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## PROTECTING CONSUMERS AGAINST PURCHASES OF DEFECTIVE MERCHANDISE

IS WHAT IS GOOD FOR GENERAL MOTORS GOOD FOR AMERICA?<sup>1</sup>

### I. Introduction

Undoubtedly the most common consumer complaint heard today relates to the purchase of shoddy or defective goods or services. Despite increasing attention to the problem both by courts and legislatures, and despite a growing consumer consciousness of the intensity on some views of a "consumer revolution", the magnitude of the problem increases rather than diminishes. For example, over the last ten years, automobile manufacturers, particularly in the matter of safety and quality standards in the industry, have been the subject of a very critical public focus. The U.S. Federal Trade Commission in a recent report concluded that the problem of unsatisfactory consumer experience with new cars and with new car warranties was so serious that a system of State-administered quality control over automobile manufacture was urgently needed<sup>2</sup>. Although this study of the industry was in progress from 1965, the incidence of defects has continued to rise dramatically since that date.

For example, the National Highway Safety Bureau in 1966 reported that 18.5 per cent.—8.7 million—of the cars built between 1960 and 1966 were, at the date of manufacture, "defective in some respect". Since 1966, Detroit's Big Four have built another 30 million cars, and 13 million of them—43.3 per cent.—were defective. Some of the defects reported to the National Highway Bureau under the U.S. Highway Safety Act 1966 have been relatively minor: e.g., unusable jacks, broken door locks, and short-circuiting electric rear windows. Most of them, on the other hand, have been potential killers, e.g. brake cylinders filled with contaminated fluid, defective link pins in steering systems, defective carburetor throttle levers which stick open, and defective reversing light suggesting car is in reverse gear when it is in forward gear. These are mainly assembly line mistakes. Apart from these, there have been some notorious examples of dangerous design weaknesses. The case of the Chevrolet Corvair, the subject of much of Ralph Nader's concern in *Unsafe at Any Speed*, is probably the best-known. Fortunately, as a result of the publication of Nader's book and other adverse publicity, sales dropped 93 per cent. before the car's run was finally ended, leaving behind a swathe of deaths, injuries and mammoth damages claims.

As an indication of the seriousness of many defects, the Federal Trade Commission in its report states that between September 1966 and 1st January 1968, 4.5 million cars had to be recalled for repair. In 1968, the Big Four

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1. (Or Australia). Charles E. Wilson, President of General Motors in 1957, claimed that it was.
2. *Federal Trade Commission Report on Automobile Warranties*, 1970.

recalled almost one million cars in 55 different recall campaigns. The prestigious U.S. Consumers Union in *Consumer Reports* has reported that 1970 cars are markedly inferior in quality to the previous year's models. For example, in their road testing of the American Motors' Gremlin, a sub-compact small family sedan, Consumers Union found that the car arrived with 28 different defects ranging from exhaust and body leaks to jamming throttle and stalling engine. The Union reports this "as about par for this year's domestic cars"<sup>3</sup>.

This experience has proved enormously expensive, particularly for the consumer. For example, in 1967 the Ford Motor Co. offered a five year/50,000 mile power train warranty on all its new models. The company found that the warranty was costing it between \$110 and \$120 a car, and shortly thereafter drastically modified it. The expense is now being borne by the consumer. Moreover, service under new car warranties, even where a defect is covered, has, from the consumer's point of view, been grossly unsatisfactory. The F.T.C. found, in general, an appalling level of dealer service under these warranties. Consumers reported to the Commission that it was commonplace to have to take cars back to a dealer four or five times to have a fault remedied. Dealer practices have become so well settled that the trade has developed a special terminology to describe them, e.g., "wall jobs" (the car is parked by a wall where it remains unrepaired) and "sunbaths" (where the car is left to be cured by itself in the sun). For obvious reasons, it is in the interests of both dealer and manufacturer to keep expense under a warranty down to a minimum. A recent illustration of this was the revelation in the U.S. Congress in January, 1970, that the President of the Chevrolet Division of General Motors had the previous month issued a directive to all dealers to repair defects in cars under warranty, whatever their nature, only if these defects were specifically pointed out by the customer. Fortunately, the directive was "clarified" within three days of its discovery<sup>4</sup>. Further light on the problems facing a consumer purchasing a new car is presently being shed by the Senate Sub-Committee hearing on the cost of automotive repairs. This Sub-Committee has estimated that American consumers are presently outlaying 9 billion dollars annually in automobile repairs, many of which would not be necessary if vehicles were properly manufactured, and many of which are incompetently executed and grossly over-charged for.

The situation in the automobile industry has been set out in some detail because this is one area where fairly detailed documentation is now becoming available. This industry has been the subject of more public attention than other industries probably because of concern over safety factors and also because the consumer commonly has larger financial interests at stake. There is no reason to suppose that the general picture is dramatically different in the case of other mass-produced consumer "durables", or that the situation in the U.S. differs markedly from that in Australia where many products are American designed and are manufactured by American-owned companies. The old saw about things never being so good, and in the nature of things bound to get better, seems strangely confounded by recent revelations.

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3. *Consumer Reports*, July, 1970, 445.

4. *F.T.C. Report on Automobile Warranties*, 123.

According to some commentators, the above trend should not be surprising in an economic climate in which products become increasingly complex, manufacturing processes increasingly committed to forms of mass production where quality control becomes difficult and expensive, and where the commitment to a norm of expanding production and thus consumption, forces a situation where "built-in" obsolescence, or what Vance Packard has called the "throw-away society", becomes one of the facts of life.

The law's attempts to grapple with these realities of the modern industrial state have so far been very tentative and token. The basic philosophy of the law relating to defective merchandise remains that laid down in the Sale of Goods Acts enacted in most common law jurisdictions late last century, which in turn reproduced common law principles laid down even earlier in the century. The philosophy of the Sale of Goods Acts naturally reflects the *laissez-faire* attitudes of the times, and the dominance of the notion of freedom of contract. Thus, the provisions of the Acts are mostly permissive in nature and can generally be excluded by agreement of the parties. In relation to the question of quality, where the Acts are not excluded, terms as to fitness for purpose and merchantability are implied.

It is worth pausing here to note that some might question whether these terms, contracting out aside, any longer protect the kind of values about which today's consumer is concerned. If the so-called consumption ethic of today is self-inspired and genuinely reflects present consumer values and is not a system of values artificially contrived by business, then the utilitarian or functional considerations underlying the Sale of Goods Act's implied terms as to quality may be irrelevant to the general body of consumers. This argument raises issues beyond the province of this article<sup>5</sup>; it is sufficient to assume here from the volume of consumer complaints that, whatever qualities besides utility consumers expect in products today, with most products a minimum utility is still expected. On this assumption, the law is still very much concerned with the protection of this expectation.

The deficiencies of traditional legal doctrines in this respect are obvious. To the extent that they leave a consumer's protection to his own native cunning, they are leaving him for the most part unprotected. The argument that a consumer should be left to pass his own judgments on the commodities he buys, and if he chooses to make an unsound purchase, that is his business and his misfortune, is not sustainable once it is acknowledged that the technically complex character of most of today's consumer durables make meaningful evaluations by a consumer impossible. If it is then argued that if a consumer cannot make these evaluations, he should negotiate suitable assurances as to a product's quality with the seller, another reality of the modern market-place must be faced—complex, and frequently standardised, legal transactions.

In conformity with the economic norm of maximising profits, business interests in a given case must ensure that they undertake the fewest obligations to the consumer possible under the law. The law indeed positively

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5. For a discussion of some aspects of these issues, see my article, "Consumer Protection in the Affluent Society" (1970) 16 McGill L.J. 267.

endorses this economic policy. If a company were to pursue a policy which involved making unsought concessions to consumers, the directors would be in breach of their fiduciary duty to the company to consult only the interest of shareholders, which clearly involves maximising profits. It might, of course, be argued that even conceding this, a company will be forced to make reasonable accommodations with consumers in order to attract or retain their business, i.e., competition is an adequate regulator of men's bargains. While this argument may have some validity in relation to two factors in a bargain—the general subject matter and the price—it is clearly untrue in relation to almost all other matters which might theoretically be the subject of negotiation between the parties<sup>6</sup>. As Lord Reid so succinctly put the consumer's plight recently in the *Suisse Atlantique* case<sup>7</sup> (in relation there to exemption clauses):

“Probably the most objectionable [exemption clauses] are found in the complex standard conditions which are now so common. In the ordinary way, the customer has no time to read them, and if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same.”

The psychology of the bargaining process militates towards the same end. From the consumer's point of view, the important aspect of negotiations is likely to be the various verbal exchanges and undertakings that precede the signing of a contract. This to him represents the reality of the bargaining process, the form a merely formal tail-piece. This reasoning is entirely understandable. As has been pointed out, “standard forms have a lulling effect induced by the knowledge that one is signing what everyone else has signed”<sup>8</sup>. The particular verbal assurances, etc., that pass between buyer and seller are of a different order entirely, and in the mind of the consumer, tend to represent the special terms of his particular bargain. The law, however, rather neatly reverses this reasoning and treats the formality as the legal reality, and the factual realities, by virtue of the parol evidence rule, etc., as strictly taboo.

Thus, business interests in “drafting to the edge of the possible”<sup>9</sup> in preparing their standard forms, have found that neither consumers nor the law have provided any resistance to their efforts to undertake minimal obligations to the consumer. In relation to obligations as to quality, “the possible” under the law is, as we have seen, nothing, and invariably forms are drafted to ensure that nothing is the operative concept.

