

**New Zealand: Last Bastion of Laissez-faire?**  
**Comparative Perspectives on Consumer Protection**

by

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**Introduction**

New Zealand is joining the world ... or at least that part composed of economically advanced citizens whose governments and legal institutions have largely European roots. The need to compete with that world, together with pressure generated by the increased exposure of New Zealanders to its rights, obligations and mores, has caused our Government to facilitate international relationships rather than, as in the past, attempt to regulate them. Corporations must compete in this new community. Consumers here and overseas may choose from what the entire world offers. The protectionism which ensured New Zealand a captive market is withering. In order to compete, and win, in this unfamiliar economic regime, New Zealand corporations must relinquish their role of lord to the traditional New Zealand consumer who was the serf in the user/provider relationship. To survive, New Zealand corporations must breach the walls of isolationism, and compete with veterans in the field of international trading.

The law is inadequate to assist our corporations in this formidable task. Both case law and statute still implicitly regard the consumer and the buyer as the same entity and the supplier and the buyer as equals. Techniques of mass marketing have made this view outmoded, and have left both the buying and non-buying consumer disadvantaged. Consumer rights must be recognised as part of the process of creating in New Zealand a trading environment which is compatible with that of the other markets in which our traders compete. The balance of "fairness" between consumer and producer must be re-ordered and

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ground rules must be established by statute rather than case law. An environment of certainty and predictability is essential to the national and international success of New Zealand corporations. This certainty should be common to the domestic market place and to the wider trading community within which New Zealand hopes to enjoy commercial relationships. Such a modern body of consumer protection law will benefit not only the consumer, but also the business community at large, as it is essential to their competitiveness in the international trading world.

The object of this paper is: to examine the inequitable position the consumer holds under New Zealand law; to review consumer protection reforms in the United Kingdom and the European Economic Community; and to identify the conceptual framework which will provide inspiration for long overdue legislative reform in New Zealand.

## CONSUMER PROTECTION IN NEW ZEALAND

### I. Contractual Redress

#### 1. *The Contractual Mistakes Act 1977*

The Act confers wide discretionary powers of relief on the courts in cases involving mistakes as to law and fact. Significantly from the seller's viewpoint, it offers no compensatory remedy if the subject matter of the mistaken contract is disposed of for valuable consideration.<sup>1</sup> Nor will it apply to any other disposition of property made by or through a person not party to the mistaken contract who has become entitled to property, bona fide for valuable consideration without notice.<sup>2</sup> Whilst this shows a concern for certainty, it will inevitably lead to the hardships the Act was designed to overcome.<sup>3</sup>

#### 2. *The Contractual Remedies Act 1979*

The Act introduced wide ranging reforms to the law of misrepresentation and breach of contract. It provides a clearly enunciated framework governing cancellation for breach of contract. However, while the statutory cancellation procedure offers a significant improvement over the confused position of the innocent party at common law, it is fraught with difficulty for the lay person.

To effect cancellation under the Act, the innocent party is compelled to follow a procedure that if not followed may result in a repudiation.<sup>4</sup> Thus legal advice must be sought prior to any decision to cancel a contract for breach.

The Act further provides that damages can be claimed for innocent misrepresentation without the difficulties involved in proving negligence, fraud, breach of warranty or collateral contract.<sup>5</sup> However,

<sup>1</sup> The Contractual Mistakes Act 1977, s 8 (1) (a).

<sup>2</sup> The Contractual Mistakes Act 1977, s 8 (1) (b).

<sup>3</sup> *Garrard v Frankel* (1862) 30 Beav. 445; *Smith v Jones* [1954] 1 WLR 1089.

<sup>4</sup> Burrows, *The Contractual Remedies Act 1979* 1 Cant LR 82, 89.

<sup>5</sup> The Contractual Remedies Act 1979, s 6 cf. Dawson & McLauchlan, *The Contractual*

this reform does not extend to contracts for the sale of goods.<sup>6</sup> Thus, the supreme irony of the Act's remedial reform is that it has no effect on the majority of consumer contracts. The parties to a contract for the sale of goods are left with the less than satisfactory common law remedial regime.<sup>7</sup> The practical effect of this is that a party to an executed contract for the sale of goods is denied, in New Zealand, the right to cancel a contract for innocent misrepresentation unless there has been a total failure of consideration.<sup>8</sup> Both the Australian and Canadian Courts have taken a more liberal approach, finding that the expression "the rules of common law" in s 60 (a) of the Sale of Goods Act 1908 includes the rules of equity, and that the equitable remedy of rescission is therefore, available for innocent misrepresentation in a contract for the sale of goods.<sup>9</sup>

### 3. *The Contracts (Privity) Act 1982*

This is the first "glimmer of hope" for the non-contracting consumer of goods. The Act has circumvented the doctrine of privity by allowing third party beneficiaries the right to enforce contractual promises made in their favour by the contracting parties.<sup>10</sup> In *Gartside v Sheffield, Young and Ellis*<sup>11</sup> Cooke J made it clear that the doctrine of privity has a very limited role to play in further case law:

The Courts and Parliament have recognised that the rule is unsatisfactory. For a New Zealand Court to defer to it now, outside its former sphere, would be gratuitous obeisance.<sup>12</sup>

Reflecting a large body of concern from the legal community, Mr Dawson has predicted the possibility of section 4 of the Act to further the ends of consumer protection; he notes, following North American trends, the potential for third parties to plead what are essentially "tort cases in contract".<sup>13</sup> This is exemplified by a case where a telephone company was held entitled to sue a contractor when that contractor negligently cut telephone cables. The telephone company's rights were fixed by a term of a contract which provided that the contractor was to use every reasonable and practicable means to avoid damage to private property and would be responsible for all damage to the same.<sup>14</sup> It re-

*Remedies Act 1979* (1981) 3.

