"Looking at the whole of the instrument and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions if they are inconsistent with what are assumed to be the main purpose of the contract." 19

Treating the effectiveness of an exclusion clause purely as a matter of construction could lead to a rather inelegant competition between the Courts and the draftsmen. One wonders what the position will be if the exclusion clause is drawn so competently that there is no contractual residue for a party who has at all times been bound and carried out his obligations in toto?

With respect it must be said that there are contradictory, vague and confusing statements in the judgments, evidencing a hesitancy to go too far. However, the Lords were ready to concede that the factual situation made a great difference in the attitude to be taken to exemption clauses. Lord Reid said:

"Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are 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 of choice must surely imply some choice or room for bargaining." 20

This about sums it up. Certainly a person should not be allowed specifically to promise to provide a particular thing with clearly defined attributes and then be able to claim against a person contractually bound to him that a subsequent clause in technical terms relieves him of his obligation or reduces his promise to a mere representation or statement of intention. Rose and Frank Co. v. Crompton Bros. 21 is no authority for such a proposition. It is entirely different as none of the three parties was bound legally. The rigid interpretation and literal enforcement of the terms of a contract made between a ship owner and a merchant may well be acceptable, but the same rigidity applied to a hire purchase agreement signed by a mother buying a pram may be unjust and cruel.

Suisse Atlantique may well be the delight of law examiners for years to come but its impact, in this writer's opinion, is well summed up in the words of one learned commentator in the Modern Law Review who says:

"Nor has the Suisse Atlantique contributed materially to the solution of old problems, for support can be found for and against almost every controversial proposition on this topic which could have been advanced but for the case. For the time being the availability of exception clauses in particular cases will be more than a matter of guess work." 22

19 [1893] A.C. 351, 357.

The scientific and technological revolution which has gathered momentum since World War II has been accompanied by widespread changes in consumer products and the introduction of a vast range of new products particularly those of a chemical or pharmaceutical nature. With these advances there are of course benefits, but there are also increasing dangers to individual safety not only in the manufacturing process but also in the use of the finished products. There is a growing social concern over the incidence of unintended harm occurring in the use of manufactured products and that therefore behoves us from time to time to re-examine the principles concerning responsibility. In the Commonwealth Courts a pre-requisite for the responsibility of manufacturers in tort has been a finding of negligence on the part of the manufacturer. This article will discuss whether, as the range of products widens, there is sufficient certainty in the application of responsibility in contract (warranty) and tort. I doubt if any manufacturer in New Zealand can assume complete perfection in his process. Because a product may possibly have dangerous end results, it does not necessarily follow that the ultimate consumer can sue the manufacturer for making a dangerous substance; for example, cigarette smokers are aware of the dangers of smoking and if they elect to continue doing so, surely that is their own business. I think we would all agree with Professor Keeton, Dean of Law, University of Texas when he says that "liability should not be extended to makers for harm resulting from unavoidable injurious effects of highly desirable products, such as good penicillin, good cigarettes or good whisky." 2 He goes on to say that "it is doubtful whether strict liability induces greater care than does negligence liability." 3 If strict liability does induce great liability it can be argued that it will also tend to inhibit the development of new products. Thus, the importance of the development of new products may be a factor to be considered in establishing the limits of strict liability. 4

Let me by way of example, discuss a drug such as thalidomide. As Mr Bennett says "by no stretch of the imagination, could it be said that a foetus injured by a drug taken by its mother was in any way a purchaser of the drug or had any privity of contract with the drug manufacturer or retailer." 5

In all four major cigarette-cancer cases fully litigated to date the defendant cigarette companies were successful. See R.A. Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678 (1966). It seems fairly clear that in Commonwealth countries no action on behalf of the affected children would lie for breach of warranty against the manufacturers of thalidomide. Liability for breach of warranty being strictly contractual the doctrine of privity of contract would effectively block any recovery. As Mr Bennett says "by no stretch of the imagination, could it be said that a foetus injured by a drug taken by its mother was in any way a purchaser of the drug or had any privity of contract with the drug manufacturer or retailer." 5

1 In all four major cigarette-cancer cases fully litigated to date the defendant cigarette companies were successful. See R.A. Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678 (1966).
3 Ibid.
5 Ibid., 257.

MANUFACTURERS' LIABILITY IN TORT (OR DEVELOPMENTS IN THE FIELD OF PRODUCTS LIABILITY)
In order to succeed therefore the plaintiffs would have to base their claim on tortious principles. The vital role of the law of torts in this type of case is therefore quite apparent.

