CONSUMER LAW REFORM: THE CONSUMER GUARANTEES BILL

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I. INTRODUCTION

Suggestions that there exists a need for reform of the law relating to sales of goods and services to consumers have been made from time to time over recent years in New Zealand. It has been said that the remedies available under the Sale of Goods Act 1908 are out of date and largely ineffective and inappropriate for the needs of modern consumers.[1] No general legislation exists to impose any liability on the manufacturers or importers of products which proved to be ineffective. New Zealand has been described as having "fallen behind comparable jurisdictions"[2] in this area.

The law of products liability has remained undeveloped. The Torts and General Law Reform Committee took the view in 1974 that once the statutory scheme for accident compensation in New Zealand was established, there would be no need for any legislative modification of the law governing products liability in New Zealand. In the field of property damage, the Committee considered that the widespread practice of loss insurance left only a very small residual area where a consumer might have to bear his or her own loss.[3]

In 1977 the Contracts and Commercial Law Reform Committee of the Department of Justice produced a Working Paper on Warranties in Sales of Consumer Goods[4] which proposed that the distinction between conditions and warranties in contracts for the sale of goods should be abolished and replaced with a single concept of warranty, with an associated new regime of remedies. No legislation was enacted on the basis of the report however, and the matter was again left for further review.

In 1986 a further report was prepared by Professor D H Vernon of the University of Iowa for the New Zealand government which was concerned to investigate the direction which should be taken in the law relating to the supply of goods and services to consumers. Consideration was being given at the time to the question of whether or not, in the light of the existence of the CER agreement between New Zealand and Australia, the law on the subject ought to be the same in both countries and, if not, what would be an appropriate statutory scheme for New Zealand. The Vernon Report adopted the view that, although New Zealand's Fair Trading Act 1986, which deals with misleading conduct and unfair practices in trade, was modelled largely on Division I of Part V of the Australian Trade Practices Act 1974, Divisions 2 and 2A of that legislation, which deal with the rights of consumers against suppliers and manufacturers of defective goods and

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1 See, for example, the remarks by the Minister of Justice, the Rt Hon Geoffrey Palmer and the Minister of Consumer Affairs, the Hon Margaret Shields in their foreword to the report An Outline for Post-Sale Consumer Legislation in New Zealand by Professor David H Vernon, 1987, Wellington (the Vernon report).

2 Ibid.

3 Products Liability, a report to the Minister of Justice, Wellington, March 1974

4 1977, Wellington.

services, should not be adopted in New Zealand. Professor Vernon proposed a quite different regime, based on the creation of Statutory Codes of Responsible Practices.[5] Again, no legislation followed this report, although the then Ministers of Justice and of Consumer Affairs both considered the report to be "an outline of an original and exciting form of consumer protection".[6]

In April of 1992, the Consumer Guarantees Bill was introduced into the New Zealand Parliament. It establishes a number of statutory guarantees with respect to the supply of goods and services and confers on consumers the rights to take action for non-compliance with the guarantees against suppliers and, in some cases, manufacturers. A new set of remedies is created and significant changes are made to other contractual legislation, including the Sale of Goods Act 1908 and the Contractual Remedies Act 1979. The appearance of this Bill indicates that the possibility of harmonising the legislation of New Zealand and Australia with respect to consumer rights and remedies in relation to defective goods and services has been rejected. The Bill is drawn from a variety of sources and represents an amalgam of provisions from such legislation as the Consumer Products Warranties Act 1977 (Sask), the Supply of Goods and Services Act 1982 (UK), the Trade Practices Act 1974 (Aust) and various existing statutory provisions in force in New Zealand. Some provisions are quite new.

The Bill is expressed not to be a code and the rights and remedies provided in it are in addition to any other right or remedy existing under any other Act or rule of law unless the right or remedy is expressly or impliedly repealed or modified by the Bill.[7] Consequently, it will exist side by side with the other legislation respecting the law relating to consumers such as the Fair Trading Act.

The right to contract out of the Bill's provisions is very limited. With the exception of the guarantee imposed on manufacturers with respect to the availability of repair facilities and spare parts,[8] and the case of "business transactions",[9] it is not possible to avoid the imposition of the statutory guarantees.[10] It is an offence against s 13(i) of the Fair Trading Act for a supplier or manufacturer to purport to contract out of the Bill other than in accordance with those provisions which permit it.[11] Clause 42(1) of the Bill states that the provisions of the Act "shall have effect notwithstanding any provision to the contrary in any agreement".

The courts in Saskatchewan have considered the question of contracting out in the context of the Consumer Products Warranties Act. In two cases[12] goods were sold "as is", an expression generally taken to mean that "the

5 See D J Harland: Post-Sale Consumer Legislation for New Zealand A Discussion of the Report to the Minister of Justice by Professor David H Vernon (1988) 3 Canta LR 410 for an outline and analysis of the report.

6 See the foreword to the report.

7 Cl 4(1).

8 Cl 41.

9 Cl 42 allows contracting out in the case of an agreement in writing made between a supplier and a consumer who acquires goods or services for the purposes of a business. As a person who acquires goods for resupplying them in trade or consuming them in the process of production or manufacture or repairing or treating other goods or fixtures is not a consumer within the definition in cl 2, the "business transaction" referred to must apply to such cases as, for example, the acquisition of a kettle (an item ordinarily acquired for personal, domestic or household use) by a factory owner to enable his or her staff to make coffee.

10 Cl 42.

11 Cl 42(4).

12 *MacLeod v Ens* (1982) 15 Sask R 75 and *Adams v J & D's Used Cars Ltd* (1983) 26 Sask R 40.

product is bought and sold in the condition in which it then exists, for better or for worse, with altogether no warranties in relation to quality, durability or fitness, and with the entire risk in those respects to be borne by the buyer''.[13] It was held that the existence of the statutory warranties in the legislation could not be ousted by the use of the words ''as is''; and the agreement should be treated as though the parties had never used the expression, it being of no legal effect whatsoever. It was also held that not only could the phrase ''as is'' not touch the existence of the warranties, but, also, it could not affect their extent by affecting the description of the product sold or amounting to a circumstance of the sale.[14] The Saskatchewan Act is more detailed in its drafting with respect to the matter of contracting out than is the new Bill, but it would seem likely that the New Zealand courts would take a similar approach, given the apparently absolute prohibition on contracting out contained in cl 42(1).

The Bill is not to derogate from any other law which imposes stricter duties on suppliers[15] or any law which implies terms not inconsistent with the Bill into contracts for the supply of services.[16] Any legislation defining or restricting the rights, duties or liabilities arising in connection with a service or any description is not to be limited or affected by the Bill;[17] and nor is the law relating to contracts of employment or apprenticeship.[18] The barrister's immunity from suit is preserved.[19]

The legislation applies to the supply of goods or services to consumers. A consumer is a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption, and not for the purpose of resupplying them in trade, consuming them in the course of a process of production or manufacture or repairing or treating in trade other goods or fixtures on land. A supplier must supply the goods or services in trade for the Bill to be applicable to him or her;[20] ''trade'' is defined sufficiently widely to include any business, profession, commercial activity or undertaking relating to the supply or acquisition of goods or services.[21]

II. Guarantees in Respect of Supply of Goods

The Bill is not limited to the sale of goods, but applies to their supply, which means the supply by way of gift, sale, exchange, lease, hire or hire purchase.[22] This means that there is no need to find that a contract between supplier and consumer exists; the guarantees are imposed by the legislation whenever a supply within its terms occurs. There is no extensive definition of ''goods'' in the Bill, but it is provided that ''goods'' includes goods which are attached to, or incorporated in, any real or personal property.[23] The provisions of the Bill do not apply, however, where goods are supplied by auction or by competitive tender.[24]

13 See *MacLeod v Ens* above n 12 at 76.
14 Ibid, p. 79.
15 Cl 39(a).
16 Cl 39(b).
17 Cl39(c).
18 Cl 39(d).
19 Cl 39(e).
20 Cl 40(1).
21 Cl 2.
22 Cl 2.
23 Ibid.
24 Cl 40(2).

