10-1-1973

Product Liability and the English Implied Terms Bill: Transatlantic Variations on a Theme

Robert J. Wittebort

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol49/iss1/10

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
PRODUCT LIABILITY AND THE ENGLISH IMPLIED TERMS BILL: TRANSATLANTIC VARIATIONS ON A THEME

I. Introduction

The action of breach of warranty arose under the general category of Case for deceit without scienter. Eventually a contract action was held to lie for breach of warranty. Stuart v. Wilkins, 2 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778).

Gradually, as liability was extended to encompass parties to express agreements who performed their undertakings badly, the form of Assumpsit emerged as distinct from Case. Assumpsit offered distinct procedural advantages. Providing an express agreement existed, it allowed enforcement of parol contracts and avoided the wager of law, which could be invoked in an action on Debt. After proof of an express promise to pay the contractual "debt" was made unnecessary, the action of Indebitatus Assumpsit supplanted Debt as the vehicle for enforcement of contracts; and, a fortiori, it supplanted Debt as the chief means of recovering for breach of warranty. The delictual character of warranty theory, however, had never been entirely forgotten, and was to reappear during the course of the American struggle with the privity doctrine.

Perhaps it is no overgeneralization to observe, borrowing Maitland's metaphor, that the action of Indebitatus Assumpsit—with its concomitant contractual flavor—rules English products liability theory today, while the American theory owes allegiance to Case. Although American courts had for some time been more willing to circumvent the privity requirement than the English, the parting of the ways occurred about ten years ago with the imposition by American courts of strict liability "in tort" for defective products. British law now faces roughly the same problems with warranty theory as confronted American courts in the early 1960's and which led to the American adoption of a strict liability rule; chief among these problems are privity and exemption clauses. Efforts are under way to deal with these problems in both the short and the long run.

The "citadel" of English privity is not yet under heavy attack, but there is a general feeling abroad that a remedy must be fashioned which will allow both recovery by third parties not in privity with the seller, supplier, or manufacturer of a defective product, and a means of imposing liability directly on the supplier or manufacturer which will be superior to the negligence method now employed. Such a remedy can be expected to emerge from the interface of tort and contract. To this end the Lord High Chancellor, Lord Hailsham of Saint Marylebone, has authorized the formation of a Law Commissions' Working Party to study the remedies available for loss caused by defective products and to recommend any changes deemed necessary.

More immediately, a Working Party was established by the English and

2 Eventually a contract action was held to lie for breach of warranty. Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778).
Scottish Law Commissions to focus on the problem of disclaimers of liability. The Supply of Goods (Implied Terms) Bill\(^4\) is the direct product of this Working Party, whose First Report was issued in July, 1969.\(^5\) The Bill represents a step forward toward the provision of an adequate remedy for aggrieved consumers, but it is a short step. It is directed towards contracts for sale and involves no reformulation of the means of recovery. It does redefine the implied conditions under the Act, and it imposes a prohibition on disclaimers of liability for breach of implied condition in consumer sales and a limited prohibition in business sales. The Bill is best viewed against the background of the Sale of Goods Act, 1893\(^6\) (which it is intended to amend and supplement) and the Act’s judicial interpretation.

II. The Sale of Goods Act, 1893

The Sale of Goods Act is a codifying statute intended to be largely declaratory of the common law of sales as it stood in 1893. The Act did, however, go further in certain areas than the cases which preceded it, notably in its restriction of the caveat emptor doctrine by the declaration of certain implied conditions.\(^7\)

Moreover, the 1893 Act “codified” a common law which was itself in a period of transition from the laissez-faire environment of the nineteenth century’s untrammeled capitalism to one more congenial to the private consumer’s interests.\(^8\) The resultant theoretical schizophrenia produced sections on implied terms which are broader than the common law of 1893 but also a section permitting contractual evasion of liability for their breach. These sections should be examined in some detail.

A. “Terms” Under the Act

Terms under the 1893 Act can be either express or implied; the category “terms” encompasses both “conditions” and “warranties.” Express terms are those agreed to in so many words by the parties; implied terms are prescribed by §§ 12-15 of the 1893 Act or are “annexed by the usage of trade” under § 14(3). There is no statutory definition of “condition” but it appears from § 11(1)(b) that breach of condition gives rise to a right of repudiation. It thus

---

4 Supply of Goods (Implied Terms) Bill (1972; printing of 5 February 1973) (hereinafter cited as “Bill” or “Implied Terms Bill”).
7 1893 Act §§ 12-15. Although the received method of interpreting declaratory statutes has been to refer first to the language of the statute itself and then to extrastatutory considerations if necessary, see Lord Herschell’s speech in Bank of England v. Vagliano Bros., [1891] A.C. 107, 144, it appears that, at least with regard to the terms implied by the 1893 Act, the court may refuse to apply the letter of the statute if it violates the parties’ reasonable intent. See Lord Diplock’s speech in Ashingon Piggeries, Ltd. v. Christopher Hill, Ltd., [1971] 1 All E.R. 847, 882.
has been inferred that “a condition is a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction.”9 “Warranties,” on the other hand, are expressly defined in § 62 as agreements “with reference to goods which are the subject of a contract for sale, but collateral to the main purpose of that contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated.” There is no distinct conceptual boundary between conditions and warranties under the Act. The implied terms delineated in §§ 12-15, however, with the exception of the implied warranties of quiet possession and freedom from encumbrance prescribed in §§ 12(2) and 12(3), are referred to as “conditions” and have been interpreted as such. It is thus incorrect to speak in the language of the Uniform Commercial Code and refer to the implied terms of merchantability and fitness for purpose as “warranties”; they are, stricto sensu, conditions. The distinction becomes especially meaningful in the context of the effect of exemption clauses.

B. The Implied Conditions and Their Modification Under the Bill

The 1893 Act imposes implied conditions of capacity to sell (§ 12), of correspondence with the description in a “sale by description” (§ 13), of fitness for purpose and merchantable quality (§ 14), and of correspondence and opportunity to inspect in a “sale by sample” (§ 15).10 The Law Commissions examined each of these conditions and recommended changes to §§ 12, 13, and 14; the most substantial changes recommended affected § 14. The Bill rewrites § 12 and § 14 and appends a clause to § 13. Each condition in the Act should be scrutinized and placed in apposition to the Bill clauses which modify it.

1. Section 12:11 In a contract for sale of goods the passing of the property is of fundamental importance. Section 12 has been invoked to provide a wide umbrella of protection for the buyer who purchases from a seller who has no right to sell. In Rowland v. Divall,12 for example, the plaintiff bought an automobile from defendant and used it for four months before discovering that it had been stolen. The defendant, who had bought the car in good faith, contended that (1) the plaintiff had “accepted” the car under § 11(1)(c) of the Act13 and thus could sue for damages only, and (2) that allowance should be made for the four months’ usage. The Court of Appeal held that the buyer

---

9 ATIYAH, supra note 6, at 32.
11 § 12: In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —
   (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
   (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
   (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.
13 § 11(1)(c): Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has
could recover the full price, without credit for use, on the grounds of total failure of consideration—the buyer had received no property in the goods.\textsuperscript{14}

The opening words of § 12—"unless the circumstances of the contract are such as to show a different intention"—seem to indicate, however, that the buyer may take subject to a possibly defective title depending on the circumstances of the transaction. More importantly, § 55\textsuperscript{15} can be relied upon to sanction a disclaimer of liability.

The Commissions appreciated the hardship worked by the rule in \textit{Rowland v. Divall} but felt that a change which would allow the buyer to recover only for his actual loss (giving allowance for his use of the goods), while desirable, should nevertheless await a study of the rules relating to the law of restitution.\textsuperscript{16} The Bill does, however, deal with the problem of exclusion clauses limiting the conditions and warranties under § 12. Under the Bill exclusion or variation of these terms is possible only when it is clear that the seller purports to sell only a limited title. Even when the seller does make this clear, the warranties of quiet possession and freedom from encumbrance cannot be entirely excluded.\textsuperscript{17} Thus,
although the condition of right to sell and the warranties of quiet possession and freedom from encumbrance can be limited by the seller's disclosure of his limited title, they cannot be excluded across the board by an unconditional disclaimer.

