Alberta Institute of Law Research and Reform

Consumer Protection and the Sale of Goods

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Consumer Protection and the Sale of Goods

Introduction

Consumer protection is not a recent concern of the courts and legislatures. From the time that classical laissez faire economic theory was at its zenith (or nadir) in its influence on the common law, courts and legislatures have interceded to protect consumers. The courts' intercessions have not been directed, at least in theory, only at helping consumers. Rather they have been designed to protect all parties from extreme cases of fraud and mistake. However, in practice these common law doctrines have often provided useful protection for consumers. On the other hand, legislative intercessions have been more numerous and more specifically designed to protect the general consuming public against particular unfair practices of more organized and powerful enterprises or groups. Examples include the extensive mechanisms for the self-regulation of several professions, the federal anti-combines legislation to control monopolies and certain undesirable trade practices, federal small loans and interest rate legislation, and provincial legislation to guarantee the solvency of insurance companies and provide insureds with a standard minimum product.

Other legislation relating to health and safety has also established minimum standards of protection for consumers. These long-standing examples of consumer

protection by the legislatures have been supplemented in recent years by a growing spate of statutory provisions designed on a piece-meal basis to correct what were perceived to be particularly grievous defects in the common law. These consumer-oriented provisions range from particular provisions such as those requiring an election of remedies in secured transactions to separate statutes covering interest rate disclosure and itinerant sales. Occasionally, more broadly-drawn statutes have been passed, but so far they have not fulfilled all of their potential.

These long-standing examples of legislative intervention on behalf of consumers exist in Alberta as well as other Canadian jurisdictions.[1] In addition, Alberta has had its share of recent more specific legislation.[2] In addition, Alberta[3] along with other Canadian provinces such as British Columbia[4] and Ontario,[5] has recently introduced more omnibus legislation to control unfair and unconscionable trade practices. This legislation is designed to provide machinery to control trade practices which are recognized to be clearly beyond the pale. The Alberta Act, like similar legislation in other provinces, provides a "shopping list" of specific kinds of unfair and unconscionable practices which are outlawed. The legislation provides both machinery to insure that such conduct is in fact stamped out and to provide civil remedies for those who are its victims.

These provincial acts supplement and to some

extent overlap with the new consumer provisions in the federal Combines Investigation Act.[6] The federal Act, like its provincial counterparts, is designed to prohibit certain practices, especially in the field of advertising, which are identified as either unfair or misleading. This legislation is essentially negative in character. That is, it prohibits certain extreme, sharp or deceptive practices. The legislation controls fly-by-night and unscrupulous operators operating on the fringe. Although such practices might have been more common than we have thought or would like to believe, they are still the atypical situations. What remains to be done is to enact comprehensive legislation to clarify, simplify and improve the position of a consumer in relation to the typical transaction which does not contain necessarily any element of deceptive, sharp or unfair practices. The typical transaction, devoid of any extreme or prohibited practices, is the central theme of this paper. What is at issue is the legal relationship and the parties' remedies under a transaction which falls within acceptable marketing practices. This does not necessarily mean that various pieces of specific legislation should be abolished or that they necessarily need to be assimilated in more omnibus legislation. It may be desirable, for example, to preserve special kinds of consumer remedies in relation to itinerant sales. However, once a more comprehensive and modern codification of the legal relationship and

remedies in a transaction involving acceptable marketing practices has been established, the need for such specific legislation will have to be examined to eliminate unnecessary duplication and remove insupportable anomalies.

Shortcoming in the Existing Law

The existing law in relation to consumers and the sale of goods suffers from two basic kinds of shortcomings. In the first place, our basic sales law is an area of conceptualism gone rampant. The concepts used to explain individual's right are too numerous, complex and in many cases too abstract and metaphysical. In part this is a situation that has existed since the codification in the last century. In part it is a result of changed economic circumstances which has required much distortion of the old notions to make them suitable for new situations. In recent years, numerous pieces of legislation dealing with particular aspects of consumer sales law have been added to this overly abstract basic sales law. While this legislation is more clearly and simply written, it creates confusion because it is scattered and poorly organized. It is difficult to find the relevant legislation covering a particular problem and even more difficult to get a comprehensive picture.

The second kind of shortcoming in the area of consumer sales law is more substantial. Quite often the results of our sales law, whatever their merit in settling

disputes between informed businessmen, are unfair to consumers. In part the law's failure to protect consumers is the result of changed social and economic situations since the law was developed. The marketplace has become extremely complex and dominated by large concerns. No longer can the consumer be expected to know the product or his seller. Nor has he any ability to bargain with large and remote concerns. In addition to these changes in social and economic circumstances there is also an increased awareness of consumers' difficulties. With this awareness has come a different sense of what is just and fair.

These two kinds of shortcomings require different treatment and suggest different roles for any law reformer. The second kind of shortcomings raises profoundly political questions. The reformer can only point to alternative solutions and try to describe the implication of each. While recommendations can be made, the ultimate decision has to be made by elected representatives in a democracy. The first kind of shortcoming poses fewer political questions. However, in the consumer field it has profound implications. One of the greatest difficulties facing consumers is access to the law. Anything which makes the law easier to understand will be of fundamental importance to them.

In the following paper, suggestions will be made to correct both kinds of shortcomings. Those which

relate to the complexity of the existing law have been widely recommended and should meet with little opposition. Those that attempt to improve the substantive rights of consumers have also been frequently recommended by others. However, here there may be more controversy.

The Need for Unique Treatment of Consumers

The current state of federal and provincial consumer legislation has developed almost in spite of the knowledge that individual consumers are not unique. All legal entities including individuals and corporations are consumers. Moreover, it is not all individuals who are uninformed or weak. On the other hand, many small incorporated businesses share the same lack of knowledge and weak bargaining position as individual consumers. Depending on the size and strength of the other side, many corporate consumers have no more bargaining room than individuals. At the same time, we should not imagine that buyers as a class need protection. Large corporate retailers are not the helpless conduits between powerful manufacturers and ultimate consumers that we once imagined.

These facts which show that the marketplace contains a continuous spectrum from ignorance to knowledge and from weakness to strength does not mean that the typical description of the average consumer as ill-informed and in a poor-bargaining position is inaccurate. Nor does it essentially destroy the notion that his bargain with a

local furniture store for the purchase of a new TV set is essentially different from the bargain between General Motors and one of its suppliers for the purchase of glass or steel.

No one has suggested we have finely calibrated rules in the Sale of Goods Act or measure small differences in knowledge and strength between the parties to a sales contract with a view of compensating for unequal bargaining positions. It is also impossible to imagine how such a finely-tuned discretion could be given to the judiciary without introducing wide variation in its application with resulting forum shopping, unpredictability and injustice. If relative bargaining strength is not to be measured from case to case then some rough divisions seem desirable. The division between consumer and non-consumer transactions is one which is already known in Alberta, is being introduced ever-more widely in the sales context in both Canada and England and parallels a division which has long been known in the civil law countries.

Given that the merchant/consumer dichotomy already exists in Canadian law and is growing, the question remains whether there should be an entirely distinct codification of consumer sales law. This is a question which is very difficult if not impossible to answer before a thorough examination of both consumer and business sales law is undertaken. A separate codification of consumer

law would have the advantage of bringing together various provisions which are now scattered amongst several statutes. Such a separate act should make it easier for consumers to understand their rights. On the other hand, my tentative view is that a thorough review of both business and consumer sales law will point to many common reforms. I suspect that in the end the similarities in a modern statement of both branches will be great. However, as a working hypothesis, separate treatment of consumer sales may be desirable. This would allow all aspects of sales law to be tested for their fairness in a consumer transaction.

The Form of Legislative Reform for Consumers

The need for a reform of basic sales law should not deter the Institute from recommending more limited reforms for consumers as an interim step. This should be done by omnibus consumer legislation which provides special sales rules for consumer transactions and also incorporates some of the recent consumer legislation such as the Direct Sales Cancellation Act, the Credit and Loan Agreements Act, the Unfair Trade Practices Act and a new part on Consumer Credit Transactions which would incorporate consumer provisions which are scattered through such Acts as the Conditional Sales Act, the Bills of Sale Act, the Exemptions Act, the Execution Creditors Act and the Seizures Act. This last part on consumer credit

legislation would require a separate study by the Institute. Once again such a study would be an interim step until more fundamental reform of secured transaction legislation is undertaken.

The Kinds of Consumer Transactions

This paper is concerned with the distribution of all goods and services. While the initial starting point will be to attempt as comprehensive an approach as possible, it must be kept in mind that the supply of certain services such as legal, medical, and dental services and insurance are already subject to comprehensive legislative control.

Our existing law does not treat the distribution of goods and services in a comprehensive fashion. Distinctions are made between the supply of goods and services and even more fundamental distinctions are made between the legal devices used to distribute goods and services such as the distinctions between gifts, leases and sales.[7] Sometimes, these distinctions are largely based in historical anomalies of case law or legislative drafting. For example, much of the distinction between goods and services arose because of the restrictive wording of the Sale of Goods Act and the resulting question of whether the Statute of Frauds provision found in the Sale of Goods Act applies to services. It is doubtful whether there ever was a time in English or Albertan history when there was a greater social need for written evidence for a contract involving goods than there was for a contract

involving services. It is unlikely that the fraudulent allegation of sales contracts was more common in relation to goods than to services. Moreover, there has never been any satisfactory explanation of why goods and services should be distinguished for this purpose. Other distinctions such as the legal distinctions between sales and leases have some historical and social justification. In relation to both kinds of distinction, those which are simple historical anomalies and those founded in some social policies, an attempt will be made to see whether there cannot be some assimilation. This will be done not because generalization per se is desirable but because the recent history of consumer protection shows that the introduction of mandatory legal requirements will be pointless if the parties who these controls are designed to control can freely use another legal device to accomplish the same purpose. Such an ability to maneuver may in the end of thought desirable or at least permissible (much like tax avoidance), but if so it should be justified at the time that controls are designed and implemented.

This need to remove anomalous distinctions between sales and near sales (i.e. other legal devices used in the distribution of goods and services which serve the same function as sales contracts) raises a fundamental question in the method of law reform. The

basic choice for the reformer is to either integrate near sales in any recodification of sales law where this seems desirable or to leave it to the court to apply the new sales rules by analogy to other appropriate circumstances.

The difficulty with the blanket assimilation of sales and near sales through a device such as expanding the definition of sales in a revised act is that a common solution which may be apt for one type of problem may be inappropriate for another. For example, the implied terms as to quality probably should be the same for both a consumer sale and a consumer lease. However, it may not be appropriate to measure the damages caused by the consumer's breach in the same way in both transactions.

On the other hand, it does not seem enough just to leave it to the courts to apply the new code to other near sales transactions without some specific direction that they do this. In the past the approach of the courts has been to treat even codifying statutes as only changing the law to the extent that the statutes specifically say so. There is great reluctance to treat statutes as a source of general principle to be applied to all analogous situations. It would be contrary to this judicial tradition to expect courts to apply a new consumer sales act to near sales.

The most appropriate solution then appears to be to incorporate in the body of specific rules any related type of transaction where the reason of the rule

also applies and to have a general provision to cover those situations which are not anticipated, directing the court to apply the sales rule by analogy in appropriate circumstances.[8]

II The Model for Consumer Sales Law

Once it has been decided to have a separate consumer sales law, a fundamental decision has to be made as to the type of protection given to consumers. This fundamental question involves the extent to which certain widespread commercial practices should be made the statutory norm.

It is now the practice amongst the largest and the most successful retailers in Canada to allow consumers to return goods even after delivery in exchange for a refund of the purchase price. There are few qualifications or restrictions to this practice. In fact, even those restrictions which do exist are often ignored or waived by these retailers, since the cost of enforcement and the resulting loss of good-will are not considered to make enforcement worthwhile. The only significant industries where this is not the commercial norm are those involved in the sale of mobile homes and automobiles. In fact, so widespread is the practice in most consumer sales that satisfaction guaranteed or money refunded may have replaced caveat emptor in the consumers' folklore of their legal rights.

This basic question is discussed again under the section of the consumers' remedies. There it is suggested that this right to return goods might be restricted by arbitrary time limits such as those found in the

Direct Sales Cancellation Act. At this point however, it should be emphasized what a fundamental effect such an adoption of commercial practice would have If consumers are allowed to return goods without the need for explanation or whether there has been breach by the supplier or not, much of the discussion and suggestions for reform found in this paper become irrelevant. There will be no need to determine which statements made by the supplier or by others on his behalf should subject him to legal liability, no need to distinguish between less serious and more serious breaches by the seller and less need for an elaborate set of implied consumer warranties. For many transactions consumers will have the ability to get redress themselves.

The acceptance of wide-spread commercial practice as the statutory norm would not solve all consumers' problems. Existing commercial practice does not, after all, allow consumers to return large, durable goods except for a short period after they have been delivered. Consumers' problems with so-called durable goods often do not appear at the time of delivery. Their problems are concerned with the fact that the goods lack durability. For these kinds of consumers the following elaboration of their rights and remedies is of critical importance.

In deciding whether all suppliers should live up to the wide-spread practice of allowing returns in exchange for refund of the purchase price certain things should be kept in mind. Such a right would no doubt add to the cost of goods and it is no satisfactory response to say that

those enterprises offering this service now sell for less. What is the real offsetting consideration is that some of these costs may be offset by savings made in avoiding litigation. More importantly another large portion of these costs may represent unsatisfied consumer complaints. To the extent that the commercial practice now provides some means of redress it simply redistributes costs rather than increases them. This would also be true if the practice was made the legal norm.

If a right of rescission even after delivery were to be given to consumers, several practical problems in defining the scope of such a right would have to be solved. These problems include whether such a right should be subject to a time limit, whether the consumer should have to account for any use and whether there should be some way to control consumer abuse. If any use by the consumer would deprive him of the right to rescind some of the advantage of such a sweeping remedy would be lost. It would then be necessary to determine if there has been some breach by the supplier and whether this breach is enough to relieve the consumer from any obligation to pay for the benefit derived. A compromise which would allow the control of the most blatant forms of abuse while still avoiding nice questions of the supplier's responsibility for breach would be a requirement that the contract be rescinded within a specified time and that the goods be returned in

substantially the same condition as they were when delivered. No attempt should be made to calculate and reduce from the purchase price the benefit of any use the consumer receives. This follows the line of the recommendation of the life insurance underwriters who now allow insureds a period for sober second thoughts and the right to rescind without payment for any benefit received.[9]

III Definition of a Consumer Sale

Background

The difficulty with separating consumer from non-consumer transactions is not in divising a definition of the distinction which is easy to understand and apply. There are various definitions now in use in Canada which meet these requirements. The difficulty is more that whatever distinction is adopted there always seems to be some situations which fall outside the definition of consumer transaction in which it seems one of the parties is deserving of the same kind of protection as that given to a consumer.

Before discussing the definitions of consumer transactions in modern Canadian legislation, two alternative approaches will be considered. The first approach would be to have a more elaborate enumeration of the kind of people and transactions which are governed by consumer law. The second alternative approach would be to have a more generalized test of consumer transactions in terms of the relative knowledge and bargaining strength of the two parties. Of these two alternatives the first is more desirable. However, the definition of a consumer transaction cannot become too elaborate without making it harder for individual consumers to understand their rights, thereby discouraging all consumers from pursuing appropriate remedies. An example of this approach is found in sections

4 and 10 of the Credit and Loan Agreements Act. These sections, which provide that Part 1 and Part 2 of the Act do not apply to any sale or loan "to which this Act is declared by the regulations not to be applicable", illustrate one way in which such an enumeration could be made.[9a] While this practice of defining by regulation provides flexibility and allows changes to be made with speed to meet unforeseen circumstances, it makes the law even more inaccessible to consumers. The second alternative approach suffers from this weakness as well. A more generalized test which leaves more discretion to the judiciary to implement also makes it harder for the typical individual consumer to understand his rights and dissuades him from pursuing them.

The second alternative is also contrary to the general statutory developments in Canada. The desirability of uniformity of national standards in Canada has frequently been argued on behalf of national firms. They quite rightly point to the economic cost of needless diversity. These arguments can be supplemented by arguments which have the consumers' educational needs in mind. In spite of the recent growth of provincial autonomy in Canada, it remains true that the media is largely national in character. Moreover, the education industry is largely national. When this is combined with the tremendous effort needed to introduce consumer knowledge, especially knowledge concerning the law, into the education system, the cost of

unnecessary diversity is large. Already the unnecessary diversity in matters of detail amongst provincial legislation in acts like those covering itinerant sales, makes it extremely difficult to devise education programmes for national television and write standard texts for national use. These arguments of course have more universal validity or application than just to the definition of consumer. They are arguments which apply to all elements of consumer legislation. With the growth of provincial law reform commissions, however, they have been neglected in recent years.

Given this need to produce a definition of consumer transactions which is not so elaborate or sophisticated that it makes consumer education difficult and the need to follow the trend of similar legislation in Canada, we should turn to a more detailed examination of the kinds of definitions found in Canadian legislation.

Of course, such definitions should only be tentatively made until the full range of distinct treatment of consumer transactions is decided. It may well be that the more substantial the protection given to consumers in a consumer transaction the more restrictive the definition of consumer transactions needs to be. On the other hand, such a division between consumer and non-consumer transactions will lose some but not all of its significance if there is eventually a modern restatement of all sales law. As we have pointed out, many of the

consumers' problems come from an inability to understand caused by the unnecessary complexity of our sales law concepts. It is doubtful whether this complexity serves any practical needs even in the strictly commercial setting. If much of our law were simplified this would go a long way to meeting one of the consumers' greatest problems.

From time to time it has been suggested that the simplest criteria for distinguishing consumer sales would be the use of a maximum price. Sales under a certain specified price would be considered consumer sales while those over that price would be considered non-consumer or business sales. This is the device used in the English hire-purchase legislation[10] and the Manitoba Consumer Protection Act.[11] However, its application to sales law was rejected by the Law Commission and the Scottish Law Commission[12] on the ground that any maximum price which would be adequate for sales to private purchasers would cover many more business sales than it did in a case of hire-purchase transactions and even if sales to corporate bodies were excluded (as they are in hire-purchase legislation) there would be anomalous distinctions between small businesses which were incorporated and others which were not. Distinctions based on monetary limits are not unknown in Alberta consumer legislation although usually they work to exclude small amounts from regulation. For example, Part I of the Credit and Loan Agreements Act provides in s.4, "this part does not apply to a sale for

an amount less than $50". This exclusion is of course motiviated by totally different reasons than the use of a monetary limit to define a consumer transaction.

If such a simple but crude test were adopted to define the scope of consumer sales legislation it would have to be large enough to cover the most important typical consumer purchase, the purchase of a new automobile. (This is assuming the most extreme examples of $10,000 worth of dancing lessons will be corrected by particular legislation covering unfair and deceptive practices). Such a large dollar figure as would be necessary to cover the purchase of automobiles would incorporate in consumer sales many transactions between large knowledgeable corporations dealing from relatively equal strength. Without further qualification it seems unnecessarily crude and seems to incorporate too many things into the definition of a consumer transaction. Moreover, while it would be readily understood it would be out of step with legislation in most other provinces.

The current definitions of consumer transactions in use in Canada[13] and England,[14] qualify the operation of consumer legislation by limits defined in terms of the nature of the seller, buyer, the commodity and the transaction. Quite frequently, limitations in terms of the nature of the goods or the transactions[15] are arbitrary. No justification is given for distinguishing between sales and near sales nor for distinguishing

between goods or services.

Some of these limits may be justified or explained as we did above under the heading 'The Kinds of Consumer Transactions.' They are motivated not so much by a desire to exclude analogous situations as by a fear that an open ended or broad definition might lead to unexpected and undesirable results. In relation to the nature of the commodity there is no legitimate purpose in qualifying the application of consumer protection unless it is used as in the English Supply of Goods (Implied Terms) Act, 1973[16] to distinguish between goods of a type ordinarily bought for private use or consumption and goods ordinarily bought for a commercial purpose. This distinction is designed to protect suppliers who have no knowledge that they are dealing with a consumer. The drafters of the English legislation did not mean that the sale of some kinds of goods per se was not deserving of special consumer protection. This was just a drafting technique to get at the question of the reasonable anticipation of the parties as to the use to which the goods would be put. If the supplier's knowledge is thought important, this is a convenient drafting technique providing "ordinarily bought for private use or consumption" is not interpreted to mean that the majority of sales of the particular commodity have to be for private use or consumption. For example, the fact that more paint or solvent is sold to business enterprises either for resale or for use in the manufacture

of other commodities should not mean that paint or solvent is not a commodity of a type ordinarily bought for private use or consumption.

The distinctions or qualifications in terms of the nature of the seller are of two kinds. First, there is general agreement that there should be a distinction between commercial and private sellers. If the basic facts which create a desire to protect consumers lie in the unequal bargaining position of the two parties, it is generally assumed that the rationale for consumer protection does not apply to a private sale between equally uninformed parties. This tends to leave private sales to be dealt with by the same legislation that governs business sales. While it is true that in both areas the parties to a transaction have relatively equal bargaining strength, the two situations have little else in common. It would be surprising if the solution suitable for one area were also ideal for the other. In fact, little attention has been paid to the question of private sales. No emperical investigations have been made as to the parties' attitudes and expectations in such sales. I suspect that in the common folklore this is an area where caveat emptor applies with full rigor. On the other hand, in commercial sales I suspect that there is a higher quality standard imposed on sellers than the case law would suggest, even though it is fairly common for sellers to disclaim responsibility for at least some of the consequences of

their breaches. Three kinds of sales law should be avoided if at all possible. If this is to be done the question becomes whether private sales should fall within consumer sales legislation or be left to be governed by legislation covering business sales. This cannot be answered satisfactorily until it has been decided what special rules will be contained in consumer legislation.

The second common issue raised in relation to the nature of the seller is whether the legislation protecting consumers should apply to sellers who have no special knowledge. That is, is a businessman who is supplying goods which are not in the ordinary course of his business to supply in the same position as the private supplier. The issue is one of whether it is strength or special knowledge which creates the unequal bargaining position and hence the justification for special treatment of consumer transactions. The issue is complicated by including the point of view of the consumer. If he relies on certain typical protection in obtaining goods and services from commercial entities, he does not necessarily know of their specialized knowledge. Moreover, much of his protection will disappear if businessmen can claim ignorance. While Canadian legislation has generally incorporated phrases to indicate that the seller must be acting in the course of business, some of this legislation seems to be carefully ambiguous.[17] That is, it is unclear whether it has to be in the ordinary course of the seller's particular business or just in the course of business in

the sense of the customary way in which the particular commodity is normally distributed commercially.

The typical restrictions on the definition of consumer transaction in relation to the nature of the buyer are concerned with two things. First, the legislation usually restricts consumer sales to situations where the buyer has purchased the commodity for his own personal use and not for the purpose of resale or for the purpose of incorporation into some other manufactured product. The second kind of restriction relates to the question of whether corporations as well as individuals should be given protection. The normal solution in the Canadian legislation is to exclude corporations even though some smaller one-man corporations are obviously in the same ignorant and weak positions in dealing with large corporations as individual consumers.[18]

Alberta Legislation

The previous section has discussed in more general terms the kinds of distinctions used in Anglo-Canadian legislation to distinguish between consumer and non-consumer transactions. We should now look more closely at the definitions of consumer transactions used in existing Alberta legislation. They include a wide variety of techniques which have been discussed in the previous section. In a new consumer code it would be desirable to attempt to have one consistent definition of a consumer transaction. Of course there may remain

particular kinds of consumer transactions which need unique treatment. However, for the most part the differences in the existing definitions are largely arbitrary.

Perhaps the simplest definition of a consumer transaction is that which is made through the exemption provided in ss. 4 and 10 of the Credit and Loan Agreements Act. Without using the term "consumer" or "consumer transaction" the Act distinguishes between what are basically consumer and non-consumer transactions by providing that Parts 1 and 2 of the Act do not apply to (1) a sale or loan for an amount less than $50, (2) to a sale or loan made by a manufacturer or distributor to a wholesaler or by a manufacturer, distributor or wholesaler to a retailer and (3) to any sale or loan to which this Act is declared by the regulations not to be applicable. This is not a very satisfactory model for a general definition of consumer transactions. Manufacturer, distributor, wholesaler and retailer are not defined in the Act.

In the Unfair Trade Practices Act on the other hand, there are definitions of consumer and consumer transaction. These are rather comprehensive definitions which do not exclude business transactions. It is not until you get to the definition of goods and services that the essential distinction between consumer and non-consumer transactions is made clear. In these definitions goods are defined as:

> "tangible personal property that is to be used by an individual for purposes that are primarily personal, family or household, or any right in that property";

and services defined as:

> "services (i) provided in respect of the maintenance or repair of goods or of real property used as a private dwelling by an individual, or (ii) provided to an individual in conjunction with the use of social or recreational facilities, or (iii) that are in their nature instructional or educational.

The definition of supplier must be read along with these definitions to understand the division between consumer and non-consumer transactions. Supplier is defined in s.1(i) in the following way:

> (i) "supplier" means
>
> (i) a person who in the course of his business becomes liable under consumer transactions to sell, lease or otherwise dispose of goods or to provide services or both, or in the case of an award by chance of goods or services or both, to provide the goods or services awarded, or

(ii) a person who in the course of his business

(A) manufactures, assembles or produces goods that are the subject of a consumer transaction, or

(B) acts as a wholesaler or distributor of goods that are the subject of a consumer transaction, or

(C) solicits, advertises or otherwise promotes the use, purchase or acquisition in any manner of goods or services that are the subject of a consumer transaction,

or

(iii) a person who receives or is entitled to receive all or part of the consideration paid or payable under a consumer transaction, whether as a party thereto or as an assignee or otherwise, or who is otherwise entitled to be compensated by a consumer for goods or services or both.

These definitions are probably unnecessarily complex and somewhat too elaborate. In the end, what is primarily personal, family or household is left to the court. No attempt is made to define these in the Act.

A third model from existing Alberta legislation is found in s. 3(3) and (4) of the Direct Sales Cancellation Act. While not using the phrases consumer or non-consumer transaction the gist of such a distinction is embodied in these sections excluding the operation of the Act.

(3) This Act does not apply

(a) to a sales contract made

(i) between a manufacturer or distributor and a wholesaler in respect of goods that the wholesaler intends to resell in the course of his business, or

(ii) between a manufacturer, distributor or wholesaler and a retailer in respect of goods that the retailer intends to resell in the course of his business,

or

(b) to a sales contract under which a retailer is the buyer of goods intended to be used in his business but not for resale, or

(c) to a sales contract under which the original buyer is a corporation, or

(d) to a sales contract negotiated, solicited and concluded without any dealings in person between the seller and the buyer or any salesman and the buyer, or

(e) to a sales contract under which the goods to be delivered consist only of food or food products in a perishable state at the time of delivery, or

(f) to a sales contract

(i) made by a seller, or

(ii) for any goods or services
of a class or kind excluded from the application of this Act pursuant to subsection (4).

(4) The Lieutenant Governor in Council may make regulations declaring that this Act does not apply to any class or kind of seller or of goods or of services.

[1966, c. 28, s. 3; 1967, c. 14, s. 3]

Finally, there is yet another definition of a consumer purchase in s.18.1 of the Conditional Sales Act. There a consumer purchase is defined in the following way:

18.1 (1) In this section,

(a) "consumer purchase" means a purchase, other than a cash purchase, of goods or services or an agreement to purchase goods or services

(i) by an individual other than for resale or for use in the course of his business, profession or calling, and

(ii) from a person who is engaged in the business of selling or providing those goods or services;

With necessary modifications, this section is probably the best model for a more comprehensive definition of a consumer transaction.

The differences in the various definitions in the existing Alberta legislation are not substantial. There is perhaps little to choose between definitions in terms of manufacturers, distributors, wholesalers and retailers or goods bought by an individual for resale or for use in the course of his business, profession or calling. All three sets of terms are designed to make the same kind of distinctions. What is important is that in a new consumer code we settle on one. Then certain specific issues should be covered which for convenience sake are listed here.

1. Should all individuals or corporations acting in a business capacity be included as suppliers or only those in the business of supplying the particular goods and service? My answer would be the same as the court's answer to a similar question under s.17(2) of the Sale of Goods Act. That is all people who are acting in the course of business whether they have supplied the particular goods and services before ought to be included.

2. Should there be some test to determine whether the supplier could reasonably expect the goods or services were intended for consumption? On balance, I think there should be no such qualification as that found in the English Supply of Goods(Implied Terms) Act 1973.

3. Should corporations be excluded from the definition of consumer? If so, should corporations which are non-profit organizations for benevalent, charitable, educational, cultural or recreational purposes be included? My own preference is not to use the fact of incorporation as part of the definition at all.

IV Other Issues Concerned With The Scope of Consumer Sales Legislation

In the introductory section we described the difficulty of trying to assimilate all consumer transactions involved in the distribution of goods and services. There it was concluded that a complete assimilation was probably not possible. At this point it is convenient to examine some specific issues in relation to the definition of the sale of goods. These are issues which have been frequently litigated and where anomalous distinctions have developed. In relation to these issues modest reforms are possible without the danger of creating unexpected results.

Contracts for the Sale of Goods and Contracts for the Sale of Work, Labour and Materials

The distinction between contracts for the sale of goods and contracts for the sale or work, labour and materials has been recognized by the courts for a number of different purposes. These include the application of the Statute of Fraud's Provision (section 7 of the Alberta Act)[19], the passing of property and risk[20], and the application of the implied conditions as to title and quality.[21] For some purposes, this distinction has now been abandoned.[22] These contradictory developments in the case law are also reflected in provincial and federal legislation which distinguishes between the sale of goods and the sale of services for some purposes and not others.[23]

Some of the anomalous nature of this distinction would have been removed if the courts had been faithful to the test for distinguishing the sale of goods clarified in section 3 of the Act. This identifies as a sale of goods a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer. Unfortunately, this property test has been ignored or rejected by some courts misinterpreting earlier case law and adopting a new relative value test.[24] With this test a contract is not a contract of sale of goods even though property in goods is to be transfered if the value of the material component is less than the labour component. Moreover, in order for the relative value test to work a distinction must be drawn between goods which are in existence at the time the contract is made and contracts for the sale of goods to be manufactured.

There would seem to be several courses of action open. First, the legislation could make no attempt to define the distinction between goods and services but instead make express reference to both. This is the approach in the Unfair Trade Practices Act and the new Federal Combines Investigation Act. At least in the consumer context it would not be a unduly harsh to subject a supplier of services to the same duties and liabilities as the supplier of goods. Secondly, the distinction could be preserved and expressed in terms of the relative value test to remove any lingering ambiguity

in the case law. Thirdly, the distinction could be preserved but defined so that the sale of goods included all contracts where the property to goods was passed. This could be a general test or a further division between contracts involving the incorporation of labour in goods and the supply of labour in addition to goods could be made.

