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Inherent Vice and Contracts for the Sale of Goods

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1. Introduction

The question of who is to bear the loss from the natural deterioration of goods during shipment to a consignee is one that has caused considerable trouble for Commonwealth courts. Even within Canada, where there has been a certain amount of judicial comment, the issue remains to be finally determined. Moreover, most of the local authority is dated to the extent that it is generally to be found in pre 1930 reports.¹ This note is an attempt to outline briefly the current state of the law as to the allocation of loss caused by inherent vice in the course of transit and make some suggestions as to the directions in which it might develop.²

2. The Existence of an Implied Condition

At first glance, one might expect that as a general rule the buyer should bear such loss in a contract for the sale of goods. There are several reasons for this initial reaction. The doctrine of *caveat emptor* would seem to be applicable as a preliminary matter of principle. Moreover, the issue will almost inevitably arise in the context of c.i.f., c. & f., f.a.s. and f.o.b. contracts. Under these agreements the seller has an express obligation to put alongside or on board goods which are *at that time* in accordance with the contract provisions and which are appropriately packed for transit.³

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1. For a general summary of authorities see 34 Can. Abr. (2nd) 278-279.

2. "By the expression vice, I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result." *Blower v. Great Western Railway Co.* (1872), L.R. 7 C.P. 655, 662 *per* Willes J. For example, excess moisture in a cargo of wheat which causes mildew.

3. See *Stead & Chisholm v. Williams*, [1955] 5 D.L.R. 292 (Nfld. S.C.) where Dunfield J. implied a condition as to appropriate packing in a contract involving shipment f.o.b. rail. Also *Can. Wm. A. Rogers Ltd. v. Lucerne Metal & Plastic Products Ltd.*, [1949] O.R. 135 (C.A.); *Van Zonnefeld & Co. v. Gilchrist* (1915), 8 O.W.N. 4.

Thereafter, as a general rule the purchaser bears the risk.⁴ Finally, it is expressly provided in the *Sale of Goods Act*⁵ that:

where the seller of goods agrees to deliver them at his own risk at a place other than where they are sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Here the Act contemplates that the responsibility for losses incidental to transit are to be borne by the buyer even where the seller delivers at his own risk. One would have thought that in the case of a sales contract where the buyer generally accepts the responsibility for losses from at least the time of shipment the same rule would apply.

The problem, however, is more complex than appears initially. In those cases where the risk of deterioration would normally be on the consignee⁶ a distinction has been drawn between two classes of loss, both of which fall within the broad classification of 'destruction by an inherent vice.'⁷ On the one hand, where *all* goods of the contract specifications would necessarily suffer a certain amount of deterioration in transit and have deteriorated no more than would be expected under the circumstances in question, the purchaser must bear the loss. On the other hand, where some goods of the contract class would bear transportation with no loss, while

4. See as to the general question of the passing of property and risk, *Comptoir d'Achat v. Luis de Ridder*, [1949] A.C. 293, 309; *Ireland v. Livingston* (1872), 5 H.L. 395, 406.

5. *Sale of Goods Act*, R.S.N.S. 1967, c.274, s. 34.

6. Where the risk is normally on the vendor the Sale of Goods Act plus the agreed allocation of risk cover the problem. The following discussion is still important, however, in determining what nature of loss the Sale of Goods Act intends to exempt the vendor from. See *Winnipeg Fish Company v. The Whitman Fish Company* (1909), 41 S.C.R. 453; Also, *D. H. Bain Ltd. v. Beaver Specialty Ltd.*, [1970] 2 O.R. 555 (C.A.); (1974), 39 D.L.R. (3d) 574 (S.C.C.). Fridman, *Sale of Goods in Canada* (1973) at p. 288 gives the impression that the case is an example of the operation of Section 34. With respect, it appears clear from the facts that the loss was not incidental to the transit but caused by the carrier's negligence and that on the facts the express risk was on the buyer. This is made particularly clear in the Supreme Court judgment.