It is, of course, true that in many consumer transactions, standard forms or other documentation are not used, and thus statutory rights are often not excluded. However, here a rather perverse ratio operates against a consumer:

6. See Karl Llewellyn, *The Common Law Tradition* 371.

7. *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rottendamsche Kolen Centrale* [1967] A.C. 361, at 406 (H.L.).

8. N.S. Wilson, (1965) 14 I.C.L.Q. 172, 176. See also generally on the problems created by standard form contracts, and suggested approaches to surveillance, Slawson, (1971) 84 Harv. L.R. 529.

9. See Llewellyn, *supra*.

the larger the transaction (and hence a consumer's financial investment), the more likely a form, and the fewer a consumer's rights; the smaller a transaction (and hence a consumer's investment), the less likely a form and the greater a consumer's rights, but the less realistic the prosecution of a claim.

Furthermore, forms or no forms, two factors generally militate against effective consumer remedies for defective merchandise. First, even where, say, the implied terms as to quality under the Sale of Goods Act are unimpaired by the agreement between the parties, how does the buyer know that such assurances are present in his transaction? There is no requirement that notice of these terms be given to the buyer in any form, let alone a meaningful form, and the Sale of Goods Act itself is not everyone's idea of a *vade mecum*. Secondly, proceeding beyond this basic informational difficulty, even if in a particular case a consumer overcomes this problem, and, perhaps charitably, assumes when he runs into trouble with his goods that the law will have taken care of him, he will then find that the cost of doing anything worthwhile about his rights in a typical consumer claim is prohibitive. It is worth stressing that this is not, as it has sometimes been represented to be, a function of poverty. The point is that *no one*, however wealthy, can in a logistical sense, afford to litigate the average consumer claim for defects in a car, home appliance, etc. Our present legal system is simply not equipped to handle small claims of this order<sup>10</sup>.

The foregoing observations, by way of introduction, have been intended to give an indication of the magnitude of the problem of defective merchandise in the contemporary consumer market-place, and to outline the traditional legal setting in which this problem has had principally to be viewed<sup>11</sup>. The remainder of this article will be devoted to an evaluation of a number of recent developments, judicial and statutory, in the law relating to defective merchandise which at last seem to reflect a growing awareness on the part of law-makers of the consumer's plight. This discussion will be confined, for the most part, to the contractual setting between immediate parties, i.e., seller and buyer, and is not concerned with products liability in tort or to third parties. To the extent that a seller's or manufacturer's liability to third parties is derivative from their obligations to immediate parties, there seems a case for ensuring that these latter obligations are of an acceptable kind before a framework of legal relations involving third parties is settled.

## II. The New Old Doctrine of Fundamental Breach

The doctrine of fundamental breach developed principally by English Courts particularly during the 1950's and early 1960's has been the most important response of the common law so far to the plight of the consumer

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10. The minimal extent to which consumers resort to the legal process is well documented in the U.S. by Caplovitz, *The Poor Pay More*, chap. 12; in the U.K. by Susan Marsden-Smedley, *Focus*, July, 1962, and in Canada by W. A. W. Neilson, cited by Ziegel (1967) 68 Col. L. Rev. 515.

11. There are, of course, other legal mechanisms for dealing with the quality of merchandise, e.g. minimum standards and grading, but these have never been accorded the prominence that a buyer's individual rights of suit for defects have. The problem was thought primarily to be one personal to himself, and one that he ought to carry the principal responsibility for solving—a typical 19th century viewpoint. For further discussion of these other expedients, see section V.

who finds that he has bought defective merchandise but that his contract excludes any obligations on the seller in this respect. The doctrine probably finds its widest statement in the judgment of Lord Denning in *Karsales (Harrow) Ltd. v. Wallis*<sup>12</sup>:

“Exempting clauses . . . , no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. . . . They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, expressed or implied, which impose an obligation on the party . . . If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses”<sup>13</sup>.

The development of this doctrine was generally very favourably received, especially by academic commentators—Professor Wedderburn described it as “the most important development in the modern law of contract”<sup>14</sup>—although in the course of time, problems with it came increasingly under notice. Unresolved difficulties included the questions of whether an exemption clause purporting to exclude liability for a fundamental breach was binding if the innocent party affirmed the contract; whether an exemption clause, no matter how explicit its wording, was destroyed by rescission of the contract by the innocent party; whether, above all, “fundamental breach” was a meaningful concept at all.

These difficulties, while admittedly fairly comprehensive, were apparently too much for the House of Lords who, of course, ultimately held in the *Suisse Atlantique* case that there was no doctrine of fundamental breach as a substantive rule of law, and that the effect of an exemption clause fell to be determined according to its true construction.

This decision, on its face, appeared to have dealt a body blow to the doctrine of fundamental breach. Some commentators saw the decision as little short of an invitation to company draftsmen to draft all embracing exemption clauses so explicit in their terms as to be susceptible of only one meaning<sup>15</sup>. Others counselled suspension of final judgment pointing out that almost any kind of judicial sin could be perpetrated in the name of construction, and that decisions after *Suisse Atlantique* might not be so markedly different from decisions before it as some feared<sup>16</sup>.

Some four years after *Suisse Atlantique*, it is now possible to discern trends in subsequent decisions which make possible a tentative evaluation of the impact of *Suisse Atlantique* on the law in this area. All the indications to this point are that those who placed so much faith in judicial inventiveness (or deviousness) are being vindicated. These indications appear more strongly in some jurisdictions than others, but nevertheless a general trend is now becoming observable.

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12. [1956] 1 W.L.R. 936.

13. at 940.

14. [1957] Camb. L.J. 16.

15. See Bray C.J. and Professor K. W. Wedderburn, text at notes 47 and 48.

16. See Treitel, (1966) 29 Mod. L.R. 546, 551 ff, 556; Thompson [1966] J.B.L., 210.

The "old" doctrine of fundamental breach has found no more congenial reception than in Canada. In a number of jurisdictions throughout Canada, *Suisse Atlantique* has either been paid lip service to, misinterpreted, or totally disregarded. Earlier decisions such as *Karsales v. Wallis*, and *Yeoman Credit v. Apps*<sup>17</sup>, on the English side, and *Knowles v. Anchorage Holdings Co. Ltd.*<sup>18</sup> on the Canadian side, continue to be cited and followed enthusiastically. Efforts at construing exemption clauses, as enjoined by *Suisse Atlantique*, are token or non-existent.

For example, in *R. G. McLean Ltd. v. Canadian Vickers Ltd.*<sup>19</sup>, which involved the sale of a defective printing machine, in the contract for which there was an exemption clause excluding all conditions and warranties except for an express warranty providing for replacement of defective parts within a specified time, the Ontario High Court (Wilson, J.) after citing extensively from *Suisse Atlantique*, concluded simply:

"The failure to supply a press which would do the quality of printing contemplated by both parties to the contract when it was made was of so serious a nature in this case that for commercial purposes there was a breach of condition which the plaintiff has treated as a breach of warranty.

Having come to the conclusion that the printed conditions of sale do not preclude the plaintiff from bringing this action, I must now consider the damages to which it was entitled for breach of warranty"<sup>20</sup>.

In *Lightburn v. Belmont Sales Ltd.*<sup>21</sup> the contract involved the sale of a new Ford Cortina car which was so grossly defective that it had to be returned to the dealer for repairs seventeen times in eight months, and still was unsatisfactory. The contract contained the standard manufacturer's-dealer's warranty providing for replacement of defective parts for a limited period, which was stated to be "expressly in lieu of all other conditions and warranties, expressed or implied, and of all other obligations and liabilities on the part of the vendor . . .". The buyer sought successfully to rescind the contract for breach of the implied terms as to fitness under the British Columbia Sale of Goods Act.

Ruttan, J. of the British Columbia Supreme Court, after citing from *Karsales v. Wallis* and *Yeoman Credit v. Apps*, referred very briefly to the decision in *Suisse Atlantique* and then "construed" the contract thus:

"In my judgment, cl. 2 of the sales contract was never intended to cover a situation of fundamental breach. Indeed the clause is confined to an undertaking to replace defective parts, and warrants that each part is free from defects in material and workmanship . . ." <sup>22</sup>.

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17. [1962] 2 Q.B. 508 (C.A.).

18. (1964) 43 D.L.R. (2d) 300 (B.C. Sup. Ct.).

19. (1969) 5 D.L.R. (3d) 100 (Ont. H. Ct.).

20. at 111.

21. (1969) 6 D.L.R. (3d) 692 (B.C. Sup. Ct.).

22. at 697.

Is this "construction" of the clause a tenable one?

In *Western Tractor Ltd. v. Dyck*<sup>23</sup>, involving the sale of a new tractor which required extensive and frequent repairs, the Court, after reviewing cases such as *Karsales v. Wallis* and *Yeoman Credit v. Apps*, and after citing from *Suisse Atlantique*, stated that as a matter of construction, the usual vendor's "defective parts" warranty, which purported to exclude all other conditions and warranties, did not exclude the implied term as to fitness for purpose under the Sale of Goods Act:

"The proper interpretation of the 1500 hours' warranty given by the contract is not inconsistent with one that it be reasonably fit for the purpose of clearing and piling brush . . . I do not believe that either the plaintiff or the defendant ever contemplated that the subject-matter of the contract was a tractor which would perform with reasonable satisfaction for only some 1500 hours"<sup>24</sup>.

Finally, in *Gibbons v. Trapp Motors Ltd.*<sup>25</sup> the plaintiff bought a new 1969 Pontiac Firebird for \$4,272.29 cash. It proved to be what is known in the trade as a "vibrator" and a complete lemon. The buyer sought to rescind the contract. While this is not entirely clear from the case, it appears that the car was covered by the usual dealer's-manufacturer's defective parts warranty, as in the foregoing cases. The Court, in finding for the plaintiff, said:

"The plaintiff purchased a new automobile, and by no means a low cost one, and was entitled to expect from it a performance typical of a new car from an established manufacturer. Instead of such performance, he in fact acquired a running fight with a chronically defective car"<sup>26</sup>.