2. Section 13: Under § 13 there is an implied condition that, in a sale by description, the goods will correspond with the description. In a sale by sample and description the goods must also correspond with the description. This provision has been interpreted quite strictly against the seller. In *Arcos, Ltd. v. E. A. Ronaasen & Son,* for example, the goods were found to be merchantable and fit for the purpose for which they were sold but the seller was nevertheless held liable under § 13 because there was a minor deviation from the description. A sale is “by description” under § 13 if (1) its subject is future or unascertainable goods, (2) the buyer has not seen the goods and relies on the seller’s description, or (3) the goods are not sold as “specific” goods but rather as goods corresponding to a description even if the buyer has seen them.

It is obvious that the meaning of “sale by description” is extremely broad; conceivably, only a sale of “specific” goods physically apparent to the buyer and sold with no representations at all could be held not to be a sale by description. In this connection the law with regard to self-service sales was felt by the Commissions to be unclear even though a dictum by Lord Wright in *Grant v. Australian Knitting Mills, Ltd.* seems to indicate that neither spoken nor printed words are necessary to constitute a “description.” The Commissions felt it desirable specifically to extend the ambit of § 13 to include self-service retail sales. Clause Two of the Bill implements their recommendation:

2. Section 13 of the principal Act (sale by description) shall be renumbered as subsection (1) of that section, and at the end there shall be inserted the following subsection:

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

3. Section 14: This section provides for the implication of terms relating to the quality of goods supplied under a contract of sale. Section 14 has been

---

18 § 13: Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.


23 [1936] A.C. 85, 100 (P.C.).

24 With the repeal of the Merchandise Marks Act, 1887 (50 & 51 Vict., c. 28), and its replacement by the Trade Descriptions Act, 1968 (c. 29), the civil action for breach of warranty of true description provided by § 17 of the 1887 Act has ceased to exist, except insofar as a false description can amount to a misrepresentation under § 2(1) of the Misrepresentation Act, 1967 (c. 7). At present, civil liability for false descriptions not amounting to misrepresentations can attach only under § 13 of the 1893 Act.

25 § 14: Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods
of vast importance in the sale of goods since its enactment; it represents the boldest attack on the doctrine of caveat emptor made by the 1893 Act, is father to § 15 of the American Uniform Sales Act, and is grandfather to §§ 2—314 and 2—315 of the Uniform Commercial Code.

The Commissions recommended amendments to § 14 which would be of general applicability and would affect both consumer sales and business sales. The Implied Terms Bill broadens the protection offered the buyer under § 14 by removing certain restrictions from the 1893 Act. As an initial matter, the Bill restructures § 14. Subsection (4) is moved to § 55, where it logically belongs. Subsections (1) and (2) are reversed in order; the implied condition of merchantable quality now precedes that of fitness for purpose, ensuring that the provision of more general application precedes that of less general application. This ordering is roughly congruent with the structure of §§ 2—314 and 2—315 of the Uniform Commercial Code.

The opening words of § 14 assert that there are no implied terms as to quality or fitness for purpose except as provided in the Section and subject to the provisions of the 1893 Act and supplementary statutes. It may be argued that this clause has become meaningless in view of the considerable scope of its exceptions. The Uniform Sales Act, for example, did not contain such a

supplied under a contract of sale, except as follows:
(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:
(3) An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade:
(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

26 Report, supra note 5, at 10.
27 Clause 3: For section 14 of the principal Act (implied undertakings as to quality or fitness) there shall be substituted the following section:—
14.—(1) Except as provided by this section, and section 15 of this Act, and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.
(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition—
(a) as regards defects specifically drawn to the buyer's attention before the condition is made; or
(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed.
(3) 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 being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, 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.
(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage. . . .
provision. Deletion of the clause was considered by the Commissions but they recommended retention for two reasons: (1) the provision places sales in which the seller is not acting in the course of business outside the purview of § 14, and (2) it has "enabled the courts to hold (and it would be undesirable to disable the courts from doing so in the future) that the implied conditions of fitness and merchantability apply to all goods supplied `under' a contract of sale even if such goods were not themselves the subject matter of the sale."

(a) Condition of fitness: Section 14(1) of the 1893 Act supplies an implied condition that the goods are reasonably fit for the buyer's particular purpose, so long as: (1) The buyer makes his purpose known, either expressly or by implication. If the purpose is obvious—e.g., a car for driving—the buyer need not express it in so many words; (2) He relies on the seller's skill or judgment. Reliance can be inferred in most situations when the seller is informed of the buyer's purpose. This provision has thus been generously interpreted in the buyer's favor. Moreover, reliance need not be total or exclusive; partial reliance will suffice. (3) The goods are of a description which it is in the ordinary course of the seller's business to supply, whether or not he is the manufacturer. In finding goods to be of such a description, the courts have looked at the general class of goods the seller supplies rather than at the particular goods in question.

It should be noted that liability under § 14 is strict. A seller who has supplied goods containing a latent defect can be reached under § 14 even though he exercised the utmost skill and judgment.

The reformulation of § 14 in the Implied Terms Bill jettisons the restriction to sales where the goods are "of a description which it is in the course of the seller's business to supply" and applies to all sales "in the course of business." Similarly, the Bill provides that the condition of fitness will be implied unless the circumstances show that the buyer did not rely on the seller's skill or judgment, or that it was unreasonable for him so to rely, thus reversing the burden of proof. Finally, the Bill deletes the "patent or other trade name" provision.

28 Report, supra note 5, at 11. For example, in Geddling v. Marsh, [1920] 1 K.B. 688, the condition of fitness was held to apply to the bottle in which mineral water was supplied. And in Wilson v. Ricket, Cockerell & Co., Ltd., [1954] 1 Q.B. 598, where a blasting cap was supplied with an order of coal with subsequent spectacular result, § 14 was held to apply in the face of a defense which asserted that the coal was fit for burning and the cap was not supplied as part of the contract goods, i.e., the coal.


31 See, e.g., Ashington Piggeries, Ltd. v. Christopher Hill, Ltd., [1971] 1 All E.R. 847; Atiyah, supra note 6, at 87.

32 This section has been held to apply to foodstuffs as well as manufactured goods, although, unlike the Uniform Sales Act's analogous clause, "growers" are not mentioned specifically. Frost v. Aylesbury Dairy Co., Ltd., [1905] 1 K.B. 608.


35 Bill clause 3 (new § 14(3)).

36 Id. The ""unreasonable"" provision allows a seller to protect himself by informing the buyer that he must not rely on the seller's skill or judgment. Report, supra note 5, at 13.

37 Bill clause 3. Elimination of the trade-name proviso was largely pro forma, as the Court
These changes represent a bit of legislative housecleaning. They bring the letter of the statute into congruence with the spirit of the case law and do not substantially alter the character of § 14(1) of the 1893 Act.

