# PRODUCTS LIABILITY IN AUSTRALIA

by

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## *Introduction*

The concept of products liability has yet to acquire familiarity in legal terminology. However, the notion and its legal implications are very familiar to American lawyers.[1] It can be said that, in that country, the law of products liability is gradually delimiting its own area, as with the law in other well-known spheres. It is advocated that the law of products liability should now be freed from being governed by its parent laws, *viz.* sale of goods, contract, tort and crime. In Britain,[2] the Law Commission[3] in its report, *Liability for Defective Products*[4] recommended radical reforms to redress the plight of the consumer at the hands of the manufacturer. The Law Commission recommended imposition of strict liability upon manufacturers for causing personal injuries to consumers including non-purchasers, arising out of the use of defective[5] goods. The *Unfair Contract Terms Act*, 1977 (U.K.) provides for the abolition of the freedom of manufacturers to take shelter under their 'guarantees'[6] (which usually accompany goods before reaching consumers) with a view to avoiding their liability in negligence for loss or

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1 Numerous articles have been written on the law of products liability in America. Important contributions in American journals are: W. L. Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)', (1960) 69 *Yale L.J.* 1100 and 'The Fall of the Citadel (Strict Liability to the Consumer)', (1966) 50 *Minn. L.R.* 791; R. A. Kessler, 'Products Liability' (1967) 76 *Yale L.J.* 887; R. J. Traynor, 'The Ways and Meanings of Defective Products and Strict Liability', (1965) 32 *Tenn. L.R.* 363. Contributions in the English periodicals on the law in the United States are: R. S. Pasley, 'The Protection of the Purchaser and Consumer under the law of the USA', (1969) 32 *M.L.R.* 241; Legh-Jones, 'Products Liability: Consumer Protection in America', (1969) *C.L.J.* 54; S. M. Waddams, 'The Strict Liability of Suppliers of Goods', (1974) 37 *M.L.R.* 154.

2 For the position of the law of products liability in the U.K., see C. J. Miller and P. A. Lovell, *Products Liability,* (1977) P. S. Atiyah, Sale of Goods, (5th Ed. 1975) Ch. 13, J. A. Jolowicz, 'The Protection of the Consumer and Purchaser of Goods under English Law', (1969) 32 *M.L.R.* 1. For a comparative study of Anglo-American Law, see R. M. S. Gibson, 'Products liability in the United States and England: The Difference and Why', (1974) 3 *Anglo-Am. L.R.* 493; S. M. Waddams, 'Strict Liability Warranties and the Sale of Goods', (1969) 19 *U. Tor. L.J.* 157; J. A. Tobin, 'Products Liability: A United States Commonwealth Comparative Study', (1969) 3 *N.Z.U.L.R.* 377; H. Teff, 'Products Liability in the Pharmaceutical Industry at Common Law', (1974) 20 *McGill* L.J. 102.

3 The Law Commission No. 82 and The Scottish Law Commission No. 45.

4 Cmnd. 6831 (1977).

5 The Law Commission recommended 'that the essence of the definition of "defect" should be the lack of safety'. See Ibid, note 4, para 47.

6 See *Infra* 57.

damage arising from the use of defective goods.[7] In Australia,[8] a new era of consumer protection has begun with the amendment of the *Trade Practices Act*, 1974 (Cth), imposing direct liability upon manufacturers to consumers, compensating loss or damage suffered by the latter.[9] There is no unanimous agreement regarding the proper scope of the law of products liability relating to manufacturers,[10] wholesalers, distributors and retailers for causing personal injury to, or damage to property of, or economic loss to consumers as a result of the use of defective products. As the movement of consumer protection is of recent origin in Australia, it is not yet clear as to who should be included in the category of consumers. Although, generally, the relevant statutes still restrict the remedies available to a consumer to a purchaser of goods alone, a few statutes[11] have extended their remedies to a person deriving title to the goods from the purchaser. But no statute has yet ventured to make those remedies available to the members of the family of a purchaser of goods or to any user (*e.g.* his guests), not to speak of compensating a bystander injured by a defective product.

