PRODUCT LIABILITY ACTIONS IN AUSTRALIA: IS THE COLLATERAL CONTRACT REMEDY AN OPTION?

By

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1. Introduction

In Australia the common law remedies currently available for defective products are basically limited to a claim for damages either in tort for negligence or in contract for breach of an express or implied warranty.

As stated by one commentator: "Australian judges are steeped in legalism and the common law has not developed a doctrine of strict liability in tort . . . Accordingly Australians are far less litigious in this field."[1]

By contrast in the United States two doctrines achieve the result of strict liability, namely "strict liability in tort" and "implied warranty liability without privity".[2] As early as 1933 in *Baxter* v *Ford Motor Co.*[3] the Supreme Court of Washington recognized an express warranty by Ford that the windshields on its motor vehicles were shatterproof, despite the fact there was no privity of contract.

The difference between the two American doctrines is that the former is a tortious principle which dispenses with the need to prove negligence, and the latter is a contractual principle which dispenses with the need for privity of contract. However, both doctrines achieve the same result of strict liability, although in practice the doctrine of strict liability in tort is the one more applied.

Therefore an Australian litigant who wishes to sue the manufacturer of a defective product is currently faced with the often insurmountable obstacle of having to affirmatively prove negligence, and a heavy onus of proof rests upon the plaintiff throughout in a negligence action, or the consumer/litigant must establish the existence of a contractual relationship with the manufacturer.

However, in the typical and most common case the contract of sale will not be between the manufacturer and ultimate consumer, but between consumer and retailer who may in turn have purchased goods from a wholesaler i.e. there is no vertical privity. Moreover the party with whom the purchaser contracted may not be as substantial financially as the manufacturer and may not be worth suing. Certainly if the purchaser does successfully sue the retailer the latter has a contractual right to sue his supplier for breach of warranty, and so on up the chain of distribution to the manufacturer. But this "is a cumbersome and expensive way of bringing home to the manufacturer liability for having marketed defective goods, and sometimes the process breaks down."[4] e.g. in *Lambert* v *Lewis*[5] the contractual indemnifying process broke down because the retailer could not remember the name of the distributor.

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1. I.R.G. Blunt 'The Tort System and Liability of Manufacturers for Product-related Injuries and Death: The Australian Viewpoint' (1980) 54 ALJ 472.
2. S.W. Cavanagh and C.S. Phegan *Product Liability in Australia* Butterworths, Sydney, 1983 at 41.
3. 12 P. 2d. 409 (1933).
4. F. Trindade and P. Cane *The Law of Torts in Australia,* Oxford University Press, Melbourne 1986 at 476.
5. [1978] 1 Lloyd's LR 610.

It is arguable that the shortcomings of the current remedies available in Australia for defective products may be overcome by application of the principles of the collateral contract which have extended the situations in which the law recognises the existence of a contractual relationship. Moreover, it has been recognised that the use of the collateral contract device imposes "strict liability for statements"[6] and representations made by a manufacturer. Simply liability does not depend on proof of fault as it does with negligence.

Therefore if the courts made use of the collateral contract remedy Australian consumer protection laws would arguably move closer to those in the United States without the need to introduce any legislative changes.

2. Collateral Contracts

(a) The Different Forms

There are two forms of collateral contract. The first recognised was a two party situation e.g. where A enters into a contract with B after B has made a promissory statement to A. This statement takes effect as a promise in a contract between A and B which is collateral to the main contract between the parties.

The classic case involving a two party situation was *Heilbut Symons* v *Buckleton*[7] where Lord Moulton said

> It is evident, both on principle and authority, that there may be a contract the consideration for which may be the making of some other contract. If you will make such and such a contract I will give you 100 pounds is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence . . .[8]

This form of two party collateral contract however is of little significance in a discussion of a products liability remedy, because the latter will usually involve three parties, namely the manufacturer, seller and buyer. However, the tripartite collateral contract was soon recognised by the courts in both England and later in Australia and Canada. An example here would be where party A (the purchaser of goods) enters into a contract with C (the seller) after a statement has been made by B (the manufacturer) which takes effect as a contract between A and B collateral to the main contract between A and C.

An essential ingredient required here to establish the collateral contract is that the statement made by the manufacturer must be of a promissory nature, not a mere representation, and it must be relied on by the purchaser. English cases have not extended the collateral contract approach beyond express warranties, and indeed Cavanagh and Phegan say there is no authority to holding a manufacturer liable for breach of implied warranties on the basis of collateral contract.[9] However, it is submitted that the courts should be prepared to extend the doctrine and imply a warranty between a manufacturer and purchaser or even bystander, that its goods are of merchantable quality. Support for this argument comes from Miller and Lovell who say this would be "theoretically possible",[10] although they see the development coming through legislation rather than case law.

