

W 395 WEEKS, C. L. The Consumer Guarantees Act 1993.

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THE CONSUMER GUARANTEES ACT 1993:  
Has this Act changed the extent of  
manufacturer's liability for defective products?

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## I INTRODUCTION

Manufacturers of defective products under product liability law can be held liable for the damage caused by their products. The Consumer Guarantees Act 1993 was enacted to improve the protection provided to 'injured' consumers, even if only pure economic loss has been incurred.

The success of the Consumer Guarantees Act 1993 is dependent on whether the law prior to its enactment is merely codified, or extended to reach the level of protection provided in other jurisdictions by providing new rights of redress to the consumer. The success of the Act in reaching this aim can be assessed in two ways. Firstly, by comparing the position of the consumer prior to the Act coming into force to their position under the Act, it can be determined whether or not any deficiencies have been eliminated. Secondly, the Act can be assessed against the rationale that underpins consumer protection law. Boslaugh J<sup>1</sup> outlined this rationale as being protecting and compensating the consumer, risk distribution and deterring the manufacture of defective products.

At first sight the Act appears to impose strict liability onto manufacturers, eliminating the need to prove negligence, thus increasing the likelihood of receiving compensation for any loss suffered. Building upon this initial impression, the key issue is whether the Act eases the evidential burden in other ways or provides other methods of seeking redress, thereby providing consumers with a level of protection comparable to that offered in other jurisdictions.

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<sup>1</sup>*National Crane Corporation v Ohio Steel Tube Co* (1983) 332 NW (2d) 39, 44.



## II THE LAW BEFORE THE CONSUMER GUARANTEES ACT 1993

Prior to the Consumer Guarantees Act 1993 being enacted, New Zealand consumer protection law involved both common law and statutory remedies. While retail purchasers could rely on their sale contracts, people receiving gifts or seeking redress from the manufacturer had to rely on the tort of negligence where no contractual privity is required.

### A *The Law of Contract*

#### 1 *The doctrine of privity*

The application of the privity doctrine to a purchaser seeking redress from the manufacturer was highlighted in *Cranston v Bay Shoe Stores Ltd.*<sup>2</sup> The Cranstons had purchased a pair of red moccasins from the Moera shoe store for their daughter to wear inside the house. The shoes, when worn at home for the first time, left irremovable red mark on the carpet. It was found that the colour transfer was due to the defective manufacturing of the splits, from which the moccasins were made. Graham J stated that "there is no privity of contract between the purchaser ... and the manufacturers."<sup>3</sup> Thus the only contractual remedy available to the Cranstons is against the retailer, not the manufacturer.

#### 2 *Contracts (Privity) Act 1982*

The Contracts (Privity) Act 1982 modifies the privity doctrine by allowing a third party to enforce a contract<sup>4</sup>, when a promise confers a benefit onto that party<sup>5</sup>. As the Act is not focused on protecting consumers from the damage caused by defective goods, a consumer could encounter several problems if S4 is relied upon when seeking redress from a manufacturer.

Firstly, there must be a promise, included in the supply contract, stating the manufacturer will remedy any defect found in the goods. This right of redress is generally given to the retailer, as the final consumer is unknown, to limit the number of possible claimants and for commercial convenience. As the promise

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<sup>2</sup>(1981) 1 DCR 161.

<sup>3</sup>Above n2, 164.

<sup>4</sup>Section 8 of the Contracts (Privity) Act 1982.

<sup>5</sup>Section 4 of the Contracts (Privity) Act 1982.



is specific to the retailer, it is likely that no promise exists in the supply contract in respect of the consumer.

Secondly, s4<sup>6</sup> requires the beneficiary, the consumer of the defective good, to be designated in the contract either as an individual or as a class. The leading cases, *Karangahape Road International Village*<sup>7</sup> and *Field v Fitton*<sup>8</sup>, both considered contracts for the sale of land to "X or nominee". The issue in both cases related to whether "nominee" designated a third party as the contract's beneficiary. In both instances, the court felt that it was not specific enough to allow the beneficiary to be identified.

At the time the supply contract was entered into the actual consumer would not be identifiable as an individual. However, if the promise was made to the group of final consumers or retail purchasers, the actual consumer would be part of a class. However following the reasoning in *Karangahape Road*, neither of these classes would allow the beneficiary, the injured consumer, to be identified specifically, and so no beneficiary would be designated in the contract.

Thirdly, the proviso in s4<sup>9</sup> would protect a manufacturer even if the supply contract did include a promise and identify a beneficiary. Chilwell J in *Karangahape Road* indicated that the contract merely concerned the sale and purchase of realty, and no enforceable obligation was intended to be created, thus the proviso applied<sup>10</sup>. Similarly, the contract between a manufacturer and a retailer is merely for the supply of goods and not intended to create an obligation which is enforceable by a third party.

Due to these problems, the Contracts (Privity) Act 1982 provides no help to the consumer who is seeking redress from the defective product's manufacturer as no obligation exists under s4<sup>11</sup>.

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<sup>6</sup>Above n5.

<sup>7</sup>*Karangahape Road International Village Ltd v Holloway* [1989] 1 NZLR 83.

<sup>8</sup>[1988] 1 NZLR 482.

<sup>9</sup>Above n5.

<sup>10</sup>Above n7, 104.

<sup>11</sup>Above n5.



### 3 Collateral contracts

One solution to the privity issue is to prove a collateral contract exists between the manufacturer and the purchaser. This contract arises when a manufacturer has made representations as to the quality or performance of their product, or has provided a written guarantee, which the purchaser relies upon when purchasing the product. Theoretically, consideration passes as part of the price paid is for these 'warranties', thus privity exists between the purchaser and the manufacturer.

This situation arose in *Murray v Sperry Rand Corporation*<sup>12</sup>. Murray had purchased a forage harvester manufactured by the defendants, relying on statements in a sales brochure concerning the products cutting capacity and also on personal representations made by the defendant's agent as to the validity of the statements. The cutting capacity never came reasonably close to the level indicated by the brochure. The court held, as Murray had relied on the statements, the statements amounted to a collateral warranty<sup>13</sup>. As the statements proved to be inaccurate, the manufacturer was liable for breaching the warranty.

A similar situation arose in *Shanklin Pier Ltd v Detel Products Ltd*<sup>14</sup>. Detel made representations to Shanklin about the quality of their paint and its seven to ten year life span. On this basis, Shanklin varied their contract with the contractors who were reconstructing their pier, who then purchased the paint. The paint lasted only three months. McNair J saw no reason why Shanklin should not be protected by a warranty of quality merely because they had directed a third party to purchase the paint for them. Thus damages were awarded to cover the cost of repainting the pier, based on this breached warranty.

The benefit of having a contractual remedy is that damages are awarded to place the injured party in the position they would have been in had the contract been properly executed. Thus the defective product will be repaired or replaced, or damages awarded to its purchase value.

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<sup>12</sup>(1979) 96 DLR (3d) 113.

<sup>13</sup>Above n 12, 122.

<sup>14</sup>[1951] 2 KB 854.