7. In insurance cases there is no distinction made and any loss from inherent vice generally has the same result. This is due to the doctrine of *proxima causa* applied in such cases by which the immediate efficient cause and not the *causa remota* is looked to by the courts in determining cause of any loss. See *Leyland Shipping Co. v. Norwich Union Society*, [1918] A.C. 350. Note the exceptions to this rule where the carrier's negligence or the assured's wilful misconduct has 'remotely' caused the loss.

others, because of an inherent defect peculiar to *them* — and not their genre — do not, the vendor accepts the risk of transit.^{7a}

The following observation of Diplock J. in *Mash & Murrell Ltd v. Joseph I. Emanuel*⁸ illustrates this distinction:

It is only the extraordinary deterioration of the goods due to abnormal conditions experienced during transit for which the buyer takes the risk. A necessary and inevitable deterioration [i.e., one occasioned by the nature of the goods themselves] during transit which will render them unmerchantable on arrival, is normally one for which the seller is liable⁹

The trend of decisions would, in other words, seem to suggest that there is an implied condition that goods should remain of merchantable quality from the time of shipment, throughout a *normal* transit to the destination, and thereafter a reasonable time for disposal. In *Mash & Murrell Ltd.*, it was held that such a condition was to be implied in c.i.f. and c. & f. contracts. Twenty years previously, Hilbery J. had come to the same conclusion. In *Broome v. Pardess Co-operative Society*¹⁰ his Honour commented:

These words seem to me to be strong enough to show that what is fundamental is that the goods must be merchantable, and, where they are perishable goods, and the contract contemplates they have a transit to undergo, merchantable not only at the beginning of the transit, though that would appear to be the place of delivery under the contract, but they must be merchantable in the sense that, at the place for delivery under the contract, they are in a suitable and fit condition for the transit normally to be expected.¹¹

Canadian courts have generally accepted this approach and placed the responsibility for loss in such circumstances on the vendor. For example, in *Sims Packing Co. Ltd. v. Corkum & Ritcey Ltd.*¹² the plaintiffs were pork packers in Charlottetown and the defendants butchers in Halifax. The latter purchased ham and bacon from the

7a. Sassoon, "Deterioration of Goods in Transit," [1962] J.B.L. 351, 354.

8. [1961] 1 W.L.R. 862. Reversed on appeal on the facts, [1962] 1 W.L.R. 16.

9. *Ibid.*, at p. 871. One should perhaps add that any necessary deterioration to the class as opposed to a particular shipment, such as necessary shrinkage, would also be at the buyer's risk even on a normal voyage.

10. [1939] 3 All E.R. 978. Overruled by the Court of Appeal on a point of evidence, (1940), 56 T.L.R. 430.

11. *Ibid.*, at p. 985. Also *Beer v. Walker* (1877), 46 L.J.Q.B. 677; *Healy v. Howlett & Sons*, [1917] 1 K.B. 337, 347 *per* Ridley J.; *Ollett v. Jordan*, [1918] 2 K.B. 41, 46 *per* Darling J. and 47-49 *per* Atkin J.

12. (1920), 53 N.S.R. 539. See also *Tregunno v. Aldershot*, [1944] 1 D.L.R. 102, 107 *per* Laidlaw J.A.; *Hebb v. Stoddard* [1935] 4 D.L.R. 394, 395-396 *per* *Roberts Co. Ct. J. Cf. Stead & Chisholm v. Williams* [1955] 5 D.L.R. 292, 293 *per* Dunfield J.

plaintiff which, when delivered, was 'slimy, wormy and unfit for food'. The Nova Scotia Supreme Court held there was an implied condition in the contract of sale that the goods would be fit to withstand the shipment from Charlottetown and a reasonable time thereafter.

