DEFENCES

Basic Principles

There are two levels of defence to a product liability claim. The first is to challenge the basic justification for the claim by asking the courts to rule that the plaintiff has not established the essential conditions for a claim. In other words, before the manufacturer needs to seek legal defences he is entitled to ask the plaintiff to prove :

1) that the product was unreasonably dangerous
2) that the defendant was in some way connected with the product, i.e. by manufacturing it or by putting it into the stream of commerce
3) that the defect in the product was the cause of the plaintiff's injuries.

The need to establish the basic facts means that evidence is all important and much of the reported cases deal with the admissibility or adequacy of the evidence brought in by the plaintiff. In the United States both sides in a dispute have the right to demand a trial by jury in civil cases (compare the opposite position in English law) and the verdict of the jury on facts is usually not to be challenged. However, it is quite common for the unsuccessful party to appeal to the court for favourable judgment in spite of the jury's verdict and the judge will agree if he considers that no reasonable jury could have brought in the verdict it did. However, it is not the function of the judge or of a Court of Appeal to weigh

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up the evidence and if there is evidence on which a reasonable jury could have come to the conclusion that it reached, then its conclusion will not be disturbed.

The second level of defence is to persuade the court that although the facts indicate that the manufacturer produced a defective product and that the defect produced caused injury nevertheless there are legal reasons why judgment should be given in favour of the defendant. These reasons include :-

1) lapse of time { limitation periods / useful life
2) misuse
3) assumption of risk
4) unusual sucseptibility
5) lack of jurisdiction

1) Lapse of time

There are two ways in which a defence may be based on lapse of time. One result of the passing of time is that the plaintiff may have delayed so long that he is barred from proceeding in court by a statute of limitations. The second possible result is that the defendant may be able to show that the product has outlived its useful life.

1.1 * Statutes of limitation

Every state has legislation barring actions after a certain time. Limitation periods are all created by statute and in any one state there may be several limitation periods for different circumstances. Thus, a claim based on a written

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contract may be different from that applicable to an oral contract or different from that applicable in a claim in tort. The defendant has the problem of finding the appropriate statute and then having to decide when the period starts and then perhaps he will be able to raise the defence that the plaintiff did not start his action within the appropriate time. The usual Common Law period of limitation for tort is six years, but most states have a shorter period of two years applicable in cases of personal injury. Then there are some odd limitation periods which may or may not apply. For example, in some states if a parent is claiming for an injury to his child he must claim within two years. In another example, there is a period of 10 years in respect of claims against an architect for injury resulting from the unsafe condition of a house he has built.

There is also the difficulty of establishing the date at which the claim arises and therefore the date at which the period of limitation is to start running. One objection to making a claim for breach of warranty is that the claim arises at the time the goods are delivered and it may well be that the injury will not arise until many years after that. In tort, the limitation period arises when the injury occurs. In the case of, for example, a motor car accident there is no great difficulty about establishing the date of the injury, but difficulty has been caused in cases where the injury has been caused by exposure to a noxious substance. Thus, the problem has arisen in connection with asbestos claims where the worker has suffered lung damage over a period of years and cannot point to a specific date on which he suffered the injury. The courts have handled this problem by holding in general that the

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period of limitation will start when the plaintiff is aware not only of his injury but also connects that injury with the drug or noxious substance.

The defence of lapse of time thus causes great difficulty and requires both the plaintiff and the defendant's lawyers to have a detailed knowledge of the limitation periods applicable in the state whose law is to govern the action. In fact, the limitation period may control the choice of forum in that a plaintiff who knows he is out of time in one state may seek to start an action in another state with a more generous period.

1.2 * Useful life

The plaintiff has to show that the defect existed in the product at the time the product left the control of the defendant. Usually, it is the manufacturer who is being sued and the plaintiff must therefore show that when the product was sold to the wholesaler, for example, the defect then existed in it. The longer the period that has elapsed since that event and the date of the injury, the more difficult it is for the plaintiff to satisfy the jury that the product was defective when it left the manufacturer's hands. The courts have said on many occasions there is no duty to make a product that will last indefinitely and they will not hold a manufacturer responsible for injury caused by normal wear and tear. Furthermore, there is the question of maintenance and it would be unjust to hold a manufacturer liable for a defect that was caused by the failure to maintain equipment in proper condition.

