

THE DEVELOPMENT OF THE IMPLIED TERMS  
ON QUALITY AND FITNESS IN SALE OF GOODS  
IN BRITAIN AND CANADA

By

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## Abstract

### THE DEVELOPMENT OF THE IMPLIED TERM ON QUALITY AND FITNESS IN SALE OF GOODS IN BRITAIN AND CANADA

Historically, in sale of goods transactions, the law has implied terms in the contract. These terms have varied in their content and application and have been subject to change. The implied terms concerning the quality of goods sold and their fitness for particular uses are considered in this thesis.

The provisions of the common law in Scotland and England are examined historically, developmentally and comparatively, and the application of the English approach in Canada is noted.

The effect on the common law of statutory provisions is then considered: first in Britain, and then in the adoption of the statutes in Canada. The content of the statutory provisions, their interpretation and amendment, and the criticisms of their operation, are reviewed.

It becomes apparent that, in both Britain and Canada, these provisions have been the subject of criticism from various quarters. The precise meaning of the terms, their application in consumer and non-consumer contracts, their suitability to the variety of types of goods sold and the remedies available in cases of dispute, have all been questioned.

The effect of this, in leading to calls for reform in Britain and Canada, is then examined. The work of the various law reform bodies and their proposals are considered from both the historical perspective and comparatively. It is concluded that, if the proposals for reform are fully implemented, they

will provide a workable framework for modern conditions.

Nonetheless, it is submitted that such a position could have been reached by the development of Scots common law.

Supervisor

Date

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E.E.S.

October 1984

## CHAPTER I: INTRODUCTION

The law on sale of goods has daily impact on all of us; perhaps we buy some item, use an item we have bought, are employed in the manufacture of goods to be sold, are employed in the retail trade, or advise clients on buying particular commodities.

A number of aspects of the sale may assume particular importance in individual cases. Such matters as the time of delivery, the effect of delay in payment, damage to the goods in transit, "sale" by a non-owner and the effect of delivery of goods of a poorer quality than expected, may matter more or less in a particular case.

It is with one of these aspects of sale that we are concerned here -- that of the quality of the goods sold. What quality of goods the seller is bound to tender and the buyer is bound to accept is often of crucial importance in sales transactions. While the parties may make detailed provision for this themselves, they often will not. Thus, the law, in providing the framework for sales, must determine what, if any, terms relating to the quality of goods sold should be implied in contracts of sale.

If it is operating effectively, the law will meet the needs of the consumer and of commerce over widely-varying sales transactions. From time to time, those needs will conflict and change, whereupon the demand will come, from one quarter or another, for reform.

Law reformers would do well to heed the advice of a leading Scottish legal scholar and teacher, Professor Emeritus Sir Thomas Smith. Himself a former Commissioner in the Scottish Law Commission, he said:

"I believe, moreover, that only when one has studied carefully the history of a rule of law and has considered it in the context of the system as a whole can one safely conclude whether it has outlived its social utility and, if one so concludes, evaluate what rule should replace it."<sup>1</sup>

That then is the starting point here. Chapter II examines the common law provision of implied terms on quality in sales of goods, and how they developed to meet the needs of the times. This concentrates on developments in Scotland and England, and concludes with an examination of the application of the latter system in Canada.

Chapter III takes up the story with the intervention of statute at the end of the nineteenth century, and traces statutory applications in Britain and Canada to the present day. During that time, rapidly changing social and industrial conditions prompted development through judicial interpretation and further statutory intervention.

Nonetheless, by the mid-1960s, there was a considerable body of opinion in Britain and Canada which viewed the law on sales as defective in a number of respects. The efforts of the various law reform agencies, prompted by this body of opinion, are examined and evaluated in Chapter IV. Some of the suggested

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1. Smith, Property Problems In Sale (1978), at p.7.

reforms have found their way into the statutes already, others are still being considered. In either case, it is apparent that common trends have emerged in Britain and Canada. One such trend is the belief that the laws should set out in detail what factors affecting the quality of goods sold are deemed to be important. One such factor -- that of durability -- appears expressly for the first time. The reformers, ever conscious that the needs of the consumer will often differ from those of commerce, have attempted to provide a sufficiently flexible system to deal with the needs of all. It may be too early to reach a firm conclusion on their success here, but Chapter V concludes with an assessment of the changes of the last two and a half centuries and the response of the law to them.

## CHAPTER II: THE QUALITY OF THE GOODS SOLD - HISTORICAL DEVELOPMENT

### (A) Scotland: The Common Law

On 21st July 1856, the Mercantile Law (Amendment) (Scotland) Act came into force. Its declared object was,

"with regard to various matters relating to trade, to assimilate the law of Scotland to the law of England."<sup>2</sup>

A Royal Commission had been appointed in 1852 to examine Scots and English mercantile law, with a view to their assimilation. The Act resulted from its Report<sup>3</sup> and both the approach taken by the Commission and the product of that approach have been the subject of criticism ever since.

The legislation was introduced into Parliament in 1856 and, in the Speech from the Throne, was explained by Her Majesty in the following terms:

"The difference which exists in several important particulars between the commercial laws of Scotland and those of the other parts of the United Kingdom has occasioned inconvenience to a large portion of my subjects engaged in trade. Measures will be proposed to you for remedying this evil."<sup>4</sup>

### The Constitutional Question

Lord Kilbrandon, the senior living Scottish judge to have sat in the House of Lords, comments on the matter and suggests two separate criticisms. The first is a constitutional point.<sup>5</sup>

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2. Jaffe v. Ritchie (1860) 23 D. 242, per the Sheriff at p.244.

3. Report of the Mercantile Law Commission, 1864, No. 7.

4. See Kilbrandon, "Scots Law Seen From England," The Child and Co. Oxford Lecture 1980/1, at p.5.

By the Treaty of Union 1707, Article XVIII, it was guaranteed that future legislation would not alter Scots law with regard to "private right" unless this was, "for evident utility of the subjects within Scotland." The Commission's comment on Scots mercantile law was that, while its English counterpart adhered to the principle of caveat emptor, it implied warrandice as to the quality of goods. That is to say, that Scots law was different from English law. As Lord Kilbrandon points out, that alone is not enough to satisfy the requirement that any change would benefit "the subjects within Scotland." The constitutional validity of the Act was never questioned in the courts; nor has any such challenge been made to the subsequent U.K. legislation on sale of goods. Indeed, the Treaty of Union has rarely been mentioned in Scottish courts.

One exception here was MacCormick and Another v. The Lord Advocate.<sup>6</sup> In that case the petitioners raised an action against the defendant, as the representative of H.M. Ministers and Officers of State, seeking a declarator that the use by Her Majesty Queen Elizabeth of the numeral "II" was inconsistent with historical fact and political reality and was in breach of Article 1 of the Treaty of Union, 1707. The action failed on the following grounds. First, the petitioners were held to have no title and interest to sue (no locus standi). Secondly, the petitioners had failed to show that it was within the competence of the Court to consider the issue. Thirdly, that there was no

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5. Kilbrandon, note 4, supra.

6. 1953 S.L.T. 255.



prohibition in The Treaty of Union which was relevant to the case. The fourth ground concerned the interpretation of the Royal Titles Act 1953 and the Court held that the proclamation of the title "Elizabeth II" was not made under the statute.

The importance of the case, in the present context, lies in the opinions delivered by the Court and their possible application to a challenge to sale of goods legislation. In addition, the case generated considerable academic debate<sup>7</sup> on the Treaty of Union and its place in British constitutional theory.

Any challenge to sale of goods legislation would have the address itself to the possibility, in the U.K., of challenging a statute. As Smith pointed out,

"So far no Scottish court has ever ruled that a statute made by the Parliament in Westminster is invalid."<sup>8</sup>

That is not to say that such a challenge is necessarily impossible. As Middleton pointed out,

"The fact that Parliament has done something, cannot prove that it was entitled to do it."<sup>9</sup>

Nonetheless, Lord Cooper's review of British constitutional theory<sup>10</sup> in MacCormick suggests that the validity of such a challenge is, at least, doubtful.

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7. See Middleton, "New Thoughts on the Union," (1954) 66 J.R. 37; Mitchell, Book Review (1956), 1 Public Law 296; Smith, "The Union of 1707 as Fundamental Law," (1957) 2 Public Law 99; Smith, British Justice: The Scottish Contribution (1961), Hamlyn Lectures, Thirteenth Series.

8. Smith, British Justice: The Scottish Contribution (1961), note 7, supra, at p.212. See also Edinburgh and Dalkeith Railway v. Wauchope (1842) 8 Cl. & S 710; 8 E.R. 279, Mortensen v. Peters (1906) 8 F. 93; and Manuel and Others v A.G. [1982] 3 All E.R. 822.

9. Middleton, note 7, supra, at p.49.

10. Note 6, supra, at p.262.

It is possible to argue, as did Smith,<sup>11</sup> that the Treaty of Union is of a higher status than ordinary legislation and that it could, therefore, form the basis of the challenge. In this respect two types of provisions within the treaty must be distinguished. On the one hand there are what the petitioners in MacCormick sought to establish as fundamental, constitutional principles. On the other hand, there are the matters concerning "private right" which are administered by the courts. Lord Cooper doubted that the former could be challenged, but expressly reserved his opinion on the latter.<sup>12</sup> Clearly, questions of sale of goods could fall into the latter category.

Assuming that a challenger was able to overcome the problem of challenging a statute, he would face a further two hurdles. First, he would have to establish title and interest to sue. He would have to show that, in a particular situation, his position was worse, or at least different, as a result of the legislation than it would have been under the common law.

Secondly, he would have to show that the legislation itself was not for the evident utility of the subjects in Scotland. It was the view of at least one learned writer<sup>13</sup> on the subject that the assessment of utility is a matter for Parliament and is not open to subsequent consideration elsewhere. Assuming that view were rejected, the challenger would have to overcome arguments favouring uniformity and the resulting efficiency in trade.

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11. Smith, "The Union of 1707 as Fundamental Law," note 7, supra.

12. Note 6, supra, at p.263.

13. Mitchell, note 7, supra, at p.297.

Given the period of time which has elapsed since legislation first made inroads into the Scottish common law, the likelihood of such a challenge is remote. In the light of the foregoing discussion, the prospect of success would be minimal.

#### Adoption of English Law

Lord Kilbrandon's second criticism of the 1856 Act relates to the way in which assimilation was achieved.<sup>14</sup> Rather than assimilating the two legal systems on the basis of the relative merits of each, the Commission's solution was to replace the Scottish approach with that from England.

This crude approach has now been modified as Gow points out:<sup>15</sup>

"It is no longer true to say as did the preamble to the 1856 Act that because Scots law inconveniently differed from English law it was expedient to remedy the inconvenience by making the former conform to the latter and ex hypothesi: superior law."<sup>16</sup>

It may be acknowledged that,

"the contract of sale must be substantially the same in all civilised countries, in as far as regards its general character."<sup>17</sup>

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14. Kilbrandon, note 4, supra, at p.6.

15. In view, particularly, of the principal jurisdictions chosen for this thesis, it seems appropriate to provide a brief background note on J.J. Gow. His book, The Mercantile and Industrial Law of Scotland (1964), has been described as "one of the most brilliant products of the renaissance in Scottish literature that took place in the 1960s." Black, Review in 1983 S.L.T. A former Director of the Institute of Comparative Law at McGill University, he is currently a Q.C. practicing in Victoria, B.C., Canada.

16. Gow, "Warrandice In Sale," 1962 S.L.T. (News) 137, at p.141.

17. M.P. Brown, Treatise On the Law of Sale (1821), at p.1. To avoid confusion, it should be noted that reference will also be made to another author of a work on sale, R.P. Brown.

However, in 1856 substantial differences in particular aspects of the law of sale did exist between the two jurisdictions in Great Britain; not least between the Scots and English approaches to implied warrandice in sale.<sup>18</sup>

It is not suggested that reform - even involving some form of assimilation - would have been undesirable. Scots law had long shown a keen awareness of the need for the law to respond to commercial reality. Stair clearly had this in mind when he stated that the law should be,

".... current and secure. For nothing is more prejudicial to trade, than to be involved in pleas; which diverts merchants from their trade, and frequently mars their gain, and sometimes their credit."<sup>19</sup>

Indeed Bell accepted that,

"The regular forms and rigid maxims of Municipal Law are not always well suited to the occasions of mercantile intercourse."<sup>20</sup>

Uniformity within the commercial sphere may have advantages but, as is submitted, those who seek to achieve it must maintain the utmost vigilance since, "The price of achieving uniformity may be unduly high."<sup>21</sup>

Indeed, over a century later, Hellner saw the problem in a different light. Discussing the United Nations Convention on Contracts for the International Sale of Goods,<sup>22</sup> which provides a

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18. Bell, Inquiries Into The Contract of Sale of Goods and Merchandise (1827), at p.96.

19. Stair, The Institutions of the Law of Scotland (5th ed. 1832), I, 9, 10.

20. Bell, note 18, supra, at p.1.

21. Smith, Studies Critical and Comparative (1962), at p.121.

uniform system to replace national legal provisions in this respect, he said,

"In all countries with an advanced economy and considerable foreign trade, the law of sales has largely been concerned with international contracts, or with contracts that are so closely connected with international trade as to be influenced by it."<sup>23</sup>

He goes on to point out that, in such cases, parties may prefer a particular municipal system.

That the root of the so-called "evil" referred to in the Speech from the Throne in 1856 was the warrandice implied by Scots law by contrast with the English doctrine caveat emptor, is beyond doubt. It is now appropriate to examine what was meant by implied warrandice, in this context, and the changes that followed, in order that "the price" of uniformity can be assessed.

#### Warrandice

Scots law on sale, in common with many other aspects of our legal system, is derived from Roman law.<sup>24</sup> However, the reception was not a matter of wholesale acceptance and differences were apparent. Both systems provided that the seller,

"be bound by the nature of the contract, and without stipulation, ... to warrant the thing sold to be free from such defects as rendered it unfit for the use for which it was intended."<sup>25</sup>

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22. Adopted in Vienna in April 1980, Official Records (A/Conf. 79/19) (New York 1981).

23. Jan Hellner, "The U.N. Convention on International Sales of Goods - An Outsider's View," in Ius Inter Nationes: Festschrift fur Stefan Riesenfeld, at p.71.

This obligation could be enforced under Roman law, by the buyer by means of the actio redhibitoria enabling recovery of the price. In addition to this, Roman law also provided that where,

"the defect was of a slighter kind, so as merely to affect the value of the subject,"<sup>26</sup>

the buyer had the remedy of the actio quanti minoris, enabling him to recover the amount by which the price paid exceeded the value of the defective goods.

The principle underlying the actio redhibitoria forms the foundation of Scots law on implied warrandice. The actio quanti minoris was generally rejected in Scotland as it was thought to be "hurtful to commerce."<sup>27</sup> In asserting this, M.P. Brown relies on the authority of Stair<sup>28</sup> and Erskine.<sup>29</sup> In so far as the aim is to avoid a plethora of litigation, this view may be defended. However, as will be discussed below,<sup>30</sup> the actio quanti minoris has much to recommend it.

Indeed, it did have limited application in cases where the goods suffered from, "a latent infirmity either in the title or the quality of the subject sold [which was] discovered when matters were no longer entire."<sup>31</sup> Thus, where the buyer, in such circumstances had consumed all or part of the goods, he was free

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24. Smith, note 1 supra, at p.9.

25. M.P. Brown, note 17, supra, at p.285.

26. Id.

27. M.P. Brown, note 17, supra, at p.287.

28. Stair, note 19, supra.

29. Erskine, Principles of the Law of Scotland (21st ed. 1911) III, III, IV.

30. Infra, at p.17.

31. Louittit's Trustees v. Highland Railway Co. (1892) 19 R. 791, per Lord McLaren, at p.800.

to claim damages from the seller.

The implied obligation with regard to quality, as it applied in Scotland has been stated thus,

"a sound price implied or sound article, irrespective of the buyers object in buying, or the knowledge of the parties regarding the condition of the goods."<sup>32</sup>

This clear statement of principle is repeated throughout the cases and writing on the subject. At first sight, the views of Bell may suggest a qualification on this general statement. He says:

"An obligation is understood to be undertaken by the seller that the thing sold at the full price, is of quality suitable to the declared or avowed purpose of the purchaser and generally that the article is of merchantable quality, not merely that it will sell at market, but that it will bring a fair average market price."<sup>33</sup>

The apparent qualification arises from Bell's mention of the buyer stating a purpose. It will be argued below,<sup>34</sup> that this merely provides for the possibility of the buyer gaining additional rights in this way and does not limit the general principle of implied warranty.

Clearly, no legal system with an awareness of commercial reality would provide that a buyer could always expect the best quality of goods, irrespective of the surrounding circumstances. What circumstances, then, affected the operation of the implied warranty?

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32. R.P. Brown, Treatise On The Sale of Goods With Special Reference to The Law of Scotland (2d ed., 1911), at p.88.

33. Bell, note 18, supra.

34. Infra p. 14.

## Priceworthiness

One factor which gives some indication of quality is that of price. The obligation on the seller was to provide goods, "of a quality commensurate with the price."<sup>35</sup> In Paterson v. Dickson,<sup>36</sup> a quantity of Ichaboe guano was sold at £7.5s. per ton. It was found to be adulterated with other substances. In finding Paterson entitled to reject the goods, Lord Justice-Clerk Hope states the position thus,

"when an article is sold at a good market price, this implies a warranty on the seller's part that it is of good quality, or of the best quality according to the price and the circumstances of the sale."<sup>37</sup>

In Whealler v. Methven,<sup>38</sup> Methven agreed to supply Whealler with a quantity of, "well-cured red herrings." These turned out to be of inferior quality. While he stresses that, in the absence of any special undertaking, a buyer is entitled to expect goods free from defects, Lord Justice-Clerk Hope continued,

"the price agreed on is important, as showing the understanding of the parties. For when anyone sends an order for goods, without a word as to their quality, he is entitled to such an article as the price entitled him to expect, of good sound fair quality."<sup>39</sup>

Thus, while payment of the highest price implies that the goods will be of the best quality, a considerably lower price might indicate that a lesser quality of goods was expected. That is

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35. Gow, The Mercantile and Industrial Law of Scotland (1964), at p.161.

36. (1850) 12 D. 502.

37. Ibid. at p.503.

38. (1843) 5 D. 402.

39. Ibid. at p.406.



not to say, however, that a buyer can be expected to accept goods which are of such quality as to render them completely unsuited to the reasonable use of such goods. The quality of red wine may vary considerably and the price will often reflect this, but when it is so sour as to taste like vinegar, it may well have passed beyond a quality acceptable as wine.

Where goods were capable of being put to a number of uses, the implied warranty did not necessarily require that they were fit for all of those uses. In the absence of any agreement by the parties, it is submitted that the question of price would be relevant in determining what was intended. In Seaton v. Carmichael and Findlay,<sup>40</sup> the pursuer sold the defenders a quantity of "good sufficient marketable bear" [coarse barley]. The bear was steeped [soaked], but failed to malt and the defenders purported to reject the goods. In finding for the defenders, the Court took the view that, for the bear to be sufficient and marketable,

"did not import that it behoved to be sufficient to be malt, if it was sufficient to be meal."<sup>41</sup>

Where, however, the buyer did state a particular use to which the goods were to be put, this provided a requirement as to quality over and above that of the ordinary implied warranty. In Pagan v. Baird,<sup>42</sup> the pursuer sold a quantity of strong ale to the defender, specifically for export to the West Indies. The

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40. 28th January 1680, cited in M.P. Brown, note 17, supra, at p.289.

41. Id.

42. (1765) M. 14240.

price was higher than usual because of the additional treatment required to prepare the ale for export. On arrival in the West Indies, much of it had been spoiled by the heat. The defender refused to pay the price and was held to be entitled to do this. In his report of the case,<sup>43</sup> Lord Kames expressed the view that,

"a man who purchases goods for a certain purpose is not bound to receive them unless they answer that purpose."

With the traditional regard for commerce, he went on to say,

"if the brewer be not answerable for the sufficiency of ale sold by him for the American market, that branch of commerce cannot be carried on."

It should be noted that this case provides another example of the price being a relevant factor in determining the quality to be expected.

#### Patent Defects

While Scots law has never accepted the doctrine of caveat emptor, Bell does point out that the implied undertaking,

"suffers exception only in the case of faults so obvious that they cannot be supposed to escape ordinary observation."<sup>44</sup>

M.P. Brown states the position, thus,

"The vendor is not liable under the obligation of warrandice, unless the vice or defect complained of was latent at the time of sale."<sup>45</sup>

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43. Repeated in Morrisson's report, note 42, supra, at p.14241.

44. Note 18, supra, at pp.96-97.

45. Note 17, supra, at p.296.

He goes on to give the example of a person buying a horse that was "obviously lame or blind." It is submitted that the "exception" does no more than infer, from the surrounding circumstances, that the buyer knew of and accepted the defect. It did not apply to defects that were less than completely obvious and did not put any particular onus on the buyer.

In Hill v. Pringle,<sup>46</sup> the pursuer purchased a quantity of rye grass seed from the defender. At the time, he noticed that it had a musty smell and a bad colour, but he did not comment on this. When the seed failed to grow, he raised an action for repetition of the price and damages. In finding for the pursuer, Lord Pitmilley found that his failure to act on the warning signs did not bar his claim. Again, the relevance of price paid was the deciding factor,

"the seed was bad, although the price paid was that for good seed ... [the buyer] was entitled to sow on the faith that the seller would not give him bad seed."<sup>47</sup>

Since the warranty as to quality is implied, it is no defence that the seller was ignorant of the defect. In Gilmer v. Galloway,<sup>48</sup> a cow which appeared healthy at the time of sale, but was in fact suffering from a longstanding illness, died within a few days of purchase. The buyer was held entitled to repetition of the price, although there was no evidence that the seller knew of the illness.

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46. (1827) 6 S. 229.

47. Note 43, supra, per Lord Pitmilley, at p.232.

48. (1830) 8 S. 420.

The same point was made by the Court in Ralston v. Robertson,<sup>49</sup> where a horse was found to be suffering from a number of ailments and was returned soon after purchase. The Court held the buyer entitled to repetition of the price and took the view that,

"when a man sells a horse for full value, there is an implied warrandice, both of soundness and title, nor is there any necessity to prove the knowledge of the seller."<sup>50</sup>

### Minor Defects

The Roman law approach, encompassing as it did the actio quanti minoris, accepted that for certain minor or curable defects, the appropriate remedy was not rejection and repetition, but damages. Since, subject to certain exceptions, Scots law did not embrace this aspect of Roman law, the curability of a defect was no bar to rejection. In Ralston v. Robb,<sup>51</sup> the pursuer bought an apparently sound horse from the defender. It was found to be suffering from a mild form of "running thrush," a defect which would make it unfit to use for the time being, but which could be completely cured simply and quickly. The pursuer was held entitled to reject the horse since,

"he is not understood in law to go to market with a view of purchasing a commodity of which he cannot have immediate use."<sup>52</sup>

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49. (1761) M. 14238.

50. Ibid. at p.14240. See also Lindsay v. Wilson (1771) M. 14243 on the same point.

51. 9th July 1808, cited in M.P. Brown, note 17, supra, at p.290.

52. Id.

On the question of minor faults, M.P. Brown takes the view that, for the implied warranty to apply,

"the vice or fault complained of must not be of a slight or partial nature."<sup>53</sup>

In so far as this is simply an example of the de minimis principle, it is unobjectionable. Most of the cases cited by Brown in support of the proposition can be explained on other grounds; one example being Seaton v. Carmichael and Findlay.<sup>54</sup>

#### Limitations on the Warranty

A number of other factors can be seen as limiting the application of the implied warranty. M.P. Brown notes that the Roman law allowed the seller to exclude particular vices from the warranty.<sup>55</sup> Such an exclusion was equally possible in Scotland and Lord Justice-Clerk Hope refers to implied warrandice applying,

"unless there are circumstances to show that an inferior article was agreed on."<sup>56</sup>

In some cases, a custom of trade may have existed which affected the buyer's right of rejection. This would explain the decision in Baird v. Aitken,<sup>57</sup> where the defender bought a quantity of lint-seed from the pursuer at the usual price, despite the fact there were some doubts as to its quality. The seed was sown and did not produce a good crop. The pursuer claimed the price and further averred that when there was doubt

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53. Note 17, supra, at p.288.

54. Note 40, supra.

55. Note 17, supra, at p.298.

56. Whealler v. Methven (1843) 5 D. 402, at p.406.

57. (1788) M. 14243.

as to the quality of lint-seed, the usual practice was to sow a small amount as a test, prior to sowing the full amount. While the Court did talk of implied warrandice, it held the pursuer's claim entitled to succeed on the basis that the defender had failed to observe the normal practice.

Delay on the part of the buyer may have barred the right to reject the goods,<sup>58</sup> although this question would only begin to be relevant where a latent defect became apparent. Roman law limited the actio redhibitoria to goods returned within six months of the sale. Scots law provided no such fixed period. As M.P. Brown put it,

"From the nature of the case, it must, in some measure, be an arbitrary question, to be determined according to circumstances."<sup>59</sup>

There are few reported cases where rejection was barred on this ground alone. In Brown v. Nicholson,<sup>60</sup> the defender purchased a horse which was, "crooked when he was bought." One year later, the pursuer raised an action for the price. The defender's right of rejection was held to be barred by his delay.

### Durability

In examining the implied warranty as to quality, one question remains. Did it include an element of durability? M.P. Brown's view that,

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58. Stair, note 19, supra.

59. Note 17, supra, at p.310.

60. 9th Jan. 1629, cited in M.P. Brown, note 17, supra, at p.310.

"The vendor is liable only for vices which are proven to have existed at the date of the contract, the subject being after that at the risk of the vendee."<sup>61</sup>

suggests, at first sight, that durability had no place in implied warrandice. However, the only Scottish case which he cites, Wellwood v. Gray,<sup>62</sup> does little to support such a sweeping statement, since the case concerned a latent defect in a horse which became patent after the sale.

The fact that the concept of durability is not discussed in the cases can be explained on two accounts. First, those consumer durables which most often give rise to the problem in a modern context were unknown in the eighteenth and nineteenth centuries. The problem must be there, before a legal system can deal with it. Secondly, problems which we now consider as concerning durability may have been dealt with on the basis that subsequent failure of the subject matter demonstrated a latent defect becoming patent.

#### Uniformity

It may be observed that there were even stronger reasons in the mid-nineteenth century than in the second half of the twentieth century for providing uniform solutions in commercial matters throughout the United Kingdom. Commercial men are, in general, impatient of legal differences and prefer speedy and certain resolution of their disputes to perfection of jurisprudential solutions. Hence the popularity even today of

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61. Note 17, supra, at p.297.

62. Note 17, supra, at p.298.

settlement of commercial disputes by arbitration in the City of London according to English law - irrespective of the nationality of the contracting parties or the proper law of the contract. Today English law is a minority system within the European Economic Community, yet in commercial matters its influence is out of all proportion with its wealth and population in relation to its European partners. In the nineteenth century the influence of English commercial law was further extended by its export throughout the Empire, although the Union agreement by which Great Britain was created made no such provision for preference to be given to English law, as is pointed out by (now Sir) T.B. Smith. Addressing the Sixth Commonwealth Law Conference on the influence of English law throughout the world, he points out that this was usually achieved,

"through mandate, colonisation, conquest or cession. Common law influence in Scotland is an apparent exception. The Scottish legal system is guaranteed by the Union Agreement of 1707 under which both Scotland and England ceded their sovereignty to the new state of the United Kingdom of Great Britain."<sup>63</sup>

It seemed only reasonable to commercial interest in England that disconformity of Scots law in matters of sale should be eliminated. It seems probable that many Scottish commercial men accepted such a solution as commercially expedient. Hence the ultimate acceptance and ultimate promulgation by a predominantly English Parliament of the Mercantile Law (Amendment) (Scotland) Act 1856 under the pretext that existing provisions of Scots law,

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63. Proceedings of the Six Commonwealth Law Conference, Lagos, 1980, at p.109.



albeit arguably more just in theory, constituted "an evil" in the United Kingdom context.