<sup>6</sup> *Ibid*, 167 referring to the Contractual Remedies Act 1979, s 15 (d) which preserves the law relating to the sale of goods.

<sup>7</sup> *Riddiford v Warren* (1901) 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458; cf *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538.

<sup>8</sup> *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519, 525.

<sup>9</sup> *Diamond v British Columbia Thoroughbred Breeders' Society* (1965) 52 DLR (2d) 146; *Graham v Freer* (1983-84) 35 SASR 424; *Leason Pty Ltd v Princess Farm Pty Ltd* [1983] 2 NSWLR 381.

<sup>10</sup> Section 4.

<sup>11</sup> [1983] NZLR 37.

<sup>12</sup> *Ibid*, 42.

<sup>13</sup> Dawson, *New Zealand Privity of Contract Bill* (1982) 20 OJLS 448, 449.

<sup>14</sup> *Pacific Northwest Bell Telephone Co v De Long Corp* 425 P 2nd 498 (1967).

quires little effort to see the analogy between this contract and, say, a manufacturer's warranty. Mr Dawson warns:

Whilst it is undeniable that the sort of social engineering that one sees reflected in these American cases would be foreign to current New Zealand conceptions of the law of contract, and is certainly not a result which the [Contracts and Commercial Law Reform] Committee intends to bring about, the long term potentialities of the reforms contained in section 4 should not be minimized.<sup>15</sup>

#### 4. *The Sale of Goods Act 1908*

The vast majority of consumer transactions fall under this Act.<sup>16</sup> Based on pre-twentieth century common law precepts, it fails to accommodate the changes that have taken place in packaging, distribution and promotional methods. It assumes equal bargaining power between the parties, excludes equitable remedies, and fails to recognize that today's typical consumer sale often involves an exchange of goods or both the supply of goods and services. Professor Sutton has attacked the Act's relevance to the modern economy in that:

It [the Act] proceeds from the fictitious premise that the parties are bargaining from positions of equal strength and sophistication, that it uses concepts to describe and distinguish between different types of obligation that are now obsolete and difficult to apply, that the remedies available for breaches of the seller's obligations are unrelated to practical realities, and that its preoccupation with the bilateral relationship between seller and buyer totally ignores the powerful position of the manufacturer in today's modern marketing structure. This results in the shielding of the manufacturer from contractual responsibility to the consumer. At the same time, the law has largely ignored the impact on the consumer of the manufacturer's express warranties or guarantees and the defects in their content and administration. Most important of all, the Act has failed to provide any really appropriate machinery for the redress of the grievances of consumers.<sup>17</sup>

The key sections of the Act from a consumer's viewpoint are those which import certain implied terms in all contracts for the sale of goods.<sup>18</sup> Of these implied terms "merchantable quality" and "fitness for purpose" are the most important and judicially controversial conditions.<sup>19</sup> Assuming the buyer has not accepted the goods, breaches of these conditions entitle the buyer to reject the goods however slight the breach may be.<sup>20</sup> Throughout the interpretative history of these terms no cohesive definition has been provided. However the concept reflects the trader's viewpoint rather than the more legitimate viewpoint, that of the consumer, and the multiplicity of judicial definitions bear this out.<sup>21</sup>

<sup>15</sup> *Supra* at note 13, at 451.

<sup>16</sup> Hire purchase transactions fall under the ambit of the Hire Purchase Act 1971 and the Credit Contracts Act 1981.

<sup>17</sup> Sutton, *Sales & Consumer Law* (3rd ed 1983) 479.

<sup>18</sup> Sale of Goods Act 1980, ss 14, 16, 17.

<sup>19</sup> *Ibid*, ss 16 (a) and 17.

<sup>20</sup> *Ibid*, s 13 (3).

<sup>21</sup> Notably *Grant v Australian Woollen Mills Ltd* [1936] AC 85; *Hardwick Game Farm v Suffolk Agricultural & Poultry Producers Association Ltd* [1969] 2 AC 31; *Taylor v Combined Buyers Ltd* [1924] NZLR 627; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441.

It can be safely concluded that there is no fixed standard or measure of “merchantable quality”. The term is rarely considered in isolation, having as its reference point, “fitness for purpose”. In *Taylor v Combined Buyers Ltd*<sup>22</sup>, Salmond J said:

I think that goods sold by description are merchantable in the legal sense when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality, and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market.<sup>23</sup>

Thus, it would seem that if goods meet the description under which they are sold, and are fit for normal use to which such goods as described are put, they are merchantable.<sup>24</sup> The Act would afford no remedy to the consumer against minor defects, for instance a rattle in a new refrigerator’s motor since such a rattle does not impede the refrigerator’s purpose — the cold storage of perishables.

