

RETAILERS' LIABILITY FOR THE ACTS AND WORDS OF OTHERS - THE LIFE OF A RETAILER MAY NOT BE A HAPPY ONE. . . .?

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Judicial notice was once taken of the fact that, "the life of a criminal is not a happy one. . ."¹ In the light of recent developments in consumer sales law, it may be that the same view might also be taken of the position of retailers who sell goods to consumer purchasers.

The Sale and Supply of Goods to Consumers Regulations 2002² give effect to the provisions of the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees³ (hereafter abbreviated to SCGD) by inserting additional provisions into the Sale of Goods Act 1979 and the Supply of Goods & Services Act 1982. The effect of these is to give consumers extensive rights in respect of the goods they purchase, all of which are exercisable against the retailer with whom they have contracted. It will be seen below that it had been in mind to expand the boundaries of liability for quality defects so as to create a form of joint and several liability to be shared by both retailers and producers. In its final form, the SCGD failed to put in place any such system of shared liability.

The purpose of this article is to examine four related issues. First, it is intended to identify the principal effects of the SCGD in order to identify those areas in which retailers have become subject to an extended liability to consumers. Secondly it is proposed to consider whether retailers are given any protection by the SCGD itself. Thirdly, it is intended to examine the principal difficulties associated with contractual chains of distribution which may adversely affect retailers. Finally, this paper considers whether retailers are likely to find any assistance in the law of tort where they have become subject to a contractual liability to a consumer, but have no means of redress within the chain of distribution.

1. The Content of the Conformity Standard and its Associated Remedies.

The general effect of the SCGD is to seek to define the requirement of conformity with the contract and to give to consumers a comprehensive,

¹ *Burns v Edman* [1970] 2 QB 541.

² S.I. 2002 No.3045. For wider discussion of the impact of the SCGD and the Regulations, see Bradgate & Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees*, OUP, 2003; Willett, Morgan-Taylor & Naidoo, *The Sale & Supply of Goods to Consumers Regulations*, (2004) JBL 94-120.

³ Dir 99/44/EC of the European Parliament and of the Council of 25 May 1999, OJ L171/12, 7 July 1999. For details of the development of the European quality standard, see Oughton & Willett, *Quality Regulation in European Private Law* (2002) 25(4) Journal of Consumer Policy 299-328.

additional range of remedies for breach of the conformity standard.⁴ However, it remains the case that under both the Directive and domestic law it is the final contractual supplier of goods to the consumer who bears the responsibility for ensuring that goods are in conformity with the contract, to the extent that they meet with the consumer's expectations of quality, fitness and compliance with the contract description.

According to article 2(2) of the Directive, goods are presumed to be in conformity with the contract if they:

- (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- (c) are fit for the purposes for which goods of the same type are normally used;
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.⁵

These requirements, with the exception of that contained in article 2(2)(d), were considered by the United Kingdom Government to reflect the provisions as to description, satisfactory quality and fitness for purpose implied by the Sale of Goods Act 1979.⁶ However, it was also recognised that there should be circumstances in which the final seller should not be responsible for the promotional materials of others. Thus article 2(4)⁷ of the Directive provides that,

The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:

⁴ See Sale of Goods Act 1979 ss.48B-E, inserted by S.I. 2002 No.3045 reg.5. These remedies operate in a hierarchical fashion allowing consumers to seek from a retailer, initially, the remedies of repair or replacement and subsequently the remedies of price reduction and, as a last resort, rescission of the contract. Furthermore, these remedies, may be enforced, on an application by the consumer, by means of an order of specific performance under the Sale of Goods Act 1979 s.48E(6), inserted by S.I. 2002 No.3045 reg.5.

⁵ Implemented in the UK by means of the Sale of Goods Act 1979 s.14(2D) inserted by the Sale & Supply of Goods to Consumers Regulations 2002, S.I. 2002 No.3045 reg.3.

⁶ Sale of Goods Act 1979 s.13 (description), s.14(2) (satisfactory quality) and s.14(3) (fitness for purpose).

⁷ Implemented in the UK by means of the Sale of Goods Act 1979 s.14(2E) inserted by the Sale & Supply of Goods to Consumers Regulations 2002, S.I. 2002 No.3045 reg.3.

- shows that he was not, and could not reasonably have been aware of the statement in question⁷
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

The new remedial regime comprises a hierarchy of remedies which allows a consumer to require the seller, at his cost,⁸ to repair or replace non conforming goods.⁹ However, it is a remedial regime specific to consumer buyers that is bolted on to the existing remedial regime under the Sale of Goods Act 1979.

The new remedies of repair or replacement must not be requested if the remedy is impossible¹⁰ or disproportionate when compared with the other of the two remedies¹¹ or the remedies of price reduction or rescission.¹² For these purposes a remedy is regarded as disproportionate if it imposes costs on the seller which in comparison to those imposed by another remedy are unreasonable, taking account of the value of the goods had they conformed to the contract, the significance of the lack of conformity and whether the alternative remedy can be effected without significant inconvenience to the buyer¹³. However, a remedy not provided for in the SCGD is an action for damages, although this will not prevent an English consumer from pursuing an action for damages under the pre-existing remedial regime under the Sale of Goods Act 1979.

The remedies provided for in the SCGD are additional, in the sense that they have been superimposed upon the traditional remedial regime under the Sale of Goods Act 1979, applicable to all buyers, namely an action for damages for breach of warranty¹⁴ and/or a short-term, but immediate right to reject the goods and terminate the contract for a breach of condition, whether implied¹⁵ or express. In the case of express terms of the contract of sale, there is also the possibility that the right of rejection prevails in the event that the consequence of breach is deemed sufficiently serious under the common law innominate terms doctrine.¹⁶ There is nothing in the Sale of Goods Act 1979

⁸ Sale of Goods Act 1979 s.48B(2)(b).

⁹ Sale of Goods Act 1979 s.48B(1).

¹⁰ Sale of Goods Act 1979 s.48B(3)(a).

¹¹ Sale of Goods Act 1979 s.48B(3)(b).

¹² Sale of Goods Act 1979 s.48B(3)(a).

¹³ Sale of Goods Act 1979 s.48B(4).

¹⁴ Sale of Goods Act 1979 s.53.

¹⁵ Because the implied terms as to description, satisfactory quality and fitness for purpose in the Sale of Goods Act 1979 ss.13-14 are stated to be conditions of the contract. In non-consumer contracts of sale, a court may determine that a seller's breach of these implied terms is insufficiently serious to allow rejection of the goods by the buyer, by virtue of the Sale of Goods Act 1979 s.15A. However, this limitation on the buyer's remedy of rejection is inapplicable where the buyer is a consumer.

¹⁶ *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Bunge Corp v Tradax Export SA* [1981] 2 All ER 513.

to prevent a consumer from relying on either the new remedies derived from the SCGD or from invoking the traditional remedy of rejection and termination of the contract, provided he is not deemed to have accepted the goods under the Sale of Goods Act 1979 section 35.

If the consumer chooses to reject goods on the ground that they are not of the desired standard of quality or fitness, the retailer will be responsible for those goods following rejection. But the retailer will have defective goods on his hands which are unlikely to demand a particularly spectacular resale price on the market, given their defectiveness. If a consumer insists on his or her automatic, but short-term right of rejection for breach of condition, or seeks the last resort remedy of rescission of the contract under the revised remedial regime,¹⁷ it is the retailer who will bear responsibility for disposal, repatriation or resale of those goods, wherever they may be situated following rejection or rescission of the contract. If a Portuguese consumer has purchased goods while cross-border shopping, on a mainland European holiday or via the Internet, from a UK retailer, that retailer will bear the responsibility of arranging for the repair, replacement or adaptation of goods that are defective. Any of these required actions is likely to impose on retailers a fairly substantial financial burden, yet it is not the retailer who has produced the defective product. However, it is the defectiveness of the goods that has placed the retailer in a vulnerable position.

Many of the additional costs faced by retailers of consumer goods might have been avoided, if, as was originally proposed in the 1993 European Commission Green Paper on Guarantees for Consumer Goods and After Sales Service,¹⁸ there was a form of joint and several liability for the quality of consumer goods to be shared between the retail supplier and the manufacturer or producer of the defective goods. However, the final form of the SCGD did not go so far.