This aspect will be dealt with in some depth later, but there seems no justification for limiting manufacturer's liability to express warranties only.

The need to recognise a contract collateral to the main contract arose for two main reasons;

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6. S.M. Waddams *Product Liability* 2nd ed., The Carswell Co. Ltd., Toronto, Canada, 1980 at 129.
7. [1983] AC 30.
8. *Ibid.* at 32.
9. *Supra* n.22 at 35.
10. C.J. Miller and P.A. Lovell *Product Liability* Butterworths, London 1977 at 65.

firstly to avoid the operation of the parol evidence rule and thereby allow oral statements to be enforced as collateral contracts and secondly, where a collateral contract is in tripartite form, which is the basis of discussion in this paper, then the privity of contract rule is avoided.

When Lord Moulton first made his classic statement in 1913 he said that collateral contracts "must from their very nature be rare."[11] However, these words have proved to be untrue in practice and it is submitted in agreement with Miller and Lovell that as a device for holding a manufacturer strictly liable, the collateral contract has not been exploited fully. Moreover, even in 1959 Wedderburn in his well known article on collateral contracts stated: "The frequency of such transactions in our society must make the 'three party collateral contract situation' a common phenomenon."[12]

(b) Inconsistency Between The Collateral Contract and The Main Contract

At a very early stage in the evolution of the collateral contract in Australia it was established that a collateral contract will not be sustained if its terms are inconsistent with those of the main contract. In this Rule in *Hoyts Proprietary Ltd* v *Spencer*[13] as it is often called, Knox C.J. stated: ". . . The two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement."[14]

This rule arguably does not apply in England see *City and Westminster Properties (1934) Ltd* v *Mudd*.[15] However the Australian position is different. In dictum in the case of *Gates* v *City Mutual Life Assurance Society*[16] Gibbs C.J. refers to Seddon's article, and on the need for the reform of the rule in *Hoyts case*, but unfortunately he finds no need to consider it so leaves the question open. However, the Full Court of NSW in *Esanda Ltd* v *Burgess & Anor*[17] held the alleged collateral contract could not be held as such because it contradicted the terms of the main contract.

However, it is submitted that this restriction should be limited to the two party collateral contract only. As stated in Lingren and Carter's text on contract law in Australia: "The requirement of consistency applicable where the collateral contract is between the same parties, does not apply where the contract is with a third person."[18] Cheshire and Fifoot express the same view.[19]

Therefore with respect to tripartite collateral contracts which are the basis of this paper this limitation is irrelevant.

3. English Developments — Tripartite Collateral Contracts

(a) Hire Purchase Agreements

The first judicial recognition in England of the tripartite collateral contract occurred with cases involving hire purchase agreements. In *Brown* v *Sheen and Richmond Car Sales Ltd*[20] the plaintiff purchased a motor vehicle on hire purchase from a finance company. Originally the plaintiff inspected the vehicle at the defendant/dealer's car yard where it was advertised

11. *Supra* n. 7 at 32.
12. K.W. Wedderburn 'Collateral Contracts' (1959) Cambridge L.J. at 68.
13. (1919) 27 CLR 133.
14. *Ibid.* at 136.
15. [1959] 2 KB 215.
16. (1986) 60 ALJR 240.
17. (1984) ASC 55.
18. K.E. Lingren, J.W. Carter, and D.J. Harland, *Contract Law in Australia* Butterworths, Sydney 1986 at 168.
19. Starke and Higgins *Cheshire and Fifoot, Law of Contract* 4th ed. Butterworths, Sydney 1981 at 53.
20. [1950] 1 All ER 1102.

to be in perfect condition. The vehicle was in fact unroadworthy and the plaintiff recovered damages against the dealer for breach of the collateral warranty that the car was in perfect condition, despite the fact that there was no contract of sale between them i.e. the main contract of hire purchase was between the customer and finance company; but the representation by the dealer could be enforced by the buyer against the dealer as a collateral contract.

It should be noted that the phrase "collateral warranty" is often used in lieu of "collateral contract", and with respect to three party contracts they mean the same thing.

Two other cases *involving hire purchase agreements* were *Andrews* v *Hopkinson*[21] and *Yeoman Credit, Ltd* v *Odgers.*[22]

In *Andrews case* a second hand dealer warranted a car to be "a good little bus". The customer bought the car from a finance company on hire purchase terms. The steering was defective however, and that caused a collision on the highway. The dealer was successfully sued.