Before the *Sale of Goods Act*, 1893 was passed, the doctrine of *caveat emptor* reigned supreme during the heyday of *laissez faire*, making the position of the buyer of goods vulnerable. An important qualification to that doctrine was made by the provision of some notable implied conditions in that Act, *e.g.*, fitness for a particular purpose[12] and merchantable quality[13] of the goods sold. Although these conditions could have been looked upon as an important charter of buyers' rights, they were myths in the sense that these rights could be taken away from buyers by

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7 S. 5.

8 For the position of law in Australia, see J. G. Fleming, *Law of Torts*, (5th ed., 1977), Ch. 23; J. Goldring and J. E. Richardson, 'Liability of Manufacturers for Defective Goods'; (1977) 51 *A.L.J.* 127; D. J. Harland, 'Products Liability and International Trade Law' (1977) 8 *Sydney L.R.* 358; D. J. Harland, 'Product Liability: The Proposed Commonwealth Legislation' (1978) 52 *L.I.J.* 231. For the law of products liability in New Zealand, where personal injury or death due to accident is compensated from state fund, see G. Palmer, 'Dangerous Products and the Consumer in New Zealand' [1975] *N.Z.L.J.* 366; D. R. Harris, 'Accident Compensation in New Zealand: A Comprehensive Insurance System', (1974) 37 *M.L.R.* 361. For the law in this field in Canada, see S. M. Waddams, *Products Liability* (1974).

9 *Trade Practices Amendment Act*, 1978, assented to and commenced 6 December, 1978. A new Division 2A has been added to Part V of the principal Act.

10 The U.K. Law Commission in its report (ibid, n. 4) has used the term 'producers'.

11 See definition of a consumer in the *Manufacturers Warranties Act*, 1974 (S.A.) s. 3 (1); see also the *Trade Practices Act*, 1974-78, (Cth), s. 74 (D)., *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (ACT), s. 3 (3) (b).

12 S. 14 (1). For similar provisions see *Trade Practices Act* 1974-8, (Cth), s. 71 (2); *Sale of Goods Act* 1923 (NSW) s. 19 (i).

13 S. 14 (2). For similar provisions see *Trade Practices Act*, 1974-78 (Cth), s. 71 (1); *Sale of Goods Act*, 1923 (NSW), s. 19 (2). For definition of 'merchantable quality' see *Sale of Goods Act*, 1893 (UK), s. 62 (1A); *Trade Practices Act*, 1974-8 (Cth), s. 66 (2), *Sale of Goods Act*, 1923 (NSW), s. 64 (3); *Manufacturers Warranties Act* 1974, (SA), s. 4 (2); *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (ACT), s. 4 (g).

the provision of suitable exemption clauses inserted in contracts by shrewd sellers.

*Rights of the Purchaser Against the Seller*

In Australia, the *Sale of Goods Acts* were passed in different States on the model of the English *Sale of Goods Act,* 1893. The *Sale of Goods Acts* were passed in order to regulate the commercial transactions between men of commerce who were in a position to bargain with each other on an equal footing. It was not surprising, therefore, that sellers were permitted to exclude liability implied under these Acts by inserting suitable exemption clauses in their contracts with buyers. Since the wide use of standard form contracts[14] incorporating wide exemption clauses, consumers' rights were reduced to a sham, being thrown upon the mercy of sellers who were sometimes giant corporations selling their merchandise nationally and internationally. The utter helplessness of the present day consumer faced with such contracts was picturesquely stated by Lord Reid in the *Suisse Atlantique* case in these words:

> 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. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

His Lordship further stated:

> This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament.[15]

It took eighty years to recognise that a consumer could not take advantage of the buyer's rights in the Sale of Goods Acts as against an unscrupulous seller. In 1973, in the U.K., the *Supply of Goods (Implied Terms) Act* made the purported exclusion of implied terms under the *Sale of Goods Act* void,[16] provided that the sale of goods was a 'consumer sale'.[17] In Australia, the States of South Australia and N.S.W. have passed similar legislation.[18] The Commonwealth *Trade Practices Act,* 1974-8, similarly avoids exclusion clauses in consumer sales.[19] A

14 See H. B. Sales, 'Standard Form Contracts', (1953) 16 *M.L.R.* 318; Second Report on Exemption Clauses (1975), paras 151-157.

15 [1967] 1 A.C. 361, at p. 406.