I would favour the first approach. It is consistent with judicial and legislative developments. Even the supplier of pure services (without any goods or materials) should be under analogous obligations as that of the supplier of goods. Yet to treat him as having sold goods seems highly artificial. It would result in the application of extremely inappropriate language to describe the parties' rights.[25]

The Distinction Between Sales and Leases

Many of the anomalous distinctions between sales and leases, especially in the consumer area, may result from the artificial nature of the distinction drawn in Helby v. Matthews.[26] This leading English case distinguished sales from leases on the basis of whether the consumer was under a legal obligation to purchase. If he was under no legal obligation to do so but merely had an option to purchase(even if it was the expectation of all concerned that the option would be exercised), the contract was not a sale.

Without obliterating the distinction between consumer sales and leases, many anomalies would disappear if the distinction were re-defined in terms of the intention of the parties or the substantial nature of the contract. This would make the distinction turn not upon the specific factor of whether the consumer is under an obligation to buy but on a more general assessment of the nature of the contract. Such a general test would be preferable to any attempt to itemize the kinds of leases which should be considered sales.

In addition to this and the general section directing the courts to apply the Consumer Statute by analogy, there are some specific matters which are discussed in this paper where the sales rule is appropriate to consumer leases. In these instances the legislation should specifically refer to consumer leases as well as sales. The obvious example is the suppliers obligation in relation to quality. Here, even without legislation isolated courts[27] have been able to overlook what others[28] have regarded as a long-standing distinction between sellers' and lessors' responsibilities for latent defects.

Gifts and Barters

Section 3(1) of the Act defines a contract of sale as a "contract whereby the seller transfers or agrees to transfer the property and goods to the buyer for a money consideration called the price". On occasion,

Canadian courts have had to apply this definition to distinguish between sales and gifts.[29] The distinction was necessary because of the generally accepted view that a donor is not liable even for negligence, let alone strictly liable for latent defects.

Such Canadian cases as Buckley v. Lever Brothers[30] and Fillimore's Valley Nurseries Ltd. v. North American Cyanamid Ltd.[31] illustrate that not all gifts are made out of a feeling of selfless good will. Instead they are made to further some business purpose. In subjecting such commercial suppliers to sale's liability the Canadian courts have had to resort to technicalities or ignore the provisions of the Act.

The definition of a consumer sale should be expanded to include any supply of goods and services for a business purpose. This would bring within the scope of the Act not only cases involving such sales gimmicks as "free samples", "free special box-top offers" or "buy one, get the second one free", but would also make it clear that the legislation applied to barters such as where a consumer trades in old goods for new ones.

V. Basic Contracts Doctrines: Capacity, Form, Mistake, Frustration

Part 1 of the present Sale of Goods Act has several sections (i.e. ss. 4-12) which touch upon some basic contracts doctrines. Most of these sections are only a very partial codification of the common law. They involve issues which transcend sales law and which are relevant in the whole field of contracts law. They have not been considered by other bodies interested in consumer sales law and they do not appear to have caused special problems for consumers. They could well be left for consideration in the context of a general revision of sales law or in an even more fundamental revision of contracts law.

Alternatively some of the sections could be dropped or made inapplicable to consumer sales. There is some justification for this in relation to sections 9 and 10. Section 9 is a codification of what (probably mistakenly) was thought to be the common law in cases of res extincta.[32] This is only one aspect of a much broader and complex body of contract law relating to mistake. Section 10 covers one specific instance of frustration.[33]

In both cases there may be situations where a seller should be liable to a consumer for the loss of his expectation interests where goods have perished. For example where a seller negligently offers something for sale which has already perished and a buyer foregoes other opportunities to buy comparable goods in order to accept the seller's offer. If the

buyer subsequently incurs additional expenses in buying these goods elsewhere there is no reason why a seller should not be held responsible. In these situations the fact that the buyer is a consumer is probably irrelevant and in most cases it will be commercial buyers who are likely to suffer greater damages.[34]

The areas of mistake and frustration which are touched upon by sections 9 and 10 are too broad and complex to be dealt with here. All that can be suggested is that sections 9 and 10 in stating that a contract is void or avoided do more harm than good. These questions would be better dealt with by the application of the common law.

The one section that may have some effect on consumers is the statute of frauds provision found in section 7. In the consumer context there are two matters which should be considered. First, should a consumer be able to enforce a sales contract where no earnest or part payment has been made. The arguments for and against the parol evidence rule which is discussed below. It is true that since most consumers will have no difficulty in purchasing substitute goods the statute of frauds provision does not create the same hardship as the parol evidence rule. However, a consumer may rely on an oral contract and forego an alternative source only to find himself put to additional expense in subsequently trying to find substitute goods.

The second matter which should be considered is what written evidence of a contract is necessary before it can be enforced against a consumer. This raises the issue of how s.7

would relate to other similar kinds of provisions such as s.5(2) of the Direct Sales Cancellation Act in the new consumer code.

While the Statute of Frauds has been subject to centuries of criticism and a steady confinement of its operation by the courts, it has been reincarnated in several recent consumer protection statutes. This is a remarkable event considering the criticism that has been directed against it by consumer advocates. The explanation is that the new Statute of Frauds provisions have a different purpose from the old ones. The new ones are found in legislation which provides mandatory disclosure of information. In order to ensure that such information is conveyed to consumers in an acceptable and understandable way, legislation has provided some detail as to the form it should be presented in and has provided that if this written information is not communicated, the contract is unenforceable against consumers. Unfortunately, the new purpose of such Statute of Frauds provision has not been fully communicated to the courts.

There is some danger that they will treat the new provisions as they have the old. That is, they may be extremely reluctant to apply them to a partially executed contract and in any event, may award the supplier a sum on the basis of quantum meriut.

If the new consumer code is to adopt formal requirements such as writing to make contracts enforceable against consumers, they should be as consistent as possible throughout

and their purpose should be made clear.

VI. Express Terms of the Contract[35]

At the heart of any sales legislation is the question of which of the many statements made by a supplier himself or through his agent either orally or in the final "sales document" can be relied upon by the consumer. Often, but not always, the question involves which of the representations made by the supplier as to the commodity's qualities can be relied upon. The elaborate nature of our shifting legal and equitable classifications of express statements has been thoroughly discussed by other law reform investigators. Perhaps the best discussion of this classification is found in the report of the Contracts and Commercial Law Reform Committee of New Zealand entitled "Misrepresentation and Breach of Contract". Excerpts from this report are included as Appendix A.

Rather than to begin with an elaboration of our existing legal classifications it may be more profitable to attempt to describe the underlying social issues without reference to legal terminology and to discuss how they should be resolved. Having done this it will then be possible to know how many legal distinctions are required to implement these solutions.

The social issues involved include the following questions. First, should the supplier be held strictly and literally accountable for the claims he makes during his "sales pitch"? Is there room for meaningless exaggeration?

If so, what should be the test between seriously-made statements and mere sales puffery? Possible answers include: what in fact was relied upon by the consumer, what would be relied upon by the gullible consumer or some higher standard such as what would be relied upon by the reasonably well-informed consumer? Second, does some distinction have to be made between oral and written statements? Is there some other way to distinguish between statements tentatively made but later withdrawn or superseded in the negotiation leading up to the final contract. Third, in the case of written agreements, do we need some special rule to protect third parties such as assignees? Fourth, amongst the claims which the consumer is entitled to rely upon what distinctions or classifications are necessary? Fifth, should the supplier be responsible for claims made by others such as his agents or employees on the one hand, or manufacturers of the product on the other?

Sales Puffery

The law has long recognized the ritualistic nature of some statements made in the process of negotiating a contract.[36] This corresponds with the rather wide-spread view in the community that suppliers are entitled to make innocent exaggerations or extravagant statements about their products which are not to be taken too seriously. This is not just a common perception of the one-sided nature of the legal caveat emptor rule, but is also a wide-spread understanding of human nature, or at least what is thought to be human nature. Modern

advertising men express the same position from a slightly different angle. They emphasize the basic need to capture the attention of potential consumers before they can convey any information about their product. They stress the need for theatrical techniques to sustain interest in their message. Governments have long recognized these truths in such things as anti-cigarette smoking or anti-drinking while driving campaigns. To be effective, bitter truths have to be hidden in amusing hyperbole. Unfortunately, consumers vary tremendously in their gullibility or understanding of human nature. In fact, it may be fairly said that much of the modern advertisers' efforts are spent on blurring the distinction between attention-grabbing entertainment and the conveying of information concerning the product. The relationship between alcoholic consumption and the good life is, for example, conveyed in such a way that even the more sophisticated viewer has difficulty discerning where entertainment leaves off and representations begin.

One possible view is that since suppliers make statements in order to sell their products (this seems a safe assumption if advertising is at all rational), it is not unfair to hold suppliers to statements which have in fact been acted upon.[37] Of course, some might argue that this view begs the fundamental issue. That is, the supplier makes these statements not intending that they be taken literally but only to put the potential buyer in a receptive frame of mind in order to hear those representations which are intended to be relied upon. The difficulty with such a sophisticated

argument, however, is that it ignores the fact that advertising is probably used if it increases sales. Whether sales have increased because people have found the advertisements or statements more amusing than the news or entertainment programmes, or because the advertisement has been believed by a significant portion of the gullible public is not always carefully determined by advertisers, nor is it evident to others such as the courts.

There is room for considerable improvement in the position of consumers short of holding suppliers to the literal meaning of all claims. The standard suggested in the Imperial Tobacco Co.[38] case in the application of anti-combines legislation would go some way in protecting consumers. There the trial judge adopted the language used in several cases before the American Federal Trade Commission, namely would the advertisement mislead a "credulous man". Alternatively, the standard imposed might be to hold the supplier if the buyer did in fact rely upon the claim no matter how unreasonable his reliance was. This would still leave suppliers with considerable room for puffery, assuming that this is socially desirable or, given human nature, at least unavoidable. The practical effects of such a test would depend upon who had the burden of proving reliance. If this burden were placed on the consumer, the difficulty of meeting it would probably increase with his gullibility. That is, those people most in need of protection would probably have the most difficult time getting it.

The foregoing discussion leads to the question of how much exaggeration can be permitted without subjecting the supplier to liability. The issue relates to how far the law should go in protecting unusually gullible consumers at the expense of limiting suppliers' selling techniques. However this issue is determined, it is at least clear that the dividing line has nothing to do with the ancient distinction between a mere affirmation of fact and a statement promissory in character. This ancient distinction which was largely abandoned in the common law in the development of the modern law of contracts was reintroduced by the House of Lords in Heilbut, Symons & Co. v. Buckleton[39] in their creation of the distinct equitable and legal remedies several decades after law and equity had been fused. The distinction is either strictly grammatical as it once was or becomes, as announced by the House of Lords, a meaningless search for the parties' intentions. This search is meaningless because it involves an inquiry not as to whether the parties intended to be serious or intended their claims to have legal effect, but must involve an inquiry as to whether they intended their claims to have effect in equity giving rise to equitable remedies or whether they intended their claims to have effect in law giving rise to legal remedies. This in effect is what is meant by inquiring whether the parties intended the claim to be inside or outside the contract. Such questions would be meaningless to non-lawyers and even if they had meaning

would encourage the worst kind of duplicity. The reform brought about by the English Misrepresentation Act, 1967, does not adequately rid the law of such an irrelevant and complicating distinction. Instead, it encrustrates the law with additional complications. The Ontario Law Reform Commission amongst others has quite rightly advocated the elimination of this distinction.[40] Elimination should be advocated not only because the test used to distinguish in the leading House of Lords case is difficult to apply, meaningless, or because the distinction creates complexity in the law which tends to confuse. More basically the distinction should be abolished because it has no functional justification. The social questions involved are really of two kinds. First, which claims made by the supplier should have legal effect and secondly, of those that have legal effect, which should be serious enough to allow the consumer to walk away from the agreement. At most, there is need for only two categories to describe different kinds of failure by the supplier to live up to the legally-binding claims made by him.

Reliance

Besides deciding the extent to which a supplier's human tendency to go beyond describing his commodity in the best light should be curbed to protect not only the reasonably well informed but also the more ingenuous consumer, it must be decided whether the consumer must have relied upon the supplier's claims in order to take advantage of them. In answer to this question the recommendations of the Ontario Law Reform Commission[41] differ from the provisions found in the Manitoba Consumer Protection Act.[42] It may seem obvious that reliance should be necessary if the object is to protect a buyer's expectations. Why should a buyer who has not heard of the supplier's claims be able to take advantage of them? He will not have been misled or induced to purchase by them and it will only be happenstance which allows him to subsequently use them in a dispute with the supplier.

Such thinking tends to preserve the notion of contracts as discreet entities. It ignores the practical way in which consumers decide on one product over another and the indirect effect of suppliers' claims through word-of-mouth and other informal recommendations. In many cases such a requirement will make little practical difference. The issue will not often be raised in litigation and in any event the courts will make the natural inference that there was reliance in appropriate circumstances. They will certainly make such an inference when it can be said that the reasonable

man would have relied. The requirement is likely to become critical in relation to cases or more unreasonable reliance. In these cases the court is going to require some evidence to overcome their natural inclination to assume a lack of reliance. The requirement seems to simply put an additional burden upon those consumers who perhaps need the greatest protection. While this requirement seems to be desirable in some cases (for example claims made in newspaper advertisements which have not been read by the consumer), in the run-of-the-mill case, it operates as a practical barrier to effective remedies.

There may be a broader purpose served by the absence of such a requirement. It may be thought socially desirable to eliminate these claims in total. If this is desired one way to encourage it would be to allow anybody who has purchased to enforce the claims. That is, to compensate for the many buyers who have relied to their detriment but have not sued, there may be great therapeutic value in allowing any buyer to do so.

On the other hand, the imposition of a reliance requirement may be a useful device to describe where the limits of sales puffery should be drawn. That is, suppliers would then be free to use more artful devices and sales pitches directed towards sophisticated consumers.

Oral and Written Statements

In our existing sales law there are two legal doctrines involved with the distinction between oral and written statements. One is the formal requirement which is a progeny of the Statute of Frauds, that contracts over a certain limit must be in writing.[43] The second doctrine is the Parol Evidence Rule which purports to exclude oral evidence when a contract has been reduced into writing. Before examining the operation of the second of these doctrines we should examine the social problem which they are supposed to solve. Both doctrines are designed to promote certainty of understanding between the parties and to ease the court's task in discovering the truth. The doctrines come from a pre-electronic age when writing was the only way to overcome the selectivity, colourability and frailty of human memory. The doctrines are also perhaps based on the assumption that perjury is more likely than forgery. In addition they are based on the view of the typical sales contracts being the culmination of a period of bargaining between the parties in which offers have been tentatively made and later qualified or superseded. In this type of situation there needs to be a method of cataloging all the things which have ultimately been agreed upon.

The court's application of these two doctrines, their justification, and the reasons advanced for their

abolition have been repeatedly canvassed elsewhere.[44] It is sufficient if some of these reasons are summarized here. The doctrines ultimately fail in their purpose in part because of understandable judicial attitudes towards them. In effect, they are exclusionary rules which for the sake of clarity and convenience assume facts are otherwise than what one party alleges. There is a natural inclination by the judiciary to be uneasy and hesitant in the application of such exclusionary rules which prevent a party from bringing forward evidence as to the truth. In effect, the result is that the difficulties sought to be avoided by the rule are replaced by ones just as complex in determining whether the rule is applicable. More fundamentally, the rules are at odds with social reality. First, they assume in a consumer transaction a far more complex bargaining history that the typical transaction really involves. Secondly, they put an undue burden on the consumer to understand complex documents and to appreciate that the written documents supersede contradictory oral statements. Thirdly, they encourage dishonest and sharp practises on the part of suppliers who realize that the consumer will place primary reliance on what has been said rather than what is written.

Arguments in favour of retaining the Parol Evidence Rule place undue emphasis on the need for great certainty and the difficulty of determining the facts and show a callous disregard for the practical limits of consumer education.

These arguments usually emphasize the responsibility of consumers to understand the law and to read and attempt to understand what they are signing. As the argument goes, the abolition of the Parol Evidence Rule would encourage consumers to act in ignorance. In reality it would encourage them to place more faith in what they have been told by the other side and should encourage suppliers to be more accurate in their oral presentations.

Classification of Express Terms

Throughout the law of contracts there is the fundamental distinction between the breach by one side which allows the other party to treat the contract as no longer binding on him and to walk away from it and breaches of more minor character which do not allow the other party to treat the contract as ended but which require him to proceed with his side and to claim in damages.[45] This fundamental distinction is found in the Sale of Goods. In the context of consumer sales this means there are some circumstances in which a consumer should be entitled to reject goods whereas in other circumstances his remedy should be confined to damages. As the matter of first impression, it does not seem justifiable to allow a consumer to reject goods for the most insignificant breach by the supplier. At the other extreme it seems just as unfair to force a buyer to keep goods which fall substantially short of the supplier's claims and to confine his remedy to

damages. It is in answer to this question of when the buyer should be allowed to treat the contracts as no longer binding upon him and to return the goods that the law has created various categories for the terms of the sales contract. These categories include conditions, warranties, fundamental terms, terms of quality and description. Of these categories, the distinction between condition and warranties is the most important and universal. However, all of these categories are used for the purpose of describing and defining the buyer's remedies. Unfortunately, their definition has not in the past been related to the consequences or seriousness of the supplier's breach.[46] For this reason, many reformers have advocated their abolition.[47] Of course, this does not mean that these reformers have advocated only one remedy in relation to consumer sales. Distinctions are still made between circumstances in which the consumer buyer should be entitled to reject the goods and those in which he should be forced to keep them and simply claim in damages. All that is really attempted is to move away from attempts at classification priori and to focus attention on the nature of the breach, that is, on the question of how far short of his promises is the supplier's performance. I shall return at a later stage to the question of the kinds of remedies a consumer should have and in what circumstances. At that point I will describe the kinds of breaches which we may want to

distinguish for the purpose of remedies. It is enough at this point to agree with other reformers that there is no point in classifying contractual terms except for the purpose of defining remedies and in any event the classification should not be done priori.

Which of the Supplier's Statements are Terms?

In recent years the American Federal Trade Commission acting on evidence collected by others, has recognized the lasting effects of advertising. That is, repeated statements by advertisers create impressions in people's minds which only gradually diminish through time. The Federal Trade Commission has put this knowledge to use in requiring misleading advertisers not only to stop misleading but to actively correct the wrong impressions that former advertising has made.[48] This fact also has implications in our basic sales law in deciding which statements made by the supplier should be considered part of the sales contract. We have had for some time in our sales law, as in our contract law in general, a rather formal notion of the discreet nature of a contract, with an offer and an acceptance supported by consideration. Amongst other things, this has led us to distinguish between terms of the contract and to adopt the Parol Evidence Rule. This formalized notion of the discreet nature of the sales contract ignores the fact that consumers rely upon statements made by suppliers at

various times and through various media. They do not approach a supplier with no previous communication, relying solely upon what they hear at the time of purchase. Even less do they rely solely upon the written document which is produced often only after the understanding between the supplier and consumer has been reached. This fact of reliance by consumers on previously made statements should be recognized in the basic sales legislation. Our definition of the term of the contract should be broad enough to include all these previous statements which have been in fact relied upon. Of course this may pose some hardship on suppliers who have discovered that their product does not meet the standards that they in the past quite innocently assumed it had. We are continuously discovering new dangers in what were previously thought to be at least harmless if not beneficial products. In addition, manufacturers are continuously discovering previously undisclosed defects in their products. A rule which subjects suppliers to all previous claims made on behalf of their products and which ignores intervening attempts to correct previous misstatements or to modify previous claims may seem unduly harsh. However, the alternative of allowing a consumer to be misled by erroneous claims is just as harsh for him. A suitable compromise would be created by qualifying the definition of terms of the contract to those statements which have in fact been relied upon by consumer. Then the

opportunity and obligation would be on suppliers to take the necessary steps to insure that the previous misinformation was corrected. In most cases it would give them sufficient protection to simply correct their previous erroneous statements in the same media. This is likely to reach any consumer who has heard and relied upon the previous statement.

The Supplier's Responsibility for Statements Made by Others

A related problem to this question of which statement through time the consumer should be entitled to rely upon, is the question of which statement made by people other than the supplier should be considered part of the sales contract. There are two kinds of questions here. In the first place, under what circumstances should the supplier be responsible for claims made by his employees, agents or independent contractors acting on his behalf? Should any effect be given to written attempts to insulate the supplier from oral statements made by these people? The second related question is whether the retailer should be liable for statements made by manufacturers, wholesalers or others in the distribution chain.

There are at least three possible solutions to the first question. First, we could preserve the present situation which seems to give overriding effect to written clauses disclaiming responsibility for all statements made by agents or employees. Second, we could as the Ontario Law Reform Commission recommends, make such written clauses invalid

leaving the responsibility of the supplier to be determined by the general law of agency. Under this solution the supplier would be responsible for statements made within the agent's actual or ostensible authority. The third, more extreme solution, would be to fasten the supplier with responsibility for all statements made by employees or agents, even statements which to the reasonable man would not appear to be within the actual, implied or ostensible authority of the employee or agent.

The difficulty with the present law is the same difficulty which exists with Parol Evidence Rule. It is based on an assumption that consumers, like businessmen, give overriding effect to written as opposed to oral statements. This assumption seems incorrect. Many consumers assume that oral statements have overriding effect, assuming they are aware of the written statments at all. As with the Parol Evidence Rule, the present situation encourages sharp and deceptive practices. There is no incentive on the part of suppliers to supervise the representations made by their employees and agents. Instead, suppliers can ultimately rely upon these clauses which insulate them from responsibility and put the burden on the consumer for the improper conduct of the employees or agents. Even assuming that both the supplier and consumer suffer from such conduct, that both parties are completely innocent and that both share the same

desire to discourage it, the present situation still places the burden of this improper conduct on the wrong party. The consumer cannot realistically be expected to guard against such conduct. Nor is he in a position to realize which agents or employees require a more careful watch. Nor does he have the information to make rational judgments about how large the danger is and how much care he should take to prevent it. All this information is more readily available to the supplier and he is in a better position to take whatever corrective steps are warranted by the danger.

The second solution and that recommended by the Ontario Law Reform Commission does go a long way in protecting the consumer. At least it protects the average reasonable consumer. It does,however, do nothing for those who rely on the oral representations made by agents or employees when such reliance may be considered unreasonable. Once again this is an example where the more gullible the consumer and the more in need of protection the consumer is, the less willing we seem to be to give him needed protection. This reluctance seems to stem from a fear that too much protection will make the average consumer too reliant upon government interference and too sloppy in his approach to serious business matters when he should be encouraged to look after himself. Our reluctance to give greater protection does not seem to relate to the question of the ability of the supplier to exercise proper control. From the point of view of the supplier,

attaching responsibility for improperly made statements either within the ostensible authority of the agent as viewed by the reasonable consumer or for all improperly made statements makes little difference.

The second kind of problem related to the supplier's responsibility for statements made by others concerns the supplier's responsibility for representation made by manufacturers. In this case the supplier does not actually have to disclaim responsibility as he does in the case of statements made by employees or agents. Here our general notions of privity of contract generally tend to prevent the supplier from being held responsible for the manufacturer's statements. The onus is on the consumer to find some device to fix the supplier with responsibility. Occasional dicta[50] suggests that this could be done by holding that the supplier has adopted the representations made by the manufacturer. However, most Canadian courts would probably take the position taken in some early American decisions that the mere act of selling does not constitute an adoption of the manufacturer advertising claims by the seller.[51]

The same kind of adoption argument could be used in relation to advertising material supplied by the manufacturer that is run in local media by the supplier under his own name. However, this will not always work to fix the supplier with responsibility for all statements made by the manufacturer. Whether this is thought to be

a problem or not will depend on the extent to which the consumer has an effective remedy against the manufacturer. But in a province such as Alberta, where many manufactured goods come from abroad, the consumer's remedy against the manufacturer may be of limited practical value. It may be that his only effective remedy is against a local supplier. In any event, any modern reform should insure that privity of contract doctrine is not used as a two-edged sword to create gaps in the consumer's remedies. That is to prevent the consumer from holding the supplier responsible for statements made by the manufacturer in national advertising and to prevent the consumer from getting an effective remedy against the manufacturer by finding no contact between them.

There are several possible positions which could be adopted in relation to the question of how far the supplier should be responsible for statements or representations made by manufacturers. At one extreme would be to impose no responsibility on the supplier unless he had done some positive thing to indicate he had adopted the representations as his own. At the other extreme would be to hold the supplier responsible for all statements or representations made by the manufacturer. There may be several possible solutions between these two extremes. For example the supplier could be responsible where he has some influence or control over the manufacturer. Alternatively, the supplier could be held

responsible unless he had taken some positive step to negate the representation made by the manufacturer. A further alternative would be to hold the supplier responsible when he has knowledge of the representations being made and knowledge of the fact that they mislead or create unrealized expectations in consumers.

In this discussion we should keep in mind the general nature of maufacturers' national advertising. In many industries, this advertising is notoriously free of any performance claim. Rather the stress is on associating the product with the good life and inculcating brand names. Performance claims are only significant in selected industries.

The fundamental problem with holding the supplier responsible for all claims made by the manufacturer is the fact that the supplier may be unable to control the claim. While large national retailers (or even some large regional retailers) may have some leverage with manufacturers over these things, many other retailers do not. It seems unfair to subject them to responsibility for conduct which they cannot control. On the other hand, it should be kept in mind that we are not settling the ultimate liability for these representations. If the representations originate from the manufacturer, he should be ultimately responsible. While normally it would be desirable to prevent circuity in law suits, this must be balanced against the desirability of increasing consumers' effective remedies. One way that consumers'

remedies can be maximized is by increasing the number of people in the distribution chain that they can hold responsible. There is some justification for this if the parties in this distribution chain tend to advertise in such a way that it is difficult to separate who is responsible for which claims.

All of the compromise solutions suffer from difficulties of administration. For instance, if the test were one of whether the supplier had effective control over the manufacturer and his advertising, this would involve the court in a discursive and detailed investigation of the corporate structure of the manufacturer and retailer and any relationship which existed between them, the marketing structure in the industry and the relative bargaining positions of the two, and an examination of the particular contracts to supply the goods between the two parties. All of this information would be in the hands of the suppliers or manufacturers and would be difficult for the consumer to obtain. Moreover, even a requirement that the consumer make out a prima facie case of control would deter all but a few consumers with very large claims.

If a compromise solution were along the lines of requiring the supplier to actively disclaim the manufacturer's representation, the difficulty would be in establishing a standard of effective communication to the consumer of this disclaimer. It would be meaningless if such a disclaimer could be done through standard clauses in unread documents.

Even if there was a higher requirement that the supplier orally communicate to the consumer during the sales negotiation or at the point of sale, it would still be doubtful whether such communication was really appreciated by the consumer. The supplier having had the advantage of the manufacturer's representation in inducing the consumer to come to buy the product would then be allowed to disclaim responsibility for such inducement in a pro forma way at a time when the consumer expects no difficulty. Moreover, those disclaiming would tend to be large national retailers which could exert pressure to control manufacturers' advertisements.

The third compromise solution mentioned was to hold the supplier responsible when he knew (or even when he reasonably ought to have known) that the consumer would have unrealized expectations based on the manufacturer's representation. This solution suffers from the same practical difficulty as the first compromise solution, that is, it would involve the consumer in proving an issue which turns on facts within the peculiar knowledge of the supplier.

On balance, the best solution would be to maximize the consumer's opportunity for recovery by holding both manufacturer and supplier responsible for all representations made by both of them, allowing the manufacturer and supplier to determine ultimate liability between themselves.

Possible Statutory Language

If a more broadly defined single concept of express terms of the contract was accepted there are several existing examples of legislative provisions which could be used in the new legislation. These include the suggestion of the Ontario Law Reform Commission to accept section 12 of the American Uniform Sales Act which provides:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

The Manitoba Consumer Protection Act has the following provision in section 58(8):

> "Every oral or written statement made by a seller, or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is
> (a) contained in an advertisement; or
> (b) made to a buyer;
> shall be deemed to be an express warranty respecting those goods or services."

The Saskatchewan White Paper on Consumer Warranties suggests the following provision:

> s. 5(1) Any promise, representation, affirmation of fact or expression of opinion or any action which can reasonably be interpreted by a consumer as a promise or affirmation concerning the sale of a consumer product, made directly or through an advertisement to a consumer by a

> retailed seller or manufacturer or their agents or employees is deemed an express warranty if it can reasonably be expected to induce and in all or in part, induces a consumer to buy a consumer product.

Additional models can be found in the Quebec Consumer Protection Act[52] and the American Uniform Commercial Code section 2-313.[53] Of these provisions the Manitoba Consumer Protection Act is the broadest. There is no express mention of the seller's intention, the buyer's reliance or the reasonableness of his reliance. While the section has the broadest potential application all of these things could be read into the statute and thus limit its application.

For the reasons given in the previous discussion I would favour a provision which read:

> "Every oral or written statement made by a seller or manufacturer or by a person on behalf of a seller or manufacturer regarding the quality, condition, quantity, performance or efficacy of goods or services that is
> (i) contained in an advertisement; or
> (ii) on any label, container or otherwise accompanying the goods or services; or
> (iii) made to a buyer
> and which either
> (i) is intended to induce,
> (ii) might reasonably have the effect of inducing, or;
> (iii) does induce a consumer to buy goods or services
> shall be deemed to be an express warranty respecting those goods or services.

VII. The Rights of Assignees

We have long recognized that the credit buyer whose purchase is financed by a third party may have his practical remedies curtailed in a number of ways. In the past such third party financiers have tried to insulate themselves from the claims of consumers against their suppliers through such devices as cut-off clauses and promissory notes. The courts[54] and the legislatures[55] have acted to prevent these attempts by third parties to insulate themselves. However, these corrective actions are directed at the specific types of devices used in the past. There is no comprehensive legislative provision subjecting all third parties to the consumer's claims against his supplier. For example, while formerly the financing of consumer purchases was typically done by finance companies taking an assignment of chattel paper together with a promissory note, the bulk of consumer financing is now done by the chartered banks, large retailers and others through the use of credit cards. The exact legal nature of the tripartite arrangement involved in bank or oil company credit cards has never been clarified by Canadian courts, but the agreements themselves attempt to insulate the financiers in the same way as the old devices did.[56] There does not seem to be any jurisdiction for allowing third parties who finance purchases through credit cards to enjoy a protective position denied to other financiers using older devices.

Some members of the New Zealand Contracts and

Commercial Law Reform Committee[57] were concerned about the position of third parties in the event that the liability of a supplier was extended beyond our existing notion of the terms of the contract. They were concerned for example, that if the Parol Evidence Rule was abolished, such third parties would be unable to know exactly what they were acquiring from suppliers. It was felt by some commissioners to place an unfair burden on these third parties if they were to be subject to some undisclosed terms between the supplier and the consumer.