The obligations on the supplier of goods are imposed whether or not the goods are supplied in connection with a service,[25] so that a contract for work and materials is subject to the same requirements, as far as the materials component of the contract is concerned, as are simple transactions for the supply of goods alone. This reflects the position which had been reached by the common law, for the courts had taken the view that the obligations on the supplier of goods should not differ according to whether an element of service was also involved in the contract.[26] Consequently, the guarantees imposed by the Bill on suppliers and manufacturers with respect to goods must be complied with even if the provision of the goods forms only a small proportion of the total consideration provided under the contract, the other, perhaps substantial, part of the consideration being for the supply of a service, such as installation of the goods.

No mention of second hand goods occurs in the Bill which means that the guarantees will apply to them provided the transaction in question otherwise comes within the provisions of the Bill. No doubt the fact that goods are second hand will be a factor in considering the extent of a particular guarantee and the standard which must be met, as is the case under the Sale of Goods Act.[27]

Guarantees as to title

Where goods are supplied to a consumer, guarantees are provided in cl 5(1) of the Bill that (a) the supplier has a right to sell the goods and (b) that the goods are free from any undisclosed security and (c) that the consumer has the right to undisturbed possession of the goods, except in so far as that right is varied pursuant to a term in a hire purchase agreement or a security or term of the agreement for supply in respect of which the consumer has received oral advice as to the way in which his or her right to undisturbed possession of the goods could be affected and also a written copy of the relevant part of the agreement for supply or security. The reference to a "right to sell" goods means a right to dispose of the ownership of the goods to the consumer at the time when that ownership is to pass.[28] In the case of a hire or lease, only the guarantee in (c) is applicable,[29] and that only for the period of the hire or lease.[30] Where goods fail to comply with any guarantee under clause 5, there exists a right of redress against the supplier.[31]

This provision replaces s 14 of the Sale of Goods Act 1908, which deals with similar implied undertakings and that section is expressed to be inapplicable to any supply of goods to which the new Bill relates.[32] Under s 14 of the Sale of Goods Act, the right to sell is an implied condition on the part of the seller, and the terms as to quiet possession and freedom from any undisclosed charge or encumbrance are warranties. The distinction between conditions and warranties is no longer applicable in the case of the Consumer Guarantees Bill, and, if any of the guarantees implied by cl 5 are not complied with, the remedies available are those provided by the Bill.

25 Cl 15.
26 See *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.
27 See, for example, *Bartlett v Sidney Marcus Ltd* [1965] 2 All ER 753.
28 Cl 5(2).
29 Cl 5 (4).
30 Cl 5(5).
31 Cl 5(6).
32 Cl 47.

The guarantees provided in cl 5 are based on those provided in s 14 of the Sale of Goods Act and s 11 of the Hire Purchase Act 1971, and the guarantees, are, *mutatis mutandis*, similar in substance to the conditions and warranties set out in those Acts. However, both the Sale of Goods Act and the Hire Purchase Act provide that the purchaser "shall" enjoy quiet possession of the goods;[33] the new Bill provides a guarantee that the consumer "has the right to undisturbed possession" of the goods. It has been held that the use of the future tense in the Sale of Goods Act makes it clear that the provision is aimed at the future, so that the right to quiet possession exists not only at the time the sale is made, but extends forward into the time after title has passed from the seller to the buyer. In consequence, it has been possible for a buyer who has received a good title to goods at the time of the sale to complain of a breach of the warranty of quiet possession some considerable time later, although the circumstances giving rise to the breach did not exist at the time the sale was made and it was subsequent to the making of the sale that the interference with the buyer's right to quiet possession occurred.[34] This conclusion was reached on the basis of an examination of the language of the provision. It is not clear whether the difference in tense employed in the new Bill will effect any change in the law. It may be argued that the concept of quiet possession necessarily looks to the future, regardless of whether a present or a future tense is used in the legislation. Against this, however, it may be noted that the right to quiet possession has been held to be a part of the implied condition of a right to sell, and as such may exist at the time of the sale rather than merely in the future.[35] Although the new Bill limits the meaning of "right to sell" by defining it solely as a right to transfer ownership, so that the concept of quiet possession is not included in the right to sell, the reasoning that a right to quiet possession may exist at the time of the sale and not merely for the future, may still hold good.

In a case where the goods supplied do not comply with the guarantee as to title, a supplier may be required to remedy the failure to comply by "curing any defect in title".[36] This provision is not further defined or explained, but its meaning is, perhaps, that, a supplier who had no right to dispose of the ownership of the goods at the time ownership was to pass may "feed the title" by making any payment due or doing whatever may be necessary pursuant to a previous transaction which would have given him title to, or a right to transfer ownership of, the goods. The courts have held that a title can be fed in this way provided the act done by the seller of goods which feeds the title is carried out before the buyer rescinds the agreement made between him or her and the person from whom he purchased the goods so that the agreement is still on foot.[37]

Guarantee as to acceptable quality

The familiar condition of merchantable quality implied by s 16(b) of the Sale of Goods Act has been replaced by the requirement stated in cl 6 of the Bill that, where goods are supplied to a consumer, there is a guarantee that the goods are of acceptable quality. This phrase is drawn from the

33 Ss 14(b) and 11(c) respectively.
34 See *Microbeads AC v Vinhurst Road Markings Ltd* [1975] 1 WLR 218, [1975] 1 All ER 529.
35 Ibid.
36 Cl 19(1)(ii).
37 See, for example, *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286 and *Patten v Thomas Motors Pty Ltd* [1965] NSWR 1457.

Consumer Products Warranties Act 1977 (Sask)[38] although its definition is more detailed in the new Bill than in the Saskatchewan legislation.[39]

Goods are of acceptable quality if they are as (a) fit for all the purposes for which goods of the type in question are commonly supplied, and (b) acceptable in appearance and finish, and (c) free from defects, and (d) safe, and (e) durable, as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to (f) the nature of the goods, (g) the price (where relevant), (h) any statements made about the goods on any packaging or label on the goods, (i) any representation made about the goods by the supplier or the manufacturer, and (j) all other relevant circumstances of the supply of the goods.[40] Where the defects in question have been specifically drawn to the consumers attention before the agreement was made, the goods will not fail to comply with the guarantee;[41] and where goods are displayed for sale or hire, the only defects to be treated as having been specifically drawn to the consumer's attention are those disclosed on a written notice displayed with the goods.[42] In any action under the new legislation, proof that the goods do not comply with Product Safety Standards set under Part III of the Fair Trading Act 1986 is prima facie evidence that the goods are not of acceptable quality, although proof that those standards are met is not to be prima facie evidence that the goods are of acceptable quality.[43]

It is doubtful whether the definition of acceptable quality and the matters to be considered in deciding whether goods are of merchantable quality differ in any way from the equivalent matters relating to merchantable quality under the Sale of Goods Act. In interpreting the expression "merchantable quality", the courts have consistently considered those same factors which are spelled out in the new Bill with regard to acceptable quality. It may be that the relabelling of the concept is intended to shift the emphasis from the point of view of that of the seller to the consumer. A perception has existed that the concept of merchantable quality is related to the question of whether in fact goods are saleable; for example, in their foreword to the Vernon report, the Minister of Justice and the Minister of Consumer Affairs stated that the "very words 'merchantable quality' indicate that the [Sale of Goods] Act is not appropriate to consumer transactions. The one thing that the consumer does *not* want to do with a purchased item is to resell it"; a statement which, it can be argued, does not accurately reflect the established meaning of "merchantable quality", which refers to the state or condition of the goods, rather than whether they can be sold.[44]

38 S 11.

39 S 2(a) of the Consumer Products Warranties Act provides that "acceptable quality" means "the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, having regard to all the relevant circumstances of the sale of the product, including the description of the product, its purchase price and the express warranties of the retail seller or manufacturer of the product, and includes merchantable quality within the meaning of The Sale of Goods Act".

