals, in veiled terms (*resulted from*), with difficult causal problems. What must heve caused the damage? The required *normal use* of a product may have resulted in a harm caused by another product! To avoid absurd consequences, it seems reasonable to imply that the used product itself must have been an essential causal factor of the harm. If so, must it be the product or a "defect" in the product? Is it at all permissible to imply a "positive" requirement of a "defect" from the fact that the non-discoverability of a causal defect constitutes a "negative" requirement for products liability under sub-article (2) (analyzed under B.1, below)? If (doubtfully) yes, what is a "defect"? If (clearly) not, how define "normal" use? Surely, the deceptively simple passage

> .. is liable for damage to another person resulting from the normal use of these products

21. This Part is sometimes repetitive, but it looks at problems from a different angle and in greater depth than Part I.
22. "(indirectly)" is added for the reasons given in Part I, 1.
23. Non-users are sufficiently protected by *strict* liability remedies against persons *other* than the manufacturer, who own, use or control the harmful product: the owner (of the machine, motor-vehicle, building: Arts. 2081 and 2077 ff.), the holder (Art. 2082), the creator of abnormal risks (Art. 2069). As to processed foods and most drugs, they can hardly injure non-users.

creates more problems than it solves. Our judges, some of whom still lack formal legal training, are hardly able consistently to cope with them. The zones of uncertainty created by this passage remain unfilled by any discernible trends in settlements or judgements, if any (the latter are neither reported, nor recorded by subject). In the extremely rare cases of which we have some (hearsay) knowledge, products liability claimants, although not required to do so by the above-cited passage, seem to strive to demonstrate what they deem to be "defects" in the products which they imply from, e.g., the defective "behaviour" (rather than "structure") of a motorcar or a mechanical device.[24] On the other hand, they happen to wrongly to assume that the fact that the use of the product was "normal" should be presumed in their favour, subject to contrary proof. The outcomes are bound to be haphazard and insignificant.

Since

(a) confidence in the courts is not prevalent (for the reasons, see above),

(b) "potential" products liability claimants are often unenlightened and unaware of their rights,

(c) the manufacturing of many essential modern products used in this country takes place in foreign countries having, as a rule, no "exequatur" agreements with Ethiopia which, on the other hand, has no "conflict of laws" legislation,

products liability claims are extremely rare. Where raised at all, they show a tendency toward "equitable" *extra-judicial* settlements. There is no pressure on the judiciary to develop the positive requirements for the products liability claim. Consequently, these vague requirements remain embryonic.

B. NEGATIVE REQUIREMENTS

After the positive requirements for the products liability claim have been met, the claim may yet be defeated by the raising of certain *defensive* legal provisions where applicable. Their *non* applicability constitutes the negative requirement for the products liability claim. Below, these provisions are considered in turn (1,2,3).

1. Only one of the three defensive provisions is *special* to the products liability provision[25] it is contained in *sub-article* (2) *of Art.* 2085. This sub-article reads as follows:

> No liability is incurred where the defect which has caused the damage could have been discovered by a customary examination of the product used.

24. We are not aware of any products liability issues involving mere defects of *design*. The very wording of Art. 2085 makes the "design defect" notion irrelevant to products liability claims. But of course a defect in design may be corroborating evidence of a relevant defect in the product.

25. The other two defensive provisions (see 2-3, below) are more general: they can be raised also in cases of strict liability other than products liability.

The burden is thus on the defendant to

(i) point out a concrete "defect" in the substance or structure of the product, and

(ii) show that this is the defect which has "caused" the damage,[26] and

(iii) prove that this defect "could have been discovered by a customary examination of the product used."

The above requisites for defence do not seem to have been tested in a case. The third requisite (*discoverability* of defect) is lifted from Art. 2293(2) of contract law, where it is used in sales-warranty cases.

2. The defensive provision of *Art.* 2088 is *general* in that it can be raised not only against products liability, but against other kinds of strict tort liability. The burden is on the defendant to show that the claimant is connected with the product[27] by virtue of *a contract* (e.g. of sale)[28] made with the defendant.