However, we are not able to say at the present stage

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in the development of the law that there is necessarily a definite period of time beyond which a manufacturer would not be responsible. Some states have passed legislation, which of course applies only in that state, which does establish a definite period. For example, periods of 12 years, 10 years and 8 years have been established by state legislation. These periods usually start from the date of the first sale of the product which is usually the date when it is sold to a distributor. The Model Product Liability Law developed by the U.S.Department of Commerce deals with this particular problem by proposing the following rule :

> "A product seller shall not be subject to liability to a claimant for harm if the product seller proves that the harm was caused after the product's "useful safe life" had expired."

and goes on to say that

> "in claims that involve harm caused more than 10 years after time of delivery, a presumption arises that harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence."

This concept of a limitation period designed to match the useful safe life of a product is usually known today as the "statutes of repose". The proposals of the U.S.Department of Commerce have not yet become law although one or two states have in fact passed legislation based on the proposals and others are likely to follow in the next year or so.

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The same concept is to be found in the European proposals. The EEC Directive provides for a period of 10 years following the marketing of the defective article. A similar period of 10 years is included in the Strassbourg convention.

2) Misuse

Liability can clearly only arise when a product is being used for the purpose for which it is intended or for a purpose which the manufacturer ought to have foreseen. There is no difficulty as a rule about establishing the purpose for which a product is intended, but there is quite often some difficulty about the concept of the purpose which should have been foreseen. In relation to motor cars, for example, the argument was raised that a motor car was not intended to be involved in a collision and that a manufacturer could therefore not be liable for injury caused when an accident arising for some unrelated reason caused injury brought about by a defective product. An example would be the personal injuries caused to a passenger in a car when the seatbelt breaks under the stress of a collision. The courts have held in these cases that motor cars are known to be involved in collisions and that the manufacturers must :

> "use reasonable care in the design of its vehicles to avoid subjecting the user to an unreasonable risk of injury in the event of a collision".

The general principle has been stated by a U.S.Court of Appeals as follows :

> "The general rule may be state as follows : it is the duty of a manufacturer to use reasonable care under the

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circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended. This duty includes a duty to design the product so that it will fairly meet any emergency of use which can reasonably be anticipated. The manufacturer is not an insurer that his product is, from a design viewpoint, incapable of producing injury."

This statement was made in a case concerning an automobile accident "Gossett v. Chrysler"(359 F 2nd 84) , in a 1966 decision, but it is of general application and would be applicable equally to other products.

In the case of "Bradley Kay v. Cessna Aircraft" (548, F.2nd 1370), a 1977 decision of a U.S.Court of Appeals,the pilot of a private aircraft was killed when one of the two engines failed on take-off. His widow sued the manufacturer on the basis of strict liability, claiming that inadequate operating instructions had been given, and at the trial the jury gave a verdict in her favour. The Court, however, overruled the verdict of the jury and gave the judgment for the defendant "notwithstanding the verdict". A judge may thus overrule a jury when the evidence permits only one reasonable conclusion. He may conclude that the verdict cannot be supported after he has reviewed all the evidence in the light most favourable to the parties against whom the verdict had been given. The Court of Appeals supported the trial judge. Lack of adequate warning would be a defect only when the product was either being used as was intended or in a way that could have been foreseen. It would be unreasonable to expect a manufacturer to foresee that a pilot of an aircraft would attempt

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to take off without checking his instrument panel. A check of the instruments would have shown that one engine was not working and the pilot was thus guilty of misuse in one of two ways. Either he noticed the failure of the engine in which case he should not have tried to take off or he did not make a proper check of the instruments.

This case also illustrates the difficulty of making a distinction between "misuse" and "contributory negligence" and "assumption of risk". The courts in general prefer to use the expression "misuse" even when there is an allegation of negligence because the concept of strict liability is quite divorced from negligence. The basis for liability is the defect in the product not the negligence of the manufacturer in producing a defective product.

3) Assumption of Risk

Assumption of risk is the voluntary acceptance of a known and appreciated danger and may be either :

1) express or
2) implied.

When we are speaking of "express assumption of risk" we mean that a party to a transaction has agreed not to sue the other party if anything goes wrong. The agreement may in fact be implied in the circumstances, as when a person engages in a potentially dangerous game such as football. In product liability, the concept implies that the user knows that he is running a danger of harm by using the product and he cannot therefore complain if in fact he is damaged. We must, however, limit the immunity

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to action to the actual parties to the transaction and a third party would not be bound by any express or implied agreement. If a third party is injured by a defective product which is being used with full knowledge of the potential danger we could argue convincingly that the injured third party could sue on grounds of negligence.