Having made these general observations I intend to divide the subject as follows:

(1) The principles annunciated in the classic case of Donoghue v. Stevenson. 6

(2) The developments since this decision in the law of the Commonwealth.

(3) The American approach to the subject.

(4) What of the future? Reference will be made, inter alia, to:
   (a) Reasonable foresight.
   (b) The arguments pro and contra strict liability.
   (c) Liability for defects in the product resulting in economic loss rather than injury to persons or property.
   (d) The Hedley Byrne principle as affecting advertising of products.

1. Donoghue v. Stevenson

In 1928 a Miss M‘Allister, later Mrs Donoghue, was "shouted" an ice-cream and a bottle of ginger beer by a friend in Glasgow. Departing from good manners, she poured the ginger beer over the ice-cream and when eating this unpalatable mess observed in the remaining contents of the bottle, a decomposed snail. She suffered shock and gastro-enteritis. After winning the first round in Court on the basis that the manufactured goods had been exposed to a risk of contamination and this was a wrong for which the defendant was liable, Mrs Donoghue had to meet an appeal which was allowed. Proceeding in forma pauperis to the House of Lords, plaintiff won her case by a majority of three to two. There was obviously no contract between the manufacturer and Mrs Donoghue; liability was founded in negligence and Lord Atkin stated the manufacturer’s duty as follows:

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care." 7


39

the House regarded the failure of the ship owners to rescind the contract as affirmation by conduct and that the consequences of such affirmation of the contract were that the whole contract, including the exclusion clause, still remained binding.

This was a clear rejection of any selective right of rescission of the exclusion clause. Either the whole contract was to be ended or the whole contract, including the exclusion clause, would remain binding. The writer of this paper sees no objection to the enforcement of an agreed damages clause which defines the allocation of risk, especially where both parties are competently advised and under no bargaining disability through lack of money.

The Lords were critical of but did not overrule the cases supporting the view that there was a rule of substantive law to the effect that no matter how comprehensive were the terms of an exclusion clause it would not protect a party responsible for fundamental breach of contract. But the necessity of providing relief against an unconscionable clause for a customer with no bargaining power was recognized. Lord Heseltine said:

"But this rule appears to treat all cases 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 unconscionable or whether it was freely agreed by the customer." 9


"I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should not be construed to apply to a situation created by fundamental breach of contract. This is not an independent rule of law imposed by the Court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties." 8

In the writer's view this is not rejection of the doctrine of fundamental breach; it is an invitation to the Courts to adopt a different approach - treating the doctrine in a gross default situation leaves the Courts considerable ground for manoeuvre, particularly as it recognized that an exclusion of liability clause is a feature of the imposed standard contract and that accordingly it should be construed strictly against the person responsible for it. Lord Upjohn said:

"Wide words of an exclusion clause which taken in isolation would bear one meaning must be so construed as to give business efficacy to the contract and the presumed intention of the parties on the footing that both parties are intending to carry out the contract fundamentally."

Repeated reference was made by the Lords to what is generally called the main purpose rule, a classic statement of which is found in Lord Halsbury's speech in Glynn v. Margeson.


18 [1964] 1 All.L.R. 446, 453.
fundamental breach covered these three concepts:

1. Performance totally different from that contemplated by the contract.
2. Breach entitling the injured party to terminate the contract.
3. Repudiatory conduct evidencing an intention by the wrongdoer no longer to be bound.

However it must be admitted that in recent years fundamental breach has appeared in many guises with unpredictable results for all concerned - even affirmation of the contract by continued use of the goods after knowledge of the defects did not preclude the buyer from recovering the price or damages.

In Charterhouse Credit Co. v. Tolly, the supply of a car with a defective back axle costing £50 to £50 to repair was held to be a fundamental breach nullifying any protection given by the exclusion clause and making it possible for the buyer to recover damages although the car had been in his possession from April until October.

Likewise the earlier Court of Appeal decision in Yeoman Credit Ltd. v. Apple appeared to invite rather indiscriminate use of the doctrine of fundamental breach. Here a buyer under a hire purchase agreement including the usual exclusion clause found when he first took the car away that it took one and a half hours to travel three to four miles and that it had such a series of defects that made it unroadworthy and unsafe. Nevertheless the buyer kept the car for almost four months and paid some instalments, meanwhile trying in vain to get the vendor to repair the car. Finally he rejected it and claimed back moneys paid on the basis of total failure of consideration. It was held that although there was not a total failure of consideration and the contract was one of hire (hire-purchase) the breach by the vendor as nevertheless continuous, and although the buyer could not recover the moneys he had paid he was entitled to damages of £100, the amount it would have cost to put the car into good repair. Both of the cases above show a marked extension in the application of the doctrine; formerly, for the doctrine to apply there had to be a failure to supply the contract goods, but in these cases defective condition or quality was held to be fundamental breach.

