Poland:

Introduction:

The Polish product liability regime consists of rules developed by the national courts since the 1960s, involving contractual and tortious (both fault-based) liability, as well as the rules implementing the Product Liability Directive (Act of 2 March 2000 on the protection of certain rights of consumers and liability for damage caused by a dangerous product, Dz. U. (2000) No 22, item 271, amending the Civil Code). In spite of certain significant advantages of contractual liability, preference for the use of tort has been seen clearly in the jurisprudence of the Polish courts. The Directive added the ‘strict’ liability standard, unknown in the product liability regime before.

The background of the Polish product liability regime - Polish legal system and legal culture:

It is considered necessary to introduce the peculiar background of the Polish product liability regime, especially for the Western European readers. The traditional, established by the national courts regime of product liability, and the legal culture determining the parameters of its application, have been affected by the historical, political and economic surroundings of the existing black letter law. Poland, primarily firmly based within the civil law family with its laws modelled on the French Civil Code, has for some time remained under the domination of the Soviet Union, and thus within what many comparative lawyers referred to as the ‘Socialist legal family’ (David and Brierley, Zweigert and Kotz). Since 1989 the country has seen a very impressive return to the democratic and market-based economy and law, as well as to its civil law roots. The commencement of building of the comprehensive product liability regimes dates, however, for the Socialist period in the Polish history.

In Socialist legal systems law has been understood to be merely a tool assisting the governing party in shaping the desired social order. The Polish Civil Code, although retaining many of its civil law features, did reflect such a tendency. Black letter law was to be of a general nature, capable of being interpreted and re-interpreted for the needs of the system. The role of the courts, therefore, was quite significant in the Socialist legal systems. This could be seen in the product liability case law, which in Poland has been substantial in number and scope in the complete absence of statutory regulation on the subject (general contractual and tortuous liability provisions of the Civil Code were used as legal bases). The economic conditions, on the other hand, put even more weight upon product liability litigation, as the proper motives for producing safe and good quality products did not exist in the centrally planned economies (lack of competition). Because of lack of the producers’ initiative to manufacture safe products, law had no choice but to provide remedies in the then unavoidable cases of injuries caused by unsafe, poor quality goods. At the moment, with the changed political and economic conditions, Poland and the rest of the post-Socialist Europe are returning to their civil law roots. The process is gradual and by no means free from serious problems. As far as the product liability regime is concerned, the operation of economic incentives to manufacture safe products (free competition) has commenced, and the prospects for joining the European Union prompted the amendments of the black letter laws. However, some representatives of
the legal doctrine (Ewa Łętowska – former Ombudswoman of the Republic of Poland and a distinguished consumer law specialist) as well as consumer activists (Małgorzata Niepokulczycka – the President of the Polish Consumer Federation) have pointed to, still in need of change, attitudes of the legal profession (conditioned by years of operating within different political and doctrinal context), and, in close relation to the previous point, lack of consumer awareness and confidence in the effectiveness of the laws designed to protect them.

**CONTRACTUAL LIABILITY:**

**Introductory remarks:**

Contractual product liability is the primary form of product liability, arising out of the fact of a failure to fulfil a contractual obligation correctly. The specific cases related to the inadequate, or unsatisfactory, quality of products have been singled out by the Polish legal system and regulated by a regime of liability relatively independent from the ordinary contractual liability. The regime of legal and commercial guarantees is autonomous because its purposes are not necessarily similar to the purposes of contractual liability in general (Articles 556 – 576 and 577 – 581 of the Civil Code). While in case of an ordinary breach of contract, under the general liability rules, the principal remedy is compensation; in case of inadequate quality of a product it has been perceived that the remedy should rather focus on ensuring the performance of the contract (exchange of the defective product for one without defects, repair or decrease in the price), or the possibility of a quick termination of the unsatisfactory contractual relationship; and not upon compensation. Legal and commercial guarantees are primarily aimed at satisfying the interests of consumers who, as the ultimate users of products, are particularly interested in obtaining a satisfactory product, hence the need to abandon the strict application of the principle *pacta sunt servanda* in these liability regimes (ibid.). The analysis below does not elaborate upon these specific regimes of contractual liability for losses related to obtaining a product of inferior quality, but only upon reparation of consequential damages.

**Requisites of liability:**


“The debtor is required to repair the loss resulting from the non-performance, or incorrect performance, of an obligation, unless the non-performance or the incorrect performance of the obligation is a result of factors for which the debtor is not responsible.” (Translated by Magdalena Sengayen)

Polish contractual liability, in common with other continental liability regimes, is based upon the requirement of fault. The fault is presumed, and as regards product liability litigation this presumption means that the victim of a defective product must only show other requisites of liability: breach of contract, damage and the causal link between the two. The defendant, on the other hand, needs to prove he has not been at
fault. Polish contractual product liability system required the party in breach (usually the seller) to show maximum care. The liability of professionals has been stricter than liability of non-professional parties to contracts.