That the common law of Scotland protected buyers before the 1856 Act is beyond doubt, but the protection was provided in a flexible way. All the surrounding circumstances - and particularly that of price - were considered in assessing what protection ought to be given. The accusation that "the Scottish rule tends to create litigations," seems little justification for depriving dissatisfied buyers of a remedy. Indeed, experience has shown that litigation is at least as likely to result from legislation.

Implied warrandice operated amid a keen awareness of the need for and needs of commerce. It is acknowledged that the needs of consumers will often differ from those of commercial entities, but there is no reason to suppose that Scots law would have failed to meet this challenge when it arose. Indeed, in commenting on implied warrandice, Lord Kilbrandon noted that it was,

"a rule designed to give a remedy to purchasers who have not got what they paid for, and was thus in line with modern consumer protection."<sup>64</sup>

That some attempt at anglicisation of Scots law was underway prior to 1856 seems beyond doubt. The extent to which this might have been successful without the Act is unknown, but it did meet with resistance. M.P. Brown refers to the increasing use of English authorities as one of his principal reasons for writing his Treatise,

"because the English law of sale is, in some fundamental principles, altogether different from the law of Scotland, and unless those distinctions are rightly understood and kept in view, the utmost confusion of principle must ultimately result from the indiscriminate use of English authorities."<sup>65</sup>

This suggests that he believed the anglicisation to be due to ignorance rather than any deliberate intention.

That view was clearly not shared by Lord Justice-Clerk Hope who said,

"There seems of late years to have been an attempt to get rid of the rule of our law as to the guarantee on the part of the seller, on the quality of the article sold by him."<sup>66</sup>

He continues, leaving the reader in no doubt as to his views on the matter,

"This is an important feature of the law of Scotland, and one in which it is favourably distinguished from that of England."<sup>67</sup>

#### The Mercantile Law (Amendment) (Scotland) Act 1856

Despite the resistance to covert attempts at anglicisation, the process became overt and the Mercantile Law (Amendment) (Scotland) Act 1856 passed into Scots law.

In section 5, the Act provided:

"Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall give an express warranty of

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64. Note 4, supra.

65. Note 17, supra, Preface, at p.v.

66. Paterson v. Dickson (1850) 12 D. 502, at p.503.

67. Id.

the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specific and particular purpose, in which case the seller shall be considered, without such warranty, to warrant the same are fit for such purpose."

For the first time in Scotland, the rule of caveat emptor began to have effect. In Hardie v. Austin and McAslan,<sup>68</sup> the pursuer sold the defenders a quantity of turnip seed, described as, "East Lothian swede, grown in East Lothian and first class stock." The seed was tested and yielded a smaller crop than expected. The defenders attempted to reject the seed. The pursuer did not accept this and raised an action for the price. The Court held the pursuer entitled to succeed, since the goods had not been sold for a "specific and particular purpose."

In Dunlop v. Crawford,<sup>69</sup> the defender bought milk cows from the pursuer. The cows did not produce as expected and the defender refused to pay the price. The pursuer succeeded in an action for the price, since the cows were being put to their usual use and had not been sold for a "specific or particular purpose."

However, the 1856 Act did not apply in all situations and where it did not apply, the principle that a sound price implied a sound article remained in force.

The Act applied only to the sale of specific goods where the risk was capable of being passed to the buyer. In the words of Lord Justice-Clerk Inglis, in Jaffe v. Ritchie,

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68. (1870) 8 M. 798.

69. (1886) 13 R. 973.

"The kind of sale contemplated ... is a sale in which, after the constitution of the contract, the goods are, at common law, at the risk of the purchaser. That is a sale of a definite quantity or corpus, for unless it were that, the goods could not be at the risk of the purchaser."<sup>70</sup>

In that case the pursuer bought 4120 spindles of "3 lb. flax yarn" from the defender. These were found to contain an admixture of jute. The pursuer called upon the defender to replace the spindles and, when this was refused, raised an action for damages. The Court took the view that the pursuer was entitled to succeed. That the Act was inapplicable to the case is explained by Lord Justice-Clerk Inglis thus,

"The terms 'bad quality,' 'defect' or 'insufficiency,' do not apply to a case in which the goods offered are of a different description from those about which parties contracted. There, there is a complete failure to perform the express words of the contract, and we do not need to imply anything. The object of [section 5] is to take away that constructive implication, which arose, according to the law of Scotland, from the payment of a full price. Here it is of no consequence whether the price was full or not."<sup>71</sup>

Clearly, where the goods tendered were different to the goods contracted for, there is a breach of contract and the Act was irrelevant to that situation. In Hutchison & Co. v. Henry and Corrie,<sup>72</sup> the pursuer ordered a quantity of Petersburg oats from the defender, for "mealing purposes." He rejected the goods tendered as wholly unsuited to the purpose and raised an action for damages for breach of contract. The defender argued that the

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70. Jaffe v. Ritchie (1860) 23 D. 242, at p.249.

71. Id.

72. (1867) 6 M. 57.

goods had not been sold "expressly" for a particular purpose. In holding the pursuer entitled to succeed, the Court found that the 1856 Act did not apply to the case, since what was tendered could not have been in implement of the contract. The goods were, therefore, incapable of passing to the buyer. In commenting on this, Lord Justice-Clerk Patton points out that, in this respect, the law in Scotland and England remained unchanged by the Act. He said,

"The law of England in such cases was always identical to the law of Scotland. If an order was given in a contract of sale, in either country, for an article which was bespoke, with a view to be applied to a particular purpose, and the order was accepted, action would lie on the contract, at the instance of the purchaser, for implement or damages, just as in Scotland."<sup>73</sup>

Section five of the Act provides itself, for a number of qualifications on the rule of caveat emptor.

The seller must be "without knowledge" of the defect. Thus, a dishonest seller receives no protection. In Rough v. Moir & Sons,<sup>74</sup> a horse, sold at auction, was described as having been "driven regularly in single and double harness." Having bought the horse, the defender found that the animal was quite incapable of performing that function. The pursuer's action for the price failed, principally because the Court took the view that he knew that the assertion made was false.

Indeed in both Hardie and Jaffe, the Courts had stressed the honesty of the sellers in the transactions.

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73. Ibid. at p.59.

74. (1862) 24D.174.

Where the seller gave an "express warranty of the quality or sufficiency" of the goods, he was liable for this. Such express warranty was always possible under Scots law prior to 1856 and operated in addition to the implied warranty. An example under the Act is found in Cooper & Avis v. Clydesdale Shipping Co.,<sup>75</sup> where the pursuers, who were marine store merchants undertook to supply the defender's ship, the "Forest Monarch" with provisions, in accordance with the requirements of H.M. Commissioners in respect of emigrant ships. On arrival in Sydney, Australia, the Commissioners found the supplies deficient and deducted £100 from the payment to the defenders. The defenders attempted to recover this from the pursuers. While their claim failed due to an insufficiency of evidence, the fact that an express warranty had been given was not questioned.

#### Fitness for Purpose

Where goods were "expressly sold for a specific and particular purpose," the seller warranted that they were fit for that purpose. Again, this was possible, in Scotland, prior to 1856. It is the use of the word "expressly" which may give rise to some confusion in section 5. In Cooper & Avis, Lord Justice-Clerk Inglis clearly thought that this "express sale" could be implied from the circumstances. In discussing the fact that the express warranty did not preclude the requirement as to fitness for purpose he said,

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75. (1875) 2 R. 529.

"There is an express warranty that all these stores shall pass survey of Government inspectors; but that is not the only warranty under this contract. On the contrary, it is superadded to another warranty clearly implied - that the articles to be furnished to the defenders should be fit for the special and particular purpose for which they were intended."<sup>76</sup>

This idea of implication is apparently limited by Lord Kinloch in Hardie<sup>77</sup> when he discusses the possibility of goods which have no specific purpose. Clearly he feels that, however obvious the purpose, unless it is specified, it is outwith the Act. He says,

"It happens in a great many cases that the purpose for which goods are sold can be no other than one purpose only, and yet this does not operate the case contemplated by the statute. The statute does not contemplate a case of mere implication. It requires express contract to be engaged in."<sup>78</sup>

While the circumstances in which it could operate were greatly restricted by the 1856 Act, the remedy remained that of rejection of the goods, possibly coupled with a claim for damages. In McCormick & Co. v. Rittmeyer & Co.<sup>79</sup> the pursuer ordered 100 bales of prime cordage hemp from the defender. He then ordered a further 100 bales on the same terms. The defender shipped 65 bales in part fulfillment of the first order and these were accepted and resold by the pursuer, as were a further 35 bales. The defender then sent a further 35 bales in part fulfillment of the second order and these were rejected. The

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76. Ibid. at p.532.

77. Note 68, supra.

78. Ibid. at p.804.

79. (1869) 7M.854.

pursuer raised an action of damages on account of inferior quality of the first order and £50 in respect of the second. The Court held that the rejection and claim for damages in respect of the second order was quite justified, since the goods did not conform to the contract. However, the claim for damages in respect of the first order did not succeed, because the defective goods had not been rejected. Lord President Inglis stated the rule thus,

"Where a purchaser receives delivery of goods as in fulfillment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract ... the purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract for that contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the actio quanti minoris, which our law entirely rejects."<sup>80</sup>

That the 1856 Act brought about a radical change in the law of Scotland is beyond doubt. Moreover, the passing of the Act was simply the beginning of a process which was to be continued by the Sale of Goods Act 1893 and subsequent legislation.

#### **(B) England: The Common Law**

Since the aim of the Act of 1856 was to assimilate the law of Scotland to the law of England,<sup>81</sup> it is appropriate to examine the contemporaneous provisions of the latter in relation to implied terms as to quality in sale of goods. However, if total

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80. Ibid. at p.858. 7 M. 854.

81. See p.4 supra.



confusion is to be avoided, it is essential to bear in mind that the use of the same word in each jurisdiction does not infer the use of the same concept.

Nowhere is this more apparent than in the use of the word "warranty." In Scotland, the implied warranty as to quality was a fundamental part of the contract.<sup>82</sup> In England, a warranty was described by Benjamin as,

"not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied."<sup>83</sup>

It is significant that Benjamin should have identified the striking contrast between English law and systems based on the developed Civil or Roman law. Judah Philip Benjamin (1811-1884) had served as Attorney General to the Confederate States in the American Civil War and had established a distinguished reputation in Louisiana before his escape to England after the defeat of the South. In 1866 he was called to the English bar and only two years later published the first edition of his treatise on Sale of Goods. Article 2451 of the Louisiana Civil Code of 1825 (corresponding to article 2476 of the Revised Louisiana Civil Code of 1870 and article 1625 of the French Code Civil) laid a clear foundation for warranty of hidden defects as among the obligations of the seller. Scots law, though not codified,

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82. Note 32, supra at p.88.

83. J.P. Benjamin, A Treatise on the Law of Sale of Personal Property; With Reference to the American Decisions and to the French Code and Civil Law (2nd ed., 1873), at p.497.

followed the tradition with which Benjamin was familiar before he made himself master of the law of sale of goods in England. The warranty in Scots law might therefore be regarded as more akin to what English law would regard as a "condition precedent." This view is supported by Greig<sup>84</sup> who, in a discussion of the pre-1893 position, demonstrated that the term "warranty" in English law did not have one clear meaning. Nor did it correspond to the term's meaning in Scotland. He says,

"If the seller was in breach of an express or implied term of the contract, the buyer's right of repudiation depended upon his being able to show that the seller's fulfilling the warranty in question constituted a condition precedent to his own liability under the contract and that the breach in question had gone to the root of the contract."<sup>85</sup>

Apart from difficulties of terminology, what did English law imply as to the quality of the goods sold?

#### Caveat Emptor

The law of sale in England has, as its foundation, the rule caveat emptor. R.P. Brown suggested that this rule dates from at least 1447.<sup>86</sup> The same authority pointed out that it may indeed be of greater antiquity. He goes on to assert that the rule, "appears to have suffered a temporary eclipse in the early part of the eighteenth century."<sup>87</sup> The view was taken by Grose J., in Parkinson v. Lee,<sup>88</sup> that, by 1778, caveat emptor was firmly re-established. He said,

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84. D.W. Greig, "Condition - Or Warranty?" (1973),

89 L.Q.R. 93.

85. Ibid. at p.96.

86. Note 32, supra at p.88 and fn. 4, where he examines briefly the evidence.

"It is the fault of the buyer that he did not insist on a warranty; and if we were to say that there was notwithstanding, an implied warranty arising from the conditions of sale, we should again be opening the controversy, which existed before the case of Douglas. Before that time it was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness, but when that came to be sifted, it was found to be so loose and unsatisfactory a ground of decision that Lord Mansfield rejected it, and said there must be an express warranty of soundness, or fraud in the seller."<sup>89</sup>

Since that decision, writers, including Benjamin<sup>90</sup> and R.P. Brown,<sup>91</sup> have accepted this conclusion without question.

However, when the case cited by Grose J. - that of Stuart v. Wilkins<sup>92</sup> is examined, it can be argued that such a sweeping conclusion is not justified. The case concerned an action by the buyer of a horse against the seller. The horse had been purchased for £31.10 (a substantial price at the time) and the seller had said that it was sound when it was, in fact, suffering from "the windgalls." Lord Mansfield found for the buyer on the basis of express warranty. He did speculate about the use of assumpsit, had there been no such express warranty and said,

"Selling for a sound price without warranty may be a ground for an assumpsit, but, in such a case, it ought to be laid that the defendant knew of the unsoundness."<sup>93</sup>

It might be thought that he was not expressing a wide proposition

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87. Note 32, supra, at p.89.

88. (1808) 2 East 314; 102 E.R. 389.

89. Ibid. at p.321-22.

90. Note 83, supra at p.525.

91. Note 32, supra at p.89.

92. (1778) 1 Doug. 18; 99 E.R. 15.

93. Note 17, supra at p.20.

of that attributed to him by Grose J. However, it is accepted that Grose J's statement did reflect the position of caveat emptor at the time he made it and, indeed, for some time prior to that.

What, then, was meant by caveat emptor? Benjamin stated the position thus,

"[It is] the general rule of law, that no warranty of the quality of a chattel is implied from the mere fact of sale. The rule in such cases is caveat emptor, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself, and has no remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent."<sup>94</sup>

He pointed out later that the rule only applied absolutely to, "an ascertained specific chattel, already existing, and which the buyer has inspected."<sup>95</sup>

This applied even where the defect was latent, and the buyer's examination of the goods could not have reasonably revealed it. An example of this can be seen in Emmerton v. Mathews.<sup>96</sup> In that case the defendant sold a quantity of (apparently good) meat to the plaintiff at Newgate market. No express warranty was given and, once the meat was cooked, it was found to be unfit for human consumption. The buyer's action against the seller failed on the ground that he had bought specific goods having had the opportunity to examine them.

In Jones v. Just,<sup>97</sup> decided on another point, Mellor J.

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94. Note 83, supra at p.498.

95. At p.525.

96. (1862) 7 H. & N. 586; 158 E.R. 604.

discussed the rule caveat emptor and the exceptions to it at length, and states the position thus,

"Where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies, even though the defect which exists in them is latent, and not discoverable on examination."<sup>98</sup>

### Exceptions

The full rigour of the doctrine of caveat emptor did not apply to all sales in all situations. Commenting on the position in 1851, Lord Campbell pointed out that the exceptions had "well nigh eaten up the rule."<sup>99</sup> Indeed, it is clear from the definitions of caveat emptor<sup>100</sup> that the seller could expect no protection in a number of circumstances.

The first exception concerned the case of fraud by the seller referred to in Lord Mansfield's judgment in Stuart and in almost all definitions of caveat emptor. Where the seller knew of the defect and represented to the buyer that the situation was otherwise, he would be liable. An example of this is found in Risney v. Selby,<sup>101</sup> where the seller of a house told the buyer that it was worth £30 per annum in rent when he knew it to be worth only £20. The Court had no hesitation in finding for the plaintiff.

It would be surprising to find the law taking any other view of fraudulent behaviour. In common with the Scottish courts, the

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97. (1868) L.R. 3 Q.B. 197.

98. Ibid. at p.202.

99. Sims v. Marryatt (1851), 17 Q.B. 281, at p.291.

100. Note 98, supra.

101. (1704) 1 Salkeld 210; 91 E.R. 189.

emphasis laid on fraud is most often demonstrated by the English courts in the number of cases where the absence of fraud is noted. Thus, in Parkinson v. Lee,<sup>102</sup> which concerned the sale of unmerchantable hops, it was emphasised that this was in no way due to fraud on the part of the seller. So too, in Chanter v. Hopkins,<sup>103</sup> where the plaintiff sold the defendant a furnace which proved wholly unsuited to the use to which it was put, the plaintiff's lack of fraud was emphasised.

A further exclusion of the doctrine of caveat emptor arose in the situation in which goods were sold by description and did not correspond to that description. However, it is clear that, in such a situation, the question of warranty does not arise since there has been complete failure to implement the contract. Lord Abinger C.B. was at pains to emphasise this when he said,

"If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that it not a warranty; there is no warranty that he should send him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is nonperformance of it."<sup>104</sup>

In Tye v. Fynmore,<sup>105</sup> the plaintiff agreed to sell the defendant, "2 tons of fair merchantable sassafras wood, in logs, at 6 guineas per cwt." The defendant refused to accept delivery of the goods on the ground that what arrived was timber from the sassafras tree (a small North American laurel) and, in the trade, "sassafras wood" meant the roots of the tree, the latter being

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102. Note 88, supra.

103. (1838) 4 M. & W. 399; 150 E.R. 1484.

104. Ibid. at p.404.

105. (1813) 3 Camp. 462; 170 E.R. 1446.

about six times as valuable as the former. Despite the fact that the defendant, who was "a druggist, and well-skilled in articles of this sort," had examined a sample prior to purchase, he was held to be entitled to refuse the goods since they did not correspond to the description given of them.

A similar situation arose in Josling v. Kingsford,<sup>106</sup> where the plaintiff obtained a quantity of "oxalic acid" from the defendant. In the trade, "oxalic acid," is understood to be a pure substance, whereas what was delivered contained 10% sulphate of magnesia (Epsom Salts). The Court found for the plaintiff on the basis of simple breach of contract by failure of performance.

While the buyer, under English law, was afforded a degree of protection in cases of sale by description, this could prove to be something of a double-edged sword. Where the goods answered the description, the fact that they proved unsatisfactory or useless did not give the aggrieved buyer a remedy. This is evidenced by Chanter v. Hopkins<sup>107</sup> itself. In that case the plaintiff was the patentee of an invention "Chanter's smoke-consuming furnace." The defendant sent an order in the following terms: "Send me your patent hopper and apparatus, to fit up by brewing copper with your smoke consuming furnace. Patent right £15.15s., ironwork not to exceed £5.5s., engineer's time fixing 7s.6d. per day." The furnace was installed but was found to be of no use for the purpose of brewing. The defendant returned the equipment and, in an action for the price, the plaintiff

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106. (1863) 13 C.B.; N.S. 447; 143 E.R. 177.

107. Note 103, supra.

succeeded. The defendant had received exactly what he ordered and the fact that it did not perform as he thought it might was held not to be the plaintiff's responsibility.

The full force of this approach can be seen in Barr v. Gibson,<sup>108</sup> where the defendant sold the plaintiff a ship, the "Sarah," on 21st October 1836. Unknown to the parties, the "Sarah" had gone aground on the coast of Prince of Wales Island on 13th October 1836. Due to the time of year and weather conditions, it was recommended that she be left there and was resold on 24th October for £10. In setting aside the original verdict for the plaintiff, Parke B. said:

"Here the subject of transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability of being got off. She was still a ship, though at the time incapable of being, from the want of local convenience and facilities, beneficially employed as such."<sup>109</sup>

However, this rigorous approach to the question of description had not been universally accepted even before the Sale of Goods Act 1893. In Gardiner v. Gray,<sup>110</sup> Lord Ellenborough required not only strict correspondence with description, but saleability as goods of that description, where there had been no opportunity for inspection. In an explanation of this view, to be recommended for its clarity, he said:

"The purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every

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108. (1838) 3 M. & W. 390; 150 E.R. 1196.

109. Ibid. at p.401.

110. (1815) 4 Camp. 144; 171 E.R. 46.



contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fitness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."<sup>111</sup>

Fifty-three years later, in Jones v. Just,<sup>112</sup> Mellor J. restricted the principle set out by Lord Ellenborough to cases where the seller was either the manufacturer of, or a dealer in, the commodity sold.

Adherence to description was subject to a further qualification that of a "reasonableness" test. In Bull v. Robison,<sup>113</sup> the plaintiff agreed to supply the defendant with a quantity of hoop-iron, to be manufactured by the former in Staffordshire and delivered to the latter in Liverpool. The hoop-iron was merchantable when dispatched but, in transit by canal, it suffered what was accepted by the court to be normal deterioration. The defendant refused to accept the goods and the plaintiff sued for the price. In finding for the plaintiff, Alderson B. took the view that,

"Any warranty implied by the law must be a reasonable warranty and cannot be one which it is physically impossible to comply with."<sup>114</sup>

No more did the protection afforded by the description extend beyond the goods to their packaging. In Gower v. Van

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111. Ibid. at p.145.

112. Note 97, supra at p.203.

113. (1854) 10 Ex. 342; 156 E.R. 476.

114. Ibid. at p.345.

Dedalzen,<sup>115</sup> the plaintiff agreed to sell the defendant "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel "Fortuna", .... (the said cargo consisting of L.R. 240 casks, containing 901 salmes and 9 pignatelles)...." The defendant refused to take delivery alleging that the casks were not sufficiently well-seasoned to contain "good merchantable Gallipoli oil." Having resold the oil at auction for less than the price agreed with the defendant, the plaintiff sued for the balance. In finding for the plaintiff, the Court made clear that the containers were a matter peripheral to the contract and their condition would only be relevant if the effect was to render the goods unmerchantable.

The restrictions on the rule caveat emptor discussed above are a result of the general principles of contract and, as such, cannot be said to be a true exception to it. However, the rule was restricted, in addition, by a number of implied warranties.

#### Sale by Sample

One such warranty arose in sale by sample. Where such a sale occurred, it was implied that the bulk must correspond to the sample. Benjamin - who treated this almost as if it "went without saying" - stated the position thus,

"in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. The rule is so universally taken for granted that it is hardly necessary to give direct authority for it."<sup>116</sup>

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115. (1837) 3 Bing. N.C. 717; 132 E.R. 587.

116. Note 83, supra, at p.528.

That this provided an additional element of protection for the buyer, was stressed by Abbott J. in Parker v. Palmer,<sup>117</sup> when he said,

"The words per sample are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality."<sup>118</sup>

In that case the plaintiff sold the defendant 1826 bags of East India rice of 132.6d. per 100 pounds, according to the conditions of the East India Company. This was a sale by sample and the bulk was of a lesser quality than the sample. While the defendant's subsequent putting the rice up for sale at a limited price and buying it himself barred rejection, the Court was in no doubt that he would have been entitled to reject prior to that behaviour.

It may be noted that the fact that a small amount of the commodity was shown to the buyer, prior to the sale, would not necessarily mean that the sale was by sample. Thus in Tye v. Fynmore,<sup>119</sup> where the buyer had examined a small amount of the sassafras wood, Lord Ellenborough was adamant that the sale was by description and not by sample.

Where the bulk did correspond with the sample, the seller was usually held to have fulfilled his obligation. Thus, in Parkinson v. Lee<sup>120</sup> the plaintiff who bought five packets of hops from the defendant, on the basis of samples he had inspected, had

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117. (1821) 4 B. & Ald. 387; 106 E.R. 978.

118. Ibid. at p.391.

119. Note 105, supra.

120. Note 88, supra.

no remedy when it became apparent that they were unmerchantable due to a latent defect, since the bulk corresponded to the sample.

However, even where the bulk did correspond with the sample, the seller was protected where the defect was such as to render the goods different to those described in the contract. This was the case in Josling v. Kingsford.<sup>121</sup>

In order that the buyer could establish whether or not the bulk corresponded with the sample he was given, "a fair opportunity of comparing the bulk with the sample."<sup>122</sup> This was stressed in Lorymer v. Smith<sup>123</sup> where the plaintiff initially declined to let the defendant examine the whole consignment of wheat. In rejecting the goods, the defendant relied on a custom of the trade which provided for inspection. The Court took the view that this was "so reasonable, that, without such usage, the law would give him that right."<sup>124</sup>

Controversy has surrounded the matter of the buyer's right where the sample itself contained a latent defect. Certainly in Parkinson v. Lee,<sup>125</sup> the fact that the bulk corresponded with the sample was held to be enough, regardless of the latent defect in the sample. However, seventy years later in Heilbutt v. Hickson,<sup>126</sup> this line of reasoning was not followed.

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121. Note 106, supra.

122. Benjamin, note 83, supra at p.528.

123. (1822) 1 B. & C. 1; 107 E.R. 1.

124. Ibid. at p.2.

125. Note 88, supra.

126. (1872) L.R. 7, C.P. 438.

In that case the plaintiffs contracted to supply the defendant with 30,000 pairs of black shoes for the French army and provided a sample shoe. It was known to both parties that French regulations prohibited the use of paper in the filling of the soles of shoes used by the army. Several consignments of shoes were accepted before it was discovered that paper had been used in the soles of some of the shoes. When the sample shoe was cut open, it was found that the sole contained paper. In finding for the plaintiffs, the Court decided that, since the defect was latent, it was no defence that the bulk corresponded with the sample.

So, too, in Mody v. Gregson,<sup>127</sup> where the defendant agreed to manufacture 2500 pieces of grey shirting according to the sample. It was agreed that each piece should weigh 7 pounds. The consignment was accepted and it was later discovered that the shirting contained 15% china clay which had been added solely in order to reach the desired weight. This had also been done with the sample. In finding for the plaintiff, Wiles J. took the view that,

"the seller himself made the sample, and must be taken to have warranted that it was one which so far as his, the seller's knowledge went, the buyer might safely act upon."

These cases are taken by Benjamin to support the proposition that,

"[I]f a manufacturer agrees to furnish goods according to sample, the sample is to be considered as free from any secret defect of

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127. (1868) L.R. 4, Ex. 49.

manufacture not discoverable on inspection,  
and unknown to both parties."<sup>128</sup>

Not only would this distinction between manufacturers and other sellers explain the decision in Parkinson v. Lee, but it is echoed elsewhere. In Jones v. Bright,<sup>129</sup> where the defective goods were a quantity of copper, Best C.J. made this point,

"Reference has been made to cases on warranties of horses; but there is great difference between contracts for horses and a warranty of a manufactured article. No produce can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles."<sup>130</sup>

This distinction has significant parallels with modern distinctions between commercial and consumer sellers and will be discussed at a later stage.

#### Fitness for Purpose

A second exception to the rule caveat emptor in the context of warranty is found in the seller's warranty that goods will be fit for a particular purpose where the buyer has made the purpose known and is relying on the seller's skill and judgment.

An example of this is found in Brown v. Edgington,<sup>131</sup> where the plaintiff, a wine merchant, ordered a crane rope from the defendant. This was to be used to lift pipes of wine from the plaintiff's cellar. When the rope proved inadequate, the court had no hesitation in finding for the plaintiff, regardless of the fact that the defendant was not the manufacturer of the rope.

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128. Note 83, supra at p.533.

129. (1829) 5 Bing. 533; 130 E.R. 1167.

130. Ibid. at p.544.

131. (1841) 2 Man. & G. 279; 133 E.R. 751.