The Court then cited *Knowles v. Anchorage Holdings Ltd.*, *Lightburn v. Belmont Sales Ltd.* and *Yeoman Credit v. Apps*, ignored totally *Suisse Atlantique*, and concluded shortly: "The accumulation of defects, taken *en masse*, constitute a breach going to the root of the contract"<sup>27</sup>.

In the United Kingdom, the first reported case on exemption clauses after *Suisse Atlantique* was *Mendelsohn v. Normand Ltd.*<sup>28</sup> In this case, the plaintiff left his car in a parking lot and was issued with a ticket disclaim-

23. (1970) 7 D.L.R. (3d) 535 (Sask. C.A.).

24. per Brownridge J.A. at 543.

25. (1970) 9 D.L.R. (3d) 742 (B.C. Sup. Ct.).

26. at 745.

27. at 745. A further Canadian example of the continuing judicial hostility to exemption clauses is *Francis v. Trans-Canada Trailer Sales Ltd.*, (1969) 6 D.L.R. (3d) 705 (Sask. C.A.) where it was held that an express representation by a seller that the goods were subject to a warranty, when the written contract excluded such a term, was held to create a collateral contract. The rule that a collateral contract cannot be inconsistent with the main contract was acknowledged, but apparently not applied. See also *Firchuk v. Waterfront Investments* (1970) 8 D.L.R. (3d) 337 (Ont. C. Ct.); and *Barber v. Inland Truck Sales* (1970) 11 D.L.R. (3d) 469 (B.C. Sup. Ct.).

28. [1969] 2 All E.R. 1215 (C.A.). In a more recent case involving a parking lot ticket, *Thornton v. Shoe Laine Parking Ltd.* [1971] 1 All E.R. 686, the English Court of Appeal held that the exemption clause on the ticket had not been sufficiently brought to the notice of the customer to be part of his contract.

ing all liability for damage to the vehicle or loss of its contents while in the defendants' possession. The plaintiff when leaving the car with the defendants indicated that he wished to lock the car in order to protect valuables inside. The attendant stated that this was contrary to the rules, but undertook to lock the car himself once it had been moved to its parking space. The car was not locked and the valuables were stolen. The Court of Appeal (Denning, Davies, and Phillimore L.J.J.) held that the defendants were not entitled to rely on the exemption clause either (a) because the oral representation of the attendant prevailed over the written contract, allegedly following *Curtis v. Chemical Cleaning and Dyeing Co.*<sup>29</sup> (where, in fact, the misrepresentation went to the meaning of the contract, not to the defendants proposed performance under it), or (b) because the contract was carried out in an entirely different way from that contemplated, and the defendants' action was thus beyond the four corners of the contract and the intended scope of the exemption clause.

*Mendelssohn v. Normand Ltd.* was a portent of things to come. In the recent case of *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*<sup>30</sup> the defendant had contracted to instal new storage tanks for holding styrene wax in the plaintiffs' plasticine factory. The contract provided that until the plaintiffs took over the new plant, the defendant would indemnify the plaintiffs against direct damage "to your property caused by the negligence of ourselves or of our servants but not otherwise, provided always that our total liability for loss, damage, or injury, shall not exceed the value of the contract". The contract price was £2,330. As a result of the negligent design and installation of the equipment, the styrene wax ignited and the plaintiffs' factory was destroyed. The plaintiffs sued for £146,581 damages.

The Court of Appeal (Denning, Widgery, and Cross L.J.J.) held that the plaintiffs were entitled to succeed (subject to a redetermination of the proper quantum of damage). Lord Denning said that on the true construction of the limitation of liability clause, it was "limited to accidents and damage done in the course of carrying out the work of erection, for example, lorries running away, workmen dropping tools, and so forth . . . On this reading of [the clause] it does not apply to damage done by breach of contract, such as faulty design. It does not, therefore, cover this case"<sup>31</sup>.

His Honour, however, went on to say that ". . . I am by no means confident of this interpretation of condition 15. So I am not prepared to base my judgment on it"<sup>32</sup>. He then offered a second ground for his decision, namely that rescission of a contract by the innocent party for fundamental breach by the other party destroys the contract, and with it the exemption or limitation clause, and leaves the innocent party free to sue for damages unencumbered by the clause. A number of dicta from the *Suisse Atlantique* case to this effect were cited<sup>33</sup>. The other members of the Court of Appeal (Widgery and Cross

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29. [1951] 1 K.B. 805. In following this case, Lord Denning was of course following one of his own decisions.

30. [1970] 2 W.L.R. 198 (C.A.).

31. at 209.

32. at 209.

33. See 210.

L.J.J.) also relied on this second ground for decision, while disavowing the first. All members of the Court were agreed that in a case like the present the question did not arise as to whether the plaintiffs, when confronted with the defendant's fundamental breach, had exercised their option to rescind the contract. Here, because the fundamental breach, by its nature, rendered further performance under the contract impossible, the contract was automatically brought to an end.

The writer has previously commented on the dicta of members of the House of Lords in the *Suisse Atlantique* case on the effect of rescission of contract on an exemption clause<sup>34</sup>. He there argued that, on principle, rescission for breach does not totally destroy a contract but only terminates executive obligations as to performance under it. Terms in the contract governing the consequences of breach, e.g., arbitration, liquidated damages, limitation and exemption clauses, should still stand. Moreover, in relation to a strict exemption clause (i.e., a clause excluding all liability in particular circumstances), it was pointed out that it was totally illogical that an exemption clause which, if a contract was affirmed, would prevent any form of recovery, following rescission for breach should no longer affect a claim for damages for breach. The basic question which this leaves unresolved is, what breach exists in these circumstances to justify the initial rescission<sup>35</sup>?

The Courts have got themselves into this logical bind as a result of tending to see exemption clauses, as Coote has pointed out<sup>36</sup>, as going only to the procedural question of a buyer's right to sue for breach of acknowledged obligations, rather than to the substantive question of whether as a result of an exemption clause, there were any obligations on the seller in the relevant respect in the first place. On the actual facts of both *Suisse Atlantique* and *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*, the illogicality was admittedly less extreme than this. The clause in question in both cases was a limitation of liability clause, not an exemption clause, that is to say, obligations in both cases were acknowledged but liability for breach of them was limited to a fixed sum. Thus the obligations could be breached, and rescission justified. However, this would still leave open the secondary question of whether rescission, even if it is possible, destroys a limitation of a liability clause. If it destroys such a clause, why does it not also destroy (which has never been regarded as arguable) a liquidated damages clause in a contract? In any event, the Court in neither *Suisse Atlantique* nor *Harbutt's Plasticine Ltd. v. Wayne Tanks* distinguished exemption clauses from limitation of liability clauses. There are numerous dicta in both cases which expressly include both kinds of clauses within the proposition that rescission for breach totally destroys a contract and leaves a buyer free to sue for damages for pre-existent breaches, unfettered by exemptions or limitations contained in the contract<sup>37</sup>. This principle, asserted in passing in *Suisse Atlantique*, and now applied in *Harbutt's* case threatens (or promises) to subvert a great deal of

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34. (1967) 3 Adelaide Law Review 105.

35. The same argument was later taken up by Guest in *Anson on Contract* (23rd ed.), 157.

36. Brian Coote, *Exception Clauses* (Sweet & Maxwell, 1964).

37. In *Suisse Atlantique* [1967] A.C. 361, see Lord Reid at 398; Lord Upjohn at 425. In *Harbutt's Plasticine*, see Lord Denning at 211; Cross L.J. at 218, 219.

the significance of the primary holding in the former case, i.e., that there is no substantive doctrine of fundamental breach and that the effect of an exemption clause is a matter of construction only.

In a more recent case still, *Farnworth Finance Facilities Ltd. v. Attryde*<sup>38</sup> the Court of Appeal, again spearheaded by Lord Denning, has become even bolder in its defiance of the decision in *Suisse Atlantique*. In this case, the defendant bought a new Royal Enfield motor-cycle from a dealer and signed a hire-purchase contract in the usual way with a finance company (the plaintiff) to finance the purchase. The hire-purchase agreement contained a clause which excluded all conditions and warranties express and implied and stated that the vehicle was not supplied subject to any condition that it was fit for any particular purpose. The bike proved grossly defective, and the defendant invited the finance company to repossess it. The finance company sued for the balance of the hire-purchase price, the defendant counterclaimed for the amount that he had already paid. The Court found for the defendant.

Lord Denning, delivering the leading judgment of the Court, said:

"We have, therefore, in this case once again to apply the principle about fundamental breach which was recently considered by this court in *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.* The first thing to do is, no doubt, to construe the contract remembering always the proposition of Pearson L.J. which was approved by the House of Lords in *Suisse Atlantique* [1967] 1 A.C. 361, 393, 405, 426, 433: 'there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should not be construed as applying to a situation created by a fundamental breach of contract'. That rule of construction applies here. *It means that we must see if there was a fundamental breach of contract. If there was, then the exemption clause should not be construed as applying to it.* We look, therefore, to the terms of the contract express or implied, (apart from the exception clauses) and see which of them were broken. If they were broken in a fundamental respect, the finance company cannot rely on the exception clauses"<sup>39</sup>. (Italics supplied.)

His Honour went on to hold that the motor-cycle was so grossly defective that its condition amounted to a fundamental breach of contract and that the defendant had rescinded the contract for the fundamental breach, which, following *Harbutt's* case, prevented the finance company from relying on the exception clause.