**Defect in goods as a type of non-performance or incorrect performance of a contract:**

According to the Polish doctrine and case law the lack of the required safety or quality in a product was generally understood to be an example of non-performance or an incorrect performance of a contract. The fact that the sold product was defective rendered the seller liable for the damage caused by the defect, whether the defect was one of quality, or the one of safety (Jagielska 1998: 24). It is however clear that only those defects which lead to the consequential damages (damages outside the defective product itself) can give rise to product liability. In the cases of the Fiat ‘Multipla’ (Judgement of the Supreme Court of 6 February 1963, 2 CR 96/62, OSN (Jurisprudence of the Supreme Court) 1964/95) and the ‘P-70’ car (Judgement of the Supreme Court of 28 April 1964, II CR 540/63, OSN 1965/32) the Supreme Court held that supplying the car with defects capable of causing an accident was a breach of a contract of sale. In the Polish doctrine and practice of law a certain amount of doubt was cast upon the exact meaning of the notion ‘defect’ in contractual liability, and whether this notion ought to mean the same in the cases of contractual and tortious liability. In cases of a dangerous characteristic of a product, however, the courts would normally declare the seller liable in contract or in tort, and the producer liable in tort. A more ambiguous situation with regard to the understanding of the notion of ‘defect’ could be noticed in the jurisprudence of the Arbitration bodies (during the Socialist period disputes between two state-owned undertakings – socialist organisations – was considered by these arbitration bodies and not by civil courts). Only after many years of experience and under the influence of the jurisprudence of the civil courts did the Arbitration bodies abandon their initial insistence that a product complying with technical standards but useless was not defective. Ultimately both the civil courts and the Arbitration understood a ‘defect’ according to the wording of Article 556.1 of the Civil Code – the provision directly regulating legal guarantees for poor quality products. Among various types of possible defects the Polish case law distinguished instruction defects, design and production defects, and ‘development defects’ (in the latter type of defect the seller was unable to exonerate himself by showing that the design or production defect could not have been discovered by him even with the exercise of due care, the level of which ought to be established with reference to the professional character of the seller’s activity).

**Contractual fault – when could the party in breach of contract escape liability:**

Civil law systems, including the Central European jurisdictions, envisage fault as the necessary element of contractual liability. The ‘fault’ in its broadest meaning includes an objective and a subjective element. The objective element in contractual liability is contractual unlawfulness. This unlawfulness is interpreted differently from the unlawfulness in tortious liability. It is a breach of contract, or an incorrect fulfilment of a contractual promise. The subjective element, in turn, is “not exercising due care” when fulfilling an obligation. Below is an examination of the manner in which the Polish courts interpreted the meaning of these two elements in product liability cases.
The fault has been presumed in case of a breach of contract (thus in the face of the objective element), unless, according to Article 472 CC, the debtor showed that he did exercise ‘due care’ in performing his obligation (subjective element). The requirement of ‘due care’ applies unless a law provision or a legal act (for instance the contract) in question specify otherwise (Article 472 CC). In case of professional seller the requirements of care very high indeed and no level of care could exonerate such a seller in case of the development defects mentioned above. In Poland, generally, fault liability has been based on the ethical assumption that he who by his action or omission caused damage to another must repair the damage. The result of the presumption of fault was that the victim of a breach of contract was only obliged to show he has suffered damage as a result of the breach, and it was the party in breach who had to show he has exercised all due care. By virtue of Article 355.1 of the Civil Code “the debtor is obliged to exercise care generally required in the particular type of relations (due care)”. In, today no more in existence, relations between ‘socialist organisations’ it was rather understood as being ‘the highest level of care’ (Gnela 2000: 126). Such level of care was also required from other professional parties in contracts, but lack of a uniform interpretation created a level of uncertainty as to the precise meaning of the crucial notion of ‘care’. The amendment of the Civil Code in 1990 (Act of 28 July 1990 on the amendment of the Civil Code, Dz. U. No. 55, item 321) changed this situation for the benefit of non-professional parties in contracts. Since this amendment Article 355.2 has read: “due care of the debtor acting in the course of a business shall be assessed with reference to the professional character of the activity”. The liability of professional contractual parties is therefore more stringent than the liability of non-professionals. It is difficult to determine the approach of the courts to this issue in product liability cases, as the contemporary product liability litigation focuses upon tort rather than contract. Jurisprudence of the civil courts and arbitration bodies, surveyed in the 1980s, demonstrates lack of attention given to the issue of contractual fault. Further, in commercial transactions the existence of fault of the seller was of no importance, as the mere fact of damage caused by the defect in a product was held to determine liability. Civil courts in many judgements based on contractual liability for defective products avoided consideration of the issue of fault. Such an attitude of the courts and arbitration bodies allowed liability to be easily established based solely on the existence of damage caused by a defect in a product.