These are the same kinds of concerns which were used in the past to support the use of cut-off clauses and promissory notes by financiers. Such moral arguments concerning fairness are sometimes coupled with economic arguments which predict that ending the third party financiers insulation will increase the cost of borrowing funds. Little independent economic empirical investigation has been done to discover the exact effect of those legislative changes which have been made. In theory at least, putting aside the cost of running the legal machinery, subjecting the third party financier to all the rights and defences that the consumer has against the supplier should not impose additional costs. Assuming that the consumer does have some legitimate grievance which because of the financier's insulated position he was prevented from pursuing, the change will simply shift cost from individual consumers through the cost of borrowing money

to consumers in general. There may be some actual over-all saving assuming that market forces are such to encourage the third party financiers to take steps to reduce complaints. In the most extreme cases of high pressure, fraudulent selling techniques by fly-by-night suppliers, the control of financiers is critical. They are in the best position to discover the selling techniques of the suppliers and are in the best position to end them by withdrawing financial services. In relation to less extreme conduct by suppliers, these third party financiers are still in a good position to detect trends of conduct. While it is true that market conditions may prevent them from dictating to suppliers the way they should conduct their business, at least in negotiating with suppliers the terms upon which they will supply credit they will know the true cost of consumers' complaints. They should attempt to compensate for these additional costs by charging high complaint suppliers more for credit than low complaint suppliers. One can only speculate as to whether in fact financiers will make these discriminating decisions. It may be that the cost of acquiring the information is more than the savings to be made by attributing higher cost to those suppliers responsible for them. Much will depend on the state of the competition in the financing industry. Much will depend upon the ability of the financing industry to pass all additional cost on to all consumers. It may be that the very act of distributing cost will tend to diminish

complaints and thereby lessen the pressure for corrective action.

It should be kept in mind that existing legislation already resolves some of the issues discussed above in favour of the consumer. Existing consumer protection subjects the third party financier to claims of which he has no particular knowledge. It is true that in relation to some of these claims the consumer's effective remedies are limited. For example, in relation to fraud or innocent misrepresentation the consumer will have difficulty proving the required mental element or will be prevented from rescinding because of the requirement of restitution. However, this is not true of all of consumers' complaints. Many complaints will relate to the quality of the goods or to the supplier's failure to live up to warranty provisions. These are matters of which the third party financier has no particular knowledge and cannot necessarily control. The extension of our concept of what is included in the sales contract by limiting the concept of sale's puffery, abolishing the Parol Evidence Rule and subjecting the supplier to statements made on his behalf by others does not pose any new or different requirements on the third party if he is made subject to them. However, in as much as the changes will broaden the remedies of consumers they will increase the frequency if not the kinds of defences against third parties.

In deciding whether third parties should be under this additional burden we should keep in mind the practical effect of refusing to do so. If we put aside the extreme examples of judgment proof suppliers (a problem which can

only be effectively dealt with by public law and its enforcement) then the consumer will of course have a claim against the supplier. In theory at least, he is no worse off if he has to pay the third party and seek compensation from the supplier. He is in no worse position than a cash buyer. It might also be argued that he should be confined to a remedy against the supplier since this will prevent circuity in law suits. The insulation which third party financiers seek could be denied only to the extent that there are any gaps in the consumer's effective remedies against suppliers. However, the possibility of such gaps in the consumer remedies against suppliers is not a major problem. More fundamentally what has to be taken into account is the practical effect of placing initiative on the consuming public. No amount of consumer education or demythologizing of the court system will overcome all of the economic, social and psychological factors which prevent individual consumers from initiating action. We must accept the fact that while much can be done to change the Small Claims Courts from collection agencies to effective agencies for consumers, consumers will always be more effectively protected if the initiative is not placed upon them.

Moreover if the concept of what is a term of the contract between supplier and consumer is broadened by abolishing some of the existing arbitrary distinctions, it would be extremely anomalous if these distinctions were re-introduced in defining the consumer's rights and defences against third party assignees.

VIII. Implied Conditions in the Sale of Goods Act

A. IMPLIED CONDITIONS AS TO TITLE

THE PRESENT LAW

Section 15 of the Sale of Goods Act provides:

Implied conditions in contract

15. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is

(*a*) an implied condition on the part of the seller

(i) that in the case of a sale he has a right to sell the goods, and

(ii) that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass,

(*b*) an implied warranty that the buyer shall have and enjoy quiet possession of the goods, and

(*c*) an implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

[R.S.A. 1955, c. 295, s. 15]

The background to this section has been described by Professor Fridman[58] in the following way:

2. THE STATUTORY OBLIGATIONS

(a) The Right to Sell the Goods

Since a contract of sale of goods is one which contemplates the transfer of property in the goods which are the subject-matter of the contract, as already noticed, it might be thought that there could be no sale unless the seller had the legal right to transfer property in the goods, either by virtue of being the owner or as a result of his investiture with the power to transfer property by the real owner, *e.g.*, by becoming the agent of the owner. At common law, however, it would seem that in sales there was no warranty that the seller had either title or the right to sell, unless such a warranty were expressly annexed to the contract in the same way as other terms could be included by agreement between the parties.[16] Gradually, however, exceptions to this arose. The case of *Eichholz* v. *Bannister*,[17] in 1864, shows that the courts were prepared to imply a warranty as to right to sell into contracts of sale. This attitude was adopted and approved by courts in Canada: and such a warranty was implied unless the facts proved that it should not and could not be incorporated in the contract.[18]

The doctrine arrived at by the common law is now contained in section 15(a) of the Act, though, significantly, with the alteration in the legal nature and quality of the implied term from warranty to condition.[19] Under this provision, in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

Criticisms of the Present Law

Most of the academic and Law Reform Commission[59] criticism of s.15 and its equivalent in other jurisdictions has stressed the fact that it may give too much protection to consumers. This occurs because of the case law which holds that s.15 is not subject to the normal rule found in s.14(4) that a buyer's right to reject for breach of condition is lost once the goods have been accepted.[60] This, coupled with the case law gloss[61] to s.15 which indicates that the buyer does not have to account for any benefit he has received even through the extended use of the goods, has led commentators to suggest that s.15 is unfair to sellers. The unfairness is further aggravated by the cases which hold that a defect of title cannot be cured.[62] Occasionally the combination of these rules has allowed a buyer to rescind the contract and return the goods after using them for several months even though at the time of litigation he had not suffered any damage and his possession could no longer be disturbed by any third party. Since he did not have to account for his use of the goods, he seems to have obtained a windfall.

These several case law glosses on s.15 should be examined in turn to see which of them requires change in any reform of consumer law. The rule that s.15 is not subject to the normal rule, found in s.14(4), that the buyer loses his right to reject upon accepting the goods, is perhaps the most difficult to understand in theory. It seems to make

s.15 a different kind of implied condition from other implied conditions found in the Act. It is founded upon the notion that the essence of a sales contract is not the exchange of the use or possession of goods for the price but rather the exchange of title to the goods for the price. The practical effect of this is to give the buyer the option of basing his claim on a return of the purchase price or in damages regardless of whether the buyer's possession of the goods has been or will be distrubed.

As we will argue later, the consumer buyer ought to be allowed to reject goods at least for substantial defects even after property has passed and they have been accepted by him. He should be allowed to do this within a reasonable time after discovering any substantial defects. This should also be the rule in relation to defects of title. That is any anomaly in the application of s.14(4) of the Act should be removed by abolishing s.14(4) and defining the right of rejection differently. Once we have decided to allow a consumer to reject for substantial defects discovered after goods have been delivered and even used, the question becomes whether in rejecting and claiming the return of the purchase price the consumer ought to account for the benefit he has received through the use of the goods. This should be decided in the same way whether his complaint is a defective title or a breach related to quality.

Whatever the merit of such a right by the seller to set off any benefits received by the buyer in a commercial

transaction, it ought not to be allowed in a consumer sale. In the first place, it must be remembered that the buyer did not bargain for some temporary use. In addition, there will be substantial practical problems in quantifying the benefits received by the buyer.

Given the initial substantial depreciation in such durable goods as automobiles and household appliances, it would be most unfair to assume the buyer has received the benefit of the difference between the initial purchase price and the resale value of the goods returned. This would be obviously inappropriate if the buyer's complaint related to quality. But it is submitted that it is also unfair when the buyer is complaining of a defect of title. He probably could have rented the goods for a temporary period at substantially less that the depreciation which occurs as soon as new goods are removed from the retailer's store.

While in some cases there may be a standard rental figure for these goods in the locality of the parties, this may still exaggerate the benefit received by the buyer. He can argue that he did not intend to rent the use of the goods for a limited period. He intended to purchase them to use them for their life-time at a substantial saving.

The final possibility would be to attempt to estimate the useful life of the goods and to allow the seller some pro rata figure. Of the different ways of assessing the buyer's benefit that I have mentioned, this seems to be the

fairest to him. However, once again, it will be difficult for the consumer buyer to refute any evidence brought forward by the seller as to the useful life of the goods. Moreover, there will be many incidental costs to the consumer involved in rejecting the goods and obtaining other goods in substitution which he will have to bear. These are the kinds of costs which a commercial buyer may be able to quantify and claim as damages but which are very difficult for the consuming public to quantify.

One further argument against the seller being allowed to set off any benefit received by the buyer in the case of a defect of title should be mentioned. This argument would deny the seller any recovery on the grounds that if he did not have the right to sell he has not transferred any benefit to the buyer. If the buyer has received any benefit it is at the expense of the true owner, not the seller. The argument is most convincing when the seller has acted improperly. However, in the case when both the seller and the buyer have been the victim of some improper conduct by a third party, to ignore the benefit received by the buyer places all of the loss on the seller even though he has derived no benefit from the use of the goods while the buyer has. All the argument demonstrates is that the seller's right to set off any benefit cannot be based on any notion of restitution. That does not mean it cannot be based on some other notion such as that as between two innocent parties the one who has received a benefit ought to account for it in distributing the loss.

On balance, it would be better to deny such a right of set off against consumer buyers. The instances where this will result in any significant windfall to the buyer will be few since most defects will be discovered within a short period after delivery of the goods.

The effect of s.15 would be far less harsh on sellers if they were allowed to perfect any improper tender. That is, if they were allowed to correct any defect in the title after it comes to their attention. There is no reason why they should not be allowed to do so within a reasonable time if the purchaser has not yet been disturbed in his possession. This would just be a particular application of the more general notion that a more generous right of consumer buyers to reject goods for defects should be balanced by a more generous right of sellers to cure. Once such a right to cure is recognized, the question becomes how long the seller has to affect this cure and whether any intervening event should deprive him of this right. In relation to a breach of the condition as to good title the simplest solution would be to allow the seller to cure within a reasonable time after notification has been given, provided the buyer's possession has not been actually disturbed. If action has been brought by the true owner against the buyer or the goods have been repossessed by him, the buyer should have the right to reject and claim a refund of the purchase price from his seller. This rule is to some extent arbitrary since even after his possession has been disturbed, it may be possible for the seller to clear the title and return possession to the buyer.

However, this then raises a question of trying to quantify the damage suffered by a consumer buyer through having his possession disturbed. This kind of burden should not be put on the buyer. It may be that he will want the goods and will tolerate the seller's breach (or settle for some payment of damages) but he ought to be given the option of deciding whether this is satisfactory to him.

While most discussion of s.15 suggests that it is too harsh on sellers, at least two shortcomings from the point of view of the consumer buyer have been noted.[63] In the first place, s.15(a)(2) requires that the seller have the right to sell the goods at the time when the property is to pass. This means that under the standard conditional sales contract since property is reserved until payment is made in full, property is not to pass until the buyer has completed payment. If some defect in the seller's title is discovered during the life of the conditional sales contract, the section seems to require the buyer to continue making payments and to wait until the time for the passing of property before complaining. That is the seller is not in breach until the time at which property is to pass. This seems to put the buyer in a very untenable position.

The suggestion of the Ontario Law Reform Commission was to amend the section to make it an implied condition that the seller has the right to sell at the time of contracting. This would not seem to be a suitable point in time in

relation to unascertained or future goods. A more suitable alternative would be an implied condition that the seller will have the right to sell at the time when the goods are to be delivered.

A further weakness of s.15 is the fact that it may be disclaimed. This has been the subject of much criticism and has led to contradictory recommendations in England[64] on the one hand and Ontario[65] and New Brunswick[66] on the other. The English recommendations were to allow disclaimers as long as the seller indicated that he was only transferring such title as he had. Moreover, even with such a disclaimer the seller would still impliedly warrant that there were no undisclosed charges or encumberances. These changes have been adopted in England by the Supply of Goods (Implied Terms) Act, 1973, s.1. The recommendations of the Ontario and New Brunswick reformers was to disallow all disclaimers relating to title in consumer sales.[67]

In deciding which reform to adopt the institute should consider the potential dangers to consumers of allowing disclaimers especially those in the fine print of unread documents, the social utility of allowing disclaimers and finally, the practical difficulty of creating any meaningful test to determine whether the seller has brought home to the buyer the existence of some defect in the seller's title. Whether there is much social utility in allowing disclaimers will depend in part upon how consumer sales are defined. If

consumer sales are confined to sales between merchants and individuals there is little need for such disclaimers. However, if the definition of consumer sales is comprehensive enough to include private sales between individuals, some opportunity to disclaim may be appropriate. For example, if an individual has bought under a conditional sales contract and before completing payment decides to "sell" the goods to his neighbour, there seems no reason why he shouldn't be allowed to do this. In such circumstances as long as there is full disclosure there is no reason why the seller should have a clear title.

Besides the implied condition in s.15(a) that the seller has the right to sell the goods, there is an implied warranty in s.15(b) that the buyer shall have and enjoy quiet possession of the goods and an implied warranty in s.15(c) that the goods are free from any charges or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. There is much overlap between s.15(b) and (c) and s.15(a). This does not seem to have created any practical difficulty for consumers in Canada. However, there seems little to be said for the differences which do exist between the sections. Section 15 should be redrafted to reduce this duplication. A possible wording might be:

> "In a contract of sale there is an implied term that the seller has a right to sell the goods free from any charge or encumbrance in favour of any third party at the time the goods are to be delivered under the contract."

The effect of s.15 will depend upon the application of the nemo dat rule and the qualifications to it. If we extend our general entrusting doctrine to protect all purchasers from merchants, s.15 will have limited application. If consumers are generally protected from defects of title when they buy in good faith from merchants, there seems little reason why they should complain to their seller. That is, s.15 should be interpreted in such a way that the seller is in breach of it only if he fails to give the buyer undisturbed possession. It is not necessary that he have a right as against a third party to make the transfer as long as he has the power to do so in the sense that the buyer will take a good title free of the claims of any third parties. The more generous the protection given to consumer buyers under the statutory qualifications to the nemo dat rule, the less need for the equivalent of s.15. It is only to the extent that consumer buyers do not take free of third party claims that s.15 is important to them.

B. Implied Condition that Goods Correspond with Description

Section 16 of the Act provides:

> 16. When there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Given the modern definition of a sale by description, s.16 has been interpreted as either saying too much or saying nothing at all. If terms of description are expressed, which they invariably will be, s.16 seems to make the superfluous and meaningless statement that there is an implied condition that the expressed terms of the contract will be observed. Alternatively, it has been suggested that s.16 makes all descriptive terms used in the process of negotiating the contract, conditions, giving rise to the remedy of rejection for their breach.[68]

The historical background to this provision has been explained by a Professor Reynolds in the latest edition of Benjamin's Sale of Goods.[69] There he describes the antithesis between sales of specific goods and sales by description. Before the passing of the Act, apparently the law was more favourable to the buyer in the case of sales by description. In these sales, the seller was regarded as promising that the goods would conform with their description and also that they were merchantable. Professor Reynolds points out that these two requirements which now appear separately in the Act were sometimes confused. This antithesis was codified in the Act and is illustrated not only by ss.16 and 17 relating to quality but also in s.14(4) which provides that the buyer loses his right to reject in the case of specific goods when property has passed. While this explanation of the evolution of s.16 indicates that it was not intended to apply to all sales, it

does not, without more, explain what was the purpose of the section. What was added by s.16 in the nature of an implied condition?

Now that the antithesis between the two types of sale has been largely forgotten and the meaning of sales by description has been broadened (basically to apply the implied condition of merchantable quality found in s.17(4) to all sales), s.16 has general application.

Some courts have avoided choosing between assuming s.16 was superfluous and assuming s.16 now abolishes the distinction between misrepresentations, warranties and conditions by establishing a further classification which is independent of the distinction between warranties and conditions. This distinction is between identity and quality.[70] Description is held to be a question of identity rather than quality so that the section makes all statements which go to identity implied conditions of the contract. The effect of this is that certain things which at first impression seem to be of relatively minor significance will give rise to an implied condition under s.16 if they can be classified as going to the identity of the goods sold.[71] One does not have to be much of a philosophical nominalist to appreciate that this distinction has no meaning. It is not just that the distinction is difficult to apply, leads to uncertainty, or as some Canadian judges have said, "each case must be decided on its own facts and its own merits." The classic illustration of the black horse

in the last stable given by Mr. Justice Channell in Varley v. Whipp[73] and the illustration of the three-quarter inch pine board in the leading Canadian case of Alkins Bros. v. G.A. Grier & Son Ltd.,[74] do not hold up to analysis. As Lord Wilberforce's judgment in Ashington Piggeries Ltd. v. Christopher Hill Ltd.[75] illustrates, if the court is not to engage in a metaphysical discussion, the question becomes largely whether the difference between what was promised and supplied is major or minor. That is, the distinction between quality and identity begins to look very much like the distinction between condition and warranty.

The attitude of reformers to the equivalent of s.16 has been to urge that any remaining doubt as to whether it is a section of universal application should be resolved by making all sales sales by description. The Ontario Law Reform Commission[76] goes further in a rather curious recommendation that the section be changed to make it an express condition (or warranty as they would call all terms of the contract). The recommendation of the Ontario Law Reform Commission seems to reduce s.16 to a totally superfluous and tautological statement that there is an express condition that goods shall correspond with the contract.

If we were to put aside s.16 for the moment, the basic questions should become whether it is necessary to distinguish between goods which have been seen and agreed upon at the time the contract is made and those which can only be identified by the terms of the contract (that is, goods which

are not seen and inspected by the buyer at the time of sale). Is there some reason to subject a seller to a higher standard of performance in one situation than in the other? I suggest there is not and this is the thrust of most decisions since the passing of the Sale of Goods Act. This explains why the provisions of s.17 as to merchantable quality and fit for the purpose have been applied more generally than was the case before the passing of the Act by extending the notion of what is a sale by description. Once the distinction has been abandoned the whole purpose of s.16 is lost.

On the other hand, if there is some merit in the distinction and a desire to hold a seller to a higher standard of performance when the goods had not been seen by the buyer at the time of sale, s.16 will have to be radically reformed to recapture its original intention.

If the distinction is rejected, the seller will be responsible for all express terms of the contract. This should include statements made by him (or even others) which were relied upon by the buyer. When we discuss remedies we will see that the remedies of the buyer are basically the right to reject and to sue for damages. In describing when he should have the more radical remedy of rejection it may be thought desirable to distinguish between serious and less serious breaches by the seller. However, this distinction should be made on the basis of how far short the seller's performance is to the express and implied terms of the contract.

It is not necessary to have the additional distinction between identity and quality. This is at best just a confusing and redundant nomenclature. At worst it encourages a metaphysical discussion which leads to relatively minor breaches by the seller (because they relate to identity) being treated as giving rise to a remedy of rejection.

We should resist the temptation of assuming that consumers will be further protected by multiplying the number of legal devices available to them. What may be gained by allowing the judiciary to choose between alternative concepts on the basis of which appeals to them, is at the expense of confusing the public. Some attempt should be made in reforming the law applicable to consumers to clear out the underbrush and remove categories and concepts from the law which have outlived their usefulness. Section 16 is this kind of provision and it ought to be abolished.

C. Caveat Emptor

Section 17(1) codifies what is generally thought to be a time-honoured principle of caveat emptor. However, the Ontario Law Reform Commission[77] points out that this maxim did not make its appearance in the relevant case law until the 17th century and its life as an accurate reflection of law was relatively short lived. They go on to point out that the only areas in which the maxim still has any vitality is with respect to private sales and sales of specific goods where the buyer

has inspected the goods and is deemed to have bought them subject to such defects as his inspection ought to have revealed.

The English and Scottish Law Commissions[78] recognized that the doctrine of caveat emptor embodied in the equivalent of s.17(1) has been considerably cut down by the exceptions found in the equivalent of s.17(2) and (4). However, while they recognized that at first sight the modernization of the law might justify the deletion of s.17(1), they thought that on closer scrutiny the balance of advantage seemed to lie with its retention. The New Brunswick First Report of the Consumer Protection Project is silent concerning the New Brunswick equivalent.[79]

No doubt, the basic maxim found in s.17(1) has been considerably qualified by s.17(2) and (4) and will be further qualified if s.17(2) and (4) are extended and made manditory in all consumer sales. The question remains, however, as to whether s.17(1) ought to be retained as a residual rule or as a general statement of the applicable standards in consumer sales. This may be of marginal importance given the creative way in which the courts have been prepared to use the exceptions of fit for the purpose and merchantable quality. It is submitted that the section ought to be omitted from any reform of consumer law for two reasons. First, there may still be marginal cases where, but for s.17(1), the courts would be prepared to imply a term of quality for fitness from the statements made by the seller or the surrounding circumstances.

There should be no impediment to prevent the courts from making any such implications. Moreover, the courts should have full scope to develop implied terms of quality in consumer transactions without the necessity of fitting them within the rubrics of merchantable quality or fit for the purpose. In the second place, s.17(1) ought to be abolished because it misstates the general rule. The general rule in consumer transactions ought to be that the goods will be fit for the purpose and of merchantable quality. Areas identified by the Ontario Law Reform Commission in which the maxim still has any vitality ought to be separately dealt with. That is, the question of whether the implied conditions of quality should apply to private sales ought to be specifically decided. In addition, the relevance of inspection or the opportunity to inspect should also be specifically stated.

D. Fit for the Purpose[80]

Section 17(2) of the Act provides:

> 17.(2) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he is the manufacturer or not, there is an implied condition that the goods are reasonably fit for such purposes.

The English and Scottish Law Commissions[81] recommended several changes in s.17(2) of the Act. These changes were endorsed without comment by the Ontario Law Reform Commission[82]

and have been accepted by the New Brunswick Consumer Protection Project[83] and the Saskatchewan White Paper on Consumer Product Warranties.[84] In part these changes were recommended by the Molony[85] committee although in some respects the English and Scottish Law Commissions went beyond the Molony committee's recommendation. The changes recommended were summarized by the Ontario Law Reform Commission as follows:

> "(1) The condition of fitness should no longer be confined to sales where the goods are "of a description that it is in the course of the seller's business to supply", but should be extended to cover all sales in which the seller is acting in the course of business.
>
> (2) The proviso to s.15(1) [Alberta s.17(3)] should be repealed.
>
> (3) The provision in s.15(1) [Alberta s.17(2)] to the effect that the condition of fitness will be implied in a contract of sale only where the buyer makes known the particular purpose for which he requires the goods so as to show that he relies on a seller's skill and judgment should be replaced by a provision whereby the condition of fitness will be implied unless the circumstances are such as to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.
>
> (4) It should be made clear that the words "particular purpose" cover not only an unusual or special purpose for which goods are bought, but also a normal or usual purpose."

The English and Scottish Law Commissions[86] noted the over-lap between s.17(2) and (3). That is, the English courts have related merchantable quality to the usual purposes for which goods are sold and they have interpreted the phrase

"particular purpose" as including in appropriate circumstances a usual purpose. In spite of the call by some lawyers that this overlap be eliminated, the English and Scottish Law Commissions decided that such elimination would be a retrograde step. Although their refusal to eliminate this overlap has the support of the New Brunswick Consumer Protection Project (and by implication the Ontario Law Reform Commission) the reasons given by the English and Scottish Law Reform Commissions for retaining this overlap are not convincing. The English and Scottish Law Commission pointed out that a consumer through careless or unskillful examination might lose his claim under s.17(4) but still have a claim under s.17(2). This reasoning is hard to understand. If an examination by the buyer is thought to be relevant so as to deprive him of a remedy for defects which such an examination ought to have revealed, it should do so under both s.17(2) and s.17(4). We should not retain overlaps in order to preserve anomalies.

The English and Scottish Law Reform Commissions originally thought the distinction should be drawn between the legal effect of a purchase for the usual purpose of the goods and the legal effect of a purchase for a special purpose. They subsequently abandoned this distinction. It is unfortunate that they did, because applying s.17(2) to purchases for a usual purpose of the goods results in a meaningless discussion of reliance and disclosure. When goods are sold to consumers they should be fit for all of their usual and normal purposes.

This requirement does not depend on any expertise by the seller. There is no need to disclose what the goods will be used for nor is there any need for the buyer to rely upon the vendor's skill and judgment. All of these questions are quite irrelevant. It is not just a question of who has the onus of showing that there was disclosure of the purposes and reliance by the buyer. As we shall see, a vendor should be liable to a consumer if goods are not of merchantable quality and merchantable quality should be defined in terms of the contractual terms and the circumstances in which the contract was made. This minimum standard imposes upon sellers an obligation to deliver goods fit for the normal and usual purposes contemplated by such terms and circumstances. The public should not have alternative ways of expressing the same claims with divergent and anomalous qualifications.

Professor Reynolds in the latest edition of Benjamin's Sale of Goods[87] describes how originally s.17(2) and (4) were designed to codify distinct branches of sales law. They originally did not have the overlap which the case law has introduced. Section 17(2) was applicable to the sale of specific goods whereas s.17(4) was applicable to goods sold by description.

The English and Scottish Law Reform Commissions like their Canadian counterparts who have adopted their suggestions, have placed too much emphasis on a desire to multiply the consumer's means of protection. In doing this, they have not adopted a consistent approach to the relevance of an examin-

ation of the goods by the buyer. Moreover, they have not given enough emphasis on the need to simplify and rationalize the implied conditions. Section 17(2) ought to be redrafted to cover only unusual or special purposes. These are the only circumstances in which disclosure and reliance by the buyer are relevant.

The three other changes recommended by the English and Scottish Law Commissions, the Ontario Law Reform Commission and the New Brunswick Consumer Protection Project all relate to the question of disclosure and reliance. The thrust of these recommendations is to enable the buyer to show disclosure and reliance more readily. Of these three recommendations the one that recommends the abolition of s.17(3) is the easiest to dispose of. Section 17(3) has already been interpreted by the courts in such a way as to make it ineffective.[88] While at one time the use of a patent or trade name might have been a good indication of whether a buyer was relying on the seller, this is no longer so. In an age when national advertising tends to be geared to product indentity rather than a description of a product performance, the use of a patent or trade name will be largely a matter of happenstance. It will be of no probative value whatever as to the question of reliance. Section 17(3) has become more of a red herring than a reliable guide to reliance and ought to be repealed.

While it is easy to see why all merchants should be responsible for supplying goods fit for their usual purpose,

it is more difficulty to understand why all sellers or even all business sellers should be responsible for supplying goods fit for an unusual or special purpose. Should the consuming public only expect to rely on sellers who have some expertise? None of the Law Reform Commissions would subject all business sellers to a requirement to supply goods fit for a special or unusual purpose simply by a buyer disclosing that he wanted the goods for such purpose. What they do is recommend that all sellers selling goods in the course of business should be liable unless they can show that the buyer did not rely or that it was unreasonable for him to rely on the seller's skill and judgment. This makes the subsection potentially applicable to all sellers not just those who have sold goods of that description. This removes the anomaly identified by some courts between the seller's initial and subsequent sale. However, this change goes much further and makes the section potentially applicable to sellers who have in no way held out to the public that they have any special skill or judgment. This is counter-balanced by allowing them to come forward with evidence that the buyer did not rely or that it was not reasonable for him to rely on the seller's skill and judgment. This means that the seller can at the time of sale make it perfectly clear to the buyer that he does not have the necessary skill and judgment to warrant that the goods will be fit for the special or unusual purposes of the buyer. Of

course, in recommending these changes the other Law Reform Commissions had in mind the section's applications to goods bought for their usual or normal purposes. If these cases are considered to be adequately covered under the doctrine of merchantability, then much of the reasons for these particular changes disappear. The situation in which consumers purchase goods for unusual or special purposes will be relatively rare. We must keep in mind that all of the recent leading English cases have involved commercial purchasers. However, in the limited circumstances where the section could apply to consumers it does not subject the seller to an unfair burden to require him to disclaim any expert knowledge. He is in the best position to know at the time of sale whether he really has the necessary judgment or skill to insure that the goods will be fit for the purpose disclosed by the buyer. He should not be allowed to keep silent if it appears that the buyer may be relying on his skill and judgment. It is only a slight extension of this to say that he ought to clarify any ambiguous situation. The simplest way is to require the seller to show that the buyer's reliance was unreasonable.

Before leaving s.17(2), we should discuss whether a more narrowly described s.17(2) ought to be applicable to private sellers. We will see in the following discussion that there may be good reason to say that even in a private sale there should be an implied condition that goods are merchantable within the terms of the contract. This is espe-

cially true if consequential damages are excluded and the purchaser allowed only restitution. Even if the seller is in no better position than the buyer to know the quality of the goods, there is an element of unjust enrichment in allowing the private seller to keep the purchase price when the goods turn out to be unmerchantable.

However, if s.17(2) is to be confined to an implied condition that in certain circumstances the goods will be fit for unusual or special purposes, there is less to be said for its application to private sellers. In a sense it would not be unjust to apply it to private sellers since they could, as business sellers, show that the buyer's reliance was unreasonable. What is reasonable reliance would depend upon the nature of the seller and whether he has held himself out as having any expertise. Reliance by buyers on business sellers will be more usual and business sellers can be expected to be more aware of the need to show buyers the limit of their expertise when buyers have disclosed an unusual purpose. Private sellers on the other hand, may not have the same awareness that the onus is on them to clarify an ambiguous situation. On balance it seems more desirable to exclude private sellers from the operation of s.17(2). This does not mean that private sellers can never make it a term of the contract that the goods will be fit for some special or unusual purpose. It just means that in a private sale the normal onus should be on the buyer to prove the terms of the sale. This will require the buyer to prove that there was some

positive representation by the private seller that the goods would be fit for the unusual or special purpose disclosed by the buyer.

E. Merchantable Quality[89]

Section 17(4) provides that in certain circumstances there is an implied condition that goods will be of merchantable quality. The Act does not define what is merchantable quality. The British Appellate Courts have in several recent commercial sales attempted to define the term.[90] In both commercial and consumer sales, the courts' difficulty seems more in giving expression to the standard than applying it. Like obscenity, the courts seem to have no difficulty knowing what is merchantable when they find it. Aside from the felicity of various proposed definitions, the discussion in the English case law seems to raise several choices which affect the scope of the implied condition. It may be useful in analyzing these choices to keep in mind the historical division (between the sale of specific goods and the sale of goods by description) which was codified in the Sale of Goods Act. In relation to the sale of goods by description, not only was there, prior to the Act, the condition that the goods should correspond with the description but also a warranty of merchantability, the two being frequently amalgamated. On the other hand, neither of these rules applied to the sale of specific goods. As we have seen, the courts in their

desire to give additional protection to buyers have dramatically expanded the notion of a sale by description, especially for the purpose of s.17(4). No one is likely to suggest that this expansion has not been desirable. However, it is perhaps at the root of some of the definitional problems surrounding merchantable quality.