In neither the Guisse Atlantique case nor the West case are the facts relevant to sales of goods, but the dicta therein are important in so far as they give a critical review of the doctrine of fundamental breach is based, and suggest limitations to its application in cases which have arisen out of the use of exclusion clauses. In the first case the dispute arose through the action of the charterers of a ship who found it advantageous to curtail a number of sailings and simply pay the reduced amount provided for lay days which was set out in the form of an agreed damages clause. The House rejected the contention of the ship owners that the failure to use the ship to its full capacity was a fundamental breach of contract although they conceded it was repudiatory conduct which would have entitled the ship owners to repudiate the charter party and the exclusion (agreed damages clause) contained therein; on the other hand, the

In the field of manufacturers' negligence, this case disposes of the rule that contractual liability of A to B excludes tort liability of A to C. Simultaneously, it introduces the positive principle that for manufacturers of dangerous substances any potential consumer is a "neighbour" to whom a duty of care is owed by the manufacturer with corresponding liability for negligence in the production of the product. Thus, however, that this duty is now modified and it is not essential there should be no reasonable possibility (or probability) of intermediate examination as long as the article is intended by the manufacturer to reach the ultimate consumer in the state in which it left him. This was decided in Grant v. Australian Knitting Mills where it was stated that:

"The decision in Donoghue's case did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer subject to the same defect as it had when it left the manufacturer." This case extended the liability of manufacturers to harm caused by independent contractors, where, as in many modern industries, the process of manufacture is apportioned. A doctor contracted dermatitis from woolen underwear he had purchased and in which a chemical sulphite irritant had remained. Not only was the manufacturer of the finished product held liable for a defect which might have been caused by an independent contractor, but also, by the application of the maxim 'res ipsa loquitur', the onus of proof was in effect shifted to the defendant: it was for the manufacturer to show that a cause outside his sphere of responsibility had intervened: the Privy Council said:

"The apellant is not required to lay his finger on the exact person in the chain who was responsible, or to specify what he did wrong: negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances." Two years later came the much criticised decision of Daniels & Son Ltd. v. White & Sons Ltd., & Barber, where a "proofless" process for filling lemonade bottles was held to rebut evidence of negligence resulting from the poisoning of a consumer through contamination of a bottle which had been subjected to this process. The Court went to great lengths to show the contractual relationship with the retailer.

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9 Paine v. Colne Valley Electricity Supply Co. Ltd. [1938] 4 All E.R. 803, 808, per Goddard L.J.
11 [1936] A.C. 85 (P.C.)
12 Ibid., 106, per Lord Wright delivering the advice of the Privy Council.
13 Ibid., 101.
14 [1938] 4 All E.R. 258.
The 'products' mentioned by Lord Atkin in *Donoghue v. Stevenson* are not confined to food and drink; pants, hair-dye, kiosks, motor cars, lifts, designs and possibly tombstones are included. As stated in Clerk & Lindsell on Torts, "the list is neither exhaustive nor closed".

I used the words 'dangerous substances' earlier in this sub-heading. The concept of 'dangerous' in this and other torts has been so widened as practically to lose any really distinctive meaning. As Professor W.G. Friedmann has said:

"No article or substance is in itself either dangerous or non-dangerous: the conduct, circumstances, and relation of the parties concerned determine whether it has become dangerous in a particular instance. At most the presumption is stronger in the case of some articles than of others, but it all resolves itself into a question of care." 10

2. The Developments in the Commonwealth since *Donoghue v. Stevenson*

Cases since *Donoghue v. Stevenson* on the liability of the manufacturer have adopted as the basic rule the classic formulation of the principle of manufacturer's liability enunciated by Lord Atkin. In the interpretation of it in Commonwealth countries there have however been several developments affecting the responsibility of the manufacturer.

