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Comment on Ontario's Bill 110 "An Act to provide for Warranties in the Sale of Consumer Products"

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I. *Introduction*

The government of Nova Scotia has recently made some limited improvements to the law of products liability¹. Merchant sellers are no longer permitted to contract out of the three basic obligations or "implied warranties" contained in the old Sale of Goods Act: to deliver a merchantable article,² fit for the buyer's purpose³ which corresponds to the description under which it was sold.⁴ The reformulation of these old common law obligations which first received statutory recognition in 1893⁵, was done in a somewhat ambiguous and unsatisfactory manner.⁶

Of far greater consequence to consumers however, is the fact that the old products liability rule has been left intact: namely, that a consumer who wishes to sue under any of these three "implied" warranties must be in privity of contract with his defendant supplier.⁷ This means that the consumer can only sue an out-of-privity defendant in tort. When one considers that the Supreme Court of Canada has recently re-affirmed that there is no action for economic loss in tort⁸, it becomes evident that the consumer has no legal remedy whatever against an out-of-privity defendant (typically the manufacturer) who has supplied an unworkable product. The consumer will only gain admission to

*Nadine Cooper Mont, LL.B. Dalhousie, 1978

1. Consumer Protection Act, R.S.N.S. 1967, c. 53

2. Sale of Goods Act, R.S.N.S. 1967, c. 274, s. 16(b)

3. *Id.* s. 16(a)

4. *Id.* s. 15

5. Sale of Goods Act, 1893, 56 & 57 Vict., c. 71 (U.K.)

6. See H. Kindred, *New Consumer Legislation in Nova Scotia* (1976), 2 Dalhousie L.J. 683 at 685

7. Much has been written about this so-called "privity barrier" in the United States. In the authors' view a case analysis by S.J. Stoljar, written in 1958, still represents one of the best discussions of this problem in the Commonwealth. *The International Harvester Case: A Manufacturer's Liability for Defective Chattels* (1958-59), 32 Aust. L.J. 307

8. *Rivtow Marine v. Washington Iron Works*, [1974] S.C.R. 1189; 40 D.L.R. (3d) 530

court when he was hurt by the defective product or at least where he alleges that the product has physically damaged another chattel.⁹ In short, the courts require some kind of trauma. Judges are not concerned with the banality of shoddy or “merely” unusable goods.

In contrast to the Nova Scotia Consumer Protection Act,¹⁰ the Legislature of Ontario is currently attempting to control this extraordinary immunity on the part of out-of-privity suppliers of defective chattels. While this new Ontario approach to implied warranties in the supply of goods has defects, it is, for all its shortcomings, a far more radical and thorough attempt than the Nova Scotian effort to provide a rational system of liability for defective goods.

The Ontario bill is relevant in the Nova Scotian context in a number of respects. It deals with problems that will have to engage the attention of the Nova Scotia Law Reform Commission at some stage. It is therefore likely that the Ontario Bill will serve as a useful model of what to do, and what not to do in Nova Scotia in rationalizing the network of liabilities which connect the manufacturer, distributor and ultimate purchaser of defective goods. With this in mind, we will make a number of comments on those strengths and weaknesses of the Ontario Bill which have seemed interesting to us.

The explanatory note preceding the Bill isolates three areas of reform:

1. A statement of implied warranties that apply to every consumer sale and product, and which denies the ability to contract out of liability.
2. The extension of responsibility for breach of warranties to the manufacturer notwithstanding the lack of privity of contract.
3. Certain warranties accompany the goods regardless of resale.¹¹

Discussion will follow the bill's classification of its contents.

II. *The Provisions Relating to Implied Warranties*

Section 3(1) of the Bill provides:

9. *Ibid.*

10. The Ontario proposals have been followed fairly closely, for instance, by the Saskatchewan Government's *Proposal for Consumer Products Warranties Bill*.

11. An Act to provide for Warranties in the Sale of Consumer Products, Bill 110, Ontario, 30th Legislature, 3rd Sess. 1976

Where there is a sale of a consumer product to a retail buyer by description formulated by the retail buyer, there is an implied warranty by the retail seller that the consumer product conforms to the description.

It may be questioned: why describe the condition of correspondence to the description as an "implied" condition when the description forms an express part of the contract? The decision in *Andrews v. Singer*¹² make it clear that it is logically preferable to characterize breach of an "implied" warranty of compliance with description as the breach of an *express* condition. It should be noted that the *Proposal For A Consumer Products Warranties Bill* in Saskatchewan accords with this judicial characterization¹³, as does the *Uniform Commercial Code*¹⁴ and, more notably, the *Ontario Law Reform Commission Report*¹⁵ itself on whose recommendations the proposed Ontario legislation is based.

