smaller scale manufacturers may be forced out of business altogether.

(6) While strict liability may be appropriate in one sphere of the law e.g. automobile collisions, it may not be suitable in another sphere such as manufacturer's liability for defective products.

I do not propose to examine the merits of the argument at this time but I do suggest that the issues here are enormously complex and of vital importance to the general community. It seems to me that there are several more research needs to be done before a definite conclusion can be reached. Even then I doubt whether the issue is one which can be successfully dealt with by a court within the framework of a typical common law adjudication. The distinctive function of the judges is the reasoned elaboration of the law and an issue of this kind is more suitable for resolution by the legislature.

(c) Liability in Tort for Defects in the Product Resulting in Economic Loss Rather than Injury to Persons or Property

A reading of Donoghue v. Stevenson67 indicates that Lord Atkin's comments were expressed as applicable only to injuries to persons or property. The law has always permitted recovery for economic loss which is the consequence of injury to persons or property, but has however declined to compensate the plaintiff to persons or property. However, the decision in Weller & Co. v. Foot & Mouth Research Institute where he said:

"the difficulty ... is that there is a great volume of authority both before and after Donoghue v. Stevenson to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or at least threaten directly to injure, the plaintiff's person or property but merely caused consequential loss as, for example, by upsetting the plaintiff's business relations with a third party who was the direct victim of the act or omission. The categories of negligence never close, but when the court is asked to recognize a new category it must proceed with some caution."68

(d) The Hedley Byrne69 Principle as Affecting Advertising of Products

One could properly submit that consumers "lose" far more each year through the deception inherent in the sophisticated means of modem merchandising and by being effectively denied the information needed to make wise purchases than they do as a result of physical form. Hitherto, liability in respect of statements in the merchandising process had depended on proof of fraud. However, the decision in Hedley Byrne's case has

A manufacturer can also be liable in tort in certain circumstances. These are dealt with in Mr Beattie's paper. Generally speaking, there will be liability where goods are dangerous and the manufacturer is negligent in allowing them to have circulation.

The Liability of Importers and Distributors

The position of importers and distributors vis-à-vis the consumer is very like that of the manufacturer. Like him, they will not be liable in contract unless some collateral agreement can be established. Like him, too, they will be liable in tort only if they are careless in allowing the goods to have circulation.

The Retailers' Liability

Under our law, it is primarily to the retailer that the consumer must look. His rights are chiefly those which derive from the contract of sale. Most consumer sales are, of course, oral and it is for the retailer concerning the goods being sold. In the absence of such undertakings, the sale is governed by the Sale of Goods Act, 1908. In the absence of agreement to the contrary, this Act implies into the sale certain provisions in favour of the buyer. These are:

(a) That the seller is able to give the buyer good title to the goods (s. 14);

(b) That where the goods are sold by description, they correspond with the description (s. 15);

(c) That where the purchase is of goods which it is in the course of the seller's business to supply and the buyer makes known the purpose for which the goods are required, the seller is to be able to show that he relies on the buyer's skill and judgment, the goods are reasonably fit for such purpose (s. 16 (a)). This rule does not apply where the buyer asks for the goods by their brand name;

(d) That where the sale is by description from a dealer in such goods, the goods are of a "merchantable quality" (s. 16 (b)). This rule does not apply, where the buyer has examined the goods, to any defect which such examination should have revealed;

(e) That where the sale is by sample, the bulk corresponds with the sample and is free from any defect rendering it unmerchantable which would not be apparent on a reasonable examination of the sample (s. 17).

Well suited though these rules may have been to the exigencies of the retail trade in the nineteenth century, they appear rather less appropriate today.

The first rule, the condition as to title, is not likely to be of much practical consequence to the ordinary consumer. Today's retailers do not often attempt to sell goods not their own under conditions where they cannot pass title.

The second, requiring the correspondence of goods with the description by which they are sold, is self-evident and hardly requires the Sale of Goods Act to reinforce it. It relates to the case where

(4) The public interest in human life, health and safety demands the maximum protection the law can give against dangerous defects in products which consumers must buy and the manufacturer has the greatest ability to control the danger created by such defective products.64

(5) The imposition of strict liability is likely to influence manufacturers toward achieving higher quality in production because they will want to avoid the danger that their products will develop a reputation for being unsafe and so be unacceptable to the purchasing public.

(6) Strict liability avoids circuity of action and therefore reduces the number of cases arising from the same set of facts.