While this potentially solves the problems which the doctrine of privity causes for the purchaser of the product, it does not provide a remedy for the person who receives a defective product as a gift.

#### 4 Conclusion

Unless a collateral contract exists between a manufacturer and the consumer, due to the operation of the doctrine of privity a consumer has no contractual remedy against the manufacturer of a defective product. As Graham J indicated in *Cranston* "[b]etween them the liability, if any, must be in tort and the gist of the cause of action in negligence."<sup>15</sup>

#### B Negligence

Notwithstanding the lack of a contractual relationship, a consumer can successfully recover under the tort of negligence, for the damage caused by a defective product, from the manufacturer. However there are several issues which may arise under the tort.

##### 1 Duty of care

In *Donoghue v Stevenson*<sup>16</sup>, Lord Atkin indicated the basic duty owed by manufacturers to consumers<sup>17</sup>.

[A] manufacturer of products, which he sells in such a form as to show he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility for intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

The plaintiff, not the retail purchaser, had consumed most of the ginger beer when a decomposing snail was discovered in the bottle. Consequently, she suffered nervous shock and gastroenteritis. The court held the manufacturer owed a duty of care as it was impossible to perform an intermediate examination to identify any defects.

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<sup>15</sup>Above n2, 164.

<sup>16</sup>[1932] AC 562.

<sup>17</sup>Above n16, 599.



Following *Donoghue*, defective product litigation has confirmed and refined the duty owed by the manufacturer to consumers. For example, in *Rutherford v Attorney-General*<sup>18</sup> the court indicated there must be a reasonable expectation that the inspection will occur and provide an "adequate safeguard to persons who might otherwise suffer harm"<sup>19</sup>.

Rutherford had purchased the truck for \$1700 relying on the newly, but negligently, issued certificate of fitness to indicate the truck's roadworthiness. However the truck required repairs costing \$1000. Cooke J held that despite an intermediate examination being possible, a reasonable person would not carry out the examination as the certificate had only been issued the previous week. As there was no reasonable expectation that an inspection would occur, the Ministry of Transport owed a duty of care to the potential purchaser when issuing the certificate.

Generally the manufacturer owes a duty of care to the consumer, as there is no reasonable expectation of intermediate examination as the goods reach the consumer in the form they left the manufacturer, and injuries could foreseeably result from taking a lack of care.

## 2 Negligence

Negligence is either acting or omitting to act in a way a reasonable person would act in the circumstances<sup>20</sup>. For a consumer proving a manufacturer was actually negligent is nearly impossible in technology driven industries. However, The Privy Council in *Grant v Australian Knitting Mills Ltd*<sup>21</sup> held that "negligence is found as a matter of inference from the existence of the defects taken in connection with all known circumstances"<sup>22</sup>. In the case Grant had purchased underwear, manufactured by the defendants, containing excessive amounts of chemicals, which caused dermatitis to be suffered. From these facts and knowledge of the manufacturing process negligence was inferred.

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<sup>18</sup>[1976] 1 NZLR 403.

<sup>19</sup>Above n18, 412.

<sup>20</sup>See *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Ex 781; 156 ER 1047, 1049.

<sup>21</sup>[1936] AC 85.

<sup>22</sup>Above n21, 101.



By comparison *Evans v Triplex Safety Glass Co*<sup>23</sup> illustrates a situation where the manufacturer produced evidence to rebut the inference of negligence. Thirteen months after Evans had purchased a car, the safety glass windscreen shattered into tiny pieces for no apparent reason. The court held the defect was not due to the manufacturing process but occurred when the windscreen was fitted by the car manufacturer, an intervening third party. Thus, the defendant was not negligent as the product had left them free from any defects.

Therefore a manufacturer can rebut the inference of negligence by either showing that reasonable care was taken, or that an intervening third party caused the defect. However, as noted in *Hill v James Crowe (Cases) Ltd*<sup>24</sup>, a manufacturer may still be negligent despite having a good quality control system. Mr. Hill fell and was injured, when a James Crowe crate caved in while he was standing on it, loading his lorry. The court held the defendant was negligent, despite having a good system of work and supervision, as the injury was a foreseeable consequence of the manufacturer's bad workmanship.

Therefore a consumer may be able to prove negligence by inferences made on the facts of the case.

### 3 Causation

There must be a causal connection between the defective product and the damage incurred. For products which reach the consumer in the form which they left the manufacturer, the court in *Grant* felt that causation may be inferred based on a coincidence in time and place, and the absence of any other explanation.<sup>25</sup> In the case the dermatitis appeared after wearing the underwear for one day. As the plaintiff was not sensitive to wool, the only cause of the dermatitis was the excess chemicals left in the underwear. Causation was inferred by the court based on this evidence.

If causation is proved, the manufacturer may allege contributory negligence, for example the consumer may not have followed all the safety instructions and thus suffered more damage than would have been incurred had the instructions been followed. If the manufacturer proves the consumer was negligent, s3 of

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<sup>23</sup>[1936] 1 All ER 283.

<sup>24</sup>[1978] 1 All ER 812.

<sup>25</sup>Above n21, 96.



the Contributory Negligence Act 1947 indicates that the damages should be reduced in proportion to the damage caused by the consumer's own negligence.

Thus while causation may be inferred from the circumstances, a consumer's own negligence may reduce any awardable damages.

#### 4 *Remoteness*

The test for remoteness was identified in the "*Wagon Mound*"<sup>26</sup> as being whether the type of damage incurred was foreseeable. The "*Wagon Mound*" was being loaded with bunker oil, when some of the oil spilled into the bay. The plaintiffs, ship builders and repairers, upon seeing oil on the water stopped all welding work until they were informed that there was no danger as the oil was hard to ignite. However a fire broke out when some molten metal fell onto flammable material floating on the water. The Privy Council held that the type of damage was unforeseeable, due to the difficulties in igniting the oil, and so the *Wagon Mound*'s owners were not liable for the damage incurred.

For the consumer, remoteness will generally be satisfied as the defective product caused the damage. For example in *Grant* the dermatitis was a foreseeable result from the underwear containing excess chemicals.

#### 5 *Damage*

In New Zealand due to s14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992 no proceedings arising out of a "personal injury" are allowed to be brought in a New Zealand Court. Thus only property damage and consequential economic loss or pure economic loss are remediable under the tort of negligence.

The problem consumers face is that the decrease in the product's value, caused by the defect, is categorised as pure economic loss. The attitude taken to awarding damages for pure economic loss was illustrated in *Muirhead v Industrial Tank Specialists Ltd*<sup>27</sup>. The manufacturer, in the case, knew that the oxygen pumps were to be used for fish farming in England. However the

<sup>26</sup>*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd ("The Wagon Mound")* [1961] AC 388, 426.

<sup>27</sup>[1985] 3 All ER 580.



lobsters died from oxygen deprivation, as the pumps were set at the wrong voltage. The court awarded damages to the value of the lobsters, but not for the profits lost by not selling them at Christmas time. This latter form of damage is pure economic loss, generally only recoverable under contract law.

