SUSAN D'ATH

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Abstract

A descriptive overview of the present law applicable to contracts for the Sale of Goods with particular concentration on the issues of consumer protection and product liability. Brief consideration is given to the failure of the New Zealand law to develop towards the imposition of strict liability upon manufacturers for harm that their products cause not only to purchasers but to users, consumers and bystanders. The remedies available to purchasers and other consumers under the Sale of Goods Act 1908, Contractual Remedies Act 1979, Fair Trading Act 1988 and Consumer Guarantees Act 1993 are canvassed.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13798 words.

Introduction and brief history

In its annual report to Parliament for the year ending 31 December 1983 the now disbanded Consumer Council (1) stated :-

> "The New Zealand public needs the protection of effective product safety legislation ...The Council knows, from the never ending stream of complaints it handles involving the Sale of Goods Act, that a complete revision of the present legislation is a high priority..." (2)

A decade later on March 17th 1993 when introducing the Consumer Guarantees Bill into the House, the Minister of Consumer Affairs was to say :-

> "The Sale of Goods Act has been looked at by everyone from the Business Round Table, to manufacturers, to wholesalers, to retailers and they are satisfied that the Sale of Goods Act 1908 is still appropriate for today's transactions between commercial traders.." (3)

The Bill was referred to the Commerce and Marketing (select) (3) committee which reported back to the House on 21st July 1993. All speakers to the introduction of the Bill agreed that revision of the Sale of Goods Act (even if only partial) was long overdue. The Bill was passed as amended and its provisions become enforceable on 1st July 1994.

The Sale of Goods Act 1908 is a consolidation of the Sale of Goods Act 1895 and sections 10 and 11 of the Merchantile Agents Act 1890. (4) As such it is the direct descendant of the Sale

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(1) NZ Consumer Council Act 1966 (Repeal Act 1988)
(2) Parliamentary debates (Hansard) Vol 522 6910
(3) Parliamentary Bulletin 9.3.14 5 July 1993
(4) All references are to the 1908 Act unless otherwise indicated

of Goods bill presented to the Westminster parliament in 1889. Drafted by Sir McKenzie Chalmers (5) (also the draftsman of the Bills of Exchange Act) the bill lapsed that year and was, following considerable amendment, later reintroduced and enacted as the Sale of Goods Act 1983. (6)

Chalmer's intention had been to codify the existing common law but the Act as passed did not do so. Nor did it constitute in any respect a "code" as it contained a specific saving of "the rules of the common law".(7) Thus the act set out rules that ran parallel to, and altered the common law but in some respects did not entirely replace it. As an example the common law continued to be the relevant law in New Zealand concerning the availability of cancellation as a remedy for innocent misrepresentation up until the enactment of the Contractual Remedies Act 1979.

The Westminster Act was adopted as a basis for local law throughout the British Empire. It proved a hardy piece of legislation yet dissatisfaction with its rules and operation is as old as the Act itself. Much of this dissatisfaction has arisen as a response to the changing times since its passage. The Act proceeds on the basis of a view that in all cases the parties to a sale transaction have an equality of bargaining power in negotiating to reach the terms of the contract. It is doubtful that this was true in the nineteenth century and

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(5) "Chalmers Sale of Goods" Butterworths London now in its 17th edition began life as Chalmers commentary on his bill.
(6) Despite being enacted in 1894
(7) Now s60(2). Note debate in later years as to the preservation of the rules of equity.

it is certainly not the case today. The nineteenth century concept of "caveat emptor" (with its expectations that the purchaser would inspect the goods, examine them to be sure they were satisfactory for their intended use and could recover, under the contract with the seller, only if there existed a term of the contract, warranty or express guarantee as to the quality and fitness for purpose of those goods that had been breached by the seller) was modified by the Act's imposition of statutory terms that were to be implied into contracts for the sale of goods. These terms, being "guarantees" of sellers title, fitness for purpose and merchantable quality were the only terms so implied and the vendor could, if he so desired and the purchaser agreed, contract out of their application to a particular sale.

The reality today for most purchasers is that the packaging of goods may prevent any real attempt at examination prior to purchase. This is particularly so with "tamper-proof" food and pharmaceutical product packaging. In the case of manufactured goods the design and makeup of the item may be so complex as to be incomprehensible to the layman. Operative parts and machinery may be sealed from the view of even the expert purchaser.

In the one hundred years since the unfortunate Mrs Carlill purchased the carbolic smokeball that so singularly failed to prevent her influenza, advertising has reached unforseen levels of pitch and saturation.

More importantly the Sale of Goods Act ignores the role of the manufacturer in the provision of goods to the end user

or consumer. Relatively few traders today make their own products and sell them directly to the end user . The reality for the purchaser is that he will buy goods from a retailer who in his turn buys from the wholesaler or importer who in turn buys from the manufacturer. The Sale of Goods Act does not interfere with privity of contract hence while each of these individual sale contracts may be sued upon by the parties to it no other person is in a position to do so.

Product Liability

The term "product liability" is used to define "the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects in those products". (8) It expresses the concept that all persons involved in the provision of goods, and in particular the manufacturer, owe a duty of care to the end user relating to the safety or fitness for use of the product.

The end user may be harmed in a number of ways by a faulty product. They may suffer direct physical harm (for example poisoning), damage or loss of the product itself, damage or loss of property (other than the actual product) caused by the product fault (as with the electric heater that burns down the purchaser's house) or pure economic loss (loss of the bargain, financial loss consequent to the loss).

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(8) See chapter 17 :Prosser & Keeton on Torts West Publishing St. Paul Minn.

There are other issues of consumer protection that do not fall within the product liability definition. The end-user of goods may be harmed by being mislead by the seller or manufacturer as to the seller's title, the suitability of the goods for a set purpose, as well as by their safety or make up.

Other jurisdictions have over the last fifty years developed regimes of manufacturer's product liability yet this has not occurred in New Zealand. In Australia the Trade Practices Act 1974 modified the rule of privity of contract allowing claims against manufacturers to go forward and imposed liability in a range of situations. Previous legislation in New Zealand has dealt with other consumer protection issues, in particular those that arise out of statements made concerning goods prior to the sale contract being entered into (culminating in the provisions contained in the Fair Trading Act) yet the Consumer Guarantees Act is the first legislative attempt (9) to relax the rule of privity and impose liability on manufacturers post-sale for the benefit of the end user.

There are good reasons to make manufacturers directly liable to the end user of their products. Such liability acts as a disincentive to the supply of faulty products and to the making of false claims about them. It is a cost against which manufacturers may insure. Further it recognises the alteration in social policy from the nineteenth century view towards the expectation by the end user that a manufacturer will take

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(9) Note: The Contracts (Privity) Act 1982 gives third party beneficiaries limited rights to enforce contractual promises made in their favour by the contracting parties.

responsibility for the safety and proper functioning of its goods. In overseas jurisdictions a regime of strict manufacturers liability has evolved, by judicial and legislative intervention as in the United Kingdom and Australia and United States. (10)

This paper examines the present state of the law and asks whether there are reasons, specific to the New Zealand jurisdiction, that negated the need for an expanded product liability regime.

The present law and the privity problem

The legal doctrine of contractual privity is one which is almost incomprehensible to the lay person. Simply stated the doctrine prevents any person other than the actual parties to a contract from suing on it. Thus the purchaser at retail is prevented from suing the manufacturer of a faulty or defective product in contract as under the doctrine there exists no contract between them on which to base a suit.

Equally unless there has been a formal assignment, a person who has been given or otherwise acquired the goods from the original purchaser cannot bring suit. The policy basis first clearly articulated in Winterbottom v Wright (11) was

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(10) Consumer Protection Act 1987 (UK)
Trade Practices Act 1974 (Aust)
Uniform Commercial Code 2-318
American Restatement of Tort S402A

(11) (1842) 10 M & W 519, 150 E.R. 402. Contract to provide a mail coach between two parties. Third party injured when a defect in the coach cased him to be thrown off it. Injured parties claim against maker of coach failed on ground no privity of contract between them.

that of the danger of opening the "floodgates" if such claims were to be allowed. This seems a nonsense to the lay person who has purchased the goods based on claims made or lures set in the manufacturers advertising and who naturally assumes that the manufacturer, whose brand or name appears on the product, will assume some responsibility for it. The doctrine also ignores the reality that people do not shop only for their own individual needs.