The implied terms as to quality and purpose do not extend to an unconditional warranty of durability. In *Lambert v Lewis*<sup>25</sup> a retail dealer supplied a defective trailer coupling to a customer who went on using it after it was obviously broken. The retail dealer had purchased the coupling from a wholesaler who had in turn purchased it from the manufacturer. Accompanying the coupling came promotional material printed by the manufacturer claiming the product was “fool proof” and that it required “no maintenance”. Eventually there was a tragic accident where the coupling gave way from its mounting and the trailer injured the plaintiffs. They brought proceedings in negligence against the owner of the coupling device and the manufacturer. One of the many issues raised by the case was, whether under section 14 (1) of the Sale of Goods Act 1893 (UK)<sup>26</sup>, the fitness for particular purpose warranty was an on-going warranty of durability. In considering the question Lord Diplock was compelled to decide at what point would the retail dealer’s implied warranty of fitness for a particular purpose expire? His Lordship said:

The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear.<sup>27</sup>

Thus, if there is a warranty of durability, it is very narrow; the onus is on the buyer to show that a defect or malfunction in goods, which manifests itself after delivery, is due to goods not being in a proper condition *at the time of delivery*. This evidential burden on the buyer exists despite the fact that all product knowledge rests with the manufacturer

<sup>22</sup> [1924] NZLR 627.

<sup>23</sup> *Ibid*, 645.

<sup>24</sup> Sutton, *Sales & Consumer Law* (3rd ed 1983) 203.

<sup>25</sup> [1982] AC 225; [1981] 2 WLR 713.

<sup>26</sup> Sale of Goods Act 1908 (NZ), s 16 (a).

<sup>27</sup> *Supra* at note 25, at 720.

and the supplier and provides a sound argument for the onus of proof to be statutorily reversed.

Concomitant to issues of warranty, is the vexed question of the legal efficacy of manufacturer's guarantees. Invariably these are disguised exclusion clauses devised to exclude liability for consequential damage. The guarantee usually takes the form of a warranty to repair or replace the whole or part of the defective product. They often limit the time in which claims must be made or notified and may require the buyer to notify acceptance of the terms before a contract is made.

Along with many standard form contracts, manufacturer's guarantees may exclude the various implied terms in a contract for the sale of goods entirely. Contracting out of these terms is possible as freedom of contract is expressly recognised by the Sale of Goods Act.<sup>28</sup> The doctrine of *caveat emptor* is operative to the extent that persons who sign a contractual document for a cash sale of goods are bound by its terms even though they haven't read the "fine print".<sup>29</sup>

### 5. *The Credit Contracts Act 1981*

This Act represents a statutory solution to the historical reluctance of the courts to grant relief against an unconscionable credit transaction where there has been an obvious inequality of bargaining power. Not only does the Act impose a duty of disclosure of the cost of credit on certain categories of lender, it confers on the courts wide discretionary powers to re-open oppressive credit contracts.<sup>30</sup> In doing so, the courts may take into account the terms of the contract, the way those terms were exercised, and the manner in which a party was induced to enter into a contract. However, disclosure need not be made to a guarantor of a credit contract debt unless requested, and this, in practice, has the potential to lead to grave injustice if that guarantor has not been made fully conversant with the extent of liability.<sup>31</sup>

### Conclusion

There can be no doubt that over the past decade the legislature and the courts have given implicit recognition to those who deal in a private capacity for private consumption. It is clear, however, that the common law is ill-equipped to develop the general principle required from the existing statutory framework to protect the consumer without straining orthodox contractual principles to an unreasonable degree. Present legislative controls are inadequate and statutory inspiration is long overdue; the target, most obviously, is the Sale of Goods Act 1908.<sup>32</sup>

<sup>28</sup> Section 56.

<sup>29</sup> *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

<sup>30</sup> Section 10.

<sup>31</sup> Section 19.

<sup>32</sup> Reconsideration of the law of consumer sales has resulted in the introduction of reformed contract of sale legislation in Canada, Australia, Sweden, Denmark, Germany (Fed. Rep.), the United Kingdom and the Republic of Ireland.

## II. Redress in Tort

### 1. *The Common Law*

Since 1932 all manufacturers of goods have owed a duty of care to the ultimate consumer not in privity with the manufacturer.<sup>33</sup> Negligent liability is based on fault; the onus is on the plaintiff to prove that the product was defective, that there was a causal link in law between the defect and the injury, and that the defendant has failed in his duty of care because the injury was of a kind that was a foreseeable consequence of the defect.

Much has been written on the development of a manufacturer's liability for defective and dangerous products to the New Zealand consumer or ultimate user. All the writers have stressed the immense rigidity by which the courts have applied this seemingly simple principle.<sup>34</sup> Despite the more frequent application of the legal rule, *res ipsa loquitur*, the burden of proof is, in the rule's absence, difficult for the plaintiff to discharge.

### 2. *Barriers to Recovery in Tort*

Utilising the tests of proximity and foreseeability, the courts have succeeded in containing the pursuit of claims, motivated perhaps by the fear of opening "the floodgates to litigation". It has taken the courts forty-six years to recognise claims for pure economic loss.<sup>35</sup> Until recently the liability of manufacturers in negligence extended only to personal injury or damage to property other than the defective product.<sup>36</sup> Liability did not extend to losses incurred solely on account of the goods being defective, and the plaintiff could not recover damages for the diminution of the value of the product itself, or the cost of curing the defect.<sup>37</sup>

Coupled with the constraints of the common law, the tort of negligence has been dramatically affected by the introduction of the Accident Compensation Act 1972.<sup>38</sup> Injury, not fault, is at issue where compensation is sought under the provisions of this Act. Section 27 (1) severely limits a plaintiff's claim for damages in tort-based actions for personal injury, providing that subject to the provisions of the section,

<sup>33</sup> *Donoghue v Stephenson* [1932] AC 562.