"The strict tort approach makes unnecessary the series of warranty actions which frequently arise when an injured consumer cannot bring a suit for breach of warranty against a manufacturer of a defective product because the plaintiff is not in privity of contract with the producer. The plaintiff often recovers on a warranty theory from the retailer, who then brings suit on the same theory against the manufacturer or the distributor, with whom the retailer is in privity. The same ultimate result may be reached under the strict tort doctrine in a single suit, for since privity between a plaintiff and a defendant is not a pre-requisite to recovery on this theory, an injured consumer can bring his action directly against the most affluent member of the distributive chain."65

The Arguments Against Strict Liability66

(1) The arguments for strict liability do not justify a departure from the traditional principle of fault as a basis for the allocation of losses.

(2) The abrogation of the fault principle would place a premium on carelessness.

(3) The cost of the finished product would be greatly increased and this increase would have to be borne by the consumer. Thus the consumers would be forced to accept substantial price increases on everything they buy in order to compensate others for their misfortunes.

(4) Strict liability will deter producers who seek to improve their products from adopting new but untried manufacturing techniques.

(5) Not all manufacturers are large enough to be able to absorb or distribute the increased costs which would result from the imposition of strict liability. Thus the

64 See Prosser, supra, note 32, 1122.
66 See generally Prosser, supra, note 32, 1114 et seq.
In the U.S.A., as we have seen, the doctrine of strict tort liability for defective products is gaining acceptance in many States. What then are the arguments pro and con strict tort liability?

The Arguments In Favour of Strict Liability

1. Strict liability eliminates the difficulties of proof and the procedural obstacles faced by an injured consumer. 61

2. A loss should be shifted from plaintiff to defendant if the defendant is a more efficient loss distributor. The essence of this argument is that "in this way a loss will be spread more generally in the community among those who benefit from the activity out of which the loss arises". 62

In other words the assumption is that the manufacturer can shift the loss to the consumers by acquiring insurance protection and by charging higher prices for the products. But on the other hand:

"In fixing limits to the legal liability of makers based on this view, in conjunction with the discussion above, it would obviously seem desirable for the courts and legislatures to consider other existing ways for shifting or guarding against losses. For example, the availability of, as well as the practices of acquiring, insurance is quite important. Since nearly every head of a family, with the exception of the indigent, protects himself and his dependents by means of life insurance, it may be undesirable to shift losses from wrongful deaths to makers without regard to this widespread use of life insurance. Also significant is the fact that employees of industrial and commercial users of products are already covered by workmen's compensation, and thus a satisfactory compensation scheme might be an answer to the problem of distributing losses attributable to physical harms suffered in the course of their employment. Such a plan would eliminate the costly and time consuming task of identifying the cause of an accident, such as an explosion that occurs during the use by one enterpriser of an oxygen cylinder supplied by a second enterpriser and an acetylene torch purchased by a third. In these situations, the users of the products are fully capable of assuming and distributing losses. 63

3. The manufacturer creates the risk of harm by placing the merchandise on the market in order to gain the profits associated with his endeavours and it is therefore incumbent on him to bear any losses which are attributable to his defective product. Furthermore, in placing the goods on the market he represents to the public that they are suitable and safe for use.

61 See Prosser, supra, note 32, 1117.
62 R.E. Keeton, supra, note 58, 405.
63 P. Keeton, supra, note 2, 1333 - 1334.
durables, few manufacturers seem prepared to accept liability for defects arising from faulty design. It may be unreasonable to expect them to do so.

Under existing law, the consumer in most cases will get, at best, only a right of action for damages. What he wants, however, is not a law suit for a sum of money, but the repair or replacement of the defective article. From this angle, the guarantee system suits him well and certainly better than the provisions of the Sale of Goods Act. His claim to some guarantee of quality is the greater when the article concerned is a sophisticated consumer durable, the working parts of which he would be unlikely to understand even if he were able to inspect them. It is, of course, in this field that guarantees are primarily to be found.

As things stand, the retailer seems to be the worst placed, since it is he who, under the Sale of Goods Act, has to bear the responsibility for defective goods. This may have been appropriate once but the retailer would probably claim it was less so now that he has no longer any direct control over the quality of the goods supplied to him.

The Function of Exception Clauses

There is one further background matter which has to be considered, and that is the function that exception clauses serve.