A slightly different position was taken by Cooke J in *Rutherford v Attorney-General*<sup>28</sup>.

It would seem capricious to allow a claim for possibly heavier damages if an accident ensued before discovery of the negligence, but to refuse recovery of the essential remedial costs when the purchaser has been lucky or alert enough to find out about the faults before meeting with an accident.

In *Rutherford*, the plaintiff was awarded damages to cover the cost of the repair work needed<sup>29</sup>.

Thus a consumer may be able to recover the cost of essential repairs from the manufacturer if they relied upon the manufacturer to provide a product which could be used safely, without performing the possible intermediate examination. However, except in these limited circumstances, a consumer will only be able to successfully claim damages for damage caused to other property and any consequential economic loss. This means the consumer is not fully compensated, under the tort of negligence, for all the loss incurred.

## 6 Limitation Act 1950

Under s4(1)(a) of the Limitation Act 1950, a consumer has six years from the time the action accrues to bring an action in the tort of negligence<sup>30</sup>. The question is from what date does the action accrue?

The recent Court of Appeal decision, *Invercargill City Council v Hamlin*<sup>31</sup>, concerned the City Council's liability for negligent foundation inspections. Seventeen years elapsed between the inspections and evidence of structural

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<sup>28</sup>Above n18, 413.

<sup>29</sup>The plaintiff had not claimed for any other form of damages, despite possibly having suffered a loss of profits while the truck was being repaired.

<sup>30</sup>The same six year time limitation applies in contract, under s4(1)(a) of the Limitation Act 1950.

<sup>31</sup>[1994] 3 NZLR 513.



defects. The court decided that the action accrued, not from when the damage actually occurred<sup>32</sup>, but from when the defect became discoverable<sup>33</sup>.

On the basis of *Hamlin*, a consumer will not be disadvantaged by the limitation period as it begins when the defect could have reasonably been discovered, not from when the product is manufactured or purchased.

## 7 Disclaimers

A manufacturer may include, with their product, a disclaimer of liability under the tort of negligence. *Shipbuilders Ltd. v Benson*<sup>34</sup> illustrates the effect of a disclaimer. Benson was storing his boat on the defendant's premises, when a fire occurred and the boat was damaged. At the premises a sign stated "Store at Own Risk". The court held the sign disclaimed liability under the tort of negligence, and therefore no duty of care was owed to Benson.

Similarly a manufacturer may be protected by a disclaimer, as long as the purchaser should reasonably have known of the disclaimer at the time of purchase. If the purchaser did not know of the disclaimer when buying the good, it could be argued that it did not form a term in the contract of sale, and so may not be able to be used as a 'defence' to an action in negligence.

## 8 Conclusion

Despite the many issues involved, a consumer can successfully recover any loss suffered, due to a product being defective, from the manufacturer. Liability may be imposed on the manufacturer based on inferences made on the facts.

However, the manufacturer may be able to avoid liability in two ways. Firstly, the manufacturer can produce evidence to rebut any inferences made to prove the elements of a negligence action. Secondly, the manufacturer may have included a disclaimer with their product. If the manufacturer successfully avoids liability the consumer will have to rely on the contract of sale with the retailer to recover damages for any loss incurred.

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<sup>32</sup>The House of Lords in *Pirelli General Cable Works v Oscar Faber & Partners* [1983] 2 AC 1 decided that the action accrues from the date on which the damage occurred. On the facts of *Hamlin* this would be when the foundations were inspected and so the action would have been barred by the Limitation Act 1950.

<sup>33</sup>Above n31, 523.

<sup>34</sup>[1992] 3 NZLR 549.



C *Sale of Goods Act 1908*

Unless a consumer has purchased directly from the manufacturer, a manufacturer's liability is unaffected by the Sale of Goods Act 1908. However, consumers receive some protection under ss13 - 17<sup>35</sup> through the conditions and warranties implied into the sale agreement.

Section 13<sup>36</sup> draws a distinction between conditions and warranties, based on the contract's construction. However, a consumer may elect to treat a condition as a warranty<sup>37</sup>. The difference is that if a condition is breached then the contract is repudiated, whereas only damages can be claimed for a breached warranty.

Under s15<sup>38</sup> the goods must correspond to the description by which they were sold. A consumer could seek redress from the seller if a defective product was purchased, as the description would not be met.

Section 16<sup>39</sup> implies two important conditions about the quality and fitness of the goods. *Cranston v Bay Shoe Stores Ltd.*<sup>40</sup> illustrates a breach of both these conditions. The moccasins could not fulfil their sole purpose, of being worn indoors, due to the ease with which the colour could be transferred. Graham J held as the Cranstons had relied on the store's skill and judgement when purchasing the shoes, s16(a)<sup>41</sup> had been breached. It was also established that the moccasins were of "unmerchantable quality"<sup>42</sup>, as the defects were not apparent under an ordinary examination<sup>43</sup>, and made the shoes unusable for their ordinary purpose.

When determining merchantability it is necessary to consider the range of purposes for which the goods could reasonably be used. The courts have been uncertain as to whether the good needs to be fit for the whole range of purposes

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<sup>35</sup>Sections 13 - 17 of the Sale of Goods Act 1908.

<sup>36</sup>Section 13(2) of the Sale of Goods Act 1908.

<sup>37</sup>Section 13(1) of the Sale of Goods Act 1908.

<sup>38</sup>Section 15 of the Sale of Goods Act 1908.

<sup>39</sup>Section 16 of the Sale of Goods Act 1908.

<sup>40</sup>Above n2.

<sup>41</sup>Section 16(a) of the Sale of Goods Act 1908.

<sup>42</sup>Section 16(b) of the Sale of Goods Act 1908.

<sup>43</sup>Above n2, 164.



or just one. This issue was highlighted by Lloyd LJ in *Aswan Engineering*<sup>44</sup>. After reviewing the law the judge decided that the good needed to be suitable for just one purpose<sup>45</sup>. *Aswan Engineering* concerned plastic pails which were being used to export a waterproofing compound to Kuwait. During transit the pails collapsed due to the method of stacking and the temperature inside of the container, resulting in the compound being lost. The court found that the pails were of merchantable quality as they were suitable for export and fitted the description they were sold by.

The consumer benefits by bringing an action under s16<sup>46</sup> in two ways. Firstly, no negligence needs to be proved for a lack of merchantability to be found. Secondly, the court's finding on merchantability can be used as evidence either for or against the manufacturer's negligence<sup>47</sup>. This way, the court is able to shift the burden of the loss up the distribution chain to the responsible party, either by relying on the chain of supply contracts or require the first negligent party to pay all the damages awarded.

However it is only the person who purchased the good who can rely on the remedies provided by the Sale of Goods Act 1908, as the terms are implied into the sale agreement. Thus these remedies are not available to third parties or if the retailer is no longer trading.

#### D *Fair Trading Act 1986*

As the long title indicates, the focus of the Fair Trading Act 1986 is to promote pre-sale consumer protection. Both civil and criminal liability can be imposed upon the supplier who breaches the Act's provisions<sup>48</sup>. The issue is whether or not the manufacturer is a supplier.