3. The defensive provision of *Art.* 2086 is *general* in that it can be raised not only against products liability, but also against other kinds of strict liability.[29] The burden is on the defendant to show that the claimant was injured solely through his own fault (see b, below). In this connection, the following observations are in order:

a. Pursuant to *sub-article* (1) of Art. 2086, the defendant to strict tort liabilities, which include products liability, is expressly barred from raising any defences based on his own faultlessness, or on third party fault, or on force majeure,[30] or on the fact that "the cause of the damage remains unknown." These *exclusions* call for the following remarks:

(i) The exclusion of the defence "I am faultless" is superflous, since the very heading of the strict liability section reads "Liability Irrespective of Fault" i.e. not-based-on-fault.

(ii) The exclusion of the defence "the cause of the damage remains unknown" makes no sense.[31] Since the "positive" requirements for

26. The *claimant* has *only* to show that the damage has resulted from the "normal use" of the product and perhaps also, at most, that it was caused by the product's defective "behaviour" (see A. point (ii) and its discussion, above).
27. Or, in other cases of strict liability, with the dangerous activity or the animal, building, machine, motor-vehicle (Arts. 2069, 2071, 2077, 2081).
28. See also ftn. 18 and accompanying text.
29. Liabilities for harm caused by dangerous activities, or by an animal, building, machine, motor-vehicle (Arts. 2069, 2071, 2077, 2081).
30. *Force majeure* for short, according to the construction of Art. 2085(1) by the draftsman René David, in *Avant projet de code civil pour l'empire d'Ethiopie*, Doc. C. CIV/13 (Addis Ababa 1955), p. 21. In contrast to this exclusion in strict tort, the "force majeure" defence is generally accepted in Ethiopian contract law.
31. It is borrowed from inept formulations found in French case decisions.

all strict tort claims include causation,[32] they preclude the very possibility of the cause of the damage remaining unknown at the "defence" stage. This, unless the cited phrase is arbitrarily taken to mean nondiscovery of a cause less immediate[33] than the required "normal use of the product"

(iii) The exclusion of the defences "third party fault" and "force majeure" (which are prevalent in the French and related jurisdictions) in the strict tort area of Ethiopian law is expedient: it simplifies litigation without notably increasing insurance costs.
In particular, an Ethiopian defendant-manufacturer cannot invoke "third party fault" or "force majeure" against a products liability claimant.

b. pursuant to *sub-article* 2 of Art. 2086, the defendant is wholly relieved from strict liability where he shows that the claimant's harm is caused "solely" by the *claimant's fault.*[34] Incidentally, for reasons analogus to those given under (ii) above, the adverb "solely" is devoid of sense unless it connotes not the absence of other causes but that of other causal faults.[35] In its application to products liability the "claimant's fault" defence is, as shown below, probably superfluous in most cases:

As a rule, the faults committed by products liability claimants consist in conduct contrary to the "positive" requirement that their use of the product be "normal" Since "normal" (non-faulty) use of the product is a prerequisite for the claim,[36] it is not for the defendant to establish the claimant's faulty (abnormal) use, but for the claimant to establish his non-faulty (normal) use of the product. For example, where the product was used in a way incompatible with the manufacturer's standard instructions or cautionary labels, the claimant may be unable to establish that such use was "normal" [37]

32. In products liability, caustation by "the normal use of the product" (discussed under A, point (ii), above).
33. Such as the precise causal defect in the substance or structure of the product. Its "discoverability" supports the defence examined under 1. above.
34. Where the defendant is also at fault, he is only partly relieved: see Art. 2098.
35. For further elaboration, see G.Krzeczunowicz, *The Ethiopian Law of Compensation for Damage* (Addis Ababa, 1977), p. 124.
36. See discussion under A, point (ii), above.
37. Incidentally, "contractual" warnings and/or disclaimers of liability cannot affect the position of) third party) products liability claimants.

PART III

CONCLUSION[38]

1. The Ethiopian products liability provision of Art. 2085(1),[39] enacted with the Civil Code of 1960, has *captured and generalized in a single phrase* the gist of certain "forward" solutions proposed by some American legal writers[40] of the fifties in order to secure a maximum protection for the "consumer" public[41] of their affluent and powerful country. It is hardly surprising that, long after enactment, this provision remains *dead-letter in Ethiopia*, a non-affluent country on the threshold of development. If the elegant formula of Art. 2085(1) had any aims other than "cosmetic" it has not achieved them. Apart from other disadvantages, its full application would have generated a flood of confused litigation. Rather fortunately, this formula's sweeping potentialities were and are not taken notice of.[42] Since the revolution of 1947, such negative attitude can be justified by new reasons:

(a) Purusuant to the nationalizations of 1975, most enterprises engaged in industrial production belong to the State.