<sup>34</sup> Tobin, *Products Liability: A United States Commonwealth Comparative Study* (1969) 3 NZULR 377; Tobin *Products Liability: Recovery for Economic Loss* (1970) 4 NZULR 36; Beattie, *Manufacturers' Liability in Tort* (1967) Second Business Law Symposium; Palmer, *Dangerous Products and the Consumer in New Zealand* [1975] NZLJ 366.

<sup>35</sup> *Anns v Merton London Borough Council* [1978] AC 728; *Batty v Metropolitan Property Realisations* [1978] QB 554; *Caltex Oil (Australia) Pty v The Dredge Willemstad* (1976) 136 CLR 529; *Junior Books Ltd v The Veitchi Co Ltd* [1982] 3 WLR 477; cf *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A firm)* [1983] 1 All ER 65; *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1983] 3 All ER 417.

<sup>36</sup> *Junior Books Ltd v The Veitchi Co Ltd* [1982] 3 WLR 477; cf *Balsamo v Medici* [1984] 2 All ER 304.

<sup>37</sup> *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.

<sup>38</sup> As amended by the Accident Compensation Act 1982.

“... no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.” The Act does not compensate a victim for property damage or consequential loss. Indeed such an inquiry was outside the ambit of the Woodhouse Report.<sup>39</sup> In 1974 the Torts and General Law Reform Committee did report on products liability, but recommended no change be made to present law.<sup>40</sup> The minority, however, called for a strict product liability regime to be instituted by legislative intervention.

While social insurance is a laudable scheme, its no-fault emphasis has served to insulate the producer from consumer claims since the more serious consequence of a defective product is likely to be personal injury or death. The present economic viability of pursuing claims for property damage and consequential loss must have been significantly reduced by the Act's compensation provisions.<sup>41</sup> This contention is borne out by an examination of litigation in this area in recent years. The targets have not been the negligent manufacturer of defective products, but parties involved in one way or another in the new home construction industry. Perhaps the most significant indicator of the difficulties in recovery is the recent growth in importance of the breach of statutory duty cases which often involve third and fourth party proceedings in actions for negligence. Indeed it is in this area that the home-buying consumer has been instrumental in furthering common law developments for the consumer's purely economic interests.<sup>42</sup>

Certainly symptomatic of the barriers to relief is the recent statutorily inspired voluntary insurance scheme administered by the New Zealand Housing Corporation.<sup>43</sup> Promoted under the name “Buildguard”, it is an insurance policy offering cover to residential home-buyers indemnifying them against structural defects in materials and workmanship. The indemnity offered extends to “residential buildings”, but it is only available to the original owner of that building. The term of the indemnity is limited to 3 years from its commencement in the case of claims for loss caused by defective materials, and 6 years for all other claims. Liability is further limited for “minor construction defects” in the sense that these claims must be brought within twelve months of the building's completion. The cover expressly

<sup>39</sup> *Compensation for Personal Injury in New Zealand* (Report of the Royal Commission of Inquiry), December 1967.

<sup>40</sup> *Products Liability*, Reported March 1974.

<sup>41</sup> On the writer's inquiry, statistical data on the number of personal injury compensation claims caused by defective or dangerous products is unavailable from the A.C.C. Only those machinery related “accidents” statistics occurring at home or at work are available. Such is the all-pervading influence of the no-fault philosophy.

<sup>42</sup> *Supra* at note 35.

<sup>43</sup> Offered under the provisions of the Building Performance Guarantee Corporation Act 1977; cf Smillie, *Liability of Builders, Manufacturers and Vendors for Negligence* (1979) 8 NZULR 109.

excludes recovery for economic loss such as diminution in value of the building itself, cost of alternative accommodation, and loss of rent. Also excluded is liability for site development work. The effect of the policy is that it protects the new home buyer against the builder disappearing or becoming insolvent and, in the event of defective materials being used, eliminates the necessity to prove breach of contract or negligence.<sup>44</sup> The maximum insurable value is \$50,000. Since the Act was passed there have been significant developments at common law which have resulted in the expansion of liability for negligence of new home builders, manufacturers and vendors.<sup>45</sup> However, there is no measure of protection for used house buyers. In the absence of a vendor's fraud, express representations, promises or warranties the doctrine of *caveat emptor* applies.<sup>46</sup> There is no duty on the vendor to disclose known physical defects in a house<sup>47</sup> and the vendor appears immune from concurrent liability in tort.<sup>48</sup> The purchaser may seek to obtain relief from other parties in negligence, say the local authority, for the negligent omissions of their building inspectors, but fault must be made out.

It is apparent that tort with its highly individualised approach to causative issues, and the heavy onus of proving fault which it places on the plaintiff, is an insufficient answer to consumer needs. Given the difficulties of redress, it is not hard to see the emergence of the "tort cases in contract" scenario predicted by Mr Dawson with the introduction of the Contracts (Privity) Act 1982. Growing consumer frustration will inevitably lead to more frequent and vigorous attack on "the citadel of privity".<sup>49</sup>

## CONSUMER PROTECTION IN THE UNITED KINGDOM

Over the past two decades, legislation in the United Kingdom has been introduced to advance the interests of the consumer to an unprecedented degree. Motivated by the commitment to the harmonisation of law with the fundamental precepts of the civil codes of continental Europe, the impact of the changes on the common law cannot be underestimated. The New Zealand jurist and practitioner can no longer ignore the underlying statutory influences created by such reform. Much of the consumer law that has been set in place offers workable solutions to the weaknesses present under New Zealand law and highlighted in Part I of this paper. The key reforms are as follows:

<sup>44</sup> Smillie, 137.