The essential elements in this warranty are the undertaking as to fitness for a particular purpose and reliance on the seller. It is clear from Jones v. Bright,<sup>132</sup> that the seller did not have to state expressly that the goods would be fit for the purpose. In that case, the plaintiff bought copper sheathing for a ship from the defendant. The defendant had said, "I will supply you well." Due to a defect in manufacture, the sheathing lasted four months instead of the usual four years. In finding for the plaintiff, Best C.J. said,

"It is not necessary that the seller should say, 'I warrant,' it is enough if he says that the article which he sells is fit for a particular purpose."<sup>133</sup>

However, the seller's actual knowledge of the buyer's purpose would not necessarily mean that the seller warranted the fitness of the goods for a particular purpose. In Shepherd v. Pybus,<sup>134</sup> the defendant undertook to build the plaintiff a barge that was, "reasonably fit for use." He knew that the plaintiff intended to use it to carry cement from Faversham to London. The written contract made no reference to the defendant's undertaking. The barge proved inadequate for the task and the plaintiff expended sums of money on repairs and damaged cement. A new trial was ordered on the question of the barge's adequacy as an ordinary barge, any question of a special purpose being rejected.

Nor did the fact that the purpose for which goods were bought was obvious result in any implied warranty on the seller's

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132. Note 129, supra.

133. Ibid. at p.543.

134. (1842) 3 Man. & G. 858; 133 E.R. 1390.

part. In Burnby v. Bollett,<sup>135</sup> the defendant had bought a pig's carcass from a butcher at Lincoln market. He left it at the butcher's stall while he completed other business. The plaintiff came to the stall and, on requesting to buy the carcass, was referred by the butcher, to the defendant from whom he purchased the carcass. It turned out to be unfit for human consumption, but the court found for the defendant there being no implied warranty since no particular purpose was stated.

In that case it appears to have been significant that the defendant was not a dealer in meat.<sup>136</sup> Again, there seems to have been a distinction drawn between manufacturers and non-commercial sellers, on the one hand, and consumer sellers on the other. While this is similar to the distinction drawn in sales by sample, it is submitted that, where the seller was a professional, it would be easier to establish the buyer's reliance on the seller's skill.

#### Custom of Trade

In common with the position in Scots law, English law accepted warranties implied by the custom of a particular trade. An example of this is found in Jones v. Bowden,<sup>137</sup> where the defendant had purchased a quantity of sea-damaged pimento. He repackaged it and resold it, at auction, to the plaintiff. Although it was the usual practice in such sales for the fact of sea-damage and repackaging to be mentioned in the auctioneer's

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135. (1847) 16 M. & W. 644; 153 E.R. 1348.

136. Ibid. at p.653.

137. (1813) 4 Taunt. 847; 128 E.R. 565.



catalogue, this was not done in this case. The plaintiff was held entitled to succeed because of the custom of trade.

#### Merchandise Marks Act

The Merchandise Marks Act, 1862, provided that where trademarks or indications of weight, measure or of the country of origin were on the containers of goods, the seller gave an implied warranty that these reflected the truth. The Act was repealed and substantially reenacted by the Merchandise Marks Act of 1887 which remained in force until the Trade Descriptions Act of 1968.

#### Express Warranty

A further point on implied warranties requires exploration. Where the seller gave an express warranty, did this preclude the possibility of a warranty being implied? This would appear to be the conclusion drawn by Benjamin when he said,

"no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound."<sup>138</sup>

In support of this view he cites Parkinson v. Lee and Dickson v. Zazania.<sup>139</sup> However, it is clear from Bigge v. Parkinson,<sup>140</sup> that this was not an absolute rule. In that case the plaintiff had agreed with the East India Company that he would convey troops to Bombay. He contracted with the defendant for a quantity of stores "guaranteed to pass survey of the East India Company's Officer." Much of the stores proved to be unwholesome

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138. Note 83, supra at p.546.

139. (1851) 10 C.B. 602.

140. (1862) 7 H. & N. 955; 158 E.R. 758.

and the plaintiff's action succeeded on the basis of an implied warranty that the stores should be fit for their purpose. The Court had no difficulty in adding this to the express warranty, as Cockburn C.J. made clear when he said:

"In addition to the implied condition that the provisions supplied shall be fit for the purpose intended, there is superadded an express condition, not qualifying the former, but inserted for the benefit of the buyer."<sup>141</sup>

It was always possible for the buyer to require an express warranty from the seller. Indeed, in a system where no warranty as to the quality of goods is implied by a general provision of the law, the express warranty takes on a greater significance. This is reflected by one learned judge who remarked, "It is the fault of the buyer that he did not insist on a warranty."<sup>142</sup>

What amounted to a warranty depended on the intention of the parties. As Buller J. put it,

"It was rightly held by Holt C.J. ... and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty, provided that it appears on evidence to have been so intended."<sup>143</sup>

Benjamin provides rather more guidance here when he said,

"a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment."<sup>144</sup>

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141. Ibid. at p.961.

142. Per Grose J. in Parkinson v. Lee, note 88, supra at p.321.

143. Pasley v. Freeman, (1789) 3 T.R. 51; 100 E.R. 450.

144. Note 83, supra at p.499.

Thus, while English law had, as its foundation, the rule caveat emptor, it is clear that, in a number of situations, a warranty as to the quality of goods would be implied. Again, the question must be asked - did any of these implied warranties include an element of durability? Two of the cases discussed above contain elements of the issue of durability. However, in both cases, the decision of the court is based on other grounds. In Jones v. Bright where the copper lasted for one-twelfth of the time expected, the matter was decided on the basis of fitness for purpose. In Bull v. Robison, where the hoop-iron deteriorated in transit, this was held to be part of the warranty to be implied. Thus, as was suggested in respect of Scotland, it may be that the question of durability was simply dealt with as an aspect of another warranty.

**(c) Canada: The Common Law**

In 1969, the then Chief Justice of Canada, the Honourable Bora Laskin, delivered the annual Hamlyn Lecture<sup>145</sup> In his opening comments, he referred to a letter, published in the Law Times in 1856,<sup>146</sup> which commented on the law in force, at that time, in England and Upper Canada. It claimed that:

"The laws of the two countries are almost identical. The practice or administration of the law is the same in each country.... I do not invite an emigration of English lawyers, for in Upper Canada the profession is well supplied from native sources. But it will be a consolation to such members of the English bar as may resolve to enter into competition in the colonies to know that they will labour under no disadvantage."<sup>147</sup>

Laskin went on to recount the tale of a member of the English bar who felt sufficiently confident that the similarity entitled him to practice in Canada, without satisfying the requirements of the Law Society of Upper Canada, that he was willing to litigate the point.<sup>148</sup>

In considering the British influence on the Canadian legal system, two points require emphasis. First, the "British influence" was, in truth, the influence of English law. The Scottish legal system made virtually no impact on developments in Canada. As Laskin said, "one looks in vain for any strictly Scottish influence on Canadian law."<sup>149</sup> Even a cursory glance at

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145. Laskin, The British Tradition in Canadian Law (1969), The Hamlyn Lectures, Twenty-First Series.

146. 28 L.T. 85.

147. Note 145, supra at p. xiii.

148. Note 145, supra at p. xiv, where Laskin cited Re de Sousa (1885) 9 O.R. 39.

149. Note 147, supra.

the names of the parties, in early Canadian reports, demonstrates that many Scots had found their way to Canada, but this does not appear to have been reflected in the legal system. As Cote said:

"Large as the Scots have bulked in the history of the British empire, no one has ever doubted that it was purely English law which was introduced into such [settled] colonies."<sup>150</sup>

Secondly, it should be noted that this English influence in Canada was only barely felt in what is now the Province of Quebec. Initially a French colony, Quebec was ceded to Britain in 1763. English law was introduced at that time, although the effect of this has been a matter of debate.<sup>151</sup> In any event, the Quebec Act, 1774 reintroduced the French law of the time, "for matters of property and civil rights," although it expressly preserved English "criminal and testamentary laws."<sup>152</sup> While the position in Quebec is outwith the scope of this paper,<sup>153</sup> it is important to note the distinct legal system operating in that part of Canada.

In examining the common law in Canada on implied terms as to quality in sale of goods, and in assessing the extent to which it was "almost identical" to the English common law, the acceptance of the latter as the foundation of the former must be established. However, this alone would not be sufficient. In

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150. Cote, "The Reception of English Law," (1977) 15 Alta. L. Rev. 29, at p.36.

151. Cote, note 150, supra at p.88.

152. Id.

153. For an excellent discussion of the seller's liability for defective goods, in Quebec, see the debate which took place between Professors Durnford and Gow in the McGill Law Journal in the 1960's (1963-64) 10 McGill L.J. and (1964) 11 McGill L.J.

addition, the development of the common law in Canada must be considered. As Laskin pointed out:

"The introduction of English law in the 18th and 19th centuries into the then separate constituents of a later Canada, whether on the principle of colonies by conquest ... or on the half-truth of colonies by settlement ... had to take account of the rude realities of small settlements, with hardly any resources of professional manpower and beset by difficulties of communication."<sup>154</sup>

#### Reception of English Law In Canada

The timing of the reception of English law in Canada has generated considerable discussion.<sup>155</sup> The following is a brief outline of the process, and the dates given relate to the time when English law was formally accepted as operating in a colony. The actual application of English legal principles would seem to depend on whether the area was acquired by settlement or was conquered or ceded. Where settlers arrived in an area devoid of an organised legal system, they simply brought the English common law rules of the time with them. As Cote points out, "the aborigines of the New World were always disregarded,"<sup>156</sup> in this context. Where the area was conquered by or ceded to Britain, English law would be applied from that date. An example of this is found in the case of Quebec. For the purpose of certainty, the legislature of the colony might set a date for the reception of English law. In terms of the Provinces and Territories, as they exist today, the following dates for reception are widely

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154. Note 145 supra, at p.2.

155. See Cote, note 150, supra, and articles cited therein, and Laskin, note 145, supra, at pp.3-10.

156. Note 150, supra p.37.

accepted:<sup>157</sup> New Brunswick and Nova Scotia, October 3, 1758; Prince Edward island, October 7, 1763; Ontario, October 15, 1792; Newfoundland, December 31, 1832; British Columbia, November 19, 1858; Alberta, Manitoba, Saskatchewan, the Northwest Territories and the Yukon, July 15, 1870. It should be noted that, once the English common law was received in a particular area, it was that law which was applied and developed in Canada and subsequent alteration of provision in Britain was irrelevant. Thus, in Hopkins v. Jannison,<sup>158</sup> Middleton J. warned that English cases decided since the Sale of Goods Act 1893, "must ... be received with caution where, and here, we still have the common law."<sup>159</sup> In 1910, in Ontario Sewer Pipe Co. v. Macdonald,<sup>160</sup> Garrow J.A. accepted that the rules set out by Mellor J. in Jones v. Just,<sup>161</sup> "may still be safely relied on as correctly expressing the law here,"<sup>162</sup> despite the fact that they had been altered by statute in Britain.

That English common law formed the foundation upon which subsequent developments built, in Canada, is clear. Indeed, the extensive reference to and reliance upon English cases and writers is found through the cases discussed below.

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157. Note 155 supra.

158. (1914) 18 D.L.R. 88.

159. Ibid. at p.108.

160. (1910) 2 O.W.N. 483.

161. (1868) L.R. 3 Q.B. 197.

162. Note 160, supra at p.485.

## Caveat Emptor

The common law of sales was firmly rooted in the doctrine of caveat emptor. In Borthwick v. Young,<sup>163</sup> the plaintiff bought 138 barrels of apples from the defendant. Prior to the sale, the defendant's agent had opened a number of the barrels to enable the plaintiff to examine the contents. The plaintiff had simply looked at the apples at the top of a few barrels, despite the opportunity to make a thorough inspection. After the sale, it was discovered that many of the apples were of inferior quality and the plaintiff claimed damages. In dismissing the plaintiff's action, Osler J.A. quoted the following passage from Benjamin:

"In general when an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are caveat emptor and simplex commendatio non obligat."<sup>164</sup>

In Higgins v. Clish,<sup>165</sup> Graham E.J. stated the position thus:

"When goods are in esse and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies, even though the defect which exists in them is latent, and not discoverable on examination, at least when the seller is neither the grower nor the manufacturer."<sup>166</sup>

In that case, the plaintiff had bought a "Leonard" boiler and engine for use in the operation of a grist mill. The machinery was unsuited to the task and he sought to recover the price paid

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163. (1886) 12 O.A.R. 671.

164. Ibid. at p.676.

165. (1900) 34 N.S.R. 135.

166. Ibid. at p.136.



from the seller. While the case also raised the question of purchase of an article under a patent name, the decision was based largely on the application of the doctrine of caveat emptor.

The doctrine is repeated in Island Cold Storage Co. v. Murch.<sup>167</sup> In that case the defendant offered to sell the plaintiff a quantity of veal. The price was agreed at 15c. per lb. and sixteen carcasses were delivered to the plaintiff's premises, where the plaintiff's employees inspected and weighed them. The plaintiff later alleged that the meat was not veal and claimed damages. The jury found for the defendant, and the plaintiff's appeal was dismissed by Arsenault J. who stated the position thus:

"They [the plaintiffs] were buying an article with no latent defects; it was, to all intents and purposes, a sale and purchase over the counter with full and ample opportunity on the part of the plaintiff to protect its interest and see that it was getting what it bargained for. The doctrine of caveat emptor applies to this case, for here the plaintiff did not buy on the faith of the seller's word, but, after taking in the goods and with a full opportunity of inspection and examination."<sup>168</sup>

It is clear, from the cases discussed above, that the doctrine of caveat emptor did not apply to every sale in all situations. As in England under the common law, certain factors had to be present before the full rigour of the doctrine was felt by the buyer. That the goods themselves had to be in esse is illustrated by Oldrieve v. Anderson Co. Ltd.<sup>169</sup> There, the

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167. (1922) 70 D.L.R. 449.

168. Ibid. at p.450.

plaintiff had some white ash lumber piled up at a station and ready for sale. The defendant's agent saw it, made a cursory examination of it and, at a later stage, the defendant bought the lumber. A dispute arose as to the quality of the lumber. In finding the plaintiff entitled to the price, Garrow J.A. said,

"The goods were in esse from the beginning of negotiations -- not goods to be manufactured. The rule caveat emptor therefore applies to exclude implied warranties."<sup>170</sup>

Where the goods were not in esse by the time of the sale, caveat emptor would not apply. The sale in such a case would be by description and the obligations on the seller, in such cases, are discussed below.<sup>171</sup>

It is clear from the cases discussed above that for caveat emptor to apply, not only must the goods be in esse, but the buyer must have been afforded an opportunity to examine them. As is illustrated by Borthwick v. Young,<sup>172</sup> where the buyer failed to take the opportunity, the doctrine continued to operate.

It is not surprising to find that, as in England, the doctrine would not protect a fraudulent seller. In Wallace v. Garrett,<sup>173</sup> the plaintiff ordered a "style number 24" piano from the defendant. The defendant delivered a "style number 20" piano and claimed it was the same as that ordered, but in a different case. On discovering the truth, the plaintiff raised an action

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169. (1916) 27 D.L.R. 231.

170. Ibid. at p.232.

171. See infra p.57.

172. Note 163, supra.

173. (1904) 3 O.W.N. 649.

to recover the price. Despite the fact that he had had an opportunity to examine the piano before accepting it, the plaintiff was successful because of the defendant's fraud.

Where the circumstances providing for the operation of the doctrine of caveat emptor clearly envisaged patent defects, did the same rule apply where the defect was latent? The statement of Graham E.J. in Higgins v. Clish, quoted above,<sup>174</sup> makes clear that the latency of the defect was irrelevant. This view is supported by the earlier case of Rothwell v. Milner,<sup>175</sup> where the defendant sold the plaintiff a horse which, unknown to either party, was suffering from "glanders." As a result of the condition, the horse was quarantined and eventually destroyed. The plaintiff sued for damages. In dismissing the appeal and confirming the original judgment, Bain J. held the doctrine of caveat emptor applicable, despite the latency of the defect.

By 1922, in Island Cold Storage Co. v. Murch<sup>176</sup> (discussed above), the absence of a latent defect was specifically mentioned in the judgment. While the reference is strictly obiter, the fact that the reference was made might suggest a changing attitude. Certainly, in the later cases, where the sale was by description, latent defects were viewed in a light more favourable to the buyer.<sup>177</sup>

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174. See supra p.53.

175. (1892) 8 Man. R. 472.

176. Note 167, supra.

177. See infra discussion p.61.

## Sale By Description

In discussing the common law in England, it was observed that caveat emptor did not apply where the goods were sold by description and failed to conform to that description. So too was the situation in Canada.

In Alabastine Co. v. Canada Producer and Gas Engine Co. Ltd.,<sup>178</sup> the defendant agreed to provide the plaintiff with a three-cylinder gas engine, pulley, regulator and piping, in accordance with certain specifications. The plaintiff paid most of the price prior to installation. While there was some dispute over the evidence, the Court accepted that the machinery never worked properly. The plaintiff raised an action for return of the money paid and for damages. In finding for the plaintiff, Meredith J, quoting from Benjamin on Sale,<sup>179</sup> said:

"Where the subject matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."<sup>180</sup>

While the goods sold by description were often unascertained, it was possible to have a sale by description of a specific article. In Mitchell v. Seaman<sup>181</sup> the plaintiff agreed

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178. (1914) 17 D.L.R. 813.

179. 3rd. Am. ed. para. 895.

180. Note 178, supra at p.817.

181. (1909) 43 N.S.R. 311.

to buy a quantity of first-class hay from the defendant. The hay was in the defendant's two barns and the plaintiff did not see it prior to going to collect it. He removed the hay from the first barn and, on starting to remove it from the second barn, discovered that it was musty and mouldy. The plaintiff refused to take it and, in finding for him, Graham E.J. accepted that this was a sale by description. He said:

"It is quite clear that there may be a sale by description notwithstanding that there is a specific article. The sales of cargoes still on the ocean are instances, and the terms of the contract often contain a description that the article is of a particular kind. One can hardly suppose that a person would buy a cargo of fish or coal or lumber without requiring some further description."<sup>182</sup>

In deciding whether or not sale of specific goods was by description, the buyer's opportunity to examine the goods was clearly relevant. Although it is not discussed in Mitchell, the earlier case of Mooers v. Gooderham & Worts Ltd.<sup>183</sup> provides a good example of the situation described by Graham E.J. In that case the grain was purchased by the defendants by letter and telegraph. Since there was no opportunity to inspect, it was held that this was a sale by description and, since the grain was of poor quality, the defendants were not bound to accept it.

What amounted to an opportunity to inspect the goods seems, in Mitchell and Mooers, to have depended on practical reality. This does not appear to have been the case in Fraser v. Salter.<sup>184</sup> There the plaintiff was the consignee of 6000 bushels

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182. Ibid. at p.317.

183. (1887) 14 O.R. 451.

of oats, stored in bulk on a vessel in the harbour. He advertised the oats for sale at an auction and, prior to the auction, the defendant agreed to buy the oats. About 1500 bushels had been resold by the time it was discovered that the oats were musty.. The defendant refused to pay the balance of the price and the plaintiff raised an action. In finding for the plaintiff the court held that the doctrine caveat emptor applied, since the sale was of a specific thing and both parties had an equal opportunity to inspect. While it is accepted that the parties' opportunity to inspect was equal, it is submitted that it was not reasonably practical. Fraser was not referred to in Mooers, nor in Mitchell, a decision in the same province.

Clearly then, where the sale is by description, the buyer is protected by the requirement that the goods should conform to the description to the full. A clear example of the degree of this protection is found in Hedstrom v. Toronto Car Wheel Co.<sup>185</sup> The plaintiff agreed to supply the defendant with a quantity of "Depere" iron. He attempted to deliver the quantity of iron, made by another company, but by the same process and of the same quality. The defendant refused to accept the iron and the plaintiff raised an action for the price. In finding that the defendant was entitled to reject the iron, Spragge C.J.O. said:

"A customer is entitled to insist upon having what his contract provides that he shall have; and is not bound to accept some other thing of the like description, even though it be shown that the other thing is of equally good quality."<sup>186</sup>

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185. (1883) 8 O.A.R. 627.

186. Ibid. at p.631.

As was demonstrated in the English context, this requirement of strict adherence to description could be something of a double-edged sword. Where the goods did conform to the description, the buyer was bound to accept and pay for them even if they proved wholly unsuited to his needs.<sup>187</sup> Thus, in Higgins v. Clish,<sup>188</sup> discussed above, the buyer got the "Leonard" engine and boiler he ordered, and the fact that it was unsuited to his purpose was not considered to be relevant.

In discussing correspondence with description, a number of cases suggest that an element of merchantability was contained within the notion of description. References to "saleability," for example, suggest that goods had to be commercially acceptable as being of a particular description. In Weis v. Bissett,<sup>189</sup> the plaintiff sold the defendant a quantity of mackeral. The mackeral was lying in boxes, in front of the parties, and the defendant was given the opportunity to inspect, although he did not do this. On arrival in Boston, it was found that part of the consignment was of inferior quality. The plaintiff's action for the price failed, despite the defendant's failure to inspect, because quality was held to be part of the description. Halliburton C.J., quoted Chancellor Kent in the following statement:

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186. Ibid. at p.631.

187. See supra p.36.

188. Note 165, supra.

189. (1857) 3 N.S.R. 178.

"There is an implied warranty that the article shall answer the character described, and be saleable in the market under that denomination."<sup>190</sup>

In Grocers Wholesale Co. v. Bostock,<sup>191</sup> the defendant sold the plaintiffs 573 cases of canned salmon. While these were "do-overs," (cans which have been cooked once, found to be unsatisfactory, and cooked and sealed again within 24 hours), there was an express warranty that they were free from "blown, burst, dry and leaks." There was breach of the express warranty for which the plaintiff was held entitled to recover and of the implied warranty of fitness for purpose. In his judgment, providing an excellent review of the law, Riddell J. made the following statement:

"The goods were bought by description, from which an implied warranty arose that they are of merchantable quality."<sup>192</sup>

The question arises -- did this requirement of merchantability within the description extend to protect the buyer against latent defects? While the case was concerned primarily with issues of sale by sample and fitness for purpose, Riddell J's judgment in John Macdonald and Co. Ltd. v. Princess Manufacturing Co.<sup>193</sup> suggests that, at least later, under the common law, the buyer might be protected against latent defects. He said that the common law required that goods should

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190. Ibid. at p.181.

191. (1910) 22 O.L.R. 130.

192. Ibid. at p.138.

193. [1926] 1 D.L.R. 718. The transaction from which the case arose took place prior to the enactment in Ontario of the Sale of Goods Act 1920, c.40. The decision rests therefore upon the common law.



"answer [their] usual commercial description and be merchantable and saleable under that description."<sup>194</sup>

Under English common law, it was suggested that the duty placed on a dealer or manufacturer to provide "saleable" goods of a particular description was higher than that placed on other sellers. While most of the Canadian cases, which deal with this point, concern fitness for purpose and, as such, may be tied to the notion of reliance, the discussion, by Middleton J. in Hopkins v. Jannison,<sup>195</sup> of the nature of implied terms is illuminating. He said:

"I think it is desirable to point out that the implied warranty, where goods are sold by a manufacturer or dealer, rest on precisely the same footing as all other implied contracts. This is sometimes lost sight of not only in argument but in decided cases; and, where that is so, the decision is generally out of harmony with the body of the law."<sup>196</sup>

He went on to review the English authorities on implied terms, emphasising that the rationale behind them lay in giving effect to the intention of the parties. On this basis, it is clear that terms could be implied, regardless of the character of the seller.

The requirements placed on the seller where a sale was by description may simply result from the application of general contractual principles, i.e., that contracting parties should do what they undertook to do. In this respect it is perhaps erroneous to describe it as an exception to the doctrine of

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194. Ibid. at p.724.

195. (1914) 18 D.L.R. 88; discussed supra p.52.

196. Ibid. at p.102.

caveat emptor. More accurately described as "exceptions" would be the law applicable to sale by sample, sales where the relative position of buyer and seller put the seller under an obligation to provide goods which were fit for the buyer's intended purpose and situations where there was a custom of trade which provided for a warranty on the part of the seller.

#### Sale By Sample

What was required for a sale to be "by sample" is discussed fully in Re Faulkners Ltd.<sup>197</sup> While the case was primarily concerned with competing claims to the property of a company in liquidation, the discussion of sale by sample examined the distinction between sale "by" sample and sale "from" samples. A Scottish company, which sold dried goods in Glasgow, sent its agent to Canada with samples of their wares. The agent showed the samples to prospective customers, in the hope that they would place orders, although the samples were not left with buyers. Faulkners Ltd. ordered a quantity of dried goods which were lodged in a bonded warehouse in Canada, in February 1915, pending payment of the duty on them. The company paid most of the duty and the goods were finally released in March 1915. Meanwhile the creditors had commenced liquidation proceedings. If the sale had been by sample, the property in the goods would not have passed to the buyer until there had been an opportunity to compare the bulk with the sample. Meredith C.J.C.P. made clear however, that this was not a sale by sample but a sale from samples. He drew the distinction in the following terms:

"In this case a good many more than a hundred different kinds of goods were purchased: to say that in such a case the sale was by sample, that the contract was that each should be in accordance with the sample, and that there was to be an inspection for the purpose of comparing them with the samples exhibited, is to say that which, by reason of its impracticability only, no business man would seriously assert. In a case of a sale by sample the buyer usually retains the sample to be the guide in the inspection or other test: in cases such as this the samples go with the salesman; they are part of the stock-in-trade of his employers."<sup>198</sup>

He goes on to note that, while sale by sample was once a popular way to deal with bulky goods, such as wheat, it had been superseded, by 1918, by "sale by grade." From Meredith C.J.C.P.'s description of it,<sup>199</sup> it appears that this latter mode of sale was a form of sale by description.

Similarly, the fact that an example of the item sold was shown to the prospective purchaser and left with him, would not necessarily mean that the sale was by sample. In Dominion Paper Box Co. Ltd. v. Crown Tailoring Co. Ltd.,<sup>200</sup> where the decision was based primarily on the seller's implied obligation that the goods would be fit for the buyer's purpose, the fact that an example of the goods had been exhibited was not enough to persuade Rose J.<sup>201</sup> that there was a sale by sample.

Where the sale was by sample, there was an implied obligation that the bulk would correspond to the sample. That

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197. [1918] 38 D.L.R. 84.

198. Ibid. at p.90.

199. Id.

200. [1918] 43 D.L.R. 557.

201. Ibid. at p.561.

this was strictly construed is illustrated in Scottish Rubber Co. v. Berger Tailoring Co.<sup>202</sup> There the defendant ordered 200 raincoats from the plaintiffs, "to be confirmed upon receipt of a fully cemented sample." The sample proved satisfactory and the order was confirmed.. When the first 100 coats arrived, the defendant rejected them on the ground that they did not conform to the sample. The plaintiff's action for the price included the claim that the coats sent were better than the sample coat. In rejecting this argument, Orde J. said:

"it was beside the mark to argue that they were better or more serviceable. The defendants<sub>203</sub> presumably knew what they wanted."<sup>203</sup>

As in cases of sale by description, in the absence of any other implied or express term, where the bulk did conform to the sample, the buyer could not then complain if the goods proved to be unsuitable. Thus, in Klenon v. Goodall,<sup>204</sup> the buyer was held liable for the purchase price of a quantity of peas where they conformed to the sample, despite the fact that they were unsuited to his purpose.

Where the sample itself contained a latent defect, the fact that the bulk corresponded to the sample might not be sufficient for the seller to avoid liability for the defect. In England, the later pre-statute cases illustrate that, at least where the seller manufactured the sample, he was liable where that defect rendered the goods unmerchantable.<sup>205</sup> Most of the Canadian cases

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202. [1921] 20 O.W.N. 463.