While there appears to be no reason why a manufacturer could not be liable, only retailers have been held liable under s29(4) of the Fair Trading Act 1986. In two cases<sup>49</sup> children's nightwear failed to meet the required safety standards

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<sup>44</sup>*Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1; 1 All ER 135.

<sup>45</sup>Above n44, 146.

<sup>46</sup>Above n39.

<sup>47</sup>See *Aswan Engineering* above n44 and *Cranston* above n2.

<sup>48</sup>Part V of the Fair Trading Act 1986.

<sup>49</sup>*Commerce Commission v Cardin Laurent* [1990] 3 NZLR 563 and *Connell v LD Nathan* (1988) 2 NZBLC 103270.



and as a result the retailers were fined for breaching the Fair Trading Act 1986. In Australia, the court, in *Clarke v Pacific Dunlop Ltd.*<sup>50</sup> held the manufacturer was liable under s65C(1)(a) of the Trade Practices Act 1974 (Cth)<sup>51</sup> for failing to comply with the prescribed product safety standards for children's nightwear. Pacific Dunlop had sewn the wrong label into a batch of nightwear. This error was not discovered until the garments had been put on sale at retail outlets.

However the Act's scope may be limited by its focus on pre-sale consumer protection, which in general is the contact between the consumer and the retailer. This could explain why no liability has been imposed on manufacturers, in New Zealand, under the product safety provisions.

If an action is successfully brought under the safety provisions, several remedies can be awarded to the consumer under s43<sup>52</sup>. The court could, for example, award damages for any loss suffered<sup>53</sup> or require repairs to be carried out<sup>54</sup>. Despite this there have been no cases brought by consumers under the product safety provisions of the Fair Trading Act 1986.

An alternative remedy is found in s13<sup>55</sup> if a representation has been falsely made. For a defective good any representation made about its quality and performance will not be fulfilled. The question is whether or not these representations were falsely made, when the representations would have been true had the good not been defective. As the Act focuses on pre-sale consumer protection, the Act covers all products not only defective ones. Thus for a representation to be falsely made, it must be false for the non-defective product, it is only then that s13 would be breached. The Act's scope is unlikely to be widened as ss15 and 16 of the Sale of Goods Act 1908 provide remedies for defective goods. If an action was successfully brought, the remedies available are the same as for a breach of the product safety provisions.

The possibility of extending the Act's scope to protect the consumer seeking redress from the manufacturer is limited, due to the Act's focus on pre-sale consumer protection and other remedies being available to the consumer. Thus

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<sup>50</sup>(1989) 11 ATPR 50734.

<sup>51</sup>The equivalent provision in New Zealand is s29(4) of the Fair Trading Act 1986.

<sup>52</sup>Section 43 of the Fair Trading Act 1986.

<sup>53</sup>Section 43(2)(d) of the Fair Trading Act 1986.

<sup>54</sup>Section 43(2)(e) of the Fair Trading Act 1986.

<sup>55</sup>Section 13 of the Fair Trading Act 1986.



the Act generally provides the consumer with redress against only the retailer, not the manufacturer.

### *E Conclusion*

The statute based consumer protection law, prior to the enactment of the Consumer Guarantees Act 1993, focused on the retailer-consumer relationship. Thus the consumer had to rely on common law remedies when seeking redress from the manufacturer. Due to a lack of privity between the manufacturer and the consumer, unless a collateral contract was established, the consumer had to rely on the tort of negligence.

The initial problem with suing in tort is that damages are awarded to place the injured party in the position they started from, thus generally pure economic loss is irrecoverable. However, Cooke J in *Rutherford*<sup>56</sup> awarded the cost of essential repairs, as the consumer had avoided greater damage being incurred, thereby providing the consumer with the remedy for part of the pure economic loss incurred.

Secondly, proving negligence and causation often raises problems. The courts have countered this by inferring the elements from the known facts, and shifting the burden of disproving the inference onto the manufacturer<sup>57</sup>, who has more knowledge of the production process involved. Lastly the consumer may have problems identifying the manufacturer. This problem can arise when the goods are imported into New Zealand or when the manufacturer is no longer in business.

Despite these problems, since *Donoghue*<sup>58</sup>, consumers who suffer damage or loss due to a defective product have been able to successfully gain redress from the product's manufacturer, based on the tort of negligence.

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<sup>56</sup>Above n 28.

<sup>57</sup>See *Grant v Australian Knitting Mills Ltd* above n 21.

<sup>58</sup>Above n16.



### III THE CONSUMER GUARANTEES ACT 1993

#### A Introduction

The Consumer Guarantees Act 1993 aims to provide post-sale protection to non-business consumers. The Act provides redress if certain guarantees are breached by either the good's supplier<sup>59</sup> or manufacturer<sup>60</sup>. As McManus<sup>61</sup> noted, this direct cause of action circumvents the problems raised by contractual privity. However, the question is whether the Act extends the law's protection for consumers seeking redress from the manufacturer.

#### B The Basics

Three key definitions must be met by the consumer seeking from the manufacturer under Part III of the Consumer Guarantees Act 1993.

Firstly, the product must be a good<sup>62</sup>. The term has been defined widely as the definitions of 'manufacturer' and 'consumer' limit the scope of the Act.

By comparison, "consumer" is defined by a two part test, covering the good's nature and the purpose for which it was purchased. The coverage is extended for the manufacturer's obligations to include those who acquire the good from the consumer<sup>63</sup>. Thus the Act covers the person who receives the good as a gift or purchases the good from the consumer or uses the good in the consumer's house. However if the good is sold or passed on as a gift twice, then the person who has the good is not covered by the definition, as they did not acquire the good from or through the consumer.

While the "consumer" definition limits who can sue, the definition of "manufacturer"<sup>64</sup> provides an expanded meaning for who can be sued. *Marcol Manufacturers*<sup>65</sup> illustrates where a non-manufacturer could be deemed to be the manufacturer. Marcol had attached swing tags indicating their name and

<sup>59</sup>Part II of the Consumer Guarantees Act 1993.

<sup>60</sup>Part III of the Consumer Guarantees Act 1993.

<sup>61</sup>JD McManus "The Consumer Guarantees Act 1993: Compliance and Administration Issues" (Legal Writing Requirements, LL.B.(Hons.), 1994), 6.

<sup>62</sup>Section 2 (1) of the Consumer Guarantees Act 1993.

<sup>63</sup>Section 27 (1) of the Consumer Guarantees Act 1993.

<sup>64</sup>Above n62.

<sup>65</sup>*Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502.



address to leather jackets with no other labels indicating their origin. The court held that s27(4) of the Fair Trading Act 1986 was breached as the jackets did not indicate their country of origin and therefore did not comply with regulation 3 of the Consumer Information Standards (Country of Origin(Clothing and Footwear) Labelling) Regulations 1992. Under the Consumer Guarantees Act 1993 Marcol would have been holding itself out to be the manufacturer and therefore falling within in the definition of manufacturer and owe the guarantees in that Act to consumers.