<sup>45</sup> *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.

<sup>46</sup> *Brown v Norton* [1954] IR 34 offers an extensive survey of this area of law.

<sup>47</sup> Unless they are dangerous, *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.

<sup>48</sup> *McLaren Maycraft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100.

<sup>49</sup> The phrase is borrowed from that classic exposition on the law of products liability, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)* (1966) 50 Min LR 791.

## I. Contractual Redress

### THE UNFAIR CONTRACT TERMS ACT 1977

#### 1. *Recognition of the Consumer Contract*

For our purposes the most important innovation introduced by this Act was the statutory recognition of the consumer contract as distinct from non-consumer agreements involving the sale of goods.<sup>50</sup> Initially the distinction was drawn to control exemption clauses in contracts, but subsequent developments have simplified the expression of the implied terms now incorporated into the Sale of Goods Act 1979.<sup>51</sup> Provisions of the Act now declare void any attempt in a consumer sale to exclude the implied terms as to correspondence with description, merchantable quality, fitness for purpose, or correspondence with sample in consumer dealings, included in the Sale of Goods Act 1979.<sup>52</sup> There are similar provisions preventing the exclusion of liability for negligence or misrepresentation causing personal injury or death.<sup>53</sup> The effect of these provisions is to severely restrict the power of the seller to contract out of his liability for defective goods in both contracts of sale and hire purchase agreements.<sup>54</sup> Further, the Supply of Goods and Services Act 1982 has extended the statutorily implied terms as to title, correspondence with description or sample, quality and fitness for purpose to contracts of exchange, pledge, and hire, including contracts involving the supply of services which involve both work and materials.<sup>55</sup>

The 1977 Act provides that there will be a consumer contract if:

- (a) The buyer does not act in the course of business; and
- (b) the seller acts in the course of business; and
- (c) the goods are of a type ordinarily bought for private use or consumption.<sup>56</sup>

The onus of proving that a person is not dealing as a consumer is on the party making such a claim.<sup>57</sup> "Business" is defined as including "a profession and the activities of any government department or local or public authority".<sup>58</sup> In *Peter Symonds & Co v Cook*<sup>59</sup> the scope of the term "dealing as a consumer" was considered. Here a firm of surveyors carrying on business in a partnership bought a 1964 Rolls Royce Silver Cloud from Cook, a car dealer for £9,000. The mileage of the car amounted to 62,000 miles. Within 2,000 miles of its being bought the

<sup>50</sup> Initially introduced under the provisions of the Supply of Goods (Implied Terms) Act 1973 and re-enacted in the Unfair Contract Terms Act 1977, ss 12 (1) and 25 (1) where it has been extended to other supply contracts.

<sup>51</sup> Sections 13-15.

<sup>52</sup> Unfair Contract Terms Act 1977, s 6 (1) and (2).

<sup>53</sup> *Ibid*, s 5.

<sup>54</sup> *Ibid*, s 11.

<sup>55</sup> The Supply of Goods and Services Act 1982, Part I.

<sup>56</sup> Section 12 (1).

<sup>57</sup> *Ibid*, s 12 (3).

<sup>58</sup> *Ibid*, s 14.

<sup>59</sup> (1981) 131 New LJ 758; cf *Rasbora v JCL Marine* [1977] 1 Lloyd's Rep 645.

car was found to be suffering from a number of serious latent defects. The car's condition was such that it was cheaper to have a replacement than repair it. There were defects in the brakes and steering which rendered it dangerous to drive. The plaintiff claimed damages from Cook on the grounds that (i) he had warranted that the car was in excellent condition; (ii) he was in breach of the implied conditions set out in the Sales of Goods Act 1893, s 14 (2) in that the car was not of merchantable quality; and (iii) he was also in breach of the implied condition set out in s 14 (3) of the Act in that the car was not reasonably fit for the purpose of being driven on the roads as a high class prestige vehicle. The defendant denied that any express warranty had been given, and contended that the implied conditions set out in the Sale of Goods Act 1893 did not apply because the sale was a non-consumer sale and therefore excluded by virtue of s 6 Unfair Contract Terms Act 1977, as they had been disclaimed. The Judge found that the plaintiff partnership were dealing as consumers within the meaning of s 12 Unfair Contract Terms Act 1977 and their rights under the Sale of Goods Act 1893 could not be excluded. For a sale to fall outside the category of a consumer sale by virtue of the plaintiff partnership buying in the course of business, the buying of cars must be an integral part of the buyer's business. Only in those circumstances could the buyer be said to be on an equal footing with the seller. There was a breach of the express warranty that the car was in excellent condition. The car was not of merchantable quality nor reasonably fit for the purpose. Thus, the scope of "consumer" is very wide indeed.