16 S. 55 (4).

17 S. 55 (7) defines a 'consumer sale' 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. Also see the *Trade Practices Act,* 1974-78 (Cth), s. 4B.

18 *Consumer Transactions Act,* 1972 (SA), s. 10; *Sale of Goods Act,* 1923 (N.S.W.), s. 64 (1).

19 S. 68.

long-standing grievance of consumers was thereby removed, as such clauses were always traps for unwary purchasers. The *Unfair Contract Terms Act*, 1977 (U.K.) provides that as against a person 'dealing as consumer'[20] liability for breach of the obligations arising from seller's implied undertakings as to conformity of goods with description or sample or as to their quality or fitness for a particular purpose cannot be excluded or restricted by reference to any contract.[21]

One of the reasons why the basis of the doctrine of fundamental breach resting on a rule of law was rejected in *Suisse Atlantique* in favour of a rule of construction, was that in its application, the doctrine made no difference in consumer and commercial transactions. In that case, which involved carriage of coal from Europe to America under a voyage charter party between men of commerce, who could be expected to bargain with each other at arm's length, the House of Lords ruled that the doctrine should rest on a rule of construction. Lord Reid stated that,

> [A]t the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a *quid pro quo* or other good reason. But this rule appears to treat all cases alike.[22]

It is submitted that by not recognising a separate rule for the operation of the freedom of contract between parties of unequal strength, the House of Lords left the fate of contracts involving consumer sales to the uncertainties and the vagaries of the rule of construction. It is gratifying to note that in the case of *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.*[23] in which a consumer entered into a standard form contract for cleaning her carpet, Lord Denning M.R. reiterated his views on the application of the doctrine of fundamental breach in situations involving parties of unequal bargaining strength. His Lordship stated that,

> . . . the doctrine of fundamental breach, . . . still applies in standard form contracts where there is inequality of bargaining power. If a party uses his superior power to impose an exemption or limitation clause on the weaker party, he will not be allowed to rely on it if he has himself been guilty of a breach going to the root of the contract.[24]

The U.K. Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable. The *Unfair Contract Terms Act*, 1977 (U.K.)[25] provides that a party dealing with a consumer will not be allowed to rely on a term of contract if he himself is in breach of contract or if he performs the contract sub-

20 For definition, see s. 12.
21 S. 6 (2).
22 [1967] 1 A.C. 361, at p. 406.
23 [1977] 3 W.L.R. 90 (CA).
24 Ibid, at p. 97.
25 S. 3.

stantially differently from that which was reasonably expected of him or if he renders no performance at all, except, insofar as the contract term satisfies the requirement of reasonableness.[26]

*Remedies of the Non-Purchaser against the Seller*

As yet there is no unanimous view regarding the attributes or the qualifications of a consumer. If a wife buys a tin of corned beef from a supermarket or a crab from a fishmonger and serves her husband who suffers from gastroenteritis due to contamination, the husband has no contractual remedy against either seller as he has no privity of contract with them. But in *Lockett* v. *A. and M. Charles Ltd.*[27] where a husband and wife entered a hotel and ordered meals and the wife subsequently became ill due to food-poisoning, although it was found that the husband paid for the meals, it was held that the wife was in a contractual relationship with the proprietor and as such she was entitled to recover damages for breach of the implied warranty that the food was fit for human consumption.

Today, it is usual for a husband or wife to buy domestic goods for consumption by all the members of the family. A corner grocer knows that his regular customer Mrs. X buys household goods from him for all the members of her family. To deny any remedy to the members of the family of Mrs. X who are not in privity of contract with the grocer, is simply to shut one's eyes to reality. A realistic approach was taken in the United States by providing s. 2-318 in the Uniform Commercial Code which reads:

> Third Party Beneficiaries of Warranties, Express or Implied.
> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The Permanent Editorial Board for the U.C.C. proposed for optional amendment two alternative versions of which Alternative B reads as follows:

> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

This version covers injury to a bystander but does not extend to damage to property. Alternative C covers not only damage to property but also extends to corporations.

26 S. 11 defines 'reasonable test'. To satisfy the reasonable test, a term in a contract should be fair and reasonable, having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made.

27 [1938] 4 All E.R. 170.