2. Consequences of the Extended Liability

The idea that the final buyer of goods is entitled to pursue his remedies for non-conformity against his immediate supplier is a deep-rooted aspect of English law and the law of any State that has adopted the UN Convention on the International Sale of Goods 1980,¹⁹ so that it is no defence for a seller to argue that he was not at fault in introducing the defect to the goods.²⁰ However, history apart, there are strong grounds for arguing that both from a consumer perspective and from a retailer perspective, a system of producer liability for non-conforming goods is justified.

While it is the retailer who must accept liability where goods are defective and fail to meet the consumer's expectations, it is frequently not the retailer who generates those expectations, but rather the manufacturer or producer of the goods who may have promoted the product in the form of national advertising and sales promotion schemes and in the form of labelling of

¹⁷ *ibid.*, reg.5 inserting a new s.48C(2)(b) of the Sale of Goods Act 1979.

¹⁸ Com (93) 509. See also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25(4) *Journal of Consumer Policy* 345-377

¹⁹ CISG 1980 art.45(1).

²⁰ See *e.g. Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608.

goods.²¹ Moreover, it has been observed, that modern economies have shifted from a system based on crafts and small scale businesses to a system of mass production and distribution, to the extent that consumers place reliance on the product rather than the retailer.²² Consumers have come to rely on retailers to supply goods at the best price and with the best possible after-sales service, and that the retailer's advisory role on the matter of product quality has diminished.²³

The concept of conformity with the contract is more concerned with defectiveness rather than with non-conformity per se. In the past, it may have been the case that in certain markets sub-standard goods could be tolerated if the price was reduced, but in the modern consumer marketplace, the fact that goods suffer from a defect, may be sufficient to render the seller liable, even though he is not actually aware of the specific use to which the goods are to be put. For example in *Ashington Piggeries Ltd v Christopher Hill Ltd*²⁴ a farmer devised a recipe for animal feed, which he intended to feed to his mink. The seller made up the feed according to the buyer's recipe using herring meal supplied to him by his supplier, a Norwegian co-operative. The herring meal proved to be defective as it contained an ingredient that was fatal to mink and could seriously harm other species of animal. Although the Norwegian co-operative had no idea that the feed was to be given to mink, it was still held that they were responsible for the losses suffered by their buyer, which included liability to the consumer-farmer for his consequential losses. Although the SCGD is not concerned with consequential losses, it remains the case that consumers may still pursue their traditional remedies under the Sale of Goods Act 1979 and this does cover consequential loss. The seller in a case like *Ashington Piggeries* is particularly vulnerable since the defect was one that was inherent in the goods he supplied and would therefore be difficult or impossible to eradicate.

3. The Conformity Standard & Public Statements

In order to implement the SCGD article 2(2)(d), the Sale of Goods Act 1979 section 14(2D) now requires a court to have regard any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling, in determining whether goods are of satisfactory quality. This would appear to cover (a) factual material contained in the likes of brochures emanating from the seller that is available from the retailer or passed on by him²⁵ and (b) factual statements emanating from the seller that have not been conveyed by the retailer but are contained in the likes of general street or media

²¹ See also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25 Journal of Consumer Policy 345, 349.

²² See EC Commission Green Paper on Guarantees for consumer goods and after-sales service Com (93) 509 p.86.

²³ *ibid.*

²⁴ [1972] AC 441.

²⁵ Such statements were covered by the requirement of fitness for purpose in the Sale of Goods Act 1979 s.14(3) before the introduction of the conformity standard in the SCGD: See *Wormell v RHM Agriculture Ltd* [1987] 1 WLR 1091.

advertising.²⁶ However, it is the retailer who bears the front-line responsibility for these statements even though they are made by the producer or his representative, and even if the statement is not passed on by the retailer. Accordingly, any redress available to the retailer will be dependent upon the terms of the retailer's contract with his immediate supplier.

As the requirements of section 14(2D) relate to the 'specific characteristics' of goods, it seems likely that this will not cover trade puffery as this is likely to be so vague in nature as to fail to relate to any specific characteristic and be incapable of objective verification. However, public statements on the specific characteristics of goods would extend to include all forms of objectively verifiable factual statement, such as those that identify the subject matter of the contract for the purposes of the Sale of Goods Act 1979 section 13. Furthermore, statements that describe a particular quality or attribute or which describe a process to which the goods have been subjected or claim that goods are suited to a particular use, while not pertaining to the identity of the goods, might be said to be descriptive of them.

A descriptive statement that comes in the form of an express guarantee of some particular feature or quality of goods will suffice and may be so specific as to give rise to direct contractual liability²⁷ or be treated as a collateral warranty on the part of the maker of the statement²⁸ (*i.e.* the producer or his representative) under common law principles. However, where the manufacturer's advertising contains factual descriptive statements that fall short of a guarantee, it is likely to be the retailer who bears primary responsibility for any disappointed consumer expectations. Thus if an advertisement suggests that goods possess a particular characteristic such as 'flameproof upholstery' or 'shatter-proof glass' this is likely to increase consumer expectations in respect of the product in question.²⁹

It has been observed that statements about goods that emanate from the manufacturer are very important in shaping the reasonable expectations of consumers about the goods they purchase. Moreover, the fact that these public statements have been singled out in the SCGD as factors to take into account in ascertaining whether goods reach the standard of quality expected appears to indicate that such statements are to be regarded as particularly important factors in determining whether the retailer is in breach of the quality obligation imposed by the Sale of Goods Act 1979, section 14(2).³⁰

²⁶ See Oughton & Willett, *Quality Regulation in European Private Law*, (2002) 25(3/4) *Journal of Consumer Policy* 299, 311.

²⁷ *Carlill v Carbolic Smokeball Co Ltd* [1893] 1 QB 256; *Bowerman v ABTA* (1995) 145 *New Law Journal Reports* 1815.

²⁸ *Wood v Letrik Ltd* (1932) *The Times*, 12 January (electric comb guaranteed to dispose of the problem of grey hair in 10 days); *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854 (paint guaranteed suitable for extreme weather conditions); *Wells (Merstham) Ltd v Buckland Sand & Silica Ltd* [1965] 2 QB 170 (sand suitable for propagating chrysanthemum plants).

²⁹ See Miller & Goldberg, *Product Liability*, 2nd ed, 2004, para. 4.77.

³⁰ See Willett, C in Howells (ed.) *Butterworth's Product Liability*, 2nd ed., 2007 chap.2, para.2.46.

Fortunately for the retailer there are three specified circumstances in which public statements about goods will not be relevant to the quality obligation. This will be the case, first, where the seller can show that, at the time the contract was made, the seller was not and could not reasonably have been aware of the statement.³¹ Thus, if the statement is made publicly, for the first time, after the contract with the consumer has been concluded, the retailer will not be liable. However, if the statement was made publicly before the goods are sold to the consumer, but after the seller has acquired those goods from his wholesale supplier, or directly from the producer, that public statement is still capable of shaping the consumer's expectations and will therefore be a matter that can be taken into account in determining whether the consumer goods are of satisfactory quality even though the retailer was not aware of the statement at the time he acquired the goods.³² In order to be able to raise this defence, the retailer would have to be able to prove that at the time the goods were sold to the consumer, he could not reasonably be expected to be aware of the statement that has been put in the public domain by the producer or his representative. In one respect, it is arguable that this defence is actually generous to the seller in that under the quality standard, generally, it is no defence for the retailer to prove that he could not have been aware of a latent defect in the goods.³³ Accordingly, what the Sale of Goods Act 1979, section 14(2E)(a) does is to provide the retailer with a reasonable care defence, when no such defence is available in respect of other aspects of the quality of goods.

A second reason why public statements about goods will not be relevant to the quality standard is that before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything incorrect or misleading, it had been corrected in public.³⁴

Thirdly, a public statement about goods will not be relevant to the quality obligation where the seller can show that the decision to buy the goods could not have been influenced by the statement.³⁵ This exception may be difficult to establish as it is undoubtedly the case that consumers do take account of statements made in advertising and the media generally and it may be difficult to rebut the initial presumption that consumers do rely on public statements. It would appear that this exception will apply where the public statement is published in a document to which the consumer does not have access or where the consumer admits that he has not placed any reliance on the statement. It might also be the case that some forms of trade puffery might fall within this exception on the basis that a reasonable consumer might not have taken it seriously. For example, it is probably the case that most consumers would not interpret literally the phrase "Red Bull gives you wings."³⁶

³¹ Sale of Goods Act 1979 s.14(2E)(a).