40 Cl 7(1).

41 Cl 7(2).

42 Cl 7(3).

43 Cl 7(4).

44 "...the condition is not that the goods shall be 'merchantable', but that they shall be of 'merchantable quality'...": see *Sumner Permain and Co v Webb and Co* [1922] 1 KB 55, 60, per Bankes LJ.

Although the Saskatchewan Act defines "acceptable quality" in different terms from those found in the new Bill, it provides that the expression "includes merchantable quality within the meaning of the Sale of Goods Act",[45] an addition which enables the courts to take into account the detailed judicial deliberations and interpretations already in existence respecting the requirements as to quality in contracts for the sale of goods. No such link is provided in the new Bill, which contains no mention of the concept of merchantable quality.

The Saskatchewan courts have considered the concept of acceptable quality in a number of cases, as well as the question of durability of goods, which is the subject of a separate warranty in the Saskatchewan Act.[46] The matters which the courts there have taken into account are essentially those which are included in the definition of "acceptable quality" in the New Zealand Bill. For example, it has been held that the contract description is relevant in that it affects the buyer's expectations as to what he will receive, even in the case of second hand goods. In Adams v J & D's Used Cars Ltd[47] the court had to decide whether a second hand car, described as "a premium unit" and purchased for $2,500.00, in which defects, both major and minor, became apparent soon after the purchase was of acceptable quality. The court considered that because the car was represented as being "a premium unit", the buyer was entitled to assume it had a higher degree of acceptable and merchantable quality than the vehicle in fact proved to have with the result that the statutory warranty was breached and the buyer was entitled to damages to compensate for the major defects which constituted a breach of the warranty. Similarly, it was held[48] that a satellite dish which was sold as being of top quality and which had cost $4, 704.75 was not of acceptable quality when it was shown to have a defective part which caused the buyer to be able to receive only four television channels instead of the ten or twelve which he expected to receive. The cost of purchasing and installing a new part was $400.00 and the part had to be replaced twice within ten months of the initial purchase of the dish. The court took the view that the buyer's reasonable expectations were not met.

However, the court observed in *Adams v J & D's Used Cars Ltd* that it was to be expected that "run of the mill repairs common to any used car" should be anticipated, and the cost of rectifying such routine and predictable problems was not recoverable under the Act. This point was discussed in *Weisbrod v Regina Motor Products* (1970) Ltd,[49] a case concerning a new van which developed a number of problems, three of which were serious, requiring the buyer to return it to the seller on 12 different occasions during the four years following the sale. The court took the view that a consumer could not expect a new motor vehicle to be totally free of all defects for an indefinite time, for that would be to expect perfection and "the standard for human behaviour is not perfection. Thus it is not possible merely to aggregate a series of minor routine repairs with three unrelated, although perhaps significant, problems and thereby label a perfectly usable motor vehicle as of unacceptable quality."[50] By contrast, it was held[51] that a second

45 S 2(a).
46 S 11.
47 Above.
48 *Nestman v M & H Electrical Contractors Ltd* (1987) 50 Sask R 233.
49 (1990) 79 Sask R 219.
50 At 223, per Matheson J.
51 *MacLeod v Ens* above n 12.

hand car, purchased for $850.00 did not meet the warranty of durability when a major mechanical problem costing $378.06 to repair developed three days after the date of purchase, when the buyer had travelled only 68 miles. The court noted that it could occasionally be difficult to apply the warranty; "by definition it expands and contracts with circumstance and each case will fall to be decided on its own peculiar facts",[52] but the engine in the particular case should have lasted more than three days.

No doubt the above cases will be of relevance in interpreting the new Bill. Although durability is not a separate guarantee in the Bill, durability is stated to be a factor to be considered in determining whether goods are or are not of acceptable quality.[53]

Guarantees as to fitness for particular purpose

Two guarantees are set out in cl 8 of the Bill. First, there is a guarantee that, where goods are supplied to a consumer, that they will be reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer;[54] and second, that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.[55] The guarantees are inapplicable, however, where the circumstances show that the consumer does not rely on the supplier's skill or judgment,[56] or where it is unreasonable for the consumer to rely on the supplier's skill or judgment.[57] The guarantee applies whether or not the purpose is a purpose for which the goods are commonly supplied.[58]

This clause replaces s 16(a) of the Sale of Goods Act, which implies a condition as to fitness for purpose where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment. The words "so as to show" have been held to be significant; the mere fact of the buyer's making his or her purpose known to the seller does not in itself suffice to make the condition applicable, for the making known of the purpose must have the effect of indicating that reliance on the seller on the part of the buyer exists.[59] So, if, for example, the parties are equally knowledgeable about the subject matter of the sale, reliance will not be inferred under the section.[60] However, in the case of retail sales, the courts have indicated that reliance will readily be found, for reliance will seldom be express, and it may be inferred that a buyer goes to a shop in the confidence that the seller has selected his or her stock with skill and judgment.[61] It also seems that, under s 16(a), because the "particular purpose" includes any general purpose for which the goods in question are commonly used,[62] it is sufficient to bring s 16(a) into play if

52 Ibid, p 80.
53 Cl 7(1)(e).
54 Cl 8(1)(a).
55 Cl 8(1)(b).
56 Cl 8(2)(a).
57 Cl 8(2)(b).
58 Cl 8(3).
59 See *Feast Contractors Ltd v Ray Vincent Ltd* [1974] 1 NZLR 212, which applied *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 39.
60 Ibid.
61 See *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 99, per Lord Wright.
62 "[I]t is not necessary for the buyer expressly to communicate to the seller the fact that he desires the goods for that general purpose. The seller must be taken to know that, if nothing is said to the contrary, food is bought for the purpose of being eaten, and motor-cars for the purpose of locomotion": *Taylor v Combined Buyers Ltd* [1924] NZLR 627, 629, per Salmond J.

the seller is aware that the buyer might use the goods for the purpose for which they were in fact used.[63] The effect of this is to impose a heavy burden on the seller, who will be liable under s 16(a) if the goods are not fit for any purpose within their possible range of uses, as well as for any additional expressly stated purpose, unless the use to which the buyer puts the goods is an unusual or abnormal one.

It may be presumed that the new Bill is not intended to effect any diminution in the rights of consumers, and that the obligation on a seller should not be less than that under the Sale of Goods Act with respect to fitness for purpose of goods. It seems that the requirement as to reliance on the seller by the buyer is unchanged under the new Bill, for the guarantees do not apply if there is in fact no reliance by the consumer or if reliance is unreasonable. These two exceptions are expressed disjunctively, so presumably if a consumer has actually relied on a supplier, but it was unreasonable for the consumer so to rely, the supplier will not be liable. This probably represents the same position which exists under the Sale of Goods Act.[64]

However, the question of the meaning of ''particular purpose'' in cl 8 is perhaps less clear. Clause 8(3) states that the guarantee is applicable whether or not the purpose is a purpose for which the goods are commonly supplied. Presumably, however, no guarantee would be imposed if the consumer did not make known to the seller any unusual or abnormal purpose for which the goods were required. It is not possible that a supplier could be liable for every possible conceivable use, no matter how idiosyncratic, which a consumer might make of goods. If the purpose were an unusual or abnormal one, it is therefore unlikely that this could be considered to have been made known to the seller merely by implication, and so an express communication would be required. No doubt it may easily be inferred that a supplier is aware of any intended use which is one for which the goods are commonly supplied. The effect, therefore, of cl 8(3) is not readily apparent and it is difficult to see whether it alters the law with regard to the meaning of ''particular purpose'' as it has been defined under the Sale of Goods Act.