In defining the concept of a sale by description, it is disappointing to note that Section 3 did not accept the recommendations of the OLRC and resolve the long standing question as to whether a sale in a self-service store is included within the purview of the section. However, on the strength of recent cases here¹⁶ and abroad¹⁷, as the OLRC¹⁸ itself pointed out, one could assume in the consumer's favor that such sales are in fact sales by description.

Subsection 3 of Section 3 provides as follows:

For the purposes of subsection 2,¹⁹ the description of a consumer

12. [1934] 1 K.B. 17; [1933] All E.R. Rep. 479 (C.A.)

13. Section 6(3)

14: Uniform Commercial Code, Art. 2-313(1) (1972 ed.)

15. Ont. *Law Reform Commission Report on Consumer Warranties and Guaranties in the Sale of Goods* (Toronto: Dept. of Justice, 1972) at 34 (hereinafter "OLRC Report")

16. M. Ruud, *The Vendor's Responsibility for Quality in the Automated Retail Sale* (1960-61), 9 Univ. Kansas L. Rev. 139

17. See *Sams v. Ezy-Way Foodliner Co.* (1961), 170 Report Series A. 2d 160 (Maine Supreme Judicial Ct.); *H. Beecham & Co. Pty. Ltd. v. Francis Howard & Co. Pty. Ltd.* [1921] V.L.R. 428 (S.C.)

18. *OLRC Report* at 34

19. (2) Where there is a sale of a consumer product to a retail buyer,

(a) by sample;

(b) by description formulated by the retail seller; or

(c) by description made by a person other than the retail seller,

there is an implied warranty,

(d) by the retail seller in a case to which clause a or b applies; or

(e) by the manufacturer and retail seller jointly in a case to which clause c applies,

product includes description by advertisement or by label or associated with product orally or in writing.

This subsection compels the seller and manufacturer to stand behind their descriptive labels and advertisements. However, it has always been the assumption in Canadian law that a retailer actually adopts the descriptive parts of labels as his own label when he displays the goods which he sells.²⁰ Although this problem has not been fully explored in Anglo-Canadian jurisprudence, there have been American decisions which suggest that the retailer's liability is limited to the descriptive material on a label, and does not extend to warranties or guarantees accompanying the goods if these warranties or guarantees emanate from the manufacturer.²¹ It should be noted that the Bill does not abolish this distinction despite the OLRC's positive recommendation that

. . . in a consumer sale, promises or affirmations of fact made on the label or container or otherwise accompanying the goods shall be deemed to be part of the description of the goods, or otherwise an express warranty by the seller, whether the labels or containers originated from the seller or not.²²

Section 6 deals with the warranty of fitness for purpose

6. (1) There is an implied warranty by the retail seller to the retail buyer of a consumer product that the consumer product is reasonably fit for the particular purpose for which it is required, unless the circumstances are such as to show that the retail buyer did not rely, or that it was unreasonable for the retail buyer to rely, on the retail seller's skill and judgment.

(2) For the purposes of this section, a particular purpose for which the consumer product is required includes not only an unusual or special purpose but also a normal or usual purpose.

This warranty of fitness provision is an improvement on the English *Sale of Goods Act*²³ which still represents the basic position in common law Canada.²⁴ The condition of fitness is no longer confined to sales where the goods are of a description which the seller supplies in the course of his business. In addition, the Ontario Bill removes the proviso that the condition of fitness will only be to the retail buyer that the consumer product corresponds to the description or sample

20. *OLRC Report* at 35

21. *Cochran v. McDonald* (1945), 161 P. 2d 305 (Wash. S.C.)

22. *OLRC Report* at 35.

23. *Supra*, note 5.

24. For example, see *Sale of Goods Act*, R.S.N.S. 1967, c. 274; *The Sale of Goods Act*, R.S.O. 1970, c.421

implied where the buyer makes the particular purpose known to the seller so as to induce reliance. Subsection 2 provides that a particular purpose for which the consumer product is required, includes a normal purpose as well as an unusual one. Although this does little more than restate the existing law going back as far as *Wallis v. Russell*,²⁵ it is nevertheless to be welcomed.

Section 4 of the new Bill deals with the crucial implied warranty of merchantability, which is renamed "the warranty of acceptability."