In Britain, the Law Commission considered the subject of 'third party beneficiaries of conditions and warranties' which would extend the remedies available to purchaser against a retailer to the members of the purchaser's family. In its report, the Law Commission stated that the comments received by it were critical of providing additional rights and remedies by altering the basic rules of contract. As for giving non-purchasers contractual rights and remedies against the retailer, the objection was made that this was placing the risk on the wrong person; the right of redress should be directed at the producer rather than the retailer. The Law Commission was of the opinion that the law of contract should not be changed to solve this problem. It recommended imposition of strict liability upon manufacturers to purchasers and non-purchasers alike for causing personal injuries arising out of the use of defective goods.[28] This recommendation to extend the category of consumers to include members of the family of purchasers, users and even by-standers is undoubtedly a bold step towards ameliorating the lot of a vast multitude of consumers who hitherto had no right against sellers, because they lacked privity, nor against manufacturers, in the absence of negligence. But it should be noted that the envisaged change would not enable a non-purchaser to enjoy all the remedies available to a purchaser. Although the artificial gap of privity of contract, which has made the manufacturer the will-o'-the-wisp in consumer sales, needs to be bridged, it is not necessary to give to the non-purchaser the same rights which the purchaser enjoys by payment of consideration. 'The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.'[29] So, under the changed position of law, if there is damage to property or economic loss, a user or a bystander would still have no remedy against the manufacturer, whereas a purchaser would be able to claim such damages or losses against a seller of goods who is under a contractual obligation to make good such damages or losses. It appears that in Australia, nothing has been done to improve the lot of consumers who themselves are not purchasers of goods or in a few situations, have not derived title to the goods from the purchasers.

*Liability of the Manufacturer in Negligence*

The liability for giving a warranty by a seller of goods to a buyer was originally in the domain of tort, so that the seller was liable in deceit for making misrepresentations in the course of sale of goods. The first case which caused the diversion of the law of warranty from the channel of tort to that of contract, was the well-known case, *Winterbottom* v. *Wright*,[30] which is looked upon as one of the corner-stones of the stronghold of privity of contract. In that case, the plaintiff while driving a coach was injured by reason of a defective axle. The coach was built by the defendant and sold to his employer. The court refused to give any remedy to the plaintiff on the ground that he lacked privity of con-

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28 Ibid, note 4, paras 31-33.
29 *Per* Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215 at p. 220.
30 (1842) 10 M & W 109.

tract with the defendant. The oft-quoted statement made by Lord Abinger which has been blindly followed by the courts for about a century was: 'Unless we confine the operation of such contracts as this to the parties who entered into them the most absurd and outrageous consequences, to which I can see no limits, would ensue.'[31]

Today, we are concerned with the plight of consumers for their sufferings at the hands of manufacturers. But in the 19th century, the protection of manufacturers was uppermost in the minds of the legislatures and the courts as they thought that the economic prosperity of a country was only possible by the output of the maximum products from factories.[32] But the physical harm caused by the tinned foods and drinks in the early part of this century reached such an alarming scale in America that the courts were willing to hold manufacturers liable in negligence even though there was no privity of contract between purchasers and manufacturers. If food or drink was found to be not fit for human consumption, the courts branded them to be 'inherently' or 'imminently' dangerous to human health, thus enlarging the category of dangerous products *per se*, which were considered to be exceptions to the general rule of privity of contract.

The first important case where the category of 'inherently dangerous products' was extended from food and drink to other negligently made products of domestic use, was *MacPherson* v. *Buick*,[33] decided by Cardozo J. In that case, the plaintiff, the purchaser of an automobile from a retail dealer was injured while driving. The injury caused was due to a defect in a wheel. Although the wheel was not made by the defendant but bought by him from another manufacturer it was found in evidence that the defect could have been detected by the defendant. The basis of holding the manufacturer liable in negligence in the absence of privity of contract, was laid down by Cardozo J. in these words:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.[34]

Although the case ushered in a new era in the law of products liability, it can be said that Cardozo J. implicitly accepted the following broad-based principle propounded by Brett M.R. in *Heaven* v. *Pender*:

> Whenever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger or injury to the person or property of him for whose use the thing is supplied, and who is to use it,

31 Ibid, at p. 114.

32 Traynor C.J. wrote: 'The courts of the nineteenth century made allowance for the growing pains of industry by restricting its duty of care to the consumer.' See ibid n. 1, (1965) 32 *Tenn. L.R.* 363.