Family or whanau members may shop for the entire group, all of whom will use or consume the goods,yet under the privity doctrine only the actual purchaser has a contract on which to sue and then only the vendor from whom the goods were purchased.

There are several advantages for the purchaser in suing the actual vendor as opposed to any other person. The seller will normally be able to be easily identified, the seller's liability to the purchaser is strict, and his or her negligence does not have to be proved for a claim to succeed. There will however always be be situations where a claim against the seller is not an available option such as where the vendor has ceased to trade or is a man of straw.

Until the enactment of the Consumer Guarantees Act the judicially developed concepts of collateral contract and the expansion of the tort of negligence remained the primary way for the end user to bring a claim against a person other than the seller.

Who is "the Consumer" ?

If a duty is to be owed concerning goods between persons who may not be the actual parties to the sale contract then the class of persons covered by the duty should be defined.

It has long been accepted that there exist classes or categories of persons who are more in need of the law's protection in their contractual dealings for the sale of goods than was envisaged in the Sale of Goods Act.

One such class is usually referred to as "the consumer" but while it is easy to agree that there may exist good policy reasons for the protection of "the consumer" in todays market it is less easy to determine exactly who "the consumer" is. One writer defined "consumers" as the

> "final or end users... (of) goods and services produced in the economy"... (12).

This definition in itself does not provide a test for determining which persons fall within the class. By accepting that some persons are more in need of the law's protection it becomes a given that some are in less of a need. If it is accepted that the businessmen, wholesalers and retailers as a class referred to by the Minister of Consumer Affairs in the passage from her introduction of the Consumer Guarantees Bill (quoted on page one of this paper) are capable of looking after themselves in the marketplace under the existing legal framework then should they not be excluded from any definition of "consumers" ? To limit the definition to those who are

parties to the sale contract would leave the position as it is at present under the privity doctrine. "Consumer" needs to be defined more broadly than simply "purchaser" to bring into the definition those who are users of the goods but who did not purchase them.

There are a number of ways of formulating a test to define a consumer. The test can be based on the type or nature of the actual goods purchased, on the use to which such goods are usually put, on the value of the goods purchased, on the use it has been stated the goods are to be put to or by focusing on the person making the claim.

Each test will operate to exclude some people who are arguably in need of the law's protection.

The Uniform Commercial Code (US) 2-318 provides an example of a statutory definition of the class that focuses on the nature of the persons making the claim. (13)

The Consumer Guarantees Act in contrast takes the type and nature approach mixed with a presumed usage by defining "consumer" as a person who acquires goods of :-

> ..." a kind ordinarily acquired for personal, domestic or household use". (14)

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(12) M J O'Grady "Consumer Remedies" (1982) 60 Can B Rev 548,548

(13) Uniform Commercial Code 2-318 .." any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods, and who is injured in person by breach of this warranty.." See also Second Restatement of Torts 402A op cit.

(14) Consumer Guarantees Act s2

No monetary limit is set on the goods acquired. This test effectively excludes the small business proprietor, the corner dairy owner in his day to day business dealings, from the applications of the Act yet he or she may be in no stronger a position vis a vis the manufacturer than is any other individual.

Australia took a different approach when in the Trade Practices Act 1974 (15) it accorded the status of "consumer" to all buyers of goods and services for a monetary value of less than A$40,000:00. This approach also carries with it some problems as while bringing the small business person within the frame of protection it may effectively exclude the non business person who, for example only, purchases an expensive motor vehicle. (16)

The Sale of Goods Act 1908 and the preservation of the common law

The 1908 Act remained, until the enactment of the Consumer Guarantees Act, the primary piece of legislation dealing with the contract for the sale of goods. The Sale of Goods Act has no impact on the provision of services whether in concert with the sale of goods or not. In contrast the Consumer Guarantees Act attempts for the first time in New Zealand to place both contracts for the sale of goods and contracts for the provision

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(15) Trade Practices Act 1974 4B(1)(b)(ii)
(16) That the rich can also be gullible is clear and it is arguably not sound policy to exclude from protection the lay person who risks a great deal of money while the lower purchase price is protected.

of services within the same framework of obligations and remedies.

The Consumer Guarantees Act will not repeal the Sale of Goods Act but will bring into being a further set of legal rules which will apply only to those particular "consumer" sales which fall within its ambit. "Commercial" or business dealings will continue to be subject to the Sale of Goods Act.

From its inception the Sale of Goods Act specifically preserved the then existing common law which continued to be relevant law. It put into place a set of rules that apply to contracts for the sale of goods and included terms that were to be implied into all sales such unless a different intention could be shown from the surrounding circumstances of the contract or the parties specifically made an exclusion.

The Act introduced a "condition" to be implied that the seller had the right to sell together with "warranties" as to the enjoyment of quiet possession and that the goods would be free from any charge over them that could interfere with the rights of the purchaser. (17)

The Act also implied terms into the contract of a condition that the ..."goods shall be reasonably fit for such purpose..." (made known to vendor expressly or by implication) (18) and that goods .."shall be of merchantable quality.." (19)

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(17) Sale of Goods Act 1908 s14
(18) Sale of Goods Act 1908 s16 (a)
(19) Sale of Goods Act 1908 s16 (b).

As stated these were the only terms so implied into the contract and that they were as stated open to exclusion by way of the parties contracting out. This could be done less than explicitly. A vendor might provide their own express "guarantee" or "warranty" in the form of a written document signed by both parties on the sale. By virtue of being inconsistent with the relevant provision of the Act (Section 16 (d)) that express guarantee would replace the implied terms thereunder. The purchaser however might have no real knowledge that they are giving up their statutory "rights" in exchange for what may be an illusory guarantee.

The expressions used in the Act, of "condition" and "warranty" are terms of legal art and have little or no meaning to the lay person. The concept "merchantable quality" has little relation to what the consumer wants from the goods they purchase. The following paragraph taken from the introduction to the "Vernon Report" puts this clearly:- (20)

> "the legal remedies available to consumers who have bought defective goods are limited and largely ineffective. The Sale of Goods Act was drafted almost a century ago and bears no relation to the needs of modern consumers. Thus one of the most important conditions implied into contracts of sale by the Act is that the goods will be of "merchantable quality". The very words " merchantable quality" indicate that the Act is not appropriate to consumer transactions. The one thing that the consumer

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(20) G. Palmer / M. Shields Introduction to "Post Sale Consumer legislation in New Zealand" (Report to Minister of Justice December 1987) Vernon

does not want to do with a purchase item is to resell it."

Furthermore the purchaser's remedies on a breach of an implied warranty while practical in the commercial setting are not such as to be particularly helpful to a "consumer".

They may (a) Set up against the seller the breach of warranty in diminution or extinction of the price. A useful remedy for the business purchaser on credit but of limited interest to the consumer who has already paid the agreed price, or (b) maintain an action against the seller for damages for the breach of warranty. (21)

The method by which damages awarded are to be calculated is set out in the Act as :-

..."(2) The measure of such damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality, such loss is prima facie 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."... (22)

These remedies assist the commercial purchaser whose intention with regard to the goods is to use them in manufacturing other goods, re-sell them or add value to them before selling them.

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(21) Sale of Goods Act 1908 s54
(22) Sale of Goods Act 1908 s54

Damages are not necessarily the most desirable remedy for a "consumer". They might well prefer a right to have the goods replaced or repaired. The purchaser of an item that while slightly defective (perhaps in appearance) still performs its function has no remedy under the Sale of Goods Act as the implied terms as to quality contained in section 16 may well have been satisfied.

Nor does the Sale of Goods Act make any provision for the consumers who is not the purchaser. (23)

Furthermore the Act may also operate to prevent the purchaser from cancelling the contract when they would most like to do so.

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(23) A defect which the Consumer Guarantees Act focuses on and attempts to remedy.

The Acceptance Problem

The Sale of Goods Act proceeds on the basis that in most circumstances there will be an opportunity for the buyer to inspect the goods. As previously stated this presumption is often unrealistic. The Act goes further however and may prevent the buyer of faulty goods from cancelling the contract. Section 13(3) provides:

> .."Where .....the buyer has accepted the goods or part thereof....the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty.."