There are two basic types of exception clauses. The first type is a method by which a party defines directly, but in a negative way, the obligations he is prepared to undertake. To take a very old example, on a sale of a horse warranted sound "except for hunting" the seller is undertaking that horse is sound for most purposes, but he is refusing to undertake that it is suitable for hunting. The use of this negative form of definition is forced on the seller because he has no single word in English to cover a horse which is unsuitable for hunting but is otherwise sound. But even if there were such a word, it should not matter whether or not one used it in preference to the exception form. The end result should be the same.

(b) The Arguments for and Against Strict Tort Liability

This is a problem which goes to the very heart of the law of tort. Professor Seavey has observed that: "In determining whether there is tort liability when harm has been caused, the focal point of conflict has been whether one should be liable for harm irrespective of fault. The law has been in a state of flux in its desire to protect the two basic interests of individuals - the interest in security and the interest in freedom of action. The protection of the first requires that a person who has been harmed as a result of the activity of another should be compensated by the other irrespective of his fault; the protection of the second requires that a party who does not harm another should not be held to be liable for the consequences of his own act. The law is the resultant derived from the competition between these two basic concepts." 57

The competition between these two basic concepts is very much in evidence today. The fault principle has by no means been eliminated but the gap between strict and non-strict liability appears to be narrowing. In a number of torts such as liability for damage by fire, vicarious liability, damage by dangerous animals, liability based on breach of statutory duty, liability for catas, and the situation in Rylands v. Fletcher, a fairly strict form of liability applies and in other areas of tort law strict liability has been strongly advocated. 60

53 Ibid., 511; [1966] 2 All E.R. 989.
55 See ibid., 511; [1966] 2 All E.R. 989 (P.C.).
56 Ibid., 524; [1966] 2 All E.R. 989, 996.
57 W.A. Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 73 (1942).
when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.\footnote{403 P. 2d 145, 151; 45 Cal. Rptr. 17, 23 (1965).}

To summarise, the effect of the California cases is to create alongside the warranty obligation of the retailer a new tort imposing strict liability on the manufacturer for personal injuries caused by defective products. There is no privity requirement as there is with warranty so that the plaintiff's injuries caused by defective products. There is no privity status prior to his injury is irrelevant. Of the product in the widest sense of the terms comes within the protection of this new tort. There is no defence of disclaimer and the rule applies to all kinds of products. It is enough that the product, if defective, will be dangerous to the user or to his property. The fact that the product is to be serviced by a dealer before it is ready for use by the consumer does not absolve the manufacturer. However, it would seem that there is no strict liability when the product is fit to be sold and reasonably safe for use, but has inherent dangers that no human skill or knowledge has been able to eliminate.\footnote{51 Prosser, supra, note 45, 812.}

It seems that strict liability will not change the rule that the seller of a product is not liable when the consumer makes an abnormal use of it. Furthermore, the rule of the negligence cases that failure of the dealer, or some intermediary to discover a defect is no defence, applies in this field. Similarly, it appears that contributory negligence is available as a defence except where the plaintiff's only failure is to discover the dangerous defect. As far as proof is concerned, the strict liability doctrine still requires the plaintiff to establish that the defendant sold a product which he should not have sold and that he was injured by an injury. In addition, it must be shown that the defect existed when the product was sold to the particular defendant. Finally, in California at least, the plaintiff cannot recover for economic loss.

\section*{What of the Future}

\subsection*{(a) Reasonable Foresight}

It seems to me that over the last few years the law has been moving irresistibly towards the concept of persons being liable for damage or injury when they should reasonably foresee that their actions might cause such damage or injury. That this appears to be the position is now reinforced by the decision of the Privy Council in Overseas Tankship Co. Pty.\footnote{[1966] 3 W.L.R. 498; [1966] 2 All E.R. 709.} This case makes it clear that a person must be regarded as negligent, if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. As Lord Reid said a "reasonable man would only

Should society decide that there is no satisfactory answer to these problems, certain compromise solutions may be possible. They involve to one degree or another the standardising or supervision of manufacturer's guarantees while leaving the retailer liable as at present and the manufacturer free to issue at least a proportion of his products without guarantee.

One possibility would be to require that all guarantees be approved by an agency constituted for the purpose. Another would be to require manufacturers to offer alternative rates, or, in other words, to charge a lesser price for unguaranteed goods. Such a scheme would, of course, involve a system of price control.