(1) The protection of the rule has been extended to cover not only consumers and users but others within the vicinity of its probable use such as the pedestrian injured through a defect in a motor vehicle. 17

(2) Lord Atkin's requirement that the product should be intended to reach the consumer in the form in which the manufacturer has not been insisted on in any strict sense. It has been sufficient that the product would retain all its material features. 18 In the New Zealand case of *Grant v. Cooper McDougall & Robertson Ltd.* 19 the manufacturer was held liable although the product was mixed, as intended, with another article.

(3) Lord Atkin's rule imposed only where there was no reasonable possibility of intermediate examination. Subsequent cases however have narrowed the scope of this restriction by imposing liability unless:

(a) The intermediate examination is not merely possible but is probable or should reasonably be anticipated and


It is appropriate to consider the social climate in which a number of so-called basic principles of contract were evolved. The Courts were aware of the merchants' improved status, his need of security and his importance in "this nation of shopkeepers", 10 but the view was strongly held that a large section of the population was a lower form of life with a limited right to existence and certainly with no rights to security of possession.

Thus Baron Eileenborough, the Lord Chief Justice of England in the early nineteenth century, was distinguished in commercial law and also administered with equanimity the sadistic law of his times when over two hundred offences, most of them minor, were punishable by death. Where as matter of humanity, the penalty of death was abrogated in minor offences against property, 11 in favour of flogging followed by transportation for life in circumstances of appalling horror, the Chief Justice's description of this new penalty was "a summer's excursion, in an easy migration to a happier and better climate".

These judges who attached so much to a rigid insistence on contract seemed devoid of any recognition of the individual's basic economic, physical and spiritual rights. It is contended that to ignore entirely the gross disparity between the bargaining power, if not the knowledge and intelligence of the seller and consumer, to fail to make laws in conformity with the entirely different type of merchandise being marketed today, is to fall back into a type of economic barbarism which finds some parallel in the physical savagery inflicted by the Courts from whose decision came many of the concepts used as justification for the unfair contract practice of today.

However, it is not surprising that the Judges of the High Court of Australia in the West case 12 and the Lords of Appeal in the *Suisse Atlantique* case 13 called for a reconsideration of the use of the doctrine of fundamental breach as a counter to the use of the exclusion clause in the dictated contract. Selective rescission, singling out of one clause in a contract and declaring this clause would have no effect but that the rest of the contract was binding, was questionable practice. So also was the growing tendency to treat all breaches of conditions 14 in contracts as fundamental breach and to consider the seriousness of the breach rather than whether the exclusion clause would have been definitely promised, illusory. It appears that today when adequate education is available, everyone should be able to understand the law in the sale of goods contract. It is wrong for it to be treated as the preserve of lawyers and academic commentators. Neither businessmen nor the consuming public should be called on to understand the difference between substantive rules of law and the rules of construction nor to distinguish between fundamental breach and breach of the fundamental term. If breach of a particular term is so serious as to justify the other party in repudiating the contract why should any contracting party have to make a distinction when in the *Suisse Atlantique* case it was stated that

10 Napoleon's gibe.
11 Sentence of death without benefit of clergy could be imposed for damaging a shrub.
14 Major terms of the contract, breach of which entitles the other party to rescind.
"But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the Courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that Courts will enforce transactions in which the relative positions of the parties in such that one has unconsciously taken advantage of the necessities of the other?"

Lord Denning in British Movietone News v. London and District Cinemas Ltd., said that "the day has gone when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draughtsmanship of a Chalmers".8

The Final Report of the Committee on Consumer Protection9 presented to the U.K. Parliament by the President of the Board of Trade stated:

426. "We now turn to the main criticism of the law of sale of goods, namely the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provisions in guarantee cards or other contractual documents...".

427. "The first aspect of the problem requiring notice is whether the practice is widespread. The answer is that it is universal in the motor vehicle trade, and general in respect of electrical and mechanical appliances.... We feel compelled to view the practice as a general threat to consumer interests in the sense that heavy and irrecoverable loss may fall on the consumer who is unlucky enough to get a defective article."

This year (1966) the English Law Commission and the Scottish Law Commission have set up a joint working party to consider:

"What restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or reducing liability for negligence or any other liability that would otherwise be incurred, having regard to the protection of consumers of goods and users of services."