Sections 36 and 37 set out the manner by which acceptance is to be deemed.

Thus a buyer who is deemed to have "accepted" the goods will lose the right to cancel the contract on the breach of the implied condition in section 14(a) as to the vendor's title to sell. The results have been perceived to be unfair in many instances and there has been some considerable judicial stretching of the section 36(1) requirement of a "reasonable opportunity for examination" by the buyer in recognition of the difficulties a buyer may face in practically inspecting goods.

Two cases illustrate the nature of the problem.
In Finch Motors v Quin (No 2) (24) the purchasers discovered the latent defects in the vehicle when it overheated while

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(24) [1980] 2 NZLR 519, 525. Held that the car as supplied was essentially capable but required repair and that there had been a total failure of consideration. Further that the existence and seriousness of the latent defect(s) amounted to a breach of term implied by s16(a) Sale of Goods Act (fitness for purpose)

towing their boat shortly after the purchase. Whereas in Taylor v Combined Buyers Limited (25) the purchaser had possession and use of the "Calthorpe" motor car for some three months before the alleged discovery.

On a cancellation of the contract by the buyer the Sale of Goods Act revests property in the goods in the seller. (26) The buyer cannot therefore give good title if he chooses to on-sell the goods following a cancellation. (27) This is not the case when a cancellation of contract is made under the Contractual Remedies Act which has implications for "mixed" contracts.

Remedies available to the purchaser under the Sale of Goods Act

The Act sets out under the Heading "Remedies of the Buyer" in sections 52 to 55 what the buyer may seek to obtain on breach of the contract by the seller. In short these are :- Firstly, damages for non delivery; the measure of which is the ..."estimated loss directly and naturally arising, in the ordinary course of events, from the seller's breach of the contract". (28) Where there is a market for the goods then

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(25) [1924] NZLR 627 see also 629. Purchaser took possession and used car for some three months. Action for recision and/or damages on grounds fraudulent misrepresentation that car was new or in the alternate on ground of a breach of implied condition of merchantable quality and reasonable fitness for purpose. Held (1) fraud not substantiated (2) Sale by description in terms of ss15 & 16 Sale of Goods Act.
(26) S22(3) has the same effect
(27) But note sections 25, 26 and 27 Sale of Goods Act
(28) S52 (2) Sale of Goods Act

the quantum of damages is to be ascertained by taking the difference between the contract price and the current or market value of the goods. (29) Secondly specific performance. This remedy may only to be of interest to the purchaser who had ordered a specifically defined or custom made item.
And thirdly (as previously discussed) damages for breach of warranty and conditions (30) that the purchaser either elects or is required by the rule regarding "acceptance" to treat as breach of warranty. (31) There would I suggest be few, if any, non-lawyers to whom the preservation by the Act of the warranty / condition dichotomy (32) would have any real meaning. The result is that the rules governing sale transactions contained in the Act are unclear and difficult to follow for the lay person.

Contract and Collateral Contract

With preservation of the common law by the Sale of Goods Act, the law of contract where not specifically altered by the Act continued to apply to contracts for the sale of goods. The purchaser would of course have a right to sue on the contract with the vendor if there has been a breach. (Subject to privity). The courts have found that where goods have been marketed to the end user through a series of suppliers and the end user did not purchase directly from the manufacturer then a "collateral contract" between that purchaser and the

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(29) S52 (3) Sale of Goods Act
(30) S54 Sale of Goods Act
(31) S13 Sale of Goods Act.
(32) See Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26

manufacturer may in some circumstances arise. (33)

A manufacturer's express "warranty" or "guarantee" may also form a contract with the purchaser. These are common today in the form of cards which the purchaser completes either at the point of sale or later and returns, usually by post, to the manufacturer. Even if not specific in setting out details such as time limits, these can still form a contract which may be sued upon if broken. However all too often in the past the "guarantee" is in fact an attempt to take away from the purchaser rights that the purchaser might otherwise have. (34) In a typical example (taken from a small appliance guarantee card) the guarantee reads:-

> .." (the manufacturer) shall not be liable ... for any loss howsoever arising ... otherwise than under this guarantee..".

A claim in contract allows a number of remedies to the purchaser. If the contract is suitable specific performance could be awarded. Otherwise termination and restitution, acceptance of the goods with offset of price, rejection and damages are all available. While these are useful remedies

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(33) The classic example being that of the unfortunate Mrs Carlill and the carbolic smokeball. Mrs Carlill purchased the smokeball from a retailer, and it was the manufacturer who had published the offending advertisment. Even so it was held that there was a contract between her and the manufacturer albeit not a contract of sale.
Carlill v Carbolic Smokeball Co Ltd (1893) CA [1893] 1QB 256 [1893] 62 LJ QB 257 67 LT 837
(Since the enactment of the Fair Trading Act 1986 such complaints are likely to be brought within its terms)

(34) S14 Consumer Guarantees Bill deals with manufacturers express guarantees in an attempt to end this practice.

in the business setting they may overlook the desire of the consumer for a specific remedy of repair or replacement.

Tort

It has been settled law since Donoghue v Stevenson (35) that a person injured by a faulty product, may be compensated by an action in tort against the Manufacturer whether or not there were the purchaser of the goods. The duty is not limited to "consumers" in the sense of the actual purchaser. Any person whom the manufacturer ought reasonably to have foreseen as being likely to be affected by the defect can maintain an action.

The facts in the case are well known and in short were that Mrs Donoghue's friend purchased at a cafe a bottle of ginger beer manufactured by Stevenson. Mrs Donoghue drank some of the contents the balance of which proved to contain the remains of two decomposed snails. Mrs Donoghue suffered shock and some gastro-enteritus.

Lord Atkin's summing up of the duty found to be owed is worth repeating :--

> "By Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the

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(35) [1932] AC 562 [1932] 86 QLR 454 Lords

product will result in an injury to the Consumer's life or property owes a duty to the consumer to take that reasonable care"

A manufacturer is also liable to warn the consumer of any danger inherent in the use of any non-defective products about which the manufacturer knows or ought to have known. The nature of the warning required will vary as to the circumstances. (36)

A manufacturer will be able to negate the duty of care where the conduct of the plaintiff was such that they either clearly contributed to their own misfortune or assumed the risk. Contributory negligence by the plaintiff may also reduce a damages award where the manufacturer's negligence is nevertheless proven. Thus a purchaser who purchases and uses a lawn mower uses it to trim hedges and suffers personal injury or property damage in the process would be unlikely to recover against the manufacturer having clearly been the author of their misfortune. (37)

From the consumers point of view negligence is not a particularly satisfactory cause of action. The consumer will have to prove that the manufacturer or one of their employees

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(36) Buchan v Ortho Pharmaceutical (Canada) Ltd. (1986) 25 D.L.R. (4th) 658 (Ont. CA) (concerned pharmaceutical drugs :whilst some harmless in most circumstances could have serious side effects or contra-indications for some users :not necessarily subject to being prescribed by a doctor who might warn the user)

(37) In New Zealand such a person would be compensated for their injury under the Accident Compensation scheme. Accordingly the law in this area has not developed as it has in other jurisdictions.

was negligent and that reasonable care was accordingly not taken in the manufacturing process. This presents obvious difficulties for the consumer who has no actual knowledge of what occurred during the manufacturing process. While the plaintiff may argue that the result itself establishes the negligence - "res ipsa loquitur" - the manufacturer may be able to convince the court that all reasonable care was taken and defeat the action.

In Daniels v White (38) the plaintiff had discovered carbolic acid in a lemonade bottle. The plaintiff pleaded "re ipsa loquitur" but the manufacturer defended on the basis of evidence that he had a safe manufacturing system and adequate supervision and thus had taken all reasonable care. This somewhat illogical argument was accepted by the Court without any apparent consideration as to how, if the system had not failed, the carbolic acid had made its way into the bottle.

Furthermore the manufacturer may be able to shelter behind the availability to the purchaser of a "reasonable possibility of intermediate examination" as posited by Lord Atkin. (39)

How realistic an opportunity to examine goods present day consumers may have, and what actual use such an opportunity

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(38) [1938] 160 LT 128, SJ 912 [1938] 4 All ER 258
(39) Donoghue v Stevenson op cit

for inspection might be to them is a moot point.