**Contractual damages:**

For contractual liability to arise the breach of contract must have caused damage. Contractual damages have an unquestioned pecuniary character – the debtor is required to ensure the economic interests of the creditor are protected (Gnela 2000: 142). Thus normally non-pecuniary damages are not recoverable in contract law. There have, however, appeared ideas of the possibility of recovery of such damages, postulating that if a breach of contract could cause personal damages, it could also cause damages of non-pecuniary nature (for instance pain and suffering). In Poland the Supreme Court expressed this opinion in the judgement of 6 July 1966 (Judgement of the Supreme Court of 6 July 1966, OSPIKA 1967/7-8, item 183), but it has not always followed it. In other judgements the Supreme Court has rather attempted to declare that, although the provision of unsafe products did amount to a breach of contract, non-pecuniary damages caused to the buyer ought to be recovered
according to the rules of tort law. Contractual damages have been understood in the Central Europe to include the physical losses (damnum emergens) and the lost profits (lucrum cessans). Both personal and property damage can be redressed under the rules of contractual liability.

**Privity of contract:**

The principle of privity of contracts was strictly adhered to, and, apart from a number of more or less successful proposals put forward by the representatives of the doctrine of law, never actually taken up by the courts, it was considered as the fundamental obstacle on the way to effectively settle complaints concerning damages caused by defective products.

**TORTIOUS LIABILITY:**

**Introductory remarks:**

No specific legal basis for tortious product liability existed in Polish law until the implementation of the Product Liability Directive. By default, the legal basis was generally accepted to have been Article 415 of the Civil Code. This provision regulates tortious liability in general. It reads: “Whoever by his fault caused damage to another is obliged to redress it”. The wording and spirit of the Article were influenced by the French *Code Civil*. Tortious liability has been dependent upon the existence of fault of the defendant, and it was generally understood by the doctrine and practice of law that the ‘fault’ ought to include the objective element (unlawfulness) and the subjective element (the fault proper). For the needs of the product liability regime the requisites of liability were held to include: the tortious conduct – introduction of a defective product into circulation (bearing the characteristics of fault), the damage suffered by the victim, and the causal link between the two. Fault, therefore, was considered to be an attribute of the defendant’s conduct and not another requisite of his liability. There was no presumption of fault prescribed by the Civil Code.

The tortious product liability regime gradually became much more popular than the contractual liability (in Poland the non-cumul principle does not apply). Because of significant advantages of tortious over contractual liability (no restraints of privity – both in the horizontal and vertical dimension; the possibility, not available in contractual liability, of recovering non-pecuniary damages and *lucrum cessans*; longer, resembling the regulation of the Directive, periods for bringing an action) contract was very often abandoned as a possible avenue of action for victims of defective products.

**Possible defendants (evolution) – from the seller to the manufacturer and the importer:**

In the Supreme Court judgements of 6 February 1963 II CR 96/62 (defective Fiat ‘Multipla’) and of 28 April 1963 II CR 540/63 (defective ‘P-70’ car), based on the
Code of Obligations of 1933 (the Code of Obligations preceded the Civil Code of 1964, the regulation of tortious liability was similar to the Civil Code), introduced the idea of the seller being liable in tort to the buyers injured by the cars. The Supreme Court found that motor vehicles were by their very nature easily capable of causing an injury to a person’s health. Therefore, selling a motor vehicle with technical defects capable in fact of causing an accident, if fault could be proven, was not only a breach of contractual obligations, but also a breach of the general duty not to put human life and health in danger. Soon, however, the focus of the courts and doctrine of law was on the manufacturers (the judgement of the Supreme Court of 5 October 1978, IV CR 340/78, OSNCP 1979, NO 7–8, item 152) and even importers. The latter were, with some initial hesitation, considered liable to the same extent as the manufacturers. In the already mentioned cases of the Fiat ‘Multipla’ and the ‘P-70’ car the Supreme Court refused to impose on the importers liability similar to the manufacturers’ liability (if with the exercise of reasonable care in checking the car the defect could not have been discovered the importer could escape liability); but the judgement of the Supreme Court of 26 March 1984, II CR 57/84, OSPiKA 1985, part 3, item 58 (defective Wartburg) changed this attitude, confirmed in the judgement of the district court of Rzeszów of 18 April 2001, Rzeczpospolita 19 April 2001 (exploding airbag in a Ford Mondeo)(1). There was a possibility of joint and several liability of a number of persons (for example the seller with the producer – the judgement of the Supreme Court of 28 June 1972, II CR 218/72, OSN (Judgements of the Supreme Court) 1972, item 228 (the chemical spray)(2); or the seller with the importer – the exploding airbag case (1)) – by virtue of Article 441 of the Civil Code.