Clause 8 adds, however, the additional provision that there is a guarantee imposed with respect to the reasonable fitness for any particular purpose for which the supplier represents that they are or will be fit. Section 16(a) of the Sale of Goods Act does not contain any such provision and no mention is made in that section of any representations made by the seller of goods. In practice, a representation by the seller that the goods are fit for a particular purpose would no doubt be linked with the buyer's making known the purpose for which the goods are required, so that it may make little difference whether the seller volunteers the information or supplies it in response to the buyer's disclosure of the purpose for which the latter requires the goods. In either case, an express statement by the seller would suffice to bring s 16(a) into play provided the buyer's intended purpose was disclosed. However, a gratuitous statement by the supplier of goods, unrelated to any disclosure made by the consumer as to the purpose for

63 Lord Diplock dissented on this point in *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 507. However, the majority of the House of Lords held that knowledge of the possibility that goods might be used in the way in which they were in fact used was sufficient to constitute knowledge of a ''particular purpose''.

64 See, for example, the suggestion by Lord Pearce that reliance must be reasonable in *Kendall v Lillico* above n 59.

which the consumer wishes to acquire the goods might give rise to liability under cl 8 although no liability might have existed under s 16(a) if a consumer in fact used goods for the purpose for which the supplier stated they were fit, although the consumer neither had nor disclosed any intention of making such use of the goods at the time of acquiring them.

Guarantee that goods comply with description

The guarantee as to compliance with description in cl 9 of the Bill is very similar in its terms to the condition implied by s 15 of the Sale of Goods Act, which is replaced by cl 9 in the case of the supply of goods to consumers. Clause 9 provides that a guarantee that, where goods are supplied by description to a consumer, the goods correspond with the description.[65] The fact that goods are selected by the consumer does not prevent the supply of goods from being a supply by description[66] and, if the goods are supplied by reference to a sample or demonstration model as well as by description, the guarantee in cl 9 is applicable as well as that imposed by cl 10, which requires compliance with sample.[67] The clause uses the familiar terminology of "sale by description" and appears to differ little in substance from the requirements of s 15 of the Sale of Goods Act which provides that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description.

It is well established in the context of the Sale of Goods Act that "the key to s [15] is identification".[68] The section does not concern the quality of the goods, but their identity, so that any inquiry into whether goods comply with their description inevitably focuses on whether or not the goods are or are not of the kind which the buyer agreed to buy, and matters relating to inessential attributes of quality are dealt with under s. 16. It may be that cl 9 proves to be different in its effect from s 15, for cl 21(b) of the new Bill, which concerns remedies, provides that there will be a failure of a substantial character to comply with cl 9 where "the goods depart in one or more significant respects from the description by which they were supplied". This language suggests that the issue of compliance with description may no longer be dealt with by examining the question of the identity of the goods, but that the attributes of the goods may be examined as well.

Guarantees that goods comply with sample

Clause 10 of the Bill provides that where goods are supplied to a consumer by reference to a sample or demonstration model, there are implied the guarantees that the goods correspond with the sample or demonstration model in quality and that the consumer will have a reasonable opportunity to compare the goods with the sample.[69] Goods which are supplied by reference to a sample or demonstration model as well as by description are subject to the guarantees found in both s 9 and s. 10.[70] This provision replaces s 17 of the Sale of Goods Act with respect to consumer sales, and does not appear to differ in substance from that section.

65 Cl 9(1).
66 Cl 9(2).
67 Cl 9(3).
68 *Christopher Hill Ltd v Ashington Piggeries* above n 63 at 504, per Lord Diplock, followed in *Finch Motors Ltd v Quinn (No 2)* [1980] NZLR 519.
69 Cl 10(1).
70 Cl 10(2).

The Saskatchewan Act is close in its wording to s 17 of the Sale of Goods Act with respect to the warranties which it implies into sales by sample. The Saskatchewan warranty was held to have been breached in *Wagner's Flooring Ltd v Lischynski*[71], when a supplier laid a carpet in the home of a buyer who had selected the carpet by reference to a sample provided by the supplier. After installation, the carpet was found to have a backing different from that which was on the sample, with the result that the carpet supplied was less resilient and had a different feel from that of the sample, although no difference in appearance was readily discernible. It was held that the carpet supplied was a quite different one in quality, and the supplier was not entitled to any of the purchase price at all unless a carpet identical to the sample was installed by the supplier to replace the carpet which did not correspond with the sample. Presumably, the same result would be reached under cl 10 of the new Bill.

Guarantee as to price

Section 10 of the Sale of Goods Act provides that where the price of goods is not determined by contract or left to be fixed in an agreed manner or determined by the course of dealing between the parties, the buyer must pay a reasonable price. With respect to the supply of goods to consumers under the new Bill, cl 11 creates a guarantee as to price which is in effectively the same terms as s 10, and enables the buyer, where the guarantee is not complied with, to refuse to pay more than a reasonable price.[72]

Guarantee as to repairs and spare parts

This guarantee is imposed only on the manufacturer of goods, and not on the supplier. Clause 12(1) of the Bill states that where goods are supplied to a consumer, there is a guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are first supplied to the consumer.

This obligation is quite new in New Zealand. It is based on similar statutory obligations imposed in Australia[73] and Saskatchewan.[74] It was suggested in the Vernon report that "the extent of nonavailability of spare parts is somewhat unique to New Zealand because of its geographic remoteness and because the limited market demands generated by its relatively small population discourage manufacturing within New Zealand of goods that require large capital investments".[75] Professor Vernon recommended that information about the availability of spare parts should be given to consumers, and that suppliers should be required to ensure a supply of spare parts throughout the "ordinary useful life" of the item.[76]

Rather than attempting to lay down any particular requirement of this kind, cl 12 uses the criterion of reasonableness; facilities for repair and supply of parts must be "reasonably available for a reasonable period after the goods are first supplied to the consumer". No doubt the expected life of goods would be a factor in considering what is a reasonable period for which repair facilities and parts should be available. The clause is succinct

71 (1987) 54 Sask R 225.
72 Cl 11(2).
73 Trade Practices Act 1974, s 74F(1).
74 Consumer Products Warranties Act 1977, s 11(8).
75 Above n 1 at 21.
76 Ibid.

in its terms, and does not contain the detail to be found in the equivalent Australian legislation which provides that a court should have regard to all the circumstances of the case and in particular, to the existence of circumstances beyond the control of the supplier that prevented repair facilities or parts being so available.[77] No such provision is to be found in the new Bill.

It is possible to contract out of this guarantee, for it does not apply where reasonable action is taken to notify the consumer who first acquires the goods from a supplier, at or before the time the goods are supplied, that manufacturer does not undertake that repair facilities and parts will be available, or that they will be available for only a specified period. Presumably, it is the responsibility of the manufacturer to so notify the consumer. As the consumer will not ordinarily have contact with the manufacturer in the retail situation, such notification would have to take place by means of documentation accompanying the goods, or by advertisements of some kind.

III. Guarantees in Respect of Supply of Services

A contract for the provision of goods to be installed in a building or structure is usually regarded as a contract for labour and materials rather than as a sale of goods.[78] However, the law has moved towards the position, in the case of contracts which are for work and materials, of imposing the same obligations on the provider of the goods and materials with respect to the goods supplied as would have been applicable had the contract been one for the supply of goods alone. The liability of the supplier of goods should not be different according to whether or not the goods are installed or worked on in same way by the supplier.[79] The new Bill confirms this principle, and the guarantees respecting the supply of goods are applicable whether or not the goods are supplied in connection with a service.[80] However, the Bill goes further and sets out a scheme of guarantees and remedies with respect to the provision of services, which apply whether or not goods are supplied in conjunction with the service.

Clause 28 is in simple terms; it states that where services are supplied to a consumer there is a guarantee that the service will be carried out with due care and skill. The word "due" is that adopted in Australia in s 74(1) of the Trade Practices Act 1974; it may be contrasted with the equivalent United Kingdom provision, which requires "reasonable" care and skill on the part of a supplier.[81] It may be that the use of the word "due" instead of "reasonable" imposes a higher duty than that imposed by the law of negligence.[82] However, this is not clear, and it cannot be said with any certainty that cl 28 does more than state the existing law.