In the *Yeoman Credit case* the vehicle was unroadworthy due to persistent brake failure and the court held the dealer liable to indemnify the purchaser with respect to his liability for rescinding the hire purchase contract.

(b) **Manufacturers Of Defective Products**

The principles enunciated above were applied in two English decisions, to hold that the manufacturer of defective products was liable to the purchaser.

In the first case of *Shankin Pier Ltd* v *Detel Products Ltd,*[23] the defendants who manufactured paint told the plaintiffs that a certain brand of paint would be suitable for use on the plaintiff's pier. The plaintiffs instructed their contractors to use that particular brand of paint and it proved unsuitable. McNair J stated, in accepting the principle applied in *Brown* v *Sheen and Richmond Car Sales*:

> I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A, or that B should do some other act for the benefit of A.[24] The defendants were held liable for breach of collateral warranty that the paint was suitable.

All of the English decisions cited above were expressly accepted by Edmund Davies J in *Wells (Merstham) Ltd* v *Buckland Sand and Silicia Ltd.*[25] The plaintiffs were chrysanthemum growers and were advised by the defendant sand merchants that a particular type of sand was suitable for the flowers because of its low iron oxide content. The plaintiff's nursery manager was also shown a sample and analysis of the sand. The plaintiff ordered the said sand from a retailer which purchased its requirements from the defendants for supply to the plaintiffs. However, the sand delivered had a high oxide content which resulted in a substantial loss for the plaintiffs.

Edmund Davies J. found there was a collateral contract between the plaintiff and defendants the consideration being the plaintiff's purchase of the defendant's sand from the retailer.

G.M. Waddams[26] argues that the effect of this English approach has been to impose strict

21. [1957] 1 QB 229.
22. [1962] 1 All ER 789.
23. [1951] 2 KB 854.
24. *Ibid.* at 856.
25. [1965] 2 QB 170.
26. *Supra* n.6 at 129.

liability for statements by means of the collateral contract device. This is therefore arguably more in line with the American consumer oriented approach and avoids the need for the plaintiff to prove negligence.

4. Australian Position — Tripartite Collateral Contracts

In Australia recognition of the tripartite collateral contract has only occurred with respect to hire purchase agreements. However, it is submitted there is no reason why the Australian courts should not follow the English decisions which made a manufacturer liable under a collateral contract, because the principles involved are the same; and there is no logical difference between that and holding a dealer liable in a hire purchase situation. Indeed the English decisions involving manufacturers applied the hire purchase cases as their authority.

Unfortunately in the 1958 Australian decision of *International Harvester Co. of Australia Pty Ltd* v *Carrigans Hazeldene Pastoral Co.*[27] the High Court left the buyer of a defective product without a remedy in contract. The decision involved a farmer who had purchased an automatic hay bailer manufactured by the International Harvester company from that company's local dealer. The sale resulted from an inspection of the machine at the Royal Easter Show accompanied by a pamphlet and a conversation with an officer of the manufacturers. The Court held there was insufficient evidence to establish a collateral contract between the manufacturer and purchaser. As the dealer had gone bankrupt the manufacturer was the only available defendant. Hopefully the ability of the courts to provide a remedy has improved since this decision and also in view of the arguments that will be outlined.

The three Australian hire purchase cases however are *Irwin* v *Poole*,[28] *C.J. Grais Pty Ltd* v *F. Jones Pty Ltd*[29] and the High Court decision in *Ross* v *Allis-Chalmers Australia Pty Ltd*.[30]

In *Irwin* v *Poole* a dealer made a statement to a purchaser on hire purchase that the vehicle was in good condition. This was held sufficient to establish a collateral contract even though the vehicle was owned by the finance company.

A majority of the Full Court of NSW in the *C.J. Grais Pty Ltd case* found a collateral contract existed between the dealer and purchaser on hire purchase of a metal rolling machine. The dealer had promised it would role half inch plate.

In the High Court decision of *Ross* v *Allis-Chalmers Australia Pty Ltd* it was held that a pre-contractual statement made to the plaintiff about the capacity of a harvester he was buying on hire purchase was not a collateral contract because according to the High Court it was no more than an expression of opinion, and not promissory.

One commentator has correctly noted that this conclusion was arrived at despite the fact that the speaker appreciated the importance to the plaintiff of what was represented, and even though the contract of sale may not have been entered into without the representation.[31]

Although the decision in this case offers no support for the development of the collateral contract remedy in Australia, it does point to the necessity of establishing the essential elements of a collateral contract before this device can be implemented.

5. Elements of a Collateral Contract

In *J.J. Savage & Sons Pty Ltd* v *Blakney*[32] the High Court held that in order to find a collateral contract three main elements had to be established.