203. Ibid. at p.464.

204. [1914] 6 O.W.N. 674.

which discuss this deal with situations where the seller was held to have warranted that the goods would be fit for the buyer's purpose.<sup>206</sup>

The question of a latent defect in a sample was discussed in Re Scotland Woolen Mills Co., Ex Parte Denby and Sons.<sup>207</sup> There, the seller, a manufacturer of woolen fabric in Bradford, England, contracted (through an agent) to sell a quantity of fabric to a manufacturer of men's suits in Toronto. The parties had transacted on numerous previous occasions and the seller knew the purpose for which the fabric would be used. The seller's agent had given the buyer samples of the fabric and had described it as "all wool." The fabric was made up into suits and sent out to various buyers. Many were returned and buyers complained that they did not "stand up." In finding for the buyer, the court based its decision largely on the questions of reliance and fitness for purpose. However, in his judgment, Fisher J. discussed the question of a latent defect in the sample and took the view that it would not have barred rejection of the bulk sold.<sup>208</sup>

In order that the buyer might assess whether or not the bulk corresponded to the sample, he was given the opportunity to inspect the goods, prior to acceptance of them. Quite apart from

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205. See discussion of Heilbutt v. Hickson (1872) L.R. 7, C.P. 438 and Mody v. Gregson (1868) L.R. 4, Ex. 49 at p.41, supra.

206. E.g., Dominion Paper Box Co. v. Crown Tailoring Co., note 200, supra.

207. [1923] 2 D.L.R. 274.

208. Ibid. at p.277.

the inherent fairness of this approach, it was important since, on acceptance, the buyer's right of rejection was lost and he was left to claim damages.

The significance of this was discussed in John Hallam Ltd. v. Bainton.<sup>209</sup> Having examined a sample of wool, the plaintiff ordered "48 to 50,000 lbs. of the mixed grey and black wool at 40c. per lb. ... sample expressed to us on Dec. 31st." The bulk did not correspond to the sample and the plaintiff rejected the consignment and sued for damages. Affirming the decision of the trial judge, Riddell J. discussed the rules where the sale was by sample. In particular, he explained that the buyer's opportunity to examine the goods,

"is for the purpose of enabling the buyer to determine whether he will take the property in the goods at all if, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deals with them, he will not be allowed to repudiate the bargain in toto and claim that the property has never passed, but he is driven to rely on the implied warranty that the bulk shall correspond with the sample -- the condition to that effect becoming a warranty on change of ownership."<sup>210</sup>

#### Fitness for Purpose.

Another exception to the application of the doctrine of caveat emptor occurred where the buyer made known the purpose for which goods were being bought and relied on the seller's skill and judgment to provide goods reasonably fit for that purpose.

In Dominion Paper Box Co. Ltd. v. Crown Tailoring Co.

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209. [1919] 48 D.L.R. 120, affirmed (1920) 54 D.L.R. 537.

210. Ibid. at pp.121-22.

Ltd.,<sup>211</sup> the buyer of cardboard boxes told the plaintiff's agent that they were required for the shipment of clothing and, in reliance on his assurance that they would be suitable, ordered 19,000 boxes. The boxes turned out to be inadequate and the defendant returned most of the original consignment of 8500. In holding that they were entitled to do this, Rose J. stated the position thus:

"through [the agent] the defendants made known to the manufacturer the purpose for which the boxes were to be used; and they relied upon the skill of the manufacturer to furnish boxes reasonably fit for that purpose, so that there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants had the right to reject the goods."<sup>212</sup>

The mere fact that the seller knew of the buyer's purpose would not alone be sufficient to require that the goods should be fit for that purpose. Thus, in City of Simcoe Agricultural Society v. Wade,<sup>213</sup> where the defendant knew that the plaintiff's agent was buying a bull for breeding purposes, the fact that he offered the agent the choice of two animals was enough to remove any suggestion of reliance on the seller's skill and, thereby any warranty that the animal was fit for breeding.

In addition to the seller's knowledge of the purpose, there had to be reliance, by the buyer, on the seller's skill and judgment. In Canadian Gas and Power Launches Ltd. v. Orr Bros. Ltd.,<sup>214</sup> the plaintiffs agreed to sell the defendants a 50 horse

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211. Note 200, supra.

212. Ibid. at pp.560-61.

213. [1855] 12 U.C.R. 614.

214. [1911] 23 O.L.R. 616.

power engine and a dynamo, complete with all attachments, for use in the defendants' restaurant and amusement facilities. The equipment never worked properly and the defendant refused to pay. The plaintiffs raised an action for the balance of the price. In a judgment which was subsequently affirmed by the Supreme Court of Canada, the Ontario Court of Appeal affirmed the trial judge's finding for the defendants. Distinguishing this case from Chanter v. Hopkins, Moss C.J.O. made the following statement:

"Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed."<sup>215</sup>

In a number of cases, the surrounding circumstances of the case make it clear that the buyer is not relying on the seller's skill and judgment and, in such cases, there is no warranty that the goods will be fit for the purpose.

Thus, in Jordan v. Leonard,<sup>216</sup> the plaintiff's action for breach of warranty failed because he was held to have bought the engine on the strength of his own assessment that it was suitable for his purpose. Similarly, in Hopkins v. Jannison,<sup>217</sup> where the defendant bought certain mechanical shovels on the basis of his own judgment and that of his prospective partner, the seller was

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215. Ibid. at p.622.

216. [1904] 36 N.B.R. 518.

217. Note 158, supra.



not liable for the fact that they were unsuited to the defendant's intended use.

In Hill v. Rice Lewis and Sons Ltd.,<sup>218</sup> the plaintiff bought a sealer box of .38 rifle cartridges manufactured by the Union Metallic Company. Prior to purchase, he had examined the outside of the box and had bought similar packages many times before. One of the shells in the box was for a revolver and the plaintiff sustained injury when he attempted to use it in a rifle. His action against the seller failed on the grounds that, since he was relying on his own judgment and on his experience of the manufacturer's product, there was no reliance on the seller.<sup>219</sup>

While, as a matter of general principle, there was no distinction dependent upon whether or not the seller was also the manufacturer,<sup>220</sup> it may have been easier to establish reliance on the seller's skill and judgment in such cases.

#### Custom Of Trade

Where, by custom of a particular trade, there existed an implied term as to the quality of goods sold, the courts were quite willing to give effect to this. Thus, in John Macdonald & Co. v. Princess Manufacturing Co.,<sup>221</sup> the term "black Italian cloth" was interpreted as meaning what was understood in the trade.

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218. [1913] 12 D.L.R. 588.

219. In his dissenting judgment (ibid. at pp.596-97), Riddell J. took the view that the sale here was by description and that the plaintiff should succeed.

220. See supra discussion at p.62.

221. Note 193, supra.

## Express Warranties

It was always possible for the buyer to require an express warranty as to the quality of goods purchased and, given the limits placed on the exception to the doctrine of caveat emptor, this must have seemed a prudent course to take.

The buyer might also volunteer undertakings as to the quality of the goods sold, thereby giving the buyer additional protection. Thus, in Laleune v. Fairweather and Co.,<sup>222</sup> where the defendant advertised a "high grade Alaska seal coat ... \$750 value for \$375," he was found liable when the coat was found to be of a poorer quality.

Where an express warranty was given, this did not preclude the buyer from relying on additional implied warranties. In Ontario Sewer Pipe Co. v. Macdonald,<sup>223</sup> where the buyer's conduct barred him from relying on the express warranty that the pipes purchased would be "vitrified and salt glazed," Garrow J.A. referred to his "other rights"<sup>224</sup> in the form of implied warranties.

## Remedies

That Canadian common law accepted the distinction between conditions and warranties is evident from the cases discussed above.<sup>225</sup> The significance of this lay in the effect of the distinction on the remedies available to the aggrieved buyer.

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222. [1915] 25 D.L.R. 23.

223. Note 160, supra.

224. Ibid. at p.484.

225. In particular, see discussion p.67, supra.

Where there was a breach of a condition, the buyer could reject the goods and claim damages, provided that nothing he had done amounted to acceptance of the goods. Thus, in Alabastine Co. v. Canada Producer and Gas Engine Co.,<sup>226</sup> the fact that the purchaser had not accepted the engine, but had simply tried it out to assess its acceptability, enabled him to reject it.

Where the goods had been accepted, thereby reducing the condition to a warranty, or where the term breached was a warranty in itself, then the buyer was limited to a claim for damages.

#### Durability

The question arises here, as it did in the Scottish and English contexts, of durability. Did any of the implied terms in the common law of Canada require that the goods should remain of a particular quality for any length of time? There seems no express reference to durability in the authorities. Indeed, in Grodwards Co. v. Kirkland Lake Gold Mining Co.,<sup>227</sup> where the defendants bought an ice-crushing machine, their claim failed because they did not establish that "at the time it was delivered," it was unfit for its purpose.<sup>228</sup>

It is possible that in Canada a lack of durability may have been treated as an indication of a defect which was dealt with in some other way. In Sims Packing Co. v. Corkum and Richey,<sup>229</sup> the

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226. Note 178, supra.

227. [1919] 17 O.W.N. 300.

228. Ibid., per Masten J. at p.301. An unusual point arose here. When the defendants found that the machine did not work, they "threw it out."

229. [1920] 53 D.L.R. 445.

defendants who were meat retailers ordered a quantity of pork from the plaintiffs. When it arrived, they refused to accept it, alleging that it was unfit for human consumption. The evidence was that it was in acceptable condition when it was shipped. In finding for the defendants, Harris C.J.<sup>230</sup> took the view that, where the goods sold were for human consumption, there was an implied term that they should remain in that state until the purchaser had an opportunity to deal with them.

Nonetheless, there appears to have been no general requirement of durability at common law.

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230. Ibid. at p.447.

**CHAPTER III: THE ARRIVAL OF SALE OF GOODS LEGISLATION**  
**AND ITS OPERATION**

In drafting a Sale of Goods Bill for England in 1888, Chalmers stated that he took the advice of Lord Herschell and, "endeavoured to reproduce as exactly as possible the existing law."<sup>231</sup> The Bill was introduced into the House of Lords in 1889 by Lord Herschell, "not to press it on, but to get criticism on it,"<sup>232</sup> and was reintroduced two years later where it was considered by a Select Committee.

Until this time there was no intention that the Bill should apply to Scotland. Indeed, commenting on the Bill in 1892, Professor Mackintosh said;

"The application to Scotland of a Bill based exclusively on English case law with a few saving clauses interjected would be productive of more confusion than advantage. If the legislative desire of the mercantile community for an assimilation of the law of sale in the two countries is to be given effect to in a satisfactory manner, it is essential that there should be adequate enquiry and mature consideration before a consolidating statute is passed."<sup>233</sup>

Lord President Inglis, for many years Olympian President of the Court of Session, had been a constant opponent of the Bill. He died in 1891. By 1892 the decision had been taken that the Bill should apply to Scotland.

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231. Chalmers, Sale of Goods (1st ed. 1894), at p.viii.

232. Ibid. at p.vii.

233. Mackintosh, The Roman Law of Sale (1st ed. 1892), at p.vi.

Chalmers himself explains why this change of policy was thought to be desirable. First, he notes that this was simply a further step in the process of assimilation begun by the Mercantile Law (Amendment) (Scotland) Act of 1856. Indeed, he remarked, "it is perhaps to be regretted that the process has not been completed."<sup>234</sup> He went on, somewhat flippantly, to state the second supposed reason thus,

"Legislation, too, is cheaper than litigation. Moreover, in mercantile matters, the certainty of the rule is often of more importance than the substance of the rule. If parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation."<sup>235</sup>

While it may well be true that certainty provides the experienced, skilled, economically powerful businessman with the opportunity to make alternative arrangements, the same choice is rarely available to the small trader or consumer. It was many years before opposition to the unrestrained doctrine of laissez-faire became sufficiently organised and effective for the legislature to be able to acknowledge this.

The hasty extension of the Bill to Scotland cannot be blamed solely on English lawyers. Organised commercial interests regarded with impatience the continued existence of a separate body of Scots law applicable to the main commercial contract. Moreover, in an imperial context the English law had been established worldwide, while arbitration according to the law of England in the City of London was a solution favoured even by

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234. Note 231 supra, at p.viii.

235. Ibid., at p.ix.

foreign businessmen. Scottish business interests looked to London as the centre of the commercial world. With the Scottish legal profession self-interest and sycophancy fostered a faction favouring Anglicisation. This was led by Lord Watson, a Scottish Lord of Appeal in Ordinary, who had never sat as a judge in Scotland. R.P. Brown and others willingly assisted in the process. While in 1891,<sup>236</sup> Brown was expressing criticisms of the Bill, by 1911<sup>237</sup> he was proud to admit his part in its extension to Scotland.

The long-term effect of bringing the Scots law of sale of goods within the scope of legislation essentially designed to restate the English common law has been that this field of law has come within the scope of the Department of Trade in Whitehall, so that future developments of the law are controlled by a Great Britain Department to which the specialties of Scots law are irritating anomalies to be curbed or eliminated.

The passing into force of the Sale of Goods Act 1893 raises a curious constitutional question. The Act itself provided, in section 63, that it should come into force on 1st January 1894. Delays in processing various amendments to it meant that the Royal Assent was not received until 20th February 1894. What then, was the law on sale of goods for the first fifty-one days of 1894? In considering this point, Robertson Christie observed that,

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236. Brown, "Assimilation of the Law of Sale," (1891)  
3 J.R. 297.

237. Note 32 supra, at p.4.

"On the other side of the Atlantic, a nice little conflict might have been engineered between the legislature and the judiciary."<sup>238</sup>

No such conflict appears to have arisen in the United Kingdom.

The Sale of Goods Act 1893 formed the foundation of legislation in Canada in all the provinces except Quebec. Indeed, most of the provinces adopted the Act almost in its entirety.<sup>239</sup> It should be noted that the timing of the enactment of legislation varied widely across Canada.<sup>240</sup> While as a strict matter of precedent, the decisions of courts in Britain are not binding on the Canadian courts, Fridman accepts that,

"English decisions are undoubtedly relevant, and to some extent authoritative in relation to the understanding of the legislation, at least when the language of the appropriate Canadian statute is the same or virtually the same as that of the Sale of Goods Act 1893."<sup>241</sup>

That this assessment is correct, is borne out by the extensive use made of English authorities in the Canadian cases, cited below.

Where the same provision occurs in the U.K. and Canadian statutes, it is proposed, in this paper, to examine it in both jurisdictions together.

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238. J. Robertson Christie, "The Sale of Goods Act 1893 and Recent Cases" (1897), 9 J.R. 275, at p.275.

239. For a cross reference to the appropriate sections of the statutes of each province, see Fridman, Sale of Goods in Canada (2d ed. 1979), at p.4-5. In this paper, the reference to the equivalent provisions in Ontario and British Columbia will be given.

240. E.g., in the Northwestern Territories, the Sale of Goods Ordinance, c.39 was passed in 1898 whereas it was not until 1920 that Ontario legislature passed the Sale of Goods Act, c.40.

241. Note 239, supra.



## Legislative Developments

The law on sale of goods did not remain static in the U.K. with the passing and enforcement of the 1893 Act. No more was this the effect of the adoption of similar statutes in Canada. If one single factor has influenced legal developments in sales in recent times, it has been a growing awareness that the need to protect consumers may require an approach different from that which is acceptable to commercial parties.<sup>242</sup> To some extent, this has been effected by changes within the sphere of private law.

The 1893 Act was amended by the Supply of Goods (Implied Terms) Act 1973 which revised the definition of merchantable quality and controlled the practice of contracting out of the obligations relating to title to and quality of goods. Minor amendments to the 1893 Act were contained in the Consumer Credit Act 1974 and, in 1977, the Unfair Contract Terms Act provided more stringent controls on the practice of contracting out or limiting of liability. The 1893 Act, as amended has now been consolidated by the Sale of Goods Act 1979. It is the 1979 Act which will be referred to hereafter.

In Canada, the 1970's saw a number of changes in provincial legislation, aimed at preventing the practice of contracting out of implied terms in sale of goods contracts where the buyer came within the category of a "consumer." In Manitoba<sup>243</sup> and Nova

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242. For an excellent discussion of the development of this approach, see, Romero "The Consumer Products Warranties Act," (1978-79) 43 Sask. L. Rev. 1 and (1980-81) 44 Sask. L. Regv. 296.

243. R.S.M. 1970, c.200.

Scotia,<sup>244</sup> the existing consumer protection legislation was amended to provide for warranties of merchantability, fitness for purpose which could not be excluded in a "retail sale." In British Columbia,<sup>245</sup> the Sale of Goods Act was amended to render void such exclusion clauses in "retail sales." In Ontario,<sup>246</sup> attempts to negate or vary implied terms were rendered void in a "consumer sale."

In the sphere of public law, legislation has provided additional protection. For particular categories of goods, provision has been made that they should conform to a particular standard. In Canada, for example, the Federal Motor Vehicles Safety Act 1970 attempts to provide such a standard for motor vehicles. In the U.K., the Consumer Safety Act 1978 empowers the Secretary of State to make regulations in respect of particular goods to ensure that they are safe. .

A connected but separate issue here is the tremendous increase in the use of credit as a means of financing transactions for the sale of goods. Again in both Canada and the U.K., this area has become strictly regulated by statute.<sup>247</sup>

No discussion of the quality of goods a buyer can expect would be complete without mention of the means by which the disappointed buyer can seek redress. In the commercial sphere,

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244. R.S.N.S. 1968, c.5 as am. 1975 S.N.S. 1975, c.19.

245. R.S.B.C. 1979, c.370. For a critical analysis of the 1971 amendment in British Columbia, see Field, "A Critical Analysis of the 1971 Amendment to the Sale of Goods Act" (1971) 6 U.B.C. Law Rev. 405.

246. R.S.O. 1970, c.82 as am. by R.S.O. 1971, c.421.

247. Consumer Credit Act, 1974.

arbitration has provided a popular alternative to the established court structure. More recently a number of alternatives to the courts have been suggested and tried in the consumer field. The growth of consumer organisations and the increased popularity of informal adjudication and mediation are trends common to the U.K. and Canada.

In Scotland, the Dundee Small Claims Experiment<sup>248</sup> was set up in 1979 to assess the value of one kind of scheme. In common with the schemes of this sort operating elsewhere, the aim was to provide a quick and inexpensive way to resolve disputes over fairly small sums of money (in this case up to £500). It was intended that the need for legal representation could be avoided by keeping the formalities to a minimum. The scheme was reviewed after three years<sup>249</sup> and, while only 33% of the cases it dealt with concerned consumer claims in respect of goods (a further 17% dealt with consumer claims relating to services), it was concluded that it "generally worked well [although it did not provide] a solution for legally resolving all small claims problems."<sup>250</sup> Thus, while this paper is concerned primarily with the rights of the buyer in respect of the quality of goods bought, it is submitted that these rights will only be of value when there is an adequate way to enforce them.

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248. See note 249 infra, at p.1 for a discussion of the background to the scheme.

249. Connor, A Research Based Evaluation of The Dundee Small Claims Experiment (1983), Central Research Unit, Scottish Office.

250. Ibid., at p.69.

In the discussion that follows, it will become apparent that a distinction is often drawn between the "consumer" and the "commercial" buyer and seller. In many cases the category into which a party falls will be clear. However, this sharp distinction may be unsuited to a number of situations. In many respects the small unincorporated business is in much the same situation as the consumer when dealing with large companies.<sup>251</sup> Goods may be bought partly for consumer use and also utilised for a business purpose. Thus the law must incorporate sufficient flexibility to provide for the diverse situations which will be encountered.

#### Conditions and Warranties

In providing for implied terms in contracts for the sale of goods, the 1979 Act does so under the heading, "Conditions and Warranties." The meanings of these terms have been the source of considerable academic debate.<sup>252</sup> They were developed in the context of the English common law and have never been defined in the context of Scots law. This is a major criticism of the Sale of Goods legislation. Where the entire contract is subject to a condition - as in a "conditional sale" - the understanding of the word "condition" is substantially common throughout Scotland, England and Canada. The suspensive and resolute conditions of the Civil law have a comparable to conditions precedent and

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251. This point was noted in relation to the provision of credit in the Report of the Committee on Consumer Credit, (Crowther Committee), 1971, Cmnd. 4597, par.1.1.3.

252. See Greig, "Condition or Warranty" (1973) 89 L.Q.R. 93, Carter and Hodgekiss, "Conditions and Warranties: Forebearers and Descendants" (1977), 8 Sydney L.R. 31.

conditions subsequent in the English common law. Clearly, "condition" in this sense is intended in the Act and the expression "condition" relates to a term of a validly constituted contract. Once this is appreciated, it is important to bear in mind that,

"the 'conditions and warranties' forming the subject of this part of the Act are special to the law of England and to legal systems founded directly upon it, as in the case of Ireland, the United States and most English colonies and dependencies."<sup>253</sup>

The importance of the distinction between a condition and a warranty in English law lies in the remedies available on breach. In the former case, the innocent party is entitled to treat the contract as repudiated and to claim damages. In the latter case the only remedy lies by way of a claim for damages.<sup>254</sup> It is, therefore, important to determine whether a stipulation is a condition or a warranty. The 1979 Act is of little assistance in providing that this, "depends in each case on the construction of the contract."<sup>255</sup> It does, however, make clear that whether the stipulation is described as a "condition" or a "warranty" will not affect the true interpretation to be put upon it. Bowden L.J. stated the test more fully when he said that it involved:

"looking at the contract in the light of the surrounding circumstances, and then making up ones mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating

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253. Brown, note 32 supra, at p.48.

254. Sale of Goods Act 1979, s.11.

255. Ibid., at s.11(4).

the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability."<sup>256</sup>

In Scotland, the innocent party is entitled to treat the contract as rescinded where there has been, "failure by the seller to perform any material part of a contract of sale"<sup>257</sup> and indeed, s.61(2) of the 1979 Act calls this a "breach of warranty." Breach of any other stipulation in the contract only entitles the innocent party to claim damages. The distinction between breaches justifying repudiation and those which will only support a claim for damages was stated thus, by Lord President Dunedin:

"It is familiar law and quite well settled by decision that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages. I need not cite authority upon what is trite and well settled law."<sup>258</sup>

The English distinction between "conditions" and "warranties" was not introduced into Scots law in 1894, but the Sale of Goods Act extended generally the benefits of the actio quanti minoris to Scotland.<sup>259</sup> However, this import from South of the border has not been universally welcomed. In the words of Gow,

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256. Bentsen v. Taylor, Son & Co. [1893] 2 Q.B. 274, at p.281.

257. Note 254 supra, at s.11(5).

258. Wade v. Waldon 1909 S.C. 571, at p.577.

259. Brown, note 32 supra, at p.63.

"[I]t is ironical that Lord President Dunedin should have attempted to impose upon Scots law a distinction which eminent English lawyers wish had never troubled their law."<sup>260</sup>

That the distinction created similar problems in Canada is illustrated by the statement of Riddell J.A. in Weil v. Collis Leather Co. Ltd.<sup>261</sup> He said,

"It is not always easy to determine whether a statement concerning goods sold is a condition or a warranty. There are extreme cases ... but other cases are not so simple, and there has been such difference of judicial opinion, many definitions have been given."<sup>262</sup>

Until the early 1960s, any discussion of conditions and warranties might have ended at this point. However, the decision in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.,<sup>263</sup> applied to a sale of goods contract in Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.,<sup>264</sup> raises another problem: that of the "intermediate term." Extensive discussion of this is out of the scope of this paper,<sup>265</sup> but the effect of these decisions is that a term in a contract may be neither a condition nor a warranty. The effect of this is to leave the innocent party in a rather uncertain position in respect of repudiation of the contract. As Benjamin points out, the willingness of the courts to favour the solution which ensures performance, when dealing with commercial contracts, may be based on the belief

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260. Note 35, supra, at p.209.

261. [1925] 4 D.L.R. 815.

262. Ibid. at pp.832-833.

263. [1962] 2 Q.B. 26.

264. [1976] Q.B. 44.

265. See Weir, "Contract - The Buyer's Right to Reject Defective Goods" [1976], C.L.J. 33; Reynolds, "Casenote" (1976), 92 L.Q.R. 17.

that "commercial men supposedly dislike rejection."<sup>266</sup> However, he goes on to say that, "rejection may often, and perhaps usually will, be the best remedy for the consumer."

The position accepted in Cehave was endorsed by Lord Wilberforce, in the House of Lords in Reardon Smith Line Ltd. v. Hansen Tangen,<sup>267</sup> when he welcomed the treatment of sale of goods contracts in the same way as other contracts,

"so as to ask whether a particular item in a description constitutes a substantial ingredient of the 'identity' of the thing sold, and only if it does to treat it as a condition."<sup>268</sup>

Lest it be thought that the position of conditions, in contract generally, is now open to wholesale erosion, the decision of the House of Lords in Bunge Corporation v. Tradax S.A.<sup>269</sup> should be noted. There, the argument that a stipulation as to time in the contract should be viewed as an intermediate term rather than a condition, was firmly rejected.

It is proposed that the terms as to the quality of the goods implied by statute should be examined in detail. In particular, the extent to which they provide for an element of durability will be considered.

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266. Guest (Gen. Ed.), Benjamin's Sale of Goods (2d ed. 1981), at p.362.

267. [1976] 3 All E.R. 570.

268. Ibid. at p.576.

269. [1981] 2 All E.R. 513.



## Caveat Emptor

Bearing in mind that the express purpose of the Sale of Goods Act, 1893 was "codifying the law relating to sale of goods,"<sup>270</sup> it is not surprising that one finds the principle of caveat emptor firmly retained in the opening words of section 14. It provided:

"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 supplied under a contract of sale...."

This provision is repeated in the Canadian Sale of Goods Acts.<sup>271</sup> While the 1979 Act, in the U.K. has changed the wording slightly and moved the proposition into the first subsection of section 14, the fundamental principle remains unaltered. Thus, when the Act does provide that the buyer can expect a particular quality of goods, it is dealing with exceptions to this general principle. In 1851, Lord Campbell thought that the exceptions to the principle of caveat emptor had, "well-nigh eaten up the rule."<sup>272</sup> While some of the provisions of the Act simply repeat pre-existing exceptions (e.g., on merchantable quality) others go considerably further. Nonetheless, the whole operation of the Act takes place in the shadow of the principle of caveat emptor.

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270. Preamble to Sale of Goods Act 1893.

271. R.S.B.C., 1979, c.370, s.18; R.S.O. 1980, c.462, s.15.

272. Sims v. Marryatt [1851] 17 Q.B. 281, at p.291.

## (A) Fitness for Purpose

In its original form, s.14(1) of the Sale of Goods Act 1893 provided,

"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 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."

This provision was adopted and remains the law in Canada.<sup>273</sup> The provision has since been amended in the U.K.<sup>274</sup> and as will be seen in the following discussion, the changes brought about thereby are more a matter of change of emphasis than substantial change in the law.

### "Business" Seller

It should be noted, at the outset, that the buyer is only protected by this provision where the seller is selling in a "business" context. Clearly, this section is intended to exclude the truly "private sale," e.g., sale by an individual of the family car. The Act gives little guidance on what is meant by a business except to define it as including,

"a profession and the activities of any government department ... or local or public authority."<sup>275</sup>

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273. Note 271, supra.

274. Now s.14(3) of the Sale of Goods Act 1979.

275. Sale of Goods Act 1979 s.61(1).

Some degree of commercial activity would indicate a "business sale." In the words of Lord Diplock, "anything which is an occupation or duty which requires attention is a business."<sup>276</sup>

#### Description

In its original form, it was provided that the goods themselves must be of a description which the seller supplied as a business. This continues to be the case under the Canadian statutes. Thus, even where a seller is "a business" if the goods sold are not of a description that is encompassed by that business, the Act will not protect the buyer.

The effect of this is illustrated by Buckle v. Morrison.<sup>277</sup> In that case, the defendant was a farmer with extensive experience in growing flax. He was approached by the plaintiff, a fairly inexperienced farmer, who wanted to buy flax seed for sowing. The defendant had some seed left over from the previous year which he sold to the plaintiff. Unknown to either party it was no longer fit for use. The plaintiff planted the seed, the crop failed and he raised an action for damages against the seller. His action failed, since the defendant was not in business as a supplier of seed.

The same result was arrived at forty-nine years later in Masden v. Anderson,<sup>278</sup> a case on almost identical facts. Again, it was held that the Act did not apply since the seller was not in business for the supply of seed.

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276. Town Investments Ltd. v. Department of the Environment [1978] A.C. 359, at p.383.