Nevertheless, while the bulk of authority would seem to support the legitimacy of the implied term, this view is not universally accepted. The attitude of one writer¹³ is that while the seller should be held liable for any inevitable deterioration resulting from insufficient packing of goods or from his employing insufficient means of conveyance, he should not be liable otherwise for loss during transit generated by the nature of the goods themselves. Any implied condition as to fitness for transportation extends only to the condition of the goods when they leave the sellers possession.¹⁴

There is some judicial support for this view. In *Bowden Bros. & Co. Ltd. v. Little*,¹⁵ a cargo of onions, merchantable with respect to condition and quality at departure, was found to have rotted during the voyage and be unfit for sale. The High Court of Australia held that the existence of any implied condition was a question of fact depending on all the circumstances whether, and to what extent, the purchaser relied on the judgement of the vendor to supply goods fit for the purpose of shipment. It was definitely not a term to be implied into every contract for the sale of goods and the Court implied strongly that it would be uncommon in a c.i.f. based agreement. The possibility of the existence of such a condition was not, however, ruled out. The important point was that it was not to be implied from the mere fact of shipment and that having regard to the nature of c.i.f. contracts positive proof of reliance on the seller must be shown. In *Oleificio Zucchi S.P.A. Ltd. v. Northern Sales Ltd.*¹⁶ Mr. Justice McNair went further than the High Court and categorically denied the existence of any such condition. Basing his opinion on the extent of a seller's obligation incurred under a c.i.f. contract, his Honour stated that the nature of such contracts

13. Sassoon, "Damage Resulting from Natural Decay" (1965), 28 M.L. Rev. 180, 189-192; for fuller comments by the same writer see "Deterioration of Goods in Transit," [1962] J.B.L. 351.

14. Compare Schmitthoff, *The Export Trade* (5th. ed., 1969) 71 whose opinion is consistent with that of the present writer. Also Fridman, *op. cit.*

15. (1907), 4 C.L.R. 1364. For a short analysis of this case see Sutton, *Sale of Goods in Australia and New Zealand* (1967) 142.

16. [1965] 2 Lloyd's Rep. 496.

precluded the application of an extended 'merchantability' or 'fitness for purpose' principle.¹⁷

It is suggested that in so far as these two streams of authority lay down any absolute rule of law neither is correct. It must be borne in mind that at common law the courts will not imply into a written contract any term that is not both reasonable and necessary.¹⁸ Accordingly, the claim that such an implied condition exists in every sales agreement involving the shipment of goods is difficult to sustain. At the same time, while c.i.f. and similar contracts do expressly provide for the allocation of risk, it is surely unreasonable to expect the purchaser to bear such loss on every occasion. The rationale of placing the risk of loss on the purchaser is based on practical considerations. Thus, the buyer, who is usually in the presence of the carrier and the goods when any damage is discovered, is generally in a better position than the seller to pursue an action against the carrier or insurer. Similarly, he is better placed to attempt any possible salvage. The writer has no argument with this approach. But, as we shall see, in cases of inherent vice the former factor is of no importance since the buyer has *no* right of action against the carrier or insurer. Moreover, the risks which these contracts contemplate shall be borne by the consignee are of an unpredictable or exceptional nature such as those occasioned by the act of a third party or peril of the sea. In the present context, the purchaser is being asked to pay for what, in effect, is the default of the seller. In the final analysis, therefore, any argument based on the *express* allocation of risk under a c.i.f. or f.o.b. contract simply begs the question. The obligation of the seller is to place on board goods which *conform to contract specifications*. The problem before the courts and the present writer is to determine whether one of the *implied* contractual specifications is that the goods must be of such a condition that they will survive a normal transit, even though any defect may be latent and not discernable for some time.

The answer to this conflict would appear to be that while it would be extremely difficult to imply such a condition at common law, it

17. *Ibid.*, at 581.