However, His Honour, going beyond *Harbutt's* case and *Suisse Atlantique*, said that affirmation or disaffirmation was immaterial in any event:

"I may add that even if [the defendant] had affirmed the contract . . . nevertheless [he] would still have been able to claim damages for the fundamental breach. The exception clauses would not protect the finance company. But I need not go into that question because in my view there has been no affirmation . . ." <sup>40</sup>.

38. [1970] 1 W.L.R. 1053 (C.A.).

39. at 1058.

40. at 1059.

It is interesting to compare Lord Denning's formulation of the doctrine of fundamental breach in this case with his formulation of the "old" doctrine of fundamental breach in *Karsales v. Wallis*<sup>41</sup>. The wording is almost identical. Moreover, in suggesting that the defeasibility of an exemption clause does not rest exclusively on the right to rescind a contract for fundamental breach, he has travelled outside the only exceptional case recognised by the House of Lords in *Suisse Atlantique* and into the area where the House emphatically denied that there was any substantive rule of law which invalidates exemption clauses. Lord Denning's various extra-judicial statements that courts will continue to reach the same results after *Suisse Atlantique* as before it<sup>42</sup> were not idle words. For him at least, the doctrine of fundamental breach is not dead<sup>42a</sup>.

In Australia, the same continuing antipathy to exemption clauses has been shown, perhaps in more muted form, in two recent decisions of the Australian High Court. In *City of Sydney Corporation v. West*<sup>43</sup>, decided shortly before *Suisse Atlantique*, the High Court, while expressing doubts as to the soundness of the doctrine of fundamental breach, felt able, as a matter of "construction", to hold that an exemption clause in a parking lot ticket did not extend to a form of loss, which to a reasonable non-legal mind, clearly fell within the wording of the clause. In the second decision, *Thomas National Transport (Melbourne) Ltd. v. May and Baker (Australia) Pty. Ltd.*<sup>44</sup>, decided shortly after *Suisse Atlantique*, a majority of the High Court, again as a matter of "construction", held that a comprehensive exemption clause in a cartage contract did not extend to loss, which on the ordinary meaning of the terms of the clause, clearly fell within the clause. Only Windeyer J., dissenting, bothered to cite *Suisse Atlantique* at all and only he made any genuine attempt at construing the exemption clause, with the result, not surprisingly, that he found that the contract exempted the defendant from liability.

As the two foregoing cases show, the difference between construing and constructing a contract, while a large one in theory, is a much less distinct one in practice. Some have contended that the difference is all but non-existent. As mentioned, Lord Denning has, for example, stated extra-judicially that the courts will continue to "construe contracts so as to give a similar result as was reached under the older doctrine of fundamental breach"<sup>45</sup>. In *Harbutt's* case, His Honour came close to stating the same point judicially: "So, in the name of construction, we get back to the principle . . ." <sup>46</sup>. (Italics supplied). Others have been more circumspect about the limits to which construction can be pushed. Dr. J. J. Bray, now Chief Justice of South Australia, has produced what he considers the all-inclusive, non-misconstruable, unsinkable exemption clause<sup>47</sup>. Professor Wedderburn fears that in the description of

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41. *Supra*.

42. *Infra*.

42a. For more extended discussions of the *Harbutt* and *Attyde* decisions, see Legh-Jones and Pickering, (1970) 86 L.Q.R. 513; and Coote, (1970) 28 Camb. L.J. 221.

43. (1965) 114 C.L.R. 481.

44. (1966) 115 C.L.R. 353.

45. (1967) 41 A.L.J. 269.

46. [1970] 2 W.L.R. 199 at 212.

47. (1967) 41 A.L.J. 270.

the contract subject-matter itself, the drafting practice may develop of shrinking the core of the contract to minute proportions<sup>48</sup>, e.g., "any old hunk of junk worth 10 cents or more that was once a car". So far, company draftsmen seem not to have yielded to these temptations. Perhaps such a course would lead to too direct a confrontation with their consciences or, more probably, they fear that the risk of legislative over-kill would be dangerously increased.

This, then, is the recent history of the doctrine of fundamental breach. It is true to say that everywhere the old doctrine of fundamental breach has been never less than stubborn in its refusal to be buried. In some jurisdictions, particularly Canada, the decision in *Suisse Atlantique*—the so-called death knell of fundamental breach—is rapidly on the way to becoming a monumental piece of semantic irrelevance.

The hardiness of the doctrine itself suggests that it is serving real and pressing needs. However, conceding that, some disturbingly basic problems with the doctrine remain unresolved: does affirmation of the contract leave the exemption clause binding and unaffected by any special substantive doctrines or rules of construction? Does rescission for breach necessarily destroy an exemption clause relating to that breach? More importantly still, what is a fundamental breach? This question is far from a pedantic academic quibble and goes to the very nature of the whole doctrine. On either the doctrinal or constructional view of the doctrine of fundamental breach, one has to face the problem of determining the *source* of the fundamental obligations alleged to have been breached. Let us take the common *Karsales v. Wallis* situation where a car is sold simply as 1950 Buick Registered Number XYZ and the contract includes a clause that "no condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein". What is the core of this contract? What are the seller's fundamental obligations, where do these appear? Are they really to be discovered within the parameters of the contract at all?

This highlights the most basic weakness in the doctrine of fundamental breach. On either a constructional or doctrinal approach, a court purports to be working primarily, if not exclusively, with the document in front of it. Either it purports to construe it, or it purports to apply a substantive rule of law which automatically invalidates certain kinds of exemption clauses. However, in neither case is the court able to investigate the real considerations which render some exemption clauses objectionable. These necessarily lie outside the contract and in the relationship of the parties, the course of negotiations between them and in the commercial setting of the transaction<sup>48a</sup>. Failure to explore such issues as these leads to decisions such as that in *Harbutt's Plasticine v. Wayne Tank and Pump Co. Ltd.*<sup>49</sup> where a substantial manufacturing concern operating a \$200,000 factory was able to escape the effects of an exemption clause in a contract into which it entered, as far as one could tell, with its eyes open. Why? There may have been good reasons, in terms of policy, for so holding, but these were certainly not articulated by the Court.

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48. [1957] Camb. L.J. 16, at 20.

48a. See Lord Reid in *Suisse Atlantique* [1967] 1 A.C. 361, at 406.

49. [1970] 2 W.L.R. 269.

While the judicial motivation underlying the doctrine of fundamental breach is clear and commendable, the failure of the Courts to articulate a clear rationale and to frame a doctrine explicitly in terms of this rationale, has often set them upon a meaningless inquiry, and produced quixotic reasoning, and arbitrary decisions.

By way of contrast, it is useful to examine the strengths and weaknesses of a comparable American development, the doctrine of unconscionability.

### **III. The Doctrine of Unconscionability**

Unconscionability is, of course, a legal concept of considerable antiquity. Courts of Equity for centuries have claimed a general reviewing power over unconscionable transactions. However, despite many magnanimous judicial formulations of the doctrine, it has, in practice, nearly always been given a most restricted application. The equitable doctrine has usually only been applied to certain classes of "presumptive sillies"<sup>50</sup>, such as expectant heirs, hopeless drunks, ship-wrecked sailors, or women, and then only when the trader has exacted terms that seem explicable solely on the basis of threatened dismemberment<sup>51</sup>.

The doctrine of unconscionability has been resurrected in the United States, in relation to contracts for the sale of goods, by the enactment of s.2-302 of the Uniform Commercial Code, which provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect, to aid the court in making the determination."

The section first came into force in 1954 when Pennsylvania adopted the Code, and is now in force in all but two state jurisdictions. The section has attracted literally hundreds of legal articles and comments, and has been described as "probably the most controversial provision in the entire Code"<sup>52</sup>.

The Official Commentary to the section states the purpose of the section as follows:

"This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past, such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy

50. The term is Leff's. (1967) 115 U. Pa. L. Rev. 532. See further below.

51. See my article (1967) 41 A.L.J. 424.

52. W. B. Davenport (1967) 22 Univ. of Miami L. Rev. 121.

or the dominant purpose of the contract. The section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability."

Karl Llewellyn, the prime mover and drafter of s.2-302, has further illuminated the rationale of the section in submissions addressed to the New York Law Revision Commission<sup>53</sup>:

"Business lawyers tend to draft to the edge of the possible. Any engineer makes his construction within a margin of safety, and a wide margin of safety, so that he knows for sure what he is gunning for . . .

That kind of drafting in which you get for your client or ask for your client things only within the margin of safety, and don't try to take more than 80 per cent. of the pie, is never going to be regarded as unconscionable. The only doubt that comes up in regard to unconscionability is if you start drafting to the absolute limit of what the law can conceivably bear. At that point, you run into what they run into now, and what they run into now is, the court kicks it over.

We have all of us seen this kind of series of cases, haven't we? Case No. 1 comes up. The clause is perfectly clear and the court said 'Had it been desired to provide such an unbelievable thing, surely language could have been made clearer'. Then counsel redrafts, and they not only say it twice as well, but they wind up saying 'And we mean it', and the court looks at it a second time and says, 'Had this been the kind of thing really intended to go into an agreement, surely language could have been found', and so on down the line.

This kind of thing does not make for good business, it does not make for good counselling, and it does not make for certainty. It means that you never know where you are, and it does a very bad thing for the law indeed. The bad thing that it does to the law is to lead to precedent after precedent in which language is held not to mean what it says, and indeed what its plain purpose was, and that upsets everything for everybody in all future litigation.

We believe that if you take this, and bring it out into the open, if you say, 'When it gets too stiff to make sense, then the court may knock it out,' you are going to get a body of principles of construction instead of principles of misconstruction, and the precedents are going to build up so that the language will be relied on and will be construed to mean what it says. . . . Anything that is done under this section is going to make precedent, and the precedents can be recorded and the precedents can accumulate and guide. . . . We count this, therefore, by no means as a section which threatens certainty. We regard it as a section which greatly advances certainty in a now most baffling, most troubling, and almost unreckonable situation."