277. [1924] 4 D.L.R. 1252.

Over the years, there has been a tendency to construe what might be included within the description dealt with by the business in a fairly broad way. In Buckley v. Lever Bros. Ltd.,<sup>279</sup> the defendants had engaged in a sales promotion scheme which offered a plastic clothespin apron and plastic clothespins to anyone who sent them 50 cents plus two box tops from their soap products. The plaintiff complied with the instructions and received the apron and clothespins. While using the clothespins, one of them shattered and a fragment hit her in the eye. She raised an action under section 15 (fitness for purpose) of the Ontario Sale of Goods Act. In finding her entitled to succeed, the Court addressed itself to the question of whether or not the defendants were in the business of supplying clothespins. In concluding that they were, Wells J. stated to position thus;

"Where a vendor deliberately deals in some commodity for the purpose of his business, he, in my view, makes it a part of his business to supply such articles."<sup>280</sup>

This was the approach confirmed and explained in Ashington Piggeries v. Christopher Hill Ltd.<sup>281</sup> In that case the respondents were experienced in preparing animal feedstuff, although until they were approached by the appellants, they had not dealt in feedstuff for mink; their previous products having been for poultry, calves and pigs. They agreed to provide the appellants with feedstuff for mink based on a formula produced by

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278. [1937] 3 W.W.R. 41.

279. [1954] 4 D.L.R. 16.

280. Ibid. at p.27.

281. [1971] 1 All E.R. 847.

an expert in mink nutrition and using herring meal, amongst other ingredients. Initially there appears to have been no problem, but after 14 months, the respondents started to use Norwegian herring meal which, unknown to them, contained DMNA, a substance toxic to mink. A number of mink died and the appellant sued for damages. In finding for the appellants, the House of Lords considered the word "description" in the context of a business. Lord Wilberforce stated the position thus:

"I would hold that it is in the course of the seller's business to supply goods if he agrees, either generally, or in a particular case, to supply the goods when ordered and that a seller deals in goods of that description if his business is such that he is willing to accept orders for them. I cannot comprehend the rationale of holding that the subsections do not apply if the seller is dealing in the particular goods for the first time or the sense of distinguishing between the first and second order for the goods or for goods of the description."<sup>282</sup>

He continues later to emphasise that in this context "goods of a description" means goods of a kind.<sup>283</sup>

While the interpretation of the word "description" remains important in Canada, the amendment of the section in the U.K. has removed the possibility of difficulty. Section 14(3) of the 1979 Act now provides that where the seller "sells goods in the course of a business," the requirement of fitness for purpose will apply. The courts in the U.K. have not yet had the opportunity to discuss the full implications of this amendment. However, it seems clear that the effect is to broaden the range of cases

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282. Ibid., at p.875.

283. Ibid., at p.877.

which will come within the provision. Reynolds, one of the contributors to the current edition of Benjamin's Sale of Goods, takes the view that the provision now extends to:

"a seller in the business of selling one type of goods who incidentally in his business sells another type of goods ... [and] also persons who sell goods in the course of a business even though the business is not directed towards sales at all."<sup>284</sup>

#### Communication of Purpose

Having established that the sale was in the course of the seller's business, the aggrieved buyer must face a number of further hurdles before being able to benefit of this provision. The buyer must make known to the seller the particular purpose for which the goods are required. The buyer may do this by stating the purpose expressly. Thus, in Winslow v. Jenson,<sup>285</sup> where the buyer told the seller that he was buying a stallion for breeding purposes, he was protected by the section when the stallion proved unsuited for this purpose.

However, the particular purpose for which the goods are to be used may be implied either by the nature of the goods themselves or by other surrounding circumstances. The former situation arose in Priest v. Last,<sup>286</sup> where the plaintiff purchased a hot water bottle without expressly stating the purpose for which it was to be used. The bottle burst, injuring the plaintiff's wife. The defendant was held liable in damages for breach of s.14(3) on the basis that the purpose for which the

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284. Note 266 supra, at p.380.

285. [1920] 55 D.L.R. 314.

286. [1903] 2 K.B. 148.

hot water bottle was purchased could be implied. The same point is accepted in the Canadian case of Yelland v. National Cafe,<sup>287</sup> where the subject matter of the sale was a bottle of coca-cola. Similarly, in Buckley v. Lever Bros. Ltd.,<sup>288</sup> the purposes for which the plastic clothespins were to be used was held to be sufficiently obvious to be implied.

Whether or not the buyer can be held to have implied the purpose for which the goods are to be used will always depend on the circumstances of the particular case. Thus, in Cammell Laird and Co. v. Manganese Bronze and Brass Co. Ltd.<sup>289</sup> where the seller knew that the propellers were being supplied for a particular ship, it was held that this amounted to sufficient communication of purpose to enable the buyer to be protected by this section.

Where the goods can be used for a number of purposes, the question of fitness for the particular purpose for which they were used has been the subject of considerable debate in recent years. In Kendall v. Lillico,<sup>290</sup> the seller A obtained a quantity of "Brazilian ground nut extractions" from a new supplier. Some of the consignment was then sold to B and it was known to A that it would be used to make feedstuffs for cattle and poultry. Unknown to the parties, the goods contained a substance rendering them toxic to poultry but not to cattle. B then resold to C in the knowledge that the goods would be used in

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287. [1955] 5 D.L.R. 560.

288. [1954] 4 D.L.R. 16, discussed at p.89, supra.

289. [1934] A.C. 402.

290. [1969] 2 A.C. 31.

feedstuff for cattle and poultry. C then made the ground nut extraction into feedstuff for birds, sold it to D who fed it to pheasants. Many of the pheasants died. C accepted liability and, having agreed compensation with D, raised an action against B. B in turn raised an action against A.

In finding that B was entitled to recover from A, the House of Lords took the view that the purpose for which the goods were purchased was sufficiently clear. Lord Reid clarified the situation saying,

"It was argued that, whenever any purpose is stated ... the seller must supply goods reasonably fit to enable the buyer to carry out his purpose in any normal way. That can only be right however, if the purpose is stated with sufficient particularity to enable the seller to exercise his skill or judgment in making or selecting appropriate goods."<sup>291</sup>

Lord Morris stated the position thus,

"The degree of precision or definition which makes a purpose a particular purpose depends entirely on the facts and circumstances of a purchase and sale transaction. No need arises to define or limit the word 'particular.' If a buyer explains his purpose or impliedly makes it known so that, to put the matter in homely language, in effect he is saying 'this is what I want it for, but I only want to buy if you can sell me something that will do', then it will be a question of fact whether the buyer has sufficiently stated his purpose."<sup>292</sup>

The decision in Kendall v. Lillico was followed in Ashington Piggeries v. Christopher Hill.<sup>293</sup> In that case, the Court accepted that the purpose had been made sufficiently clear to the

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291. Ibid., at p.454.

292. Ibid., at p.465.

293. Ibid., at p.465.



seller.

Buyer's Reliance on Seller's Skill and Judgment

In its original form s.14(1) required that, in addition to stating a particular purpose, it must be shown that, "the buyer relies on the seller's skill or judgement." Although it has undergone amendment in the U.K., this remains the form of the provision in Canada. What then, does a buyer in Canada have to do in order to meet this requirement?

Clearly, where the buyer is relying on his own skill and judgment, this will displace the inference of reliance on the seller. In Corbett Construction Ltd. v. Simplot Chemical Co.,<sup>294</sup> the defendants supplied the plaintiffs with a quantity of "prills" (ammonium nitrate pellets). They could be used as fertilizer and, with the addition of diesel oil, could be made to explode. The defendant told the plaintiff that he did not manufacture "explosive fertilizer" but agreed to let him have the prills he had in stock, if the plaintiff wanted them. The plaintiff took the prills, put them in the ground and, when they failed to detonate, raised an action against the defendants. In dismissing the action, the Court held that there had been no reliance on the seller's skill. As Wilson J. explained it,

"the plaintiff, stating the object of his purchase, is told what the vendor has for sale, and makes up his own mind whether to buy it or not."<sup>295</sup>

Where the buyer has a special expertise in the area of the

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294. [1971] 2 W.W.R. 332.

295. Ibid. at p.340.

goods sold and this is not shared by the seller, there will be an inference that he relies on his own skill and judgment. In Dominion Brake Shoe Co. v. Kramer Tractor Co.,<sup>296</sup> the defendant had designed a new plow and ordered 5,000 steel castings from the plaintiff. The defendant supplied a blueprint of the castings required and the plaintiff sent him a sample of the product. Having retained the sample for 2-1/2 months, without objection, the defendant rejected the first consignment of 1,539 castings, when they were delivered. The castings were not suitable for use in the plow. Nonetheless, the plaintiff's action for the price succeeded. In holding that the defendant had not relied on the plaintiff's skill and judgment, MacPherson J. said,

"The defendant relied on its own skill and judgment. It was the defendant who decided upon a casting. Although the plaintiff was informed what the purpose of the casting was, there was no reliance upon the skill or judgment of the plaintiff because there was no evidence that the plaintiff knew anything of plowing, sufficient, at least, to appreciate that the inexactitude intrinsic in casting would make the thing inoperable."<sup>297</sup>

An interesting example of a lack of reliance by the buyer on the seller's skill and judgment is found in Sawyer Massey Co. v. Richie.<sup>298</sup> It should be noted that the case rests on the unusual, although by no means unique, facts of the case. The plaintiffs sold threshing machinery to Ritchie and Neuffel, who were in business together, in November 1906. In return they gave notes for the price. After the threshing season was over,

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296. [1964] 46 D.L.R. (3d) 471.

297. Ibid. at p.473.

298. (1910) 43 S.C.R. 614.

Ritchie and Neuffel dissolved their business, the notes signed by them both were replaced by notes signed by Ritchie alone and he entered a new sale agreement with the plaintiffs, on the same terms as the previous one. In the autumn (fall) of 1907, Ritchie defaulted on his payments alleging breach of the implied warranty of fitness for purpose. The plaintiffs' action for the price was successful. The court held that the defendant was not relying on the plaintiff's skill and judgment, but on his own experience of using the machine during the 1906 threshing season.

While the onus is clearly on the buyer to establish that there was reliance on the seller's skill and judgment, such reliance need not have been stated expressly and may be implied from the circumstances of the case. This point was discussed at length in Manchester Liners Ltd. v. Rea.<sup>299</sup> The plaintiffs had ordered 500 tons of South Wales coal for their steamship the "Manchester Importer." Various difficulties existed, partly to an industrial dispute, but a quantity of coal was delivered. The "Manchester Importer" set out but the coal proved wholly unsuited to its draught furnaces and it had to return to port. The plaintiffs claimed damages from the defendants. In finding for the plaintiffs, the Privy Council discussed the question of reliance. Lord Buckmaster took the view that,

"If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the

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299. [1922] 2 A.C. 74.

buyer has shown that he relies on the seller's skill and judgement."<sup>300</sup>

Lord Atkinson went a little further in asserting that actual or implied communication of purpose would be sufficient to demonstrate the requisite reliance.<sup>301</sup>

While simple communication of the purpose, as sufficient demonstration of reliance in all sales, may be placing an undue burden on the seller, the courts have shown a willingness to accept implied communication as sufficient in consumer sales. Ziegel took the view that,

"very little evidence is required to show that a buyer is relying on the skill and knowledge of the seller. It has been held, for example, that the presumption arises in every retail sale."<sup>302</sup>

Support can be found for the latter part of this statement in Buckley v. Lever Bros. Ltd.<sup>303</sup> In Leitz v. Saskatoon Drug and Stationery Co.,<sup>304</sup> the plaintiff bought a pair of sunglasses, described at the retail outlet as "impact resistant." While wearing the sunglasses, the plaintiff was struck by a softball, the sunglasses shattered, causing severe injury. The court had no difficulty in finding for the plaintiff.

In Kendall v. Lillico,<sup>305</sup> the purpose stated, i.e. compounding as food for cattle and poultry, was held to be sufficiently stated to indicate the buyer's reliance on the

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300. Ibid., at p.79.

301. Ibid., at pp.85-86.

302. Ziegel, "The Seller's Liability for Defective Goods at Common Law," (1966-67) 12 McGill L.J. 183, at p.191.

303. [1954] 4 D.L.R. 16, discussed at p.89 supra.

304. (1980) 112 D.L.R. (3d) 106.

305. Note 290 supra.

seller's skill. This raises the further question of the buyer's own expertise in the field. In that case both buyer and seller were members of the same trade association and had some expertise in the preparation of animal feedstuffs. The court was willing to accept on the evidence that the buyer had relied on the seller's skill. However, in his speech Lord Reid made the following statement,

"I would readily accept that a customer, buying from an apparently reputable shopkeeper or a manufacturer, will normally as a matter of fact be relying on the seller's skill and judgment, unless there is something to exclude the inference. I do not think, however, that the same can be said when two merchants equally knowledgeable deal with each other. Then I can see no reason in law or fact for a presumption either way."<sup>306</sup>

That the reliance placed by the buyers on the seller's skill and judgment need not be total was accepted in Cammell Laird & Co. v. The Manganese Bronze and Brass Co.<sup>307</sup> The appellents, who were ship builders, ordered two propellers to be fitted to particular ships, from the defendants. The former gave the latter detailed plans and specifications. One of the propellers proved unsatisfactory (although a satisfactory propeller was ultimately provided) and the appelents raised an action for damages caused by the delay against the respondents. In finding for the appelents Lord Macmillan considered the question of reliance and particularly the fact that the buyers provided plans of the propellers they wanted. He said,

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306. Ibid., at p.457.

307. Note 289 supra.

"The respondents argument was that the appellants by their detailed specification so tied the respondents' hands as to negative the idea that anything was left or intended to be left to their skill or judgment, except mere matters of material and workmanship.... That there was an important margin within which the respondents skill and judgment is best demonstrated [by the fact that of three propellers made to the same specification, only one was satisfactory]."308

This view was accepted and followed in Ashington Piggeries v. Christopher Hill.309 It will be recalled that, in that case, the buyer had ordered feedstuff to be made up in accordance with a formula which he had obtained from an expert in mink nutrition. Lord Hodson310 repeated with approval the distinction accepted in Cammell Laird:311 that, where the seller produces goods in accordance with a specification provided by the seller, the former, while not making any claim for the overall result, undertakes to provide components or ingredients in accordance with the specification. Thus, partial reliance on the seller's skill or judgment would seem to be enough to enable the buyer to benefit from the provision.

Since the passing of the Supply of Goods (Implied Terms) Act 1973, the provision on fitness for purpose has been amended. This amendment and that introduced by the Consumer Credit Act 1974 are reproduced in the 1979 Sale of Goods Act s.14(3). With reference to the buyer's reliance on the seller's skill and judgment, there has been a substantial change of emphasis and it

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308. Ibid., at p.419.

309. Note 281 supra.

310. Ibid., at p.855.

311. Note 289 supra.

is now provided that, having expressly or impliedly made known the purpose for which the goods are being bought, the buyer will be protected,

"except where the circumstances show that the buyer does not rely,, or that it is unreasonable for him to rely, on the skill or judgment of the seller."

Thus, the buyer in the U.K. need no longer establish that he relied on the seller. The onus now lies with the latter to establish the absence of this. There are no reported cases on this point, but the pre-amendment case of Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.<sup>312</sup> may give some indication of what would be sufficient for the seller to avoid liability.

In that case, the plaintiff's agents in the U.K. ordered twelve "new and unused" air compressor units for resale in (then) Persia from the defendants. One unit was inspected by the plaintiffs and no objection was made. The whole consignment was invoiced to the plaintiff's agents and the plaintiffs sued for damages on the ground that the compressors were unfit for resale in Persia. The court did not accept that there had been reliance on the seller's skill and judgment and rejected the claim. Lord Diplock commented.

"Where a foreign merchant ... buys by description goods, not for his own use, but for resale in his own country, of which he has no reason to suppose the English seller has any special knowledge, it flies in the face of common sense to suppose that he relies on anything but his own knowledge of the market in his own country and his own commercial judgment of what is saleable there."<sup>313</sup>

## Sale Under Patent or Trade Name

In its original form the Act provided that,

"in the case of a contract for the sale of specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."<sup>314</sup>

This provision remains in the Canadian statutes, and, while it is no longer found in the U.K. legislation, a seller might argue that the buyer relied on the manufacturer's reputation or advertising in making a purchase by trade name, rather than his (the seller's) skill or judgment.

An interesting situation, concerning reliance on a trade name, arose in Sawyer Massey Co. v. Thibart.<sup>315</sup> There, the defendant bought an "Eclipse" thresher, a three-horse power tread, Pitts pattern and an "Eclipse" bagger, for the purpose of threshing grain. While individually, the items were in accordance with the express warranty and were good pieces of machinery, they could not be made to operate efficiently in combination. The defendant alleged that they were unfit for the purpose and refused to pay the price. The plaintiff's action for the price failed. The Court held that, while the individual items were sold under trade names, this was

"one contract for the sale, not of a specified article, but of a combination of specified articles ... that combination has neither a patent nor a trade name, and ... the whole trouble arose just exactly out of the

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312. [1968] 2 All E.R. 886.

313. Ibid., at p.894.

314. Sale of Goods Act, 1893, s.14(1).

315. (1907) 6 Terr. L.R. 209.



combining of those articles into one single piece of machinery and out of the attempt to work them together, and not out of the defect of any one of them separately."<sup>316</sup>

Hence, the overall combination was not sold under a patent or trade name.

Having crossed the hurdles discussed above, what is it that the buyer can expect in relation to the quality of the goods purchased? Both in its original form and as amended, the statute provides that the goods shall be "reasonably fit"<sup>317</sup> for the purpose. This will always be a question of fact, depending on the goods themselves and the purpose for which they were bought. Examples of what did or did not amount to reasonable fitness can be seen in the foregoing discussion. Thus, foodstuff for animals which proves toxic, hot water bottles which explode and propellers which are particularly noisy were not deemed to be reasonably fit.

#### Used Goods

There has been some question as to whether the implied term as to fitness for purpose covers "used" or "second-hand" goods.

In Britain, it was never doubted that the provision could apply to used goods. In Bartlett v. Sidney Marcus Ltd.<sup>318</sup> the plaintiff bought a second-hand Jaguar motor car from the defendants, having been told that the clutch required a minor repair. He drove the car for a few weeks and it was discovered

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316. Ibid. at p.415 per Stuart J.

317. Sale of Goods Act 1893, s.14(1); Sale of Goods Act 1979, s.14(3); and note 271, supra.

318. [1965] 1 W.L.R. 1013.

that the repairs required were considerably more extensive than initially believed. The plaintiff raised an action against the defendants alleging breach of the implied warranties of merchantable quality and fitness for purpose. While, on appeal, he was unsuccessful on the facts, the Court proceeded on the basis that the implied warranties could apply to second-hand goods. It is clear from Lord Denning's judgment that he felt the quality need not be as high as that to be expected from a new car. Nonetheless, he said,

"It should be reasonably fit for the purpose of being driven along the road."<sup>319</sup>

In Canada, the case of Godsoe v. Beatty<sup>320</sup> suggests that the implied terms do not apply to second-hand goods -- or, at least, to second-hand motor vehicles. The plaintiff, in that case, bought a second-hand Meteor Sedan car from the defendants. The conditional sale agreement excluded all implied warranties and this, in 1959, might have sufficed to reach the result which was, in fact, reached. The plaintiff did allege breaches of the implied warranties of merchantable quality and fitness for the purpose. In rejecting his claim, the Court held that the implied warranties did not apply to the sale of second-hand vehicles.

The decision, in that case, has been criticised. As Ziegel pointed out,

"'Used' goods and 'defective' goods are not interchangeable terms."<sup>321</sup>

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319. Ibid. at p.1017.

320. (1959) 19 D.L.R. (2d) 265.

321. Note 302, supra, at p.191.

It is most unlikely that a Canadian Court today would support the complete denial of implied warranties in the sale of second-hand goods.<sup>322</sup>

Nonetheless, some jurisdictions have sought to avoid doubt by providing for the sale of second-hand goods in other legislation. An example is found in the Saskatchewan Consumer Product Warranties Act.<sup>323</sup> The general approach taken in the Act renders limitation and exclusion of implied terms void. While second-hand dealers are permitted to exclude or modify the implied warranties,<sup>324</sup> second-hand car dealers are expressly excluded from this group. Thus, in McLeod v. Ens,<sup>325</sup> the purchaser of a second-hand car, who has signed an agreement to take the car "as is" was protected.

The approach taken by various law reform bodies, in dealing with used goods, will be considered in the next chapter.

### Durability

Where the provision applies, it seems clear that goods must be fit for the purpose at the time of sale. However, a buyer may intend not only a particular use for the goods, but also that the use will continue for some time. Is there any requirement that the goods should continue to be fit for a particular purpose; that is to say, does the concept of durability have any place here?

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322. See Truro Volkswagen Ltd. v. O'Neil (1980) 37 N.S.R. 396, discussed at p.112, infra.

323. R.S.S. 1978, c. C-30.

324. Ibid. at 3.6(2).

325. (1982) 135 D.L.R. (3d) 365.

Initially, in Britain, discussion of this point was confined to the sale of perishable goods. In Mash and Murrell Ltd. v. Joseph I. Emanuel Ltd.,<sup>326</sup> the plaintiffs bought a quantity of potatoes from the defendants. Both dealt in potatoes and the defendants knew that the plaintiffs intended to resell the potatoes for human consumption. The potatoes were dispatched from Cyprus but, on arrival in Liverpool, were found to be affected by "soft-rot" and unfit for human consumption. The plaintiffs raised an action for damages, alleging breach of sections 14(2) (fitness for purpose) and section 14(1) (merchantable quality) of the 1893 Act. They were successful, at first instance, on both claims. Although the decision was later reversed, on the facts,<sup>327</sup> by the Court of Appeal, Lord Diplock's judgment at first instance is deserving of consideration. He accepted that the buyers had sufficiently communicated the purpose for which the potatoes were being bought and had relied on the sellers' skill and judgment. Thus, the buyers would have succeeded on that ground alone. In addition, he discussed the meaning of merchantable quality and held that, in that context,

"the warranty as to merchantability was a warranty that [the goods] should remain merchantable for a reasonable time, the time reasonable in all the circumstances, which means a time reasonable for the normal transit to the destination ... and for disposal after."<sup>328</sup>

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326. [1961] 1 All E.R. 485.

327. [1962] 1 All E.R. 77.

328. Note 326, supra at p.489.

In Canada, a similar view of the meaning of merchantable quality is found in Georgetown Seafoods Ltd. v. Usen Fisheries Ltd.<sup>329</sup>

It seems clear that a degree of durability was being applied to cases where the goods sold were perishable. However, the situation with regard to non-perishable goods received scant attention until the landmark decision of the House of Lords in Lambert v. Lewis.<sup>330</sup> While the main issue centered on a tort action, the implied warranties of merchantable quality and fitness for purpose were discussed. In that case, the plaintiff was injured and her husband was killed when their car was hit by a trailer, which had become detached from the vehicle towing it. She raised an action against the farmer who owned the trailer and the vehicle towing it, the dealer who supplied the coupling which attached the trailer to the vehicle and the manufacturer of the coupling. The farmer raised an action against the dealer and the dealer raised an action against the manufacturer. The unfortunate Mrs. Lambert was successful in her action but, in the present context, the respective claims in the manufacturing and distribution chain are of greater interest. The trial judge found that the coupling was of a defective design and was dangerous. He also found that part of the coupling was missing and that the farmer must have known of this as he continued to use it. Accordingly, he apportioned liability at

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329. (1977) 78 D.L.R. (3d) 542, discussed infra at pp.117 and 121.

330. [1981] 1 All E.R. 1185.

75% for the manufacturer and 25% for the dealer. The farmer's claim against the dealer, under the Sale of Goods Act, was dismissed, as was the dealer's action against the manufacturer. The dealer appealed to the Court of Appeal against the finding of negligence against him and the dismissal of his action against the manufacturers. The Court of Appeal upheld the finding of negligence, but upheld the appeal in the action against the dealers, on the ground that the chain of causation between the manufacturer's negligence and the farmer's loss was unbroken. The dealers' appeal against the dismissal of their action against the manufacturers was dismissed. The dealers appealed against both decisions. In finding the dealer entitled to succeed, the House of Lords considered the question of implied warranties and durability. Lord Diplock's judgment gives the clearest indication of a previously uncertain area of the law. He said,

"The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear. What is a reasonable time will depend on the nature of the goods."<sup>331</sup>

The fact that the farmer knew that part of the coupling was missing meant that the goods were no longer in the "same apparent state" and consequently the obligation did not continue to operate.

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331. Ibid. at p.1191.

The importance of this decision coming, as it does, from the highest civil court in Britain, lies in its impact on future decisions. Clearly, durability has emerged as part of the implied warranty of fitness for purpose. Since merchantable quality is now defined,<sup>332</sup> in Britain, in terms of fitness for purpose, it is submitted that durability will now emerge in that context too.

#### **(B) Merchantable Quality**

In its original form, the 1893 Act provided in section 14(2)

"Where goods are bought by description from a seller who deals in goods of that description (whether he be a manufacturer or not), there is an implied condition that the goods shall be of merchantable quality;"

"Provided that if the buyer examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

This provision was adopted in Canada and remains in this form.<sup>333</sup>

The Supply of Goods (Implied Terms) Act 1973, which resulted from the work of the Scottish and English Law Commissions,<sup>334</sup> amended the provision and its present form in the Sale of Goods Act 1979 section 14(2) reads:

"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 contract is made; or

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332. Sale of Goods Act 1979, s.14(6).

333. Note 271, supra.

334. Law Com. No. 24, Scot. Law Com. No. 12 (1969), para.43.

- (b) if the buyer examines the goods before the contract is made, as regards defects which the examination ought to have revealed."

In addition to amending the provisions itself, the 1973 Act introduced, for the first time, a definition of merchantable quality. It is found in section 14(6) and provides,

"Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances."

This definition of merchantable quality, while being that finally recommended by the Law Commissions, was not as originally provisionally formulated by them at the stage of consultation. They had originally suggested provisionally that,

"'Merchantable quality' means that the goods tendered in performance of the contract shall be of such type and quality and in such a condition that, having regard to all the circumstances, including the price and description under which the goods are sold, a buyer, with full knowledge and characteristics of the goods including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract."<sup>335</sup>

In defining merchantable quality in this way, for the purpose of discussion, the Commissions acknowledged that they were adopting the "acceptability test" derived from the judgment of Dixon J. in Grant J. Australian Knitting Mills.<sup>336</sup> That is,

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<sup>335</sup>. Working Paper No. 18, Consultative Memorandum No. 7 (1968) para.23.



that goods are of merchantable quality if a reasonable buyer would have accepted them as such. They describe the alternative test as the "usability test." As formulated by Lord Reid in Kendall v. Lillico<sup>337</sup> that defines merchantable quality in terms of fitness for purpose. While the Commissions received support for their personal choice of test, it was criticised for being too complicated and circular.<sup>338</sup> They accepted the criticism and we now have a version of the "usability test."

What hurdles then face the buyer in seeking the protection of the provision as to merchantable quality in its various forms?

#### Description

In its original form, in Britain, and as it remains in Canada, the provision requires that the goods were bought by description. Sale by description has already been discussed,<sup>339</sup> but a few additional points deserve consideration. Fundamental to the question of sale by description is what is meant by "description" in this context? Debate has centered on two possible answers.<sup>340</sup> "Description" might simply refer to a means of identifying the goods or it might refer to some undertaking as to the quality of the goods. In the latter case, questions of misrepresentation may become relevant. In reviewing the cases here, Fridman concludes that,

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336. (1933) 50 C.L.R. 387, at p.418.

337. Note 290 supra.

338. Working Paper No. 85; Consultative Memorandum No. 58 (1983), Sale and Supply of Goods, at para.2.4.

339. At p.88 supra.

340. See, for example, Montrose, "The Operation of Description in a Contract of Sale of Goods" (1937) 15 Can. Bar Rev. 760.