In recent years much has been heard of "the wind of change" in international and political circles; in the business world there has been a complete transformation, hand craft has been replaced by mass manufacture, the individual has been replaced by the all powerful trade association, personal reputation has been replaced by intensive advertising, examination of goods has become impossible through elaborate packaging, testing has become impossible through technical complexity, the word of the seller has been replaced by the dictated trade group contract. Yet it is suggested that we should return to the simple principles of contract, which, probably, were of doubtful validity in the harsh cruel age in which they were conceived. The housewife with her automatic washer, rinser and spin dryer is to be

9 H.M.S.O. Cmd. 1781.

(b) The examination which is anticipated is such as ought reasonably to reveal the defect21 and

(c) It would not be contemplated that a consumer discovering the danger would incur the risk of it.22

(4) The duty Lord Atkin spoke of was to use care in the preparation and putting up of products. In accordance with this expression of the content of the duty, liability has been imposed on manufacturers not only for defects in their own manufacturing process but also for negligence in

(a) Failing adequately to check or inspect the component part made by another manufacturer23

(b) Failing to give proper instructions for the use of the product.24

(5) One of the most important practical facets in holding manufacturers liable for defects in their products has been the principle of res ipsa loquitur. Provided there is not a substantial likelihood that the defect causing the injury is due to extraneous causes outside the manufacturer's control, the defect will itself be evidence of negligence in the manufacture and it is then for the manufacturer to show that there was no absence of reasonable care. Thus in Grant v. Australian Knitting Mills Ltd.25 the presence of the characteristic discovery of the pants was regarded as sufficient evidence of negligence. The res ipsa principle of course is particularly important in this context as the cause of the defect will often be difficult if not impossible to ascertain, without the defect being itself evidence of negligence proof of negligence would be extremely difficult; with it the manufacturer has a very difficult assignment to disprove negligence.

The period since the decision in Donoghue v. Stevenson has seen a great development in the law of negligence generally. In addition to providing a rule as to manufacturer's liability Lord Atkin enunciated the general principle of reasonable foreseeability of injury as the test of the existence of a duty of care. And this principle has since been used as the guiding light or inspiration for new duties in particular cases. There has been a general tendency to assimilate particular rules for different classes of case to the general test of reasonable foreseeability. The legislature in New Zealand and England has - in the field of occupier's liability - even taken a hand in this process.

Viewed against this general development the principles governing a manufacturer's liability for his products have not

made a marked advance. Products liability has tended to remain a
confined corner of the law of negligence with its own special rules
rather like the law of occupier's liability was until attempts to
rationalize it were made by the judiciary and finally by the
legislature.

In at least two respects the rules enunciated by Lord Atkin and
developed in later cases still deny recovery to the victim of a
defective product where the simple application of his neighbour
formulation, his general principle of reasonable foreseeability,
would allow the injured plaintiff to succeed:

(1) If an intermediate examination is probable the manufac-
turer escapes liability. Yet it must surely be arguable that the manufacturer would reasonably foresee that if
he is negligent and produces a defective product, injury
may result. On normal principles if the plaintiff
carelessly fails to inspect and discover the defect
caused by another's failure to take reasonable care he
now recovers damages reduced for contributory negligence.
If it is an intermediate party who fails in the sphere
of inspection then one might expect that the reason-
sability will be apportioned between him and the
negligent manufacturer. But as the law stands in both
these cases the manufacturer is under no duty to the
victim of the defect.

(11) Although the position is not clear, there is high
authority - in Grant v. Australian Knitting Mills Ltd.26
and London Graving Dock Co. Ltd. v. Horton27 - for the
view that knowledge of the defect on the part of the
plaintiff defeats the claim. Such a position seems
clearly wrong in principle. If a manufacturer should
foresee injury from any negligence on his part -
particularly where there is no intermediate examination
contemplated which is likely to be in no doubt whose
expectations will be well founded. The "Imperial perspective", the viewpoint of the law maker,
is to prevail over consumer perspective.

Evolve in Law and Public Opinion in England said that the
principle of freedom of contract tended to be an end so remorselessly
pursued that the individual was "in danger of parting with the very
contract he is allowed to make with all real freedom".

A. Freedom of Contract - The Seller's Divine Right?

The purpose of this article is to show that it would be a
negation of justice for our Courts to be so influenced by the
judgments in Council of the City of Sydney v. West1 in the High Court
of Australia and the other dicta of the Lords of Appeal in Suisse
Affaires et Défense Socité d'Armement Maritime S.A. v. Rotterdamsche d'Armement
Centre as to uphold exclusion2 clauses in sales of goods on
the grounds of sanctity and freedom of contract. In particular it is
proposed to show that a comprehensive exclusion clause, if enforced
in a cash sale, may leave a buyer of shoddy, unsuitable and even
dangerous goods without a remedy in New Zealand Courts; already
shackled by an out-moded Sale of Goods Act; that buyers under hire
purchase, being without bargaining power, can be held to ransom by
such a clause, that exclusion clauses disguised as guarantees, 
forfeiting a buyer additional protection, take away the buyer's
basic rights - a state of affairs only too evident in the captive
car market of this country. Finally it will be submitted that our
law with regard to the exclusion of a seller's contractual obligations
lags far behind that of other countries of far wider commercial
interests and experience.