Predictable criticisms have been made of s.2-302. First, it has been said that the section constitutes an unwarranted interference with freedom of

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53. 1 N.Y. Law Rev. Comm. Rep. 177-178 (1954).

contract<sup>54</sup>. This criticism should scarcely require rebuttal in the context of the modern consumer market-place<sup>55</sup>. As has been pointed out earlier, there is now frequently no freedom of contract anyway, and a reviewing power vested in the courts would enable the power to impose contractual terms on one contracting party by another to be replaced by a power to impose terms on both contracting parties by a disinterested outsider. As one American commentator has said in defence of s.2-302: "Although it is certainly not the business of the courts to make broad pronouncements in this area, it is time to make more definite qualifications of the axiom that the animals know the game better than the keeper"<sup>56</sup>.

A second criticism is that the concept of unconscionability is meaningless, or at least, far too vague to be the subject of a legal proscription. This view has been put most fully by Leff in an article called, appropriately, "Unconscionability and the Code—The Emperor's New Clause"<sup>57</sup>.

Leff first criticises the framers of the section for failing to draw clearly what he regards as a critical distinction between procedural and substantive unconscionability, i.e., unconscionability occurring in the course of the bargaining process as opposed to unconscionability in the terms of the bargain itself. He argues that if the drafters had in mind particular abuses occurring in the bargaining process, most of these are already subject to legal sanctions, and those that are not could easily have been spelt out. If, on the other hand, the section is directed at substantive unconscionability, the concept becomes very vague. How does a bargain which has been fairly negotiated become unfair in its terms once made? The Official Commentary to the section rather rebuts the possibility that the court should concern itself with wider questions of market power in a particular market. The Official Commentary states: "The principle [underlying the section] is one of the prevention of oppression and unfair surprise and not of disturbance of risks because of superior bargaining power."

Leff claims that the section will encourage courts no longer to give false reasons for their decisions, but to give no reasons at all. He concludes<sup>58</sup>:

"The gist of the tale is simple: it is hard to give up an emotionally satisfying incantation, and the way to keep the glow without the trouble of the meaning is continually to increase the abstraction level of the drafting and explaining language. If for one reason or another (in this case the desire to forward the passage of the whole Code), the academic community is generally friendly to the drafting effort, a single provision in a massive Code may get by even if it has, really, no reality referent, and all of its explanatory material ranges between the irrelevant and the misleading. . . . But the lesson of its drafting ought nevertheless to be learned: it is easy to say nothing with words. Even if those words make one feel all warm inside, the result of sedulously preventing

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54. Goodwin, (1951) Oregon L. Rev. 213; King (1954) Oregon L. Rev. 115.

55. But see the views of P. J. Schofield [1970] J.B.L. 7.

56. Note (1960) 45 Iowa L. Rev. 843, at 845.

57. (1967) 115 U. Pa. L. Rev. 485.

58. at 558-559.

thought about them is likely to lead to more trouble than the draftsmen's cozy glow is worth, as a matter not only of statutory elegance but of effect in the world being regulated. Subsuming problems is not as good as solving them, and may in fact retard solutions instead. Or, once more to quote Karl Llewellyn (to whom, after all, the last word belongs), 'Covert tools are never reliable tools.'

This criticism of s.2-302 warrants several comments. First, it has to be conceded that the repudiation in the official comments to the section of any concern with unequal bargaining power is confusing, and further that the section could have focused more sharply on the features of a transaction which might raise a presumption of unconscionability. S.6-111 of the Uniform Consumer Credit Code which empowers the Administrator of the Act to apply to the Court to restrain unconscionable conduct sets out some criteria which identify kinds of settings in which the unconscionability which the legislature has in mind is most likely to occur. This, without locking a court into too rigid a frame of reference, indicates the broad thrust of the section, and also, equally importantly, acts as a prod to conservative benches to act in situations satisfying the statutory criteria.

Beyond this, however, to argue that unconscionability is too vague a concept to form the basis of a legal sanction is like saying that "public policy" is too broad a concept to justify non-enforcement of contracts. Yet, for centuries, courts have had no difficulty in invoking quite explicitly various heads of public policy for this purpose. In this sense, s. 2-302 does little more than remind the courts that, contrary to a view that became widely subscribed to in the heyday of *laissez-faire*<sup>58a</sup>, the categories of public policy are not closed. Moreover, as the official comments to the section point out, courts before the section commonly made policy decisions under the guise of applying substantive doctrines. Most observers of the judicial process recognise this as inherent in that process. If it is impossible to avoid policy decisions, and it is to be hoped fervently that this is the case, then surely it is preferable that the grounds for the decisions be explicit and not implicit. If most legal rules are simply instruments by which a policy consideration is enforced or promoted, then the argument for articulating the policy seems unanswerable. That this has not been done in the statute but left to the courts can scarcely be an objection in a common law context. As Llewellyn points out, the articulation of the policy considerations for decisions in particular fact situations ought to lead in time to the development, in an empirical way, of a broad framework of legal principles reflecting these policy considerations. Theoretically, at any rate, that accounts for most of the common law.

The argument that the section is redundant is impossible to follow. Whatever the precise meaning that might be assigned to the term "unconscionable", it would be contrary to common sense to assert that no business transaction today is ever unconscionable. Everybody accepts that there are transactions which are unconscionable but which do not necessarily offend against specific legal sanctions or restrictions. It was to meet this situation that the courts initially developed their concept of "public policy". The argument that s.2-302 rejects any concern with substantive unconscionability and that procedural

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58a. See for example the views quoted in *In Re Millar* [1938] S.C.R. 1 (Can.).

unconscionability is already subject to adequate legal sanctions is altogether too facile. Almost all of the existing legal sanctions for procedural unconscionability, for example, duress, fraud, misrepresentation, involve some positive and specific act of misconduct on the part of the trader. In the modern consumer market-place, however, much consumer exploitation takes a more passive form. For example, a seller will simply acquiesce in a buyer signing a contract containing clauses highly adverse to the buyer's interest: the seller knows that the buyer has not read the clauses, or if he has, has not understood them. He knows that he can take advantage of this state of affairs to insert in advance in his form contracts almost any terms he likes. Nothing has been misrepresented, but nothing has been represented either. Even if the buyer were to understand what he was signing, the distribution of power in a particular market may prevent him getting different terms elsewhere. Whether a whole market has developed along unconscionable lines raises very complex questions of the legitimate exercise of market power and the existence of true competition. In short, what traditional legal doctrines leave out of account is the unconscionability that may be involved in the passive (or not so passive) exploitation of a consumer's inability to bargain effectively. The growing complexity of both commodities and legal transactions has increased the inadequacy of these doctrines. Moreover, the shift in social values away from an unadorned caveat emptor philosophy has produced a heightened concern with this inadequacy.

Thus, s.2-302 serves two very clear purposes. First, it announces in a quite general way that the law is prepared to recognize the shift away from traditional values which would require a contract to be enforced at almost any cost and has re-asserted the proposition that the enforcement of contracts by the State is not a duty but a discretion. On a more specific level (and ignoring the Official Commentary in this respect), s.2-302 strikes at the new form of unconscionability involving the "passive" exploitation of a buyer's inability to bargain effectively in today's consumer market-place. Because this last kind of exploitation involves issues vastly more complex than simply the presence or absence of fraud, misrepresentation or duress, and may involve highly complex analyses of whole commodity markets, it is entirely appropriate that it should be encompassed under a general legal legend which can be gradually fleshed out empirically.

Contrasting the American doctrine of unconscionability with the English doctrine of fundamental breach, the obvious advantages of the former are that it is honest, direct, and explicit. It enables an analysis of the real issues at stake and does not confine the court, largely irrelevantly, to the contractual writing in front of it.

As an illustration of the way in which the doctrine of unconscionability can work in a situation which has also frequently confronted English courts in the context of fundamental breach, it is constructive to examine briefly the decision of the New Jersey Supreme Court in the well-known case of *Henningsen v. Bloomfield Motors Inc. and Chrysler Inc.*<sup>59</sup> The plaintiffs, husband and wife, agreed to purchase a new 1965 Plymouth Sedan, made by Chrysler, from Bloomfield Motors. The written agreement contained on its reverse side,

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59. (1960) 32 N.J. 358; 161 A. 2d. 69.

*inter alia*, a new car warranty under which the manufacturer undertook to replace defective parts for 90 days or 4000 miles provided that examination by the manufacturer disclosed to its satisfaction that the parts were defective and provided that they were despatched by the buyer at his own expense to the manufacturer. This warranty was in lieu of all other warranties express or implied or other obligations on the manufacturer's part. Ten days and 468 miles after the purchase, while the car was being driven by Mrs. Henningsen, the steering system collapsed, the car ran off the road into a wall, Mrs. Henningson was injured, and the car destroyed.

One of the questions which arose in the case was whether on the basis of a contractual relationship between the manufacturer and both plaintiffs, the manufacturer could fall back on this clause in the agreement as excluding the normal implied warranty of merchantability in a contract of sale. The Court held that this clause was void as being contrary to public policy.