³² See Willett, Morgan-Taylor & Naidoo, *The Sale & Supply of Goods to Consumers Regulations* (2004) JBL 94, 97.

³³ See *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, 84 *per* Lord Reid.

³⁴ Sale of Goods Act 1979 s.14(2E)(b).

³⁵ Sale of Goods Act 1979 s.14(2E)(c).

³⁶ See also *Overton v Anheuser Busch* 517 NW 2d 308, 1994.

While the retailer can pass on any liability to consumers to his immediate supplier, the retailer still remains exposed, for reasons considered below, when there is a break in the distribution chain, and it is impossible to bring an action against the producer of the goods. The difficulty with the provisions in section 14(2D) and (2E) is that while they are relevant in consumer sales, they are not specifically relevant to non-consumer sales. However, if the public statement about the goods was made to the seller at the time those goods were sold to him, thereby indicating a feature of the goods, the retailer could argue that the statement was a "relevant circumstance" for the purposes of the requirement of satisfactory quality in the Sale of Goods Act 1979 section 14(2A).³⁷ However, as observed above, there may be circumstances in which a public statement about goods is made after those goods have been supplied to the retailer but before the retailer sells those goods to a consumer, in which case the public statement cannot be a relevant circumstance to be considered in determining whether the goods sold to the retailer are of satisfactory quality. Since the retailer's supplier is liable for the condition of the goods at the time of delivery or the time at which risk in those goods passes to the retailer,³⁸ it is unlikely that a public statement made after that time will be a relevant circumstance that can be taken into account in determining whether those goods were of satisfactory quality, unless the quality of the goods can be judged by reference to the standard a reasonable person would regard as satisfactory in the light of what might later be said about the product by the producer or his representative.

4. EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Article 4

(a) Introduction

It may be that the SCGD did intend Member States to take action on the matter of retailer redress, since article 4 provides,

"Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller *shall be entitled* to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law."

It might be asked why was this provision incorporated in a Directive that, apart from article 4 itself, is concerned exclusively with consumer protection,³⁹ since article 4 does nothing at all for consumers. An interpretation of article 4 is that all it does is to state what the Directive does

³⁷ See also Sale of Goods Act 1979 s.14(2F) which confirms that a public statement about goods may be a relevant circumstance for the purpose of s.14(2A) whether or not the buyer deals as a consumer.

³⁸ Miller (ed) *Benjamin's Sale of Goods*, 6th ed., 2002, (Supplement, 2003) para.1-031 and see *Viskase Ltd v Paul Kiefel GmbH* [1991] 1 All ER (Comm) 641.

³⁹ See Bridge, *Article 4*, in Bianca & Grundmann (eds), *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.183, para.7.

not do, namely give consumers a right of direct access to the producer of defective goods.⁴⁰ However, it might be argued that the inclusion of article 4 does tend to provide protection at the end of the chain at which the parties' bargaining strength is the weakest. For example many manufacturers tend to be large scale operations that produce goods on a mass-production basis. If the retail outlets through which these goods are sold are only small to medium-sized businesses the disparity in bargaining strength may be substantial. However this will not always be the case given the tendency for retailers to amalgamate into larger groups of companies in order to operate on a national or international basis in the form of a chain of retail outlets. Thus the bargaining power of a major supermarket chain is likely to be substantially greater than that of many of its smaller-scale suppliers. Read in the light of the background to the adoption of the SCGD, article 4 might be regarded as a sop to compensate retailers in the light of the abandonment of the regime of joint producer-retailer liability proposed in the Green Paper.⁴¹

(b) *The scope of article 4*

An initial reading of the language of article 4 might suggest that a retailer who sells goods to a consumer may have a remedy against any intermediary who is responsible for the lack of conformity in the goods sold. However it has been observed that the reference to "any intermediary" may be redundant since it must be read in the light of the words that precede it, namely a reference to "the producer or a previous seller in the same chain of contracts". It has been argued that this confines 'intermediaries' to those who form part of the chain of distribution and would not include more remote third parties who may be the cause of the defectiveness.⁴² On this reading, a carrier would be an intermediary, but if 'intermediaries' are restricted to those forming part of the distribution chain, they would have to have been a 'seller' at some point. However, an alternative, wider view of the meaning of the word 'intermediary' is that it should include any person forming part of the network of contracts contributing to the process of distribution.

Initially, the language of article 4 is mandatory, in that it states that the retailer *shall* be entitled to pursue a remedy up the chain of distribution. However, it has been pointed out that this language is less than mandatory, in that all that article 4 permits is the pursuing of a remedy, but there is no guarantee that that pursuit will be successful.⁴³ Thus, it might appear to follow from this that a person in the distribution chain who is potentially liable to the retailer can choose to exclude or restrict that liability.

Moreover, what art 4 permits is that the retailer may pursue this remedy against the person or persons '*liable*' in the contractual chain. This is not the same as being given a remedy against the person *responsible* for the defect in the goods sold to the consumer. In any case, the circumstances may be such

⁴⁰ *ibid.*, p.195, para.27, citing Brüggemeier, JZ 2000, 529, 532.

⁴¹ See Bradgate & Twigg-Flesner, *Blackstones Guide to Consumer Sales & Associated Guarantees*, OUP, 2003, p.227.

⁴² See Bridge "Article 4" in Bianca & Grundmann, *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.183, para.7.

⁴³ *ibid.*

that there is no one in the chain of distribution who is *liable*, since it is quite possible that all parties higher up the chain of distribution have validly excluded their liability and there is nothing in the Directive that assists in determining who is to be liable for the defectiveness of the goods. It has been argued that it is tempting to regard art 4 as using the word 'responsible' rather than 'liable',⁴⁴ but that interpretation seems not to be tenable as an earlier draft of the proposed Directive contained the word 'responsible' but this was deliberately changed to 'liable'.⁴⁵ The concluding words of article 4 also present difficulties of another kind. This provides that 'the person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.' This has the effect of undermining any inference that the 'sop' offered to retailers is, in any way, mandatory. This is also confirmed by recital 9 which provides that the seller should be free to pursue a remedy against the producer, previous seller or other intermediary, provided he has not renounced that entitlement and provided he is able to do so according to national law. Furthermore, recital 9 also goes on to assert that nothing in the Directive is to affect the principle of freedom of contract as between the seller, the producer, a previous seller or any other intermediary.

The view taken by the Department of Trade and Industry on the content of article 4 was that the right of a retailer to maintain an action against his immediate supplier under the Sale of Goods Act 1979 sections 13 and 14 was sufficient to satisfy the requirements of article 4, despite the fact that liability to the retailer might be excluded or restricted by an exclusion or limitation clause.⁴⁶ However, this view could be open to question. In the first place, it is arguable that article 4 must have some impact otherwise its inclusion in the SCGD is entirely meaningless.

An alternative view of article 4 is that it places on Member States an obligation to make someone liable to the retailer, at least up to some limit set by Member States.⁴⁷ However, this is difficult to justify if the reference to 'renouncing' the retailer's entitlement to pursue a remedy in recital 9 is taken to permit the exclusion of liability.

An alternative view of recital 9 is that it permits a retailer to renounce his right to pursue his remedy, but that he must take active steps to do so, as if he was affirming the contract with knowledge of his right to take action or waiving his right to pursue his claim against his supplier. On this view,

⁴⁴ See Bradgate & Twigg-Flesner, *Blackstones Guide to Consumer Sales & Associated Guarantees*, OUP, 2003 p.227.

⁴⁵ See OJ L 171/12, 7 July 1999.

⁴⁶ See DTI, *Second Consultation on EC Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, DTI, London 2002, p.11, n.18 and Krummel, T & D'Sa, R (2001) Sale of consumer goods and associated guarantees: A minimalist approach to harmonised European Union consumer protection, 26 *European Law Review* 312-322, 320.