33 (1916) 217 NY 382, 111 N.E. 1050.

34 Ibid, at p. 389; at p. 1053.

> a duty arises to use ordinary care and skill as to the condition or manner of supplying such a thing.[35]

The artificial distinction between a product dangerous *per se* and a product made dangerously was also exposed by Scrutton L.J. in these words:

> I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing, instead of an obvious wolf.[36]

*Donoghue* v. *Stevenson*[37] is an important landmark in English Law, creating liability for a manufacturer[38] in negligence to a consumer with whom he has no privity of contract. The epoch-making test for holding a manufacturer liable for his defective products was laid down by Lord Atkin in these terms:

> A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge the absence of reasonable care in the preparation of putting up the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.[39]

But before a consumer can be successful against a manufacturer in negligence he must prove fault on the part of the manufacturer, which is not always an easy burden to discharge.

Although *Donoghue* v. *Stevenson* was a big step in the law of products liability, it did not resolve the other major difficulty confronting the consumer, that is — proving the fault of the manufacturer. Clearly, it is very difficult for a consumer to prove that a product was defective at the time it left the control of the manufacturer. The doctrine of *res ipsa loquitur* has scarcely been applied by the courts in order to ease the onerous burden upon the consumer.[40] Compared to the English courts, the Australian courts have been seen to be more stringent in allowing a plaintiff to rely upon this doctrine.[41] Regarding the shifting of the onus of proof from the consumer to the manufacturer, the U.K. Law Commission is of the opinion that the mere reversing of the burden of proof would not be a great help to the consumer. It observed: 'If the producer were merely required to establish that he took reasonable

35 (1883) 11 Q.B.D. 503 (CA) at p. 510.
36 *Hodge* v. *Anglo-American Oil Co.* (1922) 12 Lloyds List Rep 183 at p. 187.
37 [1932] A.C. 562.
38 The principle of liability has been extended to makers of component parts, assemblers, repairers etc.
39 Ibid, at p. 599.
40 Denying the application of the doctrine in *Donoghue* v. *Stevenson*, Lord Macmillan stated: 'There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be averred and proved.' See [1932] AC 562 at p. 622.
41 See P. S. Atiyah, 'Res Ipsa loquitur in England and Australia' (1972) 35 *M.L.R.* 337.

care, but not to establish that the defect occurred for a reason that was not his fault, the claim might still fail for want of sufficient proof.'[42]

*Strict Liability of the Manufacturer*

In the United States, in 1924, Traynor J. advocated the imposition of strict liability upon the manufacturer in these words: 'If such product nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.'[43] In 1963, he had the satisfaction of applying the principle stated above in the famous case, *Greeman* v. *Yuba Power Products Co.*[44] Reformulating the principle, he stated: '... the recognition that the liability [upon the manufacturer] is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.'[45] In this respect, s. 402A of the *Second Restatement of Torts*, promulgated in 1965, provides:

> Special Liability of Seller of Products for Physical Harm to User or Consumer
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> 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>    (a) the seller is engaged in the business of selling such a product, and
>    (b) it is expected to, and does, reacher the user or consumer without substantial change in the condition in which it is sold.
> 2. The rule stated in sub-section one applies although
>    (a) the seller has exercised all possible care... and
>    (b) the user or consumer has not brought from, or entered into any contractual relation with the seller.

In order to hold a manufacturer liable for making express representations regarding the quality of his product to a purchaser, who relying on such a warranty, purchases the product from a retailer, the device employed in English law is the collateral contract.[46] That there is no doubt regarding the juristic basis of collateral contract in a tripartite situation can be seen in the statement of McNair J.:

> If as is elementary, the consideration for the warranty in the usual case is the entering into the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.[47]

42 Ibid, n. 4, para 35.
43 See *Escola* v. *Coca-Cola Bottling Co.* 24 Cal. 2d 453.
44 59 Cal. 2d 57.
45 Ibid, at p. 72.
46 See K. W. Wedderburn, 'Collateral Contracts', [1959] *C.L.J.* 58.
47 *Shanklin Pier Ltd.* v. *Detel Products Ltd.* [1951] 2 All E.R. 471 at p. 472.