In arriving at this view, the Court traced the historical development of judicial and legislative attitudes on the question of buyer protection and emphasized the increasing unwillingness to allow notions of freedom of contract to deprive a buyer of all rights. Judicial attitudes to wide exemption clauses and legislative developments in the field of implied terms were cited. The Court also pointed out that, on the particular facts in issue, nothing had been done (as was admitted) to draw the clause to the buyer's notice, and that even if this had been done, the buyer was most unlikely to have appreciated how much he was giving up under the existing law in return for so little. For example, on the terms of the contract, he was surrendering entirely any claim to damages for personal injuries arising out of defective manufacture, a claim which the implied term as to merchantability would normally protect. Finally, even if the clause had been drawn to the buyer's notice and even if he had understood its precise impact, the warranty was a uniform warranty promulgated by the Automobile Manufacturers' Association which included the "Big Three" and controlled 86.72% of the market, and better terms, through lack of competition in this respect, were thus not available. The Court concluded<sup>60</sup>:

"In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorises agreements between buyer and seller qualifying the warranty obligations. But quite obviously, the legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorise the automobile manufacturer to use its grossly disproportionate bargain-

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60. at 95.

ing power to relieve itself from liability and to impose on the ordinary buyer, who in effect, has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case . . . , we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."

While *Henningsen* is not a decision directly on s.2-302, which was not then in force in New Jersey, the section was referred to by the Court as an illustration of the trend of legislative opinion in the area, and would now clearly provide the most likely basis for a holding of the kind made in *Henningsen*.

However, encouraging as was the holding in this case, and great as was its impact both within and outside the American automobile industry, it must be said that the promise which s.2-302, viewed in the light of this case, seemed to hold out, has unfortunately not been fulfilled. Since the section was first adopted in Pennsylvania in 1954, less than a dozen reported cases have been decided on it. In 16 years, over 49 jurisdictions, this is not an impressive record. The section has prompted many times more academic comments than cases. Its performance has fallen far short of its promise.

Several reasons suggest themselves for this. First, because of the generality of the concept involved, and the complexity of the inquiry that is implicit in it, advocates probably feel uneasy arguing it, and courts equally uneasy in basing holdings on it. It still seems so much simpler to manipulate particular rules of offer and acceptance, construction, and so on, to give effect to an unarticulated value judgment rather than to articulate the grounds for that value judgment. The size of most consumer complaints reinforces this, in that if it is worth litigating a consumer complaint at all, a weapon as elusive as "unconscionability" may not be thought likely to be the most fruitful line of attack.

These pragmatic considerations aside, the scope of the concept is inherently limited. Unconscionability is, on any view, a highly perjorative term—a "screech word", as Leff puts it—and it can only strike at extreme cases. Even Llewellyn, the framer of the section, conceded this. At best, the section will prevent a trader taking "more than 80 per cent. of the pie". Maintaining the percentile analogy, if a reasonable bargain is one in which the pie is divided equally, a great many unreasonable bargains are left untouched by the section.

This point is borne out by such consumer cases as have been decided on the section. For example, in *American Home Improvement Inc. v. MacIver*<sup>61</sup>, the defendant agreed with the plaintiff to have new windows and doors installed in his home. He agreed to pay a sum of \$2,568.60 over five years for the job. The Court found that the goods and services were in fact worth \$959.00, to which had been added \$800.00 salesman's commission and \$809.60 interest. The Court held that the contract was unconscionable and

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61. (1964) 201 A. 2d. 886.

unenforceable. In *Williams v. Walter-Thomas Furniture Co.*<sup>62</sup>, a furniture store sold a stereo set for \$514.95 to a woman with seven children whom they knew to be on welfare. The stereo was sold under an add-on agreement which apportioned monthly instalments over all purchases made from the store and provided that on default in payment of any instalment, all goods not fully paid for would be repossessed. The effect of the agreement was that nothing was paid off until the last payment was made. Mrs. Williams defaulted in payment, and the stereo set and some nine other previous purchases were repossessed. Prior to the purchase of the stereo, only a very small balance was still owing on these items. The U.S. Court of Appeals, D.C. Circuit, held that the doctrine of unconscionability might well apply in this situation and remitted the case to the court of first instance for a determination of the facts. In *Frostifresh Corp. v. Reynoso*<sup>63</sup>, the defendant had agreed to buy a home freezer for \$900, which cost the plaintiff \$348, together with interest. The defendant had only one week remaining in his employment, as the salesman knew, but the latter represented to him that the freezer would cost the defendant nothing as the price would be met out of commissions payable to the defendant on referral sales made to friends. The negotiations were carried out entirely in Spanish but the agreement was printed in English, which the defendant could not read. The Nassau County Second District Court held that the agreement was unconscionable and reduced the plaintiff's claim to the cost of the freezer (\$348) plus interest. Finally, in *Lefkowitz v. I.T.M. Inc.*<sup>64</sup>, the New York Supreme Court held unconscionable referral selling practices which involved claims being made which were so commercially unsound as to be almost certainly fraudulent. For example, it was demonstrated mathematically to the court that, taking the respondents' own representations, if they had converted or could convert every 20 names furnished by each consumer into 12 enrolments, the plan would follow a geometric progression so that by the seventh stage it would involve millions of people purchasing the respondents' commodities in untold millions of dollars. If carried many further stages, it could well exceed the population of the state, nation and world. Hyman Korn J., in giving judgment, said<sup>65</sup>:

"No longer do we believe that fraud may be perpetuated by the cry of 'caveat emptor'. We have reached the point where 'Let the buyer beware' is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too! . . ."

It will be readily recognized that these cases involve relatively extreme forms of malpractice<sup>66</sup>, and do not in any way reach the typical consumer complaint, for example, the new car that is defective in some respect or is not properly repaired, the electric blanket or iron that will not go, and the television set that goes on the blink. In all of these cases, the consumer is left with a defective commodity or service, because the manufacturer will commonly have avoided all obligations and the consumer thus has no redress. There is no dishonesty

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62. (1965) 350 F. 2d. 445.

63. (1966) 274 N.Y. Supp. 2d. 757.

64. (1967) 275 N.Y. Supp. 2d. 303.

65. at 321.

66. Although they have been criticized by some commentators as not extreme enough to fall within the section: see *Leff supra* n.57; Note, (1968) 20 Maine L. Rev. 159.

or malpractice on the industry's part, but it is allowed to avoid living up to a reasonable level of performance, and meeting reasonable consumer expectations.

Thus, s.2-302, whatever its theoretical strengths, is in practice likely only to prove significant in cases on the lunatic fringe of consumer transactions. Certainly, the evidence so far suggests that, despite the widespread initial optimism, s.2-302 falls far short of a consumer protectionist's holy grail<sup>66a</sup>.

#### **IV. Legislative Regulation of Exemption Clauses**

Legislative innovations fall into several broad categories:

##### **A. A Statutorily Prescribed Form of Exemption Clause**

This is consistent with the norm of freedom of contract in so far as legislation simply prescribes the manner in which implied terms as to quality may be excluded by the parties.

An example of such legislation is afforded by s.5 of the Australian Hire-Purchase Acts which enables the implied terms as to fitness and merchantability under the Act to be excluded in the case of second-hand goods by the agreement containing a statement to that effect and an acknowledgement by the hirer that the statement was brought to his notice. S.18 of the U.K. Hire-Purchase Act contains provisions to similar effect<sup>67</sup>.

The U.S. Uniform Commercial Code proceeds in the same way. S.2-316 states:

"(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof'.

(3) Notwithstanding subsection (2)—

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . "

The reasoning underlying provisions of this kind is clear enough. If the buyer is to forsake substantial rights made available to him under the law, then he ought to be made aware of this before agreeing to it. But how successful are these provisions in attaining this end?

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66a. For further volleys in the continuing debate on s.2.302, see Ellinghaus, (1969) 78 Yale L.J. 757; Murray, Braucher, Leff, Speidel, (1970) 31 University of Pittsburgh L. Rev. 1, 337, 349, and 359 respectively; also round-table discussion, (1970) 31 Univ. of Pittsburgh L. Rev. 547.

67. See also s.25, Conditional Sales Act 1965 (Saskatchewan).

All the provisions cited above can be complied with by the seller including printed form clauses in his standard form contracts. Then one is caught in the familiar bind: a buyer almost never reads such a contract; if he does, he does not understand the technical language involved; if he does understand it, it is unlikely that he can get different terms elsewhere. These observations are borne out by experience. For example, in Australia all hire-purchase agreements in relation to second-hand goods invariably include the statutory statement, and the hirer in signing the agreement signs the necessary acknowledgement which is simply included amongst the terms of the contract. Thus the greatest value that this form of statutory exemption clause can have for the consumer is to emphasize to him the weakness of his own position.

### B. *Disclose or Perish*

This category of statutory provision dealing with exemption clauses is also consistent with the norm of freedom of contract, but instead of requiring the seller clearly to tell the buyer of his rights or lack of them, it requires him to tell the buyer of the fitness of the goods in question, or lack of it. To the extent that the seller fails to disclose to the buyer the true condition of the goods, to that extent will he be taken to assure their fitness.

One of the earliest examples of this form of legislation is s.18(2) of the U.K. Hire Purchase Act, 1965. This provides that where goods are sold under a hire-purchase or conditional sale agreement as being subject to defects specified in the agreement (whether referred to in the agreement as defects or by any other description to like effect), and—

- “(a) the agreement contains a provision that the condition referred to in s.17(2) of this Act [i.e., merchantable quality] is excluded in relation to those goods in respect of those defects, and
- (b) it is proved that before the agreement was made those defects, and the provision in the agreement so excluding that stipulation, were brought to the notice of the hirer or buyer and the effect of that provision was made clear to him, that condition shall not be implied in the agreement in respect of those defects”.

A similar provision is s.58 of the Manitoba Consumer Protection Act, 1969, which provides that every retail sale and hire-purchase of goods, notwithstanding any agreement to the contrary, contains “a condition that the goods are of merchantable quality, except for such defects as are described”. S.58(2) states that for the purposes of the foregoing provision, “it is not necessary to specify every defect separately, if the general condition or quality of the goods is stated with reasonable accuracy.”