⁴⁷ See Schmidt-Kessel, M (2000) Der Rückgriff des Letzverkäufers. *Österreichische Juristen-Zeitung*, 55, 668-673, 672 and see also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25 *Journal of Consumer Policy* 345-377, 359 and Willett, C in Howells (ed.) *Butterworth's Product Liability* chap.2 para.2.127.

merely agreeing to an exemption clause in the immediate supplier's contract with the retailer might not be sufficient to constitute a renouncement.⁴⁸

It appears that article 4 gives Member States the freedom to choose the person against whom an action may lie, the form of the action and any procedural limits, such as time limits, that may be placed upon that liability. Thus it appears that Member States may choose whether the producer or some other person in the distribution chain should accept liability and whether that action should be contractual, tortious, restitutionary or be imposed by some separate statutory regime.⁴⁹ While there is an argument to the effect that the United Kingdom has not done enough to properly implement the SCGD article 4, it will take a decision of the European Court of Justice to determine the precise scope of article 4. At present, any contractual action against someone in the distribution chain may be barred by the presence of an exemption clause that satisfies the reasonableness test in the Unfair Contract Terms Act 1977. Accordingly, a further question that arises in this context is whether the retailer might be able to pursue an alternative action against the producer sounding in the tort of negligence in respect of economic losses caused by the defectiveness of the goods.

5. The Legal Background

a) The Primacy of contract and the distribution chain

The principle of the primacy of contract, based upon the concepts of autonomy and freedom of choice between individuals, is highly influential. This dictates that economic relations should be governed by the market within a contract framework rather than through imposed law such as tort.⁵⁰ Statutory intervention⁵¹ has protected the consumer from the rigours of this doctrine but, hitherto, has left the retailer, who is generally assumed to be bargaining at arm's length with his supplier in a more fragile position. Where a retailer buys goods from his immediate supplier, any attempt by the seller to exclude or limit his liability for defects in quality or fitness of the goods is subject to the requirement of reasonableness set out in UCTA 1977 section 11.⁵² In determining whether an exemption clause in a contract for the sale of goods is reasonable, account is taken of the relative bargaining

⁴⁸ See H. Micklitz (1999) die Verbrauchsgüterkaufs-Richtlinie. *Europäische Zeitschrift für Wirtschaftsrecht*, 10, 485-493, 487.

⁴⁹ See C. Willett, in Howells (ed.) *Butterworth's Product Liability* chap.2 para.2.127.

⁵⁰ This view of contract is open to question. See e.g. P.S. Atiyah, *Essays on Contract* (Oxford) 1986 chap.2.

⁵¹ Such as the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No. 2083.

⁵² Unfair Contract Terms Act 1977 ss.6(3); 7(3). Additional protection equivalent to that given to consumers is available to those business purchasers who are deemed not to have bought goods in the course of a business: See *R & B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847; *Feldarol plc v Hermes Leasing Ltd* [2004] EWCA Civ 747 (even a plc can be consumer). See also Law Comm No. 292, *Unfair Terms in Contracts* (2005) which proposes extension of some of the protective provisions of unfair terms legislation to cover small businesses, with fewer than 9 employees on the basis that they are as vulnerable as consumers. However, these proposals would not extend to cover a plc such as Feldarol plc.

strength of the parties⁵³ and in contracts between two businesses, much of the case law indicates that there is perceived to be a greater degree of equality of bargaining strength, thereby supporting the reasonableness of the exemption clause.⁵⁴ Nevertheless, there have been instances in which it has been recognised that one business contracting party is in a much stronger bargaining position than the other.⁵⁵ However, it might be said that those cases in which an exemption clause in a business-to-business contract has been held to be unreasonable have also involved considerations other than just the relative bargaining strength of the parties.⁵⁶ What is also significant is that there are frequent judicial statements to the effect that while an interventionist approach in favour of consumers is justified, courts should approach business contracts very cautiously and not interfere with agreed allocations of risk as a general rule.⁵⁷

The production and supply of goods are governed by a chain of contracts stretching from the producer to the consumer, known as the distribution chain. Liability for quality defects, as opposed to safety defects in the goods, is governed by this chain of contracts. The allocation of risk between the parties to this chain of contracts will depend on a number of complex factors including the relative bargaining strength of the parties dictated by their power in the market. A powerful commercial entity such as a large supermarket chain is in a position to dictate terms to its suppliers but small to medium sized retailers are not and under the contract regime will have to soak up the costs. So the medium to small businesses in retail sales are not in a strong position.

Where the goods emanate from abroad, the producer's remoteness can create difficulties for the final consumer, but there will be an importer who may be required to accept responsibility for defective goods, subject to the terms of his contract with others in the distribution chain. Furthermore, the chain may be complicated further by virtue of the fact that different parties in the chain may apply other processes to the goods, thereby adding value to them, but also creating doubt as to who is the "person responsible" for a defect.

Where the consumer/buyer has a successful claim against the retailer for non-conforming goods, the distribution chain will then operate in reverse and may result in the producer/seller having to accept ultimate responsibility. However this will not always be the case as the terms of the various contracts in the distribution chain may contain different provisions dealing with different events perceived to be possible risks by one of the contracting parties in the chain. The requirement of conformity with the contract is

⁵³ Unfair Contract Terms Act 1977 Sch.2 (a)

⁵⁴ *RW Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602; *Monarch Airlines Ltd v Luton Airport Ltd* [1997] CLC 698; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696.

⁵⁵ See *St Alban's City & District Council v ICL Ltd* [1995] FSR 686; *Motours Ltd v Euroball (West Kent) Ltd* [2003] All ER (D) 165.

⁵⁶ In *St Alban's City & District Council v ICL Ltd* [1995] FSR 686 it was relevant that ICL were almost monopoly suppliers and that the council would have to recoup their losses by increasing tax or cutting public services.

⁵⁷ See, e.g. *Photoproduction Ltd v Securicor Transport Ltd* [1980] AC 827, per Lord Wilberforce; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, per Chadwick LJ.

dependent on what the contract itself provides. Thus as between one buyer and his seller and another buyer and his seller higher up the distribution chain, descriptions or required purposes may be different. Furthermore, determining whether goods are of satisfactory quality will also depend on the way in which the goods have been described, so even the requirement that goods should be fit for 'normal purposes' may be shaped by the description given. Furthermore, the terms of the contract may specifically preclude an action by one buyer even though, as a seller he may be liable to his buyer. For example in *Gloucestershire County Council v Richardson*⁵⁸ a main building contract required the contractor to obtain concrete beams from a nominated supplier who was only prepared to supply on terms that limited his liability. Under the main contract, the owner was not permitted to object to this nomination, although it would have been possible to object to an unsuitable sub-contractor. The end result appears to have been that the owner of the building had no remedy despite the fact that he and not the main contractor, had suffered the main loss.

It has to be assumed that in *Gloucestershire County Council v Richardson* there was a reason why the owner did not object to the position he found himself in. In contrast, if the parties to a contract are in positions of roughly equal bargaining strength, then undesirable results such as that which pertained in *Richardson* should not happen. Thus in a contract between manufacturer and retailer of roughly equal bargaining strength, the retailer ought to be able to negotiate terms that ensure that the manufacturer will bear responsibility for defective goods in the event of a consumer complaint. However this will not always be the case. For example, in the new car sales sector, car manufacturers tend to be multinational corporations whereas the sales outlets with whom they contract are very often family-owned small businesses. In contrast some retailers, such as many United Kingdom supermarket chains may be in a position to dictate the terms on which their manufacturer-suppliers sell to them.

Since the conformity of the goods, in a particular case, has to be judged by reference to the terms of that particular contract, it does not follow that because one buyer has succeeded under his contract, the same will follow for others. Consumers may complain that the goods they have purchased suffer from minor or cosmetic defects or that the goods are unsafe or that the goods are not sufficiently durable. In contrast, as between a retailer and his supplier, whether that is the manufacturer or an intermediate supplier the loss suffered is likely to be financial in nature. As between a consumer and a retailer, the contractual description of the goods may differ from the description given in a contract comprising part of the vertical chain from retailer to manufacturer. All of these factors may conspire to produce the result that a party who has been successfully sued by his buyer is unable to sue on his contract with his supplier.