Tradition, indoctrination from one generation to the next, the
old hypocrical shibboleths, all play their part and shadow the
simple question, viz., 'did the buyer have any choice and was the
seller fair'? No, we are to re-enthrone the doctrine of caveat
emptor. Once again there is to be "sanctity of contract", "Freedom
of contract", "the Courts are not to make bargains", "the law
must be certain", "contracts shall be enforced to prevent disappointment
of well founded expectations". In the age of the dictated or standard
contract we are without any real freedom. The "Imperial perspective", the viewpoint of the law maker,
is to prevail over consumer perspective.

Dicey in Law and Public Opinion in England said that the
principle of freedom of contract tended to be an end so remorselessly
pursued that the individual was "in danger of parting with the very
contract he is allowed to make with all real freedom."

How revolutionary the provision of the Louisiana Code would appear
in this milieu, i.e., that the test for a warranty was: would the
buyer, if he had known of the defect, still have bought the product?

Justice Frankfurter in United States v. Bethlehem Steel Corpora-
tion7 protesting that the nation, although in a state of war, was
being held to ransom for supplies of steel because the circumstances
of the case did not fit into "a neatly carved pigeon-hole in the law
of contracts", stated:

3. Exclusion clauses are frequently referred to as exemption or
exception clauses.
4. Caveat emptor - let the buyer beware.
7. 315 N.S. 289, 326 (1942).
liability in one State only, that State being California.29

To appreciate fully the sweeping changes that have occurred in California it is necessary to return momentarily to the decision of the House of Lords in Winterbottom v. Wright.30 That was a case involving an alleged breach of contract, negligence apart from contract not being alleged or proved. However, the case was often cited as authority for the proposition that a purchaser could recover damages caused by a defective product only from his immediate vendor and it is notable for the following statement by Lord Abinger:

"There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences to which I can see no limit, would ensue."31

As Dean Prosser has said "what happened in the next century was enough to make the learned jurist turn in his grave".32 The Courts began by the usual process of developing exceptions to the general rule of non-liability to persons not in privity. The most important exception was that the seller of an inherently dangerous chattel owed a duty of reasonable care to make it safe for anyone who might be expected to use it.33 Then in 1916 came Justice Cardozo's famous opinion in MacPherson v. Buick Motor Co.34 Speaking for the majority of the New York Court of Appeals Cardozo stated that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger".35 Thus by a drastic widening of the exception as to inherently dangerous products the general rule of non-liability to persons in privity was overturned. In subsequent years the rule of the MacPherson case was extended by degrees so that "it has become, in short, a general rule imposing negligence liability upon any supplier for remuneration of any chattel".36 In California however, MacPherson v. Buick was merely the beginning. Indeed one commentator has said that "as the past generation of law students was taught that the most noted chapter of legal history was the growth of the law from Winterbottom v. Wright to MacPherson v. Buick the next generation will learn that this is only half the plot and that the line moves on to Escola v. Coca Cola Bottling Co. in 1944 and to Greenman v. Yuba Power Products Inc. in 1962".37

29 It is probably true to say that California leads the other States in this field and this is largely due to the opinions of Chief Justice Traynor of the Supreme Court of California.
31 Ibid.; 114; 152 E.R. 405 (1842).
32 W. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1100 (1960).
33 Thomas v. Winchester 6 N.Y. 397 (1852).
34 111 N.Y. 362; 111 N.E. 1050 (1916).
35 Ibid., 389; 111 N.E. 1050, 1053. The MacPherson case was of course relied upon by the majority of the law Lords in Donoghue v. Stevenson (1932) A.C. 562.
36 Prosser, supra, note 32 at 1102.
The Escola case, 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." 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." 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. 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. Then in 1962 the same Court decided Greenman v. Yuba Power Products Inc. with Justice Traynor delivering the unanimous opinion of the Court. The plaintiff was injured when a combination

if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament."