The action for damages in negligence is not limited to shock and personal injury (40) but extends to property damage and may extend to pure economic loss provided such loss is sufficiently related to some form of physical damage. (41)

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(40) Junior Books v Veitchi [1983] 1 AC 52 [1982] 3 WLR 477:126 SJ 538 [1982] 3 All ER 201 [1982] ComLR 221 (Flooring installed by third party. recovery against against contractor)

(41) Products Liability : Tortious Recovery for Economic Loss VUW Law Review 7 330 P W Bennett. Bennett noted that Atiyah (Negligence and economic loss (1967) 83 LQR 248) saw no reason post Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465, [1963] 2 ALL ER 575, [1963] 3 WLR 101, 107 Sol. Jo. 454, [1963] 1 Lloyd's REP. 485, H.L. why a claim for economic loss in tort should be denied to a consumer in terms of their right to recover for the cost of "putting right" a defective article. If a manufacturer can be held to have foreseen physical damage then they surely can be held to have foreseen economic loss if the test of foreseeability is applied and met in each case on the facts. See however The Law of Torts in New Zealand Todd (General editor) The Law Book Company Limited 1991 (p.166 4.7.) for a discussion of the development in the law since the date of Bennett's article. Note also that economic loss consequent to personal injury will be compensated under the Accident Compensation scheme and that claims in tort for such against the party causing the injury are now barred.

The Contractual Remedies Act 1979

The Contractual Remedies Act 1979 has applied to contracts entered into since 1 April 1980. Dawson & McLauchlan (42) suggest that the inclusion in s15(d) of that Act of a specific exclusion of its application in relation to transactions covered by the Sale of Goods Act 1908 other than in respect of statements made during negotiation, merger clauses and the remedy of damages for misrepresentation was intended to be a short term measure until the Sale of Goods Act was fully overhauled.

This of course has yet to occur and section 15(d) of the Contractual Remedies Act 1979 states:-

> "Except as provided in sections 4(3), 6(2) and 14 of this Act nothing in the Act shall affect ....(d) The Sale of Goods Act 1908"

The Sale of Goods Act therefore continues to be the relevant statute in regard to contracts for the sale of goods with the Contractual Remedies Act applicable only in the following limited respects:-

(1) Exemption clauses (Court still able to enquire) (43)

(2) Amendment of clause 13(3) of the Sale of Goods Act concerning acceptance.

(3) The Contractual Remedies Act clarified which of sections 36 and 37 of the Sale of Goods Act 1908 was paramount. Now it is made clear that it is section 36. (44)

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(42) The Contractual Remedies Act 1979 Sweet & Maxwell
(43) S4 Contractual Remedies Act
(44) S14(1)(b) Contractual Remedies Act

(4) Remedies for misrepresentation.

The Contractual Remedies Act code covering cancellation for breach of contractual terms has no application to contracts for the sale of goods. As a result there are two separate sets of rules and remedies for termination of contracts for breach, one for contracts for the sale of goods and one for other contracts. Misrepresentation is covered by the Contractual Remedies Act but other alleged breaches are usually not. (45) In litigation the practical result has been parallel pleadings.

Damages under section 6(1) Of the Contractual Remedies Act 1979 are available to a purchaser who was induced to enter into the purchase contract by a -

> ..." misrepresentation, whether innocent or fraudulent, made to him by or on behalf or another party to that contract" (made by the seller or their agent)

The damages available on a misrepresentation will be quantified

> ..."in the same manner and to the same extent as if the representation was a term of the contract that had been broken". (46)

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(45) Law Commission Report 25 DF Dugdale & CT Walker Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979
But note s6(2) Contractual Remedies Act. If contract provides for a remedy (for example an express guarantee given by seller or manufacturer) then s6(1)(a) Contractual Remedies Act as to quantum of damages will apply to a contract for the sale of goods.

(46) Note that Hire Purchase contracts are specified as being subject to the Contractual Remedies Act. Also the old controversy of whether the common law allowed a rescission of the sale of goods contract by purchaser on an innocent misrepresentation is laid partly to rest by the CRA S6(1) as it applies to both innocent and fraudulent misrepresentations.

The apparent conflict between the remedies available has resulted in some interesting judicial reasoning. In Printcorp Services V Northern City Publications Ltd (47) a claim for the price of newspapers supplied was resisted on the ground that the goods were of inferior quality. It was held that the Sale of Goods Act and the Contractual Remedies Act were mutually exclusive codes as to the purported cancellation and (obiter dicta) that it was the relative importance of the goods and services which determined which Act was applicable, an interesting comment with no apparent support to be obtained from the relevant legislation. The Judge then went on to hold the Sale of Goods Act applied on the facts and that accordingly Northern City Publications Ltd had lost its right to cancel the contract following acceptance by the company of the goods in question. Any rights Northern had were to set off the price with a claim for damages as there had been substantial performance.

The practical result in the case was probably the expedient one however the suggestion that the right to cancel depends on the relative importance of the goods rather than contractual intention highlights the problems that still may arise from "acceptance" being a bar to rejection under the Sale of Goods Act. In practical terms it is hard to envisage a situation where a contracting party would want to relinquish the right to cancel if it were available to them.

The Contractual Remedies Act 1979 thus went only part way

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(47) HC Tauranga CP 60/89 25.4.90 Fisher J

when it abolished the second limb of Section 13(3) Sale of Goods Act. (48)

It therefore remains important to differentiate sales from other types of dealing so as to determine which set of rules as to cancellation will apply. (49)

The Sale of Goods Act (s55) action for money paid is preserved as is the rule in Rowland v Divell (50) leaving the purchaser of goods able to rescind for breach of condition as to title and recover the full price paid on the ground of total failure of consideration even when the purchaser may have had had substantial use of the goods. (51)

One other important difference remains to again be noted. Under the Sale of Goods Act property revests in the seller on cancellation of the contract. This is not the position under the Contractual Remedies Act. This is of particular concern in the situation of a mixed contract, for example the common contract for provision of goods and services. Cancellation of either or both legs of the contract is available for a misrepresentation under the Contractual Remedies Act but for

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(48) In cases of the sale of specific goods there was apparently no right to reject the goods for breach of a condition because of the operation of S20 Rule 1 whereby property in specific goods usually passes to the buyer when the contract made (and not necessarily upon delivery) unless so provided.

(49) The Consumer Guarantees Act covers both sales and transactions that are not sales. Ref s2.CGB
Both the Contractual Remedies Act and the Sale of Goods Act preserve the buyers right to reject goods.

(50) [1923] 2 KB 500

(51) Taylor v Combined Buyers Ltd op cit

any other breach the question will be whether the provisions of the Contractual Remedies Act apply or whether the term breached was a condition allowing for cancellation as defined by the Sale of Goods Act, one that must be treated as a warranty because of the operation of that Act, or a condition, warranty or an innominate term of the type giving rise to a right to cancel in common law.

This multiplicity of rules is one with which many lawyers have grappled and is beyond the comprehension of the lay person.

With the enactment of the Consumer Guarantees Act they are faced with the addition of another set of rules covering the sale of goods with the result that the Contractual Remedies Act will cover contracts other than for the sale of Goods, The Sale of Goods Act and common law for sales of goods other than consumer sales, and the Consumer Guarantees Act for sales of goods to consumers.

The Fair Trading Act

The Fair Trading Act 1986 concentrates on the pre-sale aspects of the contract. While remedies are available to consumers for proven breaches of the Act, the thrust of the Act is to prevent certain types of conduct and punish offenders when it occurs. Under the Act it is a offense for a seller to "mislead" or "deceive" the purchaser or potential purchasers.

The relevant sections of the Act are:-

Section 9 "Misleading and deceptive conduct generally - No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." and

Section 10 " Misleading conduct in relation to goods- No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods." (52)

The terms " Misleading" and deceptive" are not defined in the Act. Their dictionary meanings are :-

.."Mislead.. lead astray, cause to go wrong in conduct or belief.." and

.. deceive..make .. believe what is false, mislead

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(52) cf Trade Practices Act 1974 (Aust). s52 and Trade Practices Act 1974 (Aust). s55A

purposefully, use deceit.." (53)

Both sections are taken from the Australian Trade Practices Act 1974 and have been considered by the Courts many times in Australia. The New Zealand Courts have followed their Australian counterparts in adopting a broad definition.