The Commissions did, however, consider a possible reform which would have changed § 14(1) considerably. The words “particular purpose,” as they are employed in § 14(1), have consistently been interpreted to include, in a proper case, the only possible purpose or a usual purpose.88 “Particular” has been taken to mean “specified” rather than as the antonym of “general.”89 Thus, the scope of § 14(1) is considerably broader than that of Uniform Commercial Code § 2—315, in which a “particular purpose” is taken to mean a use to which the goods are not normally put.40 This restriction is a recognition that § 2—314—the implied warranty of merchantability—is the section on which to rely in sales for ordinary purposes under the Code. It will be seen below that the wide interpretation of particular purpose employed in the United Kingdom demands a close relation of fitness and merchantable quality; indeed, the latter might be defined in terms of the former. It was suggested to the Law Commissions that the definition of “particular purpose” be recast to conform with the American formulation. The Commissions’ reason for rejecting the American rule is worthy of quotation at length:

In interpreting section 14 as it stands at present, the English courts have related merchantable quality to the usual purposes for which goods are sold, and they have interpreted the phrase “particular purpose” (which occurs in subsection (1)) as including in appropriate circumstances a usual purpose. To this extent the case law has created an overlap between subsections (1) and (2). We found on consultation that some lawyers took the view that this overlap should be eliminated. In particular, it has been suggested to us that subsection (1) should be restricted to fitness of the goods for a special purpose (in the sense of an unusual purpose) while subsection (2) would link merchantability to the usual purposes for which goods are sold. Although we readily concede the attraction of this approach as a matter of elegance, we think that the attraction is outweighed by the proven utility of the overlap in practice. As will be seen later in this Report, we propose to maintain the present proviso to subsection (2) whereby, if a buyer has examined the goods, the implied condition of merchantability does not arise as regards defects which such examination ought to have revealed. It follows that if a consumer examines the goods but fails to detect defects which an examination properly to be expected of him would have detected, he will have no remedy under subsection (2); in the final result, he may be worse off than he would have been if he had not examined the goods at all. As the law stands, this danger to the buyer is mitigated by the present formulation of subsection (1): if, because of a careless or unskilful examination, the buyer’s claim falls down on merchantability, he still has a remedy under subsection (1) if the goods prove to be unfit for the particular purpose which had been indicated by him. But in the vast majority of cases the buyer would lose this chance if the condition to be


39 ATIYAH, supra note 6, at 88.

40 Uniform Commercial Code § 2—315, Comment 2.
implied under subsection (1) were to be restricted to fitness for a special, i.e., unusual purpose. This, from the point of view of consumer protection, would be a retrograde step, and accordingly in our proposals for the reformulation of subsection (1) we have avoided the use of any form of words which would so restrict the implied condition of fitness.\(^{41}\)

Thus, the problem of the effect of examination determined the Commissions' posture on the proposed streamlining of § 14. (Indeed, to remove an ambiguity besetting Scots law on the point, the Bill includes the amplification "whether or not that is a purpose for which such goods are commonly supplied."\(^{42}\) When the condition of merchantable quality is negatived by merely perfunctory examination, then the condition of fitness for purpose can be relied upon to fill the breach. Such a procedure might well be superior to that applicable under the Uniform Commercial Code. Under the Code the implied warranty of fitness for purpose, as noted above, is limited to extraordinary purposes. In most circumstances it is thus an unsatisfactory backstop to § 2—314 (implied warranty of merchantability). Because of this restriction the American buyer who performs an insufficient examination is not as fortunate as his British counterpart. Section 2—316 (3)(b) of the Code excludes implied warranties with regard to defects an examination ought in the circumstances to reveal to a buyer who undertakes such an examination (bearing in mind his individual skill) or who refuses to examine (after the seller demands that he examine the goods) before the contract is struck.\(^{43}\) If he refuses to examine, if his examination does not do justice to his skill, or if his examination is not in conformity with standard methods of inspection, the warranties are extinguished. Thus, the American buyer who examines the goods must take care that his examination is as thorough as his skill will allow. Further, if he does not examine, after having been requested to do so, there will be no implication of warranties. The British buyer who examines also must inspect with care.\(^{44}\) If his examination is less than could be expected of him, or if he does not examine at all, he cannot rely on the condition of merchantable quality, but the condition of fitness for purpose can still be operative. Of course, this places the British buyer who refuses to examine in a better position than the purchaser who did not carry out his examination with sufficient care or skill. The Commissions considered modifying this situation by reinstating the common-law test: i.e., the condition of merchantability would be excluded with regard to "defects which should have come to light if only the purchaser had availed himself of whatever reasonable opportunity to examine the goods he may have been afforded."\(^{45}\) This, in effect, would impose a duty to inspect whenever possible. The Bill does not contain such a provision. The Commissions offered four reasons for their rejection of the common-law test: (1) it arose in a day of simple, unsophisticated goods and a smaller retail trade; (2) definition of "reasonable opportunity" would be prohibitively difficult; (3) "the private consumer would be less well protected than he is today"; and (4) commercial buyers

\(^{41}\) Report, supra note 5, at 14.

\(^{42}\) Bill clause 3 (new § 14(3)).

\(^{43}\) UNIFORM COMMERCIAL CODE § 2—316, Comment 8.

\(^{44}\) 1893 Act, § 14(2).

\(^{45}\) Report, supra note 5, at 17.
acting in accordance with the custom of their trade are not expected to examine even if an opportunity is afforded.\textsuperscript{46} These considerations, the Commissions felt, outweighed the value of eliminating the anomalous benefit granted the non-inspecting purchaser. Thus two reforms with an American flavor were rejected—restriction of application of the “fitness for particular purpose” provision and imposition of a duty to inspect.

(b) Condition of merchantable quality: This implied condition arises under the 1893 Act if the goods are sold by description by a dealer in goods of that description. No reliance on the seller’s skill or judgment need be shown.\textsuperscript{47} However, the proviso concerning inspection discussed above applies.\textsuperscript{48} To bring a sale unequivocally under the “by description” requirement of the 1893 Act a buyer need merely ask for an item by generic or trade name.\textsuperscript{49} Nevertheless, both the Molony Committee\textsuperscript{50} and the Law Commissions\textsuperscript{51} recommended that across-the-counter retail sales should be made specifically subject to the condition of merchantable quality. The Bill therefore extends the scope of this condition to include all sales in which the seller is acting “in the course of a business.”\textsuperscript{52} This reformulation has two major effects: (1) it broadens the class of sellers subject to a duty under § 14 to include any seller acting in the course of trade, whether or not he habitually sells goods of a given class, and (2) it broadens the class of buyers who can rely on the condition in that the condition can arise in all sales, not just consumer sales by description. Thus the new § 14(2) will be of wider applicability than its predecessor. Under the Bill the condition of merchantable quality can be excluded, in consumer sales, only when (1) the seller has brought defects specifically to the buyer’s notice, extinguishing the condition with regard to these defects,\textsuperscript{63} or (2) the buyer’s examination—if he chooses to examine—reveals defects or should reveal defects, again excluding the condition with regard only to those specific defects.\textsuperscript{64}

The central difficulty confronting the Law Commissions in drafting the new condition of merchantable quality was the definition of “merchantable quality” itself. The term is undefined in the 1893 Act, except for indication in § 62 that

\textsuperscript{46} Id.
\textsuperscript{47} ATIYAH, supra note 6, at 76.
\textsuperscript{48} For an example of a hasty inspection which negatived the implied condition of merchantable quality, see Thornett & Fehr v. Beers & Son, [1919] 1 K.B. 486, in which the buyer inspected only the outside of a consignment of barrels of glue even though the seller afforded opportunity to examine further.
\textsuperscript{49} Lowe, supra note 8, at 76.
\textsuperscript{50} Final Report of the Committee on Consumer Protection (Molony Committee), Cmnd. No. 1781, para. 441 (1962).
\textsuperscript{51} Report, supra note 5, at 16.
\textsuperscript{52} Bill clause 3 (new § 14(2)). The contrasting American treatment of the “by description” requirement is of interest. The requirement, as found in § 15(2) of the Uniform Sales Act, was often ignored by the courts when it would have limited applicability of § 15(2) to future or unascertained goods. (But see Kirk v. Stineway Drug Store Co., 38 Ill. App. 2d 327, 187 N.E.2d 307 (1963). The requirement was enforced, however, insofar as it required communication between buyer and seller describing the goods; without this communication the warranty of merchantability did not arise. Self-service sales were thus held not to be sales by description, and no implied warranty of merchantability was therefore ascribed to them. See, e.g., Esborg v. Bailey Drug Co., 61 Wash. 2d 341, 378 P.2d 298 (1963); Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955). Uniform Commercial Code § 2—314(1), of course, does not require that the sale be “by description.”
\textsuperscript{53} Bill clause 3 (new § 14(2) (a)).
\textsuperscript{54} Id. (new § 14(2) (b)).
"quality" of goods is to include their "state or condition." Numerous courts, abhorring the statutory vacuum, have advanced definitions of their own, chief among them the following:

(1) In *Bristol Tramways Carriage Co. v. Fiat Motors*,56 Lord Justice Farwell advanced the following definition:

The phrase in § 14 subsection (2) is, in my opinion, used as meaning that the article is of such quality and in such a condition that a reasonable man acting reasonably would, after a full examination, accept it under the circumstances of the case in preference of his offer to buy that article, whether he buys for his own use or to sell again.56

This "salability" definition separates purpose and merchantability. It has been criticized for not taking into account the state of the market, and the difficulty of applying a "reasonableness" standard. Moreover, it would allow goods with latent defects not revealed by a full examination to be classed as "merchantable."57

(2) Lord Farwell's definition was, however, adopted with amplification by Judge Dixon of the High Court of Australia in *Australian Knitting Mills, Ltd. v. Grant*.58 Judge Dixon held that, to be of merchantable quality, the goods

... should be in such an actual state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.59

(3) Lord Wright produced two definitions which seem to characterize merchantability in terms of fitness for ordinary purpose. In *Cammell Laird & Co. Ltd. v. The Manganese Bronze & Brass Co. Ltd.*,60 he suggested that "unmerchantable quality" means that "the goods in the form in which they were rendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description."61 In his speech in the Privy Council in the *Australian Knitting Mills* case Lord Wright proposed that an article is merchantable if it is normally meant for one particular use and is "fit for that use."62 These definitions have been criticized. In *Henry Kendall & Sons, Ltd. v. William Lillico & Sons, Ltd.*,63 four Law Lords pointed out that the Wright formulation makes no reference to price; a price reduction could conceivably persuade a buyer to purchase "unmerchantable" goods.64 In *Bartlett v. Sydney Marcus, Ltd.*,65 Lord Denning observed that there

---

55 [1910] 2 K.B. 831.
56 Id. at 841.
57 See Yates, supra note 10, at 61, and cases cited therein.
58 (1933) 50 C.L.R. 387.
59 Id. at 408.
61 Id. at 430.
64 But see Lord Reid's speech, id. at 79.
is a considerable territory where on the one hand you cannot say that the article is "of no use" at all, and on the other hand, cannot say that it is entirely "fit for use." The article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in a usable condition. It is then, I think, merchantable.

Under this argument, "merchantable quality" will depend to a large extent on the description of the goods. In Bartlett a car with a defective clutch had been sold as a "secondhand" car. Under that description and the above reasoning, Lord Denning found it merchantable. Further, under § 14(1) of the 1893 Act, as it has been judicially interpreted, fitness for purpose can include ordinary purpose. If the buyer fails to communicate his particular purpose, the ordinary purpose to which the goods are put will be implied. The resulting condition that the goods will be fit for ordinary purposes is coextensive with the condition of merchantable quality under Lord Wright's formulation, which implies fitness for the "purpose for which such goods would normally be used." The Law Commissions' response to this lack of definitional grace was quoted above in the discussion of the condition of fitness.

In the Kendall case Lords Guest, Pearce, and Wilberforce appeared to favor Lord Justice Farwell's definition as modified by Judge Dixon, but it might be noted that Lord Wright's definition wins if wigs are counted. It was favored by Judge Havers at first instance, three Lords Justices of Appeal, and, with certain changes, by two Lords of Appeal in Ordinary (Lord Morris of Borth-y-Gest and Lord Reid). All observations in the House of Lords were, however, dicta.

The Law Commissions, surveying the less than homophonic pronouncements found in the case law, resolved to supply a definition for inclusion in the Implied Terms Bill. The Working Party's recommendation, based on Lord Justice Farwell's test, was rejected as being unduly complicated. A new definition was formulated and, after minor modifications, now appears in the Bill:

After section 62(1) of the principal Act there shall be inserted the following subsection:

"(1A) 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 any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly."

The Commissions concluded:

It appears to us that the new formula has the advantage of being more in line with the text of Article 33(1)(d) of the Uniform Law on the Inter-

66 Id. at 1015.
68 Bill clause 7(2) (new § 62(1A)).
national Sale of Goods\(^69\) [than the tentative formulation] and with one of the minimum standards of merchantability laid down in section 2—314(2) (c) of the U.S. Uniform Commercial Code.\(^70\)

The Bill differs from the Code, however, in that it imposes a condition of merchantability—at least a modicum of merchantability—on goods described as "secondhand," "shop-soiled," or "seconds" (American: "as is" or "with all faults"), whereas the Code specifically exempts such goods from all implied warranties.\(^71\) In the view of the Commissions, even such goods "should measure up to some standard of fitness, and a seller who describes goods in such or similar terms should not be permitted to sell what is in effect useless rubbish."\(^72\)

The Bill's definition of merchantable quality is welcome. Merchantability and fitness are still symbiotically intertwined, but the relationship, thus exposed, should cause little difficulty. Problems might arise, however, when a buyer purchases goods for an unusual purpose which he does not communicate to the seller. If the goods prove unfit for his purpose, without outright misuse, he cannot assert that they were of unmerchantable quality as it is defined in terms of fitness for the "purpose or purposes for which goods of that kind are commonly bought." The condition of fitness for purpose is also of no avail, as he has not communicated his purpose to the seller and it will not be implied if it is "unusual." He must attempt to rely on § 13—congruence with description in a sale by description—but after Ashington Piggeries he may find that "description" and "quality" are two very different concepts.\(^73\)

The interrelationship of merchantability and fitness for purpose was exposed in Pritchard v. Liggett & Meyers Tobacco Co.\(^74\) in which the Third Circuit held that cigarettes which caused plaintiff's lung cancer might have been sold in breach of the implied warranty of merchantability. Pritchard echoes the "warranty of safety" cases, which implicated warranties in the sale of food and drink.\(^75\) A "purpose-oriented" definition of merchantability, however, might well have generated a different result. Most consumers do not (at least consciously) purchase cigarettes for the purpose of contracting lung cancer. Of course, the serious jurisprudential problem of paternalism lurks in the wings.\(^76\)

The linkage of merchantability with fitness for ordinary purpose is recogni-
tion of the close conceptual relationship between §§ 14(1) and (2) of the 1893 Act. Judge Diplock (as he then was) has said that they are "two sides of the same coin," yet, strictly speaking, purpose is irrelevant under § 14(2). Procedurally, §§ 14(1) and (2) have been treated as entirely separate. Obligations under them, the courts have held, are unrelated; breaches must be pleaded separately. A purchaser's case can fall between the sections and it will fail under each. Perhaps open recognition of the conceptual interdependence of the terms will result in greater protection under § 14.

III. Contracting Out of the Implied Terms
Imposed by the 1893 Act

A. Section 55

The terms implied by sections 12-15 of the 1893 Act "were intended to import into contracts for the sale of goods certain rules of fair dealing," and they have generally served the buyer's interests well. But whatever implied terms may arise in a given case are subordinated to the autonomy of the parties. Section 55 provides that any right, duty, or liability arising from a contract for sale by implication of law may be negatived or varied by express agreement, the course of dealing between the parties, or by usage.

Since the end of the First World War contractual erosion—or outright demolition—of the implied warranties has become disquietingly widespread in the United Kingdom. Exemption clauses are found most frequently in printed "boilerplate" contracts for the sale of major appliances or automobiles. These disclaimers can take several forms: (1) denial of the existence of any express or implied warranty; (2) limitation or liquidation of consequential damages; (3) limitation of the buyer's remedies in general; (4) attachment of (occasionally oppressive) conditions to the buyer's possible remedies, such as notice requirements; (5) imposition of a duty on the buyer to indemnify; and (6) inclusion of a statement to the effect that the buyer has assumed the risk of any defects.