Although cl 29 is based on s 74(2) of the Trade Practices Act, it is not identical in its provisions. The clause imposes a guarantee that, where services are supplied to a consumer the service, and any product resulting from the service, will be reasonably fit for any particular purpose, and of such a nature and quality that it can reasonably be expected to achieve any particular result that the consumer makes known to the supplier as the

77 Trade Practices Act 1974, s 74F(4).
78 See Atiyah, *The Sale of Goods*, 8th edition.
79 See *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.
80 Cl 15.
81 Supply of Goods and Services Act 1982 (UK), s 13.
82 See Woodroffe, *Goods and Services -The New Law*, Sweet & Maxwell, 1982 p 104.

particular purpose for which the service is required or the result that the consumer desires to achieve, except where the circumstances show that the consumer does not rely on the supplier's skill or judgment or it unreasonable for the consumer to do so.

The requirement that any product resulting from the service must be reasonably fit for its purpose is not found in s 74 (2) of the Trade Practices Act, which refers to the services supplied and "any materials supplied in connexion with those services". As the guarantees in the new Bill respecting the supply of goods refers to goods supplied under the agreement rather than resulting from a supplier's services, this guarantee is new. It may be that the guarantee as to fitness for purpose of any product resulting from the service would be included in the guarantee as to due care and skill in cl 28 in any event, but cl 29 makes this explicit.

A guarantee as to time of completion is provided in cl 30, which is essentially the same as that to be found in the Supply of Goods and Services Act 1982 (UK). Where services are supplied to a consumer, there is a guarantee that the service will be completed within a reasonable time if the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties. A guarantee as to price to be paid to a supplier for services is found in cl. 31; its terms are similar to those of cl 30, with the result that the amount payable for both goods and services is required to be "reasonable", unless the parties have agreed on the price or a mechanism to fix the price themselves.

IV. Rights of Redress Against Suppliers

A scheme of remedies for a consumer against a supplier who has failed to comply with the guarantees imposed is set out in the new Bill. The effect of this scheme is far reaching, for it replaces, as far as consumer sales of goods are concerned, the long established regime to be found in the Sale of Goods Act. Under the Sale of Goods Act, it is necessary to consider the remedies available in the light of the classification of terms of contracts for the sale of goods into conditions and warranties, the remedies available depending on the classification. A breach of a condition, being a term going to the root of the contract or of the essence of a contract, gives rise to a right to rescind on the part of the innocent party; a breach of a warranty, a term collateral to the main purpose of the contract, entitles the innocent party to damages but not to any right to rescind. This well established dichotomy will no longer apply to sales to which the Bill relates.[83] Instead, the Bill gives the consumer options against a supplier who has not complied with the statutory guarantees.[84]

In essence, the scheme laid down is that, where the failure to comply with the guarantee can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time,[85] which means repairing the goods or curing any defect in title, or replacing the goods with goods of identical type.[86] If the supplier refuses or neglects to do so, or does not succeed in doing so within a reasonable time, the consumer may have the

83 A new s 56A is inserted into the Sale of Goods Act by cl 47 of the Bill: "Nothing in section 10 or in sections 13 to 17 or in section 38 or in section 54 of this Act shall apply to any supply of goods to which the Consumer Guarantees Act 1992 applies."

84 Cl 18.

85 Cl 18(2)(a).

86 Cl 19(1).

failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied or reject the goods.[87] Where the failure cannot be remedied or is of a "substantial character",[88] the consumer may reject the goods or obtain compensation from the supplier for any reduction in the value of the goods below their purchase price.[89]

It seems that any expectation that a consumer may have as to a right to reject the goods must be a realistic one, or the courts may consider that the continuation of an action by the consumer is frivolous and vexatious. In *Weisbrod v Regina Motor Products (1970) Ltd*,[90] a breach of a statutory warranty which occurred more than four years after the purchase of the goods was a remediable one, and the supplier had offered to remedy the breach. It was held that any expectation of rejection of the contract by the consumer was totally unrealistic, and the consumer's continuation of the action was therefore frivolous, a finding which was reflected in the award as to costs which was made.

The right to reject the goods is exercised by notifying the supplier of the decision to reject and the grounds of rejection.[91] The consumer must return the rejected goods to the supplier unless the failure to comply with the guarantee or the size or height or method of attachment of the goods makes the cost to the consumer of transporting them "significant", in which case the supplier must collect the goods at his or her own expense.[92] This latter requirement, it may be noted, differs from the equivalent provision in the Sale of Goods Act, which states that the buyer is not bound to return rejected goods.[93] The provision respecting the return of the rejected goods in the new Bill is essentially the same as that in the Saskatchewan legislation,[94] which was applied in *Wagner's Flooring Ltd v Lischynski*.[95] In that case, it was held that a carpet which was found not to correspond with the sample by which it had been sold and the supplier had to be responsible for the costs of the removal of the defective carpet.

If property in the goods has passed to the consumer before rejection, it revests in the supplier upon notification of the rejection.[96] The consumer may then choose to have either a refund of goods of the same type and of "similar value" to replace the rejected goods if such goods are reasonably available to the supplier as part of his or her stock.[97] The refund must be a refund of the cash paid or value of other consideration provided by the consumer; permission to acquire other goods from the supplier is not sufficient.[98] The guarantees provided by the Bill are then applicable to the replacement goods.[99]

87 Cl 18(2)(b).
88 Cl 21 provides that a failure is of a substantial character where (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure or (b) the goods depart in one or more significant respect from their description or any sample or demonstration model or (c) the goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or a a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit or (d) the goods are not of acceptable quality because they are unsafe.
89 Cl 18(3)(a), (b).
90 (1990) 79 Sask R 219.
91 Cl 22(1).
92 Cl 22(2).
93 S 38.
94 S 22(2).
95 Above.
96 Cl 22(3).
97 Cl 23(1).
98 Cl 23(2), (3).
99 Cl 23(4).

The right to reject the goods is lost if the right is not exercised within a reasonable time,[100] or the goods have been disposed of by the consumer or have been lost or destroyed while in the possession of anyone other than the supplier or the supplier's agent,[101] or if the goods were damaged by the consumer after delivery to the consumer for reasons not related to their state or condition at the time of supply,[102] or the goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.[103] These provisions replace s 37 of the Sale of Goods Act, which provides for the circumstances in which a buyer is deemed to have accepted goods and thereby loses any right of rejection.

Certain difficulties arise with respect to this new scheme. While it is drafted with apparent clarity and simplicity, it is not clear that it will solve the problems at which it is directed, one of these being the difficulty of applying the distinction between conditions and warranties in contracts for the sale of goods. It is not immediately obvious that the introduction of the concept of a failure of a "substantial character" will simplify the process of deciding whether a breach of contract is sufficiently serious to give rise to a right to rescind, which is still the essential question to be answered. The definition of a failure of a substantial character in cl 21 does not, it may be argued, clarify the matter greatly, for the matters mentioned there are related to compliance with description, fitness for purpose, and acceptable quality. The need to make a distinction, or draw the line, still exists, although the terminology is different. Where under the Sale of Goods Act the question was whether, as a result of examining the essentiality of term, it should be classified as a condition or a warranty, under the new Bill, the question will be, in the case where a statutory guarantee has not been complied with, whether the failure to comply is or is not of a substantial character. Under both pieces of legislation, different consequences flow from the making of the distinction and the factors to be examined may prove to be, in practice, very similar as far as remedies in the context of sales of goods are concerned. In *Nestman v M & H Electrical Contractors Ltd*[104] the court considered whether or not a defect in goods which had cost $4,704.75 was remediable or whether it constituted a substantial breach and held that, because a replacement part could be supplied and installed for a maximum of $400.00, the breach was not substantial. The issue remained, essentially, one of the seriousness of the breach in relation to the contract as a whole.

