

## The Seller's Liability for Defective Goods at Common Law \*

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In the pages of the McGill Law Journal there took place a year or so ago an interesting discussion between Professor Durnford and Professor Gow with respect to the contractual liability of a seller in Quebec law for defects in the goods sold by him.<sup>1</sup> In view of the interest and obvious importance of the subject, it was suggested to me that I might care today to discuss it from the point of view of the common law and to this suggestion I readily acceded.

It may be helpful if I begin by briefly summarizing the contents of the articles to which I have referred and the nature of the difference of opinion between Professor Durnford and Professor Gow. Article 1522 of the Quebec Civil Code provides that a seller is obliged to warrant the buyer against latent defects (*défauts cachés*) in the thing sold. He is not, however, obliged to warrant the thing against apparent defects (*vice apparents*) which the buyer might have known of himself. What then are "apparent defects" or, to put it in a negative form, which defects are not latent? Professor Durnford submitted<sup>2</sup> that all defects are apparent which a competent and careful buyer would have discovered in the course of a serious and comprehensive inspection of the goods. If he does not possess the requisite skill or knowledge to properly assess the quality of the goods he is purchasing, Professor Durnford maintained, the buyer must engage the services of an expert, or perhaps even series of experts if the goods are of a particularly complicated nature. Professor Durnford was critical of the Court of Appeal decision in *Bourget v. Martel* [1955] Q.B. 659 because it appeared to him to be contrary to established doctrine and the weight of judicial and academic opinion. The only exceptions which are

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<sup>1</sup> See John W. Durnford, "What is an Apparent Defect in the Contract of Sale", (1963-64) 10 McGill L.J. 60; J.J. Gow, "A Comment on the Warranty in Sale against Latent Defects", (1964) 10 McGill L.J. 243; John W. Durnford, "Apparent Defects in Sale revisited", (1964) 10 McGill L.J. 341; J.J. Gow, "A Further Comment on Warranty in Sale", (1964) 11 McGill L.J. 35.

<sup>2</sup> See the summary of his views in 10 McGill L.J. at pp. 341-345 and 357-58.

recognized to the foregoing rules, according to Professor Durnford, are those where the seller is the manufacturer or producer of the goods, in which case the buyer is not obliged to retain expert opinion, or where an express guarantee covering both latent and apparent defects has been given. Professor Durnford insists that this is not only an accurate summary of Quebec law, but he stoutly maintains that it is also a satisfactory law and that it is in the interests of society and the minimizing of litigation that a buyer should be obliged to inspect the goods he is purchasing. Professor Gow's reply to all this was that if Quebec law was as it was represented to be by Professor Durnford, then it was seriously out of step with the character and needs of our mass production consumer oriented society. He was particularly critical of the alleged need, under Quebec law, for an unsophisticated buyer to retain the services of an expert for the discovery of apparent defects, and he intimated that on this and related points the common law was much more favourable to the buyer than the civil law. The gravamen of the dispute, then, between these two scholars is whether, as a matter of sound social and commercial policy, the buyer should always be under a duty to inspect the goods which are offered to him and what the extent of that duty should be. Professor Gow also raised several other interesting issues, but these are not germane to my subject, and I shall not consider them. My own approach to the controversy will be slightly different. I shall first outline the principal common law and statutory rules relating to the liability of a seller for defective goods, and then I shall attempt to compare them with those of the civil law in order to see whether the differences are in fact as important as Professor Gow suggests they are.

### I. The Common Law Position

The modern rules governing this branch of the law of sale of goods developed surprisingly late. The original rule concerning all defects, latent as well as patent, was *caveat emptor*, and as late as 1802<sup>3</sup> an English court affirmed the rule in uncompromising terms. The first major breach occurred in 1815<sup>4</sup> when it was held that in a sale of goods by description by a person dealing in those goods there was an implied condition that the goods would be of merchantable quality. What "merchantable" means we shall see in due course. This rule was subject to the all important proviso that the

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<sup>3</sup> See *Parkinson v. Lee* (1802) 2 East 314.

<sup>4</sup> See *Gardiner v. Gray* (1815) 171 E.R. 46.

buyer had not had an opportunity to inspect the goods before the sale.<sup>5</sup> In 1829<sup>6</sup> a second major breach occurred when it was held that where goods were ordered by description from a manufacturer to be used for a particular purpose, there was an implied condition that the goods would be fit for that purpose. In 1868<sup>7</sup> the implied condition of merchantability was applied in a modified form to a sale by sample and in 1877<sup>8</sup> the formulation of the modern rules was substantially completed when it was held that the seller's liability for a breach of the implied conditions of merchantability and fitness were absolute and did not depend on whether or not the defects were latent or patent or could have been discovered by the use of reasonable care or skill on the seller's part. The law relating to the sale of goods was codified in 1893 in the English Sale of Goods Act of that year,<sup>9</sup> and the Act has now been adopted in most, if not all, parts of the common law world, including all the common law provinces of Canada. As we shall see, however, the Act did more than merely restate the pre-1893 law; Parliament also introduced a number of significant changes, of which the most important is probably the one eliminating any duty on the part of the buyer to examine the goods he intends to purchase. Sections 13 to 16 inclusive of the English Act contain the applicable rules governing defects in the goods sold, and I should now like to examine each of these sections with greater particularity.<sup>10</sup>

1. *The Implied Condition of Description.* Section 13 of the Sale of Goods Act reads as follows:

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient

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<sup>5</sup> The pre-1893 rules concerning inspection are summarized by Mellor J. in his classic judgment in *Jones v. Just* (1868) L.R. 3 Q.B. 197.

<sup>6</sup> *Jones v. Bright* (1829) 130 E.R. 1167.