Of course, such clauses can be used to exempt the seller from liability for negligence as well as breach of implied warranty. Frequently the British consumer is asked to sign a "manufacturer's guarantee" which limits or excludes the manufacturer's liability for negligence or breach of implied warranty in consideration of the supply of free replacement parts and labor for a specified time. The Law Commissions' Report and the Implied Terms Bill itself deal only with contractual exclusion or modification of the implied terms as between the parties to the sale. The problem of guarantees has been treated in the Commissions'...
Working Paper on exclusion of liability for negligence;\textsuperscript{82} further study is now under way.

The Molony Committee found that the principal criticism applicable to the law of sale of goods was

the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provisions in guarantee cards or other contractual documents.\textsuperscript{83}

The Law Commissions recognized that English law of today, no less than English law of 1893, subordinates marketplace “fair play” to the principle of contractual freedom. For example, it is an established principle of English contract interpretation that a signed document is prima facie conclusive as to the terms of the bargain; the buyer need not have understood, or even read, the document.\textsuperscript{84} The Law Commissions examined the problem of contractual evasion of the implied terms in sales of all types, principally consumer sales and business sales. The broad control of exemption clauses imposed by the Implied Terms Bill\textsuperscript{85} harmonized with the spirit of a long line of judicial attacks on disclaimers.

\textsuperscript{82} The Law Commission (Published Working Paper No. 39) and Scottish Law Commission (Memorandum No. 15), Provisional Proposals Relating to the Exclusion of Liability for Negligence in the Sale of Goods and Exemption Clauses in Contracts for the Supply of Services and other Contracts, 27 September 1971.

\textsuperscript{83} Cited in Report, \textit{supra} note 5, at 24.

\textsuperscript{84} \textit{L'Estrange} v. Graucob, [1934] 2 K.B. 394.

\textsuperscript{85} Clause 4: For section 55 of the principal Act ‘(exclusion of implied terms and conditions) there shall be substituted the following section:

\begin{enumerate}
\item Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract, but the foregoing provisions shall have effect subject to the following provisions of this section:
\item An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.
\item In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 12 of this Act shall be void.
\item In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.
\item In determining for the purposes of subsection (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters —
\begin{enumerate}
\item The strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;
\item whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;
\item whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
\item where the term exempts from all or any of the provisions of section 13, 14 or 15 of this Act if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
\item whether the goods were manufactured, processed, or adapted to the special order of the buyer.
\end{enumerate}
\item Subsection (5) above shall not prevent the court from holding, in accordance
B. Judicial Hostility to Exemption Clauses

"The attitude of the courts to these [exemption] clauses is clearly one of hostility," asserts one commentator, "and it is no exaggeration to say that any loophole will be seized upon if it enables justice to be done." It certainly appears that the principle of freedom of contract has suffered somewhat at the hands of the courts of the British welfare state and that the private consumer has gained thereby. No fewer than eight methods which can be employed to invalidate exemption clauses have been discerned. Although hardly a catalogue of "loopholes," some are at best legalistic; and one, the "doctrine" of fundamental breach, seems to be a conscious exercise in esotericism. The principal avenues of attack on exemption clauses have been:

(1) Legislation: The Hire-Purchase Act, 1938, enacted to supply some measure of protection for consumers faced with judicial refusal to alter the terms of their contracts, provided a precedent for the prohibition of clauses purporting to negative or modify the implied conditions. The Implied Terms Bill, of course, makes similar provision.

(2) Nonincorporation into the contract: The seller must show that the exemption clause was indeed a part of the contract, either by (a) showing that the buyer signed a contract including the clause, or (b) showing that the clause was brought to the buyer's notice. In Thornton v. Shoe Lane Parking, Ltd., where the defendant was found not to have done enough to include the clause in the contract, the rule was put rather starkly: the seller must do everything reasonable to make known not merely the existence, but also the nature of the conditions he is imposing.

(3) Fraud or misrepresentation: It appears from some dicta in L'Estrange
that an exemption clause will be struck down if agreement to it was obtained by fraud or misrepresentation.

(4) Strict construction: Generally, exemption clauses are construed contra proferentem. The courts will import strict legal meanings to any technical terms. Moreover, exemption clauses will not, as a principle of construction, be held to protect the seller from a fundamental breach of his obligation under the contract. Thus such a clause will not excuse a breach of the obligation to provide goods corresponding with their description or sample, in the appropriate circumstances, even if the goods are supplied with the words "with all faults."

(5) Complete failure to perform: The seller who has contracted to provide peas and instead supplies beans cannot rely on an exemption clause, no matter how broadly worded.

(6) Modification: In the face of an exemption clause courts have, on occasion, discovered a later express warranty or an earlier express warranty, usually parol, which is not excluded by the clause itself and forms a collateral binding agreement.

(7) Liability in tort: A manufacturer-defendant who is sued in tort by an aggrieved consumer cannot invoke an exemption clause, absent a collateral contract such as a "guarantee," because he was not privy to the contract of sale. As between parties, one cannot contract out of liability for wilful or fraudulent torts. Otherwise exemption clauses can be given effect, but the courts will be extraordinarily hostile.

(8) Fundamental breach: The doctrine of fundamental breach seems to have evolved from the rules regarding deviation cases in Admiralty law and the rule in Gibaud v. Great Eastern Ry. Co. These authorities declared that a breach of condition gives a right to treat a contract as ended, after which, the contract being broken, any exemptions provided by it are void. Such a principle rested on the concept of a fundamental obligation, the breach of which could not be excused by an exemption clause. The principle of "fundamental breach" was sharpened in the course of three decisions by Judge Devlin (as he then was) and in Karsales (Harrow), Ltd. v. Wallis Lord Justice Denning

---

92 [1934] 2 K.B. 394.
97 See Attyah, supra note 6, at 120.
98 Id. See, contra, Uniform Commercial Code § 2—316.
103 [1945], K.B. 189. See also the Law Commission, supra note 82.
105 [1921] 2 K.B. 426.
106 See the Law Commission, supra note 82, at 89 et seq.
(as he then was) crystallized what had already become a rule of law, at least in the Court of Appeal, by holding that "a breach which goes to the root of the contract disentitles that party from relying on the exempting clause."  

The House of Lords, however, cut this line of development short in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale.* Their Lordships held that there exists no rule of law under which an exemption clause is automatically nullified by a fundamental breach of contract or breach of a fundamental term, but the issue is in each case a matter of construction. If a breach occurs which entitles the innocent party to repudiate the contract but he elects to affirm it, the exemption clause continues in force unless, on the true construction of the contract, the clause is not intended either to apply to or continue after the breach, in which case the party in breach cannot rely on the clause. Their Lordships were thus unwilling to assume that a wily draftsman could not produce an exemption clause which could apply to cases of fundamental breach.

The doctrine as modified by *Suisse Atlantique* was subsequently applied in two cases in the Court of Appeal (the influence of *Suisse Atlantique*, it might be noted, appears to have been rather slight) the redoubtable Lord Denning, Master of the Rolls, again striking down exemption clauses. In the *Harbutt's* case the innocent party had purported to affirm the contract after breach but was told that there was no contract left to affirm. Moreover, even when the innocent party affirms, the court declared, an exemption clause might still be struck down. In *Farnworth*, in which a hire-purchaser's motorcycle contained several defects, the courts held that, taken in the aggregate, the defects constituted a fundamental breach of contract and disabled the defendant from reliance on the exemption clauses.  