## 2. *Manufacturer's Guarantees*

The Unfair Contract Terms Act 1977 makes provision for the relationship between the manufacturer and the consumer under manufacturer's guarantees. Section 5 provides:

1. In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage —
  - (a) arises from the goods proving defective while in consumer use; and
  - (b) results from negligence of a person concerned in the manufacture or distribution of goods, liability for the loss or damage cannot be excluded or restricted by reference to any contractual term or notice contained in or operating by reference to a guarantee of goods.
2. For these purposes —
  - (a) goods are to be regarded as "in consumer use" when a person is using them, or has them in his possession for use, otherwise than exclusively for the purpose of a business, and
  - (b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.
3. This section does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed.

The section clearly prevents the manufacturer or distributor, as remote parties to the retail contract of sale with the consumer, from excluding

or restricting liability for negligence of the *Donoghue v Stevenson*<sup>60</sup> type. Section 5 (1) clearly makes void any attempt to exclude or restrict liability under the ruse of a manufacturer's guarantee.

### 3. Proposed Reform of the Statutorily Implied Terms

The Law Commission has provided further recommendations for change in the law of sale and supply in recognition of the inadequacies of the terms as to "merchantable quality" and "fitness for particular purpose" to further the on-going legislative programme of consumer protection in the law of contract in the United Kingdom.<sup>61</sup> The first reform proposed is a reformulation of the standard of quality to replace the "commercial man's notion" of merchantable quality. The report criticises the term for its exclusive concentration on fitness for a particular purpose to the exclusion of other aspects of quality notably freedom from minor defects, durability and safety. They proposed that the qualitative adjective "merchantable" should not be used in any new definition as it lacks the necessary flexibility in all cases.<sup>62</sup> The test favoured by the Commission was as follows:

#### A Neutral Standard (e.g. "Proper" Quality) Test<sup>63</sup>

The reformed test rests on its reference to specified matters of quality e.g. durability, freedom from minor defects, et cetera being statutorily specified as comprising essential elements in the 'quality' of goods. Rather than the issue of quality turning on a qualitative question, the issue would turn on whether or not goods are of an appropriate quality having regard to a list of specified matters. The report provides a draft section incorporating the proposed reformulation:

1. Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of [proper quality] [acceptable quality in all respects] except that there is no such term —
  - (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
  - (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.<sup>64</sup>
- (2) For the purposes of paragraph (a) above "quality" in relation to goods includes, where appropriate, the following matters:
  - (a) fitness for the purpose or purposes for which goods of that kind are commonly bought;
  - (b) appearance, finish, suitability for immediate use and freedom from minor defects;
  - (c) safety;

<sup>60</sup> [1932] AC 562.

<sup>61</sup> *Report on the Sale and Supply of Goods* (1983), Law Com No 85 and Scot Law Com No 58 para 1.10.

<sup>62</sup> *Ibid*, para 4.9.

<sup>63</sup> *Ibid*, para 4.9

<sup>64</sup> Unlike New Zealand, these exclusions already appear in the consolidated Sale of Goods Act 1979 (UK), s 14 (2).

- (d) durability;  
and in determining whether goods supplied under a contract are of [proper quality][acceptable quality in all respects] regard shall be had to any description applied to them, the price (if relevant) and all the other relevant circumstances.<sup>65</sup>

It is contemplated that the provisions will apply to all types of transactions, consumer or otherwise.<sup>66</sup> The report remained undecided on the best adjective to describe the standard of quality generally. The two choices offered by the Commission are contained in the closed brackets above. Both were thought to provide the widest possible flexibility needed to accommodate the state of goods in every case. However the vagueness of the descriptive words "proper" and "appropriate" were not designed to stand alone. Any determination of quality must, "where appropriate" refer to those specified matters contained in draft clause (b) (i) - (iv). Fitness for purpose becomes merely one of those matters.

#### 4. *A New Remedial Regime*

Given the flexibility of the proposed reformulation of the implied terms as to quality, the Commission rightly found it necessary to abandon the condition/warranty dichotomy that has plagued the construction of the implied term since the rise of the innominate term at common law.<sup>67</sup> The Commission outlined the difficulties, firmly concluding:

In our discussion of the difficulties arising out of the distinction between conditions and warranties, we said that the concept of condition was not appropriate to terms possessing a flexible content, breaches of which could vary widely in seriousness, such as the term as to merchantable quality, and that if the Act had not classified the implied terms as to quality and fitness as conditions, a court today would not so classify them in the absence of a clear indication that this was what the parties intended.<sup>68</sup> We think therefore that in order to ensure that any reformulation of the term is effective it is necessary to remove its designation as a condition, and thus prevent its being interpreted in practice in the light of whether or not rejection is an appropriate remedy for breach.

It was felt, for the sake of clarity, that these more flexible remedies ought to be set out in order to exclude the general law from providing, "an answer which could be the wrong one."<sup>69</sup>

In consumer sales the buyer retains the right to reject goods for breach of the implied terms contained in our equivalent sections 14 to

<sup>65</sup> Supra at note 61, at para 4.24.

<sup>66</sup> Supra at note 61, at paras 4.6 and 4.7.

<sup>67</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109; *Reardon Smith Line Ltd v Hansen - Tangen* [1976] 1 WLR 989; *Bunge Corp v Tradex Export SA* [1981] 1 WLR 711.

<sup>68</sup> In reference to the test in *Hong Kong Fir*.

<sup>69</sup> Supra at note 61, at para 4.28.