Matters may be further complicated by the fact that the ultimate consumer may have suffered consequential loss. While such losses are not addressed by the SCGD, the manner in which the Directive has been implemented in the United Kingdom may exacerbate this problem, since the amendments called for by Directive 1999/44 have been 'bolted on' to the existing

⁵⁸ [1969] 1 AC 480.

provisions of the Sale of Goods Act 1979, which consumers may still rely upon and which do permit an action for damages that will include a claim for foreseeable consequential losses.

Other factors may also cause ultimate liability to rest otherwise than at the beginning of the chain of distribution such as default by an intermediary in the chain.⁵⁹ Such default may be regarded as the cause of the harm suffered by the consumer, in which case the manufacturer will be free from responsibility. Alternatively, the extent of the intermediate default may constitute contributory negligence which will not excuse the manufacturer altogether, but may result in an apportionment of the loss suffered as between the producer and the negligent intermediary. Such an instance might arise should the retailer wrongly advise a consumer that a cosmetic lotion can be applied to the skin and left overnight. Here awkward questions might arise over the manner in which losses are to be apportioned between the producer and the retailer.⁶⁰

Alternatively, the retailer's immediate supplier might have become insolvent, in which case the retailer will have to prove as an unsecured creditor and it will make no difference that there is a solvent supplier higher up the chain to whom the insolvent intermediary might have successfully passed responsibility for the defective or non-conforming goods. Furthermore, even if the retailer's supplier was insured against liability to the retailer, the retailer would have to be able to prove that the insured seller would have been liable before he will be entitled to proceed directly against the insurer.⁶¹

Simple practicalities of assiduously maintaining records may also impinge on the ability of a retailer to bring proceedings against his immediate supplier. What has been said so far is premised on the assumption that the retailer can identify his immediate contractual supplier. However, there may be circumstances in which the identity of that person is less than clear. For example suppose the retailer sells goods that are sold by weight, but obtains his supplies from a number of different sources. Unless the retailer has been careful in recording precisely which goods came from which source⁶², he may encounter difficulties in identifying his defendant where there is a complaint about the lack of conformity of the goods some several months after the goods were first sold to a consumer.

⁵⁹ See *Holmes v Ashford* [1950] 2 All ER 76 (hairdresser used hair dye without conducting a trial 'patch test').

⁶⁰ See Bridge, "Article 4" in Bianca & Grundmann (eds), *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.189, para.16.

⁶¹ See Third Party (Rights Against Insurers) Act 1930 and *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 49 *per* Devlin J; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 at 373 *per* Lord Denning MR; approved in *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957. However, it will be sufficient for the third party retailer to show that he has been awarded an interim payment against his insolvent, immediate seller: *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437.

⁶² While modern stock control systems may assist in the identification of suppliers, the problem of inability to identify a contractual defendant has resulted in the House of Lords deciding that, in such circumstances, the retailer may sue the manufacturer directly: See *Lambert v Lewis* [1982] AC 225.

The Department of Trade and Industry stance on implementing the SCGD was the ‘ostrich’ approach, namely to assume there are no exemption clauses in the contractual chain back to the producer. This would appear to be unlikely unless the retailer is one of the retail ‘giants’ with sufficient bargaining strength to dictate terms to middlemen and producers.

Where there is an express term of the contract which clearly allocates risk, then subject to statutory intervention, a vitiating factor such as fraud, or the rules on penalty clauses, the loss will fall as allocated by the contract. No doctrine exists in English contract law to relieve a business from the consequences of a term of a contract concluded as a result of pure commercial pressure. The only role for the court in this situation would be the construction of the term in question to see if it covers the loss or damage in issue.

The further question arises in this context whether the retailer who has been placed in a vulnerable position as a result of the additional liabilities than now rest upon him in consumer contracts might be able to pursue an alternative action in tort against the producer. This requires consideration of the extent of negligence liability in respect of economic losses caused by the defectiveness of the goods, especially in the light of the inclusion of the provisions on public statements as a relevant consideration when judging the quality of the goods supplied to a consumer.

(b) *The role of Tort Law*

If the claim is between contracting parties this raises the question of concurrent liability. English law has followed the route of permitting concurrent liability whilst recognising the importance of respect for the will of the parties.

“A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequences. Subject to this qualification, where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequences.”⁶³

Courts have to be careful to avoid interfering with coherent bodies of law in other fields, particularly contract, by imposing a duty of care in negligence. The position was stated strongly by Posner J in *Miller v United States Steel Corp.*⁶⁴

⁶³ *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481, per Le Dain J. Approved by Lord Goff in *Henderson v Merrett* [1995] 2 AC 145.

⁶⁴ 902 F 2d 573 at 574 (1990).

“. . . tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law.”

This does not, however, reflect English law. If it were accepted then it would reject any exceptions to the exclusionary rule. The existence of obligations under a contract would automatically deny liability in tort for pure economic loss.⁶⁵ However, in order to retain a coherent law of civil obligations, the existence of a contractual background must be born in mind when deciding whether to impose a duty of care.

Is tort law therefore restricted to gap filling in the law of contract in terms of pure economic loss?⁶⁶ This is a starting point, although it is not suggested that it reflects the existing law. Concurrent duties in contract and tort can exist, albeit sometimes informed by different rationales. The correct approach was stated by Lord Goff in *Henderson v Merrett Syndicates Ltd*:

“Mr. Kaye's approach involves regarding the law of tort as supplementary to the law of contract, *i.e.* as providing for a tortious liability in cases where there is no contract. Yet the law of tort is the general law, out of which the parties can, if they wish, contract; and... the same assumption of responsibility may, and frequently does, occur in a contractual context. Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it... But even if I am wrong in this, I am of the opinion that this House should now, if necessary, develop the principle of assumption of responsibility as stated in *Hedley Byrne* to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract. This indeed is the view expressed by my noble and learned friend, Lord Keith of Kinkel, in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398, 466, in a speech with which all the other members of the Appellate Committee agreed.”⁶⁷

However Lord Goff sounded a note of caution:

“I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. . . Let me take the analogy of the

⁶⁵ See J. Stapleton, *Duty of Care and Economic Loss* (1991) 107 LQR 249 at 253

⁶⁶ *Simaan General Contracting Co v Pilkington Glass Ltd (No2)* [1988] QB 758 at 782, *per* Bingham LJ.

⁶⁷ [1995] 2 AC 145 at 193.

common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.”⁶⁸

6. Pure Economic Loss in Negligence

English law until the 1960s largely adopted a bright-line exclusionary rule with regard to negligently caused economic loss. Several reasons were given for this. These included arguments based on the primacy of contract in this area, the need to avoid interfering with the pursuit of legitimate economic self-interest and the fact that cases involving economic loss frequently do not result in a net loss in social wealth, but only in transfers of wealth. The exclusionary rule was arguably removed by the House of Lords in *Hedley Byrne & Co v Heller & Partners Ltd.*⁶⁹ No action would be allowed where economic loss was no more than reasonably foreseeable. Instead, there had to be a ‘special relationship’ between the parties.

As the facts concerned negligently given advice, the House had to deal with the problem created by one of their previous decisions⁷⁰ which laid down that damages were not available for negligent misstatements. The judgments are therefore less concerned with the difficulties of whether economic loss can be recovered in negligence than the relevance of the absence of fraud to a claim for negligent misstatement.

This pocket of liability was also thought to be restricted to the advice of professional advisors⁷¹ but this later became advice given in the course of business.⁷² What was swept away and was important for future

⁶⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 195.

⁶⁹ [1964] AC 465.

⁷⁰ *Derry v Peek* (1889) 14 App Cas 337.

⁷¹ See *Mutual Life & Citizens' Insurance Co v Evatt* [1971] AC 793.

⁷² *Esso Petroleum v Mardon* [1976] QB 801.

developments was the principle that applying an exclusionary rule could be justified provided a person was pursuing their legitimate self interest. What was required in future was a balancing of interests based on the 'special relationship' principle.