To be categorised as misleading or deceptive or likely to mislead or deceive for conduct must contain or convey a misrepresentation. (54) A statement may be made that is literally true but which may none the less be misleading or deceptive as for example in the James Pascoe case (55) in which jeweller advertised goods as "duty free" when those items were not such as would in any event have attracted a duty. It is not however enough to show that the conduct could simply have caused confusion. Confusion alone has been held to not be

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(53) NZ Pocket Oxford Dictionary Reprint 1990

(54) Taco Co of Australia v Taco Bell Pty Ltd (1982) 42 ALR 177 (1982) ATRP 43 751. Mexican Restaurants. Australian restaurant had traded since 1976. US chain "Taco Bell" opened in Sydney. Australia company claimed passing off as Australian one: Held breach 252 Trade practices Act 1974 -conduct was deceptive.

(55) CC v James Pascoe NZ Ltd (1989) 3 TCLR 410 Prosecution under s13(g) arose out of complaint by trade competitor to Commerce Commission. Pascoe's operated retail jewellery shop in Queenstown specialising in the tourist trade selling mainly jade and opal jewellery. Competing traders complained that the term "duty free" used to promote the goods was misleading as it gave the impression that the goods were such as to normally be subject to a specific duty or tax and that the purchaser was getting them free of this additional cost. In fact no such duty attached to the goods in question. The statement that the goods were "duty free" was therefore true in the literal sense. Held that use of term was misleading and that no defense available under s44(1)(a) as use of the term was deliberate.

of itself conclusive evidence that conduct was misleading or deceptive but evidence can be brought of confusion on the part of consumers in the course of demonstrating the misleading or deceptive nature or the conduct, or that it was likely to produce such a result. (56)

The sections do not require that the conduct in question have actually mislead or deceived any one. It is sufficient that it can be proved "likely" to have done so, or "liable" to do so. The term "likely" used in Section 9 has been held to impose a strict liability and intent is not therefore a necessary element of an offence. (57) Section 9 denotes conduct that has a greater potential to mislead or deceive than that which under section 10 is "liable" to do so.

It is not necessary to prove that any damage has actually

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(56) CC v Kimberley's Fashions Ltd & Marcol Manufacturers Ltd (1989) 3 TCLR 405 Labeling of fashion garments said to be misleading. Was "confusion" enough to be misleading ? Marcol importer leather jackets from Korea. On import had label "made in Korea" and also "Marcol Christchurch New Zealand". Marcol supplied garments to Kimberley Fashions. When inspected on K. Fashions premises the label "made in Korea" had been removed. K.Fashions maintained a belief that the garments were NZ made. Prosecution under s13(j) FTA. Held was a misleading representation as to country of origin of jackets. Kimberley Fashions held to have a defence under s44(1)(a) as mislead by importer and that mistaken belief reasonable in circumstances.

(57) Taco Co of Australia and James Pascoe op cit

been caused at the time of prosecution in terms of section 9. (58) While the court may consider the extent of actual damage when considering remedies these are not limited to economic loss.

The Fair Trading Act does not prevent the comparative advertising of goods. But even if the rival's name is not used the advertisor will still be liable to have the accuracy of its claims tested. (59)
If the public or a section of the public has been misled or deceived subsequent action by the trader to "put things right" whether by advertisment or some other method will not excuse their liability for a breach of section 9. (60)
In some areas the Act goes to conduct that was considered by the Courts under the Tort of "passing off". Both the Taco Co and Taylor Bros (61) cases being examples.

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(58) Taylor Bros Ltd v Taylors Textiles Services Auckland Ltd [1988] 2 NZLR 1 (1988) 2 TCLR 447 (1988) 2 NZBLC 103,032 Plaintiff ran dry-cleaning and towel hire co. in Wellington. Defendant recently purchased dry-cleaning (run as "Fosters") and linen-hire (run as "Taylors") companies. Held was goodwill in name "Taylors Dry Cleaning" , that consumers not perceive difference types of business - dry cleaning - linen hire- ; Test "is there likely to be confusion in the eye of the consumer" - closely related fields activity more likely confusion; Use of name "Taylors" misleading and deceptive in terms of section 9 FTA 1986.

(59) Telecom Corp of NZ Ltd v Clear Communications Ltd 30/7/92 Greig J, HC Wellington, CP504/92
Rival telecommunication companies. Part of a long running battle. This case re accuracy of claims re toll charges.

(60) Tot Toys v Mitchell 15/7/92 Fisher J, HC Tauranga CP186/88 (the buzy-bee case) Two makers of Buzy Bee Toy. Published information after compliant not remove liability for breach already occurred.

(61) Op cit

The cases in involving allegations of breach of the Act in the making of false representations are more often the result of a complaint made to the Commerce Commission by individual consumers as distinct from the "passing off" or "unfair competition" allegations which are more usually the result of a complaint by a rival trader. A survey of the reported cases concerning section 9 and 10 held on the LINX and NETWAY databases indicates that to date the majority of cases have brought either by the Commerce Commission itself (possibly following a consumer complaint) with rival traders a close second. Individual complainants who could be termed "consumers" seem to have often been stalking horses for rival traders.

False representations as to goods (62) are a major source of fair trading complaints both volume of reported cases and in the calls and inquiries made to the Consumer Institute and Ministry of Consumer Affairs (63)

In many instances the sum of money involved is small but the consumer may feel considerably cheated and aggrieved.

Section 13 of the Act makes it an offence to "in trade or

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(62) S.13 Fair Trading Act 1986
(63) Information supplied by Institute and Ministry.
Note not all inquiries result in a formal complaint.

supply" (64) to make false representations as to standard, quality, grade, quantity, composition ,style , model or that the goods have had a particular history. (65) Further the section makes an offence of misstating the origin or age or price of goods as well as a number of other matters.

Cases concerning false representations made by traders as to the quality of their goods include a brass bedstead that was brass plated (66) and three diamond rings that were cubic zirconia (67).

False representation as to "standard" included children's bed clothes that were represented as designed to reduce fire risk and were not so designed (68) and false representation as to "kind" (69) was found when a fish species not common in the retail fish trade was offered to the public under the name of another more well known fish species. Breach of the Act's provisions was found in all the above cases.

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(64) Defined in section 2 Fair Trading Act
(65) Section 13 (1) (a)
(66) CC v A & W Hamilton (1989) 3 TCLR 398 Commerce Commission prosecution following on from consumer complaint. Breach of FTA found.
(67) CC v Old Sydenham Town Jewellers (1990) 3 TCLR 440 Prosecution under s13(a). Complainant Australian resident purchased 3 "diamond" rings from OSTJ. On subsequent valuation found to be synthetic stones. The rings were very cheap for diamonds but purchaser alleged had been representation made that they had been purchased from an estate auction. Defendants credibility as a witness did not impress judges. Order refund price paid, return of rings to OSTJ. Fine $300.
(68) Connell v L D Nathan & Co Ltd and Farmers Trading Co (Wellington) Ltd [1990] 2 NZLR 160 (1988) 3 TCLR 362
(69) CC V Harbour Inn Seafoods Ltd 17/6/91 Keane J DC Wellington

The Consumer Affairs and the Commerce Commission receives complaints from the public and operate a public information and assistance service. The Commerce Commission will under the authority vested in it by the Act prosecute complaints where it considers such warranted. (70) It is also is open to an individual or corporate complainant to do so. The Act does not in its definition of trade limit itself to transactions between a trader and a consumer. Any class or person (including manufacturers) is covered whether in business or not.

The remedies provided under the Act are contained in part V and provide for the imposition of substantial fines for some offences (in the case of an individual of up to $30,000:00 and a body corporate of $100,000:00). Proceedings may be commenced up to three years after the offence was committed (71). Offences under section 40 of the Act are such as make an offender liable on summary conviction (the criminal standard of proof being required).