<sup>7</sup> *Mody v. Gregson* (1868) L.R. 4 Ex. 49.

<sup>8</sup> *Randall v. Newson* (1877) 2 Q.B.D. 102.

<sup>9</sup> 56 & 57 Vic. c. 71.

<sup>10</sup> The leading general English and American works on the sale of goods are Judah Philip Benjamin, *A Treatise on the Law of Personal Property*, 8th ed. (London, 1950; with Supplements); *Chalmers' Sale of Goods Act, 1893*, 14th ed. (London, 1963); and Samuel Williston, *The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act*, Rev. ed., 4 vols. (New York, 1948; with cumulative supplements). Professor Williston drafted the Uniform Sales Act in 1902 at the request of the Commissioners on Uniform State Laws, and this Act was adopted in some thirty odd states. It has now been replaced by Article 2 of the Uniform Commercial Code. The Code is now in force in some 38 states. The Uniform Sales Act closely followed the British Act; Article 2 differs from both in numerous respects.

that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Typical examples of cases where this section has been applied are where used goods have been delivered instead of new goods,<sup>11</sup> Giant Sanfoin seed instead of Common English seed,<sup>12</sup> an asphalt plant with a capacity of 3600 lbs. instead of the 4,000 pounds specified,<sup>13</sup> and so forth. You may ask, what have these examples got to do with defects? Surely they illustrate situations in which the buyer has totally failed to perform his express contractual obligations? The answer is twofold. The first is that historically the courts never clearly distinguished the implied condition of merchantability from the implied condition of description. The terms were frequently used interchangeably.<sup>14</sup> The second reason is that there is no simple line of demarcation between goods which are defective and goods which fail to correspond with their contractual description. A "description" of goods not merely identifies and distinguishes them from others but also describes their essential attributes. The term automobile, for example, describes a four-wheeled self-propelled vehicle used for carrying private passengers. Suppose therefore that a used car dealer supplies an object which looks like an automobile but which is without an engine, or with an engine so defective that the vehicle will not move. The dealer in such a case will not have fulfilled his undertaking to supply a car; he has merely provided a simulation of the genuine article.<sup>15</sup> In recent years the English courts<sup>16</sup> and, increasingly, the Canadian courts<sup>17</sup> have used this line of reasoning with great effectiveness in order to avoid objectionable disclaimer clauses. A disclaimer clause is a clause in which the seller purports to exclude all or some of his implied statutory obligations. It is well settled in England that a disclaimer clause,

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<sup>11</sup> *Andrews Bros., Ltd. v. Singer & Co., Ltd.* [1934] 1 K.B. 17 (C.A.). Cf. *MacHardy v. Alma Motors Ltd.* (1963), 38 D.L.R. (2d) 761 (N.S.).

<sup>12</sup> *Wallis, Son and Wells v. Pratt* [1911] A.C. 394.

<sup>13</sup> *R.W. Heron Paving Ltd. v. Dilworth Equipment Ltd.* (1963) 36 D.L.R. (2d) 462 (Ont.), applying *Schofield v. Emerson Brantingham Implement Co.* (1918), 57 S.C.R. 203.

<sup>14</sup> See, for example, the judgment of Brett L.J. in *Randall v. Newson*, supra n. 8.

<sup>15</sup> Cf. *Karsales (Harrow) v. Wallis* [1956] 2 All E.R. 866 (C.A.).

<sup>16</sup> See, for example, the case cited in the previous note; *Ycoman Credit, Ltd. v. Apps* [1962] 2 Q.B. 508; and cf. *Smeaton Hanscomb v. Sassoon I. Setty* [1953] 2 All E.R. 1471.

<sup>17</sup> See, e.g., *Pippy v. RCA Victor Co. Ltd.* (1965) 49 D.L.R. (2d) 523 (N.S.); *R.W. Heron Paving Ltd. v. Dilworth Equipment* (1963) 36 D.L.R. (2d) 462 (Ont.); *Knowles v. Anchorage Holdings Co. Ltd.* (1963) 43 D.L.R. (2d) 300 (B.C.). Cf. *Hart-Parr Co. v. Jones* [1917] 2 W.W.R. 888 (Sask.).

however widely drawn, cannot excuse a seller from performing his essential undertaking.<sup>18</sup> A promise to deliver goods of a given description is such an undertaking. It follows from all of this that if the defects are sufficiently serious a buyer will have breached section 13, quite apart from any other implied obligation which he may have assumed. It will be noted that section 13 says nothing about inspection,<sup>19</sup> but it is settled law that a seller is not excused from delivering goods corresponding to their contractual description simply because the buyer has seen the goods before he purchased them.<sup>20</sup>

2. *The Implied Condition of Merchantability.*<sup>21</sup> The next implied condition which I should like to consider is the implied condition of merchantability. It is contained in Section 14(2) of the Act, which reads as follows:

14(2): Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

It will be convenient for me to deal with the subsection in several parts. First, when does the implied condition arise? The answer is when the goods are bought (a) by description, and (b) from a seller dealing in goods of that description. *Prima facie* the term "by description" might appear to exclude the sale of specific goods, that is, goods which are agreed upon and identified at the time of the contract. If this were correct, the buyer in a retail store, for example, who selects his own goods would never be entitled to rely upon the implied condition of merchantability. Fortunately, the great majority of Anglo-Canadian<sup>22</sup> and American<sup>23</sup> courts have

<sup>18</sup> See generally, Guest (1961), 77 L.Q.R. 98; Reynolds (1963), 79 L.Q.R. 534; and Coote, *Exception Clauses* (1964).

<sup>19</sup> Though it does say that in a sale by sample the bulk must correspond with the description of the goods as well as with the sample.

<sup>20</sup> Presumably however he cannot complain if he appreciates that the goods have been misdescribed and still proceeds to purchase them.