Brian Coote

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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).
40 Ibid., 462; 150 P. 2d 436, 441.
41 Ibid., 463; 150 P. 2d 436, 441.
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).
43 59 Cal. 2d 57; 377 P. 2d 897 (1962).
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 and one which, if submitted, comes closest to meeting the needs of the situation, 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 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 encourage manufacturers' guarantees although 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 and the dealings of men are in fact various. Only by allowing scope for flexibility can all their needs be met. It was precisely on the grounds that this flexibility necessary flexibility that Lord Hila 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 alike cases that are very different. There is no indication in 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 agreed 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 defended on the ground that notice of the breach of warranty had not been given as required by the Uniform Sales Act. This 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 it plain 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 warranty theory in favour of strict tort liability approach. The tort approach, from any contract rules. 45 Dean Prosser concludes that the number of American Courts which have since adopted this strict tort liability approach is "sufficient to make it reasonably certain that this is the law of the immediate and the distant future. There are still Courts which have continued to talk the language of 'warranty', but the forty-year reign of the word is ending, and it is passing quietly down the drain."

In 1965 the Supreme Court of California took another major step in the case of Vandermark v. Ford Motor Co. 46 There it was held that the obligation of the manufacturer to supply the eventual purchaser with a safe motor car was such that it could not be delegated to the car dealer, and that the manufacturer could not escape liability for a defective product on the ground that a defect in the brakes might have been caused by something the car dealer did or failed to do in preparing the car before final delivery. Furthermore, the retail dealer was subject to the same strict tort liability as the manufacturer. The Court also decided that disclaimer of liability as a possible defence to the retail dealer was impermissible as contrary to the policy of the law even where the product was dangerous to human safety. The defence of disclaimer had previously been denied to manufacturers.

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.

44 Ibid., 64; 377 P. 2d 901.
45 See W. Prosser, The Fall of the Citadel (Strict Liability to the Consumer) 50 Minn. L. Rev. 701 (1966).
46 Ibid., 804.
47 3 Cal. 2d 256; 93 P. 2d 168 (1948).
48 403 P. 2d 145; 45 Cal. Rptr. 17 (1965).
49 Supra, note 43.
when he buys a product on the market. He can, however, be fairly charged with the risk that the product does not match his economic expectations unless the manufacturer agrees that it will.50

To summarise, the effect of the Californian 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 status prior to his injury is irrelevant. Any user or consumer of the product in the widest sense of the term 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".51

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 product. 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 it has resulted in injury. In addition, it must be established 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.

4. What of the Future
(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 (U.K.) Ltd. v. The Miller Steamship Co. Pty.52 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

453 P. 2d 145, 151; 45 Cal. Rptr. 17, 23 (1965). Contra: Santor v. A. & M. Karagheusian Inc. 44 N.J. 207, 208; 207 A. 2d 705 (1965), where the New Jersey Supreme Court allowed the plaintiff to recover for economic losses.

50 Prosser, supra, note 45, 812.


The Use of Exception Clauses in Consumer Sales

It tends to be forgotten in controversies of the present kind that the use of exception clauses in consumer sales is by no means universal. Apart perhaps from car salesmen and auctioneers, do not appear to use them at all in respect of cash sales. Their chief and almost exclusive use in practice is by manufacturers in connection with the guarantees issued by them on consumer durables and by retailers in connection with hire purchase agreements.

In the case of the manufacturer's guarantee, the exception clause is not a cynical disregard of the rights of the consumer. We have seen that, in contract, the consumer ordinarily has no such rights against the manufacturer anyway. The exception clause is rather a delimitation of the obligations which the manufacturer is voluntarily prepared to assume, expressed negatively rather than positively. In the case of hire purchase agreements, the purpose is again not to deprive the consumer but to give adequate security to the finance company which is finding the money.

Over the years, the courts have sought to promote consumer protection by attacking exception clauses. They have used several devices, notably collateral contracts, restrictive interpretation, and (over the last fifteen years or so) the doctrine of fundamental breach. None of these devices, however, really gets to the root of the problem. Restrictive interpretation can always be met by skillful drafting. Fundamental breach was a clumsy weapon in the extreme because it denied the buyer relief unless the goods delivered were "different in kind" from those purportedly sold. The consequence of that is, between peas and beans and one which would not be likely to arise very often. All these devices had the effect of increasing the liability of the manufacturer beyond what he was prepared (and presumably had budgeted) to assume. They also had the effect of impairing the finance company's security.

