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PRODUCT LIABILITY -- THE ALLOCATION OF LOSS AND RESPONSIBILITY UNDER THE PRESENT LAW IN CANADA

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INTRODUCTION

Product liability is a short-hand way of referring to the allocation of responsibility for loss or injury resulting from defective products. As a general topic it raises in encapsulated form certain basic questions of social and economic policy including:

(a) who should bear principal liability;
(b) for what products and for what losses;
(c) to whom; and
(d) to what extent,

so as to achieve social justice and an efficient use of resources? As a purely legal notion, product liability is the legal doctrine which provides the answers to these questions.

If product liability has been the subject of extensive study in recent years, in Canada and elsewhere, it is largely because the answers which the law currently provides are unsatisfactory.

In Canada, only one province, Saskatchewan, has so far enacted a statute attempting to deal with the problems in a comprehensive manner. For the rest, there is no law of product liability as such, only certain disparate remedies in contract and tort bolstered, in recent years, by a few consumer statutes of limited effect. It is not surprising, therefore, that the present situation has been subject to much criticism.

However, in order to determine whether, and to what extent, the present law furnishes an adequate response to social and economic needs, the first step must be to ascertain what the law is. Only then can it be evaluated. The object of this paper is to provide for that purpose, a brief non-technical conspectus of the existing federal and provincial law governing product liability.

No account will be taken here of various means to control the manufacture of dangerous products by federal legislation such as the Hazardous Products Act, R.S.C. 1970, c. H-3, or the Motor Vehicle Safety Act, R.S.C. 1970, c. 26 (1st Supp.). These controls are important since they

can prevent some dangerously defective goods from entering the market place or enable those which slip through to be removed immediately. They presently affect only a limited range of products, mainly food, drugs, cosmetics, cars, safety helmets, etc. There are many other unregulated defective (even dangerously defective) products on the market place. However, pre-market screening can offer an important safeguard for the consumer.

Similarly, no account is taken of the transactional costs of enforcing the rights a consumer may have against a supplier or a manufacturer. If the expense or delay in obtaining redress effectivley prevents enforcement, the rights themselves are not of much value. This question, like that of false advertising, and the effect of criminal and quasi-criminal penalties to deter the creation of false expectations about the performance characteristics of a product will be examined elsewhere separately and in an economic context.

The focus here is narrower: to determine how the existing law allocates loss and responsibility for defective products among the manufacturer, the retailer and the consumer. The law will be reviewed against the background of a leading American decision, Henningsen v. Bloomfield Motors Inc. 32 N.J. 358, 171 A 2d 69 (N.J. Supreme Court 1960) which illustrates in dramatic form the principal issues in this area. The facts have been modified and the issues simplified in order to focus on the main problems as they were treated by the Court.

HENNINGSEN v. BLOOMFIELD MOTORS (modified)

Claus Henningsen bought a Plymouth automobile from the defendant, an authorized dealer, to give to his wife as a Mother's Day gift. The contract between the parties contained the following clauses:

> 7. It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows.
>
> 'The dealer or manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.***.'
>
> (Emphasis added)

Ten days after the car had been delivered and with only 468 miles on the odometer, the steering mechanism failed, it ran into a wall and Mrs. Henningsen was severly injured. The car was too badly damaged to determine why the steering mechanism failed, whether it was due to a defective part, improper assembly or some other cause.

Both husband and wife sued the seller and the manufacturer, Chrysler, alleging breach of warranty and

negligence. Their claims for breach of implied warranty were successful against both defendants. Mrs. Henningsen received damages for personal injuries. Mr. Henningsen recovered damages for consequential losses including damages to the car (which was a total wreck), medical expenses and loss of consortium. Their claims based on negligence were unsuccessful.

How would they have fared had the defective automobile been exported and sold in Canada?

For convenience the question may be divided into

I. Liability of the Dealer

A. To the Purchaser
B. To the Injured Third Party

II. Liability of the Manufacturer

A. To the Purchaser
B. To the Injured Third Party

I. LIABILITY OF THE DEALER

1. To the Purchaser

The Court held that although the defect could not be pinpointed, the seller had committed a breach of contract. More specifically, the seller was in breach of the implied warranty of merchantability. Furthermore, the attempted elimination of basic contractual obligations violated public policy and was therefore void. The vendor was therefore liable in damages for breach of contract to the purchaser, Henningsen.

Two questions fall to be considered:

1. What are the implied warranties in a contract of sale in Canada?

2. to what extent can they be qualified or excluded?