A further difficulty which may arise is that, while the new guarantees replace certain provisions of the Sale of Goods Act, that Act remains intact so far as the law pertaining to the sale of goods is concerned, except for those sections which are expressed to be no longer applicable to the supply of goods to consumers. Consequently, the remedies available to sellers of goods are still determined by the Sale of Goods Act. In consequence, a seller may bring an action for, for example, non-acceptance of goods against a consumer, and the consumer's defence may arise from an allegation that a guarantee under the new Bill has not been complied with by the supplier. A different regime for cancellation will apply according

100 Cl 20(1)(a).
101 Cl 20(1)(b).
102 Cl 20(1)(c).
103 Cl 20(1)(d).
104 (1987) 50 Sask R 233.

to whether it is the seller or the consumer who wishes to cancel the contract for the supply of goods; in the former case, the Sale of Goods Act will set out the law respecting cancellation, and in the latter case, it will be the new Bill which sets the rules.

As far as the supply of services is concerned, the remedies available for failure to comply with a guarantee under the Bill are broadly similar to those which apply to the supply of goods. If a service supplied to a consumer fails to comply with a statutory guarantee, the consumer may, if the failure can be remedied, require the supplier to remedy it within a reasonable time[105] and if the supplier refuses or neglects to do so, or does not do so within a reasonable time, the consumer may have the failure remedied elsewhere and recover the cost from the supplier or cancel the contract, although there is no right to cancel in a case where the service to be supplied under the contract is merely incidental to the supply of goods if the consumer had the right to reject the goods where the goods did not comply with the guarantees in the Bill.[106] If the failure cannot be remedied or is of a substantial character[107] the consumer may cancel the contract (although this is subject to the limitation mentioned above if the service is merely incidental to the supply of goods) or obtain damages from the supplier in compensation for any reduction in value of the product of a service below the purchase price.[108]

The rules applicable to cancellation are set out in cl 36, which provides that the consumer's cancellation of the contracts shall not take effect before the time at which the cancellation is made known to the supplier or, where it is not reasonably practicable to communicate with the supplier, before the consumer indicates by means which are reasonable in the circumstances, his or her intention to cancel. No particular form of cancellation is required, provided the intention to cancel is made known. This provision is essentially the same in its terms to the rules set out in s 8(1) of the Contractual Remedies Act.

Clause 37 sets out the effects of cancellation. Where a consumer cancels a contract for the supply of services under the Bill, he or she is entitled to recover a refund of any money paid or consideration provided in respect of the services and, so far as the contract has been performed at the time of cancellation, no party is divested of any property unless a court or Disputes Tribunal orders otherwise. So far as the contract remains unperformed at the time of cancellation, no party is obliged or entitled to perform it further.[109] However, nothing in those provisions is to affect the right of a party to recover damages in respect of a misrepresentation or the repudiation or breach of the contract by another party, or the right of the consumer to recover damages for failure to comply with a guarantee or the right of the consumer to reject goods supplied in connection with the service.[110]

105 Cl 32(a)(i).
106 Cl 32(a)(ii), cl 34.
107 A failure is of a substantial character where the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure or (b) the product of the service is substantially unfit for a purpose for which services of the type in question are commonly supplied or a product of the service is unfit for a particular purpose, or is of such a nature and quality that the product of the service cannot be expected to achieve any particular result made known to the supplier or (c) the product of the service is unsafe.
108 Cl 32(b).
109 Cl 37(1).
110 Cl 37(2).

Where a consumer has cancelled a contract for the supply of services under the Bill, ancillary powers are conferred on courts and Disputes Tribunals to grant relief.[111] In a case where "it is just and practicable to do so"[112] a court or Disputes Tribunal may make an order vesting property in any party to the proceedings;[113] direct the transfer, assignment or giving of possession of property by one party to another;[114] direct the payment of such sum of money by one party to another as the court or Tribunal thinks fit;[115] direct any party to do or refrain from doing in relation to any other party any act or thing as the court or Tribunal thinks just;[116] or permit a supplier to retain the whole or part of any money paid or other consideration provided under the contract.[117] Any such order may be made on any terms or conditions the court or Tribunal thinks fit, provided it does not have the effect of preventing a claim for damages by any party.[118] In considering whether to make an order, and the terms of it, the court or Tribunal is required to have regard to such matters as any benefit or advantage obtained by the consumer by reason of the supply of the service;[119] the value of any work or services performed by the supplier in relation to the supply of the service;[120] any expenditure incurred by the consumer or the supplier in or for the purpose of supplying the service;[121] the extent to which the supplier or the consumer would have been able to perform the contract in whole or in part;[122] and such other matters as the court or Tribunal thinks fit.[123] An application for an order under cl. 38 may be made not only by the consumer or supplier, but by any person claiming through or under the consumer or the supplier[124] or any other person if it is material for him or her to know whether relief will be granted.[125] However, orders may not be made which would have the effect of depriving a person, not being a party to the contract, of the possession of or any estate or interest in any property acquired by him or her in good faith and for valuable consideration.[126] Presumably, this provision is not intended to affect the nemo dat rules set out in the Sale of Goods Act, but is intended to preserve the rights which have been acquired by innocent third parties pursuant to those rules as well as the rights of bona fide third parties generally. There is also a prohibition on the making of an order under cl 38 if any party to the contract has so altered his or her position in relation to the property, whether before or after the cancellation of the contract, that, having regard to all relevant circumstances, it would be inequitable to any party to make such an order.[127] This provision appears to constitute a general statement of the principle of estoppel, although there is no express requirement that the party who alters his or her position must have done so in reliance on any representation or conduct of the other party.

111 Cl 38.
112 Cl 38(1).
113 Cl 38(2)(a).
114 Cl 38(2)(b).
115 Cl 38(2)(c).
116 Cl 38(2)(d).
117 Cl 38(2)(e).
118 Cl 38(3).
119 Cl 38(4)(a).
120 Cl 38(4)(b).
121 Cl 38(4)(c).
122 Cl 38(4)(d).
123 Cl 38(4)(e).
124 Cl 38(7)(c).
125 Cl 38(7)(d).
126 Cl 38(5).
127 Cl 38(6).

It may be, however, that it would not be inequitable to make an order under cl 38 unless the alteration of position had been in fact caused by the other party to the contract.

With respect to the matters relating to the supply of services to consumers under the new Bill, the remedies set out in the Contractual Remedies Act are no longer applicable.[128] That Act governs the law relating to remedies available generally in contracts in New Zealand except for contracts for the sale of goods and created a broad and flexible regime with respect to remedies and gave wide discretionary powers to the courts to make orders in the event of cancellation of contracts for misrepresentation, repudiation or breach. The legislation codified the law relating to the method and effects of cancellation of contracts.

Certain difficulties have arisen in the past as a consequence of the fact that the provisions of the Contractual Remedies Act respecting the cancellation of contracts are not applicable to contracts for the sale of goods. It has remained necessary to examine particular contracts carefully to determine whether they are or are not contracts for the sale of goods, for different legal effects may occur depending on the classification of a contracts. In consequence, the line of cases which developed (in the days when contracts for the sale of goods worth over a certain amount of money had to be in writing) to decide whether contracts were for goods or services have remained of significance in New Zealand. For example, in *Printcorp Services Ltd v Northern City Publications Ltd*,[129] it was necessary for the High Court to consider whether contracts for the printing of newspapers were for the supply of goods or of services because the question of whether the publisher had accepted the newspapers when they were printed and returned and thereby lost any right to reject them hinged on whether the Sale of Goods Act or the Contractual Remedies Act governed the situation. It was decided that the contracts were for the sale of goods, and the question of acceptance was accordingly decided under the Sale of Goods Act.