4. There is an implied warranty by the manufacturer and retail seller jointly to the consumer of a consumer product that,
 - (a) the consumer product and its components will perform for a reasonable length of time, having regard to the price and all surrounding circumstances;
 - (b) the consumer product is in such an actual state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist would buy it for all purposes for which the consumer product is normally used without abatement of the price obtainable for such consumer product if in a reasonably sound state or without special terms unless,
 - (i) the retail seller or manufacturer has disclosed to the retail buyer defects in the consumer product or that the consumer products are not suitable for all purposes for which they are normally used, or
 - (ii) the defect should have been apparent to the consumer where he has examined the consumer product prior to purchase, or
 - (iii) it is common knowledge among the consumers that the particular consumer products are not suitable for all such purposes.

This section incorporates Lord Pearce's dissenting opinion on the test for merchantability in *Kendall v. Lillico*:²⁶

[the goods] should be in such an actual state that a buyer, fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in a reasonable sound order and condition and without special terms²⁷

25. [1902] 2 I.R. 585 (C.A.)

26. [1969] 2 A.C. 31 at 118; [1968] 2 All E.R. 444 at 486 (H.L.)

27. Lord Pearce adopted the test as set out by Dixon J. in *Australian Knitting Mills Ltd. v. Grant* (1933), 50 C.L.R. 387 at 413

Although section 4(b) above adopts a great deal of this test verbatim, it gives additional guidance on contentious issues which are of particular importance to the consumer.

First, the condition of merchantability is expanded to require durability for a reasonable period of time, having regard to the price and other circumstances. It is also interesting to note that the price paid by the buyer is given an important role in determining whether the goods are merchantable or "acceptable" in terms of the language of this Bill. This means that, although the goods supplied under the contract may be commercially saleable, they will not be merchantable if they are only saleable at a lower price. The test here is therefore a stricter test than that adopted by the majority in *Kendall* which was later approved in *B.S. Brown and Sons Ltd. v. Craiks*.²⁸ However, it is unlikely that the courts will disregard the logic of the *Brown* case completely. The mere fact that the consumer simply made a bad bargain should not enable him to complain that the product is unmerchantable or "unacceptable".

Secondly, the section advantageously expands the definition of merchantability in *Kendall v. Lillico*²⁹ by extending the warranty of merchantability to "all purposes for which the consumer product is normally used".³⁰ The section also has the virtue of placing the burden on the retailer or manufacturer to warn the consumer that the goods are not fit for all of their regular purposes. It will be recalled that according to the *Kendall* test, goods are still merchantable if suitable for some, or even one, of the purposes for which they are normally used, despite the fact that they may be unfit for other normal purposes. It is also important to note that section 4 does not confine the condition of acceptable quality to sales in which the seller is a dealer in goods of the relevant description but extends it to all sales of consumer products.

Section 8 of the Bill makes disclaimer clauses void:

8. — (1) Any term or acknowledgment whether written or otherwise and whether part of the agreement of sale or not, that purports to negative, exclude, restrict or diminish any warranty under this Act (or the availability or scope of any remedy otherwise

28. [1970] 1 W.L.R. 752; [1970] 1 All E.R. 823 (H.L.) where the House of Lords held that the goods will still be merchantable unless the buyer can only resell them at a *substantially* reduced or "throw-away" price.

29. [1969] 2 A.C. 31; [1968] 2 All E.R. 444.

30. An Act to provide for Warranties in Sale of Consumer Products, Bill 110, Ont. 30th Legislature, 3rd Sess. 1976 s. 4(b)

available for the breach thereof) is void and of no effect and, if a term of a contract, is severable therefrom, and such term or acknowledgment shall not be evidence of circumstances showing an intent that any of such warranties are not to apply.

This reflects the prevalent attitude that the consumer seldom, if ever, bargains from a position of equal strength. At present, consumers may contract out of their common law rights without either understanding what they are giving up, or without being able to acquire a better bargain elsewhere. Not only does Section 8 (1) disallow the exclusion of the warranties imposed by the Act, but it also disallows any restriction on the "availability or scope of any . . . remedy for breach". One concern that arises immediately is that the welcome change brought about by Section 8 will be watered down by Section 4 which allows the retailer or manufacturer to render the warranties inapplicable by disclosing defects in their products. For instance, the disclosure rule will do nothing to advance the regime of free bargaining which this Bill seeks to preserve. The section therefore does not regulate situations where the supplier has a monopoly or where several suppliers have agreed to sell their goods subject to the provisions of an industry-wide standard form contract.³¹ One can only hope that the courts will restrict the effect of the disclosure exception to situations of specific and informative disclosure as distinct from a generalized enumeration of defects in a standard form contract. If not, "disclosure clauses" could quite conceivably open the door to many of the undesirable features of disclaimer clauses which the Bill has taken such pains to outlaw. In this respect, the Bill has clear benefits. For, disclaimer clauses are not only rendered ineffective, but are actually prohibited:

(2) No person shall include in a written agreement anything that purports to be a term or acknowledgment that is void and of no effect under Subsection 1.