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(70) See Annual Report to Parliament Commerce Commission 1986-92 also the Commission has since 1986 published regular bulletins concerning both prosecutions and complaints. See "Fair's-Fair" It also publishes material as a guideline to traders and advertisers to assist them in avoiding offending practices. This is one of the Commissions' functions under S6 of the Act.

(71) S40 (3) Fair Trading Act 1986 Note that fines are not available for a breach of sections 9, 14 (2) & 23. The latter two sections cover situations of physical harassment or coercion and whilst such actions would in any event fall with the provisions of the Crimes Act the lack of provision for a punitive fine for such actions is interesting.

Other remedies are provided that are aimed at preventing or rectifying of bad conduct. The Court may on the application of the Commission or any other person grant an injunction preventing conduct and (only on the application of the Commission) may order that advertisment be made disclosing information specified by the Court (72). Injunctions are often sought by rival traders alleging inaccurate comparative advertising or "passing off". (see the Taylor and Telecom cases).

The Court has further wide ranging powers to make orders where it finds that a person (who does not have to have been a party to the proceedings) has suffered or is likely to suffer loss or damage by conduct of another that contravenes the Act. It may declare contracts void (ab initio or otherwise), vary contracts to direct that a refund of money be made or property returned, direct that loss or damage be paid to the party to the contract, to order repair or the provision of parts. (73) These are the remedies by which the actual consumer may be compensated for his or her loss or damage suffered. (74) They do not however extend to providing

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(72) S41 & S42 Fair Trading Act 1986
(73) S43 Fair Trading Act 1986 See CC v Old Sydenham Town Jewellers op cit for such an order in consumers favour.
(74) There are statutory defences to prosecution for all but sections 9, 14(2) and 23 which are set out in section 44. They include "reasonable mistake", reasonable reliance on information supplied by another and that the contravention was due to the act of another or accident or default outside the defendants control.

exemplary damages (which the consumer could presumably still seek in tort if so inclined).

There is an exemption for the news media when publishing information (advertisments) supplied in the ordinary course of business. This exemption does not apply where the information was itself supplied by the media organisation in question as was the situation in the Wilson & Horton case where the newspaper took it upon itself to supply a photograph of what it purported to be a "bongo" van for an advertisement placed by another person. (75)

Dangerous products under the Fair Trading Act

The other side of the coin for the consumer from deception is the dangerous product, particularly those that are dangerous because of negligent manufacture but do not appear on their face to to be inherently dangerous. The classic ..."wolf in sheep's clothing instead of an obvious wolf." (76)

The Fair Trading Act has considerable impact on the control and regulation of goods that may be unsafe or dangerous. The Minister (of Consumer Affairs) is empowered by sections 27 and 29 to set by regulation Consumer Information Standards and Product Safety Standards. These provisions have been

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(75) CC v Wilson & Horton Ltd. (1992) 4 NZBLC 102,871 Newspaper supplied photograph of "Bongo" van from its archives. Van for sale differed in several respects from the photograph.

(76) Hodge v Anglo American Oil Co (1922) 12 Ll.L.Rep 183,187 per Scrutton LJ

used to set Consumer Information Standards that apply to the "Care labelling" of bedding, clothing, yarns and other items of fabric or material (77). The labelling as to country of origin of clothing and footwear (78) attempts to prevent the inhalation of fibre by under three year olds (79) and the safety of toys (80) and bicycles (81).

Goods determined to be unsafe may be made the subject of a compulsory recall order made by the Minister and gazetted. The Minister may by this notice declare "goods or any description or any class or classes of goods will or may cause injury to any person" (82) The notice remains in force for up to 18 months and a product safety standard may be put in place. If no product safety standard is put into place then the Minister may under section 31(3) prohibit all supply of those goods. It then becomes an offence for any person to "supply or offer to supply or advertise to supply goods" which are the subject of a notice.

As an example products subject to notices prohibiting supply

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(77) Consumer Information Standards (Care Labelling) Regulations 1992/90
(78) Consumer Information Standards (Country of Origin (Clothing and footwear) labelling) Regulations 1992/360
(79) Consumer Information Standards (Fibre Content Labelling) Regulations 1992/89
(80) Product Safety Standards (Childrens Toys) Regulations 1992/91
(81) Product Safety Standards (Pedal Bicycles) Regulations 1991/225
(82) Sections 31 and 32

have been "glitter bangles" (which were filled with unpurified water which contained high levels of bacteria) (83) and "pistol crossbows" (marketed as childrens toys they did not have safety catches and fired a bolt with more than considerable force) (84).

The Act provides a clear incentive to manufacturers to co-operate in the production of a product safety standard or risk having all supply prohibited. In the course of research the writer discovered that no representatives of major retailers were prepared to discuss issues arising out of product recalls "on the record". Two retailers spoken to expressed concern about the actions of the Commerce Commission in regard to the recall of goods that they had stocked. In fact on an examination of the compulsory recalls made to date manufacturers and retailers would seem to have little to fear.

To date the majority of such notices of prohibition have related to items promoted as childrens toys particularly those aimed at the under three years age group. The Commerce Commission has adopted the procedure of discussions with manufacturers (and if relevant, retailers) over unsafe goods often resulting in a voluntary recall of product.

The procedure for making the orders, involving as it does gazetting of the notice, is bureaucratically long winded

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(83) Gazetted 4 October 1990
(84) Gazetted 19 October 1990

and, according to one retailer, so much so that the unsafe products may well all have been sold well in advance of the notice. Few products are compulsorily recalled prior to actual harm being suffered by a consumer as it is the injured consumer who brings the Commissions attentions to bear on the product.

The Minister, in making decisions concerning product recall is open to have that decision judicially reviewed and overturned if shown to have been made recklessly or negligently.
At least one challenge has been brought to the Minister's decision. In Issac v Minister of Consumer Affairs (85) the Minister had exercised her power to recall bicycles sold by Issac an investigation by the Ministry of Transport having apparently found them to be unsafe. Issac alleged that there had been procedural and substantive unfairness and that the advice given to the Minister prior to making her decision to issue the notice had failed to disclose relevant material. Issac's application was declined both because the both on application of the legal tests for procedural unfairness. and on the Judge's finding that the facts clearly disclosed that the bicycles in question were unsafe.

Issac was not without reason to be upset however. A product recall with its attendant media publicity (in part by way of Ministry press releases) can inflict considerable financial impact on a manufacturer or retailer.

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(85) [1990] 2 NZLR 606 (HC Dunedin Tipping J) 7

Because of this, retailers may be wary of publicly commenting on the recall procedure, preferring to maintain cordial relations with the Commission if at all possible.

The Fair Trading Act provisions concerning unsafe products do not amount to a product liability regime as exists in other jurisdictions. The Act does not impose any strict liability to the consumer upon manufacturers but rather provides for a method of removing from the market products already found to be unsafe.

The Consumer Guarantees Act

This Act, enacted this term, creates a new regime for contracts for the sale of some goods between those persons who fall within its definition of "consumers" "manufacturers" and "suppliers" (86). In contrast to the Fair Trading Act and Sale of Goods Act the Act's provisions extend into the area of post-sale consumer protection.

The Act does not apply to sales at auction or by competitive tender (87) nor will it give any protection to the person who receives goods by way of a charitable gift from a charity when the gift is for that person's benefit. (88) This exclusion will have the effect of taking out of the Bill's protection those who are reliant on food banks and arguably a group more in need than most of the law's protection yet less likely to want to

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(86) S.2 Consumer Guarantees Act. Note the definition of Suppliers includes Financiers within the meaning of the Credit Contracts Act 1981 in some circumstances. The Act does not only apply to sales but will cover a number of other transactions.
(87) s.42 Consumer Guarantees Act
(88) s.40 Consumer Guarantees Act

complain to the immediate donor.

The Act will not replace the Sale of Goods Act nor is it a code. It contains a saving provision that will, in turn, continue the saving contained in the Sale of Goods Act of the rules of common law that were not amended or replaced by that Act. (89)

The Consumer Guarantees Act defines the consumer as one who:-

..."(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption: and

(b) Does not acquire the goods or services or hold himself or herself out as acquiring the goods or services for the purpose of-

(i) resupplying them in trade; or

(ii) consuming them in the course of a process of production or manufacture; or

(iii) in the case of goods, repairing or treating in trade other goods or fixtures in land.