No doubt the existence of the Sale of Goods Act with its clear and well established provisions was a good reason for excluding contracts for the sale of goods from the provisions of the Contractual Remedies Act at the time the latter act was drafted. There would have been little to be gained by sweeping away the longstanding and well known scheme of the Act and the cases interpreting it, and substituting a broad discretionary regime in its place. The result is that two distinct statutory schemes governing cancellation for misrepresentation, repudiation or breach of contracts have existed side by side since the passage of the Contractual Remedies Act.[130]

Whether the introduction of yet a third scheme will assist the clarity of the law remains to be seen. If the new Bill is enacted, the result will be that those matters to which the Bill specifically relates will be dealt with under the Bill, but other matters which may arise from the same contract will be decided under different legislation. A contract for labour and materials may require consideration of the provisions of the new Bill if a guarantee is breached, of the Sale of Goods Act if, for example, a question of damages claimed by the seller arises, and of the Contractual Remedies Act if the question of misrepresentation requires determination.

128 Cl 52.

129 [1990] BCL 1604.

130 The Law Commission has recently recommended certain amendments to both the Sale of Goods Act 1908 and the Contractual Remedies Act 1979 with a view to harmonising the two statutes: see *Contract Statutes Review*, Law Commission, Report No 25, Wellington, May 1993.

The Bill creates an inroad into the doctrine of privity by providing that where a consumer acquires goods from a supplier and gives them to another person as a gift, that person may exercise any of the rights and remedies available to the original consumer against the supplier in respect of the guarantees relating to goods and any reference in the Part of the Bill concerning rights of redress against suppliers in respect of the supply of goods includes a reference to the donee of the goods.[131] The effect of this provision is that the rights against suppliers of goods run with the goods as long as the goods pass by way of gift from one person to another, for the donee becomes a consumer upon receipt of the goods as a gift. Consequently, the guarantees will remain with the recipient of the goods, no matter how many hands the goods have passed through, provided each transaction is a gift, although the chain will be broken and the rights cease if a sale occurs. This provision is simpler and narrower that the Saskatchewan provision on which it is based.[132] The Saskatchewan legislation provides that the rights against suppliers are given to "persons who derive their property or interest in a product from or through the consumer, whether by purchase, gift, operation of law or otherwise, shall, regardless of their place in the sequence of dealings with respect to the product" be deemed to be given the statutory warranties, although a retail seller who acquires a product from a consumer for the purposes of resale or use in a business is excluded from the class.[133] It is interesting that the New Zealand provision confines the extension of rights to those who were not parties to the original contract to donees. The effect of this may prove to be unnecessarily limiting, for a person who acquires goods for the purpose of resale or use in trade is not, in any event, a consumer and would therefore acquire no rights under the Act to pass on to a donee. However, a person who acquires, for example, goods for domestic use, with no intention of reselling them, but later finds them unsuitable and agrees to sell them or exchange them with a neighbour, will thereby break off any liability of the original supplier under the guarantees. The neighbour taking the goods would have no rights against the supplier.

V. Rights of Redress Against Manufacturers in Respect of Supply of Goods

The rights given by the Bill to consumers to take action directly against manufacturers are novel provisions in New Zealand law. Until now, the options available to purchasers of goods against manufacturers have been limited because of the doctrine of privity of contract. A purchaser who discovers defects in goods after their purchase generally takes action against the seller under the Sale of Goods Act and, because the buyer and seller are the parties to the contract, a remedy is available. However, this may prove to be of little value if the seller has, for example, become insolvent since selling the goods. In such a case, a purchaser might have a remedy in tort against the manufacturer,[134] although where no physical damage has occurred, this is more problematic. In certain cases, it might be possible to argue that a seller is selling goods in the capacity of an agent of the

131 Cl 24.
132 Consumer Products Warranties Act (Sask), s 4.
133 S 4(2).
134 See, for example, *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163.

manufacturer; or that a manufacturer's express guarantee constitutes a collateral warranty; or there may be a breach of some other statute such as the Fair Trading Act involved. However, if the case is the simple one of, for example, goods purchased from a retailer not being of merchantable quality, a direct right against the manufacturer might well prove impossible to find.

The Bill gives the consumer a right of redress against the manufacturer of goods where the goods fail to comply with the guarantees of acceptable quality;[135] of correspondence with description due to the failure of the goods to correspond with any description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer;[136] and as to repairs and parts.[137] There is, however, no right of redress against the manufacturer if the goods are not of acceptable quality because of any act or default or representation made by any third person, or a cause independent of human control, occurring after the goods have left the manufacturer's control, or the price charged by the supplier exceeding the manufacturer's recommended retail price or the average retail price.[138] The manufacturer is also excused if the failure to correspond with the guarantee as to correspondence with description is cause by another person or a cause independent of human control, occurring after the goods have left the control of the manufacturer.[139]

Non-compliance with any express guarantee which is binding on the manufacturer also gives the consumer a right of redress against the manufacturer.[140] This right exists provided the express guarantee is given by the manufacturer in a document which is given to the consumer with the authority of the manufacturer in connection with the supply of the goods by a supplier to the consumer.[141] In the absence of proof to the contrary, an express guarantee which is included in a document relating to goods and which appears to have been made by the manufacturer is presumed to have been made by the manufacturer,[142] and similarly, there is a presumption that the document was given to the consumer with the authority of the manufacturer if it is proven that the consumer was given a document containing express guarantees by a manufacturer in respect of goods in connection with the supply of those goods to the consumer.[143]

Presumably the document referred to must be separate from the goods, and not be simply writing attached to the goods or on the packaging. It is well established that the packaging of goods is part of the goods themselves, so that inadequacies in, for example, labelling, may give rise to a right of action on the part of the buyer of goods against the seller under the Sale of Goods Act[144] and this is recognised by the Bill itself in that statements made on any packaging or label on the goods may be considered in deciding whether goods comply with the guarantee as to acceptable quality.[145]

135 Cl 25(a).
136 Cl 25(b).
137 Cl 25(c).
138 Cl 26(a).
139 Cl 26(b).
140 Cl 25(d).
141 Cl 14(1).
142 Cl 14(2).
143 Cl 14(3).
144 See, for example, *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387; *Milne Construction Ltd v Expandite Ltd*, above n 134.
145 Cl 7(1)(h) As the Bill imposes no obligations on the supplier in respect of a manufacturer's express guarantee, it appears that the guarantee must be a document accompanying the goods, rather than be part of the goods themselves.

Where goods do not comply with a guarantee which is binding on the manufacturer, the consumer is entitled to damages from the manufacturer for any reduction in the value of the goods below the purchase price or the average retail price, whichever is the lower.[146] However, if a manufacturer's express guarantee entitles the consumer to require the manufacturer to remedy the failure by repairing or replacing the goods, the consumer is not entitled to claim such damages unless the consumer has first required the manufacturer to remedy the failure in this way and the manufacturer has refused or neglected to do so, or has not succeeded in doing so within a reasonable time.[147]

The effect of these provisions is that the consumer's rights against the manufacturer are limited to damages in the absence of an express guarantee given by the manufacturer that goods will be repaired or replaced. In this respect, the rights against the manufacturer are considerably more limited than those which exist as against the supplier, but are appropriate for the situation in which the parties, being manufacturer and consumer, in many cases will have no direct dealings with each other and will have no contractual relationship.

The rights of redress against manufacturers run with the goods as do the rights against suppliers, but, with respect to manufacturers, the rights of redress are not limited to recipients of the goods as gifts as is the case with suppliers. Where a consumer has a right of redress against a manufacturer, any person who acquires the goods from or through the consumer will have the same right to claim damages from the manufacturer or enforce an express guarantee given by the manufacturer.[148] Consequently, if the consumer sells the goods to another person, that person will have a right of redress against the manufacturer and that will be so even if the buyer is a retailer or acquires the goods for resale or for use in a business. This appears to be somewhat anomalous, for the Bill confers no rights as between the manufacturer and supplier of goods if the supplier obtains the goods directly from the manufacturer. If, however, a supplier were to sell such goods to a consumer and then buy them back from the consumer, the rights of redress given by the Bill against manufacturers would be available to the original supplier, for the supplier would be a person who acquired the goods from or through a consumer. In such a situation, the first sale between the manufacturer and the supplier would be dealt with under the Sale of Goods Act if the goods proved, for example, to be defective; but after the reacquisition of the goods from the consumer, the original supplier would rely on the rights of redress given by the new Bill as well as, presumably, any other rights which might be available at common law.