<sup>21</sup> See generally, Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can. Bar Rev. 446 (an excellent article).

<sup>22</sup> See e.g., *Varley v. Whipp* [1900] 1 Q.B. 513; *Morelli v. Fitch & Gibbons* [1928] 2 K.B. 636; *Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85 (P.C.); Benjamin, op. cit., pp. 609-627. *Godsoe v. Beatty* (1959) 19 D.L.R. (2d) 265 (N.B. App. Div.) appears to have been wrongly decided on this point.

<sup>23</sup> See e.g., *Sams v. EzyWay Foodliner Co.* (1961) 170 A 2d 160 (Me); *Mead v. Coca Cola Bottling Co.* (1952), 108 N.E. 2d 757 (Mass.). Cf. *Torpey v. Red Owl Stores* (1955) 228 F. 2d 117; Williston, op. cit., §§ 224, 225.

not so restricted the meaning of sale "by description", and the only time in effect when goods will be deemed not to have been sold by description is when they are sold "such as they are" or as "these goods" — in short, without any accompanying verbal designation.<sup>24</sup> The second requirement is that the seller must be in the business of supplying goods of the description sold; a private seller is therefore, as he was at common law,<sup>25</sup> excluded, the reason for the exclusion being that the buyer in such a case has no reason to expect merchantable goods from one who, *ex hypothesi*, is not in the business of supplying such goods.

What, then, is the meaning of "merchantable"? Two frequently cited definitions are the following:

"The phrase in section 14(2) is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article, whether he buys for his own use or in order to sell again";<sup>26</sup>

"Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use".<sup>27</sup>

These two definitions by no means comprehend all the possible meanings of merchantability,<sup>28</sup> nor are they entirely consistent with one another, but they do bring out the two essential features of merchantability, namely, that the goods must have exchange value or, in other words, be saleable in the market in their then condition, and that they must be reasonably fit for the general purpose for which such goods are used. Although these two conditions frequently coincide, they are not identical. Thus a new car which is badly scratched may be perfectly roadworthy but it will not be saleable as a new car. A striking example of the difference is afforded by a Saskatchewan decision, *International Business Machines Corporation v. Shcherban*,<sup>29</sup> in which it was held that the buyer was entitled to reject a computing scale costing \$294 because of a broken glass dial, even though the glass could have been replaced for about 30

<sup>24</sup> *Grant's case*, supra n. 22, per L. Wright at p. 100.

<sup>25</sup> *La Neuville v. Nourse* (1813) 170 E.R. 1407; *Burnby v. Bollett* (1847) 153 E.R. 1548.

<sup>26</sup> *Bristol Tramways Co. v. Fiat Motors Ltd.* [1910] 2 K.B. 831 at 841. This definition must be read subject to Lord Wright's observation in *Grant's case* that goods are not merchantable because they look all right.

<sup>27</sup> *Grant's case*, supra n. 22, at p. 100.

<sup>28</sup> For an exhaustive discussion of the term, see Prosser, supra n. 21, p. 450 et seq.

<sup>29</sup> [1925] 1 D.L.R. 864 (C.A.).

cents. This decision also illustrates that the defect which may make the goods unmerchantable need not be a very remarkable one, so long as it is still sufficiently significant to attract the disapproval of a reasonable buyer.<sup>30</sup>

Now let us look at some other aspects of the implied condition of merchantability. The common law has never adopted the doctrine of "price worthiness" in the sense in which it is apparently used in some of the civil law systems, and price is not a governing consideration in determining whether or not the goods are of acceptable quality.<sup>31</sup> The buyer of a new car at an end of season sale is entitled to expect the same product as one who pays the normal price. However, this does not mean that price is unimportant. To use Prosser's example,<sup>32</sup> a woman who purchases jewellery at Woolworth's for a few cents cannot expect an article of the same quality or craftsmanship as the woman who purchases jewellery at Tiffany's for a few thousand dollars; but she is still entitled to expect that the cheaper jewellery will not fall apart as soon as she wears it.

To what extent does the implied condition of merchantability apply in the case of used goods? It is by no means easy to say. Section 14(2) does not distinguish between new and used goods, but there are dicta in various Canadian decisions<sup>33</sup> which suggest that the condition cannot be imported at all in the sale of used goods. The reason is not clearly stated,<sup>34</sup> but it appears to be that the fact that the goods are sold as used implies that they may be defective or that they may develop defects at any time and that therefore the buyer cannot expect a sound article. Clearly this reasoning is bad; the

<sup>30</sup> For example, a single used screw or bolt in a new machine was held to be a trifling defect in *Everedy Machine Co. v. Hazle Maid* (1939) 6 A. 2d 505. Cf. *Jackson v. Rotax Motor & Cycle Co.* [1910] 2 K.B. 937, which held that new goods are not merchantable simply because the defects can be rectified at trifling cost. *Quære* whether Article 1522 of the Code is as favourable to the buyer. The prevailing opinion appears to be that "defects which only diminish the embellishment of the thing are not taken into consideration". Planiol & Ripert, *Treatise on the Civil Law*, 11th ed., Vol. 2, § 1463 (English transl., Louisiana State Institute); Faribault, *Traité de Droit Civil du Québec*, Vol. XI, pp. 289, 294.

<sup>31</sup> See, for example, *Parkinson v. Lee* (1802) 102 E.R. 389.

<sup>32</sup> *Op. cit.*, p. 466.

<sup>33</sup> See, for example, *Godsoe v. Beatty* (1959) 19 D.L.R. (2d) 265 (N.B. App. Div.); *Presley v. MacDonald* (1963) 38 D.L.R. (2d) 237 (Ont.).