27. (1959) 100 CLR 644.
28. [1953] 70 NSW WN 301.
29. [1962] NSW R 22.
30. (1980) 32 ALR 561.
31. P.H. Clarke 'Defective good: effective remedies' (1985) 59 LIJ at 183.
32. (1970) 44 ALJR 123.

(i) There had to be a statement or representation made that was promissory — a mere expression of opinion or mere representation would not suffice.
(ii) There must be an INTENTION on the part of the maker of the statement to guarantee its truth.
(iii) There must be RELIANCE by the party alleging the existence of the contract.

The test of whether a manufacturer's representation is promissory and that he intended to be contractually bound by it is an OBJECTIVE TEST of the INTENTION of the parties.

Anson[33] suggests a number of subsidiary tests which may be applied to help determine the intention of the parties.

(i) The lapse of time between the making of the statement and formation of the contract.
(ii) The importance of the statement in the minds of the parties.
(iii) A statement is more likely to be a mere representation if it is not included in the written contract.
(iv) If the representor is in a better position to ascertain the accuracy of his statement (and surely a manufacturer must be caught here) it is more likely the statement is a warranty.

In addition Lord Denning has introduced certain other tests in this area which place a greater responsibility on the party with the expertise, which in practise will usually be the manufacturer or dealer. In this respect Denning's tests correlate with Anson's fourth subsidiary test, and it is suggested that if they were applied here they would aid in establishing a manufacturer's representation as promissory in nature, rather than being a mere opinion.

Firstly in *Oscar Chess, Ltd* v *Williams*[34] a vendor of a motor vehicle innocently misrepresented the car to be a 1948 model instead of 1939. The vendor sold the car to a firm of motor dealers. Lord Denning in holding that the vendor was not liable for breach of warranty relied on the fact that as this vendor was not an expert in the trade he was in a worse position to discover its year of make than the purchaser motor dealers.

In contrast in *Dick Bentley Production, Ltd* v *Harold Smith (Motors) Ltd.*[35] the seller of a car misrepresented its mileage. The maker of the statement was the manager of a firm of motor dealers. Because the firm members were the ones with the expertise (as would by analogy be the manufacturer of a product), there was no reasonable ground for their statement and therefore the inference of warranty could not be rebutted.

6. Australian Cases

(a) Warranty or Mere Opinion

Three important Australian case examples here are the two High Court decisions of *J.J. Savage & Sons* v *Blakney* and *Ross* v *Allis-Chalmers Ltd* and the decision of the Full Court of NSW in *Esanda Ltd* v *Burgess.*

In all three cases the necessary promissory intent was found lacking and consequently a collateral contract was not established, but the availability of a collateral contract remedy, where appropriate, was not questioned.

In the *J.J. Savage & Sons Pty Ltd case* the plaintiff purchased a motor boat from the defendant after having received a letter from the defendant stating its estimated speed was 15 m.p.h. In fact it only reached 12 m.p.h., but the court held this representation was no more than a statement of opinion, but this was based on the fact the dictionary meaning of the word "estimate" was "of approximate calculation based on probability".

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33. Anson *Law of Contract* 26th ed Clarendon Press, Oxford 1981 at 125-5.
34. [1957] 1 WLR 370.
35. [1965] 1 WLR 623.

As stated previously, in the *Ross case* the pre-contractual statement made to the plaintiff was held to be no more than an expression of personal opinion; and similarly in *Esanda Ltd* v *Burgess* the majority held the assurances given by the Esanda's agent to the male respondent, were merely representational and not promissory, there being no intention on the part of the Esanda representative to give an enforceable right to the lessee to acquire the goods.

However, to balance this apparent difficulty in establishing promissory intent on the part of the defendant are the English and Australian decisions discussed previously. In each of these decisions involving hire purchase agreements the dealer was held liable via the collateral contract device for statements made directly to the purchaser. All statements were held to be promissory, and one can infer from the judgments that if a purchaser relies on the representations of a dealer who is in a better position to ascertain the particular products reliability, this can provide sufficient evidence for a court to find the necessary promissory intent. By analogy a manufacturer would occupy this same position with regard to his product.

(b) **Reliance**

One factor which will always be crucial in determining whether a manufacturer is liable is whether the purchaser relied on the former's statements or representations. Although only a two party collateral contract was involved in the case of *Shepperd* v *Municipality of Ryde*[36] the High Court found a collateral contract to the purchase of land — namely that the opposite vacant land would remain a park. The court had regard to the representation to that effect appearing on the plan and in a pamphlet, and also the fact it was the common intention that the purchaser would rely on such representations.