18. And not in conflict with any express terms of the contract. *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.*, [1958] 1 W.L.R. 661, 675; *Les Affréteurs Réunis Société Anonyme v. Walford* [1919] A.C. 801, 809. For a decision in the present context see *Broome v. Pardess Co-operative Society* (1940), 56 T.L.R. 430, 432 *per* MacKinnon L.J.

may be possible for the purchaser to rely on the statutory implied conditions in the Sale of Goods Act in appropriate cases.¹⁹ The problem is how to determine what is an appropriate case. It seems clear that ultimately the issue must be settled on the extent to which the purchaser did, in fact, rely on the skill and judgment of the vendor.²⁰ As usual, this enquiry will involve consideration of a multiplicity of factors. It is suggested, however, that a realistic starting point can be reached by drawing a basic distinction between goods of a perishable and non-perishable nature. In normal circumstances, where both parties are aware that the goods are likely to deteriorate and the vendor is more acquainted with their tendencies and the means by which they should be transported, the Courts are likely to conclude that the purchaser relied on the latter to supply goods fit for transit. In these circumstances, it can be accepted that the parties must have intended such a condition to be implied upon entering the contract. In the case of more resilient goods, on the other hand, for example, minerals or machinery, it must be extremely doubtful whether the prospect of deterioration was ever contemplated by the parties in the course of negotiations.

While English cases have not generally drawn such a positive distinction²¹ the above analysis would appear to represent an accurate interpretation of the authorities. Not unexpectedly, all reported decisions in which the Courts have implied such a condition have concerned perishable foodstuffs. Moreover, many of the Canadian authorities clearly treat the principle as being applicable only to perishable commodities.²² Thus, in one local

19. See *Tregunno v. Aldershot supra*, at p. 106, where Laidlaw J. A. was of the opinion that the implied condition could only arise under the Sale of Goods Act and not the common law.

20. To this end it would be preferable in the writer's view to treat these cases as raising a question of 'fitness for purpose' rather than 'merchantability'. It is interesting to note that the first major decision in this field was expressly decided on the 'fitness for purpose' principle. See *Beer v. Walker supra*. In following this case, however, subsequent courts have often used the doctrine of 'merchantability' to justify their conclusion, eg. *Mash & Murrell Ltd. v. Joseph I. Emanuel supra*; *Ollett v. Jordan supra*; *Tregunno v. Aldershot supra*. In that the 'fitness for purpose' implied condition specifically contemplates an enquiry as to reliance on the seller's skill and judgement, it is submitted that this is a more logical premise to proceed from. See *Sale of Goods Act*, R.S.N.S. 1967, c. 274, s.16(a).

21. *Beer v. Walker supra*; *Mash & Murrell Ltd. v. Joseph I. Emmanuel Ltd. supra*; *Ollett v. Jordan supra*. Cf. *Broome v. Pardess Co-operative Society*, particularly the passage quoted *infra*.

22. *E.g. Sims Packing Co. Ltd. v. Corkum & Ritcey Ltd.* (1920), 53 N.S.R. 539;

decision,²³ the English authorities were distinguished on the basis that whereas dead rabbits were susceptible to decay, potatoes could not be placed in the same category. More recently, the judgment in *Mash & Murrell Ltd.* has itself been distinguished by an English Court²⁴ by drawing a distinction between potatoes, which are perishable goods, and animal skins which are not.

It can also be argued that commercial practice as evidenced by national and international sales terms reflect this approach. While general international interpretations of customary shipping contracts do not expressly incorporate any such conditions into sales contracts,²⁵ several of the more recent international formulations do indicate that a condition as to *inter alia*, fitness for the purpose of shipment, may have to be implied where the damage can be traced back to the fault or default of the vendor.²⁶ While it may not be possible to attach responsibility on the seller for damage to a normally stable cargo, it would seem equitable to find fault in the latter's conduct where he took insufficient care in the selection of goods which he knew travelled badly. More importantly, at least one statute dealing specifically with perishable items does provide protection for the purchaser in the present circumstances.²⁷ The

Hebb v. Stoddard supra. It should be noted, however, that most of the Canadian decisions rest on an explicit approval of passages from texts that draw this distinction. *Mayhew v. Scott Fruit Company* (1915), 30 W.L.R. 466 appears to be the only case where the distinction was fully considered. See also the findings in the *Report on Consumer Warranties and Guarantees in the Sale of Goods* (Ontario Law Reform Commission, 1972) 37. Cf. *Tregunno v. Aldershot supra*, where the implied condition was apparently accepted as being of general application in the case of *non-specific* goods.