<sup>34</sup> The New Brunswick court in *Godsoe's* case relied on a passage in the *Corpus Juris Secundum*, which is hardly a reliable guide as to Canadian law. It is even doubtful whether the passage accurately represents American law. See Prosser, *op. cit.*, at p. 473.

buyer of used goods will not expect an article of the same quality as new goods but he is entitled to expect that the goods have been kept in a state of proper repair and that there will be a reasonable correlation between the age and amount of use of the goods and their condition. "Used" goods and "defective" goods are not interchangeable terms. Surprisingly there was no English decision on this important question until earlier this year, when it was discussed in *Bartlett v. Sidney Marcus Ltd.*<sup>35</sup> The Court of Appeal there held that, in the sale of a used automobile, the buyer was only entitled to expect that the car is "in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car".<sup>36</sup> This test is less generous than the one which I have suggested as being the appropriate one, and there are difficulties about the way the court applied it in the case before them, but it does at least repudiate the Canadian notion that the buyer is completely at the mercy of the dealer. You will also notice, however, that the general obscurity which still surrounds the subject makes the Anglo-Canadian law look substantially less attractive than the somewhat optimistic picture which Professor Gow drew of it in his criticism of Quebec law.<sup>37</sup>

Finally, we must look at the important issue of inspection. Here fortunately the law is clear and much more favourable to the buyer. Unless the seller insists on his doing so, the buyer is not obliged to examine the goods before the purchase at all and even less is he obliged to retain the services of an expert.<sup>38</sup> If he does inspect the goods he is not obliged to make a microscopic examination, to dismantle the goods, or to subject them to such tests as the ingenuity of a suspicious mind may suggest.<sup>39</sup> He is apparently free to determine for himself how extensive an examination he wishes to con-

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<sup>35</sup> [1965] 1 W.L.R. 1013.

<sup>36</sup> *Ibid.*, per Denning L.J. at p. 1016.

<sup>37</sup> The paucity of reasoned decisions is probably explained by the ubiquitous use of disclaimer clauses in the sale of used vehicles. Even *Bartlett's* case, *supra* n. 35, turned very much on its special facts since there the buyer's attention had been drawn by the seller to the existence of some sort of defect and he had been given the option between a reduction in price or having the defect repaired by the seller. He chose the former. His real complaint was that the character of the defect had been misrepresented to him. His reliance on the implied conditions of fitness and merchantability was an auxiliary argument.

<sup>38</sup> See the proviso to section 14(2). The Seller's right to insist on the buyer examining the goods flows from ordinary contract principles.

<sup>39</sup> *Mody v. Gregson* (1868) L.R. 4 Ex. 49, esp. at p. 53 et seq; *James Drummond & Sons v. Van Ingen* (1887) 12 A.C. 284 at 297. These leading cases actually involved sales by sample, but they are generally regarded as also laying down the applicable standard under s. 14(2).

duct, for the proviso to section 14(2) expressly says that he will only be deemed to have notice of such defects "which *such* examination ought to have revealed"<sup>40</sup> — not, it will be noticed, such defects as a comprehensive examination would have revealed.<sup>41</sup> In all these respects, the section differs fundamentally from the law which obtained at common law before 1893<sup>42</sup> and from the law as Professor Durnford maintains it is in Quebec today.

### 3. Implied Condition of Fitness for Particular Purpose.

The third great condition implied in the buyer's favour is contained in Section 14(1) of the Act, which reads:

14(1): Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

Time does not permit me to examine the elements of this condition at length. Suffice it to say that very little evidence is required to show that a buyer is relying on the skill and knowledge of the seller. It has been held, for example, that the presumption arises in every retail sale.<sup>43</sup> Nor is the presumption excluded because the buyer possesses some skill and knowledge of his own or even has the benefit of expert advice.<sup>44</sup> Finally, it should be noted that the "particular purpose" referred to in the subsection does not mean a "special" purpose. It may in fact be the purpose for which the goods are normally used.<sup>45</sup>

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<sup>40</sup> Italics added by the writer.

<sup>41</sup> It is of course possible for the parties to contract on the footing that there has been a full examination by the buyer, even though he has in fact conducted only a cursory examination, and this is probably the best explanation of *Thornett & Fehr v. Beers & Son* [1919] 1 K.B. 486. It must be confessed, however, that the stringent language of the proviso can bear hardly on the seller, especially where he is not present to see how thorough an examination of his goods the buyer conducted.

<sup>42</sup> See *supra*, p. 185.

<sup>43</sup> *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85 at 99, *folld*, *inter alia*, in *Godley v. Perry* [1960] 1 All E.R. 36 and *Bucklely v. Lever Bros. Ltd.* [1953] 4 D.L.R. 16 (Ont.).

<sup>44</sup> *Cammell Laird & Co. v. Manganese Bronze & Brass Co.* [1934] A.C. 402; *Hayes v. City of Regina* [1959] S.C.R. 801.

<sup>45</sup> *Grant's case*, *supra* n. 43, at p. 99; *Priest v. Last* [1903] 2 K.B. 148 (C.A.).

In practice the implied conditions of merchantability and fitness frequently overlap, but the two conditions are by no means identical. Thus the condition of merchantability applies to sale value as well as to use value. It includes sales by trade or patent name as well as by general description, and it is not necessary for the buyer to show that he communicated to the seller the purpose for which he intended to use the goods or that he relied on the seller's skill or knowledge. On the other hand, he is not entitled to expect that the goods will be fit for any particular purpose and, if he has inspected them, he takes them with such defects as his examination ought to have revealed. Generally speaking, however, it is correct to say that the implied condition of merchantability is the more powerful and stronger of the two.<sup>46</sup>

#### 4. Conditions Implied in Sales by Sample.

I turn finally to the conditions which are implied in a sale by sample. This subject is covered in Section 15 of the Act, which provides that:

15(2): In the case of a contract for sale by sample —

- (a) There is an implied condition that the bulk shall correspond with the sample in quality:
- (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
- (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Here, it will be noted, is the only occasion on which the statute imposes an obligation on the buyer to inspect and not merely a privilege to do so, and even then the examination which must be undertaken falls far short of the onus which generally rests on the buyer under Quebec law. In the words of Lord MacNaghten, rendered in a leading case,<sup>47</sup>

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of a class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by

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<sup>46</sup> Denning, M.R., in *Bartlett's case*, supra n. 35, expressed the opposite view, but he was limiting his comparison to the question of fitness.