This prohibition is reinforced by a penalty in Section 12(1).

31. See *Henningsen v. Bloomfield Motors* (1960), 161 A. 2d 69 (N.J.S.C.) where the plaintiff's wife was injured as a result of a steering defect in a new car he had bought for her. The car was covered by a manufacturer's warranty, in lieu of all others, which was the uniform warranty of the Automobile Manufacturers' Association to which all major auto manufacturers belonged. The Court refused to enforce the manufacturer's attempted disclaimer of the implied warranty of merchantability because it was unreasonably against the public interest in that it was too wide and far reaching.

12. (1) Every person, who, knowingly,
(a) contravenes Subsection 2 of Section 8; or
(b) gives an express warranty that is in contravention of a regulation made under Clause A of Section 11,
is guilty of an offence and on summary conviction is liable to a fine of not more than \$5000.00 or to imprisonment for a term of not more than one year, or to both.

Section 8 (3) forces retail sellers and manufacturers to stand behind representations made by their salesmen:

- (3) Any act or representation by an employee or agent of a retail seller or manufacturer having apparent authority shall be deemed to be an act or representation of the retail seller or manufacturer.

This provision links up with Subsection (2), which jettions the parol evidence rule in relation to consumer transactions:

- (2) In the trial of an issue under Subsection (1), oral evidence respecting the facts necessary to establish an implied or express warranty is admissible notwithstanding that there is a written agreement and notwithstanding that the evidence pertains to a representation or undertaking that is or is not provided for in the agreement.

However, it should be noted that the legislature did not adopt a related recommendation by the OLRC that the retailer should not be able to deny the authority of any employee to vary the terms of the written document by means of a clause in the agreement.³² Reading Sections 8 (1) and 8 (3) together, the Bill seems to achieve this effect anyway; although it would have been better if the draftsman had said it aloud.

What of the damages provided for the breach of these warranties? Section 9 (3) provides as follows: —

- (3) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

This is the measure of damages as set out in sales legislation throughout Canada.³³ The provision reflects the common law contractual measure of damages as laid down in *Hadley v. Baxendale*³⁴ and recently restated in *Koufos v. Czarnikow Ltd.*³⁵ It

32. *OLRC Report* at 30.

33. For example, see Sale of Goods Act, R.S.N.S. 1967, c. 274, s. 51 (2); The Sale of Goods Act, R.S.O. 1970, c. 421, s. 51(2)

34. (1854), 9 Exch. 341; 96 R.R. 742; 23 L.J. Ex. 179

35. [1969] 1 A.C. 350; [1967] 3 All E. R. 686 (H. L.)

is pertinent to observe that the Bill has chosen this limited contractual measure of damages to express the new extracontractual liability which it has created, rather than the comparatively generous tortious measure.³⁶ Moreover, this is entirely appropriate when one considers that the vast majority of defective goods are merely useless rather than dangerous. It should be noted, for example, that the *Uniform Commercial Code* draws this kind of distinction between the tortious and contractual levels of damage.³⁷ Yet, it seems likely that, despite the Bill, courts will continue to apply a generous, tort-like measure of damages to consumer claims involving personal injury both in and out of privity of contract.

III. *The Privity Problem*

The privity aspects of the Bill constitute its most important reform which involves a radical departure from the Canadian approach to products liability. For, it extends the responsibility for breach of the warranties to the manufacturer, notwithstanding the absence of privity of contract with the consumer. The objections to the Canadian privity rule are well known. As was mentioned above, manufacturers are entirely insulated from economic loss claims unless they happen to have a direct contractual relationship with the consumer, and provided that the retailers who have this direct relationship are absent from the jurisdiction, insolvent, or otherwise judgment-proof. The Bill makes the manufacturer jointly liable with the retailer for breach of the implied warranties of description (s.3(2)), merchantability (s.4) and availability of parts and service (s.5). In addition, Section 7 (2) provides that the manufacturer is

36. This is the test as set out in *Huges v Lord Advocate*, [1963] A. C. 837; [1963] 1 All E. R. 705 (H. L.); *The Wagon Mound (No. 2)*, [1967] A.C. 617; [1966] 2 All E.R. 709 (P.C.) (N.S.W.) and *Smith v. Leech Brain & Co.* [1962] 2 Q.B. 405; [1961] 3 All E.R. 1159. That is, all damages, the general type of which is reasonably foreseeable, are recoverable.