It is difficult to draw a line between assumption of risk and contributory negligence and when we are referring to contributory negligence we have to bear in mind that the concept of strict liability is expressly divorced from any concept of negligence. By contributory negligence we mean that the injured party has himself been careless and contributed to his harm. In most states there are what is known as "comparative negligence" statutes which provide for the allocation of damages between the two parties whose individual negligence has brought about harm. However, the point is that the defence of contributory negligence is in strict theory only available against a plaintiff who is complaining of negligence and most courts say that it is not appropriate when the plaintiff is claiming under the concept of strict liability. When the claim is strict liability, then the appropriate defence is either assumption of risk or misuse and just as it is difficult to draw a line between assumption of risk and negligence, so it is difficult to draw the line between misuse and assumption of risk. We should try to limit the use of the term "assumption of risk" to circumstances in which the injured party knew that he was running the danger of harm and yet voluntarily chose to use the product. The term "misuse" should be applied when the product is being used in a way that the seller

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did not foresee and could not have foreseen : it does not imply that the injured party was voluntarily running any risk to his knowledge.

An example of assumption of risk is the case of "Lee v. Ford Motor Company". Mrs. Lee bought a new 1971 Ford car and started the engine early one cold morning without getting into the car completely. She was half sitting on the driving seat and half standing on the ground. When she turned on the ignition the car moved forward, thus causing harm to Mrs. Lee. There was a defect in the gear mechanism which caused the gear to jump from "park" to "drive" and Mrs. Lee knew that this had happened before. At the trial the jury awarded Mrs. Lee damages of $30,000 and this award was upheld by the Georgia Court of Appeals. The Court then said that

1) Ford could not use the defence of contributory negligence against a claim based on breach of warranty,

2) the Ford Motor Company could use the defence of assumption of risk, but in this particular case the finding of the jury was that the plaintiff had not acted unreasonably and in the view of the jury Mrs. Lee had not voluntarily accepted the risk of the car behaving as it did.

4) Unusual Susceptibility

This is a defence that is most appropriate to claims based on dangerous drugs or other harmful substances. It is based on the claim that the plaintiff suffered harm because of

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some unusual condition applicable only to the plaintiff or to a very small class of people. The liability of the manufacturer extends to harm that could have been foreseen, but a manufacturer is not expected to foresee that one or two people might be harmed because of some special condition that could not be foreseen.

5) Jurisdiction

It is a general principle of law that a court cannot hear and determine a case unless it has jurisdiction. By jurisdiction we mean that the nature of the claim is within the type of claim that the court is established to determine and also that the parties to the dispute are under the authority of the court. There is usually no great difficulty about jurisdiction when the parties are American citizens, but difficulty can arise when the defendant is a manufacturing company not established in an American state. The point here is that all states have a "long-arm statute" that gives its court jurisdiction over the person of non-resident defendants in certain circumstances and the defence that can be raised is that the conditions have not been fulfilled . In very general terms, the condition under which a foreign manufacturer can be responsible to an American court is that the corporation has been doing business within the state and there is always the argument that the amount of business done by the corporation with a particular state is not sufficient to justify the application of the "long-arm" statute. The tendency of the American courts is to accept jurisdiction whenever possible and the defence of lack of jurisdiction is therefore very difficult to establish, but in fact it has been successful on occasions.

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There are really two aspects to this defence. One is the claim that the court does not have jurisdiction over the defendant because the defendant is out of state. If this claim is unsuccessful and the court says that it does have jurisdiction over the defendant in the circumstances, then the next stage may be to challenge the particular court on the grounds of "forum non conveniens". There have been occasions on which a state court has said that although it does have jurisdiction, yet it would be more convenient for the case to be tried in another court, perhaps even in a court of the home country of the defendant. In the last year, for example, a Delaware Court has refused to hear a claim by victims of a helicopter crash in Norway against the American manufacturer of the helicopter. The Court maintained that it would be more convenient for the case to be heard in a court in Norway. Similarly, a New York Court has refused to hear a claim against an American ship owner by the owner of a pier in Jamaica, even though the plaintiff pointed out that the damages he could recover in Jamaica would be far less than the damages likely to be awarded by the New York Court. The New York Court said the disparity in damages did not override the other factors that would make a trial in Jamaica more convenient.

In most cases a claim of lack of jurisdiction or "forum non conveniens" is not an absolute defence to a claim. It may be, of course, that the plaintiff has delayed so long that if his complaint is rejected by one court he is then out of time and cannot bring a case in another court, but this is an unusual situation. In most examples, the result of a transfer to another court may be that a difference law governs the situation or that

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even if the law is the same, the damages likely to be awarded will be much less.

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