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# REMARKS

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# REMARKS

by Vernon PALMER,
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My dear friends & colleagues. I am delighted to be among you to discuss the role of warranty in your proposed scheme of consumer protection.

My remarks today will pose a few questions about the elements of a warranty right and my theme will be the relation of your proposed provisions to the power of the judge.

A large question posed by your project, as I see it, is to what extent are the concepts of "defect", "latency" (as opposed to apparency) and "causation" sufficiently conceived and described? My feeling is that these notions are so sketchily treated as to represent very little policy choice by the legislature in the field of consumer protection. I shall attempt to illustrate this point by considering the concept of a "defect", although I believe the same lesson could be repeated by studying the concepts of latency and causation.

In the Civil Code projet a "defect" is defined mainly in terms of cause; that which renders the thing unfit for its intended use, or that which would have destroyed the motive of the buyer. [Art. 373] By contrast, this linkage to cause (the demotivation of the buyer) is not continued in the 1977 Draft Bill, which in Art. 45 speaks not about cause but about "*a defect in the design or manufacture*." Is it wise to retain the notion of cause or to rely upon it? As a means of defining a defect, it is not terribly useful. For example, the Peugeot purchaser would presumably never have bought the car had he known that the cigarette lighter would electrocute him and put him in the hospital or in his coffin. One can be sure that wherever personal injuries result, the buyer is automatically demotivated; the *vice caché* is a hidden dissuador [with apologies to Vance Packard.]

By way of contrast, in your delictual or extra-contractual provision, C.C. Art. 102, you go much further to speak of defects of design, manufacture, preservation or presentation. These are open-textured words that are broad, vague and categorical. They are not a mandate but an interpretive challenge. One may assume that a judge's conception of a warranty defect will embrace or be informed by the delictual categories. And vice versa, perhaps a warranty defect may be a type of *culpa* that provides a standard in delict. But what vast policy choices are

open here for the judge. Whether you are pro-consumer or anti-consumer, you obviously trust your judges to be one way or the other, because you have not seen fit to put the judge in a box. My only point is that I detect no policy tilt in warranty, either in your law or in mine, as evidenced by your retention of the 18th and 19th century standard of cause, and by our continued use of that concept.

Let me make myself clearer by posing a few examples. What of the sale of blood diseased by hepatitis? Is such blood defective, even though the hospital-vendor could not detect through any amount of testing that the blood was diseased? What of the relationship between cigarettes and cancer? Were cigarettes defective in 1960 though containing good tobacco, any more than good sugar is defective because it injures diabetics? Will certain products be defective *vis-à-vis* the allergic consumer, even though only 1% of the population has an unsuspected reaction to them?

I cannot of course answer these questions; but I only submit that such examples are very common, very controversial, and divide reasonable minds. Speaking as a total outsider (though a friendly one), I would have no idea how your courts would define a defect and no idea how your judges would resolve such cases. It is a paradoxical fact, I believe, that in a civilian system which is traditionally skeptical of the judge's power that he should be given a power of such heroic proportions. The question is, are your judges heroes? Ours are not, and but for two trends in Louisiana — imitation of §402A of the Restatement of Torts and a recent striving for civilian purity — we should not have made the progress toward consumer justice that we have achieved over the last 10 years. It must be remembered that both at common law and civil law, warranty was a pathbreaking concept toward modern products liability law. It was the first form of strict liability applied to defective products. In the process of code revision, it will be extremely important to translate our broad notions of a defect, latency and causation into clear policy choices. If that means that more detail and precision is needed than a statement of categories or a definition in terms of cause, I think the price would be worth the improved code product.