In *Webster* v. *Higgin*,[48] the car dealer said to the purchaser: 'If you buy the Hillman we will guarantee that it is in good condition'. It was held that the warranty was given in consideration of the purchaser entering into a hire-purchase contract. As one of the essential requirement of collateral contracts is *animus contrahendi*, the representation made by a manufacturer must be promissory.[49] A few cases decided in English law where representations given by manufacturers were found to be promissory giving rise to liability under a collateral warranty were all assurances given personally to purchasers.[50] An impersonal assurance given in the celebrated case of *Carlill* v. *Carbolic Smoke Ball Co.*[51] gave rise to liability of the manufacturer under a unilateral contract. In England or Australia, it appears that no case has been decided at common law holding a manufacturer liable for making representations on packages or containers of the goods sold by them. In the well-known Australian case of *International Harvester*,[52] the collateral contract device was not used to give relief to a farmer who bought an expensive agricultural machine from a dealer relying on the representations of the manufacturer. In the United States, a statement made by a manufacturer in an advertisement or in sales literature of a product, is considered to be an express warranty, making the manufacturer strictly liable for causing personal injury to a consumer, if the product fails to comply with the standard as narrated in the advertisement or the sales brochure. In *Baxter* v. *Ford Motor Co.*[53] a purchaser of an automobile from a retailer was injured due to a defect in its windscreen. He sued the manufacturer on the ground that he relied on its sales literature alleging that the windshield was shatter-proof. Although there was no privity of contract between the purchaser and the manufacturer, the court held the manufacturer liable on the basis of its express warranty in its advertisements. The features of express warranty in America seem extraordinary. As the basis of liability is in tort, privity of contract is not necessary for claiming damages against the manufacturer. Again, unlike liability in negligence where fault needs to be proved by the plaintiff, liability for breach of express warranties seems to be strict

48 [1949] 2 All E.R. 127; Also see *Brown* v. *Sheen* and *Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102; *Andrews* v. *Hopkinson* [1956] 3 All E.R. 422.

49 ...[to] support a collateral warranty ... the statement ... relied on [must be] promissory and not merely representational.': *JJ Savage & Sons Pty. Ltd. v. Blakney* (1970) 119 CLR 435 at p. 442.

50 See *Shanklin Pier Ltd.* v. *Detel Products Ltd.* [1951] 2 All E.R. 471; *Wells (Merstham) Ltd.* v. *Buckland Sand and Silica Ltd.* [1965] 2 Q.B. 170; *Jones* v. *Grais* (1961) 78 WN (NSW) 955.

51 [1893] 1 QB 256 CA. Also see *The Eurymedon*, [1974] 2 WLR 865 at p. 871 where the following well-known statement made by Bowen L.J. in the *Carbolic Smoke Ball Co.* case was quoted: 'why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?'

52 (1958) 32 A.L.J.R. 160; for comment see S. J. Stoljar, 'The International Harvester Case: A Manufacturer's Liability for Defective Chattels', (1959) 32 *A.L.J.* 307.

53 168 Wash. 456, 179 Wash. 123; Also see *Randy Knitwear Inc.* v. *American Cyanamid Company*, 11 NY 2d 5, where a commercial buyer was allowed to recover economic loss suffered as a result of his reliance upon representations made by the manufacturer in the sales advertisements.

liability for misrepresentations. It appears that as the liability imposed upon the manufacturer is in tort, a mere user of a product would be able to bring an action against the manufacturer for suffering personal injury.

Today, it is unrealistic to suppose that a housewife buying goods in a supermarket relies, for a statement of their quality or fitness for a particular purpose, upon the skill or judgment of young salesgirls. Commenting on this unrealistic attitude of the law in this field, the Law Commission said '... liability will often fall not on the manufacturer — who may commonly be regarded by members of the public and others as being responsible for the quality and safety of the products — but upon a retailer, who from a practical point of view is seldom nowadays regarded as being so responsible'.[54] Under the new legislation in Australia, it has been recognised that these days the techniques of marketing and sale should oblige the manufacturer to be responsible for the quality and utility of their products. They influence the mind of consumers through various sophisticated advertising media, inducing them to purchase their products. Moreover, sellers are mere conduit pipes; many products reach consumers in sealed packets and containers, defying any opportunity of reasonable examination by buyers. Not infrequently, both consumers and retailers depend upon the writing on the packets, containers, and if supplied with goods, upon sales literature in order to inform themselves regarding the quality or the utility of the products. On many occasions, the sales literature may be too technical for ordinary consumers, hence the quality or the utility of products cannot be judged until they have been used for some time.