However, if a purchaser tests the product himself before purchasing and relies on his own knowledge and expertise this will make it more difficult to establish that a warranty has been relied on. This it is submitted is not the common practise of the average consumer however.

(c) **Direct Contact**

English and Australian cases have been mainly concerned with the factual situation of direct communication between the parties to the alleged collateral contract.

As stated by Miller and Lovell there "is no doubt in such cases that a promissory intent can be more readily established."[37] Clearly therefore there is scope to establish a collateral contract between the manufacturer and purchaser where these two parties come into direct personal contact.

However, it is submitted that even where there is no direct contact, there is scope in Australia for application of the collateral contract remedy e.g. via an advertisement or sales brochure produced by a manufacturer which alone could satisfy the element of promissory intent, and not be a mere puff or representation.

Miller and Lovell give support to this argument by stating ". . . an offer of a unilateral contract may be made to the world at large and hence there is scope for movement towards a liability based on general advertising claims as in American law."[38] Moreover, as early as 1975 the Law Reform Commission of N.S.W. made the following observations:

> It has come to be recognised that in the modern world where brand images and sales

36. (1952) 85 CLR 1.
37. *Supra* n.10 at 65.
38. *Ibid.* at 65.

promotion by 'gimmickry' or direct advertising on a nation-wide scale are an accepted feature of everyday life, it is the manufacturer who plays the vital role in persuading the consumer to purchase his product . . . [the consumer] is therefore driven to rely on the accuracy of advertisements extolling the product he seeks.. and yet, the sale is not normally made through [the manufacturer] but through some retail firms. The manufacturer can make what extravagant claims he likes for his product but he will be under no contractual liability to the purchaser . . . unless he can be brought within the *Carlill* v *Carbolic Smoke Ball Co.* principle.[39]

In this latter classic English case an advertisement made by a manufacturer to the whole world was viewed as promissory and not a "mere puff". The contract found by compliance with the terms of the offer in that case was probably not a collateral contract because the consideration was the use of the smoke ball and not the purchase of it, because not all of the users purchased the smoke ball themselves. However, what is important about this case is the illustration that an advertisement can be promissory.

Although there has been little development along these lines in either Australia or England, there have been significant developments in Canada.

7. Canadian Position

(a) Advertisements: Sales Brochures

Carlills case was followed in 1943 by the Ontario Court of Appeal in *Goldthorpe* v *Logan*[40] where the defendant advertised: "Hairs removed by electrolysis . . . No marks, no scars. Results guaranteed." The Court held this was an offer to the world and that the defendant was responsible for the statement's accuracy. Laidlaw J.A. stated: "It may, perhaps, be suggested that this meaning and effect of the advertisement is strained and unfair. I think it is not. On the contrary, I read it in its plain meaning as the public would understand it."[41]

In agreement with Waddam's text on products liability, although on the facts the plaintiff did deal directly with the defendant "Laidlaw J.A.'s reasoning is clearly available to impose strict liability on for example a manufacturer who misdescribes his product, even though the plaintiff buys it from the retailer."[42]

The principle of the collateral contract has also been applied in two Ontario cases — *Naken* v *General Motors of Canada Ltd*[43] and *Murray* v *Sperry Rand Corporation.*[44] In the *Naken case* a class action was instituted against General Motors the manufacturers of Firenza motor vehicles, by purchasers of 1971 and 1972 models. The action was for breach of warranty that those models were of merchantable quality. The vehicles had been advertised through the media and in printed material distributed by the defendant as "tough reliable and durable", which they were not. There was only a contract of sale in existence between the dealers and the members of the class, however, the Court of Appeal clearly accepted the purchaser's ability to claim against the manufacturer simply by holding that the manufacturer's advertisements and representations in printed material etc. could constitute promises to those members of the public who purchased the said vehicles in reliance on the promises. The issue that the court had to determine was whether the class action was properly instituted, and it held that the definition of class in the statement of claim was

39. J. Goldring and M. Richardson 'Liability of Manufacturers for Defective Goods' (1977) 51 ALJ 127.
40. [1943] 2 DLR 519.
41. *Ibid.* at 523.
42. *Supra* n.6 at 142.
43. (1978)) 21 O R (2d) 785.
44. (1979) 23 O R (2d) 456.

too wide. However, they allowed an amendment to exclude purchasers who had not seen or relied on the advertising claims of General Motors.