(b) This non-affluent country must support the increasing costs of socialist development. Its austerity budget would be upset by liabilities of the producer-State and its enterprises for all damages caused by a "normal use" of their products.[43]

(c) In the initial stages of economic development, the aim of increasing production should prevail over that of indemnifying the consumers for harms *other* than substantive damage caused by a serious defect of the product used.

2. The continuous lack of products liability claims based on Art. 2085 seems to indicate that, in actual fact, *even* substantial harms due to serious defects in the products used do not give rise to extra-contractual suits against the producer (manufacturer). For example, a "hearsay" case of three deaths from a tinned-food poisoning was not brought to court by the surviving dependants of the deceased victims. The manufacturing firm was located in a remote foreign jurisdiction (see Part II, A.(c)). On the other hand, it seems that the surviving dependants were not aware of their rights, and anyway had no means for suing abroad.

38. The text below is reworded on the basis of the distinct French version of this Report's Part IV.
39. See Part I, 1. According to this writter's recollection, this provision was hastily drafted late in the codification process.
40. See, e.g., W.L. Prosser, cited in Part I at ftn. 7
41. United States case law now often reflects this policy (as shown by Professor B. Schorth's report to the Congress).
42. See Part II, A, point (ii) ff.
43. See *ibid.*

3. The contrast between the theoretical principle of maximum protection for the consumer and his position in actual fact is thus extreme. This situation should be remedied without, however, sacrificing the socio-economic postulates expressed under (b)-(c), above. To this end, we submit that the sweepingly general (but hardly observed) formula of Art. 2085(1) should be particularized in a way restricting its scope. *Inter alia*, there should be an express requirement that the damage sustained by the claimant be caused by a "defect" in the product used, followed by a definition of "defect" But in order to make a restricted protection of the consumer effective in practice, it may be useful to add an explanatory comment to the amending statute. Further suggestions are submitted in the POSTSCRIPT.

1980 ADDENDUM

on

FOREIGN TRENDS

Comparing foreign laws or draft laws, and comments, with one's own obviously helps to put the latter's virtues or defects in focus. It therefore seems proper to supplement our report with a minimum of remarks on some basic foreign trends in the field of products liability.[44] The following observations will be based on: 1) some of our fellow-reporters' national reports to the Congress,[45] 2) Professor W. Gray's (Michigan University) summarizing General Report, and3) other sources.

The Congress's large *Products Liability* section (Section II-A-2) met without defining the exact meaning of this expression of American origin, which in the United States is used rather loosely. As a result, the General Reporter's guidelines and the discussion of them were somewhat confusing. Hereafter, we shall continue to use the definition required by the wording of Art. 2085 Eth. Civ. C. in context. For us, "products liability" is the special (strict tort) liability for product-caused harm grounded on rules distinct from those dealing with contract or fault.

Our so far available (and perhaps incomplete) informations indicate that "products liability" in the above sense still exists *only* in some of the United States of America[46] and, since 20 years, in Ethiopia, the precursor in this field (see Conclusion, above). Those USA products liability decisions which follow the strict-tort approach are often based on the persuasive authority of Section

44. A comprehensive survey would require a bulky monograph.
45. Due to inadequate organization of the Budapest Congress, many national reports were lost before their projected distribution to fellow-reporters.
46. Prof. W. Gray, General Report.

402-A of the American Law Institute's Restatement of Torts Second,[47] but there is no Federal legislation on this subject.

In industrial countries lacking strict-tort products liability provisions, judicial inclination to protect injured product-users who have no contract with or are unable to prove a fault of the producer may lead or leads to the creation of *fictions* circumventing the law in their favour. The technical devices used vary. A device common to many countries is presuming the producer's fault from the mere fact that his product has a defect. This device is not foolproof unless the presumption is made irrebuttable in law (or prohibitively difficult to rebut in fact[48]), in which case its effects are practically the same as those of strict liability. In France, there is but a clumsy irrebuttable case-law presumption that the manufacturer is "aware" of defects in his products and is therefore at fault if he puts them on the market. A less common type of fiction-based device is described and criticized in Part I, 2. of our report. It consists in presuming a *contract*-relation where none exists in order to give the contractual sales-warranty-against-defects remedy to the injured ultimate consumer. This device is used in the case law of some American jurisdictions and in the French case law. The French reporter deplores the need to use such complex fictions, whether based on presumptions of fault or of contract. He calls them confusing and unsatisfactory.[49]