These three definitions limit the scope of the Act. Despite this the Act has a wider scope than the tort of negligence in two respects. Firstly, it is clear that the subsequent purchaser has a right of redress, while possibly being unforeseeable to the manufacturer. Secondly, the "manufacturer" definition includes persons other than the actual manufacturer, thereby eliminating inter-jurisdictional litigation or the problems raised by the true manufacturer being unidentifiable<sup>66</sup>. However if a situation does fall outside the scope of the Act, as the Act is not a code<sup>67</sup>, the consumer is able to seek redress under other areas of the law.

### *C The Guarantees*

The last limiting factor on the Act's scope is that one of the guarantees owed by the manufacturer<sup>68</sup> must have been breached.

#### *1 Section 6 of the Consumer Guarantees Act 1993*

Section 6<sup>69</sup> guarantees the acceptable quality of the product, basically reenacting s16 of the Sale of Goods Act 1908. Although the term "merchantable quality" was replaced with "acceptable quality", the definition of "acceptable quality"<sup>70</sup> basically codifies the common law position. However there is no element of "saleability" in the definition, and the goods need to be fit for their purposes, thus changing the position from that indicated by Lloyd LJ<sup>71</sup>.

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<sup>66</sup>For example, the manufacturer may be unidentifiable to the consumer in the case of "own branded" goods.

<sup>67</sup>Section 4 of the Consumer Guarantees Act 1993.

<sup>68</sup>Section 25 of the Consumer Guarantees Act 1993.

<sup>69</sup>Section 6(1) of the Consumer Guarantees Act 1993.

<sup>70</sup>Section 7(1) of the Consumer Guarantees Act 1993.

<sup>71</sup>Above n44.



The other change to the law is the guarantee is owed by the manufacturer and not just the supplier. Thus the consumer has a choice of who to sue, and a remedy if the supplier is no longer trading.

The manufacturer may avoid liability in several ways. Firstly, if a defect is pointed out at the point of sale, there must be other reasons for finding the good lacks acceptable quality<sup>72</sup>, for example a notice detailing the defect may be attached to the goods.

Secondly, if the good's failure is due to unreasonable use, the manufacturer and the supplier will not be liable<sup>73</sup>. For example if an electric knife was used, unsuccessfully, to cut through bone, the manufacturer would not be liable as the product's instructions were not followed, despite the product's limitations being indicated. This limitation codifies part of the merchantable quality test as the good only had to be fit for its ordinary purposes.

As the s6 guarantee is owed by manufacturers<sup>74</sup> several of the issues raised under the tort of negligence are eliminated. Firstly, for damage to exist the good needs to lose value due to its unacceptable quality. Whereas under the tort of negligence this form of damage is generally irrecoverable, except for essential repair costs as indicated in *Rutherford*<sup>75</sup>. Thus the Act allows the consumer to seek redress as a preventative step rather than to compensate for the damage incurred. Secondly, the consumer does not have to produce evidence from which negligence can be inferred, as the good merely has to be of unacceptable quality.

Most importantly, the consumer is able to receive a remedy which corrects the defect itself, a form of pure economic loss, from either the manufacturer<sup>76</sup> or the supplier<sup>77</sup>.

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<sup>72</sup>Section 7(2) of the Consumer Guarantees Act 1993.

<sup>73</sup>Section 7(4) of the Consumer Guarantees Act 1993.

<sup>74</sup>Section 25(a) of the Consumer Guarantees Act 1993.

<sup>75</sup>Above n28.

<sup>76</sup>Section 27(1)(a) of the Consumer Guarantees Act 1993.

<sup>77</sup>Section 18 of the Consumer Guarantees Act 1993.



The section 9<sup>78</sup> guarantee re-enacts s15 of the Sale of Goods Act 1908 and extends the law to impose liability on the manufacturer, if the description has been consented to<sup>79</sup>, not just the seller.

This guarantee covers two situations. The first instance is where, despite functioning adequately, the representations made about the good are not fulfilled, for example the jersey was described as black but turned out to be a pale grey. The second instance is where the description would have been met had the good been manufactured correctly, but the product is defective.

In the second situation the consumer can elect to seek redress under either a s6 or a s9 guarantee. The benefit of having this option, when the good is sold by description, is the defences which the manufacturer can use are different. Both guarantees may be defended by a claim of an 'act of god' or by proving that the defect was caused by an intervening third party<sup>80</sup>. The latter defence was illustrated in *Evans*<sup>81</sup> where the court found the defect was caused by the car manufacturer when fitting the windscreen, not the windscreen manufacturer. However the additional defence for the s6 guarantee is when the price paid was higher than the recommended or average retail price<sup>82</sup>. This defence recognizes the influence price has on the acceptable quality of a good, whereas the description should remain constant. Thus a consumer is protected under section 9 when an excessively priced good is sold by description but not under section 6.

Thus, this guarantee while only helping the consumer in a limited range of circumstances extends the law existing prior to the Consumer Guarantees Act 1993 being enacted.

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<sup>78</sup>Section 9 of the Consumer Guarantees Act 1993.

<sup>79</sup>Section 25(b) of the Consumer Guarantees Act 1993.

<sup>80</sup>Section 26 of the Consumer Guarantees Act 1993.

<sup>81</sup>Above n23.

<sup>82</sup>s26(a)(iii) of the Consumer Guarantees Act 1993.



Section 12 guarantees the availability of spare parts and repair facilities for a reasonable period of time<sup>83</sup>. Prior to the Act's enactment, there was no equivalent legal principle requiring spare parts to be available, thereby allowing defects to be repaired.

The court in *Panasonic Australia*<sup>84</sup> examined the protection given by s74F of the Trade Practices Act 1974 (Cth). Burstyner had purchased a replacement remote control on the basis that the ten year old remote control was irreparable. The court held the applicable test was whether it was reasonable for the manufacturer to place the consumer in a position where there are no spare parts or repair facilities available. On the facts the court held that Burstyner had failed to prove that the remote control was irreparable, and if irreparable, that this was unreasonable<sup>85</sup>. Thus a breach of s74F was not established. A similar stance is likely to be followed in New Zealand as the sections are worded almost identically, and the Trade Practices Act 1974 (Cth) was one of the Acts upon which the Consumer Guarantees Act 1993 was based.

A manufacturer can limit the s12 guarantee in two ways<sup>86</sup>. Both exceptions require "reasonable action" to be taken to notify the consumer of the non-availability or limited availability of spare parts. What constitutes "reasonable action" will depend on the good's nature and the intended length of time for which the good is to be available. Thus "reasonable action" could vary from a sign on the service counter to labelling the good.

Additionally, when the supply is limited, the parts must be available for the "specified period"<sup>87</sup>. The term "specified period" could be interpreted as either a number of months after the purchase date or a set date in the future. If the later interpretation is accepted then, what will constitute reasonable action to notify the consumer may increase as the period nears expiration.

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<sup>83</sup>Section 12 of the Consumer Guarantees Act 1993 is equivalent to s74F of the Fair Trading Act 1974 (Cth).