The practical choices which affect the scope of the implied condition as to merchantable quality seems to include: (1) Whether something which has multiple uses can be of merchantable quality if it is fit for one but not all of its various ordinary uses, (2) To what extent price is relevant in determining merchantable quality, (3) Assuming merchantable quality sets a minimum standard of quality, how is that minimum standard to be determined?

If merchantable quality is simply to be defined in terms of the contract description, the section begins to look like another tautological statement that there is an implied condition that expressed conditions will be fulfilled. That most goods can be sold at some price to willing buyers suggests that merchantable quality cannot be defined completely in the abstract apart from the description and circumstances of an individual sale.

Perhaps we can get at the proper scope of an implied condition of merchantability by thinking more fundamentally about what protection we are trying to give buyers. There seems to be two interrelated justifications for interceding

on behalf of the buyer. I believe these justifications are implicit in much of the case law. One justification is a dissatisfaction with the notion that a seller should only be responsible for his express statements as to quality. This does not seem to meet the public's (whether they be buyers or sellers) expectations or sense of justice. Circumstances in which a seller offers goods for sale in effect amount to a holding-out that certain common expectations of buyers will be met. It is a recognition of the fact, long recognized by spouses in marriage and given limited recognition in international law and politics, that not all understandings have to be verbalized in order to form the basis of action and expectation. An analogy might be drawn from the law of agency in which an agent may bind his principal for acts within his apparent or ostensible authority in spite of any secret limitation by the principal.

Along with this notion that the parties' understanding as to the quality of the goods sold is found in more than just the spoken or written words used is the separate but complementary notion of unjust enrichment. This notion is manifested in the case law by attempts to define merchantable quality in terms of the price. Goods are defined as being of merchantable quality if they can be sold at the contract price to a buyer with complete knowledge of their qualities. However, the judges seem hesitant to accept this definition without qualification. Their hesitancy can probably be explained

by a reluctance to accept the notion of unjust enrichment alone as justification for protecting the buyer.

Of these two justifications for interceding on behalf of buyers, the first seems to predominate in judicial and academic thinking. Even if there is no unjust enrichment in an objective sense, courts are still prepared to give relief to the buyer. This seems to be based on the notion that it is not solely a question of whether the buyer paid a fair amount for what he got. Rather he is entitled to relief if he has got less than what he was "promised". In determining what the buyer was promised, the courts looked beyond the actual statements of the seller. In effect, the price and the question of unjust enrichment are used as subsiduary tests to determine what has been impliedly promised in the circumstances.

If the above paragraph is an accurate description of how the two justifications have been combined in the better reasoned judgments, it seems acceptable , subject to some qualification. As we have said, the courts are reluctant to use unjust enrichment alone as justification for granting the buyer relief. This stems from the use of commercial hypotheticals where the courts imagine situations where the seller has struck a particularly advantageous bargain without any misrepresentation, concealment or unconscionable conduct of any kind. Unless courts are going to get into the seemingly impossible task of determining whether every contract

involves a fair exchange, there doesn't appear to be anything in the seller's conduct to justify giving the buyer relief. The buyer is the author of his own folly if he has struck a bad bargain.

This reasoning is less convincing when applied to consumer buyers. Here there is a fine line between acts by the seller or circumstances which create expectations for the buyer and passive silence by the seller, especially where he has reasonable grounds to know the buyer is under a mistaken assumption.

It might be argued that this discussion is too finely tuned or involves too neat a distinction. After all, in cases of gross discrepancy between the price and the value of the goods supplied, the courts will use this to find the goods unmerchantable within the terms of the contract and the surrounding circumstances. This may be true in many cases. However, the fact remains that it has not been used by the courts in the past with much innovation or resourcefulness to cope with extremely one-sided consumer transactions. I suggest that in a consumer sale a gross discrepancy between the price and the value of the goods supplied should itself amount to a breach of the implied condition of merchantable quality.

Regardless of whether unjust enrichment in itself is grounds for giving consumer buyers relief, it should not be the sole criteria. The present approach of giving buyers relief even though they have received fair value should con-

tinue. If the terms of the contract and the surrounding circumstances promise more than the buyer actually receives, he ought to be entitled to relief. This is just a particular application of the notion that he is entitled to his expectation interest.

There are several models which could be used in defining merchantable quality. These include Article 33(1)(d) of the Uniform Law on the International Sale of Goods, s.2-314(2) of the Uniform Commercial Code, s.7(2) of the U.K. Supply of Goods (Implied Terms) Act 1973, s.58(5) of the Manitoba Consumer Protection Act and s.2(a) of the Saskatchewan Proposed Consumer Product Warranties Bill. None of these is completely satisfactory, the first two because they were drawn largely with commercial transactions in mind, the next two because they are too abbreviated and the last because it is not self-contained.

Any new provision should include the following points:

1. Some more meaningful name should be given to this condition than merchantable quality. The suggestion of the Ontario Law Reform Commission is that it be renamed a warranty of "consumer acceptability". This is perhaps as good as any.
2. The definition should spell out, as the Supply of Goods (Implied Terms) Act, 1973 definition does, that consumer acceptability should be determined in light of the express terms and the surrounding circumstances.
3. Goods should not meet the test of consumer acceptability

if their price is grossly in excess of their actual market value regardless of the contract terms and surrounding circumstances.

4. The definition should make it clear that in order to be acceptable the goods must be fit for all of their normal purposes unless the seller has informed the consumer that the goods are not fit for all such purposes.
5. The definition should include some reference to the question of durability. That is, goods should only be acceptable if they last for a reasonable period of time.
6. The definition should also include a provision that goods are only acceptable if they satisfy all public law regulations applicable to them.

In addition to these points, several other questions concerning the scope and operation of such an implied term of consumer acceptability require fuller discussion. This is done in the following sections.

Sale by Description

We have already described how the original dualism of the Act with its distinct treatment of sales by description and the sale of specific goods has been eroded by the case of law. Sale by description has been given a very broad definition but vestiges of the old notion still reoccur in the case law. The implied condition of consumer acceptability should not be confined to sales by description. This has been the universal recommendation of the reform bodies and is now the

law in Manitoba,[91] Saskatchewan,[92] and England.[93]

To All Sellers

The implied condition that the goods are of merchantable quality now applies only when they are bought from a seller who deals in goods of that description (whether he be the manufacturer or not). In English case law this has been broadly interpreted in such cases as Ashington Piggeries[94] to mean something like that the seller is a commercial seller. If we think of the fundamental explanations for protecting buyers that were discussed above, we will see that they have general applications. They are just as persuasive when used against any kind of seller, i.e. not only all commercial sellers but even private sellers. Even if the seller has no knowledge of the defects and has no responsibility for them, as in the case of private sellers, there is no reason why he should be allowed to unjustly enrich himself at the expense of the buyer. Of course, it is a totally different question if the breach of such an implied condition subjects a private seller to large consequential damages for personal injury. This is a subject which will have to be treated separately since it keeps reoccurring and covers the whole gambit of buyers' remedies. The difficulty here, as elsewhere, is that traditionally once a party has established a breach of contract he has been entitled to all of the damages reasonably foreseeable within the rules of Hadley v. Baxendale. Damages are awarded in contract without regard to the nature of the

breach, that is whether it was done deliberately, negligently or completely innocently.

In sales contracts, disregard of the nature of the breach has included disregarding which of the two parties could more reasonably detect any defect in the goods. The broad potential liability of the seller has led to the restrictive definition of his obligations. A more suitable balancing of the interest of the two parties would probably result if we expanded the nature of the seller's obligation but balanced this off by a more restrictive definition of the resulting damages from his breach. For example, in the present context, a private seller should not be allowed to keep the purchase price if the goods are not acceptable within this new version of the old implied condition as to merchantable quality. To allow him to do so allows him to become unjustly enriched at the expense of the buyer. This disallowance of the seller's claim for the purchase price does not depend upon finding him at fault. He should not be allowed to keep the purchase price even though he is unaware of the defect, cannot reasonably be expected to know of it or is in no better position than the buyer to discover the defect. However, once we go beyond giving the buyer restitution, there must be some further reason for placing liability upon the seller. If he is to be liable for consequential losses, there must be some justification for saying that he ought to have discovered the defect.

The Effect of the Buyer's Examination

The existing proviso with respect to the buyer's examination is rather curiously worded. If the buyer makes an examination no matter how cursory he cannot complain of any defect which a reasonable examination would have revealed. However, if the buyer makes no examination at all, he is better off since he is not deemed to know of defects which a reasonable examination would have revealed.

The British and Scottish Law Commissions[95] gave various arguments against any change. On the other hand, the New Brunswick report[96] noted that the whole proviso with respect to examination has been dropped from the Manitoba Consumer Protection Act and recommended that the present proviso be narrowed to defects that were known to the buyer as a result of his examination. This may be justified on the grounds that if the buyer could have discovered the defect on reasonable examination, it is a defect that could also be discovered by the seller on reasonable examination. It is not an undue burden to require the seller to point out the defect to the buyer. Where the New Brunswick suggestion may be unfair, is in cases in which the defect is fairly obvious and the seller believes that the buyer is aware of them. This kind of situation would best be handled by the flexible notion of what amounts to consumer acceptability. If what the buyer alleges is an undiscovered defect is something he would not

have expected from the express statement made by the seller or the surrounding circumstances and the goods with the alleged defect are not acceptable given the statement, the surrounding circumstances and the price, the seller should bear the responsibility for not pointing out the defect to the buyer. In some circumstances the statements made by the seller, the surrounding circumstances and the price will indicate that what the buyer is now alleging as undisclosed defects do not render the goods unacceptable. In sorting this out we must keep in mind that what we are trying to do is to protect the buyer from unreasonable surprise and to prevent unjust enrichment of the seller.

Seller's Right to Avoid the Implied Term

Related to the question of whether the buyer should be responsible for defects discoverable upon examination is the question of whether the seller should be able to avoid the application of the implied term by pointing out defects to the buyer. It is difficulty to imagine how an implied term of consumer acceptability could be made to work without taking into account the communication of any defects by the seller to the buyer. After all, consumer acceptability has to be defined in terms of the statements actually made and the surrounding circumstances. On the other hand, such general phrases as "as is" or "subject to all defects", especially if they are written into detailed and unread documents, are not enough to defeat the buyer's general

expectations. They still involve, as do disclaimer clauses in general, an element of appearing to give more with one hand while secretly taking away with the other. But short of such general disclaimers it is difficult to see how the implied condition of consumer acceptability can be given any specific meaning if the seller's communication of defects are ignored. Of course, it would be possible to define consumer acceptability solely from the circumstances ignoring everything that has been said by the parties including any written documents. This would be a radical departure from our existing law with little justification. There is no reason why the seller of new goods such as a clothing retailer could not sell goods which have defects such as missing buttons, holes, poor dye jobs, etc. If these things have been brought to the attention of the buyer it is difficult to see why he should be allowed to complain. In the context of this sale such things are not defects and these goods do meet the implied term of consumer acceptability.

This discussion seems to indicate that if consumer acceptability is to be a flexible standard and not designed to say that certain kinds of goods can never be sold, then the notion that the seller can affect his liability by disclosing defects to the buyer, is built into the definition of the implied term. However, there would be no harm in making this abundantly clear by adopting the suggestion of the English and Scottish Law Commissions, the Ontario Law Reform Commission and the New Brunswick Consumer Protection Project by providing an express proviso that the seller is not liable for specific defects which he has brought to the attention of the buyer.[97]

Used Goods

What has been said in the previous paragraph applies with equal force to the case of used goods. Once again if the implied condition of consumer acceptability is to be flexible, no particular provision needs to be made with respect to used goods. However, no harm is done by making it abundantly clear that in deciding whether goods meet the standard of consumer acceptability, their age and the fact that they are used shall be taken into account.

IX The Role of Written Warranties

In previous sections we have discussed how the position of the consumer could be improved, on the one hand, by extending the notion of the express terms of the sales contract and, on the other hand, by restating and simplifying the implied terms. We should now turn to examine the relationship between these two kinds of terms. What is at issue here is whether the implied terms should be optional or mandatory. This involves the related question of whether the seller should be allowed to give a written warranty which covers all or part of the same ground covered by the implied terms.

It has been the universal recommendation of law reformers in England and Canada that the sellers should not be able to disclaim the implied terms in a consumer sale.[98] The general way in which this point is made leaves much to be clarified by the judiciary. Fundamentally, we have seen that the implied term as to consumer acceptability can only have meaning in the context of the expressed terms and the surrounding circumstances. This for example, is the way the implied condition as to merchantability is defined in the Supply of Goods (Implied Terms) Act 1973. If the express contract terms are not to be totally ignored in defining consumer acceptability while at the same time the seller is to be prevented from disclaiming responsibility for breach of the implied terms, we are left with the impression that there is a sharp distinction between the seller's obligation

itself and any remedy for its breach. There seems to be a suggestion that the seller can through the use of express terms go a long way in defining the implied term as to consumer acceptability. What he cannot do, apparently, is to deny the buyer the usual remedy if this term is broken. This way of looking at the two provisions suggests that what is sought is not the imposition on sellers of a mandatory minimum quality standard but rather an attempt to prevent them from disclaiming consequential damages. This is what sellers often try to do with disclaimer clauses, but it is by no means all they try to disclaim.

In discussing disclaimer clauses in the context of a seller's attempt to limit the buyer's claim for consequential damages, the New Brunswick Consumer Protection Project[99] quite rightly points out that we should keep in mind that the seller's responsibility is strict and does not depend upon a finding of negligence. In addition the buyer's claim is unlike his claim for his restitution interest. When goods are defective and a buyer claims the return of the purchase price, the law is simply forcing the seller to return a benefit that he has received at the expense of the buyer. However in the case of the buyer's claim for consequential damages the seller is being asked to do more than return benefit to the buyer. In fact the seller's liability may be many times any benefit he hopes to gain from the contract.

To counteract these arguments the New Brunswick Consumer Protection Project refers to the standard arguments

about the consumer's lack of knowledge of any disclaimer and lack of bargaining power. They also point to the economic and accident prevention arguments which suggest that loss is best distributed through the seller or manufacturer.

In this discussion the New Brunswick Consumer Protection Project like other reform bodies is primarily concerned with personal injury and property damage claims. The typical example is the defective car which causes injuries and damage to property.

Some reformers recognize that personal injury and property damage claims are best dealt with in the context of a distinct products liability law[100] or a general system for personal injury compensation[101] rather than as an incidental part of sales law. For example, they point to the anomalous nature of giving compensation to an injured purchaser but not to an injured donor or bystander. However, feeling that a more generalized products liability law based on strict liability is some way off, they advocate the more limited reform of providing strict liability in the sales context.

In deciding whether sellers should be prevented from disclaiming liability for personal injuries and property damage it should be kept in mind that this would not create any new anomalies. Anomalies would continue to exist between sales and non-sale situtations. All that would happen is that the line between strict and negligent liability would be drawn in a different way.

What is often forgotten in these discussions however is the fact that not all expectation interests or consequential damages are for personal injuries or property damage. It is not quite so clear that these other kinds of expectation interests should be born by sellers. Two examples which come to mind involve the supply of photographic film[102] and seeds.[103] In both cases suppliers attempt to limit their liability to the refund of the purchase price or replacement of any defective product. In both cases the suppliers are not concerned about personal injury or property damage but are concerned about the possibility that the purchaser will claim other kinds of consequential loss. For example, if seeds do not properly germinate the purchaser might claim the cost of additional food which he is required to buy because of the failure of his garden. Of course some of the supplier's fears are unfounded given the foreseeability requirement of Hadley v. Baxendale.[104] However these sellers are not content to leave the matter to be decided by litigation and want to prevent all claims for loss of expectation interests. Here the economic and accident prevention arguments in favour of lost distribution are not as compelling as in the case of personal injury. In addition these are cases where the supplier's attempt to limit his liability is fairly clearly communicated to the purchaser. Of course it may still be true that the consumer has no real choice because no supplier will be prepared to make good consequential damages.

This discussion and similar discussion found else-

where suggests the following possible courses of action:

1) Any attempt to exclude or limit consequential damages for breach of any express or implied warranty could be allowed. This would leave it to the courts to use the interpretation techniques they have invoked to limit the effect of such clauses.[105]

2) The present position could be slightly modified by some new statutory requirement of reasonableness and/or conspicuous notice.[106]

3) Personal Injuries and Property Damage could be excluded from the recovery allowed for breach of a sales contract. They could be left to Tort Law or some new scheme for handling products liability.

4) Any limit or exclusion of liability for personal injuries or property damage could be prohibited but any other reasonable attempt to limit other Consequential damage could be allowed with conspicuous notice.

5) All attempts to exclude or limit consequential damages could be disallowed.

The scope allowed suppliers to exclude or limit consequential damage claims is only one aspect of the question of whether suppliers can disclaim the implied terms.

It appears from the discussion in all law reform reports that the reformers wanted to go further than just preventing the sellers from disclaiming liability for consequential damages. All of them contain the suggestion that there should be a minimum quality standard imposed upon sellers in consumer transactions. How this is to be done if consumer acceptability

is to be given a flexible definition in terms of the expressed terms and the circumstances is not altogether clear.

One approach or interpretation may be that any general disclaimer is ineffective to counteract any particular promise made expressly or impliedly. This approach would recognize that there is nothing improper with the seller selling very little even at an exorbitant price if he, through the communication of particular information, makes it abundantly clear what little he is selling.

Alternatively, the approach might be something like the reverse of the Parol Evidence Rule. That is, nothing found in a written document, no matter how particularized, should be allowed to detract from the consumer's expectation gained through oral statements and the circumstances at the time of the sale. This amounts to saying that the expressed terms can amplify the ambit of the implied condition of consumer acceptability but cannot restrict it.

In joining with other law reformers in recommending that the implied terms be mandatory and not subject to disclaimer by sellers, I would suggest that more care be taken in describing what exactly it is that sellers cannot disclaim.

Besides recommending that the implied terms be mandatory and disclaimers disallowed, the Law Reform Commissions have wrestled with the question of whether the seller should be allowed to give express warranties which cover some or all of the same ground as the implied terms. They have universally recommended that a seller be allowed to give an express warranty that goes beyond the implied terms.

In their discussion of this question, some reformers seem to adopt what has been described above as the reverse of the Parol Evidence Rule. That is, there is the suggestion that a written warranty should not make the consumer worse off than he would have been if no warranty had been given at all. This, as we have said, seems to imagine that the implied condition of consumer acceptability should be initially defined without regard to express terms. Then express terms are to be looked at if they amplify the implied condition but not if they reduce it.

Even if written warranty can only add to and not detract from consumers' rights, this does not completely answer the question of whether they are desirable or should be subject to more control. Unless all warranties are to be given advance screening, there will be many in use which continue to try to limit consumers' rights. Moreover, since they will be expressed with some specificity, the tendency will be for them to be given more credence than the generally expressed mandatory implied terms.

One recent attempt to regulate the relationship between implied and written warranties in such a way that the consumer knows what, if anything in addition to the normal standard implied by law is promised by the written warranty is the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act.[107] This Act distinguishes between warranties which can be designated as "full (statement of duration)" warranties and "limited" warranties. A full (statement of duration) warranty must

meet certain Federal minimum standards which are set out in s. 104 of the Act.

This technique at least does not mislead consumers into thinking they are getting something when in reality the written warranty detracts from what they would have if no written warranty were given. Moreover, a consumer who purchases a product with a limited warranty is notified by this label that he will have remedies in addition to those contained in the written document. This system also allows higher standards to be imposed on those suppliers using a warranty designated as a full (statement of duration) warranty while at the same time allowing other suppliers who do not meet these standards to still offer warranties which are conspicuously designated as limited. The Federal Trade Commission is given the power to define in detail the minimum standards for full (statement of duration) warranties and to determine when a written warranty is entitled to this designation. In fact it is doubtful whether the Magnusson-Moss warranty - Federal Trade Commission Improvement Act is a very useful model unless some regulartory agency with similar powers to the American Federal Trade Commission were created.

A more modest alternative is suggested by the Saskatchewan White Paper[108] which allows the Lieutenant-Governor-in-Council to make regulations concerning

written warranties. How effective this would be would depend on whether any government agency was sufficiently funded, staffed and given broad enough powers to obtain information from manufacturers and hear representations from both manufacturers and consumers in order to develop such written warranties. There really is no need for such broad power to make regulations unless there is also the committment to establish some machinery for the development of such regulations.

At the very least, there should be a general prohibition against misleading warranties. Such a provision will have limited effect until case law has developed which identifies specific abuses. In the mean time, a provision similar to that suggested by the Consumer Products Warranties Act in the Saskatchewan white paper may be useful. This provision, found as s.10 in the propsed Act, provides guidelines for additional written warranties. These guidelines require certain information to be contained in all written warranties and also prohibit certain specific abuses which are now widespread. These prohibited conditions include: (1) any provision which makes the person giving the warranty or his agent the sole judge in deciding whether the consumer has a valid claim under the warranty or not; (2) any provision purporting to exclude or limit any express or statutory warranty or any of the rights of remedies contained in the

proposed act; and (3) any provision which makes a claim under the warranty dependent on a consumer returning a consumer product to the person giving the warranty when this requirement is unreasonable.

In addition, there should be a general provision providing for relief against forfeiture of the warranty. This provision should at least require that all stipulations in the warranty be material and that the consumer be given relief if they are in fact immaterial in the particular circumstances. It should also relieve against any provisions in the warranty which has not been sufficiently notified to the consumer. Finally, the provision might also provide relief against any unfair warranty and fairness might be described as the normal standard in the trade. By this, I do not mean that the extent or duration of the warranty should have to meet the standard in the trade since there is no reason why some sellers cannot sell at a lower price providing a more limited warranty. What should be tested for fairness are the various things that the buyer has to do to keep the warranty alive, i.e. notification, servicing, etc.

Durability

The existing Act makes no express reference to how long goods must satisfy the implied conditions as to description, fitness for purpose and merchantable quality. Of course, in some cases the description of the goods or other express warranties will refer to durability. In other cases, the courts have found goods not to be of merchantable quality when defects developed subsequent to the delivery of the goods. In a previous section we stated that the new consumer warranty as to acceptability should contain an express reference that goods will last for a reasonable length of time. The matter is raised again here for further discussion because it is the area where as a practical matter any generalized statement of consumer warranty rights causes difficulties. Even if a more generous and clearly stated warranty of consumer acceptability without anomalous restrictions were to be adopted, it would still have to be expressed in very general terms. Wide discretion would be given to the judiciary to give it specific content. The question remains how will the court give specific content to this notion and how will the consuming public know how it will apply to their particular purchase. The problem is augmented rather than diminished if suppliers are allowed to use written warranties which are designed to supplement but not detract from the implied warranties.

In certain circumstances the courts will have no difficulty identifying what amounts to a breach of the consumer warranty of acceptability. These circumstances include i) extremely shoddy goods which fall apart within a short time of their purchase, ii) cases where suppliers make inconsistent promises about their goods such as making inflated performance claims while at the same time (usually in the unread fine print) making severely restricted promises of repair, replacement or refund of price, and iii) the odd case of consequential damages such as those caused by personal injury. In these cases the consuming public can make fairly accurate predictions as to a court's decision. However in the vast majority of cases covering thousands of manufactured products, how is a court to determine what amounts to durable quality?

There are several related questions involved here. Even if the courts were given the authority to rule on the reasonableness of the durability of consumer goods, how many judges would feel they had sufficient evidence to justify ruling that a particular industry does not make products that last long enough? Second, assuming a court wanted to make a ruling on all the best evidence available, how would any consumer be able to overcome the evidence which would be forthcoming from the industry? Third, as a practical matter, such decisions could not help clarify consumer's rights. For the most part, an

unfavourable ruling would not necessarily cause the industry to manufacture more durable goods. Moreover, since the bulk of consumer litigation would occur in lower courts whose decisions would not be reported, there would be no developing case law to flesh out the general standard.

Without a much greater standardization of products than now exists it would not even give much specific content to the rule to say that the product must be of fair average quality. For example, the proposed Saskatchewan Consumer Products Warranties Bill provides:

> "if the circumstances of the sale do not indicate otherwise, the consumer product shall be at least as durable as similar consumer products which are available at the date of the sale."

Without some reference to the price, this provision would be inappropriate. There is no reason why more cheaply made, less durable imitations of better quality goods should not be sold at a lower price. And since goods are not sold at uniform prices or easily identifiable distinct grades, it is extremely difficult to know whether the consumer should be looked at as having bought a poor grade at a higher price than necessary or whether it should be regarded as having bought a higher grade which is defective because it lacks durability.

The situation is made even more complex by the fact that with many large durable goods the components wear out at different rates. Different manufacturers can

and do put different emphasis on different cosmetic or functional components. In other words, without a greater degree of standardization than we now have, the phrase"at least as durable as similar consumer products" is largely question begging because of the difficulty of identifying similar consumer products.

The purpose of the above discussion is to emphasize the limits on consumer warranty legislation.

In some areas, much can be done to improve the minimum protection given consumers. As we have stated this tends to be in three (or four) situations, such as: i) where defects develop very soon after delivery, ii) where misleading techniques are used by suppliers in informing consumers of the quality of goods or services, and iii) if this is thought desirable, in preventing suppliers from disclaiming liability for consequential damages such as personal injury. There is a fourth area (not very common in relation to large durable items) where some of the factors mentioned above which tend to deprive the consumer of meaningful protection may not be as pertinent. This is the case where very little or nothing has been promised by way of express warranty or the express warranties are in very general terms. Here courts may not have the same hesitation in second guessing the industry practice. However, they will have the same difficulty in setting standards which can be communicated in an effective way to consumers. But these

three or four areas do not cover the central concern of many consumers in connection with the quality of goods, which is that they obtain goods that last.

The occasional individual consumer action will not lead to the development of judicially defined minimum standards expressed with any specificity over a very broad range of products. That can only be done through minimum quality standards and grading developed and enforced through some regulatory agency. Such a system was recommended by the Royal Commission on Price Spreads of 1935.[109] In the absence of such a system, standards will continue to be set by producers in response to market conditions.

If this prediction of the practical effect that a generalized statement on durability will have is correct, we should not be misled by the true relationship between express and implied warranties. In most cases the true situation will be not that express warranties are effective to the extent that they supplement the implied warranties. Rather the express warranties will give specific content and meaning to the more generally expressed warranties.

My conclusion from this prediction is not that written warranties should be disallowed. On the contrary, subject to at least the controls suggested in the last section, they should be encouraged.

The more specific and straightward information consumers have concerning the repair and replacement policies of suppliers the better off in practice they will

be. Of course consumers should have the right to claim by court action that even the most specific and straightforward express warranty has not met the overriding implied warranty of consumer acceptability. But this right will probably only be recognized by litigation. In as much as they have any choice in the market place, consumers will be better off knowing in advance how their supplier interprets his warranty obligations.

X Additional Implied Warranties

A. Availability of Spare Parts and Repair Facilities

Following the example of the agricultural machinery legislation of Alberta, Saskatchewan, Manitoba and P.E.I. and the California Song-Beverley Consumer Warranty Act,[110] the Ontario Law Reform Commission[111] recommended that there be statutory recognition given to the responsibility of the manufacturer and retailer to provide spare parts and servicing facilities. This recommendation was accepted in the Saskatchewan White Paper[112] but was not accepted by the New Brunswick Consumer Protection Project.[113] However, the New Brunswick Consumer Protection Project did recommend that such an obligation be imposed on sellers on a selective basis where it is reasonable to expect the seller to have available spare parts and servicing facilities. They mention automobiles and mobile homes.

In rejecting a more general requirement the New Brunswick Consumer Protection Project argues that it would impose risks on sellers that in many cases would be beyond their control. While recognizing this is already true in relation to defects rendering goods unmerchantable, they argue that it is much easier for a seller to bear the burden of or insure against the risk of these defects than it would be for him to insure against the risk of something like obsolescence.

We should keep in mind how the suggestion of the Ontario Law Reform Commission changes the existing law. Of course, at present, if the seller did not provide the repair

or servicing promised by either an implied or express warranty, he would be liable. The concern is for buyers after the expiration of the warranty when it is normal for the goods to require additional servicing or repairs. It is understood that the buyer is responsible for these repairs but his complaint is that there are no facilities or trained personnel to make them. Most reformers recognize that this should be primarily the responsibility of the manufacturer. The more difficult issue is whether the seller should also be responsible. At present, the consumer will have a remedy against neither the manufacturer nor retailer.

Of course the popular expectation of consumers who purchase automobiles or durable household items such as refrigerators, stoves, washing machines, dryers or televisions is that the goods will last longer than any applicable warranty period. The consumer expects to be able to have the items serviced or repaired and recognizes the likely need to do so before the useful life of the items has been exhausted. Such an expectation should not be a just pious hope with no legal remedy if manufacturers decide no longer to supply spare parts or servicing facilities. It is true that in many areas services will continue to be offered by third parties. This is less likely to be true of spare parts.

Once it has been decided that the consumers have a legitimate complaint which should be recognized by the law, the question becomes against whom should the consumer have redress? The answer to this second question is almost dictated

by the fact that most of these items are manufactured outside of Alberta. Unless some local seller is held responsible, in many cases consumers will have no practical remedy. On the other hand, it should be kept in mind that a seller will not be completely helpless when faced with the suspension of the supply of spare parts and services by a manufacturer. If the sellers potential liability is great enough, it may justify him in providing spare parts and services himself. He would not of course have to supply these free since we are talking about making available spare parts and services beyond the warranty period when the responsibility for their costs would be on the consumer.

With these factors in mind, I do not think the reservations of the New Brunswick Consumer Protection Project are justified and I recommend the adoption of a provision such as s. 6(7) of the Saskatchewan proposed Consumer Products Warranties Bill. This provision is very broadly drawn and does not for example state whether repair facilities have to be available in Alberta or not. If the provision is to apply across the board to the whole range of consumer products, such a broad provision seems necessary. However, it would be possible to make more specific regulations in relation to different kinds of products stating a minimum duration that spare parts and repair facilities had to be available and at what location. In the absence of such specific regulations, perhaps it might be useful to state that in determining what is reasonable regard should be had to the relationship between

the cost of repair and the cost of transporting the goods to the nearest repair facilities.

B. Condition as to Services

In the introductory sections we discussed the difference between the sale of goods and the sale of work, labour and materials. There we suggested that the definition of a sale of goods should be expanded to cover any contract which resulted in the ultimate passing of property. In addition we suggested that any rules adopted for the sale of goods should be applied by analogy to other appropriate transactions. One analogous situation which should be recognized for specific treatment is the performance requirement in a contract of services or the service component of a contract for work, labour and materials. The case law has applied the implied conditions of quality to the goods covered by a contract for work, labour and materials but there are no statutory or judicial norms for the service component. The wording of the implied warranties fit for the purpose and consumer acceptability are not entirely apt to describe services, although the general notions found in them are just as applicable to service as they are to goods.

An appropriate statement of the performance obligations of someone providing consumer services is found in the Manitoba Consumer Protection Act,[114] s. 58(6) which states that the services sold shall be performed in a skillful and workman-like manner. Like the implied warranty of consumer acceptability, this could be amplified by reference to the

express terms, surrounding circumstances, price and any relevant public law standards.