37. Section 2-715(2):

Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

It will be noted that the tortious or "generous" measure of damages in (b) is made dependant on the presence or absence of injury, *not* the presence or absence of contractual privity.

also jointly liable with the retailer for any express warranty whether written, published or broadcast.

However, the OLRC also recommended that the manufacturer should be liable for sale by sample, title, and fitness for purpose. Sales by sample are not at all unusual in the carpet industry where the manufacturer supplies the samples to the retailer. Manufacturers should also have to warrant fitness for purpose in two circumstances; (a) where the manufacturer is told by the retailer that the goods are needed by the consumer for a specific purpose, or, (b) where a special purpose is indicated by the manufacturer in his advertisements.³⁸ The Bill does not give effect to these recommendations. For better or for worse, the manufacturer's warranties still do not parallel those of the seller.

The idea of making the retailer and manufacturer jointly and severally liable is a sound recommendation. The consumer ought to have the option of bringing his action against either the seller or manufacturer or both. There is a suggestion resulting from the use of the word "jointly" in Sections 3, 4 and 7 of the Bill that a consumer could not bring an action solely against one or the other, but this problem is remedied by Section 10 (1):

Where by this Act the retail seller and manufacturer give a warranty jointly, the retail seller and all manufacturers of the consumer product are jointly and severally liable under Section 9 but as between themselves, in the absence of any contract, express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be responsible for the creation of the circumstances leading to the creation of the warranty and its breach.

It becomes clear, thus, that the consumer can recover his whole loss from either the manufacturer or the retailer regardless of any contractual allocation of responsibility between the latter two.

A major objection to this Bill is the fact that it still does not give small businessmen or other "non-consumers" along the distributive chain any recourse in the absence of privity of contract.³⁹ Granted, the position may well be complicated by the presence of disclaimers

38. *OLRC Report at 70-71*

39. *Mazetti v. Armour* (1913), 135 P. 633 (Wash. S.C.) The plaintiff was operating a restaurant and bought canned meat, manufactured by the defendant, from a wholesaler. It was served to a patron who became ill. As a result the plaintiff lost business, reputation and profit. The general rule was that there was no liability on the part of manufacturers in these cases except where the consumer was injured by an "inherently" or "imminently" dangerous product. The Court held,

between merchant sellers and buyers. Yet, there is no reason to deprive the courts of an opportunity to adjudicate upon the conscionability or propriety of disclaimers accompanying the goods simply because the plaintiff and defendant are not in contractual privity with one another. Is there any real reason for requiring the plaintiff to be a consumer before he is permitted to overcome the outmoded privity barrier?

IV. *Used Goods*

A buyer of used goods should be entitled to receive goods that a reasonable buyer would expect. The Bill does not permit the exclusion of the statutory warranties in the sale of second hand goods. However, Section 4 does allow the court to consider price and other relevant criteria in defining the extent of the warranty of acceptability. The OLRC agreed that the concept of merchantability was flexible enough to apply to used goods and that it was not necessary to permit the exclusion of statutory warranties and conditions in this category. However, as regards the flexibility of Section 4 (acceptability), it was considered desirable to insert a special provision to this effect in the Bill.⁴⁰

V. *Conclusion*

Products liability specialists will recognize immediately that this Bill was designed to give effect to the dramatic judicial revolt against the privity barrier in the United States which started in the late fifties and still provokes heated controversy and voluminous academic comment today.

Despite the shortcomings of this Canadian proposal, it is ironically a far truer restatement of these exciting judicial events than § 402(a) of the *Restatement of Torts (Second)*, which attempts to preserve the privity barrier in economic loss cases, by restricting its effect to personal injury or property damage.⁴¹

however, that in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages and that such warranty is available *to all who may be damaged by reason of their use in the legitimate channels of trade.*

It is obvious that this plaintiff could not have succeeded anywhere in Canada, even today, *and even under the Ontario Bill.*

40. *OLRC Report* at 39

41. R. Dickerson, *Was Prosser's Folly Also Traynor's?* (1974), 2 *Hofstra L. Rev.* 469