"The expression in the Uniform Commercial Code, viz., that the seller is a merchant with respect to goods of that kind, is preferable, at least as one possible solution of the problem raised in this context, since it avoids the niceties and problems raised by the meaning of description."<sup>341</sup>

Nonetheless, the trend appears to suggest that a preference was being shown for interpreting "description" in terms of identification of the goods. This was confirmed in Ashington Piggeries Ltd. v. Christopher Hill Ltd.,<sup>342</sup> discussed above, where it was accepted that despite contamination (and the implications in law thereof), what was supplied was "Norwegian herring meal."

Another point to be considered is what kind of goods can be the subject of a sale by description. Clearly, this will include unascertained and future goods since these can only be described. However, it has long been accepted that ascertained goods can be sold by description even where the buyer has the goods before him at the time of sale. In Grant v. Australian Knitting Mills,<sup>343</sup> Lord Wright was quite clear on this point. He said,

"there is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as the thing corresponding to a description."<sup>344</sup>

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341. Note 241 supra, at p.222.

342. Note 281 supra.

343. Note 336 supra.

344. Ibid., at p.456.

In Canada, the same view of sale "by description," has been accepted. Thus, in Leitz v. Saskatoon Drug and Stationery Co.,<sup>345</sup> the purchaser of sunglasses on display in a shop bought them "by description."

In Truro Volkswagen Ltd. v. O'Neil,<sup>346</sup> the defendant agreed to trade in her car as part of the price of a new car. Both parties knew that the vehicle was sometimes difficult to start due to a problem with the fuel pump. Prior to the trade-in, the car broke down completely. The defendant led the plaintiff to believe that this was simply due to the fuel pump problem. On discovering that the car required extensive repair, the dealer raised an action against the defendant. Despite the fact that the plaintiff was experienced in the field and that he had had the opportunity to examine the car, this was held to be a sale "by description."

While the question of whether or not the sale was by description remains important in Canada, this is no longer the case in the U.K. where the amended provision makes no reference to such sales. Similarly, the requirement that the seller must deal in goods of that description.

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345. (1980) 112 D.L.R. (3d) 106, discussed at p.97 supra.

346. (1980) 37 N.S.R. 396.

## Business Seller

In the discussion of fitness for purpose,<sup>347</sup> what constituted dealing in goods of a particular description was discussed at length and applies equally to the provisions currently under discussion. The discussion of selling "in the course of a business" found in the current U.K. provision is equally applicable here.

### What is "Merchantable Quality"?

Having established that the provision requiring the goods to be of merchantable quality applies, what guarantee of quality does this give the buyer? Although there is now a statutory definition of merchantable quality in the U.K.,<sup>348</sup> it is worth considering the attitude of the courts in Canada and the U.K. for two reasons. First, because the statutory definition has not yet been adopted in Canada. Secondly, because it was that very interpretation by the courts which led to a definition being formulated<sup>349</sup> in the U.K. and influenced its eventual form. It has long been accepted that the term "merchantable quality" has its roots in the commercial notion of "commercially saleable"<sup>350</sup> and that this may render it less than ideal to cover "consumer" as opposed to "commercial" sales. However, as the cases discussed below show, the concept is capable of being applied to all sales. Indeed the question of "saleability" can itself be interpreted in at least two ways. First, goods can be saleable

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347. See p.87 supra.

348. Sale of Goods Act 1979, s.1(6).

349. See p.108 supra.

350. Kendall v. Lillico, note 290 supra, at p.477.

in terms of purpose; that is to say, can fulfill a purpose and therefore be marketable. Secondly, goods can be saleable in terms of acceptability to purchasers. An example of the courts considering whether or not the goods are sufficiently suited to their purpose as to make them saleable is found in Cammell Laird Co. Ltd. v. Manganese Bronze and Brass Co. Ltd.<sup>351</sup> Lord Wright took the view that goods were not of merchantable quality if,

"goods in the form in which they were tendered were of no use for any purpose for which goods would normally be used and hence were not saleable under that description."<sup>352</sup>

This was later criticised as being too narrow and only one of the relevant factors. Commenting, in Kendall v. Lillico,<sup>353</sup> on Lord Wright's statement, Lord Guest<sup>354</sup> considered that one of its crucial weaknesses was the omission of any reference to price. Lord Reid<sup>355</sup> too thought that Lord Wright's definition required amendment to cover the variety of purposes to which goods could be put and the relevance of price thereto.

Another test would be to relate merchantability to the "reasonable buyer." In Bristol Tramways, etc. Ltd. v. Fiat Motors Ltd.,<sup>356</sup> the plaintiffs bought an omnibus and chassis from the defendants. They proved unsatisfactory and in finding for the plaintiffs on the question of merchantable quality, Farwell L.J. gives the test in the following terms,

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351. Note 289 supra.

352. Ibid., at p.414.

353. Note 290 supra.

354. Ibid., at p.477.

355. Ibid., at p.452.

356. [1910] 2 K.B. 831.

"that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again."<sup>357</sup>

This is the test accepted by Dixon J. in Grant J. Australian Knitting Mills,<sup>358</sup> with the refinement of assuming the buyer to know of hidden as well as apparent defects.

In Niblett Ltd. v. Confectioners Materials Co. Ltd.,<sup>359</sup> the buyers agreed to buy a quantity of condensed milk in cans at a certain price from sellers in the U.S.A. On arrival in London, the goods were detained by H.M. Customs at the instigation of the Nestle and Anglo-Swiss Condensed Milk Co. Ltd. The cans bore the word "Nissly" and this was alleged to infringe the Nestle Co.'s brand name. The buyers were obliged to remove the offending word and were only able to sell the milk at a loss. They succeeded in their action against the sellers on a number of grounds including a breach of the requirements as to merchantable quality. In commenting on this Lord Atkin said,

"If [the buyer] knew the real facts he would refuse the goods on the grounds that they were in such a state or condition as to expose him to an injunction. No one who knew the facts would buy them in that state or condition; in other words they were unsaleable and unmerchantable."<sup>360</sup>

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357. Ibid., at p.841.

358. Note 337 supra.

359. [1921] 3 K.B. 387.

360. Ibid., at p.404.

The approach found in Grant was severely criticised by Lord Reid in Kendall v. Lillico who preferred Lord Wright's approach in Cammell Laird. He did, however, feel that this required some amendment and his reformulated version gives the following test for merchantable quality;

"that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description."<sup>361</sup>

This definition was accepted in B.S. Brown & Son Ltd. v. Craiks Ltd.<sup>362</sup> where the buyers bought a quantity of cloth from the sellers, without intimating the purpose for which it was intended. The fabric was capable of a number of industrial uses but was not suitable for making dresses which was what the buyers had intended. The cloth was held to be merchantable because it was capable of a number of uses which fell within the description applied to it.

In one Canadian case the Court appears to have accepted Lord Wright's approach in Cammell Laird and given a very wide interpretation to the "reasonable buyer." In International Business Machines Co. Ltd. v. Shcherban,<sup>363</sup> the defendants bought a computing scale from the plaintiffs for c\$294. On arrival, it was found that a small piece of glass which covered the dial was broken. The glass could have been replaced for about 30 cents

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361. Note 290 supra, at p.451.

362. [1970] 1 All E.R. 823.

363. [1925] 1 D.L.R. 864.

and its absence did not prevent the machine from operating. Nonetheless, the defendants refused to accept the scale on the ground that it was not of merchantable quality. While Houltain C.J.S. viewed this as falling within the de minimis maxim,<sup>364</sup> the majority of the Court held the defendants entitled to reject the goods. Despite the nature of the defect, its curability and, in the case of Martin J.A., the fact that he regretted the result,<sup>365</sup> the majority held the goods to be unmerchantable.

In the more recent case of Georgetown Seafood Ltd. v. Usen Fisheries Ltd.,<sup>366</sup> the buyer contracted to buy fish for processing. Once processing started, the fish was found to be wholly unsuited to the purpose. The Court found for the buyers on the basis of a latent defect, rendering the goods unmerchantable. In reaching its decision the court did consider the question of the "reasonable buyer." In that case, however, it is probable that the same result would have been reached by application of the "saleability" test.

Merchantable quality applies not only to the goods themselves but, in the words of the statutes, to their "state or condition."<sup>367</sup> As was demonstrated by Niblett v. Confectioners Materials Ltd.,<sup>368</sup> this can extend to the packaging of the goods.

The definition of merchantable quality found in the 1979 Sale of Goods Act would appear to follow the thinking of Lord

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364. Ibid. at p.865.

365. Ibid. at p.870.

366. (1977) 78 D.L.R. (3d) 542, discussed at p.121 infra.

367. Sale of Goods Act 1893, s.62; Sale of Goods Act 1979, s.61; R.S.B.C. 1979, c.370, s.1; R.S.O., 1980, c.462, s.1.

368. Note 359 supra.



Reid in Kendall v. Lillico. As was discussed earlier,<sup>369</sup> the Law Commissions original suggestion for consultation was more in line with the thinking of Farwell L.J. and Dixon J. and the change of emphasis was in response to comments and criticism received. The Law Commissions are continuing to look at this area of the law on sale of goods and their criticisms of the current legislation and proposals for the future will be discussed in the next chapter.<sup>370</sup>

### Buyer's Examination of the Goods

For the moment it is appropriate to consider the statutory exceptions to and limitations on the requirement that the goods should be of merchantable quality. In its original form, the 1893 Act provided that,

"if the buyer examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."<sup>371</sup>

Clearly, this applies only in cases where the buyer had an opportunity to examine the goods. Where the buyer was given the opportunity to examine the goods but failed to do so, Reynolds<sup>372</sup> takes the view that he would still be protected by the provisions on merchantable quality, although he does concede that the question of estoppel (personal bar, in Scotland) might arise. This view seems open to criticism. If the buyer is better off if

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369. See p.109 supra.

370. At p.124 infra.

371. Sale of Goods Act 1893, s.14(2).

372. Note 266 supra, at p.391. Prosser takes the same view. See Prosser, "The Implied Warranty of Merchantable Quality" (1943) XXI Can. Bar Rev. 446, at pp.479-483.

he fails to inspect the goods, then this will only delay the discovery of defects and lead to dispute and possibly litigation at a later stage - by which time the costs incurred by both buyer and seller may be greater. Such an approach is hardly in line with commercial sense.

An interesting decision, in this context, is found in Thornett and Fehr v. Beers and Son,<sup>373</sup> where the defendants agreed to buy a quantity of vegetable glue from the plaintiffs. They went to the plaintiffs' warehouse to inspect the glue and were given every opportunity to do so. The defendants were pressed for time and, instead of looking inside at the contents, simply looked at the outside of the barrels. Once the glue had been delivered, they alleged that it was unmerchantable and refused to pay the price. The plaintiff's action for the price was successful. Having decided that this was not a case of sale by sample, Bray J. went on to consider the question of inspection. He was satisfied that both parties had intended that a full examination should have taken place and that, in the event the barrels were not opened. He continued,

"the reason was that they [the defendants] had no time; they were satisfied with their inspection of the barrels, and they were willing to take the risk, the price being so low."<sup>374</sup>

He concluded that there was inspection, within the meaning of the Act, and that, "such an examination if made in the ordinary way would have revealed the defects complained of."<sup>375</sup> This suggests

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373. [1919] 1 K.B. 486.

374. Ibid. at p.489.

that, not only is the buyer better to avoid examination altogether, but that he should also avoid partial examination.

Where there has been inspection of the goods, the seller is only protected against defects that ought to have been revealed by the inspection. Where the defect could not have been discovered by such inspection, the seller remains liable. Thus, in Wren v. Holt,<sup>376</sup> where the beer was contaminated with arsenic, it was accepted that examination would not have revealed the defect and the plaintiff's claim for damages for the injury caused was successful.

This exception in the 1893 Act was retained and is now found, with slight changes in the wording in the 1979 Act. Section 14(2)(b) provides that there is no condition that the goods will be of merchantable quality,

"if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal."

It can be argued that the change from "such examination" to "that examination" may result in a different decision in the future where the buyer chose to make a partial rather than total examination, but there has, as yet, been no decision on the point.

The Supply of Goods (Implied Terms) Act 1973 introduced another statutory exception to the condition that goods will be of merchantable quality,

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375. Id.

376. [1903] 1 K.B. 610.

"as regards defects specifically drawn to the buyer's attention before the contract is made."<sup>377</sup>

While this exception has application throughout the field of sale of goods, it will have particular application in cases of sale goods and second-hand goods.

#### Durability

The decision in Mash and Murrell Ltd. v. Joseph I. Emanuel<sup>378</sup> made clear that, at least as regards perishable goods, the implied terms of merchantable quality required that the goods should remain in that state for a reasonable time.

The same view was taken by the Supreme Court of Prince Edward Island in Georgetown Seafoods Ltd. v. Usen Fisheries Ltd.<sup>379</sup> In that case, the plaintiffs sold the defendants a quantity of fish. Both parties were in the fish processing business and while the fish were adequately stored and should have lasted for ten days under those conditions, they deteriorated after three days. Although the defendants had inspected some of the fish, the deterioration did not become apparent until processing was started. The plaintiffs' action for the price failed because the court found that there had been a breach of the implied warranty of merchantable quality, since the goods should have remained merchantable for a reasonable time -- in this case, ten days.

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377. Sale of Goods Act 1979, s.14(2)(a).

378. Note 326, supra, discussed at p.105 supra.

379. Note 329, supra.

As was discussed earlier, the point was taken a stage further by the House of Lords in Lambert v. Lewis<sup>380</sup> where the notion of durability in fitness for purpose was applied to a non-perishable item. Since merchantable quality in Britain, is defined in terms of fitness for purpose, it seems clear that durability has now firmly emerged. It seems probable that the Canadian courts might take the same view.

#### Other Provisions As To Quality

In addition to conditions requiring goods to be fit for their purpose and of merchantable quality, the Act deals with sale by description<sup>381</sup> and sale by sample<sup>382</sup> and is to a large extent, a restatement of the English common law. Thus, the discussion of both concepts in Chapter II<sup>383</sup> is still applicable today.

One point should be noted, in both sale by description and sale by sample, the buyer is protected whether or not the seller was selling in a business context and therefore the provisions have wider application than those dealing with fitness for purpose or merchantable quality.

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380. Note 330, supra.

381. Sale of Goods Act 1893, s.13; Sale of Goods Act 1979, s.13; R.S.B.C., 1979, c.370, s.17; R.S.O., 1980, c.462, s.14.

382. Sale of Goods Act 1893, s.15; Sale of Goods Act 1979, s.15; R.S.B.C., 1979, c.370, s.19; R.S.O. 1980, c.462, s.16.

383. See p.39 supra.

## Usage of Trade

Again restating the common law, the Act provides that,

"an implied condition or warranty about quality or fitness for a particular purpose may be annexed to a contract of sale by usage."<sup>384</sup>

This too was discussed in the previous chapter.<sup>385</sup>

These then are the terms which may currently be implied as to the quality of goods sold in Britain and Canada. As the foregoing discussion shows and the following chapter will consider in more depth, they are open to a number of criticisms. This has prompted law reform bodies in all the jurisdictions concerned to consider alternative approaches. It is now appropriate to consider the work of these bodies.

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384. Sale of Goods Act 1893, s.14; Sale of Goods Act 1979, s.14(4).

385. See p.45 supra.

**CHAPTER IV: CRITICISM OF THE LEGISLATION  
AND THE MOVEMENT FOR REFORM**

It has been accepted, for some time, that the provisions of the Sale of Goods Act 1893, as amended, and as adopted in Canada, are open to criticism. In Britain, the Law Commissions commented that, "for some time there has been dissatisfaction with certain aspects of the law on sale,"<sup>386</sup> noting that:

"The Sale of Goods Act 1893 was a statement of principles of law largely derived from the cases decided up to that date. These cases almost all concerned disputes between merchants and many of them reflect conditions of a mercantile life in the 19th century."<sup>387</sup>

Writing in 1969 Sutton took the view that,

"The law governing everyday transactions of the buying and selling of goods is that representing the outlook and marketing conditions of the England of the years of the industrial revolution. A statute which was concerned with the business practices of the mid-nineteenth century determines the rights and duties of the consumer in a vastly different society today."<sup>388</sup>

Nor has the criticism of the Act been confined to its incongruity in a consumer contract. As Fridman put it:

"In modern Canada for the most part we are governed by an out-of-date statute, which does not fairly represent, nor parallel, the realities of everyday commercial life."<sup>389</sup>

Given these criticisms of the Act, it is hardly surprising that the provisions on sale of goods have been the subject of considerable scrutiny over the last twenty years. That scrutiny

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386. Note 388 supra, at para.1.10.

387. Ibid., at para. 3.1.

388. Sutton, "Reform of the Law of Sales" (1969), 7 Alta. L. Rev. 130, at p.173.

389. Note 239 supra, at pp.6-7.

has extended throughout the law on sales, to cover matters outwith the scope of this discussion (e.g., provisions on the implied terms on title and quiet possession). It has included considerable examination of the provisions relating to the quality and fitness of the goods and it is with these areas that we are concerned here. Research in Britain and Canada has often highlighted similar criticisms and concerns. Although not always suggesting the same reforms, it seems appropriate to consider the views of the various reform bodies, on a particular aspect, together. First, however, it is necessary to provide a brief background to the process by which these views emerged.

#### **(A) The Reform Bodies**

##### Britain

In Britain, the two Law Commissions<sup>390</sup> worked together on most stages of the examination of the law on sale of goods. The Report<sup>391</sup> which resulted from the first of these cooperative ventures lead to the enactment of the Supply of Goods (Implied Terms) Act 1973, which amended the provisions on implied terms as to quality of the goods sold and restricted the practice of contracting out of them. The second cooperative study by the Commissions and the Report<sup>392</sup> which resulted lead to the

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390. The two Commissions are "The Law Commission," which deals with law reform in England and Wales, and "The Scottish Law Commission," which deals with law reform in Scotland. While they usually work separately, often on unrelated topics, the fact that the Sale of Goods Acts 1893 and 1979 applied to the whole of the U.K., made joint projects appropriate.

391. Law Com. No. 24, Scot. Law Com. No. 12 (1969), First Report on Exemption Clauses.

392. Law Com. No. 69, Scot. Law Com. No. 39 (1975), Second Report on Exemption Clauses.



enactment of the Unfair Contract Terms Act 1979. The effect of these enactments has been discussed in the previous chapter.<sup>393</sup>

In January 1979 the Lord Chancellor asked the Law Commission to consider

- "(a) whether the undertakings as to quality and fitness of goods implied under the law relating to the sale of goods, hire-purchase and other contracts for the supply of goods require amendment;
- (b) the circumstances in which a person to whom goods are supplied under a contract of sale, hire-purchase or other contract for the supply of goods is entitled, where there has been a breach by the supplier of a term implied by statute, to:
  - ( i) reject the goods and treat the contract as repudiated;
  - ( ii) claim against the supplier a diminution or extinction of the price;
  - (iii) claim damages against the supplier;
- (c) the circumstances in which, by reason of the Sale of Goods Act 1893, a buyer loses the right to reject the goods; and to make recommendations."

The Law Commission pursued this inquiry alone and reported<sup>394</sup> in 1979. The Supply of Goods and Services Act 1982, which applies to England and Wales only, resulted from that Report. In the course of its work, the Law Commission considered a variety of questions, including possible provisions on the durability of goods in the contract of sale or supply of goods.<sup>395</sup>

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393. See supra pp.87-91.

394. Law Com. No. 95 (1979), Implied Terms in Contracts for the Supply of Goods [Terms of reference in Introduction].

It was accepted<sup>396</sup> that such matters were closely linked to more general questions of quality and fitness and again, the two Commissions embarked upon a cooperative examination of implied terms in sale of goods contracts and related matters. A special joint committee<sup>397</sup> was set up by the two Commissions and this reported in 1983,<sup>398</sup> provisionally recommending a number of reforms. Comments were invited on the provisional recommendations by March 1984. The comments<sup>399</sup> received by the Commissions, are under consideration and a final report, recommending what, if any, legislative action should be taken, will appear in due course.

Such was the opposition to the existing provisions on aspects of the law of sale of goods in the U.K., that a Private Members Bill was introduced into Parliament in 1979 by Donald Stewart, M.P. This Bill was withdrawn, however, when it became known that the Law Commissions were about to engage in a detailed examination of the issues.

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395. Ibid. at paras. 113-114.

396. Note 338 supra at para. 1.8.

397. The joint committee comprised Mr. Justice Ralph Gibson, Mr. Brian Davenport, Q.C., and Dr. Peter North, all of the Law Commission, and the Rt. Hon. Lord Maxwell, Dr. E.M. Clive and Mr. J. Murray, Q.C., all of the Scottish Law Commission.

398. Note 338 supra.

399. The comments of the Law Society of Scotland (submitted February 1984) are, as yet, unpublished. See Scottish Consumer Council's Response (March 1984).

## Canada

In Canada, the concern for reform of the existing provisions in this area has resulted in a considerable body of research, reports and recommendations. One landmark in the process of law reform, in this respect, was the Report on Sale of Goods<sup>400</sup> produced by the Ontario Law Reform Commission in 1979. It would be no exaggeration to describe the significance of the Report, in itself, and in terms of events which followed from it as "enormous." It is, therefore, important for an observer of the law reform process to note that the Report itself was, in some measure, the result of views expressed by a small group of individuals on the periphery of the process.

A sub-committee of the Commercial Law Subsection of the Ontario Branch of the Canadian Bar Association reported and recommended<sup>401</sup> that the existing law on sale of goods should be replaced by Article 2 of the Uniform Commercial Code. The Report was approved<sup>402</sup> by the Council Ontario Branch of the Canadian Bar Association in September 1969 and submitted to the Minister of Justice.

In February 1970, the Minister of Justice and Attorney General, Hon. A.A. Wishart, Q.C., referred the matter of sale of goods to the Ontario Law Reform Commission. Before a study could be fully organised, a joint request by the Minister of Justice and the Minister of Financial and Commercial Affairs to "give

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400. Ontario Law Reform Commission, Report on Sale of Goods, 1979.

401. Ibid., Appendix 7.

402. Ibid., at p.159.

first priority to a study of the law of warranties and guarantees in the contract of consumer sales,"<sup>403</sup> was received by the Commission. It was agreed that this project should form part of the broader study on sale of goods.

A research team headed by Professor Jacob S. Ziegel<sup>404</sup> assisted the Commission in preparing its Report<sup>405</sup> which was published in 1972. As a result of the Report, Bill 110,<sup>406</sup> was introduced in the Ontario Legislature. The untimely dissolution of the Ontario Legislature in June 1977 prevented it from becoming legislation. However, the Report did influence legislation elsewhere<sup>407</sup> and is an integral part of the Commission's work on sale of goods.<sup>408</sup>

The Commission resumed work on the more general examination of sale of goods in 1972 and again made considerable use of the assistance of a research team headed by Professor Ziegel. Their report, research conducted by the Ontario Branch of the Canadian Manufacturers' Association and research conducted by Professor

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403. Ibid., at p.3.

404. See Ziegel in Nielsen (ed.), Consumer and the Law in Canada (1970), at p.165; Ziegel, "Report of the Ontario Law Reform Commission on Consumer Warranties and Guarantees in Sale of Goods" (1973) 22 I.C.L.Q. at p.363.

405. Ontario Law Reform Commission Report on Consumer Warranties and Guarantees in Sale of Goods (1972).

406. Consumer Product Warranties Bill 1976.

407. E.g., Consumer Product Warranties Act 1977, S.S. 1976-77, c.15, Consumer Product Warranty and Liability Act 1978, S.N.B. 1978, c.18.1.

408. See, e.g., Report on Sale of Goods, note 400 supra, at pp.216-17, where one of the reasons given for including an implied warranty in a contract of sale between commercial parties is that the seller to a consumer would be giving such a warranty to the buyer if the Report on Consumer Warranties and Guarantees in the Sale of Goods were implemented.

Monson on purchasing practices were considered in detail by the Commission.<sup>409</sup> A Draft Bill was prepared by Professor Ziegel and his team, taking into account the Commission's views<sup>410</sup> and the final Report on Sale of Goods was published in 1979.

Initial reaction to the Report was not overwhelming. Discussion of it was confined in the Canadian Bar Review to the "Book Reviews" section.<sup>411</sup> There, the reviewer noted that,

"the Commission appears to have assumed as a fundamental axiom, that the legal rules of sales matter";<sup>412</sup>

an assumption which he had difficulty in accepting.

Despite this, the Report was to have considerable impact throughout Canada. The Report was submitted to the Uniform Law Conference of Canada at its annual meeting in 1979. The U.L.C.C. Executive appointed a committee<sup>413</sup> to consider the Report's suitability to form the basis of a uniform law of sales for Canada. The committee met over the next two years and in 1981 produced a Draft Uniform Sale of Goods Act.

In a number of important respects, the scheme proposed by the committee differed from the scheme proposed by the Ontario Law Reform Commission. In the following discussion, these differences will be noted. The Draft Uniform Sale of Goods Act

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409. Note 400 supra, at p.4.

410. Id.

411. Ramsay (1980), 58 Can. Bar. Rev. 780.

412. Ibid., p.782.

413. The committee was comprised of Dr. Mendes da Costa, Q.C. (Ontario), Prof. Braid (Manitoba), Prof. Bridge (Alberta), Prof. Cuming (Saskatchewan), Mr. Dore (New Brunswick), M. Paquette (Quebec), Miss Campbell (Prince Edward Island) and Prof. Vaver (British Columbia).

was adopted by the Uniform Law Section of the U.L.C.C. in August 1981 at Whitehorse and the final English version appeared in 1982.

Since then, the law reform bodies of Alberta<sup>414</sup> and Manitoba<sup>415</sup> have given detailed consideration to the Act. In both cases, it was recommended<sup>416</sup> that the Province should adopt the Act, subject to certain changes. Since one aim of the Uniform Sale of Goods Act would be to achieve uniformity throughout provincial sales laws, it is not surprising that, in both Alberta and Manitoba, adoption of the Act was made conditional,<sup>417</sup> to varying degrees, on acceptance of it by the other provinces.

The criticisms of the current legislation and the proposals for reform will now be examined. First, a number of the broader issues -- the distinction between consumers and non-consumers, the distinction between conditions and warranties, the doctrine of caveat emptor, the structure of the detailed provisions and the distinction between business and private sellers -- will be

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414. Institute of Law Research and Reform, Edmonton, Alberta, Report No. 38 (1982), The Uniform Sale of Goods Act.

415. Law Reform Commission of Manitoba, Report No. 57 (1983), The Uniform Sale of Goods Act.

416. I.L.R.R.A. note 414, supra, at p.14; L.R.C.M. note 413 supra, at p.3.

417. In Alberta, the I.L.R.R. recommended that, prior to adoption of the Act, the Alberta Government, "by consultation with the governments of other provinces and the territories, be satisfied that the adoption of the Uniform Act will promote uniformity of law among the provinces and territories" (Report at p.14). In Manitoba, the L.R.C. recommended that, "before the Uniform Act is proclaimed, the Government of Manitoba be satisfied that at least one other province has already proclaimed the Uniform Act in force or will, on or about the same time, proclaim the Uniform Act in force" (Report at p.4).

considered. Secondly, the detailed provisions on quality of goods and their fitness for purpose will be examined and thirdly, the focus will be placed on the remedies available to the aggrieved buyer.

## **(B) Some General Issues To Consider**

### **Consumer and Non-Consumer Sales**

The idea that the law should provide greater or different protection for consumers as opposed to non-consumers (commercial parties) is a familiar one<sup>418</sup> in sale of goods and other legislation. The justification for the distinction lies in the belief that the consumer's inexperience and inequality of bargaining power may put him at a disadvantage at a number of stages in the process of a sale. The consumer may lack the resources and experience to bargain as effectively as a non-consumer buyer. At the stage of acceptance of goods tendered,

"a consumer may be less vigilant than a commercial buyer in scrutinising goods delivered to him, and indeed it may not be reasonable to expect the same standard of vigilance in both cases."<sup>419</sup>

Should the consumer be dissatisfied with the goods, again inexperience and a lack of resources may greatly diminish his ability to enforce his rights effectively.