The beneficiaries of the product liability regime – possible claimants:

Since the liability was placed in the area of tort, any victim of a defective product, subject to the requirements of the regime, was able to make a claim, unhindered by the privity constraints. Although consumers have usually been the victims in need of redress, protection was also provided to small businesses and entrepreneurs. The Supreme Court provided protection to an owner of a poultry farm (Supreme Court, 3 June 1986, II CR 131/86), an owner of a sugar beetroot plantation (Supreme Court, 21 June 1985, I CR 127/85), or a person renting a farm for business purposes (Supreme Court, 28 June 1972, II CR 218/72 (2)).

The specific regime for relations between state enterprises and the peculiar understanding of the economic loss:

Until 1990 in Poland the relations between public and state enterprises were governed by a specific Arbitration regime. Hence, these relations were excluded from the jurisdiction of civil courts. The regime created its own product liability rules, resembling the rules established by the civil courts. There was one crucial difference – relating to the possibility of recovery of ‘pure economic loss’ under tortious product liability. A public or state undertaking could thus be liable to another public or state undertaking, provided it was at fault, when selling products with ‘crucial defects’ (liability was possible when the products did not cause any damage, and the value of the defective products could be recovered). This change in the understanding of torts began officially from the Decision of the Collegium of the National Economic Arbitration of 25 April 1977 (1/77, OSPiKA 1977, no. 10, item 173). The rationale behind such a detraction from the usual understanding of torts and the division
between what was a tort and what could normally only amount to a breach of contract, were the very peculiar political, social and economic conditions in which the Polish market and laws functioned for some time (the Socialist ‘obligation to respect the rules of economy of production and circulation (of goods) and protection of the national economy from losses’ – OSPiKA 1977, n. 10, item 173).

After 1989 the civil courts’ jurisdiction extended over all legal persons. The concept of ‘crucial defects’ and the philosophy accompanying it have disappeared.

**Economic loss and the general rules of its recovery:**

Apart from the abovementioned phenomenon of economic loss recovery in product liability litigation between two state-owned undertakings, general rules of recovering loss related to the product itself have been the contract law rules on legal guarantees (rękowmia za wady). These are contained in Articles 556 – 576 of the Civil Code.

**Products within the scope of application of product liability law:**

The concept of ‘products’ was not as such recognised in the Civil Code before the implementation of the Directive. The product liability regime was based upon the traditional civil law notion of ‘things’. According to Article 45 of the Polish Civil Code “(T)hings, in the understanding of this Code, are only material goods”. No division between processed and unprocessed goods existed. However, only a movable could be subject to the product liability regime. Further, the Polish courts have so far had no experience, in product liability litigation, with various ‘controversial’ products which caused some problems of interpretation in the Western Europe, such as blood, human organs, subjects of intellectual property rights or computer software.

**Separate regimes for specific products:**

**GMOs:** The Act of 22 June 2001 on genetically modified organisms (Dz. U. No 76, item 811) has introduced civil liability of the ‘users of GMOs’ for damage to persons, property or environment. It seems to be liability separate from the ordinary tortious liability, and further, even strict product liability following the implementation of the Product Liability Directive into the Polish Civil Code. The exonerating circumstances include only: *force majeure* and an exclusive fault of the victim or of a third person for whom the user is not responsible.

**The requisites of product liability:**

1. **Introduction into circulation of a defective product:**

   Two issues arise within this factor: the introduction into circulation, and the defectiveness of the product.

   - **Introduction into circulation:** this concept was not defined in the Civil Code, but was mentioned in the case law on product liability. The doctrine of law attempted to define it, referring to the moment when the product enters the market (Czachórski), or when the producer loses control over it (Łętowska). The notion extended upon all the actors in the distribution chain and was not solely focused upon the manufacturer.
Defectiveness: the Supreme Court expressed the view that a merely defective (poor quality) product could not give rise to product liability and that the product must have had some dangerous features rendering it unsafe for use (the decision of 21 November 1980, III CZP 50/80, OSN 1981/205 – defective engine in ‘Fiat 125p’ which needed to be replaced – the Supreme Court referred to the provisions of the Civil Code on the legal and commercial guarantees) (see, however, a different view of the arbitration tribunals). There have been a number of types of defects recognised by the Polish product liability regime: the defects which have had their origin in the design and construction of products (design and construction defects), or the manufacturing process (manufacturing defects), the instruction, or information defects, and ‘observation defects’ (the latter derived from the professionals’ failure to fulfil the obligation to monitor the products introduced by them into circulation after this introduction has taken place, for possible defects and dangers not known before) (For the relevant case law see Fault).