XI. Privity Problems

The Manufacturer's Responsibility[115]

The Ontario Law Reform Commission[116] joined with others in noting the dominant role played by manufacturers in the modern marketing milieu. The manufacturer most often determines the quality of goods, establishes the quality control mechanism, and often creates the consumer demand for the goods in the first place. Moreover the consumer relies on the express warranties, advertisement and other sales literature supplied by the manufacturer. Since defects are caused by the manufacturer's actions and he has been enriched along with the seller at the expense of the consumer, it seems just that he should be liable to the consumer.

Under the present law, the manufacturer is insulated from the consumer's complaint by the doctrine of privity of contract.[117] The effect of this doctrine is only partially mitigated by the notion of collateral contracts[118] and the manufacturer's tort liability. The Ontario Law Reform Commission argued that not only should the manufacturer not enjoy this insulated position because it is often his actions which have caused damage to the consumer, but also he should not enjoy this insulation because in some cases the consumer's remedies against the seller will be ineffective and the consumer should have effective recourse against someone.

At first sight, it might appear that allowing consumers direct recourse against manufacturers would be of less

value in Alberta where many goods are imported than in other provinces such as Ontario where more consumer goods are manufactured. However, the recent Supreme Court of Canada[119] interpretation of the provincial long-arm rules will permit such law suits to be brought in Alberta against manufacturers who are beyond the province.

Once a basic decision is made to allow consumers direct recourse against manufacturers, several subsidiary questions involving the scope of this action must be decided.

1. Will the manufacturers liability be coextensive with the sellers? That is, will the manufacturer be deemed to have adopted all the representations made by the seller and will the implied conditions be interpreted in light of the representations and surrounding circumstances of the sales contract between seller and consumer?

2. Should the manufacturer be liable not only for the consumer's claim for restitution or difference in value but also for consequential damages? Should a distinction be made between personal injury and property damage on the one hand and economic loss on the other? As we have discussed in the context of the consumer's remedy against a seller, the consumer's claim for restitution or difference in value may be more compelling than a claim for consequential damages. A manufacturer, like a seller, has been unjustly enriched if the consumer has received goods which are defective. This justifies reimbursing the consumer regardless or fault or negligence. Given the fact that as between

manufacturer and seller, ultimate responsibility for defects causing consequential damages will most likely be with the manufacturer, it would be anomalous to allow a consumer to claim against the seller for consequential damages, but not the manufacturer. Of course there may be instances of consequential loss other than personal injury and property damage which result not from defects in the manufacturing of goods but rather because the goods do not live up to performance claims made by the seller.

4. If the consumer has a claim against the manufacturer, should this relieve the seller from liability? Whatever theoretical value this might have in avoiding circuitous law suits, it is not a practical solution in Alberta. The seller may be the only local entity. Moreover, the consumer will have relied upon the seller and ought not to have his complaints fobbed off to someone else.[120] Finally as the Ontario Law Reform Commission[121] suggests relieving the seller would have the adverse effect of discouraging them from exercising whatever control or influence over manufacturers they do have.

5. How should "manufacturers" be defined? The definition suggested by the Ontario Law Reform Commission[122] is the following:

> (1) The person who manufactures or assembles the goods, except where the goods are manufactured or assembled for another person who attaches his own brand name to the goods;

> (2) Any person who describes himself or holds himself out to the public as the manufacturer of the goods;
>
> (3) Any person who attaches his brand name to the goods;
>
> (4) In the case of imported goods, the importer of the goods where the foreign manufacturer does not have a regular place of business in Canada.

The Rights of Successors In Title To The Purchaser: The Problem of Horizontal Privity.

The Ontario Law Reform Commission pointed to several examples where goods are bought not for the use or enjoyment of the consumer. These include instances where the consumer buys goods for the use of members of his family or to be given as a gift to a friend and where the consumer resells the goods before the expiration of any express or implied warranty. Once again, the privity of contract doctrine comes into play to deny these successors in title recourse not only against the manufacturer but also against the seller. The Ontario Law Reform Commission argues that the reason which militates in favour of allowing the retail buyer to sue the manufacturer directly applies at least as strongly to this situation. In fact, they point out there may be even the more compelling reason to allow a successor in title to sue since at present he is left without a remedy.

If such successors in title were to be allowed recourse against the seller and manufacturer the same kinds

of questions arise as to the scope of this right as were identified in discussing the manufacturer's responsibility to the original purchaser. The recommendation of the Ontario Law Reform Commission is that they be answered in the same way. They suggest that a consumer buyer be defined to include any person deriving his interest in the goods from the original purchaser whether by purchase, gift, operation of law or otherwise.

In considering the effect of such a change, it should be kept in mind that in relation to a claim for diminished value caused by defects, the seller will have been unjustly enriched and it matters little to him to whom he must disgorge this unjust enrichment. In relation to consequential damages, the rule of remoteness will severely limit the amount of claims any successor in title could bring. Such a change would allow successors in title to claim personal injury and property damage without regard to fault. This would remove some anomalous distinctions in our law but leave others.

XII. Delivery and Payment

Introduction

Part Three of the present act entitled "Performance of Contract" covers a number of things including the duties of the seller and buyer with respect to delivery and payment (sections 28 to 33), transit risks (section 34), the buyer's rights to examine goods (section 35), acceptance (section 36), the buyer's responsibility for rejected goods (section 37), and the buyer's liability for refusal to take delivery (section 38). Sections 35 to 38 all deal with questions which relate to the remedies of the two parties and they will be dealt with later. Section 34 will be dealt with in relation to the more general question of the passing of risks between seller and consumer.

Delivery and Payment

Sections 28 and 29 of the Act establish the basic rule that unless otherwise agreed the seller must be ready and willing to give possession of the goods to the buyer in order to claim payment and the buyer must be ready and willing to pay in order to claim possession. This operates as a satisfactory rule in consumer as well as in commercial sales. The consumer should not expect goods to be delivered on credit unless that has been specifically agreed to. At the same time, the consumer should not be required to pay before he has received the goods.

The most significant provision in the act relating to delivery and payment however, is section 13 which deals with the question of the importance of terms in the contract relating to the time of payment and delivery. Sub-section 1 provides that unless a different intention appears from the terms of the contract, stipulations as to time of payment will not be deemed to be of the essence of the sale. The phrase "of the essence" is the quivalent of calling the stipulation a condition or major term, that is a stipulation which if broken allows the other side to treat the contract as repudiated.

The importance attached to the time for payment.

Whether late payment allows the seller to repudiate is probably only of marginal significance in a consumer transaction involving the sale of goods which are widely available from other sellers. If a seller treats late treatment by a consumer as a repudiation of the contract, the consumer will not be prejudice if he can readily obtain the goods elsewhere. However, it will remain significant in those cases where the buyer is unable to find other goods or incurs expenses in so doing. In these situations the seller should not be allowed to treat late payment as a repudiation when he has not stipulated this in the agreement.

The most difficult issue is whether a consumer should always be bound by such a stipulation. This is a similar kind of issue as the question of whether the seller's

obligations should be classified a priori or in terms of the magnitude of the breach. Just as that issue relates to the question of what remedies are available to the buyer, so here the issue really is under what circumstances the seller can exercise his remedy of resale or cancellation. By applying a similar kind of reasoning as that applied to the seller's breach, the test might be defined as a serious delay in payment which causes or threatens to cause serious injury to the seller. For example, where the goods are perishable or otherwise are likely to decline in value.

Alternatively, the present law, which allows the parties to stipulate that time is of the essence might be retained. This seldom will be an undue hardship to consumers. In most situations in which the buyer cannot easily find alternative goods the seller will not be able to readily find alternative buyers. It will in fact be in the interest of the seller not to act precipitously.

The importance attached to the time for delivery.

When it comes to the importance attached to the seller's obligaiton to deliver on time, the act is not very helpful and the caselaw is divided.[124] Under what circumstances late delivery by the seller should entitle the buyer to treat the contract as repudiated will depend on the general scheme of remedies given to a consumer. In the section on consumer's remedies, various possibilities ranging from an

automatic cooling-off period through a right of rejection for any breach to some more limited right to reject for major breaches are discussed. These various remedies are discussed primarily in the context of some defect in the quality of the goods. However, a comparable remedy should be adopted for late delivery. It is only if a consumer's right to reject or cancel the contract is confined to major breaches that it will be necessary to determine whether the time for delivery is of the essence. Once again classification could be made in terms of the magnitude of the breach. This would mean that only when delivery has been substantially delayed would the consumer be able to treat the contract as repudiated.

Rules regarding delivery.

Section 30 of the Act provides detailed rules as to the place and manner of delivery. These rules do not appear to create any special problems for consumers. Of course, the term delivery in the Act is used in a special way. It does not mean as a layman might expect, the transporting of the goods to the buyer's residence. For this reason, some thought might be given to redrafting section 30 if it were put into a consumer code.

Section 33 of the Act does not seem suitable for a consumer transaction. In a consumer transaction, there should be no effective tender by the seller entitling him to claim the price until the goods have been delivered by the carrier.

In fact, it may be that the seller should not be able to claim the price even at this point if the consumer refuses to accept the goods. Once again, section 33 will have to be redrafted with the seller's and consumer's remedies in mind.

Section 31 and 32 covering delivery of the wrong quantity and installment deliveries create no obvious hardship for the consumer. Of course, parts of them may be unnecessary if consumers are given an absolute cooling-off period or right to reject for any breach. This is not to say that sections 31 and 32 are ideal or have no shortcomings. However, they require further study and could be left until a more general revision of sales law is undertaken.

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XIII The Transfer of Property and Risk

Part two of the Act (sections 19-27) relates to the transfer of property as between seller and buyer, the transfer of risk and, under the heading of Transfer of Title, certain qualifications to the nemo dat rule. These last provisions are only a part of the relevant law in relation to questions on title. They must be read in relation to the Factors Act and the statutory and common law rules in relation to such security devices as conditional sales and chattel mortgages.

Transfer of Risk

Section 23 provides the basic rule that risk passes with the passing of property. The Act in turn provides that property will pass basically when the parties intend it to. In the absence of an ascertainable intention, the Act provides a number of rules to determine when property has passed.[126] Without examining these rules in detail, it should be stressed that they provide for the transfer of property quite independently from the transfer of possession in the goods and without regard to payment. For example, in most consumer contracts involving the sale of specific goods, property will pass to the purchaser at the time the contract is made.[127] In the absence of any contrary intention, a consumer will have the risk before goods have been delivered and before

they have been paid for. In other situations the property and hence risk may pass to the buyer when goods are tendered even though they are not accepted.[128]

These rules are not at all suitable for consumer transactions. A consumer should not have the risk until he has acquired possession. It is only then that he is in a position to take appropriate steps to protect the property from harm. As long as the seller is in possession, he can easily arrange insurance and is in the best position to take whatever steps seem appropriate to protect the goods.

There is one situation that requires specific treatment. This is the situation where the seller has agreed to deliver goods at a place other than his place of business, for example, where the seller has agreed to transport the goods to the consumer's residence. In these circumstances, section 34 now provides that even where the seller agrees to deliver them at his own risk, unless otherwise agreed the buyer shall nevertheless take any risk of deterioration of the goods necessarily incident to the course of transit.[129] This rule is basically unfair to the consumer on a number of grounds. In the first place they are not likely to know of it and not likely to appreciate the nature of any risk necessarily incident to the course of transit. Consumers are not likely to have any control over the method of transportation or the mode of packing the goods. In the second place,

there will be difficulty in determining what risks are necessarily incident to the course of transit. Thirdly, the consumer's insurance may not cover such risks or such goods before he has acquired any proprietary interest.

In any case where the seller is to transport the goods to the buyer whether by his own vehicle or through a third party carrier the transit risk should be on the seller. Moreover, if there is the third party carrier who is ultimately liable for the transit risk a consumer should not be forced to claim against the carrier. It is true that as between him and the seller, he is in the best position to give evidence of the state in which the goods arrived at their destination. However, his position should only be to cooperate with the seller in any claim the seller may have against the carrier. A seller should not be able to fob off the consumer. This consumer will have had no role in choosing the carrier and in negotiating the terms of carriage. He will not even be in a position to judge the responsibility as between seller and carrier. He has dealt with the seller and has relied upon him. It is to the seller that he should be allowed to look for recovery.

Transfer of Property as Between Seller and Buyer

Once the sellers' and buyers' remedies and the passing of risk have been defined without regard to the passing of property, this concept has less practical

significance. Its significance will not be in defining the rights and obligations as between seller and buyer. Instead, it may have significance for a number of non-sales questions such as insurable interest in insurance law and theft in criminal law. However, its most important role will be in defining the starting point for the application of the common law rule of nemo dat quod non habet. For any of these residual purposes, the present rules which define the transfer of property independently of the transfer of possession and payment are completely arbitrary.

For whatever residual significance the transfer of property as between seller and buyer has it would be simpler and more in keeping with people's expectations to say that the property was transferred with possession. This would also tie property into some easily identifiable physical fact.[131]

Transfer of Title

Sections 24 to 27 of the Act could be left out of any consumer sales legislation. A consumer should be protected from any security interest created by the merchant. This protection is given to him by the Factors Act.[132] In the converse situation where the consumer is in possession and the seller has retained title, the appropriate provisions are found in the Conditional Sales Act.[133]

XIV Buyer's Remedies

A. Specific Performance

Section 52 of the Act, which gives the court discretion to award specific performance, does not appear to have created many problems for consumers. The section is generally thought to be a codification of the principles applied by the Court of Equity in granting specific performance. In the sale of goods, specific performance was generally granted by the Court of Equity only in the case of unique chattels. As long as uniqueness is defined broadly to take into account the particular needs and desires of the buyer and his ability to effect cover for such goods, this requirement creates no difficulty for consumers.

Those difficulties with the application of s.52 which are illustrated by the case law and informed commentary are primarily applicable to commercial transactions. However, some of these difficulties may be of marginal importance to consumers. In the first place, the section only applies to a breach of contract to deliver specific or ascertained goods. There seems to be little justification for this restriction. In fact, as the recent case of Sky Petroleum v. VIP Petroleum Ltd.,[134] illustrates, in modern commercial settings specific performance is most often desired in the case of output and requirement contracts involving a particular source or market and in which the goods are

neither specific nor ascertained. Second, the case of In Re Wait[135] raises the question of whether something like specific performance should be available to buyers to protect them from the consequences of their seller's insolvency. Should some special protection be given to buyers who have paid for goods which have not yet been delivered at the time when their sellers go bankrupt? There is such a provision in s.2-502 of the U.C.C.[136] Third, is there any need to clarify the relationship between the right of specific performance found in s.52 and the tort remedies, such as detinue and conversion, available to a buyer who has title and immediate right to possession? Fourth, is there any need for an even more generous right to claim delivery of identified goods whenever the buyer is prepared to perform his side of the bargain? Should such a right be granted to consumers regardless of the passage of property and regardless of whether they have paid for the goods? If such a generous right to delivery were granted, this might obviate the need for any special rule such as s.2-502 of the U.C.C. to cover the cases of a seller's bankruptcy.

There may be some doubt whether any provision along the line of s.2-502 would be within provincial competence. It may well be a matter of bankruptcy legislation. Moreover, it would not be desirable to try to accomplish the same thing by giving consumers a more generous right to the delivery of identified goods without more investigation of the effect

this would have on commercial bankruptcies. In fact, is this really a problem for consumers? How often do consumers who have paid for undelivered goods lose their payments on the bankruptcy of retailers?

As long as the awarding of specific performance is discretionary, it is difficult to see what a broadening of the right would accomplish other than perhaps to shift the onus to the seller to come forward with some explanation or justification why it should not be granted. Aside from impossibilities such as where the goods have been destroyed or proved defective, the kinds of reasons which would prompt a seller to refuse to deliver to a willing purchaser would be a desire, probably justifiable on economic grounds, to send substitute goods. For example the retailer might find it cheaper to have the goods shipped directly from his warehouse rather than from his showroom.

What is probably of greater interest to consumers than a more generous right to the delivery of identified goods is a prohibition against substitution without consent. What many consumers want is the particular goods which they have viewed and inspected in the retailer's showroom. If those particular goods cannot be delivered by the seller some consumers would rather cancel the contract than accept other goods even though they are identical in the eyes of the retailer.

One further problem that has arisen in relation to specific performance is the question of whether damages can be awarded when specific performance is unavailable. This problem results from the peculiar fusion accomplished by the Judicature Acts. It is more frequent in the area of land law[137] than the sale of goods. It is a problem similar to the difficulty created by the court's refusal to award damages for innocent misrepresentation. It will decline in importance through the acceptance of equitable principles in any modern codification of consumer law, but to the extent that it survives, some specific provision ought to be included to at long last accomplish the fusion of law and equity.

B. Rejection

The most effective remedy of the consumer is his right to reject the goods for breach by the seller. At least this is the most effective remedy if the buyer has not yet paid for the goods. In this way he can relieve himself from any responsibility in respect to the goods. He does not have to arrange the repair of any defect nor does he have the difficulty of proving damages. Perhaps most importantly in the consumer context, it relieves him of any initiative in claiming a remedy in the courts.[138] Several studies of the operation of Small Claims Courts have shown how important is this last aspect in consumer transactions. In many cases the consumer is, in effect, without a remedy if the initiative is put upon him.

Before describing when a buyer is now entitled to reject it may be useful to discuss several possible answers to the question of when a buyer should be able to reject and the considerations of justice and practicality which would prefer one solution over others.[139]

The solution most generous to consumers would be to give buyers an absolute right (similar to the rights now granted by some retailers) to return goods even after delivery with no need for any explanation or justification at all. This is a fairly-wide spread marketing practice and has some precedent in the law in relation to itinerant sales. Some qualification would have to be imposed to cover goods which have been used. Some arbitrary time limits such as that found in itinerant sales legislation might be used to provide some certainty as to when agreements are irreversably concluded. Such a generous right of rejection would allow a cooling-off period for sober second thoughts by consumers and would remove much of the consumer's difficulty in establishing the terms of the sales contract and the existence and magnitude of any breach. In fact, at the time that the itinerant sales legislation was introduced, questions were raised as to why door-to-door sales should be treated differently from sales which occur on retailer's premises.

Of course such a generous right to reject could not be granted without some additional cost. The additional cost to all consumers would have to be weighed against the benefits derived to consumers through having a more effective means of dealing with shoddy goods and other breaches by the seller. Of course, we should keep in mind that such a mandatory rule might involve only marginal increased costs given the existing fairly wide-spread return practices of many large retailers.

A second, less radical remedy might be to allow consumers to return goods for any kind of defect once the defect has been discovered. This solution would at least not impose upon all consumers the cost involved with the return of goods for whimsical reasons which have been purchased on impulse without sufficient care. It would however, deprive consumers other than those who purchased from itinerant salesmen of any automatic cooling-off period for sober second thoughts. The justification for this is the justification advanced for the special treatment of itinerant sales in the first place, that is that these kinds of sales are notoriously infused with high-pressure selling techniques which are often unfair and misleading. The same kind of high-pressure tactics are not typical in the case of sales on retailers' premises. To the extent that they are, they will be adequately dealt with by the new fair trade practices legislation. This solution also requires the purchaser to at least prove that there has been some breach of the sales contract. This will require him to

show the relevant terms of the contract and the fact that the goods are defective. However, consumers will still be left with a very powerful weapon, especially where they have not yet been paid for the goods. They will have no responsibility in relation to the goods, no need to prove the measure of their damages, nor any need to show the magnitude of the defect. Several variations of this solution might include allowing consumers to reject for any defect within a reasonable time after the goods have been delivered or within some arbitrary time limit after they have been delivered. In any event, as with the first solution, special consideration would have to be given to the problem of goods which have been used in such a way that their return in their original condition is no longer possible.

A third solution would be to distinguish between major and minor breaches by the seller. A more extensive right to reject could then be given for major breaches than for minor breaches. In fact, the buyer could be given no right to reject at all for minor breaches. This is the basic approach of our existing law although there are many distortions which act against the interest of consumers.[140] The most fundamental difficulty with such an approach is the difficulty of classification. In the consumer context this difficulty may not be as great as it first appears, especially in cases in which the purchaser has not yet paid for the goods. This is due to several factors, some of which have already been described. In the first place, if the goods

are a large ticket item, most sellers will accept the buyer's rejection even if it is thought to be wrongful. They do this for the simple reason that if payment has not yet been made, their most effective remedy may be against the goods. Secondly, if retailers generally accept the return of goods without explanation, they are not likely to resist the return of goods simply because they think the buyer exaggerates the significance of some defect. Of course, the problem of classification becomes of critical importance where payment has already been made and the initiative is more clearly with the consumer. Then there is less incentive for the retailer to accept the return of the goods. However, even in these cases it does not often impose an undue burden upon the consumer to keep the goods and await the determination of any litigation. The consumer, unlike the commercial buyer, will seldom, if ever, be faced with the critical choice between characterizing the defect as major and refusing any responsibility for the goods and characterizing the defect as minor with an obligation to mitigate damages. This reasoning also applies to situations where the buyer has paid for the goods and the seller for some reason refuses to take them back. Even if the seller's refusal is unjustified, it does not impose an undue burden upon the buyer to keep the goods until there is some judicial determination of the party's rights.

Such a distinction between major and minor breaches by the seller recognizes that the buyer's remedy of rejection is fairly extreme in its effect upon the seller. It perhaps seems unfair to deprive the seller of all expected benefit of the contract through some minor breach. Not only does this right of rejection deprive him of all expected benefits but it also imposes additional costs upon him. From the seller's point of view, the buyer's complaint should be fairly serious before he is allowed to walk away from the contract and thrust these additional burdens upon the seller. The buyer ought not to be allowed to do this if his action simply aggravates both parties' positions and in fact the buyer's complaint could be remedied at less cost to both parties by the buyer keeping the goods and claiming compensation from the seller.

In studying this equation most commentators imagine a frictionless system of adjudication. They overlook that as a practical matter, the only remedy of the buyer may be to reject the goods. If he is allowed only a remedy in damages it may mean he has no practical remedy at all except at the discretion of the seller.

In addition we should keep in mind that a broad right of rejection would not affect the seller of consumer goods in the same adverse way as the seller of non-consumer goods. A consumer sale will seldom involve goods made to the buyer's specification which are difficult to dispose of to alternative buyers. Nor is there the same likelihood that

the goods will be shipped to a distant market in circumstances that make it more commercially reasonable for the buyer to dispose of disputed goods. Moreover, the market price of consumer goods in unlikely to drop significantly, giving added incentive to buyers to reject and the need for some protection for sellers.

In balancing the interest of sellers and consumers, most courts and commentators forget the different nature of the expectation and motiviation of the two sides. This stems from a largely economic way of looking at the transaction. This overlooks the fact that while the retailer is largely engaged in the transaction to earn money, this is far from the point of view of the consumer. While some consumers may occasionally pretend that they are purchasing goods to save or earn money, by and large they purchase goods for what might be called (for lack of a better phrase to describe the social and psychological factors involved) their use and enjoyment. Many variable factors are involved in the consumer's decision to purchase. These factors are difficult, if not impossible, to quantify. Yet the law must attempt some objectivity and equal treatment amongst consumers. To illustrate the point which is being made, let us take the example of the sale of a new coloured automatice washing machine with a small but noticeable chip in the enamel on its top. Such a defect will not be considered serious from the point of view of the function of the machine. It does not affect the machine's

ability to wash clothes. It probably will not be considered serious from the economic outlook of the seller. Nor may it seem serious to those purchasers who intend to install their washer in some out-of-the-way place such as their basement. On the other hand, there may be consumers who are largely motivated in their choice of washing machines by its appearance. This may be caused by their desire to install it in public view and in fact a large element of the consumer's enjoyment may involve this public display of economic well-being. The fact that in some cases the buyer has not suffered any damages because the chip makes no difference to his use and enjoyment of the goods, while in the other case the damages are great but impossible to quantify, does not necessarily lead to the conclusion that they should be ignored in the law. It might also lead to the conclusion that since they cannot be quantified the only suitable way they can be handled by the law is to give the consumer the right to reject.

Another solution is a variation of the third. That is to distinguish between major and minor breaches by the seller and to allow rejection for any kind of breach for limited periods but give a more extensive right to reject for major breaches. This variation recognizes that if rejection occurs early in the transaction, the seller suffers little prejudice and what prejudice he does suffer is out-weighed by the right of the buyer to have a practically effective remedy.

On the other hand, the longer the buyer has had the goods the more likely the seller will be prejudiced by their return and this burden should only be thrown upon him for more serious breaches. The best approach would be to have the loss of the buyer's right to reject for minor defects tied to readily identifiable circumstances. This might be within a reasonable time of the receipt of the goods by the buyer.

The Seller's Right to Cure Performance

Any extension of the consumer buyer's right to reject should be coupled with an extension of the seller's right to cure. Such a right is given in the U.C.C.[141] and has been recommended by the Ontario Law Reform Commission[142] and the New Brunswick Consumer Protection Project.[143] Such a right to cure is also given in the U.L.I.S.[144] The exact nature of the seller's right to cure has to be defined in terms of the buyer's right to reject. However, as a general matter, I submit that a broadly defined right of rejection coupled with broad right to cure best meets the needs of both parties. The threat of rejection is the most effective way for the buyer to get the seller to take his complaints seriously and to correct them. In most consumer transactions, the seller is in the best position to correct the defect either by repair or replacement. Even where the defect is cured by the seller the buyer will seldom be completely compensated for the added expense and trouble that such a defect has caused him. At the very least this will evolve a return trip to the seller's premises. If the buyer cannot reject the goods but must see to their repair himself, this will likely increase the expense and trouble to him for which he receives no compensation.

If the seller's right to cure is to be limited in some way, two questions arise. First, should the seller's right to cure be the same both for and after the time for delivery has arrived. Second, should there be a distinction

between the cure of minor or major breaches. In relation to the first question, a right of the seller to cure before the time for delivery has arrived seems very compelling. In these circumstances, an abortive delivery of defective goods by the seller cannot prejudice the buyer if the seller has still time before the contract delivery date to redeliver goods corresponding to the contract. On the other hand, after the time for delivery, it is strictly speaking too late to completely cure the seller's breach. It is then impossible for the seller to completely comply with the contract. However, if the buyer's complaint is primarily in relation to the quality of the goods, the seller may still be able to deliver goods which correspond with the contract even though delivery is late. The seller should not have an unqualified right to cure after the date for delivery since this may be unfair to the buyer. There may be circumstances where the late delivery is of utmost importance to him, where it in effect amounts to a major breach of the contract. The U.L.I.S. and the U.C.C. suggest two different models for trying to determine when a seller should be allowed to cure after the time for delivery under the contract. The test suggested by the UNCITRAL working group revising the U.L.I.S. is,

> "The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract nor without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared a contract void in accordance with Article 44 or

> the price reduced in accordance with Article 45 or has notified the seller that he will himself cure the lack of conformity."

On the other hand, the U.C.C. s.2-508 reads:

> "(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects the non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender."

Both of these provisions were drafted with commercial as well as consumer sales in mind. In particular, the U.C.C. refers to the seller's reasonable grounds to believe that the goods would be acceptable "with or without money allowance." This provides needed flexibility in a commercial sale where it may be reasonable for the seller to allow the buyer to repair the goods at his expense or to keep the goods at a reduced price. (The U.C.C. doesn't actually give the seller the right to insist upon this but only allows him to tender conforming goods where he has reason to believe that the buyer might have accepted the goods with some reimbursement or payment of damages by the seller.) The U.C.C. puts too much emphasis on the seller's reasonable foresight and not enough emphasis on the actual consequences of the seller's defective delivery. In consumer transactions whatever the nature of the seller's foresight, the buyer ought not to be forced to accept any cure which leaves him with performance substantially short

of what he expected or which puts him to unreasonable inconvenience or expense.

Another way of expressing the same position would be to say that the seller has an unconditional right to cure both before and after delivery. However, what amounts to a cure would have to be defined in such a way that the ultimate performance by the seller does not fall substantially below what was provided in the contract. While this provides a more generalized formula and perhaps a more accurate use of the term cure, it tends to confuse different kinds of breaches by the seller which should be distinguished.

We should distinguish between breaches relating to the quality of the goods and those relating to the time and manner of delivery. If the breach relates to the quality of the goods, cure should require that the defect be completely corrected. In consumer transactions, unlike some commercial transactions, the buyer will seldom be in a better position to cure than the seller. Even in the case of the sale of a large item to a remote, sparsely populated region, if the seller has difficulty arranging local repairs at the buyer's residence the difficulty will be just as great for the consumer buyer. Unlike the case of commercial sales, the seller should be under some responsibility to provide local servicing or, if not, some responsibility for effecting the cure by replacement from his location. That is, he ought not avoid his obligation to cure simply because the buyer is located in a remote area. While it might be theoretically easier for the

buyer with local contacts and more familiarity with local tradesmen to arrange repair, this obligation should never be thrust upon him. Nothing is more frustrating for consumers than to have their sellers pass off their complaints and to be told to seek redress from third parties. This is true even if the seller does not deny ultimate responsibility for reimbursement.

On the other hand, when the breach relates to the time of delivery, it is impossible for the seller to cure. Moreover, it will often be very difficult for him to cure breaches of quality within the contract time for delivery. It is not unfair to require a consumer buyer to accept an original or cured tender past the time for delivery unless the buyer can show unreasonable inconvenience or expense. Such a requirement is a necessary ingredient of a broad right to reject. Such a broad right to cure coupled with the requirement of good faith on the part of both parties and perhaps the requirement that the buyer specify his complaint so that the seller can cure would go a long way to protect the seller against contrived and trivial reasons for rejection.

The second question in relation to the seller's right to cure is whether he should be allowed to cure even major breaches. In discussing this matter the Ontario Law Reform Commission decided that the consumer should not be forced to accept goods once there has been a substantial breach by the seller. Their reason seems to be that a purchaser will have his faith in the reliability of the seller

shattered and he should be entitled to walk away from the contract. That is, when he buys a new appliance which does not work, he ought to be able to say that he doesn't want a repaired appliance. This seems to go to unreasonable lengths to pander to the irrational feelings of consumers. It seems to distinguish between corrections made before the time of delivery and corrections made afterwards. For example, if after the goods come off the assembly line but before they leave the manufacturer's premises the defect is discovered and corrected, the purchaser would have no complaint. Moreover, the suggestion does not seem to distinguish between goods which are repaired and those which are comletely replaced.

All of the consumer's legitimate needs are sufficiently covered in the concept of what is an effective cure. His legitimate interest is that in the end he will have a product which complies with the contract at least as to quality. It really doesn't matter how grossly defective the goods were when they were first tendered as long as they are completely cured. For instance, in the sale of a new T.V., in the end it matters little to the consumer whether the defect was a malfunctioning fine tuner or a picture tube, as long as either defect has been corrected by repair or replacement and the resulting product satisfies the contract. Of course, if the repaired T.V. does not have the same qualities as a new T.V. then the defect has not been cured.