The acceptance that these differences justified different legal provisions in each case has found expression in a number of

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418. See, e.g., Jolowicz, "Protection of the Consumer and Purchaser of Goods Under English Law" (1969), 32 Modern L. Rev. 1; Cavalier, "Consumer Protection and Warranties of Quality" (1970), 34 Albany L. Rev. 339, where the author refers to "the rash of consumer-oriented articles," at p.339.

419. Note 338 supra, at para. 4.73.

statutory provisions on sale of goods. In Britain, the Supply of Goods (Implied Terms) Act 1973, defined a "consumer contract" as one where,

- "(a) the buyer neither acts in the course of business nor holds himself out as doing so; and
- (b) the seller acts in the course of business; and
- (c) the goods are of a type ordinarily bought for private use or consumption;"

and provides that the operation of exemption clauses will be different to their operation in other contracts.

In Canada, a number of provinces<sup>420</sup> have enacted legislation dealing specifically with consumer sales or have amended existing legislation to acknowledge the distinction. In British Columbia, the Sale of Goods Act provides that a "retail sale" includes

"every contract of sale made by a seller in the ordinary course of his business but does not include a sale of goods

- (a) to a purchaser for resale;
- (b) to a purchaser who intends to use the goods primarily in his business;
- (c) to a corporation or an industrial or commercial enterprise; or
- (d) by a trustee in bankruptcy, a liquidator or a sheriff,"<sup>421</sup>

and provides that any purported limitation or exclusion of the implied warranties or conditions in such a sale shall be void.<sup>422</sup>

The Ontario Law Reform Commission Report on Consumer Warranties and Guarantees in Sale of Goods was based on acceptance of this separate category of contracts. The Saskatchewan Consumer Products Warranties Act, which was founded

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420. See supra p. 73.

421. R.S.B.C. 1979, c.370, s.21(i).

422. Ibid., s.21(2).



upon the "basic ideas"<sup>423</sup> of the Report, defines "consumer"<sup>424</sup> and "consumer product"<sup>425</sup> in dealing "in a comprehensive and systematic manner with the problems faced by consumers of defective products."<sup>426</sup>

The notion of consumers as opposed to non-consumers is, however, open to criticism. The expression "non-consumer" covers an enormously diverse group of individuals and legal entities; from the sole trader to the multinational corporation. Many non-consumers suffer from all the limitations in terms of experience, resources and bargaining power as the consumer, yet none of the legislation reviewed attempts to offer special protection. It is accepted that the small non-consumer will have chosen to enter the business arena. Furthermore, to distinguish different kinds of businesses would be a difficult, although not impossible, matter of definition. The response to this problem has been greater in Canada than in Britain.

In Britain, the Commissions, when making provisional recommendations for reform, assumed<sup>427</sup> that the definition would remain that contained in the Sale of Goods Act 1979. In provisionally recommending that the concept of "merchantable quality" should be replaced by a new statutory definition designed to cover both consumer and commercial transactions,<sup>428</sup>

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423. Romero, "The Consumer Products Warranties Act" (1978-79) 43 Sask. L. Rev. 81 and (1980-81) Sask. L. Rev. 296. At p.97, Prof. Romero, himself a member of the committee that drafted the Act, acknowledges this.

424. S.S. 1976-77, c.15, s.2(d).

425. Ibid., s.2(e).

426. Romero, note 423 supra, at p.83.

427. Note 338 supra, at para. 1.19.

the Commissions avoid the problem. However, a completely new set of proposals on remedies available to the consumer are different to those provided for non-consumers, regardless of their size.<sup>429</sup>

In commenting on the Commissions' proposals, the Scottish Consumer Council<sup>430</sup> repeated its view that "a separate statement of consumer law" would be of benefit in demonstrating the "distinctiveness of consumer law" and providing consumers with a statement of their rights which they might more easily understand. They urged the Commissions to state their position on this.<sup>431</sup>

In its Report on Sale of Goods,<sup>432</sup> the Ontario Law Reform Commission referred frequently to its Report on Consumer Warranties and Guarantees,<sup>433</sup> noting whether or not the same solution should apply in all situations.<sup>434</sup>

In the case of disclaimer clauses, for example, the Commission had recommended that, in consumer transactions, such clauses should be prohibited.<sup>435</sup> When it considered disclaimer clauses, in the context of commercial sales, it felt that such a solution would be "too draconian."<sup>436</sup> However, the Commission did accept that

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428. Ibid., Prov. Recc.2.

429. Ibid., Prov. Reccs. 10-18.

430. Scottish Consumer Council, supra note 399, at p.3

431. Ibid., at p.4.

432. Note 400 supra.

433. Note 405 supra.

434. Note 400 supra, at p.214, where the criticism of the test of merchantable quality applied by the House of Lords in a particular case was accepted at "just as apt for non-consumer sales."

435. Note 405 supra, at p.49.

436. Note 400 supra, at p.228.

"This is not to say that, in the commercial context, buyer and seller are always bargaining on equal terms, and that the buyer is always capable of protecting his own interests.... The dividing line between a consumer sale and a commercial sale is often a fine one, and many non-consumer buyers are not noticeably more sophisticated, or in a better bargaining position than the average consumer."<sup>437</sup>

The solution, they believed, lay in the concept of unconscionability and accordingly, they recommended that disclaimer clauses should be permitted unless they were unconscionable.

Clearly, the flexibility of this approach appealed to the committee appointed by the Uniform Law Conference of Canada. The Uniform Sale of Goods Act provides that:

"In determining whether the whole or any part of a contract of sale is unconscionable, the court may consider, among other factors

- (a) the commercial setting, purpose and effect of the contract and manner in which it is made,
- (b) the relative bargaining strength of the seller and the buyer, taking into account the availability of reasonable alternative sources of supply or demand,
- (c) the degree to which the natural effect of the transaction, or any party's conduct prior to or at the time of the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties under the transaction,
- (d) whether the party seeking relief knew or should reasonably have known of the existence and extent of the terms alleged to be unconscionable,

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437. Ibid.

- (e) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled,
- (f) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages.
- (g) the degree to which a party has taken advantage of the inability of the other party to reasonably protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of the agreement, lack of education, lack of business knowledge or experience, financial distress or other similar factors,
- (h) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances, and
- (i) knowledge by a party, when entering into the contract, that the other party will be substantially deprived of the benefits reasonably anticipated by that other party under the transaction."<sup>438</sup>

Any agreement by the parties to waive the application of this provision is ineffective.<sup>439</sup> Exclusion, limitation or modification of any warranty insofar as it affects the right to recover in respect of personal injury is deemed prima facie to be unconscionable.<sup>440</sup>

In addition, the Act gives the Court the right to raise this issue of its own motion.<sup>441</sup> This provision was rejected by both

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438. Uniform Sale of Goods Act, Approved by the Uniform Law Conference of Canada, August 1982, S. 31(2).

439. Ibid. s. 31(4).

440. Ibid. s.48(2).

441. Ibid. s.31(3).

the Manitoba L.R.C.<sup>442</sup> and the L.L.R.R. in Alberta.<sup>443</sup> The latter body described such a power as a "forensic surprise"<sup>444</sup> and saw the possibility that it might

"degenerate into the sort of unanalytical incantation that the system of guidelines in [s.31(2)] is designed to avert."<sup>445</sup>

While these criticisms have some force, it could be argued that such a power, if used with caution by the Court, would have provided a useful safety net.

Nonetheless, if the scheme of unconscionability provided for in the Uniform Sale of Goods Act is finally adopted, it is submitted that the courts will have the opportunity to acknowledge the very real differences within the sphere of "non-consumer" transactions and, to this extent, the Canadian proposals are to be preferred to those put forward in Britain.

#### Conditions and Warranties

The Sale of Goods Act<sup>446</sup> classifies the implied obligations in the contract as "conditions" or "warranties." Not only has there been considerable debate as to the meaning of these terms,<sup>447</sup> the very classification of terms as one or the other has been doubted.<sup>448</sup>

In examining this classification and the remedies flowing from it, the Law Commissions, in Britain, concluded that it was

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442. Note 400 supra, App. B., Am. 8.

443. Note 338 supra, Recc.10.

444. Ibid., at p.66.

445. Id.

446. 1979, s. 11(3).

447. See supra p.81.

448. Cenave N.J. v. Bremer Handelsgesellschaft m.b.H. [1976] Q.B. 44.

"inappropriate and liable to produce unjust results."<sup>449</sup> Indeed, they went as far as saying,

"If the Sale of Goods did not classify the implied terms as conditions of the contract, a court today would not so classify them in the absence of a clear indication that this was what the parties to the particular contract intended."<sup>450</sup>

They reached their conclusions for a number of reasons.

Acknowledging that the breach of an implied term might, "vary from the trivial to one which renders the goods wholly useless,"<sup>451</sup> they found the term "condition" and the resulting automatic right of rejection, too inflexible. This, they stated, might result, where the defect was of a minor nature, in a court holding that there was no breach of a particular implied term, in order to avoid the remedy of rejection.<sup>452</sup> They supported their concern here with a recent case,<sup>453</sup> where the court's finding that there had been no breach of the implied term, could be attributed to a reluctance to allow rejection for such minor defects. The Commissions provisionally recommend that the terms as to the quality of goods should no longer be classified as conditions. They rejected the notion of using "term" to cover all warranties and conditions<sup>454</sup> and preferred, instead, that the consequences of the breach of each implied term should be detailed expressly.<sup>455</sup>

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449. Note 338 supra, at para. 2.37.

450. Ibid., at para. 2.30.

451. Ibid., at para. 2.29.

452. Ibid., at para. 2.31.

453. Millars of Falkirk v. Turpie 1967 S.L.T. (Notes) 66.

454. Ibid., at para. 4.30.

455. Id. For a discussion of the remedies for breach of the

The Ontario Law Reform Commission expressed the same concerns over the distinction between conditions and warranties.<sup>456</sup> In the context of consumer transactions, it concluded that,

"the distinction between warranties and conditions be abolished with respect to consumer sales and be replaced by the single concept of warranty."<sup>457</sup>

This recommendation has found support and the Saskatchewan Consumer Product Warranties Act,<sup>458</sup> which classifies all such obligations "as warranties." They concluded that the distinction was equally inappropriate in the context of commercial sales.<sup>459</sup> Consequently, they proposed the single classification of the terms as "warranties."

This approach is repeated in the Uniform Sale of Goods Act, where "warranty" is used throughout.<sup>460</sup>

#### Caveat Emptor

As a codification of the then English law, the Sale of Goods Act 1893 restated the principle of caveat emptor<sup>461</sup> before detailing exceptions to it. In view of the development of the "exceptions" to the principle and of the current approach to consumer transactions, the continued place of such a notion must be questioned in a modern context.

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implied terms, see pp.161-170 infra.

456. Note 405 supra, at p.31.

457. Id.

458. Note 407 supra.

459. Note 400, supra at p.147.

460. See, for example, Uniform Sale of Goods Act, ss.44 and 45.

461. S. 14.

Not only did the Ontario Law Reform Commission feel that the principle was a source of confusion to the layman and inappropriate in the consumer sphere,<sup>462</sup> it recommended that it should be deleted in statutory provisions, in the commercial sphere.<sup>463</sup>

This approach was followed in the Uniform Sale of Goods Act, where the seller's obligations are expressed in positive terms<sup>464</sup> and no mention is made of "caveat emptor."

In Britain, the Law Commission did not consider this matter and consequently, no change is suggested. This is not only unfortunate but is surprising in view of the fact that the principle of caveat emptor was unknown in Scotland before 1856. Under the heading "General Policy Considerations,"<sup>465</sup> they did say,

"in such an important area of commercial and consumer law, the opportunity should be taken to bring closer together the laws of the two jurisdictions."<sup>466</sup>

Perhaps any emphasis on the imposition of an English legal doctrine upon Scotland would have been inappropriate in such a setting. Certainly, if the Commissions' proposals are accepted, the implied terms will be extensive and detailed and, in practice, it will make little difference that caveat emptor remains in the background. Nonetheless, as a reflection of modern conditions, the removal of the statement as a principle would have been preferable.

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462. Note 405, supra at pp.31-33.

463. Note 400, supra at p.207.

464. See, e.g., ss.44 and 45.



## Merchant and Non-Merchant Sellers

The provisions as to quality and fitness apply, in Canada,<sup>467</sup> where the seller is one who "deals in goods of that description." The Act in Britain has been amended to require only that the seller, "sells goods in the course of a business."<sup>468</sup> The Ontario Law Reform Commission noted the intended result<sup>469</sup> of this and, viewing the consequences for the seller as too harsh, recommended that Canadian approach remain substantially unchanged.<sup>470</sup> The Uniform Sale of Goods Act reflects this<sup>471</sup> and provides that, for the provision to apply, the seller must be one who, "deals in goods of that kind."

In Britain, the Commissions did not consider the extension of the implied terms to private sellers. Again, this is surprising in view of the fact that, prior to 1856, the implied warranty applied to all sales, regardless of the character of the seller. The Ontario Law Reform Commission considered the idea and rejected it<sup>472</sup> on the ground that the threefold justification for the restriction;

"namely, that a merchant seller holds himself out as possessing special skill and knowledge with respect to the goods; that he sells for profit and, that he is in a better position to absorb, or to pass on, any loss resulting from undiscoverable defects than the average buyer;"<sup>473</sup>

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465. Note 338 supra, at pp.54-55.

466. Ibid., at para. 3.4.

467. Note 406 supra, s.52.

468. Sale of Goods Act 1979, s.14(2) and (3).

469. See supra discussion at p.87.

470. Note 400 supra, at p.209.

471. Note 438, supra, ss. 44 and 45.

472. Note 400 supra, at p.207.

was sufficiently persuasive. Nor were they inclined to require by statute that such a seller should be obliged to disclose known defects.<sup>474</sup>

While it is accepted that the private seller should not be subject to all the obligations of a commercial seller, some lesser standard of disclosure could be imposed by statute. It is submitted that the appropriate level for this should relate to the seller's actual knowledge of defects. There is no reason, in principle, why a seller should be protected where he fails to mention that, e.g., the fuel tank in a car is ruptured and that fuel leaks out, if he knows of this. As the Ontario Law Reform Commission pointed out, this is a difficult area to regulate by statute.<sup>475</sup> However, some statutory of acknowledgment would have two beneficial results. First, in the cases where the seller's knowledge could be demonstrated, the aggrieved buyer would have a remedy. Secondly, if the provision were sufficiently publicised, it might reasonably be expected to make private sellers disclose defects, in order to protect themselves.

### **(C) The Quality of the Goods and the Implied Term**

In Britain, in 1973,<sup>476</sup> the Law Commissions' recommendation<sup>477</sup> that the implied warranty of merchantable quality should appear before the implied warranty of fitness for purpose was implemented. This new format was repeated in the 1979 Act.<sup>478</sup>

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473. Id.

474. Id.

475. Note 400 supra, at p.207.

The Ontario Law Reform Commission recommended the same change in their proposals. This approach was followed in the Uniform Sale of Goods where the implied warranty of merchantable quality precedes the implied warranty of fitness for purpose.

The change reflects the wider application of the provision on merchantable quality and the belief that the new, refined definition will result in less reliance on fitness for purpose.

#### Problems Surrounding the Implied Warranties of Quality and Fitness

Before the problems highlighted by the law reform bodies in relation to the existing definitions of merchantable quality and fitness for purpose are examined and the solutions assessed, it is appropriate to consider three specific problems common to both warranties. The first is the extent to which used goods are covered by the warranties. The second is the extent to which durability is implied by either or both of the warranties. The third is whether or not any spare parts or servicing facility is or should be part of the warranty.

It will be recalled, from the discussion in the previous chapter,<sup>479</sup> that, in Britain, it seems clear that the implied warranties do extend to used goods and it is probable, that this approach would be taken in Canada.

In Britain, the Commissions clearly thought<sup>480</sup> that used

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476. Supply of Goods (Implied Terms) Act 1973.

477. Law Com. No. 24; Scot. Law Comm. No. 12 (1969).

478. Sale of Goods Act, 1969, s.14.

479. See supra pp.102-104.

480. Note 338 supra, at para. 2.17, where the Commissions refer, in passing, to second-hand goods.

goods were already covered by the implied warranties. Consequently, they make no express reference to them in their recommendations. It is to be hoped that, in the light of the discussion of their provisional recommendations, clear reference is made to the inclusion of used goods.

The Ontario Law Reform Commission felt that, while the Commissions in Britain were probably correct in their assessment, a revised statute should make the position explicit.<sup>481</sup> Accordingly, in the provision relating to merchantable quality, they include goods "whether new or used."<sup>482</sup> There is no repetition of this phrase, however, in the provision on fitness for purpose.<sup>483</sup> While the quality or fitness of used goods cannot be expected to be the same as that of new goods, there seems no reason why, e.g., a used car should not be required to satisfy the fitness test.

The Uniform Sale of Goods Act<sup>484</sup> repeats the distinction. While the clear inclusion of used goods within the scope of the implied warranty of merchantable quality is to be welcomed, the failure to do so, in the case of the warranty of fitness for purpose, is to be regretted.

The extent to which the existing provisions include an element of durability has been discussed in the previous chapter.<sup>485</sup> While the Commissions<sup>486</sup> in Britain and the Ontario

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481. Note 400, supra at pp.214-215.

482. Draft Act, s.5(13)(a).

483. Ibid. at s.5.14(1).

484. ss. 44 and 45.

485. See supra pp.104 and 121.

486. Note 338 supra, at paras. 2.14 and 2.15.

Law Reform Commission<sup>487</sup> believed durability to be an inherent part of "merchantable quality" they felt there was a need to clarify this.

In their provisional proposals, the Commissions in Britain specifically mention "durability" as one of the facts in the new definition of merchantable quality.<sup>488</sup> While this is a welcome clarification, it is to be hoped that what is meant by "durability" will be spelled out explicitly in any future legislation.

In their comments on the Commissions' proposals, the Scottish Consumer Council suggested that the Director General of Fair Trading should be empowered to require manufacturers of particular goods to publish statements of life expectancy of those goods.<sup>489</sup> Furthermore, they suggested that any statement as to life expectancy made to the buyer prior to purchase should be incorporated in the contract of sale.<sup>490</sup> These suggestions could operate in addition to the basic implied term on durability and, as such, would provide useful additional protection to buyers.

In Canada, the Draft Uniform Sale of Goods Act provides, as one of the elaborations on the basic definition of merchantable quality, that the goods,

"will remain fit, perform satisfactorily and continue to be of such quality and in such condition for any length of time that is

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487. Note 400 supra, at pp.215 and 216.

488. Note 338 supra, at Prov. Recc. 6.

489. Note 399 supra, at para. 4.24.

490. Ibid. at para. 11(1).

reasonable having regard to all the  
circumstances."<sup>491</sup>

Although, similar to the provision suggested by the Ontario Law Reform Commission,<sup>492</sup> the provision in the Draft Act is more explicit.

In addition, the Draft Act extends the implied warranty of fitness for purpose, in providing that,

"the goods will so remain for any length of time that is reasonable having regard to all the circumstances."<sup>493</sup>

While this was not part of the Ontario Law Reform Commission's<sup>494</sup> proposals, it has been received without objection in Alberta and Manitoba.

It is to be regretted that no such extension is proposed by the Commissions in Britain. While durability may be an inherent part of the warranty, clarification of the matter would be welcome.

The question of spare parts and servicing/repair facilities was considered by the Commissions<sup>495</sup> in Britain and the Ontario Law Reform Commission.<sup>496</sup> It is submitted that this is often part of the same issue as durability. One of the concerns of any buyer, particularly where the item purchased is mechanical (e.g., vehicles, domestic appliances, industrial plant) is the length of time for which it can be used. While this may relate to the item

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491. s.44(b)(iv).

492. Note 428 supra, s.s.13(1)(b)(vi).

493. S.45(1).

494. Note 428 supra, s.5.14(1).

495. Note 338 supra, at para.2.17.

496. Note 400 supra, at pp.216 and 217.

as a whole, and so be a general question of durability, it will often include the possibility that a particular part of the item will require replacement before the rest of the parts cease to operate. In Britain, the Commissions rejected the idea of creating any obligation on the seller or supplier to maintain stocks of spare parts or to provide servicing facilities. In the words of the Commissions:

"Hardly any support for [the creation of such an obligation] was received on consultation and it was thought that if such an obligation applied to all kinds of contract involving all kinds of goods, it could, in many cases, impose hardship on the retailer, particularly the small shop-keeper."<sup>497</sup>

Their conclusion is to be regretted. The opposition of the merchant-seller is neither surprising, nor the only factor to be considered. The difficulty of applying the obligation in all situations is not insurmountable as the provision of the Uniform Sale of Goods Act, discussed below, indicates. There, the provision simply raises a presumption and is confined to new goods. It is to be hoped that, after consultation, the Commissions will reassess their position.

In its consideration of the question, the Ontario Law Reform Commission supported the inclusion of a requirement that spare parts and repair facilities should remain available for a reasonable period of time. In their view,

"Given the fact that complex durable products require spare parts and repairs during their lifetime, the availability of spare parts and repair facilities does seem to us to come

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497. Note 338 supra, para.2.17.

within the expanded concept of a modern warranty of merchantability."<sup>498</sup>

The Draft Uniform Sale of Goods Act, which follows the Ontario Law Reform Commission's proposal, on this occasion, provides that,

"In the case of new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time."<sup>499</sup>

While this provision was accepted without objection in Alberta, the Law Reform Commission in Manitoba proposed an amendment. They proposed that the requirement should be only that

"the seller will make reasonable efforts to ensure that spare parts and repair facilities, if relevant, will be available for a reasonable period of time."<sup>500</sup>

While this may appear to be a lesser requirement, the result may frequently be similar under both provisions. Since adjudication of the question will only arise after spare parts or repair facilities have not been provided, the seller's "reasonable efforts" to ensure their provision will at least be one of the circumstances to be considered. Insofar as the provision gives sellers prior warning of what is expected of them, it is a valuable addition.

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498. Note 400 supra, at p.217.

499. s5.13(1)(c).

500. Note 415 supra, App.B., Ann.12.



## Merchantable Quality

In its original form, in Britain, and as it has remained in Canada, the only statutory clue as to what was meant by "merchantable quality" was that this included the "state or condition"<sup>501</sup> of the goods. Despite a considerable body of judicial decision and academic debate, a degree of uncertainty remained and the Ontario Law Reform Commission felt that the concept was unsatisfactory in its current statutory form.<sup>502</sup>

In Britain, a definition was introduced in 1973, in the following form:

"Goods of any kind are of merchantable quality ... 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 other relevant circumstances."<sup>503</sup>

Despite this, the Law Commissions felt<sup>504</sup> that the concept and its definition required further scrutiny. The concept of "merchantable" quality was found to be deficient in a number of respects.

First, the concept itself, being firmly rooted in 18th century commercial practices is dated in a modern sales context and particularly so with respect to consumer transactions.<sup>505</sup> Secondly, it has been the subject of such extensive and varied interpretation that its meaning is unclear.<sup>506</sup> Thirdly, it

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501. R.S.B.C. 1979, c.370, s.1.

502,. Note 400 supra, at pp.210-13.

503. Sale of Goods Act 1979, s. 14(6).

504. Note 338 supra, at para. 1.18.

505. Note 338 supra, at paras. 2.6 and 2.7.

506. Ibid., at para. 2.3; note 600 supra, at p.210.

relies excessively on the question of the purpose for which goods were bought.<sup>507</sup> Fourthly, this reliance on purpose leads to uncertainty on the question of whether or not minor defects can amount to a breach of the implied term.<sup>508</sup> It should be noted that the Ontario Law Reform Commission did not accept this criticism, stating that it,

"places an unjustifiably narrow construction on the meaning of 'fitness,' and also ignores the statutory definition, which is not restricted to functional characteristics."<sup>509</sup>

While they may be correct in this, it is nonetheless possible that a court, in the absence of a clear indication to the contrary, might adopt such a construction.

Having considered the weaknesses in the existing operation of the concept of "merchantable quality," the Commissions in Britain came to the provisional conclusion that one word was not adequate in qualifying the standard of quality to be implied in instances of sale of goods.<sup>510</sup> In addition, they felt that the word "merchantable" was sufficiently burdened with past interpretation, which would remain with it in the future, that it should be deleted.<sup>511</sup> Instead, they suggested that the implied term should,

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507. Note 338 supra, at paras. 2.10-2.12.

508. Ibid., at para. 2.13.

509. Note 400 supra, at p.212.

510. Note 338 supra, at para. 4.3.

511. Ibid., at Prov. Recc. 4.

"be formulated as a flexible standard coupled with a clear statement of certain important elements included within the area of quality (e.g. freedom from minor defects, durability and safety) and with a list of the most important factors (e.g. description and price) to which regard should normally be had in determining the standard to be expected in any particular case."<sup>512</sup>

The "elements" and "factors" will be discussed below. In developing the "flexible standard," the Commissions considered three possibilities.<sup>513</sup>

The first, was to provide a qualitative standard, e.g., "good quality."<sup>514</sup> While this would be appropriate in many cases, they felt that it might lack the necessary flexibility. The second possibility was based on some notion of acceptability, e.g., "acceptable quality."<sup>515</sup> This, however, raises the question, "Acceptable to whom?" and, if the answer is not to be the actual buyer, must involve the complex possibility of the "reasonable buyer." Thirdly, they considered a neutral standard, e.g., "proper quality."<sup>516</sup> This may appear, at first glance, to be so vague that it is meaningless, but it would be flexible and, coupled with the "elements" and "factors," would meet individual cases.

While accepting that there were difficulties inherent in the concept of "merchantable quality," the Ontario Law Reform Commission was not prepared to abandon it. Instead, it

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512. Ibid., at para. 4.7.

513. Ibid., at paras. 4.8-4.12.

514. Ibid., at para. 4.8.

515. Ibid., at para. 4.10.

516. Ibid., at para. 4.12.

recommended adoption of a definition similar to that in the U.K. Sale of Goods Act with some amendment, coupled with specific criteria drawn from the Uniform Commercial Code.<sup>517</sup> Their amendment of the definition takes account of goods which may be put to a number of uses and makes clear that "quality" is not restricted to functional characteristics. Thus, they suggested that "merchantable quality" mean:

"that the goods, whether new or used, are as fit for the one or more purposes for which goods of that kind are commonly bought and are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances."<sup>518</sup>

While the Draft Uniform Sale of Goods Act retains many of the features of this definition, there are certain differences. It provides that "merchantable quality" should mean,

"(a) that the goods, whether new or used, are  
    (i) as fit for the one or more purposes for which goods of that kind are commonly bought or used,  
    (ii) of such quality, and in such condition, as is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances."<sup>519</sup>

It then goes on to provide a list of additional criteria for assessing merchantability. The criteria will be considered below.

First, it is important to note the changes made to the Ontario Law Reform Commission's proposal, by the Draft Uniform

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517. Uniform Commercial Code, 2-314(2).

518. Note 136 supra, at p.212.

519. s44(1).

Act. The reorganized format, in providing a more readily intelligible definition, is an improvement. In addition, in discussing the purpose for which the goods should be fit, the Draft Act talks of the purpose for which the goods are "commonly bought or used" (emphasis added). This can only clarify the position, particularly for the layman.

At first glance, it may appear that, by retaining the term "merchantable quality," what is being accepted in Canada, is what was rejected in Britain. However, when the British proposal is viewed, in the light of the "important elements and factors," and compared with the Canadian proposal and its "additional criteria," it becomes clear that the overall result is similar, in many respects.

In Britain, it is proposed that the new definition should make reference to the following factors:

- "(a) the fitness of the goods for the purpose or purposes for which goods of that kind are commonly bought
- (b) their state or condition
- (c) their appearance, finish and freedom from minor defects
- (d) their suitability for immediate use
- (e) their durability
- (f) their safety
- (g) any description applied to them
- (h) their price (if relevant)."<sup>520</sup>

The Draft Uniform Sale of Goods Act provides, in addition to the definition of merchantable quality, that the goods,

- "( i) are goods that pass without objection in the trade under the contract description,

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520. Note 338 supra, Prov. Recc. 6. These would provide the test for what is good/acceptable/proper quality (see supra notes 514, to 516).