Suggestions for Reform

In the light of all this, to attempt to solve the problems of the consumer by banning exception clauses is simply to evade the real issue. To meet the real issue, it is submitted, society must decide:

(1) In what circumstances and to what extent consumers need to be protected;

(2) What obligations must be imposed in order to effect this protection and upon whom they should be imposed;

(3) By what means these obligations are to be enforced.

The answers to these questions are not easy. Who, for example, is the manufacturer in cases where the article is assembled from parts and is made by other suppliers? Should the required standards be left to be determined by litigation under some such rubric as "merchantable quality" or should a code of standards be laid down? Should there be liability for defects in design as well as in quality? Who would win the battle of an enforced guarantee? The consumer or the products concerned? Should the consumer be permitted, in return for a reduced price, to take the risk of quality upon himself? What part of the manufacturer would he rely on the retailer or the finance company? How should the scheme be administered and enforced? Should the sanctions be criminal or civil?
durable; 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 the 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.

The other type of exception clause does not purport to exclude the obligations undertaken by the proferens but it does set out to limit the remedies available to the buyer. Typical examples are the clause which says that claims must be made within fourteen days of delivery of the goods and the clause, most commonly found in contracts of carriage and bailment, which limits liability to (say) £10 per package or unit.

The point to be stressed here is that there is nothing intrinsically unfair or reprehensible about the exception clause as such. It can of course be abused. Claims in large print followed by exceptions in print so small as to be unreadable would be an example. But as a form, it is no more than one mode of expressing the obligations of the parties.

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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 furnished 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.

the buyer defines the goods he wants in the abstract. Unless the article delivered corresponds with that definition, there has been no sale. But though it has been held to apply in some retail contracts, this provision is really more appropriate to the order placed from a distance for the sale of goods not yet ascertained. It finds no place in the modern supermarket. The last provision, that dealing with sales by sample, is again of little practical consequence to the consumer.

The two remaining provisions are those of greatest importance to the consumer. Only one of them goes to the quality of the goods. An article is said to be merchantable when it 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". As a "consumer's" charter however, s. 18 (b) suffers the defects:

(a) That it is confined to sales by description and though these have been held to include some over-the-counter sales, they do not cover them all; and,

(b) That it is confined to purchases from dealers in the particular commodity; and,

(c) That in the ordinary case, by the operation of rules relating to the passing of property, the buyer will not be relieved of the goods or replacement of defective parts, but merely an action for damages.

Of course, sales are not the only contracts between consumers and retailers. A substantial proportion of dealings in consumer durables are by hire purchase and hire agreements. To certain of these (the hire purchase as distinct from the conditional purchase agreements) the Sale of Goods Act and its implied terms do not apply at all. In practice, the Courts do imply such agreements terms equivalent to those under the Sale of Goods Act, with the exception, so far, of any implied undertakings as to quality.

Finally, the retailer, like the manufacturer, can be liable in tort if he negligently puts dangerous goods into circulation.

The Problems of the Parties

This, then, is the background of obligation against which the effect of exception clauses must be measured. On the one hand, there is the liability of the manufacturer which would not usually exist at all apart from anything voluntarily undertaken in his guarantee. On the other, there is a set of implied terms which gives the consumer some recourse in damages against the retailer in some circumstances.

It is probably true to say that the law as it stands is adequate to meet the needs of none of the parties to a sale of manufactured goods. In fact, it imposes no liability on the manufacturer yet most manufacturers seem prepared to assume some responsibility for the quality of their products. Most of them are interested in quality control. On the other hand, no system of quality control yet devised is perfect. The human factor is too strong and easier to provide for a basic minimum of quality control in the factory and, for the rest, rather than fruitlessly to pursue perfection and replace defective parts in articles returned by the consumer under guarantee. Nevertheless, while responsibility for quality control is widely recognized, at least in the field of consumer
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-a-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 buyer to establish whether and what undertakings were given by 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 to the seller so as to show that he relies on the seller'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

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64 See Prosser, supra, note 32, 1122.


66 See generally Prosser, supra, note 32, 1114 et seq.
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 therefore that a great deal 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 who has merely sustained a direct economic loss. Mr Justice Widgery recognized this limitation 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 medium 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 has depended on proof of fraud. However, the decision in Hedley Byrne's case has

provided liability in certain circumstances for negligent misstatement. On a proper reading of the case it seems to me that the special relationship between the parties is a pre-requisite to the use of the principle and that the relationship between the manufacturer and the consumer is not of the special kind contemplated.

D.S. Beattie