The present state of the law relating to fundamental breach is unclear. It seems that a distinction ought to be made between breaches which completely destroy the basis of agreement, automatically nullifying exemption clauses designed to protect against them, and less serious breaches which still enable the aggrieved party to repudiate the contract, in which case exemption clauses will be given effect if, as a matter of construction, they express the intent of the

---

109 *Id.* at 940.
111 *Suisse Atlantique* thus limits, in greater or lesser measure, most of the cases on fundamental breach which preceded it, including those above cited and, *inter alia*, Charterhouse Credit Co., Ltd. v. Tolly, [1963] 2 Q.B. 683; Astley Industrial Trust, Ltd. v. Grimley, [1963] 2 All E.R. 33; Yeoman Credit, Ltd. v. Aps, [1962] 2 Q.B. 508.
113 As early as Pollock & Co. v. Macrae, 1922 S.C. 192 (H.L.), Scots law recognized that "total breach" could result from a "congeries of defects." *See* The Law Commission, *supra* note 82, at 83.
114 *See* Attyah, *supra* note 6, at 121: "... it cannot be said that this is an area which has been well illuminated by recent decisions." *See also* Guest, *Fundamental Breach of Contract*, 77 L.Q.R. 98 (1961); Reynolds, *Warranty, Condition and Fundamental Term*, 79 L.Q.R. 534 (1963).
parties at the time of the contract. But this distinction overlooks a difficulty with cases in the first category. In these cases the fundamental breach is said to nullify the exemption clauses by bringing the contract to a complete end, but under general contract theory breach operates only to terminate the contract for the future and "does not disentitle the parties from relying on clauses (e.g., an arbitration clause) in relation to events occurring before termination." Exemption clauses will obviously apply to events occurring before the contract is terminated. If *Suisse Atlantique* is read narrowly this problem does not arise, but the decisions in *Harbuttt’s* and *Farnworth* do not appear to circumvent it. Moreover, *Suisse Atlantique* seems to recognize a difference between breach of fundamental terms, which constitutes a fundamental breach even if the consequences are trivial (e.g., if a minor term has been agreed upon as "fundamental" by the parties), and fundamental breach of contract (which might consist of the breach of nonfundamental terms, or an aggregation of them), which is adjudged "fundamental" because its consequences are grave.

This distinction having been drawn, it would be sensible to allow exemption clauses to protect against relatively minor breaches. The focus in the cases, after all, is on the consequences of the breach. The rule of construction in *Suisse Atlantique* is predicated on the assumption that the parties did not intend exemption clauses to excuse catastrophic breach, and the rule of law in *Karsales* prescribes that exemption clauses cannot survive once the consequences of the breach become severe enough. Yet the balance point between judicial abhorrence of a breaching party’s successful invocation of a clause completely excusing him from liability and judicial refusal to violate the autonomy of the parties is still to be found. The Implied Terms Bill alleviates the problem completely in sales to private consumers, but in business sales the problem could very well remain alive.

The point of the doctrine of fundamental breach is simply "to require the party who seeks protection to make clear the extent of the protection he is seeking." When he has done so it will be a matter for judicial determination whether, under the Implied Terms Bill, a commercial party’s reliance on the exemption clause will be "fair or reasonable" in "all the circumstances of the case." Presumably this criterion leaves room for the continued application of the principle of fundamental breach.

American courts have shown a similar hostility towards exemption clauses,

---

117 The Law Commissions, *supra* note 82, at 98.
118 *See Atiyah, supra* note 6, at 122.
119 *Id.* at 123-24.
120 Bill clause 4 (new § 55(4), (5)).
121 *Id.* (new § 55(5)).
122 In clause 4 the Bill suggests as one of the factors to be considered in deciding whether reliance on a clause exempting from §§ 13-15 is reasonable, "whether it was reasonable at the time of the contract to expect that compliance with that condition [which, on non-compliance, triggers the exemption clause] would be practicable." (Emphasis added.) The limitation of the time frame to the time of the contract harmonizes with *Suisse Atlantique*’s emphasis on the constructional aspect of the problem.
although their range of inventiveness in striking them down is somewhat more restricted. In general, they have either construed them away or found that they were not adequately communicated to the other party. It is apparent that complete failure to perform, "total breach," or failure of consideration will not be excused by a disclaimer—the English "peas and beans" scenario.\textsuperscript{4} In some cases, disclaimers have been struck down because they were made before the contract was completed.\textsuperscript{125} Further, the disclaimer must be brought home to the purchaser.\textsuperscript{128} Disclaimers were often held not to apply to the implied warranties under the Uniform Sales Act or their common-law counterparts.\textsuperscript{127} As did the English courts, some American jurisdictions have refused to allow exemption clauses to affect the primary obligation to provide a product meeting its description.\textsuperscript{128}

Disclaimers are largely ineffective if strict liability is applied. In 1922 the rule was announced that a manufacturer could not insulate himself from liability in a strict liability environment by means of an exemption clause because, if warranties do not run with the goods, neither can disclaimers.\textsuperscript{129} Reliance on a contractual provision (with the exception of clauses indicating that the buyer has assumed the risk of damage) in the face of strict liability is generally useless. The development of the judicial attitude toward exemption clauses is outlined at length in \textit{Henningsen v. Bloomfield Motors, Inc.}\textsuperscript{130} Henningsen's invalidation of both the manufacturer's\textsuperscript{121} and retailer's\textsuperscript{132} disclaimers spawned a number of decisions imposing strict liability and invalidating exemption clauses, either as elements of contracts of adhesion violative of public policy or as unconscionable because of the possibility of unfair surprise.\textsuperscript{133}

A party wishing to exempt himself from liability for breach of implied warranties may still find statutory shelter. Section 71 of the Uniform Sales Act sanctioned sellers’ exemption clauses which disclaimed the existence of a warranty, limited it to particular defects or consequences, or restricted the buyers'
remedies to replacement, repair, return of the price, and the like. This provision was of course patterned after § 55 of the 1893 Act. Section 2-316 of the Uniform Commercial Code, while providing a measure of protection for the buyer against surprise, nevertheless permits contractual abridgement of the implied warranties in consumer sales.

Thus, before the Implied Terms Bill, the British statutory attitude towards exemption clauses was more permissive than the American, but the English courts had established a rigorous obstacle course for each disclaimer to negotiate if it was to be upheld. Still, one British commentator observed that "[i]t is, nevertheless, clear that the power of the courts to protect consumers and other buyers against oppressive exemption clauses is severely limited" in the face of prima facie statutory acceptance.

IV. The Comparative Products Liability Environments

It is at this point, the theme having been sounded, that the transatlantic variations begin. American courts have hastened, molto allegro, into the areas of strict liability and unconscionability, invalidating exemption clauses as they go. The British, on the other hand, have proceeded lento maestoso to remove a difficulty inherent in the time-honored structure of contractual liability. American jurisdictions have rushed by the ailing conceptual framework of warranty, which was hobbled by exemption clauses and privity requirements; the British while reluctant to disturb privity's senescent slumber have—as an interim measure, at least—provided the individual consumer statutory protection against disclaimers which his American cousin does not enjoy.

134 § 2-316. Exclusion or Modification of Warranties.

(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;

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (§§ 2-718 and 2-719).

135 See generally Hawkland, Limitation of Warranty Under the Uniform Commercial Code, 11 How. L. J. 28 (1965). The buyer is further handicapped by the fact that "merchantability" is a term of art and not a term of common understanding. See Shanker, Strict Tort Theory of Products Liability and the U.C.C., 17 Western Reserve L. Rev. 5, 43 (1965). It might be argued that, even with the restrictions on limitation of damages imposed by §§ 2—718 and 2—719, the situation can only work against the average consumer. Perhaps, however, § 2—316 could be seen as subject to the Code provisions relating to good faith (§ 1—203) and unconscionability (§ 2—302). See Shanker, supra.

136 Atiyah, supra note 6, at 130.
A. The Scope of the Implied Terms Bill’s Limitation of Exemption Clauses

The Molony Committee was disturbed by the widespread employment of exemption clauses, finding that the average consumer seldom understood their import and, when he did, often had little choice in accepting the clauses if he wanted to obtain the goods. They thus recommended legislation declaring most such clauses to be of no effect. Subsequent pressure from the Consumer Council and consumers’ action groups, as well as some traders, resulted in an apparent decrease in the frequency of wide exemption clauses in the automobile and electric-appliance trades. The Law Commissions’ Working Party, once established, began to take evidence on the employment and effect of exemption clauses, but found the task rather difficult: retailers seldom attempt to exclude their liability by a direct clause in their contract of sale with purchasers. “That is usually done indirectly by limiting the buyer’s rights, or leading the buyer to believe that his rights are limited to those to which he is entitled under the manufacturer’s guarantee.” Moreover, consumers seldom go to law to assert their rights and consequently “many situations remain untested by judicial decisions.”