( ii) in the case of fungible goods, are of fair or average quality within the description,

(iii) within the variations permitted by the agreement, are of the same kind, quality and quantity within each unit and among all units involved,

( iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement required, and

( v) will remain fit, perform satisfactorily and continue to be of such quality and in such condition for any length of time that is reasonable having regard to all the circumstances."<sup>521</sup>

Here, the only substantial difference between the Draft Act and the Ontario Law Reform Commission's proposals is that the latter also required that the goods,

"conform to the representations or promises made on the container or label or other material, if any accompanying the goods."<sup>522</sup>

The reason that this provision was deleted probably lies in the fact that such statements or promises will have been provided by the manufacturer, who will frequently not be the seller in the final contract. It might be placing an undue burden on the seller to require him to investigate the claims made on the packaging of every product he sells. Furthermore, these representations may be made in literature which is inside a sealed package, and therefore beyond the reach of the seller. In any event, should the manufacturer's representations have been made negligently or fraudulently, the ultimate buyer may obtain

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521. s.44(1)(a).

522. Note 428 supra, at s.5.13(1)(b)(v).

redress through an action in tort.

When the overall proposals in Britain and Canada are compared, it becomes apparent that there are substantial similarities. The following are mentioned specifically as being relevant under the British and Canadian proposals; the purposes for which the goods are commonly bought, the description applied to them, the price and their condition. While some matters are detailed in one set of provisions and not in the other, they can usually be included under some aspect of the latter's more general provisions. Thus, while "appearance, finish and freedom from minor defects" appear in the British proposals and are not individually mentioned in the Uniform Sale of Goods Act, they would be covered by the requirement that they should be "of such quality and in such condition" as is reasonable to expect.

The differences between the proposals, in Britain and Canada, in respect of used goods, durability and the provision of spare parts and servicing/repair facilities have been discussed.<sup>523</sup>

#### Defects Outwith the Scope of the Warranty

Regarding defects which are outwith the scope of the implied term, the Law Commissions in Britain provisionally recommended<sup>524</sup> that no change in the existing provision was required and there would continue to be no implied warranty,

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523. See supra pp.144-149.

524. Note 338 supra, at para. 4.24.

"(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal."<sup>525</sup>

The Ontario Law Reform Commission considered the difficulty that the basis for the defects to be excluded from the implied term is the buyer's "actual" examination, not a "thorough" or "reasonable" examination. Despite the possibility that this could be prejudicial to the seller, they recommended no change,<sup>526</sup> believing that the general requirement of good faith should cover the situation where the buyer chose to make a cursory examination. This general approach was accepted in the Uniform Sale of Goods Act, as was the acceptance of a provision dealing with defects drawn to the buyer's attention prior to sale.

The Draft Uniform Act provides that the implied warranty of merchantable quality does not apply,

"(a) to defects specifically drawn to the buyer's attention before the contract was made,

(b) if the buyer examined the goods before the contract was made, to any defect that the examination should have revealed."<sup>527</sup>

While these exceptions were accepted in Alberta,<sup>528</sup> the Manitoba Law Reform Commission recommended amendment of part (a) above to:

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525. Sale of Goods Act 1979, s. 14(2).

526. Note 136 supra, at pp.218-219.

527. s.44(3).

528. Note 414 supra.



"defects known to the buyer before the contract was made."<sup>529</sup>

This imposes a slightly higher standard of communication on the seller and also excludes defects known to the buyer, regardless of how that knowledge was acquired.

The implied term on the quality of goods sold proposed by the Commissions in Britain and enacted in the Uniform Sale of Goods Act in Canada provides a more comprehensive guide to the parties to a contract and to the courts. There will still be a need for judicial interpretation, but this is essential if the terms are to have the flexibility to enable application over the great variety of goods sold.

#### **(D) Fitness for Purpose**

In Britain the implied term dealing with the fitness of goods for a particular purpose was amended in 1973,<sup>530</sup> as a result of recommendations made by the Law Commissions. In reviewing the new legislation, which provides,

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known -

(a) to the seller, or

(b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,

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

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529. Note 415 supra, at Am. 12.

530. Supply of Goods (Implied Terms) Act 1973, implementing Law Com. No. 24; Scot. Law Com. No. 12 (1969).

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 skill or judgment of the seller or credit-broker,"<sup>531</sup>

the Commissions noted that they were "unaware of any criticisms directed against"<sup>532</sup> it and therefore proposed that it remain substantially unaltered.<sup>533</sup> The amendment they suggested, reflecting their general scheme on implied terms and the remedies for breach thereof, was that the term no longer be designated a "condition."<sup>534</sup>

The Ontario Law Reform Commission considered the existing provision,<sup>535</sup> based on the original U.K. legislation, in the light of subsequent developments in Britain and concluded that amendment was required.<sup>536</sup> They proposed that the new U.K. provision should be adopted in so far as it removed the reference to patent or trade name, shifted the onus of proof concerning reliance on skill and judgment and made clear that, "particular purpose," covered a usual purpose as well as an unusual purpose.<sup>537</sup> In taking an approach consistent with that taken in relation to the implied term on quality of goods, they rejected the extension of the term to all sellers "in the course of a business" and preferred the restriction of the term to the seller

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531. Note 525 supra, s. 14(3).

532. Note 338 supra, at para. 2.20.

533. Id.

534. Ibid., Prov. Recc. 8.

535. See supra p.87.

536. Note 400 supra, at pp.120-122.

537. The effect of these amendments, in Britain, is discussed in the previous chapter.

who "deals in goods of that kind."

Their proposed provision was in the following terms:

"(1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are commonly supplied.

(2) The implied warranty mentioned in subsection 1 does not apply where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the seller's skill or judgment."<sup>538</sup>

In the Draft Uniform Sale of Goods Act, the implied warranty is different in a number of respects. It provides,

"(1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not it is a purpose for which goods of that kind are commonly supplied, and that the goods will so remain for any length of time that is reasonable having regard to all the circumstances.

(2) The implied warranty mentioned in subsection (1) does not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller to supply goods reasonably fit for the buyer's particular purpose."<sup>539</sup>

The most important difference is that the Draft Act provides for an element of durability in the notion of fitness for purpose. This aspect of the provision was discussed above<sup>540</sup> and

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538. Note 428 supra, s.5.14.

539. s.45.

540. See supra p.147.

would be a welcome improvement on the British proposals.

The language used in the Draft Act to explain situations where the implied warranty will not apply, is more precise and, it is submitted, would be more readily understood by the layman, than the provision proposed by the Ontario Law Reform Commission.

The Commissions in Britain<sup>541</sup> and the Ontario Law Reform Commission<sup>542</sup> were aware that the implied terms dealing with fitness for purpose and the quality of the goods might overlap, but both agreed that each term should be retained. It is submitted that they were quite correct in this approach. While the implied term on quality provides a broad spectrum of protection for the buyer, the implied term on fitness for purpose will often provide separate, additional protection.

**(E) Remedies for Breach of the Implied Terms of Quality and Fitness for Purpose**

To consider the rights of a particular party, in a given situation, tells only part of the story. In order to assess the overall situation in which that party finds himself, one must also consider the remedies available to him when those rights are not observed. This is as true in relation to the rights of the buyer in a sale of goods contract as it is elsewhere. It is, therefore, appropriate that the remedies proposed by the various law reform bodies should now be outlined.

The Commissions in Britain and the Ontario Law Reform Commission devoted considerable efforts to the area of remedies,

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541. Note 338 supra, at para. 2.20.

542. Note 400 supra, at p.207.

as did the drafters of the Uniform Sale of Goods Act and those who commented upon it.

The Commission in Britain<sup>543</sup> and the O.R.L.C. felt that the distinction between conditions and warranties and the resulting impact on the remedies available was undesirable. The O.R.L.C. stated the position thus,

"The a priori classification of contractual terms in the Sale of Goods Act has come under increasing criticism. The reason for this criticism is the arbitrary results to which such a classification may give rise."<sup>544</sup>

Thus, the Commissions in Britain<sup>545</sup> and Ontario<sup>546</sup> proposed that the distinction be abolished and replaced with a single concept of warranty.

They acknowledged that this, alone, would not solve the problem. Two further difficulties remained.<sup>547</sup> First, the range of remedies available, on breach, was very limited. Secondly, it was not always clear when a particular remedy should apply. For these reasons the Law Commissions in Britain concluded,

"The consequences of breach of the implied terms contained in ... the Sale of Goods Act ... should be expressly set out in the Sale of Goods Act."<sup>548</sup>

The Ontario Law Reform Commission recommended,

"The adoption of a new regime of remedies for breach of warranty obligations that would turn on the gravity of the breach."<sup>549</sup>

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543. Note 338 supra, at paras. 2.23-2.32.

544. Note 400 supra, at p.146.

545. Note 338 supra, at Prov. Reccs. 7 and 8.

546. Note 405 supra, at p.31; note 400 supra at pp.145-150.

547. Note 338 supra, at para.4.30; note 400 supra, at pp.147-149.

548. Note 338 supra, at Prov. Recc.9.

The schemes of remedies proposed in Britain and Canada will now be considered separately and then compared.

Britain

In Britain, the Commissions concluded that,  
"when the interests of the buyer are analysed  
a clear difference emerges between those of  
the non-consumer and those of the  
consumer."<sup>550</sup>

This was so, they believed, because business transactions were often more complicated than consumer transactions. In addition, not only was the receipt of defective goods "often a normal risk of ... business,"<sup>551</sup> but the non-consumer could more easily measure any loss in monetary terms than could the consumer. This led them to propose a scheme of remedies where some of the remedies available are common to consumers and non-consumers; but, in at least one important respect, there is a difference.

Where there has been a breach of one of the implied warranties, both consumers and non-consumers may reject the goods and claim return of the price unless,

"the seller can show that the nature and  
consequences of the breach are slight."<sup>552</sup>

This places the onus of proof firmly on the seller.

Where the nature of the breach is slight, the remedies available depend on whether the buyer is a consumer or a non-consumer. It is in this context that the Commissions introduced their proposals for a regime of "cure."<sup>553</sup>

Hitherto, it is at least doubtful that the seller had any

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549. Note 400 supra, at p.147.

550. Note 338 supra, at para.4.31.

551. Ibid. at para.4.32.

552. Ibid. at Prov. Reccs. 10 and 11.

553. Ibid. at para.2.38.

right to repair or replace defective goods in order that they would conform to the contract. The Commissions concluded that, for consumers, the opportunity to require cure would provide a satisfactory solution in many cases. Thus, they proposed that the buyer's right to reject the goods and claim back any money paid should be suspended,

"where the seller can show that the nature and circumstances of the breach are slight and in the circumstances it is reasonable that the buyer should accept cure."<sup>554</sup>

Thus, they confined the seller's opportunity to effect cure to situations where the nature and consequences of the breach are slight. In addition, they proposed that where,

"cure is not effected satisfactorily and promptly,"<sup>556</sup>

the buyer should be able to reject the goods and claim back the price. In either case, they proposed that a claim for damages should be available to the consumer.<sup>557</sup>

Under the Commissions' proposals, it is the seller, not the buyer, who can enforce cure. The Commissions assumed that the seller would prefer to repair or replace defective goods, rather than return the price and they were wary of giving the buyer the right to require such action,

"where the cost of doing so would be out of all proportion to the inconvenience [involved]."<sup>558</sup>

The proposal for the introduction of this new remedy is to

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554. Ibid., at Prov. Recc. 10(1).

556. Ibid. at Prov. Recc. 10(b).

557. Ibid. at Prov. Recc. 10(c).

558. Ibid., at para. 4.34.

be welcomed as a sensible approach to dealing with the more minor, but nonetheless irritating, defects in goods with which consumers are faced. It is, however, regrettable that the Commissions confined the remedy to consumer sales. In assessing the position in respect of non-consumer sales, the Commissions concluded that a regime involving cure

"would be positively inappropriate."<sup>559</sup>

They reached this conclusion for two reasons. First, they felt that the attraction of cure, in consumer transactions, lay in the simplicity of applying it. They felt that commercial transaction could be sufficiently complex that such a scheme would be difficult to operate.<sup>560</sup> Secondly, the sums of money involved and distances separating buyer and seller may make cure inappropriate.<sup>561</sup>

Given the fact that enforcing cure would only be possible, even in consumer transactions, where this is "reasonable," it is submitted that the notion of cure could, and should, have been applied to non-consumer transactions. This argument gains force when one finds the Commission admitting that cure is,

"already common in the case of many commercial contracts."<sup>562</sup>

As will be seen below, the Canadian proposals include the possibility of cure in all transactions.

Under the Commissions' proposals, the commercial buyer

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559. Ibid. at para. 4.52.

560. Ibid. at para. 4.53.

561. Ibid. at para. 4.54.

562. Ibid. at para. 4.55.



remains restricted to rejection and return of the price, or to retaining the goods; and, in both cases, may claim damages.<sup>563</sup>

A further distinction between consumer and non-consumer contracts is found in the Commissions' proposals on the way in which the right of rejection can be lost by a buyer. In considering loss by the "inconsistent act" rule,<sup>564</sup> they propose the abolition of the rule in respect of consumer buyers.<sup>565</sup> In the context of commercial sales, they invite views<sup>566</sup> on whether or not the rule should be retained and, if retained, how it should be clarified.

While the Commissions' proposals, in Britain, are an improvement on the existing law, it will be demonstrated in the following discussion that they fall short of the more radical scheme proposed in Canada.

#### Canada

In Canada, the Ontario Law Reform Commission first considered the question of remedies in relation to consumers.<sup>567</sup> When the Commission considered remedies in all sale of goods contracts, it concluded that their

"earlier recommendations are as appropriate for general contracts of sale as they are for consumer sales."<sup>568</sup>

They accepted that their earlier recommendations would require some adaptation to meet the needs of a broader range of

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563. Ibid. at para. 4.52.

564. Under the Sale of Goods Act 1979, s.35(1).

565. Ibid. at Prov. Recc. 17.

566. Ibid. at Prov. Recc. 18.

567. Note 415 supra, at pp.41-46.

568. Note 400 supra, at p.147.

contracts.<sup>569</sup> The Draft Uniform Sale of Goods Act substantially followed the Ontario Law Reform Commission's proposals. The remedies discussed below apply, unless otherwise stated, to consumer and non-consumer contracts.

The Draft Uniform Act provides that, where the seller breaches the contract, the buyer may,

- "(a) exercise this rights under section 81(1),
- (b) maintain an action for damages,
- (c) obtain specific performance,
- (d) exercise his rights under section 111.
- (e) cancel the contract,
- (f) recover so much of the price as has been paid."<sup>570</sup>

Section 81(1) allows the buyer to reject or accept non-conforming goods or accept only that portion of the goods which conform to the contract. Damages, specific performance, cancellation and recovery of the price are familiar remedies and these remain available to the aggrieved buyer.

The situation in which the buyer would lose the right to reject the goods is clarified and amended. The right is lost by the buyer where

- "(a) he signifies to the seller that the goods are conforming or that he will take or retain them despite their non-conformity,
- (b) he knew or should reasonably have known of their non-conformity and he fails seasonably to notify the seller of his rejection of the goods,
- (c) the goods are no longer in substantially the condition in which the buyer received them and this change is due neither to any defect in the goods themselves nor to casualty

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569. Id.  
570. s.107.

suffered by them while at the seller's risk;  
or

(d) the non-conformity is of a minor nature  
and a substantial period has elapsed after  
delivery."<sup>571</sup>

Where the buyer retains non-conforming goods in the reasonable belief that the non-conformity will be cured, he is not barred from subsequent rejection.<sup>572</sup> The "inconsistent act" rule is modified to provide that, after rejection, use of the goods or other acts of ownership by the buyer do not nullify rejection unless the seller has been materially prejudiced by the acts.<sup>573</sup>

Where the buyer has possession of the goods and rejects them, the Act places him under an obligation<sup>574</sup> to take reasonable care of the goods, in the case of a consumer buyer. In the same circumstances, a "merchant buyer" is placed under an obligation to follow any reasonable instructions from the seller in respect of the goods and, if they are perishable, to make reasonable efforts to sell them.<sup>575</sup>

An interesting addition to the buyer's statutory remedies is found in section 111. This provides that, where the buyer is entitled to cancel the contract, he may,

"cover by making in a commercially reasonable time and manner any purchase of, or contract to purchase, goods in substitution for those due from the seller."

While in practice, in the past, the buyer may have done this and included any financial loss occasioned thereby in a claim for

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571. s.82(2).  
572. s.82(3).  
573. s.83(a).  
574. s.83(b).  
575. s.84.

damages, to have that right expressly included in the statute is to be welcomed.

The Draft Act introduces the idea of cure<sup>576</sup> and, as in Britain, provides that the seller has the right to provide this, in certain circumstances. The seller is given the right where,

"(a) the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer.

(b) after being notified of the buyer's rejection, the seller seasonably notifies the buyer of his intention to cure and of the type of cure to be provided, and

(c) the type of cure offered by the seller is reasonable in the circumstances."<sup>577</sup>

The seller is denied the right where it would be unreasonable to expect the buyer to give him more time to perform or where he is given the opportunity and fails to perform within a reasonable period of time.<sup>578</sup>

Thus, the Draft Uniform Act provides a wide range of flexible remedies designed to cover all kinds of transactions. It has been recommended that these should be accepted in Alberta and Manitoba.

#### Britain and Canada Compared

The striking difference between the remedies proposed in Britain and in Canada lies in the fact that the latter are set out in greater detail. To be fair to the Commissions in Britain, their proposals contain no draft statute and are primarily

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576. s.73.

577. Id.

578. Id.

intended to generate discussion prior to the drafting of a new Act.

The proposals in both countries provide for the remedies of damages, rejection and return of the price. The Canadian proposals mention specific performance and cancellation and, while these are not mentioned in the British proposals, the remedies are presently available at common law. The right to obtain goods elsewhere, where the seller fails to supply conforming goods, is clearly set out in the Canadian proposals. While, as a matter of practice, this is done in Britain, it would be beneficial to set it out in a statute.

The most significant difference between the proposals, in the two countries, lies in the possibility of the buyer exercising the right to cure the nonconformity in goods. The Canadian provision itself is more flexible than the British, but its real strength lies in its application to non-consumer contracts. It is to be hoped that the British proposal is redrafted in this respect.

## CHAPTER V: CONCLUSIONS

This then has been the development of the quality of goods to be implied in contracts of sale over the last two and a half centuries, in Britain and Canada. From Britain, where the two independent legal systems began from radically different premises, we have traced the dominance of the English approach in Britain and throughout the Empire. The changing needs of that setting, and the changing setting itself, prompted the emergence of new political and economic forces which, in their turn, effected changes in the law.

That the dominant group of the time will colour the response of the law is seen throughout legal systems, and this is no less true in the case of sale of goods than in other areas of the law. Thus, in nineteenth century Britain, the needs of commerce, with its roots in the principle of "laissez faire" ensure the dominance of caveat emptor. Technological and economical developments led to the emergence of a consumer lobby and a resulting strengthening of implied terms, through the amendment of the terms themselves and the restriction of exclusion clauses.

Given the similarities in other respects between the two countries, it is not surprising that, in Britain and Canada, common trends emerge in the independent development of the implied term. In both countries, the democratic tradition is reflected in the belief that, where the parties to a contract are not bargaining on equal terms, the law should protect the weaker party. This has resulted in legal measures of consumer protection. So, too, is there the acceptance, in both countries,

that the economy depends on commercial activity and that the law must meet the needs of commerce.

The resulting need for the law to meet the needs of consumers and commerce had led to an awareness, in the approach to law reform, that whatever is provided must be flexible. Thus, the implied term on quality may be restricted in the commercial context but not in dealings with consumers.

With the development of implied terms came the move away from a broad general principle to more detailed legal provision. From the general provision in Scotland that "warrandice is implied in sale," we have moved to the acceptance that "merchantable quality" alone is not sufficiently precise. The proposed reform, in Britain, details aspects of this which should be considered. Similarly in Canada, the meaning of the term is spelled out.

Amongst the factors which emerge are the requirement of durability -- that goods should last for a reasonable time. Never before in either country has this requirement been given statutory recognition. This, when taken along with such other requirements as freedom from minor defects and safety, marks a tremendous increase in the protection afforded to buyers. In the context of a legal system which began with the premise caveat emptor it is a considerable achievement.

In the context of a system which implied warrandice in sale, however, the development would not have been remarkable. It is accepted that this concept of implied warrandice was struck down by legislation, in Britain, before it could meet the changing

conditions that have brought us the implied term in its present form. However, given that implied warrandice was designed to provide the buyer with what he could reasonably expect under the contract, there is every reason to suppose that, as goods themselves become more sophisticated, the application of warrandice too would have developed. Thus, as the sale of consumer durables became widespread, the warrandice implied would have required them to be just that -- durable.

Perhaps speculation on "what might have been" is not the crucial issue here. Clearly, that the law, in its present form, meets the needs of the whole community, is what is important. That the implied term on quality in sale of goods will do this, in Britain and Canada, seems likely if the suggested reforms are fully implemented. Nonetheless, it remains true that an integral part of law reform is that an appreciation of the solutions found to problems, in the past, may be of relevance for today and tomorrow.



## BIBLIOGRAPHY

### Monographs

- Atiyah, The Sale of Goods (5th ed. 1975).
- Bell, Inquiries into the Control of Sale of Goods and Merchandise (1827).
- Benjamin, A Treatise on thye Law of Sale of Personal Property with Reference to the American Decisions and to the French Code and Civil Law (2nd ed. 1873).
- Brown, M.P., Treatise on the Law of Sale (1821).
- Brown, R.P., Treatise on the Law of Sale with Special Reference to the Law of Scotland (2nd ed. 1911).
- Chalmers, The Sale of Goods Act 1893, (1st ed. 1894, 9th ed. 1922).
- Diamond, Commercial and Consumer Credit (1982).
- Erskine, Principles of the Law of Scotland, (21st ed. 1911).
- Fridman, Sale of Goods in Canada (1st ed. 1973; 2nd ed. 1979).
- Gall, The Canadian Legal System (1983).
- Gow, The Mercantile and Industrial Law of Scotland (1964).
- Laskin, The British Tradition in Canadian Law, 1969 Hamlyn Lectures, 21st Series.
- Guest (Gen. Ed.), Benjamin's Sale of Goods (2nd ed. 1981).
- Mackintosh, The Roman Law of Sale (1892).
- Mark, Chalmers' Sale of Goods Act (18th ed. 1981).
- Schmitthoff, The Sale of Goods (2nd ed. 1966).
- Smith, British Justice: The Scottish Contribution (1961), Hamlyn Lecutres, Thirteenth Series.
- Smith, Studies Critical and Comparative (1962).
- Smith, A Short Commentary of the Law of Scotland (1962).
- Smith, Property Problems in Sale (1978).
- Stair, Institutions of the Law of Scotland (3rd ed. 1759).
- Walker, The Law of Civil Remedies in Scotland (1974).

Walker, Principles of Scottish Private Law (1st ed. 1974; 3rd ed. 1981-1983).

Ziegel and Foster (eds.), Aspects of Comparative and Commercial Law (1969).

Ziegel and Nielsen (eds.), Consumer and the Law in Canada (1970).

#### Articles

Axworthy, "Recent Developments in Consumer Law in Canada" (1980) 29 Int. & Comp. L.Q. 346.

Brown, "Assimilation of the Law of Sale" (1891) 3 Jur. Rev. 297.

Burrows, "Contractual Co-Operation and the Implied Term" (1968) Mod. L. Rev. 390.

Cavalier, "Consumer Protection and Warranties of Quality" (1970) Alb. L. Rev. 339.

Cote, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29.

Durnford, "What is an Apparent Defect in the Contract of Sale" (1963-64) 10 McGill L.J. 60.

Durnford, "Apparent Defects in Sale Revisited" (1963-64) 10 McGill L.J. 341.

Field, "A Critical Analysis of the 1971 Amendment to the Sale of Goods Act" (1971) 6 U.B.C. L. Rev. 405.

Gow, "Warrandice in Sale" 1962 S.L.T. (News) 137.

Gow, "A Comment on the Warranty in Sale Against Latent Defects" (1963-64) 10 McGill L.J. 243.

Gow, "A Further Comment on Warranty in Sale" (1964-65) 11 McGill L.J. 35.

Greig, "Condition or Warranty?" (1973) 89 L.Q. Rev. 93.

Hepworth, "Sale of Goods Contracts" 1977 New L.J. 997.

Jolowicz, "Protection of the Consumer and Purchaser of Goods under English Law" (1969) 23 Mod. L. Rev. 1.

Kessler, "Contract of Adhesion - Some Thoughts About Freedom of Contract" 1943 Colum. L. Rev. 629.

Middleton, "New Thoughts on the Union" (1964) 66 J.R. 37.

Mitchell, Book Review (1956) 1 Public Law 296.

- Montrose, "The Operation of Description in a Contract of Sale of Goods (1937) 15 Can. Bar Rev. 760.
- Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can. Bar Rev. 446.
- Robertson-Christie, "The Sale of Goods Act 1893 and Recent Cases" (1897) 9 Jur. Rev. 275.
- Romero, "The Consumer Products Warranties Act" (1978-79) 43 Sask. L. Rev. 81 and (1980-81) 44 Sask. L. Rev. 296.
- Schwartz, "Seller, Unequal Bargaining Power and the Judicial Process" (1974) Ind. L.J. 49.
- Smith, "The Union of 1707 as Fundamental Law" (1957) 2 Public Law 99.
- Sutton, "Reform of the Law of Sales" (1969) 7 Alta. L. Rev. 130.
- Weir, "Contract - The Buyer's Right to Reject Defective Goods" [1976] C.L.J. 33.
- Ziegel, "The Seller's Liability for Defective Goods at Common Law" (1966-67) 12 McGill L.J. 183.
- Ziegel, "Report of the Ontario Law Reform Commission on Consumer Warranties and Guarantees in Sale of Goods" (1973) Int. & Comp. L.Q. 363.

#### Reports and Other Materials

- Connor, "A Research Based Evaluation of the Dundee Small Claims Experiment" (1983).
- Hellner, "Ius Inter Nationes," Festschrift for Stefan Riesenfeld.
- Institute of Law Research and Reform, Edmonton, Alberta, Report No. 38, The Uniform Sale of Goods Act (1982).
- Kilbrandon, "Scots Law Seen from England," 1980-81 Child & Co. Oxford Lexture.
- Law Commission No. 24, Scottish Law Commission No. 12, First Report on Exemption Clauses (1969).
- Law Commission No. 69, Scottish Law Commission No. 39, Second Report on Exemption Clauses (1975).
- Law Commission No. 95, Implied Terms in Contracts for the Supply of Goods (1979).

Law Commission, Working Paper No. 85, Scottish Law Commission Consultative Memorandum No. 58, Sale and Supply of Goods (1983).

Law Reform Commission of Manitoba, Report No. 57, The Uniform Sale of Goods Act (1983).

Ontario Law Reform Commission, Report on Consumer Warranties and Guarantees in Sale of Goods (1972).

Ontario Law Reform Commission, Report on Sale of Goods (1979).

Proceedings of the Sixth Commonwealth Law Conference, Lagos, Nigeria (1980).

Ramsay, Review (1980), 58 Can. Bar Rev. 780

Report of the Committee on Consumer Credit, 1971 Cmnd. 4597.

Report of the Mercantile Law Commission, 1865 No. 7.

Reynolds, Casenote (1976), 92 L.Q. Rev. 17.

Scottish Consumer Council, Response, to S.L.C. Consult. Memo. No. 58 (1984).

Smith, Casenote (1953), 69 L.Q.R. 512.

United Nations Convention on International Sale of Goods, 1980 ((1980) 19 I.L.M. 668).