The court recognised the essential element of the purchaser relying on the advertising material — "The question of reliance is important in determining whether something said or written is a representation or has become a warranty."[45]

In the Canadian case of *Murray* v *Sperry Rand Corporation* a farmer purchased a harvester from a retailer after he had read a sales brochure issued by the manufacturer. The brochure stated that the harvester could cut 45 to 60 tons per hour whereas in fact it only cut 16 tons. The farmer successfully sued the retailer, the distributor and the manufacturer. The only connection between the manufacturer and purchaser was the sales brochure, but the manufacturer was held liable on the collateral warranty exemplified by the representations in the brochure. Reid J. adopted the English decisions on collateral contracts and the tests devised to distinguish between a mere representation and a warranty. He said "I cannot see any significant difference in the situation of the paint manufacturer in Shanklin . . . and the harvester manufacturer in this case",[46] and he said of the sales brochure: "Its tone was strongly promotional. It goes far beyond any simple intention to furnish specifications. It was, in my opinion, a sales tool. It was intended to be one and used in this case as one."[47]

The distributor as well as the retailer were also held liable for breach of warranty (against the former in collateral contract also), because both of them on visiting the farmer's property had given oral assurances of the machines capacity. Indeed they affirmed the claims which had been made in the manufacturer's sales brochure.

A recent tripartite collateral contract situation which involved both an advertisement and a sales brochure is *Hallmark Pool Construction* v *Storey*[48] a decision of the New Brunswick Court of Appeal.

In this case the plaintiff purchasers entered into a contract with a retailer for the acquisition and installation of a fibreglass swimming pool manufactured by the defendant. They were induced to do so by a statement made by the defendant in a magazine advertisement and a sales brochure that the pool was guaranteed for fifteen years. The pool actually supplied was satisfactory, however, it was installed incorrectly and as a result deteriorated and became unserviceable after only four years. It was held that the relevant parts of the advertisement and brochure amounted to an offer of a fifteen year guarantee by the defendant. The court said that gave rise to a collateral contract with the plaintiffs when they accepted the offer by entering into their contract with the third party retailers. By means of this contract the plaintiffs were able to enforce the guarantee against the manufacturer.

The court justified their approach by going back as far as *Carlills case* stating: "As in the Carbolic Smoke Ball case, supra, the representations in the present case were not of a kind a reasonable consumer shucks off as 'mere puff' or laudatory commendation."[49]

Interestingly the precise terms of the guarantee excluded faulty installation, but reasonable notice of this limitation did not appear in the advertisement or brochure. For this reason it was not incorporated into the collateral contract.

To conclude the Court of Appeal referred to the commentator Waddam's view that the principles of collateral contract could lead to the development of strict liability for misleading

45. *Supra* n.43 at 790.
46. *Supra* n.44 at 468.
47. *Ibid.* at 465.
48. [1983] 144 DLR (3d) 56.
49. *Ibid.* at 61.

statements with respect to defective products. Therefore if this approach was adopted by the Australian courts it would relieve the plaintiff of the need to prove negligence.

However, caution should prevail because many advertisements are so uncertain and vague that they could not possibly be enforced as promises. But in the Canadian cases discussed the advertisements were not vague, though factually it should be noted that generally they were reinforced by brochures which contained substantial material as to the qualities of the product. It would seem unlikely that an Australian or English court would be prepared to hold that a single vague advertisement on its own could constitute a warranty on which a collateral contract remedy at common law could be based. Something more substantial would be required.

In Canada the collateral contract remedy has also been successfully invoked to enable purchasers to sue manufacturers, where rather than the purchaser relying solely on an advertisement or brochure, there has been some direct personal contact between the representor and representee. In practise the elements of a collateral contract are more easily established in this situation. A case in point is *Traders Finance Corporation Ltd* v *Haley*; *Haley* v *Ford Motor Co.*[50]

In this case the appellant purchased three T850 Ford trucks from a finance company, the assignee under a conditional sales agreement originally made between the appellant and a party named Fix. Before he purchased the trucks the appellant conferred with Fords' local manager, and the latter described the T850 truck in some detail including the fact that its features "were superior to anything competition has on the market."[51] During this discussion the appellant was also shown a tear sheet of the company's advertisement which said such a truck could run for approximately 150,000 miles without requiring any major repairs. In fact the trucks consistently broke down involving the plaintiff in heavy expense, delay and loss of work. It was held that Ford was liable to the appellant on two grounds.

The first ground was for breach of a collateral contract. The principles in *Heilbut Symons & Co.* v *Buckleton* were adopted, and also Lord Denning's test in *Oscar Chess, Ltd* v *William* i.e. would an intelligent bystander reasonably infer that a warranty was intended.

Ford was also held to be liable under the Sale of Goods Act for breach of implied warranties.