23. *Mayhew v. Scott Fruit Co. ibid.*, at p. 471 *per* Stuart J.

24. *Cordova Land Co. Ltd. v. Victor Bros. Inc.*, [1966] 1 W.L.R. 793, 796 *per* Winn J.

25. E.g. *Incoterms* (International Chamber of Commerce (I.C.C. Brochure 166, 1953); *Trade Terms* (I.C.C. Document 16, 1953). For a detailed analysis of these publications see Sassoon, "Deterioration of Goods in Transit" *op. cit.*, at pp. 357-358.

26. E.g. *General Conditions of Delivery of Goods* (Comecon Conditions, 1968) para. 71(2). See also para. 7(2) (b), (3)(b) in which the passing of risk in f.o.b., c.i.f. and c. & f. contracts is specifically limited to "the risk of *accidental loss or accidental damage* to goods." See the English translation by Hoya and Quigley, "Comecon 1968 General Conditions for the Delivery of Goods" (1970), 31 Ohio. S.L.J. 1. Also *Uniform Law on the Sale of Goods*, 1964, Schedule I, Article 96. For a discussion of the latter see Graveson, Cohn and Graveson, *Uniform Laws on International Sales Act*, 1967 (1968).

27. For an excellent general discussion of the risk of loss in transit as evidenced by international formulations see Schmitthoff, "Risk of Loss in Transit" in J.

U.S.A. *Perishable Agriculture Commodities Act*, 1930 provides that a warranty that goods are in a 'suitable shipping condition' shall be implied in normal trade terms. Such condition is defined in section 42.24(j) as:

A condition which if shipment is handled under normal transportation service and conditions, will assume delivery without deterioration, at the destination specified in the contract of sale.

This legislation can only be an acknowledgment that, within its admittedly narrow scope, the existence and acceptance of such a stipulation must necessarily be imputed to the parties.^{27a}

The American position does not, overall, provide much assistance. Sassoon suggests that American jurisprudence does not generally recognize the extension of the fitness for purpose condition even with respect to sales of perishable goods.²⁸ As usual, however, one can find judicial comments to the contrary. In *Philip Olim & Co. v. C. A. Watson & Sons*²⁹ the purchaser bought apples for resale, to be stored by the seller and shipped upon order of the purchaser. The evidence showed that the products were in good condition when transferred to the seller's warehouse, but were in a

Honnold (ed.), *Unification of the Law Governing International Sales of Goods* (1966) Chapter 7.

27a. Sassoon, *op. cit.*, at n. 7a. gives the impression that the coverage provided by this Act is exceptional and that it was introduced to provide some protection for the buyer. On the contrary, the Act as a whole is designed to clarify the position generally as between parties dealing in perishable agricultural commodities and was, in fact, principally motivated by a desire to improve the position of the seller. Compare the following passage from the judgment of the First Circuit Court of Appeal in *L. Gillarde Co. v. Joseph Martinelli & Co. Inc.*, 169 F. 2d. 60 at p. 61 (1948); "The Act was intended to prevent produce from becoming distress merchandise and to protect sellers who were often at a great distance from the buyer." See also *California Fruit Exchange v. Henry*, 89 F. Supp. 580 (1950). Since the Act contemplates strict limitations on the buyer's right to reject, it seems reasonable to conclude that at least the right maintained under statute must have existed in the basic law of sales. Moreover, the Act was not intended to replace the basic law of sales which remains applicable when the Act does not apply. *Fletcher v. Ozark Packing Co.*, 188 F. 2d. 858 (1951). For a brief note on the common law position see *post*, at n. 29.