The conferral of rights against manufacturers is to be welcomed, and should obviate the necessity to rely on the causes of action mentioned above, some of which, such as the concept of a collateral warranty, require a degree of artificiality in their analysis. This aspect of the new legislation represents a further significant erosion in the doctrine of privity of contract in New Zealand.

146 Cl 27(1)(a).
147 Cl 27(2).
148 Cl 27(1).

VI. CONSEQUENTIAL LOSS

In addition to the remedies available against suppliers for failure to comply with the statutory guarantees, the Bill confers on consumers the right to obtain from the supplier of goods or services damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods or the product of the service) which was reasonably foreseeable as liable to result from the failure.[149] A similar right of redress is available to the consumer or any person who acquires goods from or through the consumer against the manufacturer of goods which fail to meet the guarantees imposed on manufacturers[150] so that the class of possible plaintiffs is broad. The liability imposed on suppliers and manufacturers for losses other than the value of the goods or products of services is also extensive, for the provisions appear to be drafted widely enough to cover consequential loss of the kind which would normally be recoverable in both contract and tort.

In contract, the question of remoteness of damage has of course long been established in general terms in the rules stated in *Hadley v Baxendale.*[151] It was stated in that case, that damages should be such as may fairly and reasonably be considered arising naturally, according to the usual course of things, from the breach, or such as may reasonably have been supposed to have contemplated by the parties as the probable result of the breach. This first limb of this principle is essentially that stated in s 54(2) of the Sale of Goods Act, and s 55 preserves the second limb.[152] In addition, any special knowledge which the parties actually possess may be imported into both limbs.[153] The familiar concept of reasonable foreseeability found in the law of tort may not in fact give rise to different results in examining the question of damages recoverable when the damage is consequent upon a breach of contract; it has been suggested that, at least in a case where both parties to a contract have the same actual or imputed knowledge, the amount of damages recoverable ought not to depend on whether the plaintiff's cause of action is breach of contract or tort.[154] However, it has been pointed out that one significant difference between contract and tort is that, in contract, a party wishing to protect himself or herself from the assumption of a risk which might appear unusual can direct the attention of the other party to that risk and thereby affect the incidence of liability. In tort, however, no such opportunity for protection exists, and the tortfeasor cannot complain if he is liable for some unusual, but nevertheless foreseeable, damage resulting from the commission of the tort.[155] Strictly speaking, the inquiry in the case of contract is into the actual or imputed contemplation of the parties rather than into the question of remoteness, a concept which is more appropriate in the field of tort because of the different relationship which exists between the parties.[156] However, the

149 Cl 18(4), cl 32(c).

150 Cl 27(1)(b).

151 (1854) 9 Exch 341. However, the value of *Hadley v Baxendale* may be confined to the distinction drawn in it between the usual course of things and communicated special circumstances. In *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 the Court of Appeal observed that on the question of remoteness of damages, the case was neither "classic authority" (at 42, per Cooke P) nor "Holy Writ or statute" (at 45 per Hardie Boys J).

152 *H Parsons Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, per Lord Scarman at 807.

153 See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

154 *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*, above n 152.

155 *The Heron II* [1969] 1 AC 350, 386, per Lord Reid.

156 Ibid, at 411, per Lord Hodson.

Court of Appeal has indicated that whether there is any true difference in the tests to be applied in cases of contract and tort with respect to damages remains obscure, and the question cannot be answered with any certainty.

The phrase "reasonably foreseeable as liable to result"[157] which is used in the new Bill perhaps represents a combination of the concepts used in contract and tort. "Reasonably foreseeable" is, of course, the language of tort but it is found in contract as well; in *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 the Court of Appeal took the view that "reasonable foresight" and "reasonable contemplation"appeared to be interchangeable terms which would provide a proper and sufficient test in most cases concerning the remoteness of damages in contract. "Liable to result" is one of the several such expressions discussed by the courts in their considerations of the question of damages recoverable in contract, examples of other such phrases being "on the cards", "not unlikely to occur", "likely to result, or at least not unlikely to result", or that a "real danger" or "serious possibility" of an occurrence existed.[158] In *The Heron II* Lord Reid took exception to the phrase "liable to result"; he considered "liable" to be "a very vague word", but went on to say that it could usually be said that "when a person foresees a very improbable result, he foresees that it is liable to happen".[159]

In Saskatchewan, damage which was reasonably foreseeable as liable to result from failure to comply with the statutory warranties has been held to include, in the case of a car sold in breach of the warranties of fitness for purpose and of durability, the plaintiff's lost income when he lost a customer as a result of being late for work, taxi fares and the expense of hotel accommodation when the plaintiff had to stay overnight away from home when the vehicle in question broke down.[160] Out of pocket expenses for trips to a garage as well as increased the increased fuel costs in running a substitute vehicle have also been held to be recoverable.[161] However, a consumer who took out bank loans to purchase goods which proved to be insufficiently durable and not of acceptable quality as well as for replacement goods was held not to be entitled to the interest on the loans.[162]

The above examples are of the kind which would normally be recoverable for breach of contract. However, the provision that damages are recoverable for any loss or damage resulting from a failure to comply with a guarantee which was reasonably foreseeable as liable to result from the failure is wide enough to encompass the case where defective goods or a product of a service cause damage to other property of the person who acquires the goods or product of the service. The kinds of difficulties which might arise in this area, and the significance of the distinction between physical loss or damage and loss which is purely economic are questions which have been discussed by the courts in the past. In the recent significant case of *Murphy v Brentwood District Council*[163] it was said that a dangerous defect, once known, constituted merely a defect in quality, and to permit recovery of what was really economic loss would give rise to an unacceptably wide category of claims in respect of buildings and chattels

157 The same phrase is used in s 20 of the Saskatchewan Act.
158 See Lord Reid's judgment in *The Heron II*, above n 155.
159 Ibid, at 389.
160 *Adams v J & D's Used Cars Ltd* (1983) 26 Sask R 40.
161 *Kitely v Ford Motor Co of Canada Ltd* (1988) 61 Sask R 5.
162 *Paskiman v Meadow Ford Sales Ltd* (1985) 35 Sask R 81.
163 [1991] 1 AC 398.

which were defective in quality, thereby introducing product liability and transmissible warranties of quality into the law of tort by means of judicial legislation. The new Bill, it is to be hoped, will preclude the necessity to consider such matters where chattels are concerned, for, where the statutory guarantees are breached by a supplier or manufacturer, any reduction in the value of goods or services is recoverable. There need be no contract between the acquirer of the goods and the manufacturer to enable the acquirer to bring an action directly against the manufacturer for any reduction in value of the goods in question. Loss or damage to other property, which would have been recoverable in any event under the usual principles of the law of negligence, may be claimed under the provisions of the Bill which deal with consequential loss. There will, it is to be hoped, be no necessity to evaluate whether loss or damage caused by a failure to comply with a guarantee is to the goods themselves or to other property in the case of defective goods which form part of a complex structure and cause damage to other parts of the structure,[164] for, regardless of whether the damaged property is classified as "other" or not, the result should be the same under the Bill as a result of the direct right of redress against manufacturers conferred by its provisions.

VII. Conclusion

The new Bill will have far reaching effects on New Zealand law. The provisions which impose obligations on manufacturers and enable direct rights of action against manufacturers to proceed for breach of those obligations are likely to clarify and simplify the law significantly in the area of product liability and to strengthen the position of consumers. Reform of the law in this important field has been long overdue.

The guarantees imposed on suppliers, however, may give rise to difficulties, particularly when the relationship between the Bill and other legislation which affect the same subject matter falls to be considered by the courts. Much of the legislation replaces long established law, such as the conditions provided under the Sale of Goods Act, and the position may be further complicated by the fact that the replacement affects only consumer transactions. Only time and the experience of the operation in practice of the new legislation will tell.

164 See the discussions in *Murphy* and *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135 on these points.