In many jurisdictions doctrinal opinion now favours introduction of strict-tort products liability. Moreover, in the *law reform* bodies of several states, and on the international plane, there now emerge strong trends towards definite statutory regulation of liability for harm from defective products. Such trends are prominently apparent in certain recent documents,[50] which are discussed with varying emphasis in the remainder of this Addendum:

A. The *Yugoslav* 1976 Draft Law on Obligations and Contracts.[51]

The translated version of its Article 151 reads as follows:

Whoever puts in the market a thing manufactured by him and which, due to a shortcoming or properties not known to him, represents a danger to provoke damage to persons or to property, is liable for the damage which would ensue due to such a shortcoming or properties. [We suspect shortcomings in this translation]

This rule resembles the Ethiopian products liability provision in that it is a ***strict-tort*** provision based neither on fault nor on contract. However, it is different in that it is derived from the general concept of "dangerous

47. Prof. P. Schroth, United States Report.
48. As in England in cases where the famed *res ipsa loquitur* doctrine is being applied.
49. Prof. P. Malinvaud, French report.
50. Reproduced or referred to in Prof. Gray's General Report, which includes the translation under A., below.
51. We have no information on whether this draft law is already enacted. On the other hand, we regret that the Yugoslav report by Dr. J. Radisic & Prof. D. Mitrovic was not distributed at the Congress (see ftn. 45). We offer apologies in case this affects the accuracy of the comment below.

thing", which is not used in Ethiopian law for reasons mentioned on page 41-F of our prior work.[52] After enactment of the above Draft Law the manufacturer, holder of and thus responsible for his dangerous product, will continue to be liable for damage caused by it after he has put it in the market.

B. In the *United Kingdom*, the excellent joint report on "Liability for Defective Products" (favouring *strict-tort* liability) of the Law Commission and the Scottish Law Commission[53] has not yet given birth to a draft statute, but offers, inter alia, penetrating insights into basic problems tackled also by the draft European Convention on Products Liability (discussed below), accession to which is recommended by the Law Commission.

C. The full title of the just mentioned draft treaty is "European Convention on Products Liability in Regard to Personal Injury and Death"[54] hereafter called *the Convention*. Despite the fact that the Convention is destined for adoption by highly industrialized European states, its principl feature strict tort liability is common with that of Ethiopian law. Moreover, certain of its features which are foreign to Ethiopian law would, if adopted by the latter,[55] implement the concluding postulates of our report (Part IV), hereafter referred to as *postulates*. We shall therefore set out these *features* after reproducting the Convention's basic provision (Art. 3(1)), which reads as follows.

> The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.[56]

Feature 1

Under the Convention (Art. 2(a)) the term "product" includes only *movables*. This prevents producers of immovables from being affected by products liability. This restriction (to be discussed later) would meet our postulate 3.

Feature 2

The Convention (Art. 3(1)) clearly requires that the injury be caused by a *defect* in the product. This, again, would meet our postulate 3. Our present law only requires that the damage result from a "normal use" of the product.[57]

Feature 3

The Convention (Art. 2(c)) includes a *definition* of the product's "defect" (to be discussed later). This, again, would meet our postulate 3.

52. The work first cited at ftn. 6, above.
53. Her Majesty's Stationary Office, London 1977.
54. I-15.341 *European Treaties Series*, No. 91 (1977); so far signed by Austria, Belgium, France, Luxemburg.
55. They may be adopted for *reasons different* from those of the Convention's Explanatory Report.
56. "Product", "producer" and "defect" are defined in the preceding Article 2.
57. See critique in our report, Part II, A, (ii).

Feature 4

The Convention (Art. 3(1)) limits products liability for damage to "death or *personal* injury" (the resulting exclusion of damage to property will be discussed later).[58] This would meet postulates 1 (b) and 3.

Feature 5

Under the Convention (Art. 3(2-3)) the term "producer" includes certain persons *deemed producers* for the liability-purposes of the Convention. These persons appear to be.

a) in the case of imported goods, the importer of the product.
This would meet our implicit postulate 2.

b) the person who "has presented the product as his product" by putting his trade name or mark etc. on it ("own-brand" product).

c) subsidiarily, the supplier of products which do not indicate the identity of the producer or the persons deemed producers *unless he discloses* such identity or that of his supplier.