17 of the Sale of Goods Act 1908. However a test of reasonableness in cases of rejection of goods is introduced by the notion of "cure". "Cure", is the process whereby the seller has offered to repair or replace the goods and, if repair and replacement were attempted, whether it was promptly and satisfactorily implemented. Thus, where the seller is in breach of one of the implied terms, the remedial regime would entitle the buyer to:

- (a) reject the goods outright and claim his money back (without deduction being made for his use or possession of the goods) except where the seller can show that the nature and consequences of the breach are slight and in the circumstances it is reasonable that the buyer should be required to accept cure (i.e. repair or replacement of the goods);
- (b) where cure (whether the buyer is required to accept it or, though not so bound, has requested it) is not effected satisfactorily and promptly, having regard to the nature of the breach, to reject the goods (and claim his money back as in (a) above);
- (c) in all cases to claim damages.<sup>70</sup>

The buyer should retain his right to reject the goods unless it is unreasonable in the circumstances to do so, and he has had the reasonable opportunity to examine them. This right can not be excluded or limited by reference to any contractual terms. The remedies for breach of the implied terms other than title, and freedom from encumbrances are to apply to consumer contracts for the supply of goods, conditional sale agreements, and contracts for the exchange of goods. In consumer contracts of hire purchase the hirer should be under no legal obligation to continue to make payments while the goods were being repaired or replaced.<sup>71</sup>

Together with the statutory reforms already in place, it is the writer's opinion that the implementation of the recommendations as to the implied terms in statutory form provides the British Consumer with an enviable code of contractual protection.<sup>72</sup>

## II. Strict Product Liability

Perhaps the most significant consumer reform currently being formulated is directed at the United Kingdom's expressed commitment to a strict product liability regime and, thus, the demise of tort-based actions against manufacturers for defective products bought by non-contracting user-consumers.<sup>73</sup> Strict product liability has been termed

<sup>70</sup> Ibid, para 4.43.

<sup>71</sup> Ibid, paras 5.12 and 5.14.

<sup>72</sup> For a practical example of the scope of protection see in James, *The Supply of Goods & Services Act 1982* (1983) Journal of BL 10.

<sup>73</sup> *Liability for Defective Products* (1975), Law Com No 64 and Scot Law Com No 20; (Cmnd 6831, 1977); (Cmnd 7054, 1978) Chap 22; *The Strasbourg Convention on Product Liability* approved by the Commission on September 26, 1979.

an “American invention”.<sup>74</sup> The American Restatement of Tort defines strict liability as:

S402A. 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 bought the product from or entered into any contractual relation with the seller.

The “seller” may be a manufacturer or any one in the chain of distribution not in an immediate contractual relationship with the user or consumer. The absence of privity is essential for the section to be operative. The manufacturer is strictly liable for the defective product even though the consumer may not know who the seller is at the time of the product’s use or consumption. However:

The manufacturer’s liability is far from being absolute — it is simply strict in the sense of not depending on proof of fault — and the intention was not to make the manufacturer an insurer, but simply to oblige him to satisfy the reasonable expectations of the buying public.<sup>75</sup>

In the United Kingdom, both the Pearson Commission<sup>76</sup> and the Law Commission<sup>77</sup> have studied and reported on the subject of liability for defective products. Two international documents bear a central role in the reports: the first, the Strasbourg Convention on Products Liability in Regard to Personal Injury and Death, was prepared by the Council of Europe;<sup>78</sup> the second is the Third Draft Directive of the E.E.C. on Products Liability.<sup>79</sup> Both documents contemplate the imposition of strict liability on producers, but the original Draft Directive extended liability beyond that for personal injury or death, to property damage, including loss of profits. In the United Kingdom, it is proposed to fund the scheme on the private insurance framework rather than the social insurance model adopted for New Zealand’s personal injury by accident scheme. The private insurance approach has sparked concern among the business community that liability for both property damage and

<sup>74</sup> The Pearson Commission, *Report on Civil Liability and Compensation for Personal Injury* (Cmnd 7054, 1978) para 1216.

<sup>75</sup> Legh-Jones, *Product-Liability: Consumer Protection in America* [1969] CLJ 54, 73.

<sup>76</sup> *Supra* at note 73, at Chap 22.

<sup>77</sup> *Supra* at note 73, Law Com No 64.

<sup>78</sup> *Convention on Products Liability in regard to Personal Injury and Death*, European Treaty Series no 91, 1977.

<sup>79</sup> *EEC Draft Directive on Products Liability* (1985) OJ 210.

personal injury or death caused by defective products may place an overwhelming financial burden on producers of goods. That burden, it was strenuously argued, would manifest itself in higher priced consumer goods. However, if New Zealand were to adopt a strict product regime, and the writer believes it should, these difficulties would not arise. The Accident Compensation Act would ensure that liability would arise only in cases of property damage and consequential loss since the State would continue to fund personal injury claims. Private insurance indemnity for damages claims for pecuniary loss is already well established in New Zealand in the area of negligent professional advice.