<sup>47</sup> *Drummond v. Van Ingen* (1887) 12 A.C. 284 at 297.

merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country."

Subject, then, to such defects as a reasonable examination ought to have revealed, the buyer is still entitled to obtain merchantable goods and the goods must also conform to the description under which they were sold.

This concludes my summary of the principal provisions in the Sale of Goods Act relating to the seller's liability for defects, but in order to present a balanced picture of the common law I must briefly refer to certain other matters.

What are the remedies of an aggrieved buyer for breach of the above conditions? The answer is that it depends partly on the nature of the breach involved and in part on whether or not the goods were specific goods at the time of the sale. The Sale of Goods Act classifies the seller's obligation as being either "conditions" or "warranties". A "condition" constitutes an essential term of the contract<sup>48</sup> and, in the event of a breach, entitles the buyer to reject the goods and to sue for damages (if he has suffered any) or to retain the goods and again to sue for damages.<sup>49</sup> The right to reject, however, must be exercised promptly and dates not from the time when the defects were first discovered but from the time the goods are delivered.<sup>50</sup> The common law rule is therefore more stringent than the interpretation which has been placed on the "reasonable diligence" rule in Article 1530 of the Civil Code.<sup>51</sup> Moreover, the right to reject apparently only exists in the case of unascertained goods; it does not apply to a sale of specific goods, that is, goods that are identified

<sup>48</sup> The Sale of Goods Act also uses it in other senses, though the Act nowhere defines the term. See further, *Wallis v. Pratt* [1910] 2 K.B. 1003, per Fletcher Moulton, L.J., and Chalmers, op. cit., Appendix II, Note A.

<sup>49</sup> SGA, ss. 11(1)(b), 51-52; Benjamin, op. cit., p. 953 et seq; Chalmers, pp. 149-161.

<sup>50</sup> SGA, ss. 34-5; Chalmers, op. cit., pp. 120-23.

<sup>51</sup> See Durnford, "The Redhibitory Action and the 'Reasonable Diligence' of Article 1530 C.C.", (1963) 9 McGill L.J. 16, esp. at p. 25. Note, however, that the Quebec law is less favourable to the buyer than the common law, insofar as under Quebec law the buyer must commence action promptly after discovering the defect. At common law the buyer has the usual period of limitations appropriate to actions in simple contract in which to bring his suit, viz. 6 years. Indeed, if he is merely resisting the seller's claim for the price he need bring no action at all. His rightful rejection of the goods *ipso facto* rescinds the sale.

and agreed upon at the time of the contract.<sup>52</sup> In such a case the buyer may have to content himself with a claim in damages.<sup>53</sup>

A "warranty" is a lesser or collateral term of the contract and a breach of it only entitles the buyer to claim damages — never to reject the goods.<sup>54</sup> However, the implied terms in Sections 13 to 15 of the Sale of Goods Act are all conditions. Where the buyer maintains an action for damages — whether it arises out of breach of a condition or breach of warranty matters not — his claim is not limited to the return of the purchase price or to the diminution in value of the goods by reason of their defective state. He is also entitled to claim "consequential damages", by which is meant all damages arising naturally out of the seller's breach of contract and which were reasonably foreseeable by him.<sup>55</sup> Here then is another striking difference from the Quebec rule<sup>56</sup> and one which enormously enlarges the scope of the seller's liability. In *Buckley v. Lever Brothers*,<sup>57</sup> for example the defendant sold the plaintiff some plastic clothes pins for fifty cents and a couple of box tops from the defendant's soap products. One of the pins contained a latent defect; the pin broke and severely injured one of the plaintiff's eyes. The Ontario court held that there had been a breach of the implied conditions of merchantability and fitness and that the plaintiff was therefore entitled to recover damages in respect of her personal injuries. The defendants were not the manufacturers of the pins and the evidence showed that about five hundred million of them had been sold without mishap.

At common law it was always possible for the seller to exclude any implied conditions or warranties, and this right is preserved in the Act.<sup>58</sup> However, the phenomenon of *contrats d'adhésion*, the frequent unconscionability of such disclaimer clauses, and the un-

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<sup>52</sup> SGA, ss. 11(1) (c) and 18, Rule 1.

<sup>53</sup> *Home Gas Ltd. v. Streeter* [1953] 2 D.L.R. 843 (Sask. C.A.). American law does not impose this limitation. The limitation is an unjust one and a Divisional Court, in *Varley v. Whipp* [1900] 1 Q.B. 513, held that it does not apply where the goods which are supplied do not correspond with the description under which they were sold. The decision has been much criticised.

<sup>54</sup> SGA, ss. 52 & 62, definition of "warranty"; Chalmers, *op. cit.*, Append. II, Note A, p. 244 et seq. American law does not distinguish between warranties and conditions, but treats them alike. See UCC 2-601, -02, -06, -08, -713-5.

<sup>55</sup> SGA, s. 53(2), the wording of which differs slightly from the one used in the text. This rule is also frequently referred to as the 'first rule in *Hadley v. Baxendale*' (1854), 9 Ex. 341, after the case in which the rules governing damages for breach of contract were authoritatively laid down.