28. (1965), 28 M.L. Rev. 180, 191. See *Harp v. Haas Phillips Produce Co.*, 205 Ala. 573; *Fruit Dispatch Co. v. C.C. Taft Co.*, 197 N.W. 302 (1924); *Rhynas v. Keck*, 161 N.W. 486 (1917). Generally, *Williston on Sales*, (rev. ed.) para. 245; 47 *Am. Jur.* para. 350 at p. 535. But compare the second edition, para. 470 at p. 641 where the early reference does not appear.

29. 204 Ala. 179. See also *California Fruit Exchange v. Henry*, *supra*, at p. 586; *A. J. Conroy Inc. v. Weyl-Zuckerman & Co.*, 39 F. Supp. 784 (1941); *Ernest E. Fadler Co. v. Hesser*, 166 F. 2d. 904 (1948).

decaying and unmerchantable state when they arrived at their ultimate destination. In disposing of the case in favour of the purchaser, the court said:

So it is a clear implication from the correspondence between the parties that the apples, being for resale in the usual way, should be in a condition that would keep them sound and saleable for a reasonable time for that purpose.

The *Uniform Commercial Code* does little to clarify the confused state of the law. Neither the basic implied warranties³⁰ nor the sections dealing with c.i.f. and f.o.b. transactions³¹ provide any direct help. Sassoon argues, however, that section 2:321 is of some assistance. The section reads:

Under a contract containing a term c.i.f. or c. & f.

- (1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.
- (2) An agreement described in sub-section (1) or any warranty of quality or condition of goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

The above commentator suggests that this section implies that unless the parties have expressly agreed on, for instance, a 'net landed weight', any loss in transit through deterioration to the goods must be borne by the buyer. This approach completely ignores the rationale for the provision. It was introduced to deal with variations of the c.i.f. agreement which are commonly adopted in practice and is specifically aimed at providing for a shift to the seller of the risk of quality and weight deterioration during transit *without* changing the legal consequences of the c.i.f. contract as to the passing of risk to the buyer at the time of shipment.³² The section specifically contemplates that where a seller warrants, impliedly or expressly, the quality or condition of goods on arrival he shall bear the risk of ordinary deterioration, i.e., deterioration which might be expected because of the nature of goods. The buyer, on the other hand, will

30. Ss. 2:314, 2:315.

31. Ss. 2:320, 2:319.

32. *Uniform Commercial Code* (1962 Official Text) S. 2:321 comment.

still bear the risk of loss arising from *accidents* in the course of shipment as is usual under such contracts.³³ Section 2:321, therefore, would appear to be neutral in its effect. It leaves to the basic risk provisions³⁴ and the implied warranties the question of whether a warranty as to fitness for shipment exists and the allocation of loss on breach of such warranty.

In the final analysis, perhaps the most important argument in favour of the existence of an implied condition in so far as perishable goods are concerned finds its basis in simple common sense. It has been implied that such a condition would only be found rarely in a c.i.f. contract because the buyer will always be covered by insurance,³⁵ or alternatively, have an action against the carrier. On the contrary, the protection any normal policy gives will be quite worthless since, in the absence of express coverage,³⁶ neither the underwriter³⁷ nor the carrier³⁸ is liable for loss caused by inherent vice. In the case of goods which normally remain stable in transit this factor is not particularly relevant. The purchaser will likely consider that any foreseeable loss is covered by his usual policy and remedies. It must be queried, however, whether any person would agree to purchase perishable goods which have a well established tendency to deteriorate without some recourse if they are in fact damaged by that inherent vice in the course of transit. It can be assumed that the parties are aware of the lack of a remedy against the insurer or carrier; this leaves only the vendor to accept responsibility.

3. Scope and Limitation of the Implied Condition

The major problem to be faced in applying the above analysis will

33. *Uniform Commercial Code* (Michigan Compiled Laws) S. 2:321 practice commentary.

34. Ss. 2:509, 2:510.

35. *Bowden Bros. & Co. Ltd. v. Little* (1907), 4 C.L.R. 1364.