A third possibility is that an agency could be approved by an authority constituted for the purpose. This would be the enactment of a model form of guarantee. Manufacturers using this form would be free to advertise that their goods carried a "Statutory Guarantee." Granted an adequate programme of public education in the meaning of the expression (which would of course have to be protected) such a scheme could be expected to generate its own momentum.

Conclusion

The purpose of this paper has been to suggest that in concentrating on exception clauses, the friends of consumer protection are flogging the wrong horse. To ban exception clauses and leave it at that would do little to meet the real needs of the consumer. It could even result in the manufacturer's guarantee actually doing nothing to remedy the deficiencies in the Sale of Goods Act.

At some stage, it must be decided affirmatively what rights consumers should have. The reformers should also think very carefully indeed before making any such rights absolute and invariable. Exception clauses have economic consequences and a valid economic function. The dealings of men are infinitely various. Only by allowing scope for flexibility can all their needs be met. It was precisely on the grounds that this necessity flexibility that Lord Hlad in the Suisse Atlantique case rejected the doctrine of fundamental breach.

"Exception clauses" he said, "differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. But this rule appears to treat all alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unreasonable or whether it was freely given by the customer. And it does not seem to me to be satisfactory that the decision must always go one way.

power tool proved to be defective. He sued the manufacturer who on the ground that notice of the breach of warranty had not been given as required by the Uniform Sales Act. The defence was rejected, the reasoning being that since the liability was a strict one in tort the law relating to warranty was not appropriate. The plaintiff made out his case merely that he was injured while using the tool "in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the product unsafe for its intended use." 44

The effect of this decision has been an abandonment of the warrenty as the basis of the tort liability and the expression (which would of course have to be protected) such a scheme expected to generate its own momentum.

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Finally we have the decision in Seely v. White Motor Co. 48 with the question of recovery for economic losses suffered by the plaintiff. Chief Justice Traynor speaking for the majority, approved the trial Court's award of damages for lost profits and for money paid on the purchase price of the truck on the basis of breach of an express warranty contained in the purchase order signed by the plaintiff. However, the Court limited the Greenman 49 decision to situations in which there has been personal or property damage. The reasoning applied was that if recovery for economic loss was allowed on the basis of strict tort liability, the manufacturer would be liable for the business losses of purchasers for the failure of its products to meet the specific needs of their businesses even though those needs were communicated only to the dealer. The Court said:

"A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury
The Escola case,\textsuperscript{38} decided by the Supreme Court of California, involved an exploding Coca Cola bottle. The plaintiff pleaded res ipsa loquitur and succeeded in negligence. The case is notable for the concurring opinion of Traynor J. who began by announcing the broad proposition that "manufacturers' negligence should no longer be singled out as the basis for the plaintiff's right to recover in cases like the present one."\textsuperscript{39} He then went on to say "even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent, in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection."\textsuperscript{40}

This broad statement was buttressed by four other considerations: (1) in allowing res ipsa loquitur to be pleaded freely, the law of negligence approaches strict liability; (2) where a warranty is available there is already strict liability; (3) it is pointless to have the plaintiff sue the retailer and the retailer in turn sue the manufacturer; and (4) in the cases relating to foodstuffs strict liability has long been accepted.\textsuperscript{41} In subsequent Californian Supreme Court cases the strict tort liability theory was followed, and the surreptitious use of res ipsa loquitur and the law of sale of goods to achieve the same result was severely criticised.\textsuperscript{42}

Then in 1962 the same Court decided Greenman v. Yuba Power Products Inc.\textsuperscript{43} with Justice Traynor delivering the unanimous opinion of the Court. The plaintiff was injured when a combination

\textsuperscript{38} 24 Cal. 2d 453; 150 P. 2d 436 (1944). This case may also be found in C.A. Wright, Cases on the Law of Torts, 299 (1954).

\textsuperscript{39} 24 Cal. 2d 453, 461; 150 P. 2d 436, 440 (1944).

\textsuperscript{40} Ibid., 462; 150 P. 2d 436, 441.

\textsuperscript{41} Ibid., 463; 150 P. 2d 436, 441.

\textsuperscript{42} See, e.g., Gordon v. Aztec Brewing Co. 33 Cal. 2d 514, 523; 203 P. 2d 522, 528 (1949) where Traynor J., concurring, said: "If such liability is to be imposed it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases." See also Trust v. Arden Farms Co. 50 Cal. 2d 217, 235; 324 P. 2d 583 (1958).

\textsuperscript{43} 59 Cal. 2d 57; 377 P. 2d 897 (1962).