This test of who is a "consumer" focuses on the nature of the goods rather than their monetary value. (90) Goods themselves are defined widely so as to only exclude residential buildings (noting that non residential removable buildings are included). In transactions covered by the Act the terms implied into contracts by the Sale of Goods Act 1908 are replaced by a new series of implied "guarantees" (the words condition and

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(89) see s4 Consumer Guarantees Act and s60 Sale of Goods Act 1908.

(90) S2 Consumer Guarantees Act : Compare Trade Practices Act 1974 Aust.

warranty are strenuously avoided in the Act). The concept of merchantable quality, still not satisfactorily judicially defined in over eighty years, is replaced by the more modern sounding "acceptable quality" and "fitness for particular purpose" guarantees contained in sections 6, 7 and 8 of the Act. Whilst these terms are more fully defined within the Act than were those contained in the Sale of Goods Act they will still be the subject of judicial interpretation in the future.

Defective goods may still be sold to consumers but if a retailer is to avoid liability then the defects must be drawn to the consumers attention prior to purchase. (91)

The guarantee as to title contained in section 5 of the Act goes not only to the sellers right to sell the goods and that they be free from any undisclosed security. (92) It also goes to the right of the purchaser to undisturbed possession. This right however comes with a proviso that where the consumer is in possession under any agreement for supply then oral advice alone of the terms that might result in loss of the right to undisturbed possession in terms that a reasonable consumer might understand will not be enough. The purchaser must acknowledge this in writing. (93)

Also contained are guarantees as to price (which goes further

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(91) S7(2) Consumer Guarantees Act
(92) S5(a) & (b) Consumer Guarantees Act
(93) S5(A) altered by select committee. The practical effect of this presumably being that consumers will be asked by the retailer to sign an acknowledgement. Ideally this should contain the relevant advice as to the title position.

than that contained in section 10 of the Sale of Goods Act in that it also provides for a remedy if the guarantee is breached. (94) That the goods comply with description (95), and that they comply with sample (96). These latter two guarantees should assist consumers in cases of sales by description of the the type outlined in Taylor v Combined Buyers Ltd and still common.

There is also a guarantee to the consumer from both manufacturer and supplier of goods that repair facilities and spare parts will be available post sale. (97) Manufacturers (and retailers) may avoid the need to make such provision if :-

> ..."reasonable action is taken to notify the consumer who first acquires the goods from a supplier at or before the time the goods are supplied, that the Manufacturer does not undertake that repair facilities and parts will be available for those goods ...or that such may not be available after a specified time..." (98)

This is a practical approach, particularly in the case of imported items, however for the consumer the only change may be to the label on the goods or the erection of a sign at the point of sale advising that the manufacturer does not guarantee repair or spare parts availability. In a perceived quality driven market, such as presently exists for whiteware,

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(94) S11 Consumer Guarantees Act
(95) S9 Consumer Guarantees Act
(96) S10 Consumer Guarantees Act
(97) Ibid NZLR [1924] 627
(98) S12 Consumer Guarantees Act: Guarantee does not apply to second hand goods.

a manufacturer has an incentive to offer repair facilities but the effect on a market that is entirely price driven (such as discount chains) may well be negligible. This certainly was the opinion expressed to the writer by the Sales Manager of a large (New Zealand wide) discount chain.

Consumers Remedies under the Act

Under the Act the consumer will have a remedy against both the seller and the manufacturer of goods. Where the failure by the goods to comply with an implied term is capable of remedy then the consumer may :-

> ..."(a) Require the supplier to remedy the failure within a reasonable time ..."
>
> (b) Where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time -
>
> (i) Have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred ...
>
> (ii) .... reject the goods in accordance with Section 22.... "

Where the failure to comply or breach of the implied term is either not capable of remedy or is of a substantial character (99) then the consumer may:-

> ..."(a)...reject to goods in accordance with section 22..
>
> or
>
> (b) Obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid

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(99) As defined in the Act, note the similarity of approach with that of S7 of the Contractual Remedies Act.

or payable ..."

As well as the above remedies the consumer may also seek damages from the supplier for:-

> ..."any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure". (100)

The consumer will not now be subject to the problems arising out of "acceptance" of the goods under the Sale of Goods Act. The purchasers initial "acceptance" of the goods does not limit the right of rejection. If the goods breach one or more of the implied guarantees contained in the Act, and the the failure is not capable of remedy or if it is of a "substantial character" then the purchaser can either reject the goods or obtain damages in compensation for loss of value. (101) Further the consumer now has the right to seek a remedy against the manufacturer of the goods. If the goods fail to comply with the implied guarantees as to acceptable quality, correspondence with description, repair and parts or any express guarantee given by the manufacturer (102) then the consumer has the right to seek damages against the manufacturer on the same basis as against the retailer. If the breach complained of is of an express guarantee given by the manufacturer the consumer is required to allow the manufacturer

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(100) S18 Consumer Guarantees Act
(101)S18(3) Consumer Guarantees Act
(102)S25 Consumer Guarantees Act

opportunity to remedy the defect either by repairing or replacing of the goods. (103) The manufacturer or retailer has a right to cure the defect which extends to refunding the price paid. In some situations where for example the defect is minor a retailer might well prefer to be able to choose to whether to replace or repair the goods complained of or to refund the price paid.

Section 22 sets out how the purchaser must go about a rejection of defective goods. It may be done it by letter or in person but the goods must be returned (except in limited situations where it is not possible to do so whereupon the seller then has a right to collect the goods).

The rejection of the goods will re-vest the property in the supplier, an explicit preservation of the existing position under the Sale of Goods Act and in contrast with the scheme of the Contractual Remedies Act.

The Act has been welcomed by Consumer interest groups as being a strong step in the direction of consumer protection. However there have been concerns expressed about the failure to harmonise the various strands of the law and provide a complete codification of the law relating to formation of and breach of contracts (not only sales transactions). (104)
These same concerns about the lack of harmony in the law were expressed in the Law Commission Report number 25 (105)

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(103)S27(2) & S19 consumer Guarantees Act
(104) Information and comments made to the writer by a staff member of the Consumer Institute and a senior advisor Citizen's Advice Bureau.
(105) Ibid (45)

The Impact of Accident Compensation

Since Donoghue v Stevenson (106) the focus of negligence cases involving a manufacturer's liability was on those products which had caused injury or damage to the person or property of the individual. (107) Since 1 April 1974 it has not been possible to bring an action in New Zealand for personal injury or death suffered after that date. (108) The 1972 and 1982 Accident Compensation Acts replaced tort actions arising out of "personal injury by accident" with compensation provided at set levels from a single source and the jurisdiction for determining what was a "personal injury by accident" vested at first instance with the Accident Compensation Corporation itself. The Acts barred all claims for damages (whether in tort or under the Deaths by Accident Compensation Act 1952) that arose directly or indirectly out of personal injury.

This bar was not in fact complete although I suggest that the lay person would have believed it to be so. If the plaintiffs cause of action arose prior to 1 April 1974 and had been concealed by a fraud then the six year limitation period set down by the Limitation Act 1950 for personal injury claims was not applicable and suit could still be brought. (109) At least one action arising before the legislative cut off

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(106) [1964] AC 465

(107) Hadley v Baxendale Ct Exch 9 Exch (Welsby, Hurstone and Gordon) 341, (1854) 156 Eng Rep 145

(108) S27(1) Accident Compensation Act 1982 (cf: S5 (1) Accident Compensation Act 1972) S8 Accident Rehabilitation and Compensation Insurance Act 1992

(109) Green v Matheson [1989] 3 NZLR 546 (CA) A surviving patient of the "unfortunate incident" at National Womens Hospital attempting to bring a tort action against the then Professor alleged to have been conducting the "experiment".

date was still being heard a decade later. Exemplary damages in tort remained available during the currency of the ACC Schemes as they were held not to arise directly out of the personal injury by accident. (110) Some other statute based claims such as under the Carriage by Air Act 1967 also survived the Accident Compensation regime. In general however, following the introduction of the Accident Compensation Schemes there was no longer any particular impetus for the plaintiff to seek recompense for their injury through the courts.