<sup>84</sup>*Panasonic Australia Pty Ltd v Burstyner* (1993) 15 ATPR 41083.

<sup>85</sup>Above n84, 41086.

<sup>86</sup>Section 42 of the Consumer Guarantees Act 1993.

<sup>87</sup>Section 42(2) of the Consumer Guarantees Act 1993.



Despite these exceptions, the s12 guarantee provides consumers with a new method of protection. For the consumer with a defective product, the guarantee provides a method by which the defect can be remedied as the availability of spare parts is guaranteed.

#### 4 *Section 14 of the Consumer Guarantees Act 1993*

The definition of "express guarantee" covers undertakings and representations made in connection with the supply or promotion of the supply of any goods<sup>88</sup>. However, to be binding on the manufacturer, it must be contained in a document and provided with their authority<sup>89</sup>. This means that representations made on the television are not covered under the s14 guarantee.

Despite the guarantee's limited scope, the protection provided is greater than that under the common law. Firstly the consumer does not have to know of or rely on the representation before buying the good, the document could be included inside the package with the good. Whereas to gain a remedy under a collateral contract or s13 of the Fair Trading Act 1986, the consumer had to have relied on the representation when purchasing the goods.

Secondly, despite it being common practice amongst manufacturers to honour the guarantees they provide, this practice is extended to honouring statements which are part of their sales pitch. Thus the onus is on the manufacturer to prove that they did not make the guarantee or that it was made without their authority.

A problem may arise where a replacement guarantee, relied upon when purchasing a product which later proves to be defective, is for another good or the product is no longer in production. In the first scenario, the manufacturer can show the guarantee was given without their authority. Thus the consumer would need to rely on other forms of redress, for example the guarantee under section 6. In the second scenario, as the remedy outlined in the guarantee is exhausted, monetary compensation may be claimed<sup>90</sup>.

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<sup>88</sup>Above n62.

<sup>89</sup>Section 14(1) of the Consumer Guarantees Act 1993.

<sup>90</sup>s27(2) of the Consumer Guarantees Act 1993.



Thus s14<sup>91</sup> codifies manufacturers general practice of honouring their express guarantees by repairing or replacing the defective good. Section 14 extends the law to include representations made in documents supplied in connection with the promotion of the goods as "express guarantee". The section also extends beyond the people protected by collateral contracts as the injured consumer does not need to be the retail purchaser.

#### *D General Exceptions to the Guarantees*

Section 41<sup>92</sup> indicates three situations when the guarantees do not apply. However, s41(1)<sup>93</sup> is qualified by the extended coverage of the guarantees owed by the manufacturer, to those who acquire the goods from the consumer. Thus unlike under the Sale of Goods Act 1908, the injured consumer is not denied a remedy because they are not party to the sale agreement.

The final exception to the Consumer Guarantees Act 1993 is for goods supplied to businesses, for example when a kettle is purchased for the staff room. In that case the supplier is able to contract out of the Act<sup>94</sup>, as the good was purchased for business purposes. This results in the business having no redress against the supplier or the manufacturer, despite falling within the definition of consumer in the Act.

In no other situations is it possible to contract out of the Act<sup>95</sup>, thus consumers are protected from the effects of disclaimers. Therefore, unless an exception applies, the consumer will have a right of redress against the manufacturer under the Act.

#### *E Limitation Act 1950*

A six year limitation period applies to actions taken under the Consumer Guarantees Act 1993<sup>96</sup>. This period accrues in the same manner as for actions in tort or contract. Thus for consumers it makes little difference whether the action is taken in tort, contract or under the Act.

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<sup>91</sup>Above n89.

<sup>92</sup>Section 41 of the Consumer Guarantees Act 1993.

<sup>93</sup>Section 41(1) of the Consumer Guarantees Act 1993.

<sup>94</sup>Section 43(2) of the Consumer Guarantees Act 1993.

<sup>95</sup>Section 43(1) of the Consumer Guarantees Act 1993.

<sup>96</sup>Section 4 (1)(d) of the Limitation Act 1950.



## *F Conclusion*

The Consumer Guarantees Act 1993 provides consumers with post-sale protection when the guarantees in Part I of the Act are breached. Depending on the guarantee, redress may be sought from the supplier, the manufacturer or both. Most importantly, the guarantees reward the prudent consumer who avoids damage to other property, by allowing the good's decreased value to be claimed against the manufacturer. This helps to fulfil one of the aims of product liability law, the protection of and compensation for the consumer, by providing a remedy for the defect.

The guarantees in ss6 and 9 expand the law which existed under ss13 - 17 of the Sale of Goods Act 1908, to impose liability on both the supplier and the manufacturer. Section 12 expands product liability law, recognising that consumers would prefer to be able to repair a good rather than receive monetary compensation, to allow the fulfilment of the purpose for which the good was purchased. The s14 guarantee consolidates the general practice of guarantees being honoured by manufacturers, with the law relating to collateral contracts and false representations under s13 of the Fair Trading Act 1986. This guarantee covers representations made about the good's quality and performance, despite the consumer not relying on the statement when purchasing the good, thereby expanding a consumer's protection from statements made in relation to the supply of goods.

Overall, the Consumer Guarantees Act 1993 consolidates and refines the law protecting consumers in a post-sale situation when seeking redress from the manufacturer. The only new remedy provided is the guarantee imposed by s12<sup>97</sup>. The evidential burden of proving negligence has been removed allowing the consumer to gain a remedy more readily, and the law relating to collateral contracts has been expanded to protect people other than the purchaser. However, should a consumer fail to remedy their loss under the Act, as the Act is not a code<sup>98</sup> the consumer is able to use other areas of the law to gain redress from the manufacturer.

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<sup>97</sup>Section 12 of the Consumer Guarantees Act 1993.

<sup>98</sup>Above n67.



#### IV OTHER JURISDICTIONS

One of the reasons for developing product liability law is to compensate for the personal injuries caused by dangerous or defective products. Thus the world-wide trend is towards holding the manufacturer strictly liable for any damage their defective products cause. Whereas in New Zealand, proceedings involving "personal injury" are barred<sup>99</sup> and the law has developed differently as a result.

##### A *American Product Liability Law*

Since *MacPherson v Buick Motor Co*<sup>100</sup>, manufacturers have been liable for damage caused by dangerous products. The case involved a defective car wheel, which collapsed and resulted in a person being injured when thrown from the vehicle. The court found the product was unreasonably dangerous and the car manufacturer was liable for the damage incurred. Subsequently the law has imposed strict liability onto manufacturers of dangerous products, irrespective of any negligence by the manufacturer.

The court in *Greenman*<sup>101</sup>, where the plaintiff had been injured when a block of wood had been thrown out of a lathe manufactured by the defendants, explained the concept of strict liability, only applied when the goods were to be used without any inspection, and injury resulted as a defect existed<sup>102</sup>. As no inspection of the tool was expected, the manufacturer was liable.