1.A Fault - the attribute of the defendant’s conduct: The Polish Civil Code has to a great extent followed the Code of Obligations of 1933, which in turn was based upon the French Code Civil 1804. Following the latter, the conduct of the defendant in an action based upon Article 415 of the Polish Civil Code was to have, in the opinion of the doctrine of law, the ‘characteristics of fault’, hence be objectively and subjectively negative. The Polish Civil Code does not expressly mention unlawfulness, but the courts generally considered a violation of a legal provision or the principles of community life (general clause very popular during the times of Socialism, and even now it remains relevant, with a revised meaning) within the frame of unlawfulness. Unlawfulness in Poland was understood to be a breach of duties imposed by rules of law concerning safety, or a breach of certain other legal provisions [in the product context these were for instance: the Act on Normalisation of 27 November 1961 (Dz. U. No 53, item 298), or the Act on the Quality of Goods, Services and Buildings of 8 February 1979 (Dz. U. No 2, item 7) – both now repealed]. In Poland breaching such norms was an offence. Still, the courts increasingly attempted to defend the argument that compliance with them did not automatically mean safety of the product. In Poland such an approach was pioneered by the Collegium of the National Economic Arbitration. In 1963 the Collegium held that compliance with the technical norms was but one criterion determining quality of products [4 November 1963, Przegląd Ustawodawstwa Gospodarczego (Economic Legislation Review) 1964, no 11, item 407]. The Polish Supreme Court in the judgement of 4th December 1981 confirmed this view in the consumer context and in terms of safety, not quality of products (the Judgement 4 December 1981, IV CR 433/81, OSPiKA 1983, z. 2, item 55 (3)). In this case of self-igniting television sets the conformity with the ‘Polish Norm’ was no defence for the producer who used cheap ‘replacement materials’, unsuitable for proper isolation of flammable objects inside the television sets. See also the case of chemical mousse (4).

With regard to the subjective element of fault, in the process of development of the product liability regime a number of duties of the manufacturers, importers and sellers has been established, the breach of which meant the existence of fault:

PRE-MARKETING DUTIES:
• duty to exercise care in the design and manufacturing process (the television sets case (3), pin in the cake case (5) or the Fiat ‘Multipla’ case, above),
• duty to inform the users of products of any dangers [the Judgement of the Court of Appeal of Bialystok of 30 November 2000 (1 ACa 340/00, 43 – 49) (4)]. The case involved a chemical mousse for use in the bathroom, equipped with
inadequate warnings as to the danger of explosion. When the chemical present in the mousse (propane-butane) accumulated in the bathroom, upon the switching on of the washing machine the explosion occurred, injuring the plaintiff and damaging his property. The instructions on the packaging informed the users of the necessity of holding the can in the desired manner, and warned that one should not use the mousse in closed spaces as well as heat the can, without however indicating the consequences of not following the warnings. The Court of Appeal held that the producer breached Article 415 of the Civil Code by not instructing the users of his products of the full consequences of their use, also the television sets case (3), and the exploding airbag case (1).

- duty to provide adequate equipment ensuring safety [the case of the chemical spray (the Judgement of the Supreme Court of 28 June 1972, II CR 218/72, OSN 1972/228, 67 – 74) (2) was an example of a tragic set of events to which the lack of appropriate warnings and protective equipment has lead. The chemical spray bought by the farmer and used by him for the purpose of preparation of facilities for his business of producing prickled cabbage and cucumbers caused the death of the farmer and his son. The information contained on the packaging of the spray included instructions of proper use – in closed spaces a gas mask capable of protecting from contact with benzol ought to be worn. Unfortunately the masks of this sort were not available on the market at the time. The Court indicated that the manufacturer’s and the seller’s fault was had been demonstrated in their failure to provide such gas masks (probably producing them would be a good solution for the manufacturer). Another aspect of the case were inappropriate warnings on the can of the spray – warning of the danger of poisoning, not of death].

POST-MARKETING DUTIES:
- duty to observe the market and warn the users of any potential dangers if accidents have been reported (the case of television sets (3)).