An initial problem related to the pocket of liability that was thought to have been created was the requirement of 'reliance.' In order for there to be a 'special relationship' between the parties there had to be reliance by the claimant on the defendant's advice.⁷³ As liability was thought to be restricted to advice cases, an element of the duty equation was that the claimant had to have relied on the defendant. Cases where there was no clear reliance by the claimant presented difficulties and helped to restrict liability to the pocket of professional advice. Eventually, prompted by academic criticism, the courts incorporated issues of reliance in the question whether or not the defendant was the cause of the claimant's loss.⁷⁴ In the negligent wills cases there is no reliance by the disappointed beneficiary on the negligent solicitor but this does not prevent either duty or causation being established. The removal of the reliance requirement had the effect of opening up liability for pure economic loss. No longer was it restricted to pockets of liability or one type of conduct but could be extended to the negligent provision of services,⁷⁵ negligent construction of a building resulting in economic loss⁷⁶ and damage to property of a third party on which the claimant was economically dependent.⁷⁷

7. Developments in England and the Commonwealth

Whether the result of *Hedley Byrne* was to remove the exclusionary rule is arguable. One view is that the case did remove the exclusionary rule and this may certainly be the case today and is broadly the approach taken by Commonwealth courts. Another is that the rule remained in the sense that there was still a presumption against the recovery of economic loss but a pocket of liability relating to negligent words but not to negligent acts was created. The initial response in England by some members of the judiciary to economic loss claims was positive.⁷⁸ The view was that it was impossible to achieve a satisfactory distinction between economic losses and other damage.⁷⁹ For a time it appeared that this would be the prevalent view⁸⁰ but was rejected by the House of Lords in a series of decisions.⁸¹ The rejection came on a number of grounds, including keeping tort law in its place, the difficulty of setting standards in tort and the dangers of creeping welfarism.

⁷³ The expression 'reliance' is in itself misleading and the term 'influence' is probably preferable. J.Stapleton, "Comparative Economic Loss". (2002) 50 UCLA Review 1,12.

⁷⁴ *White v Jones* [1995] 2 AC 207.

⁷⁵ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

⁷⁶ *Junior Books & Co Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁷⁷ *Caltex Oil (Australia) v The Dredge "Willemstad"* (1976) 136 CLR 529

⁷⁸ *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 396 *per* Lord Denning MR; *Anns v Merton LBC* [1978] AC 728, *per* Lord Wilberforce.

⁷⁹ Cooke, (1991) 107 LQR 46.

⁸⁰ The high water mark was probably *Junior Books Ltd v Veitchi Co Ltd* [1983] 1AC 520.

⁸¹ Culminating in *Murphy v Brentwood DC* [1991] AC 398.

This rejection left a problem for English law in that cases on economic loss lacked the broad analysis used in novel physical damage cases and instead of analysing the substantive legal concerns for and against imposing a duty of care, the courts were concerned with factual issues which led to the use of concepts such as reliance and assumption of responsibility which tended to conceal the underlying moral, economic and other concerns relevant to the existence of tort liability.

Commonwealth courts on the other hand have broadly embraced the role to be played by tort law in this area and have embarked, particularly in Australia, on developing a matrix of factors which underlie recovery of economic loss and the relationship between contract and tort and markets and tort law.

(a) A New Matrix for Economic Loss?

The abandonment of the ‘pockets of liability’ approach by Commonwealth courts and to a certain extent by English courts has allowed the underlying themes in the courts’ reasoning to be exposed and a matrix of the substantive legal concerns that govern economic loss to be examined. This matrix can take account of first, the concern that tortious intervention may impinge on the competitiveness of markets. It may also take account of the argument that the boundaries of liability be normatively justifiable and that those boundaries should be ascertainable, while also taking account of the claimant’s opportunity to take appropriate forms of self protection and the vulnerability of the claimant.⁸²

(i) Tortious intrusion into the competitiveness of markets

This argument is concerned with interference with legitimate acts of trade. English law has never accepted the proposition that a person owes a duty of care to another person because they know that their careless act may cause economic loss. Leaving aside the economic torts, a person will generally owe no duty even though they intended to cause economic loss. The trader may increase his advertising or cut his prices even though this is done with the intention of taking the market share of rivals. This principle reflects the autonomy of the individual protected by the common law and the desire to give effect to individual choices. However, assuming the other indicators of duty are present, immunity should only extend to conduct which is a legitimate pursuit of one’s interests. What would not be a legitimate pursuit of one’s interests? Competitive acts not prohibited by law are legitimate unless they fall within the ambit of the economic torts. At the other end of the spectrum, conduct which involves deceit, duress or intentional acts prohibited by law is seldom regarded as the legitimate pursuit of one’s own interests.

One of the effects of the SCGD reflected in the Sale of Goods Act 1979 section 14(2D), as qualified by section 14(2E), is to make the retailer liable for any goods that are not of satisfactory quality by reason that they fail to live up to a reasonable consumer’s legitimate expectations of quality generated by ‘public statements’ about the goods emanating from the seller, the producer or his representative. This may include statements that the

⁸² J. Stapleton, *Comparative Economic Loss* (2002) 50 *UCLA Law Review* 1, 9.

retailer has not passed on to the consumer, but if the producer (or person other than the retailer making the 'public statement') is legitimately pursuing his own interest in advertising his product a court applying principles of the tort of negligence might be reluctant to impose a duty of care under the matrix. Nevertheless those public statements have given rise to legitimate expectations in the consumer which are not met by the goods and the consumer is contractually left with a loss as a result. However, the fact that a person is in breach of the law and the other indicators of a duty are present does not in itself amount to justification for removing the immunity. This needs to be considered in conjunction with the other features in the matrix.

(ii) Concern that the boundaries of liability be normatively justifiable and ascertainable.

Traditionally this subsumes the problem of indeterminacy of liability. The infliction of economic loss may have a ripple effect creating indeterminacy of the class of victims and the total loss flowing from the negligence. It is now clear that this need not be fatal to a claim for economic loss provided that there is a normatively justifiable basis for who can sue and the amount which they can claim for.

These questions are clearly demonstrated in cases involving relational economic loss. Relational economic loss will occur where physical damage is caused to one person's property or person which then causes economic loss to a third person. Again the contrast between English and Commonwealth courts is instructive.

In England the 'pockets of liability' approach has led to such loss being generally irrecoverable.⁸³ Even where there is no problem of indeterminacy the House of Lords concluded that liability would only be incurred where the claimant had a proprietary or possessory interest in the damaged property.⁸⁴ The plaintiff suffered economic loss when goods which he had contracted to purchase were damaged at sea. At the time of the damage the risk but not the ownership of the goods had passed to the plaintiff. The plaintiff claimed that he was owed a duty of care by the defendants who had damaged the goods. The loss was classified as economic loss rather than physical damage because at the time of the damage the goods belonged to a third party.

Lord Brandon stated:

“where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think the law should allow special pleading in a particular case within the general rule to detract from its application . . . certainty of the law is of the utmost importance, especially but by no means only in commercial matters.”⁸⁵

⁸³ *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] QB 27; *Candlewood Navigation Corp v Mitsui OSK Lines Ltd* [1986] AC 1.

⁸⁴ *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.

⁸⁵ *ibid.*, at 816-7.

The House of Lords invoked the exclusionary rule⁸⁶ and emphasised the primacy of contract in the recovery of economic loss⁸⁷ If a person wanted legal protection in these circumstances then they should protect themselves through contract with the property owner.⁸⁸

Commonwealth courts have taken a different approach and rejected the exclusionary rule. The problems of indeterminacy and primacy of contract raised by the English courts to justify blanket exclusion have been approached by a more sophisticated route. The approach to indeterminacy is treated as one aspect of basing legal rules and drawing boundaries on principles which are normatively justifiable.

An early example of such an approach came in *Caltex Oil v Dredge "Willemstad"*⁸⁹ in which a dredge negligently damaged an underwater pipe owned by AOR, which carried petrol from AOR's refinery to the Caltex terminal. Caltex recovered for the cost of transporting its petrol until the pipe was repaired. The High Court of Australia rejected an exclusionary rule and found that there was no indeterminacy problem. The defendants knew of the risk to Caltex as a specific individual and the claim was for expenditure necessarily incurred rather than loss of profits. As AOR and Caltex were involved in a common venture and if the loss had not been suffered by Caltex it would have been suffered by AOR there was no increase in the overall damages incurred by the defendants.