Two points however arise out of the operation of the Compensation system. Firstly it has been suggested by several writers including one of the authors of a recent text The Law of Torts in New Zealand (111) that a primary reason for the failure of a strict liability product liability regime to develop in New Zealand has been the existence of the compensation scheme.

Secondly the scheme itself has undergone major alteration in 1992 with the enactment of the Accident Rehabilitation and Compensation Insurance Act and amendments which by considerably altering the policy and approach of the previous schemes may well have a direct impact on public perception as to the need for a strict product liability regime.

As to the first issue it is interesting to note that in the years since Donoghue v Stevenson (and in the United States

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(110) Donselaar v Donselaar [1982] 1 NZLR 97 One brother assaulted another, claim made under ACC scheme for compensation, did that bar tort exemplary damages. Held that the tort action survived the Act.

(111) Todd, Burrows, Chambers, Mulgan, Vennell Law Book Company 1991.

since MacPherson v Buick (112) There has been considerable development in the intervening years in other jurisdictions towards a strict manufacturers product liability . Introduced judicially in the United States the concept is now accepted law. The American Restatement of Tort provides that:-

S.402A Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property,if

(a)the seller is engaged in the business of selling such a product and

(b)it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The Rule in subsection (1) applies though

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

This expresses in a nutshell the concept of strict product liability. The absence of privity is essential for it such a duty to operate to benefit those other than the actual

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(112) 217 N.Y. 382, 111 N.E. 1050 (1916) NY Court of Appeals, Cardozo J, M brought car from dealer who purchased from manufacturer B. Wheel defective wood, car collapsed, M injured. B held liable to M.

purchaser. It is not however true to say that the manufacturer is simply an insurer, his liability is strict in the sense that it rests on no proof of negligence, and his product must still meet the test of being "unreasonable dangerous".

Compare this with Lord Aitken's test in Donoghue v Stevenson (whereby the manufacturer may shelter behind the lack of proof of negligence) and the progress over the years in the United States towards a greater protection of the consumer is clear. The Australians took the step to abolish the negligence requirement in the Trade Practices Act 1974 and the British did the same with the Consumer protection Act in 1979 yet in New Zealand no real progress away from the essential concepts of the tort of negligence were made. The Accident Compensation Schemes were not introduced until the 1970's. Certainly any impetus for such development was driven in other jurisdictions by personal injury cases (113) and the existence of the schemes removed this impetus.

Why then the lack of progress ? Products were no more safe in New Zealand than elsewhere and consumer concerns were no less vocally expressed. (114) Perhaps one difference lay also in the nature of the New Zealand market. In the years from 1930 up until the election of the third Labour government New Zealand was a strongly regulated economy. Imports of goods into the

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(113) Prosser & Keeton on Torts (op cit) contains detail on the American position including brief historical background.

(114) See annual reports of NZ Consumer Council to Parliament and any issue of "Consumer" magazine published during the 1970-1972 period.

country were tightly controlled by a strict licensing system and complaints were common about the limited range of products available in the retail market. (115) The focus of the Woodhouse Report (116) and the subsequent legislation was to be on physical injury to the person, whether in work related, motor vehicle or other situations. Interestingly, with the exception of bicycles, the Accident Compensation Corporation does not appear to have under either scheme published statistics that would indicate how many claims each year are individual product related. This is despite one of the main focus points of the Corporation being on "injury prevention". (117)

Another difference lay in the inability to bring "class action" suits under the both old Code of Civil Procedure and now again under the High Court Rules and the continuing Law Society disapproval of contingency fees. Where a plaintiff will have to bear "up front" the entire cost of litigation there is clearly less incentive for them to proceed with a less than certain action.

The Accident Compensation scheme has been criticised outside New Zealand for its omissions in the area of product liability but criticism within New Zealand in this regard appears to have been rather more muted. (118)

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(115) Import / export / trade figures see New Zealand Year Book (annual)
(116) "Compensation for personal injury in New Zealand" 1967 Report of Royal Commission Chaired by Hon Mr Justice Woodhouse
(117) Annual Report Accident Compensation Corporation 1991, and 1992.
(118) The Law of Torts in New Zealand. Ibid p79

The introduction of a altered compensation scheme by the Accident Rehabilitation and Compensation Act 1992 may now have an impact on the public perception of a need for product liability. A substantial feature of the previous schemes was the availability of "lump sum" payments to claimants who suffered both physical and emotional or psychological damage. Sums of up to $27,000:00 were available together with an on going right to a payment based on percentage (80% in most cases) of the injured persons previous average income. Whilst the Act did not (for policy reasons) discriminate between those engaged in legal or illegal activity at the time of the injury it did discriminate against those (often women) who had not held paid employment.

Furthermore those unfortunate enough to be incapacitated through illness as opposed to accident were placed in a distinctly less financially advantageous position.

People disabled by illness could claim a sickness or invalids benefit under the Social Security Act. This payment was considerably less than the earnings related sum payable under the Accident Compensation scheme. Further there was increasing concern as to the sustainable financial viability of the scheme. Following the Working Party Report on ACC reform in 1989 (119) the then Labour Government introduced the Rehabilitation and Incapacity Bill 1990. Following Labour's subsequent electoral loss the National party convened the Ministerial Working Party on the Accident Compensation

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(119) See also Law Commission Report No.4 9 May 1988

Corporation and Incapacity. The Accident Rehabilitation and Compensation Insurance Bill was introduced in 1991 and enacted (after amendment) in March 1992. The scheme became fully operational on 1 July 1992. The Act reflected the National Party's stated election policy of making "the state and the individual share responsibility for funding health care and income maintenance in cases of sickness and accidents outside the workplace". (120)

Lump sum payments are a thing of the past and are replaced by a new periodic "disability" payment which in some cases may be paid in conjunction with the relevant social welfare benefit. This change was financially driven (121) however there has been considerable media comment to the effect that the new scheme interferes with or betrays the "trade off" made by the New Zealand public in 1974.
The argument as it is put is that the public "traded-off" their right to bring an action in tort against the person responsible for their injury against a guaranteed cover under the scheme and accordingly that if coverage is to be reduced then the tort action should be restored. This argument gains some support from the fact that the new Act does indeed reinstate the old tort action in some limited circumstances. If for example a claim does not fall within the Act's definition of "medical misadventure" a tort claim may not be brought against the health professional or institution concerned. (122)

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(120) National Party Election 1990 Health Policy Manifesto.
(121) Refer Working Party Report and ACC Annual Report. for outline.
(122) Ref S5 Accident Rehabilitation and Compensation Insurance Act 1992 and S3 ARCI Amendment (No.2) 1993. for definition of medical misadventure.

If the comments of the writer's clients are any indication then this argument has considerable popular currency. (123)

It is unsound in some respects. The figures supplied in the Woodhouse report as to the recovery rates under the old tort scheme speak for themselves. Few plaintiffs recovered a considerable sum, all had to prove negligence and pay considerable legal costs. For those who could prove negligence against a wealthy defendant the result might well have proven to be a windfall but in the great majority of cases it was not.

If however the public perception of the present compensation scheme does not alter it may be that there will be in New Zealand sufficient impetus to bring about progress towards a statutory product liability regime.

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(123) Refer full page advertisement "Sunday Times" 5 September 1993 : NZ Engineering Union Inc. "Demand the right to sue the unsafe employer".
Refer also to the comments made by L. Cairms on "3 National News" Television 3. 25 September 1993.

Bibliography

J.G. Fleming — Fleming on Torts 8th Edition

T. Housden & M. Copeland (Ed) — Brookers Fair Trading Law Book Company 1992

Law Commission — Report No.4 Personal Injury : Prevention and Recovery Wellington 1988

Law Commission — Report No. 5 : Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979 D.F. Dugdale & C.T. Walker Wellington 1993

Martindale Hubble Law Digest 1993

B. McCormas — Fair Trading NZ Law Conference Papers Christchurch 1987, 198

Prosser & Keeton — Torts West Publishing Company St Paul Minnisota.

Russell & Miller — Annotated Trade Practices Act Law Book Company 1993

Todd, Burrows, Chambers Mulgan and Vennell — The Law of Torts in New Zealand Law Book Company 1991

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