<sup>56</sup> C.C. 1526, 1528. See also *post*, p. 197.

<sup>57</sup> [1953] 4 D.L.R. 16.

<sup>58</sup> Section 55.

equal bargaining strength of sellers and consumers has caused the common law courts and legislatures alike to cast an increasingly jaundiced eye on their use.<sup>59</sup> So far as the Anglo-Canadian courts are concerned, disclaimer clauses are usually interpreted very narrowly and the courts are astute in finding loopholes in them. Where the interpretative method fails, a court may be willing to invoke the doctrine of the fundamental term of a contract, to which I referred to earlier.<sup>60</sup> The American courts have gone a step further and, since the now celebrated judgment of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors Inc.*<sup>61</sup> in 1960, have frequently held disclaimer clauses to be contrary to public policy. Section 2-302 of the American Uniform Commercial Code now also empowers the state courts to refuse to enforce any contract, or any clause in any contract, which the court finds to be unconscionable at the time it was made. Legislative developments of a similar but more limited character have also occurred in other parts of the common law world. The English Hire-Purchase Act of 1938<sup>62</sup> implied certain conditions and warranties concerning the goods in every hirepurchase agreement which came within the Act,<sup>63</sup> and, save in the case of used goods, these could not be excluded at all or excluded only if the seller or owner could show that before the contract was made the provision was brought to the attention of the hirer and its effect made clear to him.<sup>64</sup> These provisions have been widely copied in other parts of the Commonwealth.<sup>65</sup> In Canada, however, only Saskatchewan has so far adopted them,<sup>66</sup> although the recently published report of the

<sup>59</sup> See generally, Brian Coote, *Exception Clauses* (London, 1964). For an admirable comparative law treatment of the problem, see Wilson, "Freedom of Contract and Adhesion Contracts", (1965) 14 I. & C.L.Q. 172.

<sup>60</sup> *Supra*, p. ....

<sup>61</sup> (1960) 161 A. 2d 69.

<sup>62</sup> 1 & 2 Geo. 6, c. 53.

<sup>63</sup> *Ibid.*, s. 8. The original limits were £50 in the case of motor vehicles, £500 in the case of livestock, and £100 in every other case. The limits were substantially raised in 1954 and 1964. The current Hire-Purchase Act 1965, s. 2, applies, generally speaking, to all hire-purchase, conditional sale, and credit-sale agreements in which the hire-purchase price or total purchase price does not exceed £2,000 (approx. \$6,000).

<sup>64</sup> These provisions were enlarged in 1964 as a result of the recommendations in the Final Report of the (Molony) Committee on Consumer Protection (Cmd. 1781, July 1962). See now the Hire-Purchase Act 1965, ss. 17-18. Section 18 is reproduced below, at pp. 186-187.

<sup>65</sup> As, for example, in the Australian Uniform Hire-Purchase Bill, clause 5 (1959). See Ziegel, "New South Wales Hire-Purchase Legislation", (1962) 25 Mod. Law Rev. 687.

<sup>66</sup> See The Conditional Sales Act, Stat. Sask. 1957, c. 97, s. 19. See also The Agricultural Machinery Act, Stat. Sask. 1958, c. 91, s. 19 & Sch. A.

Ontario Select Committee on Consumer Credit<sup>67</sup> contains recommendations for the adoption of similar legislation in Ontario. In 1962 the Molony Committee on Consumer Credit in England also recommended<sup>68</sup> that the English Sale of Goods Act be amended so as to prohibit the exclusion of the implied conditions and warranties in that Act in the same way as their exclusion was then prohibited in the Hire-Purchase Act. Finally reference should be made to the fact that a substantial number of provincial Motor Vehicles Acts contain a provision making it an offence for dealers in vehicles to sell a vehicle that is unroadworthy.<sup>69</sup> I mention these legislative developments because, it seems to me, they have a direct bearing on the controversy between Professor Durnford and Professor Gow.

## II. The Quebec Civil Law Position Compared

I have said all I have time to say about the common law rules and I should now like to attempt a brief comparison between them and the civil law rules:

1. The implied warranty in Article 1522 of the Code applies to sales by all persons; whereas the implied conditions of merchantability and fitness in the English Act are limited to sales by persons dealing in goods of the description sold.
2. The implied warranty in Article 1522 is limited to latent defects; the common law rules are not so limited. On the other hand, the Anglo-Canadian courts have substantially limited the scope of the implied condition of merchantability in the case of used goods, although the precise extent of the limitation is not yet settled.<sup>70</sup>
3. By virtue of Article 1523, the buyer is obliged to examine the goods — at any rate where they are “in his presence”;<sup>71</sup> and he is deemed to buy the goods with such defects as a serious examination by an alert buyer would have revealed. Moreover, if he lacks the necessary skill and knowledge he must retain expert

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<sup>67</sup> June 10, 1965, Sessional Paper (No. 85), §§ 138-151.

<sup>68</sup> *Supra* n. 64, ch. 12. See further, Ziegel, “Report on Consumer Protection”, (1962) 106 Sol. Jour. 801, 824, 847, 869.

<sup>69</sup> See, for example, Stat. Sask. 1957, c. 93, s. 125. The common law courts are, however, divided as to whether or not a breach of such provisions confers a civil remedy on the buyer. Cf. *Schmidt v. International Harvester Co.* (1962) 38 W.W.R. 180 (Alta.) with *Presley v. MacDonald* (1963) 38 D.L.R. (2d) 237 (Ont.).

<sup>70</sup> *Supra*, pp. 189-190 and *infra*, pp. 200-201.