The Law Commissions’ Working Party found itself in agreement with the Molony Committee’s main proposal that in sales to private consumers any exclusion of the statutory conditions and warranties should be void. It considered and rejected one proposal which would have allowed limitation of consequential damages and another which would have imposed a “reasonable reliance” test for all exemption clauses; and it decided that the prohibition on contracting out should be “absolute and unqualified.” It was so recommended, with regard to consumer sales, by the Law Commissions in their report. The Commissions also entertained the possibility of extending the class of those protected by the recommended prohibition to include “consumers” other than private purchasers. It was argued that in some cases a prohibition on disclaimers would be desirable in business sales, especially where the buyer, even though a “trade buyer,” does not enjoy a rough parity in bargaining position with the seller.

Clause 4 (new § 55(7)) of the Bill defines a “consumer sale,” to which an absolute ban on contracting out of §§ 12-15 applies, as

a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods—

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

137 Molony Committee, supra note 50, paras. 431-435.
138 Id. para. 445.
139 REPORT, supra note 5, at 26.
140 Id. at 27.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id. at 30.
The burden of proving that a sale is not a consumer sale is placed on the party so contending.146

Prohibition of exemption clauses in consumer sales contracts only, of course, puts the retailer at risk. He may have accepted goods under an exemption clause imposed by his supplier. Consequently, he cannot protect himself vis-à-vis the consumer and he is precluded by the clause imposed upon him from passing liability back to the party at fault.

Evidence presented to the Working Party revealed widespread use of exemption clauses in contracts for the sale of aircraft, computers, and complex machinery, and in sales of goods intended to be resold (e.g., automobiles); but "certain organisations representing large enterprises of the retail trade have pointed out that it happened but rarely that exemption clauses were imposed upon their members."147 Moreover, "[t]he evidence disclosed only a very small number of cases where unfairness or injustice resulted from these clauses."148

There was, on the other hand, considerable anxiety in the Commissions over the position of retailers under a prohibition of exemption clauses on the private consumer level, and the position stabilized with the Commissioners evenly divided as to the desirability of general control of exemption clauses in business sales.149 It was the sense of the Commissions that, if control were to be imposed, it should take the form of a "reasonableness" test,150 that is, an exemption clause will be invalidated insofar as it can be shown that, in the circumstances of the case, it would not be fair or reasonable to allow reliance on the clause.

This formulation was derived from § 3 of the Misrepresentation Act, 1967.151 It was supported by five major arguments:

1. "It would be morally and socially unjustifiable to reform the law at the expense of a single section of the trading community,"152 i.e., retailers. England, after all, is still a nation of relatively small-scale shopkeepers, who are not entirely capable of protecting themselves from an imposition of heavy liability.

2. The cost of products liability insurance bought by retailers, if generally available, would be passed on to the consuming public. "It would be more convenient and cheaper for insurance of this type to be carried by the manu-

146 Bill clause 4 (new § 55(8)).
147 Id. at 35.
148 Id.
149 Id. at 39.
150 Id.
151 C. 7. The section is as follows:
(3) If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict—
(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a mis-
representation;
that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.
The Bill places the burden of proving that reliance is unfair or unreasonable on the party challenging the exemption clause.
152 Report, supra note 5, at 41.
facturer who even now often insures against certain types of claims by consumers.153

(3) The reasonableness test involved no "revolutionary innovation":

In a number of states of the United States of America the courts, in addition to the technique of adverse construction of exemption clauses, have developed powers of striking down such clauses by reference to considerations of public policy. Moreover, under section 2-302 of the U.S. Uniform Commercial Code, the courts in those jurisdictions which have adopted the section have statutory power to strike down exemption clauses on the ground of unconscionability. All the available information154 tends to show that this provision has not led to the chaos and uncertainty which some commentators predicted. The argument about uncertainty which is the mainstay of the opposition encountered in our own consultation is greatly exaggerated.155

This reasoning is indicative of the second stage of Anglo-American cross-fertilization relating to the sale of goods. As noted above, the Sale of Goods Act, 1893 was the model for the Uniform Sales Act. Today the Law Commissions are carefully observing the operation of the Uniform Commercial Code. The Implied Terms Bill's "fair and reasonable" test represents a step towards vesting greater discretionary power in the courts. It is by no means certain that this foothold will be widened into a general unconscionability doctrine, but the eyes of the Commissions and the English courts are on the American experience.

(4) It would be inconsistent to forbid the contracting out of liability for misrepresentation, as does the Misrepresentation Act, 1967, without imposing a similar prohibition on exemption from the implied terms of the 1893 Act.

(5) Imposition of a general reasonableness test would "go a long way towards bridging the gap created by the recent demotion of the doctrine [of fundamental breach] from a rule of law to a question of construction,"156 i.e., by the Suisse Atlantique case.

The Bill at its first reading in the House of Lords contained the general reasonableness test, supplemented by two guidelines intended to reduce the uncertainty surrounding the "fair and reasonable" criterion: (1) regard should be had to the buyer's knowledge, actual or constructive, of the exemption clause and (2) availability of alternative sources of supply should be considered.157

The Bill emerged from the report stage in the House of Lords with a few minor changes and one fairly substantial alteration—inclusion of further guidelines for adjudging what constitutes "fair or reasonable" reliance. Potentially most important of these is the provision calling for the court's consideration of whether it was reasonable at the time of the contract to expect that a condition, with which noncompliance is to trigger exemption from §§ 13-15, could be practically met. This test limits examination of the contractual situation to the

153 Id. at 41-42.
154 This information included a study of § 2—302 written by the Working Party and included as Appendix C to the Working Paper, supra note 67.
155 Report, supra note 5, at 42.
156 Id.
time of contracting. The report had recommended a broader frame of reference, suggesting that

where the provision excludes or restricts liability unless certain conditions are complied with (for example, claiming within a prescribed time), [the query should be] whether it was, in the events that have occurred, reasonably practicable to comply with those conditions. . . . (Emphasis added.)

It is submitted that the above recommendation would have been more welcome to small-business buyers than the clause as finally drafted, in view of the restrictive interpretation of "fundamental breach" announced in Suisse Atlantique. It is important, however, to remember that the guidelines in the Bill are suggestions only, intended to point towards the relevant issues. The limitation of the inquiry to reasonableness at the time of contracting is thus not binding on a court.

B. Privity of Contract

It is evident that any attempt to ensure the protection of the terms implied by the 1893 Act into a contract for sale depends on the existence of a contract for sale. Consequently, the attempt to impose liability for defective products in a contractual environment will be bound in by the fence of privity. In the United Kingdom this fence is considerably sturdier and encircles less ground than in the United States. It may well be that the stringent British privity requirement owes much to the disastrous misinterpretations of Winterbottom v. Wright exposed by Bohlen in 1905 and recognized in the leading case of Donoghue v. Stevenson and the fence has been breached on occasion since; but unless a prospective plaintiff can squeeze through the breaches or wriggle through the slats, he is trapped. Thus the final consumer of goods bought by another cannot sue the seller for breach of implied condition, and, mutatis mutandis, one who buys from a retailer cannot sue the wholesaler or manufacturer on the same grounds. The fence encloses only the immediate parties to the sale.