By Article 3 (1) of the Strasbourg Convention strict liability is contemplated for all "producers" of defective products. Those producers contemplated by the provision include all those involved in the commercial distribution of manufactured goods, service industries,<sup>80</sup> natural products, raw materials, component-part manufactures,<sup>81</sup> importers of foreign products, pharmaceutical producers, even those involved in the distribution of human blood.<sup>82</sup> The commercial producer is exposed to liability by putting the fruits of his production into circulation.<sup>83</sup> "Defect" is defined thus: "a product has a 'defect' when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product."<sup>84</sup>

As to the heads of damages, both Convention and Directive exclude cover for damage to the defective product itself, concluding that it ought to be an issue confined to the contractual parties themselves.<sup>85</sup> And both texts confine damage to pecuniary loss only.<sup>86</sup> The sort of case contemplated by the Draft Directive, and used as an example by the Law Commission is illustrated thus:

The claimant's chickens were inoculated by a veterinary surgeon with a vaccine the latter had purchased from the manufacturer's. The vaccine proved defective in that it contained virus which were active in the vaccine when it was delivered to the vet by the manufacturers. The chickens died as a result. The claimant was unable to discharge the onus of proof in negligence.<sup>87</sup>

Monetary ceilings are set on manufacturers' liability as is the duration of the liability which extends over a maximum ten year period from

<sup>80</sup> Including professional, managerial and labour services, but excluding medical services. Pearson Commission para 1281.

<sup>81</sup> Liable to the extent that the cause of the defect lies with the producer of the component part.

<sup>82</sup> Goode, *Commercial Law* (1982) 385; Law Commission No 85.

<sup>83</sup> Convention Art 3 (2); Draft Directive Art 7(a).

<sup>84</sup> Convention Art 2; The Draft Directive provides a similar definition with emphasis on "safety" — Art 6.

<sup>85</sup> Convention Art 12; Draft Directive Art 13.

<sup>86</sup> Indeed it is contemplated by both documents that claims in tort or contract based on fault should co-exist with the strict liability regime. Thus punitive damages or claims for pure economic loss would be available by proving negligence.

<sup>87</sup> BGHZ 51,91; NJW 1969, 269. Germany (Fed Rep).

the date the product was put into circulation.<sup>88</sup> In addition to this cut-off period for claims, there is a maximum three year limitation period, during which the claimant may commence proceedings for recovery running from the day the claimant "became aware of the damage, the defect and the identity of the producer."<sup>89</sup> The rationale for this limitation has been said to be that it allows the evolution of technology to proceed and with it expectations of improved safety standards to develop.<sup>90</sup>

There is the possibility of raising certain defences to strict liability. A state of the art defence for development risks is provided for. If a manufacturer can show that a product was designed according to principles known and practised in the industry at the time the product was put on the market, he will not be liable for injury caused by the product.<sup>91</sup> In addition, three implicit defences emerge from the way the strict liability principle is imposed on producers: first, there will be a defence if the producer did not put the defective article into circulation. For example, if as a result of a theft, an article was put into circulation there would be no liability. Second, it would be a defence to show that the product was not defective at the time it was put into circulation.<sup>92</sup> Third, the product must have been manufactured "for economic purposes" or "in the course of the business" of the producer.<sup>93</sup> Thus, a producer would not include the private person acting for personal gain. In addition to these defences, both the Convention and the Draft Directive assume the principles of *volenti non fit injuria* and contributory negligence would continue to apply in a producer's defence.<sup>94</sup> However, both texts provide that a producer's liability cannot be excluded by contract.<sup>95</sup>

## Conclusion

While the growing awareness of consumer protection issues in New Zealand is to be welcomed, it is with some frustration that the writer views current developments. The reforms both planned and implemented do not address the central issue: that is the legal relationship between the consumer and the producer, or distributor. The focus of reform should, as its starting point, begin with this relationship being either contractual or tortious. To protect a consumer from false or misleading advertising is treating the symptoms without regard for the cause. Yet it is this type of reform that persistently takes priority in New

<sup>88</sup> Taschner, "Product Liability — Actual Legislation and Law Reform in Europe" in Woodroote (ed), *Consumer Law in the EEC* (1984) 113,123.

<sup>89</sup> Convention Art 6; Draft Directive Art 10(1).

<sup>90</sup> *Supra* at note 88, at 128.

<sup>91</sup> The defence is of American origin. See *Beshada v Johns-Manville Products Corp* 477 A 2d 539, 546 (Sup Ct of New Jersey, 1982); Nebraska Product Liability Act 1978, s 4: "State of the art as used in this section shall be defined as the best technology reasonably available at the time."

<sup>92</sup> Convention Art 5; Draft Directive Art 7(b).

<sup>93</sup> Convention Art 5 (1) (a); Draft Directive Art 7(c).

<sup>94</sup> Convention Art 4; Draft Directive Art 8(2).

<sup>95</sup> Convention Art 8; Draft Directive Art 12.

Zealand over key reforms to the legal relationship now well in place between consumer and manufacturer in England, Europe and the United States.

The writer believes that the first step must be the statutory recognition of the consumer contract as distinct from the commercial contract. In tandem with this reform there must be an overhaul of the implied terms and remedial regime in consumer contracts for the sale and hire of both goods and services. By statutorily recognising the consumer contract as a distinct contractual species, the law as to commercial transactions would be made more certain. Many of the core common law doctrines have been attacked and eroded as the courts attempt to achieve fairness in consumer contracts.

The second step must be the implementation of a strict product liability regime covering defective products directed at compensatory remedies available to the consumer user for property damage and economic loss, and with liability ceilings set by statute. It is contemplated that this regime could viably be funded by a private insurance scheme and, thus, overlay and complement the social insurance system for personal injury currently in place in this country.

The call for consumer protection legislation is not new, but the demands on New Zealand manufacturers are. It is the writer's belief that such reforms can only enhance product quality and, thus, export competition if the New Zealand manufacturer's duty to the New Zealand consumer was comparable with the duty owed to his or her American, European, and Australian counterpart.