Feature 6

The Convention (Art. 5(1)) arms the producer with special *defences* which are fair, and would meet our postulate 1 (b). The producer[59] is not liable

a) if the product was not put into circulation by him (but, for example, was stolen and sold before being tested) ;or

b) if, having regard to the circumstances, it is probable (e.g. in experts' opinion) that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that the defect was brought about afterwards (e.g. by a careless user or a third person) ; or

c) if the product was manufactured and/or distributed neither for the producer's economic purposes nor in the course of his business.

Incidentally, we have considered neither the Convention's international aspects,[60] nor its solutions or problems fairly solved by our general tort law,[61] nor its dispensable provisions.[62]

D. The "proposal for a Council (of the European Communities) Directive relating to the Approximation of the Laws... concerning Liability for Defective Products",[63] hereafter called *the Directive*. Inter alia, it proposes *limitations on the amount* of the producer's liability, which are not directly relevant for us. We nevertheless mention it here because of the interesting *rationale* for the general concept of such limitations (which is relevant for

58. See Feature 4 in Postscript.
59. Reminder: "producer" includes "deemed producer" (see above).
60. Convention Arts. 1 and 10-19.
61. Convention Arts. 3(5), 4(1), 5(2), 6, 7, 8. Compare Eth. Civ. C. Arts. 2086(1), 2086(2), 2143, 2147(3), 2155(1), 2156.
62. E.g. Convention Arts. 2(b) (unwelcome), 2(d) and 9(a) (superfluous), 9(b) (premature).
63 *Official Journal of the European Communities* (1976), No. C. 24179.

us), found in paragraph 22 of its Explanatory Memoradndum:

> "Liability irrespective of fault without any kind of limitation place an incalculable burden of risk on the producer" and "Every (liability) insurance contract provides for a limit on the amount for which cover is given", etc. (See "The Directive" in Postscript, below).

POSTSCRIPT

de lege ferenda

The above Addendum on Foreign Trends in Products Liability has hopefully increased the reader's awareness of both the basic virtue (strict-tort liability) and the shortcomings in this country's products liability law, best seen in the light of the draft European Convention on this subject. We favour an adjusted *reception of the Convention's features* 1-6 (see above). We have so far only hinted at their consistency with the concluding postulates of our report. Further reasons for their reception in this country are added below.

Feature 1

The exclusion of *immovables* from the coverage of the term "product" would eliminate the wasteful overlapping of products liability with the remedy available under Art. 2077(1) against the owner of the immovable who, in turn, can "recover from the builder" (producer) pursuant to Art. 2077(2).[64]

Feature 2-3

The requirement that the injury be caused by a defect in the product, coupled with a sensible definition of "defect", protects producers against abusive claims. The definition proposed by the Convention amounts to exclusion of that used in contract law. In tort law, the product's *defect* does not consist in lack of utility or commercial quality, but in *lack of safety*:

A product has a "defect" when it does not provide the safety which a person is (reasonably)[65] entitled to expect having regard to all the circumstances, including the presentation of the product. (Art.2(c) of the Convention).

Often the "safety" defect lies only in the physical structure of the product (e.g. of an unsafe drug or brake). In other cases, a given product may or may not be deemed defective depending on various circumstances. The defect may consist, e.g., in unsafe packing. The Convention's Explanatory Report, para. 36, mentions the need to consider whether the product "was utilized more or less correctly

64. See p. 44 of our work first cited at ftn. 16, above.
65. The term *reasonably* was left out by the Convention (see its Explanatory Report, para. 35) because it had an inconvenient connotation in its French version's counterpart (raisonnablement"). We deem it *proper* to refer to the objective "reasonability" standard of expectation.

(normally) or used in a more or less foreseeable way." The express inclusion of "the presentation" of the product among the circumstances to be considered means that "defect" includes, e.g., "incomplete or incorrect directions for use or warnings" or "the absence of directions for use or warnings" (where needed for safety reasons). "Presentation" defects may also consist in incorrect labelling or misdescriptions which create risks of injury.

Feature 4

Several elaborate reasons for exclusion of damage to *property* from coverage by strict-tort products liability are formulated in paras. 117-121 of the United Kingdom's document cited at ftn.53, above. We can here cite only the following:

> ... the inclusion of property-damage in a regime that imposed strict liability on producers would mean a significant increase in the cost of insurance to the producer [who, in Ethiopia, is primarily the State or its enterprises]. ... the extra cost to the producer ... would be passed on to the general public in the price of the product.