In Australia, court have been found to be shy in not interpreting the express warranty given by the manufacturer to the consumer as giving rise to his liability for defective goods under a collateral contract. They also have not followed the example of the courts in the United States which have declared that the implied warranty of quality runs with the goods. The new Australian legislation provides that any assertions or statements by a manufacturer relating to his products in an advertisement or in a brochure would be considered as an 'express warranty'[55] and a consumer purchasing such goods from a retailer would be entitled to bring an action against a manufacturer on the ground of breach of such an express warranty, 'as if the action were for breach of warranty

54 Ibad, para 29.

55 'Express Warranty' has been defined in the *Trade Practices Act*, 1974-78 (Cth), s. 74A: 'express warranty' in relation to goods, means an undertaking, assertion or statement in relation to the quality, performance or characteristics of the goods given or made in connexion with the supply of the goods, or in connexion with the promotion by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods. Also see *Manufacturers Warranties Act*, 1974 (SA), s. 3 (1); *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (ACT), s. 3.

under a contract between the manufacturer and the consumer'.[56] It can be said that the collateral contract device has now found statutory recognition in consumer sales.

Sometimes a contract is established between the manufacturer in the form of a manufacturer's guarantee[57] or a servicing agreement. The U.K. Law Commission recommended that liability due to negligence for death or personal injury caused by defective goods should not be capable of exclusion or restriction by means of a clause in a guarantee given to the ultimate purchaser by the manufacturer, where the goods were in consumer use.[58] The *Unfair Contract Terms Act*, 1977, (U.K.), goes further by providing that a manufacturer would not be allowed to exclude or restrict his liability in negligence by reference to any contract term or notice contained in a guarantee for loss or damage arising from goods proving defective while 'in consumer use'.[59] In the American case of *Henningsen* v. *Bloomfield Motors Inc.*,[60] the manufacturer was held strictly liable for personal injury to the wife of a purchaser of a car and was not allowed to rely upon its guarantee which sought to limit liability to replacement of defective parts only. Under the new Australian legislation, a manufacturer is not entitled to exclude or restrict his liabilities created by statutes in favour of consumers by relying upon any term of a contract incorporated in a guarantee.[61] A manufacturer who purports to exclude or limit such a liability will be found to be guilty of an offence incurring a penalty.[62]

Under the traditional concept of enforcing the implied condition of merchantable quality, the remedy is available only against the seller of goods on the theory that the warranty does not run with the goods. The Australian legislation has now created a statutory warranty of merchantable quality of the goods, making manufacturers liable directly to purchasers or persons deriving title to the goods from the purchasers for breach of such a warranty.[63] This liability of the manufacturer is not absolute in the sense that a manufacturer would not be liable if the

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56 *Manufacturers Warranties Act*, 1974 (SA), s. 5; Also see *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (ACT), s. 5; *Trade Practices Act*, 1974-78 (Cth), s. 74G.

57 For definition of 'Guarantee', see *Unfair Contract Terms Act*, 1977, (U.K.) s. 5 (2) (b): 'anything in writing is a guarantee if it contains or purports to contain some promise ... that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise'. For definition of 'Written Warranty', see *Manufacturers Warranties Act*, 1974 (SA) : s. 3.

58 Ibid n. 4, paras 111-112.

59 S. 5 (1); s. 5 (2): 'Goods are to be regarded as "in consumer use" when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business.

60 32 N.J. 358.

61 *Trade Practices Act*, 1974-78 (Cth), s. 74K; *Manufacturers Warranties Act*, 1974 (SA); s. 6 (1); *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (A.C.T.) s. 7 (1).

62 *Manufacturers Warranties Act*, 1974 (SA), s. 6 (3): up to $500; *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (A.C.T.), s. 7 (4); up to $1,000.