Not fulfilling any of these duties meant liability of the responsible person. However well developed, the Polish product liability regime did require the existence of fault, and certain suggestions to establish a strict liability regime were not accepted by the courts. In order to facilitate the victim’s task in proving fault the concept of anonymous, organisational fault, widely accepted by the representatives of doctrine of law and the courts, has been devised. As long as the victim was able to point to the fact of the defendant legal person as a whole not having acted in an expected manner, there was no need to search for a particular person within the structure of the latter who has been the cause of the defect. A further concept introduced to facilitate the role of the victim was the rule of res ipsa loquitur. The concepts were used in the case of a pin in a cake (the Judgement of the Supreme Court of 6 August 1981, I CR 219/81, OSN 1982, item 37 (5)). After having established the facts, the lower instance court had assumed that the pin must have been inside the cake. Having excluded all the other possibilities, such as the pin being for some reason left on the plate on which the cake was served, the court went on to hold that the person liable for the presence of the pin in the cake was the producer (no need to point to a particular employee of the producer). The Supreme Court confirmed the views of the District Court. An interesting phenomenon, which could be observed in the judgement, is that the plaintiff – the person who was unfortunate enough to have swallowed the pin which then injured his throat – did not have to prove the fault of the manufacturer. The mere presence of the pin in the cake was held to have demonstrated the weaknesses in the
production and supervision processes (Łętowska 1999: 99). The manufacturer did not succeed in defending itself against this res ipsa loquitur presumption, and this was so especially in the light of the statement of one of its employees, who pointed out to sugar used in production not being properly tested. The use of res ipsa loquitur can also be seen in the ‘self-igniting television sets’ case (3). Not only the use of cheap ‘replacement materials’ in the production process, held the Court, but also the knowledge of the danger and failure to warn the users of the television sets of the imminent danger to their property, as well as life and health, determined the existence of fault. The Court of Appeal of Katowice in the judgement of 10 October 1996 (I Acr 500/96, Wokanda 2/1998, 40 – 43) indicated that all products, if used according to their ordinary purposes, ought to be safe and no accidents should occur. Such an accident (in this case the cap of a bottle of Pepsi Cola detached and hit the plaintiff’s eye), followed the court using the res ipsa loquitur rule, demonstrated either a defective technological process or its defective operation by the manufacturer.

2. Damage: The scope of damages recoverable was larger than the scope prescribed by the Product Liability Directive. For instance, there has been no minimum amount involved, and the property damage recoverable could also involve property used for purposes related to business. Such a large scope still remains and will undoubtedly be of use even after the implementation of the Directive in cases where the latter does not apply. Damages to person were governed mainly by Article 444 of the Civil Code. The provision stipulates that in cases of injury to person (damage to body and health) the victim can recover all the costs, such as the cost of treatment, and, if the damage involves permanent incapability to perform the existing profession, also the cost of preparing for a different profession. In cases where the victim is not, or is to a lesser extent, capable of working, his needs have increased, or his prospects for the future have decreased, the person liable may also be required to pay an allowance (paid in instalments). In special circumstances the court can, instead of the allowance or a part of it, require the defendant to pay a lump sum (Article 447). Non-pecuniary damages could be recovered, and this, together with the possibility of recovering lucrum cessans (lost profits), has normally been considered as the greatest benefit of tortious liability over contractual liability. Pure economic loss (the value of the defective product itself) is not generally recoverable in tort.

3. Causal link between the defendant’s act and the damage: Two main theories developed in the Western Europe: the equivalence of the cause (conditio sine qua non), and the adequate causal connection, exerted a considerable influence upon the Polish approach in the area. Polish tortious liability law, conditioned by the particular political and economic circumstances, offered its own theory of causal link, following the thoughts explored in the Soviet Russia. The theory of necessary and accidental causal links reflected the common contention of Socialist legal writers that law ought to use the same concept of causal connection as other sciences, and especially social sciences. Accordingly, only necessary causal links (determined by science and experience) between the tortious act and the damage could give rise to liability. This theory was however described as only verbally different from the theory of adequate causal connection (Czachórski). The relationship with the latter was even deeper owing to Article 361.1 of the Civil Code, which states: “the person liable to compensate damages is liable only for normal effects of his action or inaction which caused the damages.” The regulation followed the Code of Obligations of 1933, in spite of criticism that the theory of adequate causal connection, which does not
comply with the Marxist theory, had been used there. At the moment the adequate causal connection theory is being used, also in product liability cases.