Strict liability is also imposed on the seller of defective products under s402A of the Restatement (Second) of Torts (1965) (US). The court in *National Crane Corporation*<sup>103</sup> examined the types of loss which are recoverable under the section. The facts involved defective tubing which was purchased from the defendants and incorporated in the plaintiff's cranes, which were on sold. The plaintiff's replaced all the faulty parts, to avoid further injuries occurring, and wished to recover these replacement costs from the defendant. The court held the Restatement of Torts did not allow recovery of economic loss in the absence of any physical harm<sup>104</sup>. The reluctance to award damages for pure economic

<sup>99</sup>Section 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992.

<sup>100</sup>(1916) 217 NY 382; 111 NE 1050.

<sup>101</sup>*Greenman v Yuba Power Products Inc* (1963) 27 Cal Rptr 697.

<sup>102</sup>Above n101, 700.

<sup>103</sup>Above n1.

<sup>104</sup>Above n1, 43.



loss parallels the position under the tort of negligence, again the prudent consumer is left with no remedy for the defect.

Boslaugh J's dissenting judgment indicates economic loss may be recoverable under the Uniform Commercial Code<sup>105</sup>, for example UCC 2-318 extends the law of express and implied warranties by placing the third party beneficiary in the same position as the purchaser under the sale agreement. As the remedy is contractual, the decrease in the product's value due to the defect is recoverable, as are any repair costs.

In addition, the Senate passed the Product Liability Fairness Act 1995(USA)<sup>106</sup> on the 10 May 1995. Section 565<sup>107</sup> holds manufacturers of defective products strictly liable for any damage the defect causes, extending the strict liability imposed on sellers under s402A<sup>108</sup>. Taken together, while easing the evidential burden on consumers, these changes may lead to manufacturers taking less care, as it is the threat of punitive damages which deters careless manufacturing<sup>109</sup>.

Overall the American product liability system reflects a need to compensate for any personal injuries suffered. Strict liability is therefore imposed on manufacturers in three ways, via s565 of the Product Liability Fairness Act 1995(USA), when a product is dangerous and under any express or implied warranties made to the purchaser.

The introduction of the Consumer Guarantees Act 1993 has moved New Zealand law closer to the concepts of strict liability applied in America. For example, the s14 guarantee partially includes the concepts of express and implied warranties which is one ground of liability in America. Both jurisdictions have concluded that it is more equitable for the final consumer, not just the retail purchaser, to have a remedy available for any damage incurred. Despite the different approaches both jurisdictions are aiming for the same result, to fulfil the

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<sup>105</sup>Above n1, 45.

<sup>106</sup>"Senate passes Liability Suit Limits" Facts of File World News Digest, United States, May 25 1995 (Nexis Document), 375D1.

<sup>107</sup>Section 565 of the Product Liability Fairness Bill 1995(USA).

<sup>108</sup>Section 402A of the Restatement (Second) of Torts (1965) (USA).

<sup>109</sup>"Prepared Testimony of Larry S Stewart President the Association of Trial Lawyers of America on s565 "The Product Fairness Act of 1995" Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism of the Committee on Commerce, US Senate." *Federal News Service*, United States, 3 April 1995 (Nexis Document).



rationale upon which product liability law is based, by imposing liability on manufacturers.

### *B English Product Liability Law*

Prior to the enactment of the Consumer Protection Act 1987 (UK), manufacturers could be liable based on a collateral contract or under the tort of negligence for the damage caused by a defective product. However, Part I of the Consumer Protection Act 1987, imposes strict liability onto the defective product's manufacturer<sup>110</sup>.

The Consumer Protection Act 1987 (UK)'s scope, as with the Consumer Guarantees Act 1993, is limited by the definitions of "good"<sup>111</sup> and "manufacturer". However the scope is narrowed further by the concept of "defect", which requires the good to be unsafe. Whereas the good under the Consumer Guarantees Act 1993 need not be unsafe but merely of unacceptable quality.

The two Acts also differ in the types of damage which they cover. The damage which the defective product inflicts upon itself, while being excluded from the Consumer Protection Act 1987 (UK)'s scope<sup>112</sup>, it is recoverable under the Consumer Guarantees Act 1993 as part of the good's decreased value<sup>113</sup>. However, while the Consumer Guarantees Act 1993 requires other property damage to be foreseeable before recovery is allowed<sup>114</sup>, the Consumer Protection Act 1987 (UK) imposes liability when this damage is caused by the product. Thus consumers in England receive greater protection from other property damage caused by the product, however pure economic loss must be recovered under the tort of negligence.

Even if the Consumer Protection Act 1987 (UK)'s requirements are met, liability may not be imposed in two situations. Firstly, the action may fall outside the three year limitation period or the product may have been in circulation for over

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<sup>110</sup>Section 2 of the Consumer Protection Act 1987. Part I of the Consumer Protection Act 1987 (UK) enacts the EEC Directive on Products Liability.

<sup>111</sup>The definitions of "good" is equivalent to the "consumer" definition in the Consumer Guarantees Act 1993.

<sup>112</sup>Section 5 of the Consumer Protection Act 1987 (UK).

<sup>113</sup>Above n76.

<sup>114</sup>Section 27 (1)(b) of the Consumer Guarantees Act 1993.



ten years<sup>115</sup>. Liability under the Consumer Guarantees Act 1993 is not constrained by the number of years the product has been in circulation, and thus protecting the consumer for a potentially longer period. Secondly, claims under £275 can not be remedied under the Consumer Protection Act 1987 (UK)<sup>116</sup>, whereas these small claims fall within the Disputes Tribunal's jurisdiction in New Zealand<sup>117</sup>. Thus consumers in New Zealand have less limitations placed on the application of the protection provided under the Consumer Guarantees Act 1993, when compared to the Consumer Protection Act 1987 (UK).

The purchaser of the good also receives protection under the Supply of Goods and Services Act 1982 (UK). This Act implies certain conditions into the sale agreement which correspond to the guarantees indicated in Part I of the Consumer Guarantees Act 1993. For example the test for "merchantable quality"<sup>118</sup> is worded identically to the test for "acceptable quality"<sup>119</sup> in the Consumer Guarantees Act 1993. Like the Consumer Guarantees Act 1993, the Supply of Goods and Services Act 1982 (UK) aims to remedy the defect in the product, but only for the purchaser of the good.

Thus overall, the Consumer Guarantees Act 1993 provides more protection to consumers than the Consumer Protection Act 1987(UK) and the Supply of Goods and Services Act 1982 (UK) as liability is imposed in more situations and for a longer time period.

### *C Australian Product Liability Law*

Manufacturer's liability for defective products is covered in two parts of the Trade Practices Act 1974 (Cth). Part V Division 2A<sup>120</sup> involves guarantees similar to those provided under the Consumer Guarantees Act 1993. Whereas, Part VA<sup>121</sup> enacts strict liability for defective products based on the EEC Directive on Product Liability.

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<sup>115</sup>Section 11A of the Limitation Act 1980(UK). Section 74J of the Trade Practices Act 1974 (Cth) imposes the same limitation period.

<sup>116</sup>Section 5(4) of the Consumer Protection Act 1987 (UK).

<sup>117</sup>Section 47(4) of the Consumer Guarantees Act 1993.