36. Discussion with Halifax insurers involved in the carriage of goods field led the writer to the conclusion that, to quote one representative, "they avoid express coverage like the plague." It appears that it is almost never given in inland carriage and extremely uncommon in the case of marine carriage. Specialist insurers, however, eg. Lloyd's, may provide coverage for unique cargos, in particular coal, at a 'substantial premium.'

37. Even where there is an 'all risks' policy. *British & Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A.C. 41.

38. See the *Carriage of Goods by Water Act*, R.S.C. 1970, c. C-15, Article N, s. 2(m).

be to decide in any particular case what constitutes 'perishable' goods. In this area, the law is in an absolute state of confusion. On occasions, distinctions have been drawn between animal carcasses and potatoes,³⁹ between potatoes and animal skins,⁴⁰ and oysters and other perishable foodstuffs.⁴¹ As indicated earlier, English and Canadian authorities have even differed in their conclusion as to whether the sale of potatoes gives rise to the implied condition.⁴² As a general rule the courts appear likely to apply the everyday meaning of 'perishable', i.e., likely to decay.⁴³ Accordingly, it is probable that a broad distinction will continue to be drawn between raw foodstuffs and other products. Yet such an approach does not provide a totally satisfactory answer. For example, what is the position with contracts for the sale of coal or *tinned* pork? These are products which have a tendency to self-destruct but which, at the same time, would not normally be classified as perishable items.

The courts can only face this problem by adopting a realistic approach to interpreting the term 'perishable'. In the writer's view it should not be construed narrowly but in the light of what the parties would have contemplated at the time of their negotiations. If the subject matter of the contract is known to have a tendency to self-destruct when not in condition fit to survive a normal shipment, whether the damage be caused by decay, decomposition, combustion or 'blowing', then it would seem reasonable and necessary to infer that this factor was something the purchaser relied on the vendor to guard against. In other words, they should be regarded as 'perishable goods'. Certainly this is wider than the normal definition of 'perishable'. Such an approach has the advantage, however, of according with *commercial reality*. In the final analysis, this factor must be the basic requirement of any so called 'test'. Otherwise, the question being asked by the courts i.e., whether the *trading* parties would have regarded the condition as being part of the contract, is being asked out of context and the entire enquiry would be a fiction.

It should not be assumed that the mere fact that the goods are 'perishable' will be enough to persuade the courts that the implied

39. *Mayhew v. Scott Fruit Co. supra*.

40. *Cordova Land Company Ltd. v. Victor Bros. Inc. supra*.

41. *Barnes v. Waugh* (1906), 41 N.S.R. 38.

42. Cf. *Mash & Murrell Ltd. v. Joseph I. Emanuel supra*, and *Mayhew v. Scott Fruit Co. supra*.

43. *Shorter Oxford English Dictionary* (1973) at p. 1556.

condition should be read into the contract. While generally it will be sufficient, there may be other factors that will rebut any presumption of reliance on the seller's skill and judgment. For example, the consignee may have express cover for inherent vice in his insurance policy. Since such coverage is extremely rare and must have been expressly bargained for, this is likely to be construed as an indication that he has accepted the risk of loss from this source. Similarly, a heavily reduced price could be evidence of an 'as is' attitude. In other cases the consignee may be in the position of 'expert' and handle all practical matters himself. For instance, in *Kelly, Douglas & Co. Ltd. v. Pollock*⁴⁴ the purchaser stipulated that the goods should be sent 'standard heat and vent.' However, the evidence showed that the cargo in question required a higher than usual temperature. The Ontario High Court was not prepared to imply any condition of merchantability when turnips rotted as a result of the specified mode of shipment. Clearly, on the facts, there was no reliance on the seller as the buyer had made all arrangements for shipping himself.