The Right of the Buyer to Demand Cure

As long as the buyer is given a broad right to reject for any breach there is no need for a specific right to demand cure. Allowing the buyer to reject unless there has been cure gives as much incentive as possible to the seller to effect a cure. Providing a specific right that the buyer could demand cure would give him nothing in addition. However, if the right to reject is more limited, for example by allowing the buyer to reject only for major breaches, a specific provision giving the buyer the right to demand cure of defects which do not entitle him to reject may be appropriate. This is the model of the U.L.I.S. which allows the buyer to reject for non-fundamental breaches after there has been a demand for cure which is unsatisfied. In effect the practical end result is much the same as giving a broad right of rejection to the seller in the first place coupled with a broad right of cure. All this approach seems to do is to make a description of the party's rights more complex.

The Seller's Right to Receive Notice

If the seller's right to cure is to be effective as a practical matter there will need to be some provision requiring the buyer to give prompt and specific information of defects. This will be necessary to allow the seller to effect a cure. His ability to cure should not be prejudiced through unreasonable delay by the buyer in communicating information as to the nature of the defect.

There is no specific right to notice of any defect in the existing law although the doctrines of Estoppel and Waiver may come to the aid of the seller. The U.C.C. has two sections designed to give the seller particular knowledge of the buyer's objection. These are ss.2-605 and 2-607, the relevant parts of which state:

> "s.2-605
> (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach
>
> (a) where the seller could have cured it if stated seasonably; or
>
> (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.
>
> (2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents."

"s.2-607
(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation."

These sections are designed to give the seller prompt notice of any alleged defect in order to allow him to verify the bona fides of the buyer's claim and to take immediate corrective steps. The difficulty with adopting them in their totality is that they place fairly elaborate notice requirements on the buyer. Except perhaps in an initial period after their adoption, most consumers would not be aware of these notice requirements. In a consumer transaction it should be enough to require the buyer to give notice of complaint within a reasonable time after he has discovered the defect. This notice should not need to be in any particular form or with any particular degree of specificity. In addition, there might be a general requirement that the buyer co-operate in

any attempt by the seller to cure. This would include providing additional information if requested to do so by the seller. The consumer should not be precluded from subsequently alleging other defects provided he gives notice within a reasonable time after their discovery. There should be specific provision either in the definition of reasonable time for notice or as a qualification to it, that the consumer should always be allowed to reject if his delay in giving notice has not prejudiced the seller.

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The Buyer's Right to Reject under Existing Law

In this area I have found it best to put the existing law to one side and think anew about the problem of when a consumer ought to be allowed to reject. This is because our existing legal concepts are so fundamentally inapt for the task. Many of the identified specific difficulties in our existing law are likely to be swept aside by any new approach. However, it may be useful to look at some of the fundamental difficulties with our present concepts and to catalogue some of the specific criticisms which have been leveled against them. From this discussion may come a clearer understanding of what fundamental notions in the existing law are salvageable and what kind of changes are necessary to bring the law in line with what is thought to be the correct answer to the social problems involved.

In the first place, our law is made complex by the duality of law and equity which has survived the fusion of the Judicature Act and the codification of sales law in the Sale of Goods Act. A buyer can rescind in equity (but not sue for damages) for innocent misrepresentation. He can at law reject goods for breach of more major terms called conditions. Whether innocent misrepresentation and the terms of the contract called conditions are mutually exclusive remains in some doubt in Canada. While the common law right of rejction has been codified in the Sale of Goods Act the equitable remedy of recission is not codified in any statute and its exact scope remains unclear. It is undecided whether Lord Denning's attempt,[146] probably for erroneous reasons, to equate the circumstances in which the two remedies can be exercised will be accepted in Canada.

At the very least, there should be a fusion of legal and equitable remedies. As we have already seen, if consumers are not to be made worse off this involves accepting the Court of Equity's attitude towards the problem of parol evidence. That is, all statements made during the negotiation which were intended to be relied upon and give rise to legal consequences and which have not been superceded ought to form the basis of a consumer's claim. How many categories are then necessary will depend upon the answers to the previous discussion of whether the buyer should have different remedies depending upon the magnitude of the seller's default. While

the elaborate notion of statements inside and outside the contract may have been a necessary sophistry when Courts of Equity clung to the pretense of not contradicting the common law, such a schizophrenic attitude has no place in any modern reform.

If we turn to the legal remedies codified in the Sale of Goods Act, we discover general notions with some similarities to basic contract law concepts.

In the general law of contracts, the law has long recognized the distinction between breaches which allow the "innocent" party to treat the contract as repudiated and less serious breaches which do not allow the innocent party to treat the contract as repudiated but only allow him to claim in damages.[147] Various expressions are used in different branches of contract law to describe the essence of this two-fold classification. For example, the issue is phrased as whether covenants are independent or dependent, whether performance by one side is condition precedent to performance by the other, whether terms are conditions or warranties, etc. What was somewhat unique in the development of sales law was the shift in the 19th century from basing this distinction on the nature of the breach to making the classification a priori. This shift was codified in the Sale of Goods Act. It is unnecessary to retrace this development here or to explain why it might be the natural outgrowth of viewing this classification in terms of the implied intention of the parties at

the time they contracted.

Along with this shift to classifying the terms *a priori* there developed a tendency to generalize the process of characterization. For example, the implied conditions as to merchantability and fitness. This means that in relation to one of these two implied terms as to quality, the contract is either broken in a serious way or not broken at all. This process ignores the fact that goods often are only slightly unmerchantable or only unfit in a minor way. The result of these two 19th century developments which are codified in the Sale of Goods Act, is anomalous decisions which allow extreme remedies for very minor defect, yet allow only damages for very serious breaches.[148]

Some courts have recognized the problem and have emphasized that the classification should be made in terms of the magnitude of the breach.[149] This is a desirable development but its full scope is probably available only in relation to express provisions of the contract. In relation to the implied terms of the Sale of Goods Act it is difficult to see how the courts can make the breach of an implied condition a breach of warranty. That is, goods are either fit for the purpose or not. If they are unfit because of some minor defect, the Act has no provision which would allow that to be considered a breach of warranty.

If the remedy of rejection is to be continued to be confined to more serious failures by the seller, the structure of the Sale of Goods Act will have to be revamped. Rather than attempting to classify the terms of the contracts, giving different kinds of terms different remedies, the Act should distinguish between different kinds of breaches. This is the structure of the U.C.C. and the U.L.I.S. and has been recommended by the Ontario Law Reform Commission,[150] the New Brunswick Consumer Protection Project[151] and the Saskatchewan White Paper.[152]

The desirability of this shift from examining the nature of the term broken to examining the magnitude of the breach and from generalizing so that any breach of the implied term of merchantability must be serious, is not confined to consumer sales. This is a defect in the legislation which leads to just as anomalous results in commercial transactions.

At a more specific level the Act creates some difficulties and anomalies for consumers. These difficulties relate to the duration of the buyer's right to reject. The Act provides that in the case of specific goods this is lost with the passing of title.[153] Elsewhere, the Act provides that normally with the sale of specific goods property passes when the contract is made.[154] The net effect is that the right to reject is lost in most consumer sales at the time the contract is made, before delivery and perhaps even before any inspection by the buyer. These provisions are undesirable not only because they make the buyer's right to reject an illusion,

but also more fundamentally because they tie the right to rejection to the passing of property. There should be no need to repeat here the voluminous comment which demonstrates the difficulty of tying the solution to too many problems to the lump concept of title. Such an approach was rejected in the U.C.C., is not used in the U.L.I.S. and has been universally condemned by reformers in Canada.

Alternatively, the right of rejection is lost by the buyer accepting the goods. Acceptance is defined in the Act in s.36. The concept of acceptance has created several theoretical and practical problems. The most important practical problem relates to the relationship between the definition of acceptance in s.36 and the provision of s.35 relating to inspection. The Act is unclear as to which section takes precedent. That is, does the buyer by accepting the goods within s.36, lose his right to reject even though he has not had an opportunity to inspect within s.35. The case law indicates that he can.[155] This has been corrected by specific statutory amendment in England.[156]

Apart from this question, there are several other more theoretical problems in relation to the definition of acceptance in s.36. For example, s.36(b) says the buyer shall be deemed to have accepted the goods when the goods have been delivered to him and he does in relation to the goods any act inconsistent with the ownership of the seller. The meaning of the phrase "inconsistent with the ownership of the

seller" is difficult to understand given the structure of the Act, since under the rules for the passing of property in s.21, property will have passed to the buyer at the very latest when the seller tenders conforming goods. At that point, at the latest the seller is no longer the owner. When pressed, the courts have overcome this problem by inventing a concept of divided ownership. Finally, the whole notion of acceptance is ambiguous because the Act fails to make clear whether it relates to the buyer indicating that he accepts the goods as satisfying the contract or whether it is a broader concept meaning that he accepts dominion and control over the goods under the contract.

In examining the specific difficulties and anomalies for consumers in relation to when they lose the right to reject under existing law, we ought to distinguish between basic policy choices and difficulties created by the existing legal concepts and legislation. Moreover, this presupposes some basic decision about how broadly defined the right of rejection should be in the first place. Once that is done it is submitted the policy choices remaining are: (1) What should be the role of inspection and, (2) what effect should the buyer's inability to return the goods in their original condition have. As the U.L.I.S. demonstrates, these questions can be answered and the answers implemented in the law without resort to a confusing concept such as acceptance.

This identification of the policy choices involved in describing how long the buyer should have the right to reject rules out delivery, use of the goods, or any uninformed statement by the buyer that the goods correspond as criteria for describing when the right of rejection is lost. These things in themselves are arbitrary criteria. They are only significant to the extent that they relate to the question of the opportunity and responsibility for the buyer to inspect and the question of whether the buyer can return the goods in their original condition.

As we have already discussed, whatever the rule should be in relation to commercial transactions, in consumer transactions the buyer should not be responsible for defects which he has not actually discovered. There should be no special duty on the buyer to make a reasonable inspection. If the buyer could have discovered the defect on reasonable inspection so could the seller.

What is a more difficult question is what to do when the buyer discovers a latent defect after he has used the goods for a considerable length of time. In this situation the problem is more difficult because of the inability of the buyer to return the goods in the original condition plus the fact that he has received some partial use and enjoyment. We have already discussed in relation to the seller's failure to give a good title reasons why the buyer's partial use and enjoyment might be ignored.

There are reasons for relieving him of any need to account for these benefits. This of course goes further than the recommendation of other reformers. For example, the Ontario Law Reform Commission has simply suggested that a buyer ought to be allowed to reject within a reasonable time of discovering the defect no matter when that occurs although he should be required to pay for any benefits received.

There are, of course, other minor variations between these two alternatives and the present legal position which would prevent the buyer from returning the goods and would confine him to a claim in damages.

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The Buyer's Rights and Obligations with Respect to Rejected Goods

Section 37 of the Act leaves many questions with respect to the buyer's rights and obligations over rejected goods unanswered. This section provides that "unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them." Even though the buyer is under no obligation to return the goods to the seller, can he act as an agent of necessity and sell the goods, especially if they are of a perishable nature or subject to rapid price fluxuations? Alternatively, may the buyer return or store the goods at the seller's expense? Secondly, if the buyer has already paid for the goods, does he have some lien over them to enforce repayment?

These questions are specifically dealt with in the U.C.C. In relation to the first questions concerning the buyer's rights and responsibilities in the goods, s.2-602(2)(d) codifies the common law position in obliging the buyer after rejection to hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Section 2-604 allows the buyer to store the goods, reship them to the seller or resell them, all at the seller's expense. Finally, s.2-603 places some additional obligations on merchant buyers with respect to the disposition of the disputed goods.

These provisions would form a suitable model for needed codification in Alberta. The consumer buyer ought not to be allowed to refuse to take any steps to preserve even rightfully rejected goods. For example, he ought not to be allowed to leave them outside to be stolen or destroyed by the elements. At the same time, after giving the seller reasonable opportunity to give instructions for the return of the goods, the buyer ought to have a free hand to ship, store or sell the goods at the seller's expense. Of course, it ought to be made clear that the buyer's obligations with respect to rejected goods are the same if they are wrongfully rejected. (This problem only arises under the U.C.C. because the seller no longer can sue for the price if property passes or the time for payment has arrived. The seller can only sue for the purchase price if the goods have been accepted).

If the rejected goods have been paid for the Act gives the buyer no right in the goods similar to the unpaid seller's right of lien. Nor has such a right been recognized by the case law.[158] On the other hand, the U.C.C. provides in s.2-711(3) that "on rightful rejection or justifiable revocation of acceptance the buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (s.2-706)." Of course, it must be remembered that the buyer can have the equivalent of a lien by simply accepting the goods rather than rejecting, disposing of them and claiming any damages. However, there may be situations in which the buyer does not want to dispose of the goods but does not want to return possession to the seller until he has been repaid. In other words, the value to the consumer buyer of such a lien is not that it would be the first step to an ultimate disposition of the goods but rather it lies in the inconvenience this may cause to the seller. Since the seller will have ultimate responsibility for the goods it will put some pressure on him to repay the purchase price in order to regain possession quickly. If such a right were given to buyers who rightfully reject, I would recommend that it be confined to a lien for any part of the purchase price paid. I would not extend it to any claim for consequential damages.

C. Damages

General Principles

The Sale of Goods Act has in general codified the common law principles covering the measure of damages for breach of contract. The completeness and felicity of this codification will be examined in detail later, but for the present it is adequate to say that the Act brought no change in the common law. The long standing general principle in measuring contractual recovery is to put the "innocent party" in the same position as if the contract had been performed according to its terms. This general principle is of course misleading unless it is immediately qualified by the foreseeability limitation enumerated by the Court of Exchequor Chamber in Hadley v. Baxendale[159] and more recently restated by the House of Lords in the Heron II.[160] Even with this limitation however, the law goes much beyond simply allowing the return of the purchase price to the buyer for the seller's breach. To use the oft cited classification of Perdue and Fuller,[161] the law protects the buyer's expectation, reliance and restitutionary interest within the general limits of the parties' reasonable foresight. While a buyer's liability under a sales contract will nearly always be limited to the purchase price, the seller's liability may be far in excess of the price and out of all proportion to any profit the seller expected to make. When this is coupled with the strict liability nature of the seller's obligations it is not surprising that sellers

regard the normal measure of damages as unfair and attempt to restrict them at every opportunity.

The basic question which has to be asked is whether the existing law is not too generous in measuring the buyer's damages. Would giving consumers additional protection and increasing their opportunity to claim breach of contract put the balance too far in the buyer's favour? Perhaps in exchange for increasing the opportunity to complain, the consumer should be limited in the amount of any damage recovered.

There are several possible alternatives to the rather generous measure of damages given by the existing law. One would be to confine the buyer to the return of some part or all of the purchase price. This would be a codification of the almost universal attempt by sellers to limit their liability by contract to the repair or replacement of the goods supplied. A variation of this approach would be to allow the buyer some multiple of the purchase price.

A second approach would be to remove claims for mere personal injuries from the area of sales law altogether and to treat them separately either as part of the general law of negligence or as part of some first party public or private accident insurance scheme. In relation to consumer sales these are the kinds of consequential damages which are likely to be large and out of proportion to the purchase price or the seller's anticipated profit. They are the kinds

of consequential damages which the seller is interested in avoiding in a consumer transaction. Whatever the ultimate desirability of these first two alternative approaches would be in terms of the most economic allocation of risk and most desirable means of accident prevention, their implementation without an alternative compensation scheme in place would be a retrograde step.

A third possibility would be to allow consequential damages based on fault while continuing to allow the return of part of all of the purchase price based on the seller's strict liability to observe the contract terms. While this approach would also remove many anomalies that exist in our complex system of contract, tort, and insurance law for compensating accident victims, to the extent that it would reduce the total compensation available to victims without any alternative compensation scheme in place, it too would be a retrograde step.

All of these suggestions to limit the buyer's recovery, especially as they relate to compensation for personal injuries, are contrary to the recommendations of many reformers. There have been repeated suggestions that manufacturers, as well as retailers, should be strictly liable in contract for personal injuries without opportunity to disclaim. Such strict laibility is quite openly recommended as a means of guaranteeing that accident victims will receive compensation. At the same time it attempts to put liability on those parties who are in a position to minimize these accidents

through appropriate methods of accident prevention.[162] As Calabresi[163] has demonstrated, these schemes may not be the most efficient way of accomplishing the desired result. However, in the absence of some general scheme such as that suggested by the Woodhouse Committee in New Zealand,[164] they are steps in the ongoing process of providing more comprehensive accident compensation.

In this discussion, we should keep in mind the fact that most consumers' claims will be for part or all of the purchase price. A claim by a consumer for consequential damages will be relatively rare. Unlike the commercial buyer who intends to use the goods for resale or in some profit-making way, his consequential damages are not likely to be for economic loss. Rather they are likely to be restricted to claims for personal injuries caused by some defect in the goods sold.

We should also keep in mind the limiting effect of the foreseeability test in Hadley v. Baxendale. With this limitation, buyer's damages are not so open ended as would first appear and should allow the seller to take any necessary protective steps. Thus in a consumer transaction, the seller can within rough limits take appropriate steps to minimize the danger or spread the risk through either insurance or his pricing system.

Given the nature of the consumer's likely consequential damages, no change is recommended in the general principles used in assessing his damages. While the most

desirable approach would be to have a universal scheme for compensating accident victims regardless of fault or cause, until such scheme is devised no steps should be taken to reduce available compensation.

The Existing Codification of the General Principles

The Act does not have an exhausted enumeration of the situations where the buyer can claim damages. Section 51 provides the buyer with a remedy when the seller refuses to deliver the goods and s.53 provides a remedy for breach of any condition when the buyer is obliged to keep the goods. These two sections do not expressly cover rightfully rejected goods which is usually treated as the equivalent of no delivery at all. In addition these two sections codify only the first branch of the Hadley v. Baxendale rule. However, the second branch is codified in s.54(a) which states that "nothing in this Act affects the right of the buyer or the seller, (a) to recover interest or special damages in any case where by law interest or special damages may be recoverable". Special damages (contrary to its modern meaning) is the old expression for the damages due to special circumstances communicated to the seller within the second rule of Hadley v. Baxendale. In any event, the tendency of modern cases is not to distinguish between the two branches of the rules in Hadley v. Baxendale, but to see them as two particular applications of

the same general principle. Moreover, the two sections provide prima facie rules which only cover rightfully rejected goods and cases of late delivery.

Sections 51, 53 and 54 of the Act ought to be re-drafted to more accurately and comprehensively codify the general principles. How this might be done will be discussed after some more particular questions related to damages have been examined.

Foreseeability

The rules in Hadley v. Baxendale (especially the first rule with its reference to loss "directly and naturally resulting in the ordinary course of events from breach of warranty") are probably more often expressed in the language of Lord Justice Asquith from Victoria Laundry Ltd. v. Newan Industries Ltd.,[165] than they are in their original natural law language. Lord Asquith's enumeration in the Victoria Laundry case was the subject of much discussion in the recent House of Lords case of the Heron II. There the various law lords played a kind of logomachy in deciding whether the true test was that of "serious possibility", "real danger" or "on the cards" as preferred by Lord Asquith in Victoria Laundry, or whether it should be a "very substantial degree of probability" or not "unlikely to occur" as preferred by Lord Reid in the Heron II. In addition, several of the law lords discussed whether the test of foreseeability was the same

in measuring damages in contract and tort. The question that results from this case law development is whether the relevant test can be expressed more accurately than that found in s.51(2) and 53(2) of the Act. In any restatement some attempt should be made to incorporate the second rule in Hadley v. Baxendale which is rather obscurely codified by s.54(a) of the Act. One possibility which more accurately reflects the test used in the case law would be the following:

> "The measure of damages is the estimated loss which, having regard to the seller's knowledge of all the circumstances, he ought to foresee as likely to result from his breach of contract."

This covers both the ordinary circumstances of the first rule and the special circumstances covered in the second rule of Hadley v. Baxendale expressed in terms of the seller's foresight rather than in terms of losses which "directly and naturally result".

A more detailed model is found in s.2-715 of the U.C.C. This provision enumerates some of the typical, incidental and consequential damages that a buyer is likely to suffer. It will be noticed however, that most of these are damages that a commercial rather than a consumer buyer would suffer. Section 2-715 reads:

> "(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty."

The Market Price Test

Sections 51(3) and 53(3) provide two similar, although not identical, prima facie rules for measuring the buyer's damages. As we have already seen, even though they are narrowly worded, s.51 and 53 have been applied more generally. Section 51 is applied to all cases where the buyer has not received the goods either through the seller's refusal to deliver or because the buyer has rightfully rejected. On the other hand, s.53 has been applied more generally to all cases where the seller has breached the contract but the buyer is forced or has elected to keep the goods.

The prima facie rule established in s.51 provides a relatively simple test for measuring the buyer's damages while at the same time reflecting his obligation to take reasonable steps to mitigate his damages. This means a reasonable buyer ought to go out to the market place and buy similar goods in substitution. Section 53 on the other hand is not based upon any notion of mitigation. It is not

imagined that a buyer forced to keep the goods will actually sell them and buy other goods in substitution. In fact, unlike s.51(3), s.53(3) does not make express reference to the market price. Instead the reference is to the difference between the value of the goods at the time of delivery "to the buyer" and the value they would have had if they had answered to the warranty. In spite of what seems to be a subjective reference to the value of the goods to the buyer, the case law interpretation of s.53(3) has used the objective standard of the difference in market values. This provides a more readily ascertainable measure of damages but does not necessarily reflect the buyer's particular damages.

Section 51(3) which provides the prima facie rule when the seller has failed to deliver is in parallel terms to s.50(3) which provides the prima facie rule where the buyer wrongfully neglects or refuses to accept the goods. These two prima facie rules are based upon parallel obligations to go into the market place and either buy or sell in substitution. The two provisions have created several particular problems for the courts and have been the subject of elaborate analysis.[166] The problems include the meaning of available market, the place of the market and the time of the market price. Many of these difficulties could be avoided by redrafting the prima facie rules to provide more flexibility and to re-emphasize the basic principle. What is required is that the innocent party make reasonable attempts at substitution in the market

place. There is no need for any particular kind of market, nor does he necessarily have to buy at any particular time and place as long as he has made reasonable attempts to get the best price. In a consumer transaction, there should be a large degree of tolerance in judging the buyer's actual conduct. That is, if he has gone out and bought goods in substitution, the onus should be on the seller to show that his conduct was unreasonable. The particular bargaining position of consumers, their knowledge and the sources available to them, ought all to be taken into account in judging the buyer's reasonableness. If the seller has been given a broad right to cure by supplying goods in substitution himself, it may not be unreasonable to provide that no purchase in substitution by the consumer should be unreasonable unless the seller can prove bad faith. Bad faith might involve a refusal by a consumer to follow the advice of the seller as to where substitute goods might be purchased. As at present, there should be no need for the buyer to actually buy goods in substitution. Indeed, a consumer may not be able to afford to do so without first recovering from the original seller. Where the buyer has not acutally covered, his damages should be the additional cost of taking reasonable steps to buy other goods in substitution. Once again, if the test is worded broadly enough, the particular problems illustrated in the case law such as the meaning of available market and the time and place of the market can be avoided.

D. Restitution

No description of the consumer buyer's remedy of damages where there has been failure of delivery or rightful rejection would be complete without some examination of his restitutionary remedy reserved by s.54(b) of the Act. Even though s.51(3) speaks of prima facie rule for measuring damages, in most consumer transactions the buyer will be content not to claim damages at all. Instead he will be satisfied with the recovery of that part of the purchase price that he has already paid or with the right not to have to pay. This strictly speaking is not a claim in damages at all and there is some doubt as to whether the claim for damages will preclude the restitutionary remedy. There doesn't seem to be any practical reason why these two things should be mutually exclusive, although there have been theoretical difficulties suggested in their compatability.[167]

Any reclassification of consumer sales law ought to try to simplify and amalgamate these various remedies. The provision which drew together the buyer's remedies might read:

> "Where the seller wrongfully refuses to deliver goods to the buyer or where the buyer has rightfully rejected (keeping in mind the seller's right to cure which could be referred to in a cross-reference) the buyer is entitled to:
>
> (1) return of any part of the purchase price already paid and to refuse to pay any part of the price unpaid;

(2) any additional cost actually incurred by the purchase of goods in substitution unless the seller can prove that such cover was made in bad faith or the reasonable cost which are likely to be incurred by the buyer purchasing goods in substitution in good faith;

(3) any additional damages which having regard to the seller's knowledge of all the circumstances, he ought to foresee as likely to result from his breach of contract."

XV. Sellers' Remedies

Introduction

Neither the Ontario Law Reform Commission Report nor the New Brunswick Report of the Consumer Protection Project dealt with sellers' remedies. This area may have been outside the terms of reference of these reform bodies because most of the identified abuses or shortcomings in the existing law are in the area of credit sales. While this may be so, a cash seller's remedies cannot be completely ignored for two reasons. First, any identifiable shortcomings in the existing law ought to be corrected and, as much as possible, the law relating to a cash seller's remedies ought to be assimilated with the law relating to credit seller's remedies. This may not be entirely possible until after there has been a full examination of consumer credit law. Second, if the Institute accepts the recommendation made in the introductory part of this report to have a comprehensive consumer code which does not depend on the Sale of Goods Act, it is necessary to decide whether the seller's remedies found in the Act should just be duplicated without amendment in the consumer code.

The Present Law[168]

The seller's remedies have traditionally been divided into real (in rem) and personal (in personam) remedies. The real remedies are the seller's self-help remedies against the

goods themselves. They include the unpaid seller's lien, his right of resale and his right to stop in transit in the event of the buyer's insolvency. The personal remedies on the other hand involve the seller's right to sue for either the purchase price or for damages.

In the existing law, the nomenclature and concepts involved in both the seller's real and personal remedies are connected with the concept of property and its passing. Whatever changes in substance are made to the seller's real remedies, much clarification could be obtained by defining the seller's right without regard to title. The present Act provides separately for the real remedies available to a seller once property has passed to the buyer on one hand and those available when property has not passed on the other. In fact, the term lien is only appropriate when the buyer has become the owner of the goods. Although some doubt has been raised by Professor P.S. Atujah[169] because of what appear to be an oversight in the Act, the remedies available to the seller in either situation are the same. To remove any lingering doubts and to emphasize that the seller's remedy depends upon possession rather than title, the seller's real remedies should be referred to as a right to withhold delivery and resell.

Real Remedies

There are three separate real remedies mentioned in the Act: lien, stoppage in transitu, and right to resell. Of

these three, only the unpaid seller's lien and right to resell are of much significance in consumer transactions. The unpaid seller's right to stop in transit only arises on the insolvency of the buyer. Even in a commercial setting it is invoked very infrequently. Of the remaining two real remedies it should be noted that the seller's right to a lien, especially in a consumer transaction, is not significant in itself. Rather its usefulness to the seller lies in the fact that it is the first step in his exercise of his right to resell. Both real remedies are limited in scope. They are not available for any breach by the buyer. Instead, they are available to an unpaid seller until "payment or tender of the price".

A large number of particular issues have been identified in connection with the unpaid seller's right of lien and resale. Not all of these issues have been resolved by the court and those that have, have not always been settled very satisfactorily. Many have little significance for consumers. In any event, they could not be covered by legislation without the legislation becoming too lengthy and complex. These issues should be left to the courts and only more general issues covered by any new legislation.

One basic issue is whether the unpaid seller's real remedies should be extended or restricted; for example, should the seller have a real remedy against the goods for more than just the purchase price? Should he be able to look to the goods for any consequential damages? Should he be able to

resell for other kinds of breaches by the buyer besides failure to pay the price?

In the absence of any evidence that sellers do not have effective remedies now, an extension of self-help remedies is not recommended. The only justification for such self-help remedies is that they in fact reduce the liability of the buyers by providing an inexpensive and expeditious remedy to the seller. There is no point in providing for elaborate judicial proceedings if they will go by default anyway and only add to the consuming buyer's ultimate liability.

On the other hand, it is only if the seller's self-help remedies are confined to circumstances where he is unpaid that they are at all fair to the buyer. In these circumstances the claim of the seller is liquidated and not a matter of dispute. If there is some defect in the goods which has prompted the buyer to withhold payment he will want the seller to resell the goods. In fact, he will not usually want any responsibility for them and will be attempting to reject them. In other circumstances, the buyer may no longer be able to pay for the goods. Here, resale may be justified by the seller if it is the cheapest way of compensating the seller. Even in these circumstances careful safeguards have to be built into this right to be sure that it does do justice to both parties and is not either an in terrorum weapon for the seller giving him no real compensation, or one that gives the seller compensation at unacceptable cost to the buyer. However, to extend the seller's self-help remedies to unliquidated claims where the

amount is a matter of dispute or to circumstances where the price is not yet due would unfairly put the initiative on the buyer. By exercising self-help, the seller could unilaterally quantify his damages thrusting the burden of initiating litigation to settle any dispute on the buyer. The result in consumer transactions would likely be that no such litigation would be initiated and any abuse would go uncorrected.

The self-help remedies of lien and resale provided by the Sale of Goods Act exist only as long as the seller remains in possession of the goods. One other way in which the seller's remedy might be extended would be to give him the right of resale even after the goods have been delivered. Such a right can now be obtained by a seller through some security device such as a conditional sales contract or chattel mortgage. It is not a satisfactory response to argue that a security device such as a conditional sales contract has been bargained for or agreed to by the consumer. In reality, he has no choice in the matter if he wants the goods before payment.

Whether he gets the goods with or without a right of repossession by the seller is a matter dictated by the seller and his business practices. However, the fact that sellers frequently and unilaterally provide for such self-help is no reason for granting it automatically by the law. At the very least, the need to provide for such self-help in the sales contract has marginal value in making the consumer aware of what

rights the seller will have. However, more fundamentally the onus should be on those who advocate an expansion of unpaid seller's self-help remedies. They are notoriously subject to abuse. They should not be extended without clear demonstration of need.

If the seller's real remedies are not to be broadened, is there any reason for them to be restricted? There have been many studies of the seller's real remedies in credit sales, but very little examination of the seller's real remedies in a cash sale, i.e., the remedies given by the Sale of Goods Act.

Assuming some change is needed, should there be some attempt to assimilate the remedies of a cash seller with those of a secured seller? Should a cash seller be subject to the same election of remedies as that found in the Conditional Sales Act?[170] further, should the cash seller be subject in other respects to the same kinds of control in exercising his real remedies as found in legislation covering secured sales? Specifically, should he be required to give the same notice, should the rules as to the conduct of the resale be the same, and should the cash seller have to account for any surplus realized by the sale?

A second, more extreme alternative, would be to abolish the real remedy of resale altogether. Perhaps only allowing the seller to retain the goods for payment, but not to resell. Such a total abolition of the right to resell would not be in the consumer's interest, nor would it necessarily be very

significant in practice. To appreciate this we must keep in mind the limited nature of this right and the circumstances in which it is likely to be exercised. Where the goods have not been delivered or paid for, the buyer's vested interest in them is very tenuous. At this point, he has made little commitment and with most consumer goods can find an alternative source very readily. Moreover, it must be kept in mind that he has broken his commitment to pay. It would be an extremely rare case where a consumer was late in payment and the seller precipitously resold to someone else even though the original buyer expressed a willingness to pay and take delivery. Nearly all typical consumer cases then will involve a buyer who is unwilling or unable to pay and take delivery.