A rather more specific proposal of the same nature was recently advanced by the Adelaide Law School Committee on Consumer Credit<sup>68</sup>. The Committee recommended that, in relation to sales of second-hand cars, which they found to be a particular area of consumer abuse, a dealer should be required to guarantee a car sound in all respects for three months or 3,000 miles except as regards defects disclosed to the buyer at the time of sale. In respect of

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68. South Australian Government Printer, 1969, Chap. XIII.

disclosed defects, in order for the dealer to avoid liability, he must also provide an estimate of the cost of repair within a maximum permissible tolerance. If repairs exceeding this tolerance should be required within the period of the guarantee, the dealer should be liable for them, and if they exceed a certain monetary figure, be liable to have the transaction rescinded.

Some general comments can be made here of these provisions. First, an initial and obvious problem is, what is a "defect"? Quality is a very relative concept, and is especially relative to price. For example, is a new \$3 cotton dress, made in Peking, which fades after three washings, or the seams of which quickly come unsewn, "defective"? Is a used car, which after all, by definition, is more used than a new one, defective when a door will not open properly, a catch is missing here, the paint is blistered there, or which is burning a quantity of oil (how much?)? When does poor quality, or wear and tear produced by use, degenerate into a "defect"?

Secondly, what is meaningful disclosure of a defect? Is it sufficient to say that goods are "used" or "worn" or "seconds" or is something more specific required? The Adelaide Law School Committee sought to meet the problem of particularising defects in a meaningful way by requiring an estimate of the likely cost of repair, but this solution would not be feasible with all commodities. How would the law deal, for example, with sales of fire stock, flood stock, salvage stock, bankrupt stock, factory rejects or seconds? In some of these cases, the seller may only know that some of his stock may be defective. It may not be an economic proposition to ask him to disclose more. For example, if he is selling ten thousand pairs of fire-damaged men's socks, the nature of the defect or whether in fact a given item is defective at all, may, realistically, be a matter for the consumer to ascertain. Similarly, in the case of second-hand goods, for example, cars, the existence, and precise nature, of any defects may only be ascertainable on dismantling, which again may not be an economic proposition.

Additional criticisms that have been made of the Adelaide Law School Committee's proposals in relation to used cars are:

- (1) The majority of motor vehicle transactions involve trade-ins and on rescission by the buyer, it may be the case that his trade-in has already been disposed of.

This difficulty could be resolved in the same way as a similar difficulty is resolved under the cooling-off provisions in the U.K. Hire-Purchase Act, by giving the dealer the option of paying out the trade-in allowance in cash.

- (2) The difficulty of identifying existing or potential defects accurately in the case of a car may be extreme, and only really resolvable on complete dismantling.

The reply to this must be that if it is unreasonable to expect this of the dealer, it is equally unreasonable to expect this of the prospective buyer. The question is simply one of allocation and spreading of risks. Then, it is further argued that dealers may place an unrealistically low value on trade-ins in order to cover possible liability for defects that might or might not materialise after re-sale. There is force in this point, but this is the price that the consumer has to pay to be assured of a sound purchase.

- (3) It is argued that disputes will arise as to whether particular defects were inherent in the car at the time of sale or were caused subsequently by consumer misuse.

The Committee sought to meet this problem by allowing the consumer always to rescind (assuming that the cost of repairing the defect exceeded the prescribed sum), and by giving the dealer a right subsequently to sue for damages for wrongful rescission if he contended that the consumer was responsible for the defects. In this way, the consumer would not be out of his money pending resolution of the dispute, and the onus of proof on an admittedly difficult issue would rest with the dealer, which again has to be justified on the basis of an appropriate allocation of risks. In cases of defects not extensive enough to justify rescission, a system of immediate arbitration could be devised to handle the problem, with the dealer again carrying the onus of proof.

- (4) It is also argued that the existence of defects in a car, their extent, and the urgency and cost of repair, are very much matters of personal judgment, and if, for example, the responsibility for making these judgments were entrusted to a series of authorised motor garages in the first instance (i.e., prior to any arbitration of disputed assessments), a vast range of different judgments would be forthcoming. Uniformity would be impossible.

Again this point has force. One can only hope that the system of arbitration for disputed assessments would ultimately ensure an acceptable degree of consistency.

- (5) A consumer criticism of the proposals has been that they do not make clear whether the dealer is entitled to insist on executing necessary repairs himself, or whether the consumer is entitled to have his car repaired at an authorised garage and simply seek reimbursement from the dealer.

Clearly, the latter course is to be preferred. Otherwise, dealers would face a strong and probably irresistible temptation to do the cheapest and least adequate job possible on a car in order to minimise liability to themselves<sup>69</sup>.

Although the foregoing proposals have been condemned by the motor industry as impracticable, the answer to this may be furnished by the fact that the same industry is apparently able to offer warranties which, on their face, are far more extravagant in their benefits than those envisaged by the Committee's proposals. It ill-becomes the industry to complain that their sales claims have for once been taken at face value.

These are some of the problems that fall to be resolved under either general or specific legislative proposals operating on a disclose or perish thesis.

### C. *Perish?*

The most radical legislative proposals for the regulation of exemption clauses are widely viewed as those which envisage a complete prohibition on

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69. I am indebted to Mr. R. H. Waters, General Manager of the Royal Automobile Association of South Australia, for information on some of these points.

the parties contracting out of obligations arising under statutorily implied terms as to quality. This approach has gained considerable favour in recent years, although it is by no means new. For example, farm implement legislation in the Prairie Provinces in Canada dating back to the First World War imposes obligations as to the fitness of farm implements on a seller which he is not at liberty to avoid<sup>70</sup>. These obligations are quite detailed. For example, the Saskatchewan Agricultural Implements Act, 1968, provides that where a new farm implement is sold for cash or on credit, a statutorily prescribed form appended to the Act must be used. This form provides that the vendor and the general provincial distributor warrant that the implement is well made and of good materials, that it will well perform the work for which it is intended (which must be stated in the agreement), that if the purchaser cannot make the implement work well within a ten day trial period after delivery, the vendor must within eight days rectify the deficiencies and if he cannot, the purchaser may then rescind. The vendor and the general provincial distributor must also warrant for a period of one year that the implement will be durable if used in suitable conditions and with proper care. They must further warrant that all necessary repair parts for the implement will be available from the general provincial distributor for a period of ten years from the sale. S.16 of the Act provides that the agreement can contain additional terms to these, but they must not derogate from or conflict with the prescribed terms.

This legislation spells out with considerable clarity the vendor's obligations and the purchaser's redresses, and most importantly, ensures that all this information is communicated to the buyer in fairly readily intelligible form. That this far-sighted legislation has not been emulated elsewhere is surprising<sup>71</sup>.

More recently in Australia, the implied terms as to merchantability and fitness for purpose in hire-purchase agreements have been made non-excludable in the case of new goods. In the case of the implied term as to merchantability, there is no liability if the owner or dealer could not reasonably have been aware of the defects, or where the defects are such that where the hirer has examined the goods, they should have been discovered by him<sup>72</sup>. In the United Kingdom, the Molony Committee, in 1962, recommended that restrictions be imposed on contracting out of implied terms as to quality in all consumer sales, along the lines of the restrictions contained in the U.K. Hire-Purchase Act, 1938, now (in this respect) substantially reproduced in the Hire-Purchase Act, 1965 (see above)<sup>73</sup>. Under these proposals, the position as regards the term as to merchantability would be the same as under the Australian Hire-Purchase Acts; the implied term as to fitness for purpose could be excluded if the agreement so provides and this provision is explained to the hirer. This area has been more recently examined in the United Kingdom by the Law Commission in a report

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70. Farm Implement Act, 1967 (Alberta); Farm Implement Act, 1954 (Manitoba); Agricultural Implements Act, 1968 (Saskatchewan).

71. See also the Israeli Standard Contracts Law 1964 which requires that standard forms be approved by a State tribunal before use. The U.K. Law Commission Report on *Exemption Clauses in Contracts*, 1969 rejects such a system for the U.K. as too cumbersome and inflexible (para. 106).

72. See e.g. s.5 Hire-Purchase Act, 1960 (N.S.W.).

73. Final Report of the Committee on Consumer Protection (1962) Cmnd. 1781, para. 426 *et seq.*

*Exemption Clauses in Contracts*, completed in 1969. The Law Commission, while divided on the question of the need for regulation of exemption clauses beyond the context of consumer sales<sup>73a</sup>, were nevertheless unanimous that in the latter context, contracting out of the implied terms as to merchantability and fitness should, in most circumstances, be banned<sup>74</sup>.

On the face of them, these proposals seem to go a good deal further than any proposal examined in either of the previous two categories of legislative innovations in this field. But to what extent is this in fact so?

First, the implied term as to fitness which the Commission proposes closely follows traditional formulations and provides:

“Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are bought, there is an implied condition that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly bought, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller’s skill or judgment”<sup>75</sup>.

It is clear from the wording of this provision that a seller is very far from prevented from avoiding obligations as to the quality of the goods he is selling. In order to avoid these obligations, he is simply required to describe accurately to the buyer the condition of the goods, whatever that condition might be. Once he has done that, it is no longer reasonable for the buyer to rely on the seller’s skill and judgment in inferring qualities that the goods do not possess. As in category two, the seller may confess and avoid.