The Law Commissions' Working Party considered various "anomalies" which would result in hardship by imposition of the privity requirement. A man who takes a woman out to dinner, for example, paying the bill, can recover for food poisoning he suffers as a result; but the woman cannot if the restaurant had exercised reasonable care (thus barring her tort claim). Similarly, if a boy buys a toy which injures him, he can recover from the seller under § 14 of

---

158 Report, supra note 5, at 44.
159 The test under the Uniform Commercial Code § 2—302, is whether the agreement is unconscionable at the time of contract.
164 Buckley v. LaReserve, [1959] C.L.Y. 1330. But see Lockett v. A. M. Charles, Ltd., [1938] 4 All E.R. 170, in which the concept of "contractual relationship" was broadened somewhat to allow the woman's recovery in a similar situation.
the 1893 Act, which imposes strict liability; but if his father had bought the toy for him, the boy would have only a claim in negligence.\textsuperscript{165}

An end-consumer can reach the manufacturer by means of a claim in negligence\textsuperscript{166} (occasionally involving res ipsa loquitur). He can also obtain the equivalent of imposition of strict liability by engaging in third- or fourth-party proceedings,\textsuperscript{167} based on infractions of implied warranties (a long and cumbersome process), or he can rely on the existence of a collateral contract which includes an express assurance of quality from the manufacturer.\textsuperscript{168} These alternatives involve serious difficulties for a prospective plaintiff.

The Commissions noted that “the law’s strict observance of the boundaries between the fields of contractual and delictual liability can and does lead to anomalies and hardships in individual cases.”\textsuperscript{169} The Working Party had recommended a rather revolutionary reform, proposing that

in consumer sales the benefit of the seller’s obligations under §§ 12-15 of the Sale of Goods Act 1893 should be extended to anyone who may reasonably be expected to use, consume, or be affected by the goods.\textsuperscript{170}

Such a remedy, it may be observed, would impose strict liability on retailers for breach of implied warranty at the suit of certain users not in privity. These users would not be forced to establish negligence. Again the Law Commissions turned to the American experience, noting that “[t]here are important lines of decisions in a number of states . . . giving extended rights to users of goods” and that the theory of recovery in such cases is unclear as between contract, tort or a sui generis remedy.\textsuperscript{171} Section 2—318 of the Uniform Commercial Code (1962 Official Text)\textsuperscript{172} was scrutinized, apparently with some favor, as it treats the rights of end-consumers as extended contractual rights and the Commissions desired to remain in the contractual context if possible.\textsuperscript{173}

Predictably, English consumer groups supported an extension of the seller's
obligation; insurers expressed reservations about the effect of placing a heavier burden on retailers. The central issues, however, were the nature of the liability in products liability cases and the shape of the most desirable remedy. Inevitably, the dead forms of action made themselves felt. The conditions implied by the 1893 Act are contractual creatures, unable to slip through the slats in the fence of privity. In contrast, the task of shaping the American consumer’s remedies has been eased by progressive relaxations of strict privity doctrine.

As early as 1852 an American court announced that a warranty of quality can be imposed by law and does not depend on a contractual relationship. Gradually breach of warranty regained much of its original delictual nature. With the advent of strict liability for defective products and the extension of implied warranties beyond the areas of food and drink, American jurisprudence presided over a marriage of strict liability and warranty theory. It was, however, not a particularly harmonious match. Problems arose with exemption clauses, the reasonable notice requirement under U.C.G. § 2—607(3), and wrongful death actions. The “illusory contract mask” still worn by warranty imported various privity-related problems, including the issue of “reliance” on the warranty on the part of one ignorant of the manufacturer’s identity and the definitions of “buyer” and “seller” under the Uniform Sales Act §§ 12-16 and Uniform Commercial Code § 2—318. The mask seems to have been torn away by a series of decisions imposing strict liability for defective products, regardless of warranty, following § 402A of the Restatement (Second) of Torts. The basis of liability is tort, but the fault principle has been displaced by strict liability. The necessity of the step into strict liability, in view of the possibility of a “liberal” reading of the Uniform Commercial Code, has been questioned, as has been the abandonment of the fault principle in holding manufacturers liable. Moreover, practical problems have arisen in the implementation of the strict liability principle.


177 Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Colum. L. Rev. 335 (1924).


179 Prosser, supra note 174, at 1134.


183 Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products —
Strict liability is not absolute liability, and the boundary beyond which a manufacturer can escape it is still fluid. Moreover, products can be improved almost to the point of functional perfection but at a cost which neither consumer nor manufacturer can bear. "Should the economic feasibility of improving a product constitute the outer limit of liability?" A strict liability rule without the privity requirement may in many cases result in liability by economics: the party who can pays, regardless of his fault either vis-à-vis his codefendants or in the absolute sense. His only fault is wealth. If he is the manufacturer, of course, he may be in a better position to distribute the risk of liability (i.e., by raising the price), but the cost of his protection is passed on to the public at large.

In this respect privity provides an insurance policy. "Properly understood, privity is only a means of protecting a party guilty of a breach against losses suffered by remote parties which are unanticipated and therefore not included in the calculation of costs." The duty to provide goods of a certain quality, however, has been imposed by operation of law as a matter of policy and does not arise merely ex contractu; it springs from the nature of the supplier's business. Perhaps there is some vitality in the theory of the old action on Case for breach of warranty—the manufacturer, by holding his product out to the public, warrants its quality to the public at large. His liability thus arises in Case and should not be governed by Assumpsit procedure.

The Implied Terms Bill represents a realization that the right of the parties to alter contractually the duty of quality—the expression of the principle of supremacy of party autonomy—must give way at least between those parties to the overriding duty to provide a fit and merchantable product. The next step in the diminution of the importance of the contractual aspect of products liability is extension of benefit under this duty to third parties. The Commissions, although sympathetic to the possibility, deferred action pending further study:

the majority [of those polled on the issue] advised against introducing a fundamental change in the law by a side wind and urged upon us the need for further intensive studies of the whole range of contractual and delictual problems involved in reforming the law relating to products liability. As however the results of the consultation have confirmed our view that the extension of the seller's liability to certain third parties is a live issue, we hope that as soon as practicable products liability in all its legal implications will be made a subject of a separate study.

Such further study might well concentrate on the provision, ubi jus, of a remedy
for the aggrieved end-consumer, rather than focusing overmuch on the technical theory of recovery. If there indeed is a right for the third-party end-consumer, it is extracontractual; if it is extracontractual, it does not depend upon privity.

Should we as lawyers not open our minds to the possibility that the doctrine of privity of contract, so beloved of the common law, is a distorting factor in the law of consumer protection and that the contractual relationship which exists between buyer and seller . . . is a less important element than the present structure of the law makes it out to be?189

To this end a new Products Liability Working Party has been established, under the chairmanship of Aubrey L. Diamond. The Lord High Chancellor's Terms of Reference for the Working Party are as follows:

To consider whether the existing law governing compensation for personal injury, damage to property or any other loss caused by defective products is adequate and to recommend what improvements, if any, in the law are needed to ensure that additional remedies are provided and against whom such remedies should be made available.190

IV. Conclusion

The Implied Terms Bill is a limited step towards the creation of a products liability climate which will be more congenial to the British consumer. In conjunction with the Bill, the Commissions' Working Paper on exclusion of liability for negligence has made concrete proposals for prohibiting or controlling disclaimers of negligence liability, and a Report is awaited.

Even under the Bill, however, a seller can still show that the buyer has not relied on his skill or judgment, or that the goods were merchantable if defects were drawn to the attention of the buyer. In such cases, recovery in tort, if possible, is appropriate.

It would be erroneous to conclude that because the Implied Terms Bill speaks to the buyer-seller contractual relation, further development of products liability theory in Britain will be limited to the frame of reference of warranty. Work proceeds apace on several fronts towards the fashioning of a single, unitary remedy. It is conceivable that the American experience may be of some assistance in this regard. Surely, although the transatlantic variations on the theme of products liability differ melodically, they share the same key.191

Robert J. Wittebort, Jr.

190 Unpublished communication to the Law Societies.
191 After this note was written, the Supply of Goods (Implied Terms) Bill was passed by the House of Commons. Royal Assent was granted on April 18, 1973, and the Act came into force on May 18, 1973. All references to the clauses of the Bill may, therefore, be taken as applying to the corresponding sections of the Supply of Goods (Implied Terms) Act 1973 (c. 13). See Ryan, Supply of Goods (Implied Terms) Act 1973, 117 Sol. J. 363 (1973).