Even in these circumstances, the seller's remedies could be restricted in the hope that by making his remedies difficult to obtain, he would be more willing to give buyers concessions such as extended time for payment or he would be more careful in the first place in committing himself before payment. It is not clear that such tolerance by sellers is necessarily in consumers' interests. It may just compound their difficulties and postpone the day of reckoning. Moreover, a broad and crude policy of restricting sellers' remedies may have little effect on their business practices. Alternatively, what effect it has may not necessarily be in the consumers' interests. When the consumer no longer wants or is no longer able to take delivery of the goods and pay for them, it is typically in his best interest not to have the responsibility

of disposing of the goods to an alternative guyer. It is in his best interest to allow the seller to resell. The only disadvantage or danger to him is that the seller may not make a provident resale and he may have continuing liability for the deficienty. In a non-credit sale where the goods have never been delivered to the buyer, this is, at least in practice, only a theoretical ,albeit legal ,danger.

In most cases the goods will be resold as new rather than in the second-hand market at the sacrifice prices which is typical in credit transactions. Any residual possibility of harm to a consumer could be easily overcome by forcing the seller to elect between resale and damages. This would simply bring the law into step with existing commercial practice. Retailers seldom, if ever, claim any deficiency following resale in a nonsecured transaction. In fact they seldom, if ever, claim loss of profit or the expense of finding an alternative buyer even though they are theoretically entitled to make such claims. If such an election of remedies were introduced, it would obviate any need to provide for any detailed control over the real remedy of resale. In fact, if the resale was surrounded with too many restrictions and too elaborate requirements, it would simply add to the cost. While an election of remedies would prevent the seller from claiming these costs in a deficiency action, they would have to be borne by consumers in general.

All of the above discussion was concerned with the typical consumer situation where the buyer had not paid or taken delivery of the goods and where an alternative source of supply was readily available. It was also based on the assumption that the only breach by the buyer which would entitle the seller to resale was a failure to pay the price. There are, however, less typical situations where the buyer needs more protection. First, if the buyer has paid any part of the purchase price, the seller should only be able to exercise the right of resale if he refunds the part of purchase price paid. Otherwise the consumer who has made a part payment would be in an anomalous situation. His seller would not be forced to elect between real and personal remedies. Moreover, in practice there would be more temptation for a seller to make a deficiency claim against a buyer who has made a partial payment. Since the money is already in the seller's hands, there are few expenses involved in repossession and resale which would otherwise lead them to writing the claim off.

Personal Remedies

The Act provides two separate personal remedies for the seller, an action for the price and an action for damages for non-acceptance. However, the Act is not exhaustive since there may be circumstances in which the buyer has breached the contract but a seller cannot bring a claim under either s.49 or s.50. Then he must rely upon s.59 which preserves his common law rights.

The seller may bring an action for the price in the two circumstances provided for in s.49, i.e., first on the passing of the property to the buyer and second, where the contract of sale provides that the price is payable on a day certain regardless of the passing of title and that day has arrived. The delivery or acceptance of the goods is not necessary to give the seller an action for the price. There is some uncertainty as to the meaning of payable on a day certain, although it is generally assumed that s.49(2) does not apply where the contract provides a method of determining the day on which the price is payable.[171]

There is a partial overlap in the seller's remedies. He often has the choice of either exercising his real remedies or suing for the price. In fact, in most cases, the seller can waive his real remedies and eventually sue for the purchase price.

It should also be kept in mind that in the sale of specific goods property will normally pass at the time the contract is made regardless of the time for payment or delivery.[172] This means that in many consumer transactions, the seller has a right to the price from the time the contract is made.

In discussing whether the existing personal remedies of the seller are appropriate, we should keep in mind the nature of the distinction between suing for the purchase price and suing for damages. The action for the purchase price is in the nature of specific performance.

In fact it relieves the seller from any obligation to mitigate his damages. He does not have to accept any refusal of the buyer to go on with the contract and has no responsibility to dispose of the goods. In addition, the action for the purchase price is a liquidated debt claim which gives the seller limited procedural advantages.

There is little justification for giving a seller a remedy in the nature of specific performance in a consumer transaction. As long as the seller remains in possession of the goods, he should be obliged to resell them in order to mitigate his damages. He is in by far the best position to dispose of disputed goods. In fact, by doing so, he will suffer at most only insignificant damages. This is, in fact, the almost universal commercial practice and a change would only bring the law into step.

Even after delivery to the buyer, it would be possible to make the seller take charge of any unwanted or disputed goods and dispose of them. If this were adopted because sellers are in a better position than consumers to dispose of goods and hence this would be the best way to mitigate damages, the seller would have to be allowed a claim for any deficiency. Unlike the situation where he is exercising self-help contrary to the wishes of the buyer, here he would be reselling solely to mitigate his damages. He would be under a duty to do so and would not be able to elect between reselling and suing for the price.

Requiring the seller to take back and dispose of goods which the buyer is unwilling or unable to pay for may not always be fair to him. This is particularly true when the goods have been used and can only be disposed of in the second-hand market. Not all sellers would be in the business of selling used goods and their facilities for doing so may be no better than the buyer's. However, requiring the seller to take back and dispose of goods which have not been used places no greater burden on him than requiring him to dispose of goods before they have been delivered. The only advantage of drawing the line at the time in which possession changes is that it provides a simple and clear cut way of defining the seller's obligation. It has the advantage of avoiding undue dispute as to whether the goods are in the same condition as when they were originally sold. However, it is essentially an arbitrary rule. Requiring the seller to dispose of any goods, whether delivered or not, which are still in their original condition would correspond with wide-spread commercial practice.

Another practical difficulty with requiring a seller to retake possession and dispose of disputed goods is that it might make the election of remedies by the seller unenforceable in practice. This would only be a significant difficulty if the obligation extended to goods which had been used by the buyer. Then the seller could avoid the normal requirement that he elect between

repossessing the goods and suing for the price by obtaining the buyer's agreement to repossession. Thus the protection given to the buyer by requiring the seller to elect between repossession and suing for the price would be lost in many cases. It would be very difficult to be sure that consumers appreciated their rights and genuinely intended to make good the seller's deficiency. Moreover, such a distinction between repossession by the seller as a right and repossession while under an obligation to do so in order to mitigate would only encourage consumers to be uncooperative.

Apart from the question of when the seller can sue for the purchase price which involves the issue of who has responsibility for disposing of the goods, the question of the seller's damages raises few problems for consumers. While under some circumstances sellers may be entitled to sue for lost profit or other consequential damages resulting from the buyer's refusal to accept, they seldom do in practice. Moreover, in the typical consumer transaction the amount of consequential damages which would be foreseeable under the codification of the Hadley v. Baxendale Rule of s. 50(2) would be very limited. It might be desirable, however, to redraft s.50 using the foreseeability language of most modern court decisions. At the same time, the law might be brought into line with commercial practice by expressly disallowing any claim for lost profit in a consumer sale.

XVI Summary of Issues and Recommendations

I Introduction

1. There should be new omnibus consumer legislation which would include a new part governing consumer sales as well as the Direct Sales Cancellation Act, the Credit and Loan Agreements Act, and the Unfair Trade Practices Act. (pp. 1-7).

2. Once the basic sales law provisions are drafted there may have to be some consequential amendments made to the definition and substantial law sections of the other integrated acts to remove anomalies and make all parts compatible.

3. There should be a general section instructing the courts to apply the new consumer code by analogy in appropriate circumstances. (pp. 9-12).

II The Model of Consumer Sales Law

4. One fundamental issue, upon which many other issues depend, is how far the prevailing commercial practice of "satisfaction guaranteed or money refunded" should be made the mandatory or presumptive legal norm (pp. 13-16). I recommend that it should at least be the rule in the absence of agreement to the contrary in a consumer transaction.

III Definition of a Consumer Sale

5. There should be one consistent definition of a consumer transaction adopted. I recommend a definition based on s. 18.1 of the Conditional Sales Act which specifically

covers the points summarized on pp. 30 and 31. (pp. 17-31).

IV Scope of Consumer Sales Legislation

6. The new consumer sales Act should expressly refer to both the sale of goods and the sale of services. (pp. 32-34).

7. The Act should adopt the "substantial nature" test in place of the obligation test of Helby v. Matthews in distinguishing sales from leases. In addition there should be specific sections imposing the same obligations in relation to the quality of goods on lessors as there are on sellers. (pp. 34-35).

8. The definition of a sale should include goods and services supplied for a business purpose. (pp. 35-36).

V Basic Contracts Doctrines

9. Ss. 4,6,9,10 of the present Act should be omitted from the new consumer sales Act. (pp. 37-38).

10. Sections 11 and 12 of the present Act could be included in the new consumer sales Act with further consideration of them left until there is a general review of sales law.

11. A consumer sales contract should be enforceable by consumers whether or not it is in writing. (pp. 38-40).

12. If a consumer contract is not enforceable against a consumer unless certain formalities have been complied with, the Act should clearly state the purpose of such formalities, so that they will not be confused with the old Statute of Frauds. (pp. 38-40).

13. Should suppliers of goods and services be held strictly and literally to all performance claims they make? Should they be liable only for statements which would be relied upon by the reasonable consumer or the credulous consumer? (pp. 42-46).

14. Should a consumer have to show reliance upon a supplier's claim before being able to sue on it? (pp. 47-48).

15. The distinct concept of innocent misrepresentation should be abolished. (pp. 45-46).

16. The Parol Evidence Rule should be abolished in consumer transactions. (pp. 49-51).

17. The classification of contract terms a priori into conditions and warranties should be ended. (pp. 51-53).

18. When can a consumer rely upon statements which later have been withdrawn, qualified or superseded? (pp. 53-55).

19. A supplier should not be able to insulate himself from responsibility for claims made on his behalf by employees, agents or independent contractors. There should be no need for the consumer to show that the agent was acting within his actual or apparent authority or that the consumer's reliance was reasonable. (pp. 55-58).

20. A supplier should be held responsible for all advertising made by manufacturers. (pp. 58-62).

VII The Rights of Assignees

21. Assignees of the seller of goods and services should be subject to the same rights and liabilities that the consumer has against the seller. Some attempt should be made to broaden the definition of an assignee to include banks and other financial institutions operating under a tripartite credit card arrangement. (pp. 65-69).

VIII The Implied Conditions in the Sale of Goods Act

A. Implied Condition as to Title.

22. Section 15(a)(b) and (c) should be redrafted into a single implied condition that the seller has a right to sell the goods free from any charge or encumbrance in favour of any third party at the time the goods are to be delivered. (pp. 71-79).

23. The seller should have a right to cure any defective title within a reasonable time after notification by the buyer and before the buyer's possession has been disturbed. (p. 75).

24. If the buyer does rescind for breach of this condition he should not have to account for any benefit received from the use of the goods. (pp. 72-75).

25. Merchants should not be allowed to disclaim this implied condition. However private sellers should be allowed to do so by disclosing all charges or encumbrances. (pp. 77-78).

26. It should be made clear that a buyer can only rescind for a breach of this implied condition if his possession can be disturbed. To the extent that he is protected from third party claims by statute, he should have no recourse against his seller. (p. 79).

B. Implied Condition that Goods Correspond with Description

27. The implied condition found in s.16 of the Act ought to be deleted. Consumers will be adequately protected by the new extended definition of an express warranty. (pp. 79-84).

C. Caveat Emptor

28. Section 17 which codifies the principle of caveat emptor ought to be deleted. (pp. 81-86).

D. Fit for the Purpose

29. The overlap between s.17(2) "fit for purpose" and s.17(4) "merchantable quality" ought to be eliminated and s.17(2) made applicable only to a special or unusual purpose. (pp. 86-90).

30. The proviso found in s.17(3) ought to be abolished. (p. 90).

31. The implied condition of fit for the purpose should apply to all merchants. (p. 90-91).

32. Reliance by the consumer should be presumed unless the seller has effectively disclaimed any expert knowledge. (p. 92).

E. Merchantable Quality

33. The implied condition of merchantable quality should be renamed a warranty of consumer acceptability and should be defined in such a way as to cover the points summarized on pp. 99 & 100 (pp. 94-100).

34. The implied warranty of consumer acceptability should not be confined to sales by description. (pp. 100-101).

35. The implied warranty of consumer acceptability should apply to private sellers as well as merchants. However, the remedy of a consumer against a private seller should be restricted to a return of the purchase price. (pp. 101-102).

36. There should be no proviso that the consumer cannot complain of defects that a reasonable examination ought to have revealed. (pp. 103-104).

37. There could be an express proviso that the seller is not liable for defects which he has brought to the attention of the buyer. (pp. 104-105).

38. There could be an express statement in the Act that in deciding whether goods meet the standard of consumer acceptability, their age and the fact that they are used shall be taken into account. (p. 106).

IX The Role of Written Warranties

39. The Institute should choose one of the courses of action outlined on p. 111 in relation to attempts by sellers to disclaim liability for consequential damage. (pp. 107-111).

40. In a consumer sale a seller should not be allowed to disclaim in a general way any particular express or implied warranty. (pp. 112).

41. There should be a general provision against misleading written warranties, statutory guidelines of the type described on pp. 115-116 to cover additional written warranties, and an express provision allowing the court to relieve against the forfeiture of a warranty. (pp. 113-116).

X Additional Implied Warranties

A. Availability of Spare Parts and Repair Facilities

42. There should be an implied warranty by the seller that with respect to consumer products that normally require repairs, spare parts and repair facilities will be available for a reasonable period of time after the date of the sale. (pp. 123-126).

B. Services

43. There should be an implied warranty that services sold shall be performed in a skillful and workmanlike manner. (pp. 126-127).

XI Privity Problems

The Manufacturer's Responsibility

44. Consumers should have a right of direct recourse against the manufacturer for breach of any express or implied warranty. (pp. 128-131).

45. The Institute should define the scope of the consumers

recourse right against the manufacturer by deciding the issues discussed on pp. 129-131.

The Rights of Successors in Title to the Purchaser

46. A consumer buyer should be defined to include any person deriving his interest in the goods from the original purchaser whether by purchase, gift, operation of law or otherwise. (pp. 131-132).

XII Delivery and Payment

47. A seller should not be allowed to treat any late payment as a repudiation of the contract unless this has been stipulated in the contract. (pp. 134-135).

48. The consumer's remedies for late delivery should be consistent with his remedies for defect in quality. (pp. 135-136).

49. If s.30 which contains the detailed rules as to the place and manner of delivery were put in the consumer Act, it should be redrafted to avoid the special use of the word 'delivery' found in the present Act. (p. 136).

50. Section 33 of the present Act should not be included in the consumer Act. (pp. 136-137).

XIII The Transfer of Property and Risk

Transfer of Risk

51. In a consumer transaction, the risk should pass with possession. (pp. 138-139).

52. In any case where a seller agrees to transport the goods to the buyer, the transit risk should be on the seller. (pp. 139-140).

Transfer of Property as Between Seller & Buyer.

53. In a consumer transaction, in the absence of any contrary agreement, property should pass with possession. (pp. 140-141).

54. Sections 24 to 27 of the present Act should be left out of the consumer sales Act. (p. 141).

XIV Buyers' Remedies

A. Specific Performance

55. Section 54 which allows the court to award specific performance could be incorporated in the new consumer sales Act leaving those matters discussed in the text for consideration when there is a general review of sales law. (pp. 142-145).

B. Rejection

56. The Institute should choose one of the following basic solutions as to when a consumer should have a right to reject:

a) a right (perhaps for a fixed period of time) to return goods without explanation or justification,

b) a right to return goods within a reasonable time of discovering any defect,

c) a more extensive right to reject for a major breach by the seller and a more limited (or no) right to reject for a minor breach.

(pp. 145-153)

The Seller's Right to Cure Performance

57. If a consumer's right to reject is limited to cases where there has been a breach by the seller, the seller should have a right to cure defects in the goods both before and after the time for delivery. (pp. 157-160).

The Seller's Right to Receive Notice

58. If a consumer's right to reject is limited to breaches and the seller is given a right to cure, the consumer should be required to notify the seller of any defect within a reasonable time and co-operate in any attempt by the seller to cure. (pp. 161-163).

59. In defining how long the buyer has a right to reject, the new consumer Act should avoid the notion of acceptance. (pp. 168-171).

60. A consumer should not lose his right to reject for defects which a reasonable examination ought to have revealed. (pp. 168-171).

61. A consumer should not have to account for any benefits derived from the use of rejected goods. (pp. 170-171).

The Buyer's Rights and Obligations with Respect to Rejected Goods

62. There ought to be a general statement of the consumer's rights and obligations with respect to rejected goods. (pp. 171-172).

63. Consideration should be given to whether a buyer should have a lien over rejected goods for any part of the purchase price paid. (p. 173).

C. Damages

General Principles

64. There should be no change in the general principles used in assessing the buyer's damages. (pp. 174-178).

65. Sections 51, 53 and 54 of the existing Act ought to be redrafted to more clearly and comprehensively codify the general principles. (pp. 178-185).

XV Seller's Remedies

Real Remedies

66. Cash sellers should have no claim against consumers for any deficiency following the exercise of their lien and right to resell. If any part of the purchase price has been paid it ought to be refunded. (pp. 186-193).

Personal Remedies

67. The seller should have no claim for the purchase price as long as he remains in possession of the goods. He should be forced to resell the goods. Alternatively the seller should have no claim for the purchase price whenever the goods are returned in their original condition. (pp. 194-197).

68. The seller should have no claim for lost profit in a consumer transaction. (p. 198).

APPENDIX A

MISREPRESENTATION AND BREACH OF CONTRACT, Extracts from the Report of the Contracts and Commercial Law Reform Committee New Zealand.

. . . .

The Classification of Statements

Traditionally the law has not regarded every statement made by way of inducement to negotiate, or made during negotiations, as part of the contract. There is a complex classification.

Statements which are not terms of the contract are classified as -

(1) Invitations to treat
(2) "Puffs" or commendations.
(3) Statements of opinion.
(4) Statements of law.
(5) The supply of information.
(6) Representations of fact inducing the contract. If these are false, they are further classified as -
    (a) Innocent misrepresentations,
    (b) Negligent misrepresentations,
    (c) Fraudulent misrepresentations.
(7) Statements of intention.
(8) Independent or collateral contracts.

Statements which are terms of the contract have been classified as -

(9) Fundamental terms.
(10) Conditions.
(11) Warranties.

A given statement made by one party to another in the expectation of making a contract may therefore fall into one or more of some thirteen classes.

The law recognises that persons may effectively disclaim responsibility for their statements. Furthermore, the Courts have recognised that the parties are free to make agreements which are binding in honour only.

Finally the law recognises that the culminating agreement, especially when it is written, may not express the true bargain, because of some mistake in expression or transcription, for which the Courts afford the remedy of rectification.

The importance of this classification emerges on a consideration of the remedies available to an aggrieved party. The remedies judicially applied in contract cases are -

(a) The award of damages. This is the traditional remedy of the common law which is available to compensate -
  (i) Breach of a term of the contract.
  (ii) Fraud.
(b) Injunction to restrain breach of contract, which is granted in the discretion of the Court only in limited circumstances.
(c) The decree for specific performance of the contract, which is granted in the discretion of the Court only in limited circumstances.
(d) Rescission, whereby the Courts recognise the right of an aggrieved party to bring the contract to an end. A party may rescind:
  (i) For misrepresentation by another party which led the former into the contract.
  (ii) For breach of a condition by another party to the contract.
  (iii) Where the other party manifests an intention not to be bound by the contract.
(e) Declaration. By the Declaratory Judgments Act 1908 prccedures are provided whereby a declaration of the rights and liabilities of the parties to a contract may be obtained from the Supreme Court.

There are settled rules stipulating or limiting the remedies available according to the classification mentioned in paragraph one of The Classification of Statements. We give the following broad outline.

Invitations to Treat

Statements which are no more than invitations to treat carry no remedy for falsity.

Thus a shopkeeper who marks his goods at a certain price does not bind himself to sell at that price, or to sell at all. Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd. [1953] 1 Q.B. 401, [1953] 1 All E.R. 482.

Puffs

Courts have readily left room for "mere puffs" or commendations, on which no reasonable man would rely. Modern advertising abounds in these, e.g. a popular motor spirit is said to "put a tiger in your tank" and a household cleaner is reported as "cleaning with the power of liquid lightning". These can readily be seen for what they are, mere "chaffer on the market-place", and the Courts attach nothing to them. But the boundary between palaver and affirmation is not clear. For example, the description of a business as a "gold mine" was held to be more than a mere puff; it was a representation (Senanayake v. Cheng [1966] A.C. 63; [1965] 3 All E.R. 296).

Opinions

Statements of opinion, for example of worth or value do not in general support a remedy if they turn out to be wrong, so long as the opinion was honestly held by the person who gave it. Thus in Bissett v. Wilkinson [1927] A.C. 177, [1926] All E.R. Rep. 343, the Privy Council on appeal from New Zealand held that a contract for the sale of a sheep farm could not be rescinded by the purchaser on the grounds that the vendor's statements about the carrying capacity of the farm were misrepresentations, because in the circumstances the statements could only be regarded as the expression of an opinion which the vendor honestly held.

. . . .

The present law appears to be -

(a) If the statement is merely the expression of an opinion honestly held, no relief is available if the opinion is wrong;

(b) But if the opinion is not honestly held by the contracting party who expressed it, i.e., if it is fraudulent, the party misled may have relief by way of rescission of the contract and by way of damages for deceit;

(c) And if statements of fact are expressed or implicit in the opinion, these amount to representations if they induce a contract between the parties;

It is possible that if the statement was made negligently in the course of a special relationship, the law of tort may carry relief on the principles adumbrated in Hedley Byrne v. Heller & Partners [1964] A.C. 465, [1963] 2 All E.R. 575. This aspect of the law of negligence is not at all developed.

Statements of Law

Statements of law are usually put in a separate class with the observation that if they prove to be false, a contract between the maker and the person to whom it is made is not voidable (Anson's Law of Contract 22nd Ed. 210). This view is sometimes put on the footing that statements of law are really statements of opinion.

The trouble is that statements of law often entail statements of fact. Thus in Solle v. Butcher [1950] 1 K.B. 671; [1949] 2 All E.R. 1107 the mistaken belief of

both parties that a flat was not subject to the English Rent Restrictions Acts was held to be a mistake of fact and a lease was set aside. Lord Denning said that a misrepresentation as to private rights is equivalent to a misrepresentation of fact for the purpose of obtaining relied in equity (ibid, 695; 1121).

It is often said that certain classes of receipts are tax-free, but it does not appear to have been decided whether this is a statement of fact or a statement of law.

....

Representations

Representations of fact form the major class of statements outside the contract which are of legal consequence. They are classified as innocent, fraudulent, and lately, negligent.

But to have significance in the law of contract they must possess two common features -

First the representor must be taken to have intended that the representation should be acted upon;

Second the representation must induce the representee to enter into a contract with the representor.

The distinction between a representation inducing a contract and a term of the contract becomes of importance when the statement in question has not been carried into the culminating agreement. If it has, it is a term of the contract; if it has not, it may be either a representation of a term of a contract comprising the culminating agreement and other points of agreement along the way to it. Where the culminating agreement is in writing, the distinction can readily be discerned, especially if the parties have agreed that the writing records the entirety of their contract. But where the culminating agreement is oral, the distinction is not easily drawn in practice.

....

5. The separate jurisdictions which existed before jurisdiction in equity was conferred on the High Court by the Judicature Act 1873 account for much that appears anomalous in this branch of law. The concept of misrepresentation inducing a contract flourished in Chancery where it could lead to the grant or refusal of equitable relief, whereas in the common law Courts it appears to have signified nothing unless the representation became a term of contract, or was fraudulent in the sense required

to support the common law action for deceit (see Lord Herschell's speech in Derry v. Peek (1889) 14 App. Cas. 337, 359; [1886-90] All E.R. Rep. 1).

The common law Courts redressed the victim of a fraudulent misrepresentation by giving him damages in an action for deceit. And the equitable jurisdictions aided the victim of any misrepresentation by granting or witholding equitable relief. Hence the Court of Chancery could order rescission of a contract induced by misrepresentation whether innocent or fraudulent. Lord Herschell expressed the rule in Derry v. Peek by saying "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand." (ibid. 359). And in such a case Chancery would order restitution and hold the party misled entitled to an indemnity from the misleading party. (Newbigging v. Adam (1888) 13 App. Cas. 308; [1886-90] All E.R. Rep. 975.)

Moreover the Courts of Equity would refuse the decrees of specific performance if the party against whom those decrees were sought had been led into the contract by misrepresentation. (Lamare v. Dixon (1873) L.R. 6 H.L. 414.)

But the Courts of Equity did not award damages. Consequently innocent misrepresentation did not sound in damages, a position affirmed by Lord Moulton in Heilbut Symons & Co. v. Buckleton [1913] A.C. 30, [1911-13] All E.R. Rep. 83, by saying "It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made." (ibid. 51)

Very recent decisions suggest a new refinement. In Hedley Byrne & Co. Ltd. v. Heller & Partners [1964] A.C. 465; [1963] 2 All E.R. 575 the House of Lords expressed the view that damages may be awarded for negligent misrepresentation. And in Dick Bentley Productions Ltd. v. Harold Smith Motors Ltd. [1965] 2 All E.R. 65 the English Court of Appeal appear to have subscribed to the view of Lord Denning that a prima facie inference that a given statement is a warranty (sounding in damages) may be rebutted if the maker shows that he was innocent of fault in making it and that it would not be reasonable in the circumstances for him to be bound by it.

. . . .

Future cases may demonstrate further overlapping of the areas of contract and tort, but concerned as we are with the field of contract, the enforcement of undertakings, we incline to the view that negligence is irrelevant. All the authorities except Bentley's case seem to sustain this view.

For the purposes of this rudimentary summary we may therefore state the present law as to the consequences of a misrepresentation of fact inducing a contract but not itself contractual as follows -

(a) If fraudulent, the aggrieved party may elect to rescind or affirm the contract, successfully resist any claim to enforce it (except where he has affirmed it), and obtain damages.
(b) If not fraudulent, the aggrieved party may elect to rescind or affirm the contract and successfully resist any claims to enforce it (except where he has affirmed it) but he cannot recover damages (except, possibly, where he can prove that the misrepresentation was made negligently).

It is important to note that these remedies are not governed by the gravity of the misrepresentation, except to the extent that this may be taken into account in considering whether the misrepresentation did induce the misled party to enter into the contract.

It is also of consequence to note that the party misled by an innocent misrepresentation must either go on or rescind; there is no intermediate relief. Furthermore, the misrepresentor, however innocent, must lose the contract if the misrepresentee elects to rescind.

The rigor of these rules is mitigated to a degree by certain "bars to rescission" which we discuss in section 7 of this report, but it is as well to note it in passing.

Statements of Intention

Statements of intention which do not become part of the contract present difficult problems.

They are representations that the maker has the intention he avers. But unless they become part of a contract, they cannot operate to prevent the maker from changing his mind.

A leading example of statements of this class is given in Jorden v. Money (1854) 5 H.L.C. 185; [1843-60] All E.R. Rep. 350.

. . . .

The difficulties in the way of one who seeks to rely on a statement of intention which does not become part of a contract are more fully discussed in Spencer Bower and Turner on Estoppel by Representation p. 30.

Collateral or Independent Contracts

Statements made in the course of negotiating one contract may themselves constitute an independent contract. "It is evident both on principle and on authority" said Lord Moulton in Halibut Symons & Co. v. Buckleton [1913] A.C. 30, 47, [1911-13] All E.R. Rep. 83, "that there may be a contract the consideration for which is the making of some other contract." This concept is most helpfully reviewed by K.W. Wedderburn "Collateral Contracts" 1959 Cambridge Law Journal 58 where an interesting aspect of Mouat v. Betts Motors Limited [1959] N.Z.L.R. 15; [1958] 3 All E.R. 402 is discussed.

. . . .

The device of erecting two contracts where one would suffice has found judicial favour in four main situations -

(a) Where the parties have written one agreement but have agreed separately that their writing will have qualified effect. (Mudd's case).

(b) Where a requirement of law that all the terms of the contract must be written would lead to the avoidance of the bargain of the parties if regarded as a single contract, e.g. Jameson v. Kinmel Bay Land Co. Ltd. (1931) 47 T.L.R. 593.

(c) Where the insertion of the so-called "collateral" promise in the "main contract" would make it illegal, e.g. Mouat v. Betts Motors Ltd. [1959] N.Z.L.R. 15 (compare Campbell Motors v. Storey Ltd. [1966] N.Z.L.R. 584.)

(d) Where the "main contract" contains an exemption clause, e.g. Webster v. Higgin [1948] 2 All E.R. 127.

. . . .

Terms of Contracts

At last we come to consider those statements and promises which become terms of the contract. These have been called fundamental terms, conditions and warranties. Traditionally these three classes have been regarded as comprising the content of a contract. But as we shall show, the classification is not exhaustive and the categories are not mutually exclusive.

"Fundamental" terms

There has been a great deal of judicial discussion of recent years about the concept of a fundamental term, which has been laid at rest so far as the English common law is concerned by the decision of the House of Lords in Suisse Atlantique etc. v. N.V. Rotterdamsche etc. [1966] 2 All E.R. 61. Until this decision, the view was widely held, and has been sustained by the English Court of Appeal, that the party in breach of a fundamental term was not entitled to the benefit of an exemption clause in the contract. Parker L.J. had expressed this view in Karsales (Harrow) Ltd. v. Wallis [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 very neatly (with respect) when he said "In my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term." (ibid, 871)

....

This decision illustrates the rule that after a breach, which amounts to a repudiation of the contract, described as a "fundamental breach", the party not in breach has a free election. He may bring the contract to an end by "accepting the repudiation" and may sue for damages, in which event he will not thereafter be bound by an exemption clause unless it has been agreed in terms to cover this eventuality, or he may affirm the contract and go his way upon it (as White and Carter (Councils) Ltd. did in their contract with McGregor ([1961] 3 All E.R. 1178) in which event he will be bound by all its terms.

In the course of their jugments, their Lordships, notably Lord Reid, affirm that the parties are free to contract out of common law liability. The question in all cases is whether, on the true construction of their contract, they have done so. We will discuss this subject in considering remedies for breach.

One must now conclude that a fundamental term is neither more or less than a condition.

Conditions and Warranties

It is a curious fact that there is little uniformity of view as to the meaning of the term "condition" and "warranty" at common law (see e.g. Anson's Law of Contract 22nd Ed. 119 et seq., Cheshire and Fifoot's Law of Contract (Northey's 2nd N.Z. Ed.) 117 et seq., and Salmond and Winfield's Law of Contracts 1st Ed. 33 et seq.). As terms of a contract, a condition is regarded as "going to the root of the contract" whereas a warranty "goes only to part of the consideration", is "subsidiary", or "collateral to the main purpose". Traditionally a condition is defined as a term which if unfulfilled allows a party who is not in default to

rescind the contract, and a warranty is defined as a term breach of which is remediable in damages only. the circular and therefore useless nature of these traditional definitions has only lately been realised. (Indeed see Anson's definition of Condition p. 119).