Similarly, in relation to the Law Commission’s implied term as to merchantability. First, as in the Hire-Purchase Act, it is conceded that there should be 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>76</sup>. The Commission considered it reasonable that a seller should be able to avoid liability for particular defects disclosed to the buyer before sale<sup>77</sup>. The Commission, however, in addition, felt that the whole problem of the highly relative concept of “quality”, including more particular problems created by second-hand or sub-standard goods, could best be dealt with by an elastic definition of “merchantability” which took account of all the factors in a sale which bear on the question of what is a reasonable expectation on the part of a consumer as regards quality. The proposed definition reads:

73a. The distinction between consumer sales and other sales is an important and difficult one, as the Law Commission acknowledged. See also Adelaide Law School Report *supra* n.68, Chap. II, and my article (1970) 7 *Melb. Univ. L. Rev.* 315.

74. See proposals to similar effect contained in the U.S. Model National Consumer Act prepared by the National Consumer Law Center, Boston College Law School, 1970, s.3.302. For comments on the Law Commission’s Report, see Coote, (1970) 34 *Conv.* 259.

75. p. 54.

76. p. 54.

77. para. 49.

"Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to their price, any description applied to them and all the other circumstances"<sup>78</sup>.

Again, provided the seller has described the condition of the goods accurately, he is entitled to sell goods of *any quality whatever* without liability.

Thus, it will be seen that, on closer analysis, the Law Commission's proposals do not depart fundamentally from earlier provisions applying the so-called disclose or perish (or confess and avoid) thesis. Certainly those, who, in advocating the prohibition of contracting out of the statutory obligations as to quality, imagine that this will, within the present legal framework, necessarily ensure minimum standards of quality in consumer goods, are deluding themselves. If these are desired, it must be recognised that the Law Commission's proposals do not provide them. In so far as they simply require that the seller tell a buyer what he is getting (whatever that might be), they are not radical at all.

But how much further can one reasonably go? Is it possible to adopt a different position? In some cases, it is clearly in the public interest to impose minimum standards of quality. Both new and used cars are a case in point. However informed the purchaser of a defective car, it is clearly in the public interest that a potentially dangerous motor-vehicle not be allowed on the road. Thus quality control systems in the case of new cars and certificate of roadworthiness systems in the case of second-hand cars can readily be justified. Beyond this, one has to acknowledge that there are an infinite variety of circumstances where a consumer's needs or means justify him in buying less than Cadillac-scale quality. If I can only afford a \$200 car, then assuming it is roadworthy and provided I am accurately informed of its defects, is there any policy reason why I should be prevented from buying it? If I desire to buy a non-operational stove from the local junk shop for my child's playhouse, is there any reason why, if I am told by the seller that it is non-operational, that I should not buy it? Similarly with the new \$3 cotton dress from an earlier example.

The same considerations tell against the argument not infrequently made that, as an irreducible minimum, a seller should not be able to contract out of liability for negligence<sup>79</sup>. This may be unobjectionable as far as it goes, but it says very little. What does "negligence" mean in this context? Always accepting that public interest considerations such as public safety (for example, in the case of the dangerous car), should never be infringed upon, when is it otherwise "negligent" to sell a defective produce? Provided that the product is described as defective, it is hard to imagine what negligence could be involved. Even where it is not described as defective, a whole new framework of legal obligations would have to be constructed in order to render the non-

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78. This definition of "merchantability" follows closely that adopted by the majority of the House of Lords in *Kendall v. Lillico* (the *Hardwick Game Farm Case*) [1969] 2 A.C. 31 which in turn follows that of Dixon J. in *Australian Knitting Mills v. Grant* (1933) 50 C.L.R. 387, at 418. The element of "price-worthiness" is recognised in these judicial definitions.

79. See Bright J., (1967) 41 A.L.J. 261.

disclosure culpable, but having done that, any general concept of negligence in this context would become redundant.

The truth of the matter would seem to be that the Law Commission's proposals, in terms of general legislative prescriptions of private rights in the field of sale of goods (as opposed to particular solutions that might be adopted in relation to particular commodities), go as far as legislation can reasonably go. Their effectiveness will depend, very largely, on how realistically courts choose to apply them. In particular, the Courts must meet the questions of *what* information must a seller convey to a buyer about a commodity and, as importantly, *how* must this information be conveyed. Unless the Courts ensure that there is, from the consumer's point of view, a *meaningful* conveyance of information to him about the product during the bargaining process itself, so that the bargain is struck on the basis of accurate and relevant information, i.e., between *two informed* parties, the proposals will be utterly frustrated. Thus, a very heavy onus will fall upon the Courts to make the proposals work. The kinds of inquiries upon which Courts will be required to embark in order to satisfy themselves on the questions posited by the proposed provisions, turning heavily, as they do, on notions of reasonableness, emphasize once again the futility of courts seeking to reach just solutions in this area by adopting the pretence that all relevant information is to be found in the parties' contractual writing, which, according to accepted dogma, has only to be construed (or misconstrued, as the case demands). The Law Commission's proposals, if enacted, will move the English approach on the surveillance of exemption clauses much closer to the American approach under the doctrine of unconscionability in so far as it will require examination of the surrounding circumstances of a bargain.

### V. Exploiting all Options

Even acknowledging that the U.K. Law Commission's proposals in relation to exemption clauses in contracts for the sale of goods represent a significant step forward, some very grave deficiencies remain in the law in this area.

First, neither of the two general deficiencies noted at the outset of this article has been met. Not a word is said in the Commission's report on the basic question of informing a consumer of what his statutory rights and remedies are. New rights are of no use without some knowledge of them. Communication seems to be rated low in a lawyer's order of priorities; perhaps his are not the ideal skills for solving the problem. Surely, in relation to some classes of transactions and commodities, a prescribed statement of rights and remedies could have been required<sup>80</sup>. The provisions of the U.K. Hire Purchase Act relating to the cooling-off period for door-to-door sales demonstrates the feasibility of this. The First World War Canadian Prairies Farm Implements legislation demonstrates even more forcibly what can be done.

Also, not a word is said in the Commission's report on how the new rights are to be enforced. Unless the machinery of justice is such that, in a practical

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80. It is accepted that the law in this area, as in others, cannot be made fully accessible to the layman (see H. R. Hahlo, (1967) 30 M.L.R. 241, at 245), but nevertheless communication experts with the relevant talents ought surely to be able to devise means for at least putting the consumer on notice as to the possibility of redress.

sense, rights are worth enforcing, they might just as well not exist. Admittedly, this problem is more pragmatic than prosaic. Commentators have for decades preferred to analyse endlessly nuances in the various judicial definitions of merchantability. That no one much is able to sue on this term is no doubt a tedious objection.

A proper sense of priorities would demand that we first create an appropriate legal machinery for the enforcement of consumer rights and then worry about finer points of substantive definition.

A large range of possibilities for meeting the problems of suit call for examination. Still within the framework of civil enforcement of rights, possibilities range over the appointment of a Commissioner of Consumer Affairs to mediate disputes between business and consumer so that litigation can be avoided by private settlement<sup>81</sup>; the development of the class action procedure to allow a representative of a number of consumers similarly affected by a particular business malpractice to bring one action on their collective account<sup>82</sup>; the development of informal and inexpensive adjudicatory procedures for determining consumer complaints—the notion that any claim, no matter how small, warrants Ritz Hotel style justice or else no justice at all, may need to be one of the first shibboleths to go<sup>83</sup>.

Outside the framework of civil enforcement of consumer rights, emphasizing prophylactic rather than merely compensatory measures, the potential of criminal sanctions, together with the problems of enforcement which “white collar” crime give rise to, fall to be evaluated. The potential of publicity sanctions also needs to be explored. Again, State-administered or State-sponsored systems of minimum standards, informative labelling, grading and comparative testing, all offer interesting possibilities which lawyers have little explored but cannot continue to ignore<sup>84</sup>. The performance of regulatory agencies in these various fields is again a question of some importance, for example their composition, their friends, and the voices which are heard in their forums<sup>85</sup>.

Until now, in this area of consumer protection, we have been locked into a conceptual framework of thinking inherited from the age of the industrial

81. See Adelaide Law School Report, *supra* n.68, Chap. XXV.

82. A procedure rapidly being developed in the U.S.

83. I am indebted to Professor J. S. Ziegel for mentioning to me State-administered adjudicatory procedures in force in Sweden for dealing with consumer complaints under which a consumer simply makes his complaint to one of a series of expert committees by letter. The trader is invited to reply by letter. The consumer is offered an opportunity to comment by letter on this reply and on the basis of these letters the committee makes a finding. While apparently not binding on the parties, the finding places the onus of proof on subsequent proceedings on the party disagreeing with it. In practice, it is rarely challenged. Generally on procedural reforms needed in order to make private law remedies effective, see my forthcoming article in the University of Toronto L.J., “Private Law Remedies for Misleading Advertising”.

84. The Molony Committee, 1962 Cmnd. 1781, considered these various expedients but generally adopted a non State-interventionist attitude on them. I have mentioned some of the issues raised by them in (1970) 16 McGill L.J. 263.

85. Again an issue which has come into prominence recently in the U.S.; see for example, William L. Cary *Politics and the Regulatory Agencies* (McGraw-Hill, 1967), Louis M. Kohlmeier, *The Regulators* (Harper & Row, N.Y., 1969).

revolution, which can scarcely conceive of any more radical change in the law than the addition of a couple of qualifications to a section of the Sale of Goods Act. We ought to be ready now to acknowledge the inadequacy of so narrow an approach to reform. Then we can start fashioning the arsenal of weapons which is required if any real impact is to be made on the problem of providing consumers with adequate assurances that they are getting fair return for their money.

Until this is done, the observation of the late Senator Robert Kennedy that large sections of the community now see the law as an essentially hostile institution—it seems only ever to take things away from them—remains uncomfortably close to the truth. In an age when established institutions are coming under increasingly critical public scrutiny, this is not a charge that can safely be allowed to lie much longer.