Further, it would appear that if the implied term is held to exist it will be limited, in the absence of wording to the contrary, to the shipment from vendor to purchaser. In *Tregunno v. Aldershot*⁴⁵ the purchaser asked the court to extend the condition to cover the quality of goods during shipment to subpurchasers. The approach adopted by the court provides an excellent illustration of factors which should properly be taken into account in any enquiry:

While the plaintiff knew, or may be taken to have known, that the defendant required the goods for the purpose of resale and shipment to its customers, there is no evidence to show that the defendants relied on the plaintiff's skill or judgement as to the fitness of the goods for such purposes. *On the contrary, the defendants used the skill and judgment of its own officers or advisors, and exercised its own discretion in the matter.* If it made a mistake and took a chance which a reasonable shipper would not have taken in the circumstances, it cannot put the responsibility for any resulting loss on the plaintiff. . . .⁴⁶

To place such a burden and responsibility on the grower of fruit in the absence of any express agreement on his part would be unreasonable and unjust. *I venture to think that few, if any, growers would be willing to sell their crops under such conditions. They would demand prices commensurate with the risk and insist upon measures specified by them as to the protection of the goods in transit.*⁴⁷

44. (1958), 14 D.L.R. (2d) 526 (O.H.C.).

45. [1944] 1 D.L.R. 102.

46. *Ibid.*, at p. 106 per Laidlaw J.A.

47. *Ibid.*, at p. 108 per Laidlaw J.A.

These two factors, the relative position of the parties as to expertise and consequently an absence of reliance on the seller, and the commercial reality of the situation led the court to conclude that the implied term should not be given the wider application claimed. While the condition will not generally extend to subshipments it does, on the other hand, require the goods to remain in good condition for a reasonable time after actual delivery to the purchaser.⁴⁸ It follows, however, that if the purchaser delays for an unreasonable period before inspecting the goods and discovering the deterioration he may well have a difficult time proving that the perishing occurred in the course of transit and not after arrival.⁴⁹ In these circumstances a court may well deem the goods to have been shipped and to have arrived in good condition thus satisfying any implied term.⁵⁰

4. Conclusions

In conclusion it appears that in cases of c.i.f., c. & f., f.o.b. and f.a.s. contracts, loss caused by an inherent defect in the contract goods should be allocated on the following bases. Where the subject matter is known to those in the trade to have a tendency to be damaged by an inherent vice, they should be regarded as 'perishable goods'. In such circumstances, the courts may be expected to draw the conclusion, in the absence of any contrary indication of the parties' intentions, that the purchaser relied on the vendor to supply goods fit to survive a normal transit. If, as the result of any inherent vice, the consignment does not reach the purchaser in a reasonable state and remain so for a reasonable time thereafter, the vendor must accept responsibility for the loss. On the other hand, if the deterioration is no more than could be expected to result from the transit to all goods of the class, e.g. necessary shrinkage, the

48. *Mash & Murrell Ltd. v. Joseph I. Emanuel*, [1961] 1 W.L.R. 862, 870 per Diplock J.; *Ollett v. Jordan*, [1918] 1 K.B. 41, 47-48 per Atkin J.; *Sims Packing Co. Ltd. v. Corkum & Ritcey Ltd.* (1920), 53 N.S.R. 539. Cf. *Beer v. Walker* (1877), 46 L.J.Q.B. 677, 678: "a reasonable opportunity of dealing with them in the course of business."

49. Questions relating to the burden of proof are often decisive in cases such as these which are determined ultimately on matters of evidence. This is a study worthy in itself of independent treatment and cannot be dealt with in this note. See generally *A. B. Kemp Ltd. & Others v. Tolland*, [1956] 2 Lloyd's Rep. 681.

50. See, for example, *Hebb. v. Stoddard*, [1935] 4 D.L.R. 394 (N.S. Co. Ct.); *McLean Produce Co. v. Freedman* (1908), 12 O.W.R. 1038.

purchaser will bear the loss. Similarly, the latter must accept responsibility, in accordance with the general rules as to the transference and allocation of risk, for any damage occasioned by extraordinary incidents of the voyage.⁵¹

⁵¹ *Barnes v. Waugh supra*, (delay caused by storms and freezing). *Davidson v. Bigelow & Hood Ltd.* (1922), 55 N.S.R. 539 (excess heat).