In *Norsk Pacific Steamship Co v Canadian National Railway*⁹⁰ a barge negligently collided with a railway bridge owned by a third party. The claimant railway company sued for economic loss incurred as a result of the non availability of the bridge. The Supreme Court of Canada found for the claimant. There was a joint venture of the type in *Caltex*. The claimant was specifically foreseeable in terms of this loss.

In both *Caltex* and *Norsk Pacific* the court was able to offer a normatively justifiable reasoning for restricting liability to certain classes of person and excluding others. The ripple effect of economic loss necessitates a line being drawn but not simply on the basis that the facts of the case do not sit within an established pocket of liability. If no normative justification is available for restricting and identifying meritorious claimants then liability should be rejected. The Canadian Supreme Court rejected liability where a courier delayed in delivering an envelope to a Land Office resulting in the claimant losing a valuable contract.⁹¹ The class of potential victims here was large and the court was unable to devise a normatively justifiable rule for distinguishing between victims of the negligence.

The sophisticated reasoning which is available to the courts is apparent in some of the Australian agriculture cases. Typically, infected seed is negligently supplied, with resultant physical damage and economic loss to various parties in the chain of contracts. In *McMullin v ICI Australia*

⁸⁶ *ibid.*, at 818-9.

⁸⁷ *ibid.*

⁸⁸ But see now the Carriage of Goods by Sea Act 1924, s.2(4).

⁸⁹ (1976) 136 CLR 529.

⁹⁰ [1992] 1 SCR 1021.

⁹¹ See *BDC v Hofstrand* [1986] 1 SCR 228.

*Operations Propriety Ltd*⁹² insecticide used on cotton contaminated cattle. Four classes of claimant were held to be owed a duty of care by the High Court of Australia. Graziers whose cattle were contaminated had their losses classified as physical damage. Persons who purchased already contaminated cattle and persons who owned meat which was found to be contaminated were owed a duty. Persons who incurred economic loss because of the cost of keeping contaminated cattle in their possession were classified as primary victims based on the normatively justifiable rule located in ownership/possession of contaminated meat. Other claims for economic loss were rejected as falling outside this normatively justifiable rule. In *Perre v Apand Propriety Ltd*⁹³ infected seed was supplied to a farmer who used it to grow a crop. Legal regulation then prevented growers within a twenty mile radius from selling their crops in the Western Australian market. Claims by growers, processors and landowners were allowed as these persons were primary victims exclusively dependent on the defendant taking care. Secondary victims such as truckers would not have been successful. By analogy, a retailer, who is exposed to economic loss by a producer making 'public statements' in relation to his product, could be classed as a primary victim. This would be normatively justifiable as a person who had had ownership of the goods and suffered loss as a result of the producer's breach of duty and the boundaries of loss are sufficiently ascertainable.

(iii) Self Protection and the Primacy of Contract

The argument that contract is the correct sphere for claims for economic loss continues to dominate English and US law. This is made apparent in actions in respect of unsafe products. Where a defect in a product causes physical damage then any foreseeable victim of the defect may have a claim. Where the defect is one of quality, the supremacy of contract and the inadvisability of interfering with sales warranties are stressed. Commonwealth courts appear on the whole to have rejected the primacy of contract approach and concentrated instead on whether contract would have provided a realistic alternative avenue of protection for the claimant. This operates in particular in cases where the claimant has suffered economic loss through the acquisition of defective property.⁹⁴ In another contaminated seed case the cost of weed eradication suffered by primary victims was recoverable.⁹⁵ The damage to the claimants was reasonably foreseeable and the defendant was not legitimately protecting or pursuing its business interests. The class of victims vulnerable to lack of warning by the defendant was limited and ascertainable and there was no indeterminacy of liability. There were sound policy reasons for encouraging people to avoid or mitigate loss. The decision would not interfere with Sale of Goods law or interrupt any contractual matrix and it was not a situation where farmers would protect themselves with contractual warranties.

⁹² (1997) 72 FCR 1.

⁹³ (1999) 198 CLR 180.

⁹⁴ *Rivtow Marine Ltd v Washington Iron Works* [1974] 1 SCR 1189 (Claim allowed against manufacturer of defective crane by person economically dependant on using the crane).

⁹⁵ *Wilkins v Dovuro Propriety Ltd* (1999-2000) 169 ALR 276.

There are two aspects to contractual protection. First, the claimant might be a powerful commercial entity able to extract protection from the defendant or a middle party in a way that would appropriate internal loss to the careless party and thereby eliminate commercial free riders. Secondly, where the claimant is less powerful and is unable to protect himself in this way, market forces seem to prevent the claimant from gaining appropriate contractual protection. In this situation the retailer is a reasonably foreseeable victim of the producer's breach of duty and it is arguable that the producer was not legitimately pursuing his business interest by making false claims in relation to the goods.

(d) Vulnerability

The final element and one not usually considered by English courts⁹⁶ is the vulnerability of the claimant. It is arguable that Tort law is concerned with the protection of the vulnerable⁹⁷ and that this is supported by both rights and deterrence theories.

Where it is reasonably open to the claimant to protect himself there will be no sound reason for imposing a duty on the defendant to protect the claimant against economic loss.⁹⁸ This reflects the first aspect of contractual protection. The second aspect of contractual protection, that the claimant could not really have protected himself in this way, indicates that the vulnerability of the claimant is a pre-requisite to imposing a duty to protect against economic loss.⁹⁹ One important factor in determining whether the claimant is vulnerable is whether he could have protected himself by protective action such as obtaining contractual warranties. Pecuniary losses are one of the ordinary risks of commercial life and a person taking steps to minimise these losses is normally more efficient than requiring another person to have regard to the risk that others might suffer economic loss. One question should be who is the best cost avoider and in the case of defective retail quality this would be the person responsible for the defect in the goods.¹⁰⁰

It is therefore arguable that the vulnerability of the claimant may be a justifiable, but not sufficient, reason for imposing a duty of care in respect of pure economic loss when the claimant could not have protected himself in contract. A contractual assumption is that the parties will bargain to protect their position. A claimant who cannot do this in any meaningful way is vulnerable and the law of negligence may fill the gap left by contract in its pursuit of corrective justice. This is illustrated by the negligent valuer cases

⁹⁶ However, contrast *Smith v Eric S Bush (a firm)* [1990] 1 AC 831 where the claimant was prevented by market conditions from obtaining contractual protection and although the House of Lords stated that the case was decided within 'settled principles', (pp.845-6) this is doubtful and claimant vulnerability is a factor which clearly influenced the House of Lords.

⁹⁷ *Perre v Apand Propriety Ltd* (1999) 198 CLR 180. See also *Hill v Van Erp* (1997) 188CLR 159.

⁹⁸ *ibid.*, at 214 *per* McHugh J.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

where market conditions prevented a consumer from obtaining contractual protection, although the claimant was part of a contractual matrix.¹⁰¹

Even if there is a formal contractual matrix linking claimant and defendant there is no reason for tort law to refuse protection in appropriate cases.¹⁰²

The principle of caveat emptor still applies in the case of the sale of used buildings. The buyer cannot achieve contractual protection from builders whose shoddy work results in quality defects.¹⁰³ The fact that the action takes place against the background of a contractual matrix is regarded as more an argument for liability than against. Issues of proximity and standard of work can be measured against the contractual matrix. In the negligent valuation cases there is a contractual matrix but no way for a buyer to acquire contractual protection because of standard form contracts.¹⁰⁴ In the Lloyd's names cases such as *Henderson v Merrett Syndicates Ltd*¹⁰⁵ market conditions prevented names from bargaining for contractual protection against their agent's carelessness.

The principal tools used by English courts in economic loss cases are those of reliance and voluntary assumption of responsibility. Is claimant vulnerability synonymous with and capable of being subsumed within those concepts? Typically an economic loss case will involve a relationship of dependence (reliance) or an assumption of responsibility but these are probably best viewed as evidentiary indicators rather than sufficient or necessary criteria and the underlying principle is that of vulnerability.¹⁰⁶ Reasonable reliance can therefore be seen as an indicator of vulnerability either on its own or in conjunction with voluntary assumption of responsibility.

It is submitted that these principles can be used in cases of retailer vulnerability.