We may add that damage to valuable property is or should usually be covered by the owner's first-party insurance. We therefore recommend limitation of products liability to cases of personal injury and death. Incidentally, this would in no way prevent recoveries for property-damage under other strict liability provisions (e.g. Arts. 2081, 2082, 2077, 2069), or under "fault" provisions (e.g. Art. 2031).

Feature 5

In compensation for seeing the scope of his protection curtailed under features 1-4 above and 6 below, the injured consumer well deserves to be given the possibility of briniging his claim against such defendants as can be reached easily.[66] We therefore recommend assimilation of the Convention's Feature 5 points a) and c), while leaving out point b).[67] Incidentally, the burden on the *importer* is not intolerable, since he can usually recoup himself by claiming damages for breach of "warranty-against -defects" in the product imported (Arts. 2287, 2289, 2300(3), 2361(1)). As for other commercial suppliers of products, they are protected by the "disclosure" faculty.

Feature 6

We recommend reception of this feature. The *defences* at a) and b) protect the producer (who, in Ethiopia, is primarily the State or its enterprises) against abusive claims. Defence at c) is fair and is implicit in the present law (Art. 2085 (1)). Incidentally, the Convention does not provide any "discoverability of defect" defence. This defence, typical of sales-warranty of quality (Art. 2293(1-2)), is incongruous in a products liability law concerned with the consumer's safety

66. For additional arguments, see para. 102 of the United Kingdom document cited at ftn. 53. They fit, a *fortiori*, the situation of unenlightened claimants in Ethiopia.
67. Because "own-brand" products are little known in this country, and exceptional cases can be solved by application of the subsidiary remedy at c.)

(see Features 2-3). If the defect is so obvious (e.g. product rotten or marked "dangerous") that its nondiscovery amounts to fault, the producer's defence is that of Art. 2086(2). We therefore recommend abrogation of Art. 2085(2).

The Directive

In the Ethiopian system, the Directive's interesting concept of liability-limitations (see Addendum D.) cannot be discussed in the narrow framework of products liability. In Ethiopian law, *whatever be the legal grounds* of the liability.[68]

1) in case of death, liability for material damage is limited to a compensation "in the form and nature of a maintenance allowance" (art. 2095(2));[69]
2) in case of death or personal injury ("bodily harm"), the "moral" component of the damages is limited to the trifling sum of 1000 Birr (Art.2116(3))[70]
3) in case of non-mortal injury, there are, as a rule,[71] no limits on liability for material damage.[72]

DRAFT LEGISLATION

In light of all above considerations, we respectfully submit the following draft provisions intended eventually to replace article 2085 Civ. C. (if our preceding arguments are acceptable):

PRODUCTS LIABILITY 1. PRINCIPLE

The producer is liable for death of or bodily injury to a user of his product caused by a defect in that product.

PRODUCTS LIABILITY 2. DEFINITIONS

(1) "Product" is a movable thing made, transformed or processed by man.
(2) A product has a "defect" when it does not provide the safety which a user is reasonably entitled to expect having regard to all the circumstances including the presentation of the product.
(3) "Producer" is
    a) the manufacturer of the product,
    b) the importer of the foreign product, and
    c) the supplier of the product if unwilling to indicate the identity of his supplier to the claimant.

68. E.g. under Secs. 1-2 of Chap. 1, Title XIII Civ. C.
69. See critique of and conclusions on this confusing criterion on pp. 146-153 of our work cited at ftn. 35, above.
70. See critique and proposal *ibid.*, top of p. 287 and p. 291(d).
71. For exceptions, see *ibid.*, Part II, Chap.3.
72. Incidentally, for the "loss of earnings" component of material damage from personal injury (whether or not mortal) we have proposed *ibid.* (P. 153, 3.), after considering a Danish model, a limitation on liability for loss of earnings (or support-income) to a maximum based, for example, on the salary of the average public servant: persons with higher earnings would themselves have to acquire higher coverage insurance.

PRODUCTS LIABILITY - 3. DEFENCES

The producer is not liable if he proves:

a) that the product has not been put into circulation by him, or

b) that, in consideration of all the circumstances, it is probable that the causal defect did not exist at the time when he put the product into circulation or that this defect was brought about afterwards, or

c) that the product was not manufactured and or distributed for profit in the course of the producer's business.

Incidentally, the "fault of the victim" defence against strict liabilities, provided by Article 2086 (2), includes products liability.