<sup>118</sup>Section 4(9) of the Supply of Goods and Services Act 1982 (UK).

<sup>119</sup>Above n70.

<sup>120</sup>Part V Division 2A of the Trade Practices Act 1974(Cth).

<sup>121</sup>Part VA of the Trade Practices Act 1974(Cth).



As the Trade Practices Act 1974 (Cth) was one of the pieces of legislation the Consumer Guarantees Act 1993 was based upon, there are many similarities. For example, under both Acts the term "consumer" is defined in reference to the type of goods and the definition of "manufacturer" includes the importer in certain circumstances.

On the other hand, the Trade Practices Act 1974 (Cth) imposes more obligations on the manufacturer. For example, s74E<sup>122</sup> holds the manufacturer liable when the goods do not correspond to the sample by which they were sold, whereas the guarantee is only owed by the supplier of the goods<sup>123</sup>. Similarly, s74B<sup>124</sup> imposes the obligation that the goods must be fit for a specific purpose on the manufacturer, while the Consumer Guarantees Act 1993 imposes this guarantee on only the supplier<sup>125</sup>.

The other notable difference is that s74D<sup>126</sup> requires the goods to be of "merchantable quality" whereas the s6 guarantee<sup>127</sup> considers "acceptable quality". However the terminology difference will probably not decrease the precedent value of the Australian case law<sup>128</sup> as the statutory definitions are very similar. As ss74C, 74F and 74G<sup>129</sup> correspond to the guarantees outlined in ss9, 12 and 14<sup>130</sup> respectively, the Australian case law relating to these sections will also be persuasive when interpreting the New Zealand provisions.

Part VA<sup>131</sup>, to which New Zealand has no equivalent, reflects the need to compensate for personal injuries under product liability law in Australia. This factor indicates, again, New Zealand's unique position in that the compensation for personal injuries is founded in legislation rather than left to the uncertainties of the common law.

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<sup>122</sup>Section 74E of the Trade Practices Act 1974(Cth).

<sup>123</sup>Section 10(3) of the Consumer Guarantees Act 1993.

<sup>124</sup>Section 74B of the Trade Practices Act 1974 (Cth).

<sup>125</sup>Section 8(4) of the Consumer Guarantees Act 1993.

<sup>126</sup>Section 74D of the Trade Practices Act 1974 (Cth).

<sup>127</sup>Above n69.

<sup>128</sup>See *Rasell v Garden City Vinyl and Carpet Centre Pty Ltd.* (1991) 13 ATPR 53153.

<sup>129</sup>Sections 74C, 74F and 74G of the Trade Practices Act 1974 (Cth).

<sup>130</sup>Sections 9, 12 and 14 of the Consumer Guarantees Act 1993.

<sup>131</sup>Above n121.



Despite this difference New Zealand and Australian product liability law, since the enactment of the Consumer Guarantees Act 1993, is on par with each other. Both jurisdictions have simply chosen different ways to remedy personal injuries suffered, but in many other instances similar if not identical causes of action have been provided to the consumer.

#### *D Conclusion*

There is a trend, in the other jurisdictions, towards imposing strict liability onto the manufacturer, due to the need to compensate for the personal injuries caused by the product. As s14 of the Accident Rehabilitation and Compensation Insurance Act 1992 bars proceedings involving "personal injury" New Zealand has not had the same reasons to impose strict liability in the post-sale situation. While the New Zealand system is on par with the Australian system, it has some advantages over the systems used in America and England. Firstly, there is no equivalent to the guarantee provided by s12 of the Consumer Guarantees Act 1993, unless an express warranty is given by the manufacturer. Secondly, the prudent consumer who avoids additional property damage can recover the pure economic loss incurred, despite not being party to the sale agreement<sup>132</sup> or a collateral contract.

Overall, each jurisdiction has concluded that to adequately protect consumers, liability must be imposed on the manufacturer of the defective product. New Zealand's law clearly protects consumers to the same extent as the law in other jurisdictions, particularly when it is remembered that personal injuries are compensated for under different legislation.

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<sup>132</sup>Above n76.



## V CONCLUSION

The Consumer Guarantees Act 1993 provides the consumer, in certain circumstances, with direct redress against the manufacturer of the defective product. The manufacturer owes consumers four separate guarantees<sup>133</sup>. Only the s12<sup>134</sup> guarantee extends the law beyond its position prior to the act being passed. The other three guarantees codify, modify and extend the coverage of both the common law and the relevant statutes, to provide the consumer with a remedy without having to provide the manufacturer's negligence or establish that a collateral contract exists.

The other change to the law is that the decrease in the good's value, due to the defect, can be awarded as damages<sup>135</sup>. Pure economic loss is usually only remedied under contract law, thus the prudent consumer could only seek redress for this damage from the manufacturer if a collateral contract existed. Thus the Consumer Guarantees Act 1993 provides an incentive for consumers to be cautious as a remedy is now available to people who did not purchase the good.

New Zealand has not followed the world-wide trend of imposing strict liability on manufacturers<sup>136</sup>, due to product liability law not needing to compensate for personal injuries<sup>137</sup>. Despite this, the Consumer Guarantees Act 1993 fulfills many of the aims of Product Liability Law, and protects consumers to the same extent as other jurisdictions protect their consumers. The Act provides for compensation to be awarded to the injured consumer<sup>138</sup>, and as the manufacturer is unable to contract out of the Act<sup>139</sup>, the threat of liability deters defective manufacturing. Finally the manufacturer, the person who placed the good in the marketplace, has to bear the burden of any foreseeable damage caused by the defective good<sup>140</sup>, besides repairing the defect or providing monetary compensation for the decrease in the good's value.

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<sup>133</sup>Above n68.

<sup>134</sup>Above n97.

<sup>135</sup>Above n76.

<sup>136</sup>See s565 of the Product Liability Fairness Act 1995 or the EEC Directive on Product Liability.

<sup>137</sup>Section 14 of the Accident Rehabilitation and Compensation Insurance Act 1992 bars proceedings involving "personal injury".

<sup>138</sup>Above n63.

<sup>139</sup>Above n67.

<sup>140</sup>Above n114.



Thus the Consumer Guarantees Act 1993 has extended the liability of manufacturers thereby filling in gaps which the law prior to the Act had left empty, by providing a remedy for the defect itself and by guaranteeing the availability of spare parts and repair facilities<sup>141</sup>.

New Zealand

Consumer Guarantees and Compensation Act 1993

Consumer Guarantees Act 1993

Consumer Guarantees Act 1993

Consumer Guarantees Act 1993

Consumer Guarantees Act 1993

Consumer Guarantees Act 1993

Consumer Guarantees Act 1993

United Kingdom

Consumer Protection Act 1987 (UK)

Consumer Protection Act 1987 (UK)

Supply of Goods and Services Act 1992 (UK)

United States

Product Liability Reform Act of 1985 (USA)

Restatement (Second) of Torts (1965) (USA)

Uniform Commercial Code (USA)

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<sup>141</sup> Above n97.



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*McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39.  
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