<sup>71</sup> See Durnford, 10 McGill L.J. 60 at 66, and cf. Faribault, *op. cit.*, pp. 277-78.

advice, unless the goods are sold to him by a manufacturer or, possibly by a trader, where the trader has done something to the and his examination need not be a through one nor is he obliged to examine the goods at all, except in the case of a sale by sample, and his examination need not be a through one nor is he obliged to engage expert advice.

4. So far as the remedies of an aggrieved buyer are concerned, Quebec law does not distinguish between "conditions" and warranties". Under Quebec law, the buyer is obliged to bring his redhibitory action with reasonable diligence, which apparently means within a reasonable time after the defect comes to light.<sup>72</sup> The common law, on the other hand, only allows rescission for breach of condition and only then if the rescission occurs promptly after delivery of the goods. However, all the important implied terms amount to conditions.
5. The civil law only entitles the buyer to claim the return of the purchase price or a reduction in the price,<sup>74</sup> but this is subject to an important exception where the vendor knows or is deemed to know of the defects.<sup>75</sup> He is apparently deemed to know where he is the manufacturer or, *quaere*, a specialized dealer in the goods.<sup>76</sup> In such cases he is apparently responsible for consequential damages. At common law, the buyer can always recover such consequential damages as were reasonably foreseeable, whether or not the seller knows or is deemed to have known of the defects.
6. Under Quebec law the seller is entitled to exclude the legal warranties unless he was guilty of *dol*.<sup>77</sup> He is deemed to be guilty of *dol* if he knew of the defects, or, as a dealer in the goods, ought to have been aware of them.<sup>78</sup> At common law the seller *prima facie* has the same right of exclusion, but he cannot exclude his obligation to comply with the main undertaking of the contract. This position is now reinforced by statutory provisions in an increasing number of common law jurisdictions.

From this all too superficial comparison I draw the conclusion that the main areas of difference between our two legal systems, so

<sup>72</sup> See Durnford, 10 McGill L.J. 341 at 358.

<sup>73</sup> *Supra*, pp. 193-194.

<sup>74</sup> C.C. 1526.

<sup>75</sup> C.C. 1527.

<sup>76</sup> Faribault, *op. cit.*, s. 321, pp. 294-95.

<sup>77</sup> C.C. 1524.

<sup>78</sup> *Touchette v. Pizzagalli* [1938] S.C.R. 433, esp. at pp. 438-39; Faribault, *op. cit.*, pp. 288-89.

far as commercial sales are concerned, lie in the quantum of damages recoverable by an aggrieved buyer and with respect to the duty to inspect.

Time does not permit me to examine the first difference in any detail, though it is of great importance, and I will restrict myself to a few comments. The civil law appears to limit the buyer's damages, in the absence of actual or constructive fault on the seller's part, because it conceives the buyer's action as resembling an action for unjust enrichment. The buyer has not received his money's worth and therefore it is unjust that the seller should be able to retain the purchase price or be able to retain all of it. The common law, on the other hand, emphasizes the *promissory* character of the transaction. The seller impliedly promised to deliver merchantable goods. He did not do so and in consequence the buyer (let us assume) suffered direct and consequential damages — damages that are directly attributable to the seller's breach. He must therefore make good the breach by compensating the buyer.

From the practical point of view I think the common law rule better serves the needs of modern society.<sup>79</sup> Take, for example, the English case of *Godley v. Perry*,<sup>80</sup> whose facts were strikingly similar to those in the Ontario decision in *Buckley v. Lever Bros.*<sup>81</sup> to which I referred to earlier. A small boy walked into a newsagent's store and purchased a plastic catapult for a few pence. The store had purchased the toy from a wholesaler, who in turn had purchased it from an importer and he had bought it from the Hong Kong manufacturers. The catapult contained a latent defect and when the boy tried to use it it broke and either a fragment of the catapult or the stone which he was trying to eject struck one of his eyes and he lost the sight of it. The boy, through his father, successfully sued the newsagent for breach of the implied conditions of fitness and merchantability and recovered general damages. Under Quebec law, if I understand it correctly, he would not have been able to do so since the newsagent neither knew of the latent defect nor could he reasonably have been expected to know of it.<sup>82</sup> How unfair there-

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<sup>79</sup> For a contrary view, see Waite, "Retail Responsibility and Judicial Law Making", (1936) 34 Mich. L. Rev. 494.

<sup>80</sup> [1960] 1 All E.R. 36.

<sup>81</sup> [1953] 4 D.L.R. 16.

<sup>82</sup> Cf. *Blais v. United Auto Parts Ltd.* [1944] B.R. 139, cited in Faribault, op. cit., pp. 294-95. HELD, a distributor of antifreeze who dealt in the product for the first time after he had received favourable reports about it from other users could not be deemed to have known of its alleged defects, even assuming their existence had been proved.

fore, you may say, that he should have been held liable in damages amounting to many times the price of the toy. My answer is there was no unfairness.

In the first place, the newsagent joined the wholesaler as a 'third party'<sup>83</sup> to the action and obtained judgment over against him. He was therefore not left out of pocket after all. Secondly, the newsagent, had he thought it prudent, could have covered himself against this type of contingency by some form of insurance. Thirdly — and I regard this as the governing consideration — it would have been very difficult for the boy to recover his damages from any one but the newsagent. He could not have sued the wholesaler, the importer, or the manufacturer in contract because there was no contractual relationship between him and them.<sup>84</sup> Nor could he have sued the first two for the tort of negligence<sup>85</sup> because there was no evidence of any negligence on their part.<sup>86</sup> Whether or not the manufacturer was negligent is not clear, but even if he was he carried on business outside the United Kingdom and it would have been a long and tortuous process to sue him and to prove that he was negligent and then to enforce the judgment outside the jurisdiction. All these difficulties were avoided here by the common law rule regarding the scope of a seller's liability. True, it does mean that when the chain of third party actions reaches the manufacturer he may himself be liable in contract to *his* immediate buyer even though he was not negligent, but this should cause no misgivings since he can easily insure himself against such risks or treat it as one of his overheads.