**Defences:** in a fault liability system the main defence is obviously the lack of fault. However, in certain cases, especially those involving manufacturing or instruction defects, it was difficult for the manufacturer or another person to defend themselves. Mere showing that all due care was taken in organisation and control of production did not suffice. The maximum care had to be shown to have been exercised by all those taking part in the distribution chain. The argument of *force majeure* was acceptable, but the manner in which the concept itself was understood by the courts rendered the proof an uneasy task. In the abovementioned case of the Pepsi Cola bottle the manufacturer of the bottle attempted defence by claiming *force majeure*. His arguments were rejected by the court of appeal. According to the court, a *force majeure* is an “unusual, external, impossible to prevent event, which is not an ordinary accident (*casus*). These are phenomena such as natural catastrophes (*vis naturalis*), the acts of public authorities to which an individual cannot oppose (*vis imperii*), and military acts (*vis armata*)” (see the Pepsi Cola bottle case (6)).

**Implementation of the Product Liability Directive:**

Poland has adopted the Act of 2 March 2000 *on the protection of certain rights of consumers and liability for damage caused by a dangerous product* (Dziennik Ustaw [Dz.U.] (Journal of Laws) No 22 at 271) in order to implement the Product Liability Directive 85/374. The Act inserted Articles 449.1 to 449.11 into the Polish Civil Code of 1964 (title VI.1 introduced into Book III ‘Obligations’ of the Code). The Act came into force on 1 January 2001. The formal obligation to implement the Directive into the Polish legal order arises with the accession to the European Union, but it has been considered useful for the process of implementation to commence earlier. The rules in force before the implementation will remain applicable to the claims which arose before 1 July 2000, as well as to cases in which the Directive does not apply. An interesting fact is that the place in which the new regulation is situated in the Code does not clearly indicate tortious liability (covered by Title VII). This has already raised questions of some prominent representatives of the doctrine of law as to the true nature of this new category of liability.

The requisites of product liability before the implementation of the Directive in the Central European tortious liability regimes were: introduction into circulation of a defective product, damage sustained and the causal link between the two. A further requirement was the existence of fault, which, however, was being gradually abandoned. What are the requisites of product liability under the Directive? Article 1 stipulates that the “producer shall be liable for damage caused by a defect in his product”. Article 7 enables the producer to escape liability if he proves that (a) “he did not put the product into circulation; or (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards”. It seems, therefore, that no significant difference has appeared with the implementation of the Directive in the Central Europe. The regime introduced by the Directive is rather much more restricted in scope, and on the other hand much more complex in application and interpretation, than the national regimes.
Further, the Directive on many occasions leaves the national regimes the freedom to decide upon the particulars of the proceedings, and thus the traditional national tortious liability regimes remain of relevance even in the presence of the new product liability regime.

‘Producer’:

The Polish Act on Liability for Dangerous Products inserted Article 449.5 into the Civil Code. The provision deals comprehensively with the issue of possible defendants under the new liability regime. Apart from the manufacturers of finished products, Article 449.5 refers to liability of manufacturers of raw materials or parts of a product, who according to the provision are liable like the producers, unless the sole reason for the damage was a defective construction of the final product or the instructions provided by the producer. The provision also renders liable for damages caused by a product, to the same extent as the producers, those who, by placing on the product their name, trade mark or other distinguishing mark hold themselves out to be producers. Importers, defined as those who introduced a product of a foreign origin into the domestic market in the course of their business, are liable as producers. The liability of the suppliers is subsidiary, and thus, by virtue of Article 449.5, if it is not known who the producer and other persons mentioned above are, the person who in the course of business supplied the dangerous product. The liability arises unless within one month from the day he was informed of the damage he points to the person mentioned above and his address, or, if the latter is impossible, of the person from whom he himself received the product.

The commentators of the Polish Act noticed that with regard to the subsidiary liability of suppliers the position of a victim is facilitated in comparison with the Directive: while the latter refers to the liability of suppliers as arising “where the producer of the product cannot be identified”, the Polish Act only requires the producer “not to be known”. This approach seems to relieve the victim of a possible burden to try and identify the producer.

Product:

Polish Act was adopted after the amendment of the Directive in 1999 and hence included the new version of the definition of ‘products’, with no limitations regarding non-processed agricultural products and game. A product is: “a movable thing, even if it has been connected with another thing” as well as “animals and electrical energy” (Article 449.1 para.2 of the Civil Code).