Retailer Vulnerability

Where defective goods have been supplied and cost has been incurred as a result of the defect, the approach of English law, and that of the SCGD, is to treat losses caused by quality defects as being dealt with by the contractual matrix. Had the original proposal in the European Commission Green Paper on Guarantees for Consumer Goods and After Sales Service¹⁰⁷ been accepted there would have been a form of joint and several liability for the standard of consumer goods shared between the manufacturer and the retailer. Instead,

¹⁰¹ *Smith v Eric S. Bush (a firm)* [1990] AC 1.

¹⁰² J.G. Fleming, *Employee's Tort in a Contractual Matrix*, (1993) 13 OJLS 430.

¹⁰³ Protection in tort through a claim for economic loss in negligence has been rejected in England; *D & F Estates Ltd v Church Commissioners* [1989] AC 177; *Murphy v Brentwood DC* [1991] AC 398; but has been accepted in some other Commonwealth jurisdictions; *Bryan v Maloney* (1995) 182 CLR 609. (Australia); *Invercargill CC v Hamlin* [1994] 3 NZLR 513 (New Zealand); *Winnipeg Condominium Corp v Bird Construction* [1995] 1 SCR 85. (Canada).

¹⁰⁴ *Smith v Eric S Bush (a firm)* [1990] 1 AC 831.

¹⁰⁵ [1995] 2 AC 145.

¹⁰⁶ *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 263-4 per Toohey J.

¹⁰⁷ Com (93) 509.

what we are left with is a position in which retailers must accept primary responsibility for the defective goods they have sold, but at the same time, they appear to derive little assistance from the SCGD article 4 and will be subject to the vagaries of the distribution chain. In times past, it might have been correct that the retailer should accept responsibility for the quality of consumer goods as the retailer is the first point of contact with consumers. However, it has been observed already that modern trading conditions have changed and that consumers are more likely to rely on brand images created by advertising campaigns run by producers rather than retailers, for the most part. Article 4 of the Directive appears to indicate that Member States should do something about 'network liability' so that the retailer does not soak up all the costs, but what that 'something' is, is far from clear.

Where defective goods are supplied by the producer to the retailer and the goods are resold to a consumer who rejects them or asks for repair or replacement of them due to their lack of conformity with the contract it needs to be asked how principles of tort law will affect any claim by the retailer against the manufacturer. In the case of the costs associated with repair or replacement questions need to be answered. Is it the retailer or the producer who must repair or replace the goods? In principle this is dealt with through the contractual matrix. Recovery of any loss suffered by the retailer will be dependent on the contract with the producer. Although the scenario satisfies the requirement of vulnerability if the retailer is not in a strong enough position to negotiate for redress from the producer and the boundaries of liability are ascertainable and normatively justified, the primacy of contract and the theoretical opportunity to obtain protection through contract will bar any recovery through tort law. The roles of contract and tort are so firmly entrenched that any change would probably have to be made either in contract law on the basis of unequal bargaining, or through legislation.¹⁰⁸ If there has been misleading labelling on the product which has given rise to the consumer claim, could the retailer then claim on the basis of assumption of responsibility by the producer to the retailer that the goods would comply with the claims on the label? If the contract firmly excludes any producer liability for economic loss caused by consumer claims, could the retailer argue breach of contract by the producer in respect of the misleading labelling amounts to a breach of condition which sweeps away the exclusion clause?

If a wholesaler is interposed, would tort law have a role to play? If the retailer could satisfy the requirement of vulnerability in the sense that he could not reasonably have obtained contractual protection from the wholesaler, a case would turn on the requirements of assumption of responsibility and reasonable reliance. Assumption of responsibility could currently be defeated by the argument that the producer's contract with the wholesaler indicated what he did and did not assume responsibility for. Could this argument be defeated by the labelling point made above?

¹⁰⁸ The latter appears to be the preferred judicial approach. See *Pao On v Lau Yiu Long* [1980] AC 614 at 634-635 *per* Lord Scarman; *National Westminster Bank v Morgan* [1985] AC 686 at 707-708 *per* Lord Scarman, rejecting the view of Lord Denning MR in *Lloyd's Bank Ltd v Bundy* [1975] QB 326.

Conclusion

The new remedial regime imposed by the SCGD is bolted on to the existing remedial regime under the Sale of Goods Act 1979 and requires the retailer, at his expense, to repair or replace non conforming goods. One effect of the new regime is that retailers are likely to find life more arduous financially. This is particularly likely in regard to 'public statements' which are made by manufacturers in respect of their products and turn out to be misleading. The retailer will, in many cases have to foot the bill to the consumer.

As the SCGD has imposed extra costs on retailers it is legitimate to ask whether any protection is given to retailers by the SGCD itself. A solution was originally proposed in the 1993 Green Paper¹⁰⁹ in the form of joint and several liability for the quality of consumer goods. However, this was not incorporated into the SGCD and Article 4 provides that national law shall determine the extent to which the retailer can pursue an action up the contractual chain against the person liable for costs incurred. Whether the SCGD intended Member States to take action on the issue of retailer redress is arguable. The Department of Trade took the view that the right of the retailer was to maintain an action against his immediate supplier despite the possible existence of exclusion/limitation clauses or other barriers to recovery. If this view is accepted then it would appear to render the inclusion of Article 4 in the SCGD otiose. Whatever the intended situation under the SCGD, in English law a retailer is left to obtain redress under existing English national law. The options are contractual or tortious.

In contract law the problems are the usual ones of privacy, exclusion/limitation clauses in the chain of contracts and possibly the insolvency of a party in the contractual chain. Whilst statutory intervention has done much to protect the consumer from the rigours of the freedom of contract doctrine, the courts are more reluctant to intervene in business to business contracts. The position is complicated by differences in trading conditions. In some areas of commerce, the retailer (*e.g.* a supermarket chain) may be in the stronger bargaining position. In many other areas it is the manufacturer who is in the dominant position when it comes to negotiating contracts. At present there is no doctrine in English contract law which will relieve a business from the consequences of a term of a contract concluded as a result of pure commercial pressure.

Any change in the contractual position would undoubtedly require legislation as the courts would probably see this as a step too far for them to take. The rationale for legislative intervention would be that retailers have had an additional cost imposed as a result of legislation and require an adjustment in their legal position as a result.

At present English negligence law on economic loss will not be of any assistance because of the primacy of contract law in this area. Previous attempts to introduce negligence principles to address the issue of defective product quality¹¹⁰ have not succeeded. One solution would be for English law to abandon the pockets of liability approach to pure economic loss

¹⁰⁹ *Guarantees for Consumer Goods and After Sales Services* (Com) (93) 509.

¹¹⁰ *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507.

claims and to adopt the more open textured approach taken by Commonwealth courts in order to develop a more flexible approach. Key to this issue is the acceptance of vulnerability as a factor in whether or not to impose a duty of care. Australian courts have rejected reliance and assumption of responsibility as unifying criteria in cases of pure economic loss and have treated them as indicators of the claimant's vulnerability to harm from the defendant's conduct. It is the concept of vulnerability rather than these evidentiary factors which is the relevant criterion for determining whether a duty of care exists.¹¹¹ English courts have shown a recent willingness to abandon embedded legal rules in order to avoid an injustice to the vulnerable in the mesothelioma cases¹¹² and the legislature has intervened where the courts have attempted to mitigate the effect of their decision on insurance companies.¹¹³ The concept of assumption of responsibility would be of no assistance as the manufacturer does not currently assume tortious responsibility to the consumer for quality defects. To say that they assumed responsibility to the retailer for financial losses arising from their products would at present be regarded as usurping the role of contract law.

The preferable solution is contractual through legislation. This is a specific problem and legislation is better equipped to deal with specific issues than case law. This is particularly the case where consumer protection is concerned. Given the lack of clarity over the precise scope of the SCGD article 4 and whether the Department of Trade and Industry has properly implemented article 4 (if it does impose an obligation on Member States), there appears to be a need to legislate in favour of retailers where they have been rendered particularly vulnerable.

¹¹¹ *Perre v Apand Propriety* (1999) 198 CLR 180.

¹¹² *Fairchild v Glenhaven Funeral Services* [2002] 3 All ER 305.

¹¹³ Compensation Act 2006 s.3.