63 *Trade Practices Act*, 1974-78 (Cth), s. 74D (1); *Manufacturers Warranties Act*, 1974 (SA), s. 5; *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (A.C.T.) s. 5.

goods are not of merchantable quality by reason of an act or default of consumer or some other person or a cause independent of human control occurring after the goods have left the control of the manufacturer.[64] The Law Commission also recommended that a producer of a product should not be liable where he can establish that the product was not defective when he puts it into circulation.[65] In the United States, as early as 1917,[66] it was proposed that in the case of a sale of soft drink the implied warranty of merchantable quality ran with the goods, thus making the manufacturer directly liable to the consumer. The principle was gradually extended to products for external intimate bodily use. In *Henningsen* v. *Bloomfield Motors Inc.*,[67] the plaintiff, the wife of the purchaser of a new car suffered injury when the steering mechanism failed. The manufacturer was held liable for breach of implied warranty of merchantability although there was no privity and no proof of negligence.

The *Trade Practices Act* (Cth), 1974-78 and the A.C.T. Ordinance (1977) provide that a manufacturer would be liable to a consumer for suffering any loss or damage if the goods purchased by the latter do not fulfil the requirement of fitness for a particular purpose,[68] description[69] or sample.[70] Under the A.C.T. Ordinance, a manufacturer's liability has been extended to a person deriving title to the goods from a purchaser.

We have seen that as the remedies against the retailer proved to be inadequate, strict liability has been imposed upon the manufacturer. As it is very inconvenient and costly on the part of a consumer to sue a manufacturer in a foreign country, the new Australian legislation provide that an importer of goods is deemed to be the manufacturer for the purpose of incurring liability, for causing loss or damage to the consumer.[71] The Law Commission recommended that the importer of goods should answer for the quality of the imported goods, not only to persons with whom he is in a contractual relationship, but to any person who may be injured by them.[72]

It should be noted that in both Australia and Britain, it has been realised and resolved that strict liability should be imposed upon the manufacturer in order to enlarge the present inadequate remedies available to consumers. But the approaches adopted by the two countries are significantly different. In Australia, the new remedies available

64 *Trade Practices Act*, 1974-78 (Cth), s. 74D (2); *Manufacturers Warranties Act*, 1974 (SA), s. 4 (3); *Law Reform (Manufacturers Warranties) Ordinance*, 1977 (A.C.T.) s. 4.
65 Ibid, n. 4, para. 49.
66 See *Coca-Cola Bottling Works* v. *Lyons* 145 Miss. 876.
67 Ibid; n. 60.
68 See *e.g. Trade Practices Act*, 1974-78 (Cth), S. 74B.
69 Ibid, s. 74C.
70 Ibid, s. 74E.
71 *Trade Practices Act*, (Cth), 1974-78, s. 74A (4); *Manufacturers Warranties Act* (SA), 1974, s. 3 (1) (d); *Law Reform (Manufacturers Warranties) Ordinance* (A.C.T.), 1977 s. 3 (1) (d).
72 Ibid, n. 4, para 102.

against the manufacturer, being contractual in nature, are more satisfying to a consumer compared with the remedy of compensation for personal injury or death only flowing from strict liability imposed upon the manufacturer as recommended by the Law Commission in the United Kingdom. The reason advanced by the Law Commission for not recommending contractural remedies against the manufacturer was that it would introduce an unnecessary fiction by supposing the existence of an ordinary contract.[73] The Law Commission adopted the view that if strict liability were to be imposed on the producers of defective products it should only be in respect of products that were unsafe, not products that were 'safe and shoddy'. Complaints about the quality and performance of products, as opposed to complaints about their safety, should be regulated by the law of contract between buyer and seller.[74] Under the recommendations of the Law Commission, remedies against the manufacturer flowing from the imposition of strict liability would be available equally to purchasers and non-purchasers, suffering personal injury or death. Although the new Australian legislation can be looked upon as significant addition to consumer's rights, these rights have been restricted only to those consumers who are at the same time purchasers or in a few situations, deriving title to the goods from the purchasers, thus ignoring the plight of still a vast number of consumers who happen to be members of the family of purchasers, other users or even bystanders.

73 Ibid, n. 4, para 32.
74 Ibid, para 47.