Damage:

The damages recoverable under the Directive have been restricted to pecuniary damages to persons, and property other than the defective product. The damaged property must exceed the threshold of 500 Euros, and be of a type ordinarily intended and actually used by the victim for private use or consumption. A further limitation imposed by the Directive is the potential for the maximum threshold of liability of at least seventy million Euros. Recovery of non-pecuniary damages was left for the national law.
The Polish Civil Code stipulates that damage ought not include damages to property the intended purpose of which is personal use and if the victim mainly used the property for such purpose (Article 449.2). Also damage to the defective product itself, as well as damage not exceeding the equivalent of 500 Euros, have been excluded (Article 449.7). Thus, the Polish Civil Code does not regulate the issue of damage in a comprehensive manner. Such a comprehensive regulation seems however unnecessary because of the presence of the product liability regulation within the Code, and the use of the same concepts defined elsewhere in the Code. The issue of damages within the Polish tortious liability system was explored in the part on the tortuous product liability, and no divergences from this system, apart from the restrictions introduced by the Directive and duly implemented by Poland, are envisaged. Both pecuniary and non-pecuniary damages can be recovered, including damages to persons and property (Articles 444 – 447 CC).

It appears that the scope of recoverable damages decreases in Poland with the implementation of the Directive. Nevertheless, it must be submitted that the issue of damages will receive greater attention following the attitudes of the ‘West’ to the issue. The damages actually awarded to claimants in product liability cases during the Socialist period were not impressive. It is to be hoped that the new ‘legal culture’ of product liability deriving from the ‘West’ can increase the amount the victims actually receive.

**Defect:**

The ‘circular’ definition of a defect provided by the Directive (Article 6) is not likely to provide significant assistance the Central European courts in application of the new regime. The ordinary tortious liability regimes utilised the ‘boxes’ system with regard to defects (the classification rather related to the types of fault than types of defects (fault in manufacture, fault in design/construction, fault in warnings, fault in observation)); and it is clear that the drafters of the Directive did not intend for such a classification to be applied. On the other hand, however, the emphasis upon safety and not quality of products has been a significant factor which the case law of Central Europe and the Directive have had in common. Regarding the interpretation of the ‘defect’ by Central European courts after the implementation of the Directive, the ‘circumstances’ indicated by Article 6 will be crucial, but the existing jurisprudence of Western European courts is likely to offer more insight into the desired approach to the concept. Interestingly, the Polish regulation abandoned the notion of ‘defect’ desired by the Directive, for the notion of ‘lack of safety’ (‘unsafe/dangerous product’). The rationale behind this approach was the need to distinguish defects of quality from lack of safety (Łętowska). The concept of ‘defect’ has, however, been deemed by many commentators as wider in scope, and the use of another, possibly narrower notion by Poland is likely to upset the delicate relations within the regime. Article 449.1.3 of the Polish Civil Code stipulates that a product shall be considered “unsafe” if it does not provide the safety which can be expected taking into account normal use of the product. Circumstances determining safety are in particular the presentation on the market and the information about the qualities of the product provided to consumers. The Act contains the ‘state of the art’ element stating that the product cannot be deemed defective (‘unsafe’) merely because a safer product has later been put into circulation.
Time limits for bringing action:
The Directive introduces changes into the Central European limitation provisions, analysed in Part Two. All the analysed states implemented the 3 and 10 years’ periods, although the regulation is more beneficial for the victims as regards the time limits for bringing claims in Poland: both the 3 and the 10-years’ periods required by the Directive are in Poland not extinguishing periods, but limitation periods (Article 449.8). A potential action by the European Commission can be envisaged with respect to this discrepancy.

Possible problems and inconsistencies:
The Act amending the Civil Code does not comply with the Directive entirely. It is more beneficial for the victims as regards the time limits for bringing claims (both the 3 and the 10-years’ periods required by the Directive are in Poland not extinguishing periods, but limitation periods), and the more narrow understanding of the exonerating factor of the defect not existing at the time of introducing the product into circulation [the defect must have existed in the product at the time, even in a rudimentary form, and the mere ‘probability’ of its existence (Article 7(b) of the Directive) does not exonerate the defendant – Article 449(3) of the Civil Code]. Some provisions of the Directive have not been translated literally, probably for a better compliance with the spirit of the Code. Further, certain issues mentioned in the Directive have not been mentioned by the Polish regulation. Causal link, burden of proof, damage etc. have been referred to in other parts of the Code and there was no need to consider them in detail again.

Optional provisions of the Directive and their implementation:
• The development risk defence (Articles 7(e) and 15.1(b) of the Directive): Poland has inserted the development risk defence into the new regulation, and hence the defendant can prove that “it was impossible to foresee the existence of the dangerous qualities of the product, taking into account the state of knowledge and science at the time of introduction of the product into circulation.” (Translated by Sengayen) (Article 449(3).2).
• The producer’s total liability resulting from ‘identical items’ (Article 16 of the Directive): Poland did not introduce this limitation of the producer’s liability.