The tradtional approach to the question whether the breach of a particular term justified rescission or sounded only in damages postualted a governing intention common to the parties when they made their contract. So often, however, the parties, intent upon performance when they make their bargain, never contemplate breach. The task of imputing an intention which they did not have, but must for legal purposes be presumed to have had, is in most cases wholly unreal.

....

Bars to Rescission

7. In the foregoing summary we have referred to the right to rescind for misrepresentation. It is to be noted that this right may be lost in certain circumstances, viz. -

(a) If the party entitled to rescind, with knowledge of the misrepresentation, affirms the contract. Long v. Lloyd [1958] W.L.R. 753, [1958] 2 All E.R. 402 shows that an affirmation of the contract may consist of taking the benefit of something provided under the contract.

(b) Lapse of time. Leaf v. International Galleries [1950] 2 K.B. 86; [1950] 1 All E.R. 693.

(c) Rights of third parties intervening. It is said that if third parties bona fide and for value acquire an interest in the subject matter of the contract, the right of rescission is defeated. (Cheshire and Fifoot's Law of Contract, Northey's 2nd N.Z. Edition 235, Clough v. London and North Western Rail Co. (1871) L.R. & Exch. 26 [1861-73] All E.R. Rep. 646, and the speech of Lord Blackburn in Erlanger v. New Sombrero Co. (1878) 3 App. Cas. 1218, [1874-80] All E.R. Rep. 271. But the case law does not seem to have been fully worked out, at all events in the field of hire-purchase law. It is a commonplace that dealers assign their hire purchase contracts to finance companies, but it does not appear to have been decided whether such an assignment will bar a hire-purchaser's right to rescind for misrepresentation.

(d) Rescission is not permitted if restitution is impossible. The Court looks for substantial restitution; it seeks to do what is just in practice. Spence v. Crawford [1939] 3 All E.R. 271.

(e) There is some uncertainty where the contract has been completed. On the sale of land, it is settled that a party misled cannot, after completion, rescind for innocent misrepresentation. This notion regarding innocent misrepresentation has been applied to a sale of shares (Seddon v. North Eastern Salt Co. Ltd. [1905] 1 Ch. 326), [1904-07] All E.R. Rep. 817. Moreover, we must emphasize that our Court of Appeal has held that a contract for the sale of goods cannot be rescinded for innocent misrepresentation (Riddiford v. Warren) (1901) 20 N.Z.L.R. 572).

Criticism of Existing Law

The summary we have attempted enables us to state the criticisms most often directed against the rules there outlined. These are -

(a) The rules are too complex and correspondingly difficult to apply in practice. Especially is this so in relation to the representation-term distinction, and the condition-warranty distinction. Some writers assert that they are useless for commercial purposes. No two lawyers can begin to agree upon the classification of any given statement. Cynics remark that Judges themselves must choose the remedy they consider just then find an appropriate legal basis for it.

(b) Because of the confused state of the law, it is difficult for an innocent party to decide whether he has an option to rescind or affirm, and he tends to and is often advised to, equivocate (e.g. Schwarcz v. Ede discussed in paragraph below).

(c) Rescission for innocent misrepresentation is not always available. Where it is available the party misled is constrained either to sacrifice the bargain or to go without a remedy. This is a hard choice for him and in many cases some financial adjustment would bring about a more proper settlement. In other cases rescission will impose a liability upon the misleading party which is altogether disproportionate to the importance of his assertion. This would be avoided by the payment of suitable compensation. Where rescission is not available the situation is even less satisfactory.

(d) Especially in cases of sale of goods, but in other cases too, the principles upon which a party is entitled to cancel for breach of a term of the contract are vague and unreal.

(e) The unrestricted liberty to "contract out" preserved by the Suisse case has been abused and is open to abuse by standard printed clauses, notably in hire purchase contracts (e.g. Lowe v. Lombank Ltd. [1960] 1 W.L.R. 196, [1960] 1 All E.R. 611).

The restrictions on the right to rescind for innocent misrepresentation are said to be too severe, especially in loss of the right after completion.

There are many cases exemplifying these criticisms. During our investigations, it so happened that a case which aptly illustrated them arose and some of us attended the hearing of the appellate stage of this litigation in the Supreme Court. We refer to Schwarcz v. Ede (Plaint No. 7893/64 in the Magistrate's Court, Wellington; M. 15/65 Supreme Court Wellington). Mr. Schwarcz desired to buy a house. A land agent took him to property which the agent had been instructed to sell. This property had legal access from a street, but this access was very steep. Mr. Schwarcz and the agent approached the house by another route, an easy path leading to a group of houses including the house under inspection. Before they entered the house, the agent told Mr. Schwarcz that this path was vested in the City Council as a public path. After the inspection, Mr. Schwarcz decided to purchase the property. He signed a written offer to purchase which described the property by its legal description without reference to the path. The offer provided -

> "4. I admit that I have purchased the said property in reliance upon my own judgment and not upon any representation or warranty made by you or your agent."

The offer was accepted. A few days later Mr. Schwarcz ascertained that in fact part of the path was the property of a Mr. Brennan, a neighbour, who had allowed the vendor and others to use it. Mr. Schwarcz immediately informed the agent, who suggested that Mr. Schwarcz should try to obtain an easment of right of way from Mr. Brennan. He tried, but without success. Ultimately Mr. Schwarcz's solicitors informed the vendor that Mr. Schwarcz would not complete unless he could obtain a right of way over the path. The vendor's solicitors replied by calling on Mr. Schwarcz to complete "the contract", fixing a time for settlement and making time of the essence. Mr. Schwarcz did not complete. The vendor kept the deposit of £400, and resold the property for £100 more than the price agreed by Mr. Schwarcz.

Mr. Schwarcz sued for the return of his deposit. He argued that there was a fraudulent misrepresentation by the agent; alternatively that the agent's statement about the path was a condition of the contract, submitting that clause 4 did not apply to conditions. On these submissions he claimed to recover damages. Vendor argued that there was no more than innocent misrepresentation, but that Schwarcz had lost the right to rescind, even if available in the face of clause 4, by his delay during his negotiations with Mr. Brennan. The learned Magistrate held that there was an innocent misrepresentation but that Mr. Schwarcz had not exercised his right to rescind, and that he had lost this right by not electing to rescind prior to the time for settlement. "The Plaintiff (by requiring the vendor to provide the right of way) was and had been contending for something to which he was not entitled by the contract, and in order to maintain that position he elected not to exercise a right of rescission arising out of misrepresentation". His Worship volunteered but rejected the suggestion that the agent's statement constituted a collateral contract. Finally His Worship observed that "At the time of the conversation the parties had not turned their minds to a contractual relationship and that when they did reach the stage at which a contract was contemplated nothing was said upon this subject." He gave judgment for the defendant.

Mr. Schwarcz appealed to the Supreme Court. This Court held that there was an innocent misrepresentation and that Mr. Schwarcz had rescinded by stating that he would not complete unless the right of way was forthcoming from Mr. Brennan. His Honour then turned to clause 4. He held that in the present case there was misdescription substantial and material which rendered the subject matter of the contract different from that which by virtue of the representation the purchaser was entitled to expect. "The representation, in my opinion, amounts to a condition. It is more than a warranty for which damages would be reasonable compensation. Clause 4 in the contract protects the vendor only against misrepresentation and breach of warranty ... I do not think the expression 'representation or warranty' is sufficient to cover the present misrepresentation, which in substance amounts to a misdescription". The appeal was allowed, and Mr. Schwarcz got his deposit back, if anything remained after meeting his costs.

From these simple facts, see how the law constrained the Courts to run through the gamut of classification from a statement without contractual intention through misrepresentation both innocent and fraudulent, in passing to ruminate upon the concept of a collateral contract, to the result that there was a misdescription amounting to a breach of condition.

FOOTNOTES

1. Examples include The Insurance Act, R.S.A. 1970, c.187; The Exemptions Act, R.S.A. 1970, c.129; The Seizure Act, R.S.A. 1970, c.338; The Execution Creditors Act, R.S.A. 1970, c.128; The Conditional Sales Act, R.S.A. 1970, c.61.

2. The Credit and Loan Agreements Act, R.S.A. 1970, c.73; The Direct Sales Cancellation Act, R.S.A. 1970, c.110; Amendments to the Conditional Sales Act, ss. 18.1 and 19, S.A. 1971, c.18, s.4, S.A. 1971, c.96, s.2 and S.A. 1972, c.89, s.4.

3. The Unfair Trade Practices Act, S.A. 1975, c.33.

4. Trade Practices Act, S.B.C. 1974, c.96.

5. The Business Practices Act, 1974, S.O. 1974, c.131.

6. Amendments to the Combines Investigation Act, 1975, Bill C-2, which came into effect January 1, 1976.

7. S.M. Waddams, Strict Liability, Warranties and The Sale of Goods (1969), 19 U. of T. Law J. 157.

8. This suggestion comes from Professor Jacob Ziegel and other members of the Sale of Goods Research Team, Ontario Law Reform Commission.

9. See the Minutes of Proceedings of the Association of Superintendents of Insurance, 1974.

9a. For an example of an elaborate enumeration of exemptions in the legislation itself, see The Direct Sales Act, R.S. Nfld. 1970, c.96, as amended, s.6(2).

10. Hire Purchase Act 1965, ss. 2,4 where the limit is £2,000.

11. R.S.M. 1970, c. C200, s.1(t)(v) "retail sale" of goods or of services or of both means any contract of sale of goods or services or both made by a seller in the course of business except...

(v) a sale in which the cash price of the goods or services or both exceeds seven thousand, five hundred dollars.

12. The Law Commission and the Scottish Law Commission, Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893, at p. 28. (Hereafter referred to as The English & Scottish Law Commissions Report).

13. E.g. Consumer Protection Act, S.B.C. 1967, c.14 as amended, s.4; The Consumer Protection Act, R.S.M. 1970, c. C200, as amended, s.1(t); Direct Sellers Act, R.S.N.B. 1973, c. D-10, s.3(2); The Cost of Credit Disclosures Act, R.S.N.B. 1973, c. C-28, s. 1; The Newfoundland Consumer Protection Act, R.S. Nfld. 1970, c.256, s.2; The Consumer Protection Act, R.S.N.S. 1967, c.53, s.1; The Direct Seller's Licensing and Regulation Act, S.N.S. 1975, c.9, s.6; The Consumer Protection Act, R.S.O. 1970, c.82 as amended, s.44a; The Consumer Protection Act, R.S.P.E.I. 1974, c. C-17, s.2; The Consumer Protection Act, S.Q. 1971, c.74, s.1; Cost of Credit Disclosure Act, S.S. 1967, c.85, as amended, s.2(2).

14. Supply of Goods (Implied Terms) Act 1973, s.4, amending s.55(7) of the Sale of Goods Act 1893.

15. For example, s.44a. of the Ontario Consumer Protection Act, R.S.O. 1970, c.82 and s.58(1) of the Manitoba Consumer Protection Act R.S.M. 1970, c. C200 which make the implied conditions of quality found in the Sale of Goods Act mandatory in a consumer sale. These provisions apply, however, only to the sale of goods and not to services.

16. s.4

17. E.g. The Ontario Consumer Protection Act, R.S.O. 1970, c.82, as amended, s.44a.

18. E.g. Ibid., s.1(c). Manitoba Consumer Protection Act, R.S.M. 1970,c. C200, as amended, s.1(t)(iv).

19. Robinson v. Graves, [1935] 1 K.B. 579 (C.A.)

20. Philip Head & Sons Ltd. v. Snowfronts Ltd., [1970] 1 Lloyd's Rep. 140 (Q.B. Div.)

21. Francis v. Cockrell (1870), L.R. 5 Q.B. 501, 503.

22. Young & Marten Ltd. v. McManus Childs Ltd., [1969] 1 A.C. 454 (H.L.) holding that at common law there were similar implied conditions as to quality applicable to the materials component of a contract for work, labour and materials as those in the Sale of Goods Act.

23. Contrast s.5(2) of the Alberta Direct Sales Cancellation Act(which has a formal requirement of writing for some sales of both goods and services)and s. 18.1 of the Alberta Conditional Sales Act with s.19 of the Alberta Conditional Sales Act and s.7 of the Sale of Goods Act.

24. Robinson v. Graves, supra note 19, misinterpreting Lee v. Griffin, 1 B. & S. 272, 30 L.J. (Q.B.) 252. In Canada contrast Ross v. Sadofsky,[1943] 1 D.L.R. 334 with Preload Co. v. City of Regina (1958), 13 D.L.R. (2d) 304 (Sask. C.A.), affd. in the S.C.C., [1959] S.C.R. 801.

25. Such terms as rejection, delivery, passing of property and risk, of merchantable quality do not seem apt when applied to pure service contracts or the labour component of a contract for labour and materials.

26. [1895] A.C. 481 (H.L.)

27. Neilson v. Atlantic Rentals Ltd. (1974), 8 N.B.R. (2d) 594 (App. Div.); Star Express Merchandising Company v. V. G. McGrath Pty. Ltd., [1959] V.R. 443 (C.A.).

28. Halsbury's Law of England, 2nd ed., vol. 2, "Bailment" at para. 237 citing Readhead v. Midland Rail Co. (1869), L.R. 4 Q.B. 379 and Christie v. Griggs (1809), 2 Camp. 79.

29. See the discussion in Waddams, Strict Liability, Warranties and the Sale of Goods (1969), 19 U. of T. Law J. 157.

30. [1953] 4 D.L.R. 16 (Ont. H.C.).

31. (1958), 14 D.L.R. (2d) 297 (N.S.S.C.).

32. The leading case is Couturier v. Hastie (1856), 5 H.L. Cas. 673. See Cheshire & Fifoot, Law of Contract, 8th ed. 1972, p. 204; Anson's Law of Contract (23rd. ed, ed. Guest, 1969), p. 264; G.H. Treitel, The Law of Contract, 3rd ed., 1970, p. 221.

33. The suggestion by Chalmer is that the section is based on Elphick v. Barnes (1880), 5 C.P.D. 321 (death of a horse delivered on sale or return). For a discussion of frustration more generally see Cheshire & Fifoot, supra note 32, p. 540, Anson's Law of Contract, supra note 32, p. 453 and Treitel, supra note 32, p. 741.

34. See e.g. McRae v. Commonwealth Disposals Commission (1950), 84 C.L.R. 377 (Aust. H.C.) where the plaintiff incurred substantial out-of-pocket expenses in reliance on the defendant's representation that there was a ship to salvage.

35. See Ontario Law Reform Commission, Report on Consumer Warranties and Guarantees in the Sale of Goods, 1972, pp. 28-31; First Report of the Consumer Protection Project, Law Reform Division, New Brunswick Department of Justice, 1974, pp. 9-58. (Hereafter referred to as the O.L.R.C. Report and the N.B. Report respectively).

36. The case most often cited in connection with "sales puffery" in fact held the seller bound by his representations. Carlill v. Carbolic Smoke Ball Company, [1893] 1 Q.B. 256 (C.A.).

37. See e.g. the argument of Trebilcock, Private Law Remedies for Misleading advertising (1972), 22 U. T. Law J. 1, 4.

38. R v. Imperial Tobacco Products Ltd. (1972), 22 D. L. R. (3d) 62 (Alta. S.C., App. Div.) affirming (1970), 64 C.P.R. 3 (S.C.).

39. [1913] A.C. 30 (H.L.).

40. O.L.R.C. Report, p.29, N.B. Report, p. 47. See also Quebec Consumer Protection Act, S.Q. 1971, c.74 ss. 60 & 62, Manitoba Consumer Protection Act, R.S.M. 1970, c. C200, s.58(8), and the Saskatchewan White Paper entitled Proposal for a Consumer Products Warranties Bill, 1975, s.5(1).
The distinction discussed in the text also seems to have been rejected in the Alberta Unfair Trade Practices Act, S.A. 1975, c.33, s.11, which allows damages for deceptive or misleading representations.

41. O.L.R.C. Report, p. 29.

42. R.S.M. 1970, c.C200, s.58(8).

43. The Statute of Frauds provision of the Sale of Goods Act, s.7 has been discussed above at p. 49.

44. For a recent defence of these doctrines see J. E. Cote, An Introduction To The Law of Contract, 1974, pp. 55 ff. and 69 ff.

45. In general see Cheshire and Fifoot, Law of Contract, 8th ed. 1972, pp. 563-568.

46. In this, Sales law has departed from general contract law. For two recent English cases illustrating an attempt to return to the general contract law of classifying by the magnitude of the breach see Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26; [1962], All E.R. 474 (C.A.) and Cehave N.V. v. Bremer Handelgesellschaft m.b.H., [1975] 3 W.L.R. 447 (C.A.).

47. O.L.R.C. Report, p. 31; N.B. Report, p. 126.

48. See F.T.C. News Summary No. 2 - 1972.

49. O.L.R.C. Report, p. 30, N.B. Report, p. 21.

50. See Lord Denning in Ingham v. Emes, [1955] 2 All. E.R. 740, 742 (C.A.) and Lord Pearce in Kendall v. Lillico, [1968] 2 All E.R. 444, 487 (H.L.).

51. Trebilcock, supra note 37, 6 citing Pemberton v. Dean (1902), 88 Minn 60, 92 N.W. 478; Cochran v. McDonald (1945), 23 Wash. 2d 348, 161 P. 2d 305; Dobbin v. Pacific Coast Coal Co. (1946), 25 Wash. 2d 190, 170 P. 2d 642.

52. The Consumer Protection Act, S.Q. 1971, c 74,

60. Any goods furnished by a merchant must comply with the description of them given in the contracts and in catalogues, circulars or other means of advertising.

62. Every warranty in a merchant's advertising respecting goods shall be deemed to form part of the contract of sale respecting such goods.

53. s. 2-313. (1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

54. The leading case in relation to the attempt by financiers to insulate themselves by the use of promissory notes is Range v. Belvedere Finance Corp. (1969), 5 D.L.R. (3d) 257 (S.C.C.).

55. An Act to amend the Bills of Exchange Act, R.S.C. 1970, 1st. Supp., c.4 adding a new Part V Consumer Bills and Notes to the Bills of Exchange Act and The Conditional Sales Act, R.S.A. 1970, c.61 (as amended by S.A. 1971, c.18, s.4) s. 18.1.

56. American periodical literature abounds. See for example, D. H. Maffy and Alex C. McDonald, The Tripartite Credit Card Transaction: A Legal Infant (1960), 48 Calif. L. Rev. 459. and E.E. Bergsten, Credit Cards: A Prelude to the Cashless Society (1967), 8 B.C. Ind. & Com. L.R. 485.

57. "Misrepresentation and Breach of Contract", Report of the Contracts and Commercial Law Reform Committee, New Zealand, 1967 at p. .

58. Fridman, Sale of Goods in Canada, 1973, p. 101.

59. The English & Scottish Law Commissions Report, p. 4 and The Twelfth Report of the Law Reform Committee (Transfer of Title to Chattels), 1966, Cmnd. 2958, para. 36.

60. Rowland v. Divall, [1923] 2 K.B. 500.

61. As well as Rowland v. Divall see McNeill v. Associated Car Markets Ltd. (1962), 35 D.L.R. (2d) 581 (B.C.C.A.).

62. Butterworth v. Kingsway Motors Ltd., [1954] 1 W.L.R. 1286.

63. O.L.R.C. Report, p. 33; N.B. Report, p. 60.

64. The English and Scottish Law Commissions Report, p. 5, para. 17 and 18.

65. O.L.R.C. Report, Chapt. 3.

66. N.B. Report, p. 66.

67. Several Canadian Provinces already prohibit the exclusion of s.15 in Consumer transactions, including Ontario, The Consumer Protection Act, R.S.O. 1970, c.82, as amended, s. 44a; Manitoba, The Consumer Protection Act, R.S.M. 1970, c. C200, as amended, s. 58; Saskatchewan, The Conditional Sales Act, R.S.S. 1965 c. 393, ss. 25, 28; British Columbia, Sale of Goods Act, R.S.B.C. c. 344, as amended, s. 21A.

68. See e.g. P. S. Atiyah, The Sale of Goods, 4th ed. 1971, p. 66.

69. Benjamin's Sale of Goods, 1974, ed. Guest, p. 341.

70. The most often cited attempt to illustrate this distinction is the passage from the judgment of Channell, J. in Varley v. Whipp, [1900] 1 Q.B. 513 (C.A.).

71. The most extreme example of this is Arcos Ltd. v. E. A. Ronassen & Sons, [1933] A.C. 470 (H.L.).

72. New Hanburg Mfg. Co. v. Webb (1911), 23 O.L.R. 44 (C.A.).

73. Supra note 70.

74. (1924), 55 O.L.R. 667, 677 (C.A.).

75. [1971] 1 All. E.R. 847.

76. O.L.R.C. Report, p. 34.

77. O.L.R.C. Report, p. 32.

78. Supra note 59, p. 10.

79. The Saskatchewan Proposed Consumer Products Warranties Bill has dropped the Saskatchewan equivalent of s. 17(1).

80. See Benjamin's Sale of Goods, supra note 69, pp. 363-374; Atiyah, supra note 68, pp. 86-96; Fridman, supra note 58, pp. 176-193.

81 Supra note 59, pp. 11-14 and 48-49.

82. O.L.R.C. Report, pp. 35-36.

83. N.B. Report, pp. 90-96.

84. See s. 6(5) of the Proposed Consumer Products Warranties Bill.

85. Final Report of the (Molony) Committee on Consumer Protection, 1962, Cmnd. 1782, para. 447-449.

86. Supra note 59, p. 14, para. 39.

87. Supra note 69, p. 352.

88. Baldry v. Marshall, Ltd., [1925] 1 K.B. 260 (C.A.).

89. Benjamin's Sale of Goods, supra note 69, pp. 353-363; Atiyah, supra note 68, pp. 75-85; Fridman supra note 58, pp. 194-205.

90. Kendall v. Lillico (Hardwick Game Farm case), [1968] 3 W.L.R. 110 (H.L.); Christopher Hill Ltd. v. Ashington Piggeries, [1971] 1 All. E.R. 847 (H.L.); B.S. Brown & Sons Ltd. v. Craiks Ltd., [1970] 1 W.L.R. 752 (H.L. (Sc.)).

91. Consumer Protection Act, R.S.M. 1970, c. C200, as amended, s. 58(1)(e).

92. The Conditional Sales Act, R.S.S. 1965, c.393, s. 25(1)(d).

93. Supply of Goods (Implied Terms) Act 1973, s. 3.

94. Supra note 90.

95. The English & Scottish Law Commissions Report, p. 17.

96. N.B. Report, p. 90.

97. Such an express reservation may be necessary to qualify a blanket prohibition against disclaimer clauses.

98. English and Scottish Law Commissions Report, Chapt. V; O.L.R.C. Report, Chapt. 3; N.B. Report, Chapt. IV.

99. N.B. Report, p. 142.

100. S. M. Waddams, Products Liability, 1974. The Law Commission, Working Paper No. 64, and the Scottish Law Commission, Working Paper No. 20. Liability for Defective Products, 1975.

101. Accident Compensation Act 1972, N.Z.Stat. 1972, No. 43; Accident Compensation Amendment Act (2) 1973, N.Z. Stat. 1973, No. 113. These statutes resulted from the Report of Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand, 1967. (The Woodhouse Report). See G.W.R. Palmer, Abolishing The Personal Injury Tort System, The New Zealand Experience, 9 Alta. L.R. 169; D. R. Harris, Accident Compensation in New Zealand: A Comprehensive Insurance System (1974), 37 Mod. Law Rev. 361.

102. Warranty: This product will be replaced if defective in manufacture, labelling or packaging. Except for such replacement, this prcduct is sold without other warranty or liability ....

103. **NOTICE TO BUYER - STOKES WARRANTY AND CONDITIONS OF SALE.** Stokes Seeds Ltd., or Stokes Seeds Inc. limits its warranty to the vitality and purity of its garden seed to the full amount of the purchase price. It is recognized that a mistake can be made, and it is therefore mutually agreed that in no case shall Stokes Seeds Ltd., or Stokes Seeds Inc., be liable for more than the amount actually paid for the seeds. By acceptance of the seeds, the buyer acknowledges that the limitations and disclaimers herein described are conditions of sale, and that they constitute the entire agreement between parties regarding warranty or any other liability. Our prices are based on this warranty and limited liability, and would be much higher if further liability coverage is required. **If this is not satisfactory, please return at once and we will refund your money.**

104. (1854), 9 Exch. 341, 156 E. R. 145. The codification of this rule in the Act is discussed below in the sections on remedies.

105. Discussed in O.L.R.C. Report, pp. 50-53.

106. For examples, see U.C.C. s. 2-316.

Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

and Supply of Goods (Implied Terms) Act 1973, s.4(4) and (5):

(4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.

(5) In determining for the purposes of subsection (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to

all the circumstances of the case and in particular to the following matters -

(a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;

(b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term exempts from all or any of the provisions of section 18, 14 or 15 of this Act if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed, or adapted to the special order of the buyer.

107. 88 Stat. 2183 (1975).

108. See s. 20(b) of the Proposed Consumer Products Warranties Bill.

109. Report of The Royal Commission on Price Spreads, 1935, Canada.

110. Stat. Cal. 1970, c. 1333 adding Tille 1.7, sec. 1790-1792 to the California Civil Code.

111. O.L.R.C. Report, p. 40.

112. See s. 6(7) of the Proposed Consumer Products Warranties Bill.

113. N.B. Report, pp. 84-87.

114. Supra note 67.

115. Benjamin's Sale of Goods, supra note 69, pp. 465-468; Trebilcock, Private Law Remedies for Misleading Advertising (1972), 22 U. of T. Law J. 1, 6. Atiyah supra note 68, pp. 111-113.

116. O.L.R.C. Report, p. 65.

117. See Cheshire & Fifoot supra note 32, p. 428 et. seq.

118. Wedderburn, [1959] Camb. L. J. 58.

119. Moran et al. v. Pyle National (Canada) Ltd., [1974] 2 W.W.R. 586 (S.C.C.). See the comment by W. H. Hurlburt, (1974), 52 Can. Bar Rev. 470.

120. In addition this would have the disadvantage of placing the initiative always on the consumer. He would for example have to pay the seller and then seek recourse against the manufacturer. See the discussion under the section above on the rights of assignees.

121. O.L.R.C. Report, p. 73.

122. Id., p. 72.

123. Id., p. 74.

124. Compare Hartley v. Hymans, [1920] 3 K.B. 475, 484 with Allen v. Danforth Motors Ltd. (1957), 12 D.L.R. (2d) 572 (Ont. C.A.).

125. Benjamin's Sale of Goods, supra note 69, chapt. 5 & 6; Atiyah, supra note 68, chapt. 17 & 18; Fridman, supra note 58, chapt. 4.

126. s. 21.

127. Rule 1, s. 21.

128. Rule 5(1), s. 21. See e.g. Caradoc Nurseries Ltd. v. Marsh (1959), 19 D.L.R. (2d) 491 (Ont. C.A.).

129. B. G. Hansen, Inherent Vice and Contracts for the Sale of Goods (1975), 2 Dal. L. J. 168.

130. There will be a much greater tendency for the seller to tell the buyer to look to the carrier if the seller has already been paid.

131. This coupled with the recommendation in the next section might pose a problem for consumers who pay for goods before delivery. They may have no protection against the seller's creditors in the event of his bankruptcy. If this is a practical problem it should be attacked directly not through artificial rules about the location of title.

132. R.S.A. 1970, c. 132, s. 3.

133. R.S.A. 1970, c. 61, as amended.

134. [1974] 1 All. E.R. 954.

135. [1927] 1 Ch, 606.

136. s. 2-502. Buyer's Right to Goods on Seller's Insolvency.
(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender or any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

137. See Comment by J. M. MacIntyre (1969), 47 Can. Bar Rev. 644.

138. Justice Out of Reach, H.M.S.O. July 1970, a study prepared by the U.K. Consumer Council; Ison, Small Claims (1972), 35 Mod. Law Rev. 18.

139. O.L.R.C. Report, p. 41; N.B. Report, Chapt. III.

140. These distortions are discussed under the following section on The Buyer's Right to Reject under Existing Law.

141. U.C.C. s. 2-508. There is perhaps a limited right to cure recognized in the present law in the sale of unascertained goods by description. See Benjamin's Sale of Goods, supra note 69, p. 878.

142. O.L.R.C. Report, p. 43.

143. N.B. Report, p. 133.

144. Uniform Law on the International Sale of Goods Article 37 and 44. See now Articles 21 and 29 of the redrafted U.L.I.S. approved by the Working Group of UNCITRAL at its Sixth Session, January 27 - February 7, 1975, U.N. Document A/CN.9/100.

Article 21

If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or

remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 55.

Article 29

(1) The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

(2) If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision.

145. Benjamin's Sale of Goods, supra note 69, pp. 380-407; Atiyah, supra note 68, Chapt. 26 & 27; Report of the New Zealand Contracts and Commercial Law Reform Committee on Misrepresentations and Breach of Contract.

146. Leaf v. International Galleries, [1950] 2 K.B. 86; [1950] 1 All. E.R. 693 (C.A.).

147. See e.g. Cheshire & Fifoot, supra note 32, p. 577 et seq.

148. I.B.M. v. Sheherban, [1925] 1 D.L.R. 864 (Sask. C.A.)

149. Supra note 46.

150. O.L.R.C. Report, p. 31

151. N.B. Report, p. 133.

152. s. 11 of the Proposed Consumer Products Warranties Bill.

153. s. 14(4)

154. s. 21, Rule 1.

155. Hardy & Co., Ltd. v. Hillerns & Fowler, [1923] 2 K.B. 490 (C.A.).

156. The Misrepresentation Act 1967, s.4(2).

157. Benjamin's Sale of Goods, supra note 69, pp. 396-399.

158. J. L. Lyons & Co. Ltd. v. May & Baker, Ltd., [1923] L K.B. 685.

159. (1854), 9 Exch. 341; 23 L.J. Ex. 179.

160. Koufos v. Czarnikow, [1969] 1 A.C. 350 [1967] 3 All. E.R. 686 (H.L.).

161. Fuller and Perdue, The Reliance Interest in Contract Damages (1936), 46 Yale Law J. 52.

162. Atiyah, Accidents, Compensation and the Law, 1970; Calabresi, The Cost of Accidents, 1970; Ison, The Forensic Lottery, 1969.

163. Ibid.

164. Supra note 101.

165. [1949] 1 All. E. R. 997 (C.A.).

166. D.W.M. Waters, The Concept of Market in the Sale of Goods (1958), 36 Can. Bar Rev. 360.

167. Benjamin's Sale of Goods, supra note 69, p. 673.

168. Atujah, supra note 68, Chapt. 24 & 25.

169. Ibid., p. 242.

170. R.S.A. 1970 c.61 (as amended), s. 19.

171. Atiyah, supra note 68, p. 263.

172. s. 21, Rule 1.