> Where as here a purchaser goes to a manufacturer, makes known the purpose for which he requires equipment, is told that specific pieces of equipment shown to him would do the required job, then notwithstanding who else may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion, the seller within the Sale of Goods Act.[52]

The Canadian commentator Waddam appears to prefer the collateral contract approach because he says of the Sale of Goods Act finding: "With respect, it seems unsatisfactory to say that the manufacturer is the seller, when it is clear the contract of sale is made between the plaintiff and the dealer."[53]

An unsuccessful appeal by Ford on the issue of quantum of damages was made to the Supreme Court of Canada[54] but no doubt was cast on the grounds of liability relied on by the court below.

In 1969 in the case of *Hawrish* v *Bank of Montreal*[55] the Supreme Court of Canada

50. [1966] 57 DLR (2d) 15.
51. *Ibid.* at 17.
52. *Ibid.* at 18.
53. *Supra* n.6 at 145.
54. Cited as *Ford Motor Company of Canada Ltd* v *Haley* [1967] 62 DLR (2d) 329.
55. [1969] 2 DLR (3d) 600.

recognised the existence of the collateral contract remedy but two elements precluded its use here (i) the court was not convinced there was a clear intention to create a binding agreement and (ii) this being only a two party situation they applied the *Hoyts Proprietary Ltd* v *Spencer* rule that a collateral contract cannot be established where it contradicts the written agreement.

In 1982 the Supreme Court of Canada in *Carman Constructions Ltd* v *Canadian Pacific Rail Co.*[56] dealt with the collateral contract remedy, but failed to find such a contract on the facts of the case. Carman, the appellant carried on the business of heavy construction, particularly rock excavation. Carman wished to tender for rock excavation work for the Canadian Pacific Railway, and Carman's general manager sought from the latter an indication of the amount of rock to be removed. The general manager admitted in evidence that an employee of the railroad company whose name he could not remember "volunteered a figure". The decision of the court on the collateral contract point followed closely the decision in the *Hawrish case*, i.e. (i) insufficiency of evidence to establish the intention of the railroad company employee to warrant the accuracy of his statement and (ii) that a collateral contract would contradict the terms of the main contract, which is not allowed.

But it must be remembered that both of these cases were two party situations, and the element of consistency of terms is not required in a tripartite situation which is what is involved in a product liability case. Neither of these cases questioned the availability of the collateral contract remedy where the necessary elements are established. Therefore there is clearly scope to establish a collateral contract remedy between manufacturer/dealer/purchaser where there is some direct contact between manufacturer and purchaser, and there is not just reliance on advertisement and/or sales brochures.

(b) **Mere Reputation of a Manufacturer**

Canadian cases have been examined where these manufacturer's advertisements alone have been held to be contractually binding promises. The question is whether the courts would take a further step and find a collateral contract merely on the basis that the manufacturer's reputation amounts to a warranty in respect of his goods. To regard reputation as a warranty is in effect to imply a warranty that the goods are of merchantable quality. All of the cases discussed have involved express warranties and as stated previously Cavanagh and Phegan say there is no authority for holding a manufacturer liable for breach of implied warranty on the basis of collateral contract.[57] In support of this view is the English case of *Lambert* v *Lewis* where mere reputation was held to be incapable of constituting a warranty. Stocker J., in replying to the retailer's claim against the manufacturer based on collateral contract said: "I do not think that the reputation that the manufacturers rightly enjoyed in the trade, and upon which no doubt the retailers relied, can be elevated to the status of a warranty."[58]

But arguably this view is unfair. The courts should be aware of the public policy need for the manufacturer to bear the loss with defective products, especially as they are the ones who reap the rewards and should be best able to bear the loss via insurance etc. Miller & Lovell find it possible to imply warranties of merchantability from the mere presence of goods on the market, though they predict that this development will be achieved through legislation rather than case law. But there seems no justification for limiting the collateral contract remedy to express warranties only and indeed some commentators anticipate this development will occur in the United Kingdom.[59] However from observation of the speed

56. [1982] 136 DLR (3d) 193.
57. *Supra* n.2 at 129.
58. *Supra* n.5 at 628.
59. See Professor Derrick Owles *The Development of Product Liability in the U.S.A.*, London Press Ltd 1978 in his Preface.

with which the Australian courts adapt to change it seems highly unlikely the courts here would follow that approach.

8. Horizontal Privity — Bystanders

Despite the arguments put forward about the availability of the collateral contract remedy there is one limitation on the applicability of these principles in practise. That is where it is not the actual purchaser who is injured by the defective product, but his family or friends or even an innocent bystander. There is a lack of horizontal privity here, for it is really only the purchaser of the product who has provided the consideration for the manufacturer's warranty.