Let me turn now to the question of inspection. Here, it seems to me, the difference between the common law and the Quebec law may be more apparent than real. In the case of new goods, the occasions when the buyer will have an opportunity to inspect them before delivery are likely to be in a minority, so that presumably Article 1523 will not apply in such cases in any event. To the extent

<sup>83</sup> This is a proceeding open to a defendant who claims to be entitled to contribution or indemnity from another person in the event of the plaintiff obtaining judgment against him. See *Rules of the Supreme Court*, Order 16; *The Annual Practice 1965*, Vol. I, p. 321. The common law Provinces have generally adopted similar rules.

<sup>84</sup> Cf. *Johnson v. Relland Motors* [1955] 2 D.L.R. 418 (Sask. C.A.).

<sup>85</sup> Under the doctrine in *Donoghue v. Stevenson* [1932] A.C. 562.

<sup>86</sup> The far reaching advances made in recent years by the American courts in imposing strict liability for defective goods on manufacturers, distributors and retailers towards users and consumers of their products, without regard to any contractual links, has no counterpart in the Anglo-Canadian common law jurisprudence. See Prosser, *Handbook of the Law of Torts*, 3rd ed., § 97.

that inspection is possible, and therefore mandatory, I assume that an enlightened court would not require the buyer to conduct anything more than the most cursory examination. The apparent absence of contrary decisions would appear to support this conclusion, although I must confess my ignorance of the Quebec law on this question.<sup>87</sup> I do however strongly dissent from Professor Durnford's view that the widespread use of manufacturer's guarantees provide adequate protection for the buyer against defective goods. Most guarantees are so limited in character as to be almost useless.<sup>88</sup> They also frequently purport to exclude the buyer's common law (or civil law) remedies against the seller and manufacturer (where the two differ), and from this point of view are doubly objectionable.

So far as used goods are concerned, the restrictive application given by the English Court of Appeal in *Bartlett v. Sydney Marcus Ltd.*<sup>89</sup> to the implied conditions of fitness and merchantability makes it almost imperative for the buyer to examine the goods beforehand for his own protection or, preferably, to have them examined by an expert. From the practical point of view, therefore, the common law rule is hardly more favourable to the buyer than the civil law rule. In my opinion the position under both systems is unsatisfactory. The civil law rule is unsatisfactory because it presupposes that the buyer is able to look after his own interests. This may have been true in Roman times and may still be true in dealings between merchants, but it is pathetically untrue of the modern consumer who is constantly assailed on all sides by a barrage of seductive sales talk urging him to buy this or that on easy credit terms. The common law rule is unsatisfactory because it assumes that all that a reasonable buyer expects, and is entitled to expect, when he buys used

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<sup>87</sup> Professor Durnford does not deal with the question in his articles, and in the short time at my disposal I have not found any reference to it in the other Quebec sources which I have consulted.

<sup>88</sup> "...The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, and to decide for himself whether they are reasonably fit for the designed purpose... But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability. To call it an 'equivocal' agreement, as the Minnesota Supreme Court did, is the least that can be said of it". *Henningsen v. Bloomfield Motors, Inc.* (1960) 161 A. 2d 69 at 78 (N.J.). For a similar indictment, see *Johnson v. Relland Motors*, supra n. 84.

<sup>89</sup> [1965] 1. W.L.R. 1013.

goods is a chattel that is in apparent working condition at the time of purchase even though it may cease to operate a couple of weeks later. Needless to say, the average buyer expects something better. He expects a chattel that is in a reasonable state of repair and in as good a condition as can reasonably be expected in all the circumstances.

I think the dealer should be obliged to provide him with such a chattel and only be excused from meeting this standard if he can show that he drew the buyer's attention to any existing or impending defects or that the buyer appreciated that the goods were being sold to him without any warranty. No responsible dealer should cavil at having to assume one of these several duties, and in any event he can distribute any potential loss arising from a breach of his duty over all his sales. The English Hire-Purchase Act of 1965 contains provisions which appear to me to embody substantially this degree of protection for the consumer. Section 17 of the Act implies in every hire-purchase and conditional sale agreement coming within the Act a condition of merchantability and fitness. Section 18 then provides in part:

18 (1): Where under a hire-purchase agreement or a conditional sale agreement goods are let or agreed to be sold as second-hand goods and —

- (a) the agreement contains a statement to that effect, and a provision that the condition referred to in section 17 (2) of this Act is excluded in relation to those goods, and
- (b) it is proved that before the agreement was made the provision in the agreement so excluding that condition was brought to the notice of the hirer or buyer and its effect made clear to him,

that condition shall not be implied in the agreement in relation to those goods.

(2) Where under a hire-purchase agreement or a conditional sale agreement goods are let or agreed to be sold as being subject to defects specified in the agreement (whether referred to in the agreement as defects or by any other description to the like effect), and

- (a) the agreement contains a provision that the condition referred to in section 17(2) of this Act is excluded in relation to those goods in respect of those defects, and
- (b) it is proved that before the agreement was made those defects, and the provision in the agreement so excluding that condition, were brought to the notice of the hirer or buyer and the effect of that provision was made clear to him,

that condition shall not be implied in the agreement in respect of those defects.<sup>90</sup>

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<sup>90</sup> For a decision applying s. 8(3) of the Hire-Purchase Act 1938, the predecessor of s. 18(1) (b), see *Lowe v. Lombank Ltd.* [1960] 1 All E.R. 611 (C.A.).