It is possible that consideration may be found where there has only been a use rather than purchase of the product, if the manufacturer contemplated that such use would be the price of the promise or warranty as in *Goldthrope* v *Logan*. However it is submitted that even if the warranty can be construed to apply to them the requirement of consideration will be difficult to satisfy, because the consideration for the collateral contract is the purchaser's entry into the main contract with the seller.

By contrast this is one situation in which the negligence based product liability action is not deficient because an action in negligence is not confined by horizontal privity provided the plaintiff can prove the manufacturer has breached the duty of care owed; and if the goods are of a type intended to reach the consumer in the form they left the producer, then manufacturers would owe a duty of care to bystanders, because it is reasonably foreseeable they would come into contact with goods.

9. Manufacturers Guarantees

The use of manufacturers' guarantees is now widespread.[60]

A typical guarantee is where the manufacturer undertakes to repair or replace defective goods without cost to the purchaser, provided the purchaser has complied with the manufacturers instructions about use etc., and the defect is not caused by fault on the purchasers part.

Cavanagh and Phegan say that use of the manufacturers guarantee is "akin to"[61] the collateral contract method of rendering a manufacturer liable. But it is submitted there is more than a mere similarity. There may indeed be a collateral contract where the manufacturer has given assurances about the quality and reliability of his product. This view is supported by a number of writers.[62] Indeed Treitel states quite emphatically that "The main contract of sale is between the dealer and the customer, but it seems that *the guarantee is a collateral contract* between the manufacturer and the customer."[63] Treitel goes on to point out that a collateral contract must be supported by consideration, and concludes that such consideration is indeed present — being the purchase by the customer of the goods from the dealer.

It is suggested that the purchaser must have known of the guarantee before purchasing the product and therefore have purchased it partly in reliance on the guarantee. However, even if the purchaser is ignorant of the guarantee until after completion of the purchase it is at least arguable that completing and forwarding the guarantee form to the manufacturer may supply the requisite consideration and acceptance.[64]

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60. This was recognized by the U.K. Law Reform Commission 'Final Report of the Committee on Consumer Protection' Cmnd. 1781 July 1962 and by D.J. Cusine 'Manufacturers Guarantees and the Unfair Contract Terms Act' (1980) The Juridical Review 1985.
61. *Supra* n.2 at 35.
62. *Supra* n.10 at 160.
63. G.H. Treitel *The Law of Contract* 7th ed. Stevens and Sons, London 1987 454.
64. *Supra* n.60 at 414.

In *Adams and Others* v *Richardson and Starling Ltd*[65] Lord Denning made disparaging reference to these guarantees as "non guarantees". The reason for this conclusion was that in effect the guarantees contain exclusion clauses which might cut down warranties which might otherwise have been established by means of collateral contract.

Manufacturers guarantees have been the subject of a number of Law Reform Commissions[66] and many statutory provisions have been enacted with respect to them.

10. Legislative Intervention

In Australia legislative intervention has significantly increased the range of remedies available to persons who suffer loss or damage from defective products. Most notable is the protection given by the Trade Practices Act. For example under S.74G of that Act if the manufacturer fails to comply with an express warranty in relation to goods and the consumer suffers loss or damage as a result of that failure the manufacturer is liable to compensate him for that.

The term "express warranty" is defined in S.74A(1) as

> an undertaking, assertion or representation in relation to the quality, performance or characteristics of the goods . . . given or made in connection with the supply of the goods or in connection with the promotion of the goods . . . the natural tendency of which is to induce persons to acquire the goods.

Note that this definition will be complied with if the statements are merely representational and therefore they do not have to be promissory.

11. Conclusion

In conclusion despite the availability of the collateral contract remedy to the Australian purchaser of defective goods, in reality it will be the alternative legislative avenues of relief provided, particularly under the Trade Practices Act which will be the ones pursued in practise. These legislative provisions provide an alternative remedy to both the negligence based products liability action and also the collateral contract based action.

However, the possibilities inherent in the use of the collateral contract device as a means of making manufacturers strictly liable for their representations should not be overlooked by the courts. Even though it has been suggested that talk of contract in these situations is deceptive — that these warranties and contracts are merely "judicial artefacts"[67] it must be recognized that

> In a society in which people are daily led to enter into written contracts which they do not understand on the basis of oral promises which they do understand, the value of this weapon of justice is likely to increase.[68]

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65. NLJ April 10, 1969 344.
66. U.K. Law Reform Commission *supra* n.60 New South Wales Law Reform Commission 'Working Paper on the Sale of Goods' 1975 Sec. 3.39, and Ontario Law Commission 'Report on Sales of Goods' Ministry of the Attorney General 1979.
67. G.H.L. Fridman 'The Interaction of Tort and Contract' (1977) 93 LQR 443.
68. *Supra* n.12 at 71.