(a) Common Law Provinces

(i) The Implied Warranties in a Contract of Sale

All nine provinces have enacted, with minor variations the English Sale of Goods Act, 1893. All therefore contain, as a mnimum, implied warranties as to:

Title
Description
Merchantability
Fitness for Purpose

The implied warranties in effect impose upon the seller a strict obligation to ensure that the goods meet certain minimum standards. Breach of an implied warranty will, in all cases, entitle the purchaser to recover damages and sometimes to reject the goods and obtain a refund. They may of course be supplemented by express warranties made by the seller at the time of sale by advertising and together comprise the legal expectations of the consumers about its performance, quality or other attributes.

There is no prescribed content for implied warranties and although there is abundant case law interpreting the Sale of Goods Acts, it may be difficult to predict whether a particular defect amounts to a breach of warranty. For example, to be "unmerchantable", the defect must have existed at the time of sale. If not, the product may have shown a want of durability, but is "durability" implicit in "merchantability" and if so to what extent. Furthermore, although the purchaser is entitled, in principle, to rescind the contract for "unmerchantability", he may in practice have to settle for damages owing to the vagaries of the Sale of Goods legislation.

For these reasons, some provinces have clarified and amplified the warranties implied into consumer contracts. The definition of "consumer" is not uniform, but in general means a transaction where the article is bought by an individual for his own use and consumption.

Thus in Manitoba and Nova Scotia "durability" is specifically implied into consumer contracts of sale. The Manitoba Act makes it clear that "goods" for the purpose of merchantability include used goods.

However, the major innovations are contained in the Saskatchewan Consumer Products Warranties Act 1977 which has replaced the warranty of merchantability by a new warranty of "acceptable quality". This warranty applies to new and used goods except with respect to defects which the seller has specifically drawn to the consumer,s attention beforehand or, if the consumer happens to examine the goods those defects which he ought to have noticed himself.

It has also added a warranty of durability and, for products requiring maintenance a new warranty that spare parts and service facilities will be available for a reasonable time after purchase.

Another important feature is the section specifying the various rights of the aggrieved buyer. The provisions set out in detail, for example, the conditions in which the buyer can reject the product ("breach of substantial character" or an "unremediable breach") and when the seller shall have an opportunity to repair the product.

However, this is the only Act to do so.

(ii) The Exclusion of Implied Warranties

Implied warranties may be supplemented by express warranties made at the time of purchase. They may also be modified or eliminated which is the situation in the Henningsen case. In place of all the implied warranties the seller has only an express 90 day warranty. Every provincial Sale of Goods Act contains a provision enabling the parties to contract out of any of its provisions. However, it is unlikely that the exclusion clause in Henningsen would protect the vendor any more than it did in New Jersey.

Five provinces have enacted legislation to prevent the exclusion of implied warranties in consumer transactions which would render clause 7 in Henningsen null and void. See British Columbia: Sale of Goods Act, R.S.B.C. 1960, c. 344, (as amended) s. 2.A;
Manitoba: Consumer Protection Act, S.S.M. 1970, c. C200, ss. 58, 96;
Nova Scotia: Consumer Protection Act, R.S.N.S. 1967, c. 53, (as amended) s. 20C;
Ontario: Consumer Protection Act, R.S.O. 1970, c. 82, (as amended) s. 44a.
Saskatchewan: Consumer Products Warranties Act, 1977 ss. 1976-77, c. 15, ss. 7, 11.

The Saskatchewan Act goes further: any attempt to exclude or modify the statutory warranties is made an offence under the Act. This is an important advance upon the equivalent provisions elsewhere. To declare an exclusion clause null and void is not thereby to prevent its use. The added sanction will serve to prevent the consumer from being misled about his rights. On the other hand, it does allow the retailer to exclude statutory warranties in sales of used goods.

In the four provinces which have enacted Unfaire Trade Practices legislation it might be possible to establish that the exclusion clause was an "unfair act or practice" because of its form, or an "unconscionable act or practice" because it was "excessively one sided in favour of someone other than the consumer". In either event, the purchaser could claim damages and, except in Alberta, the exclusion clause could constitute an offence punishable by fine or imprisonment.

Alberta: Unfair Trade Practices Act, S.A. 1975, c. 33, ss. 4, 11.
British Columbia: Trade Practices Act, S.B.C. 1974, c. 96, ss. 2, 20.
Ontario: Business Practices Act, 1974, S.O. 1974, c. 131, ss. 2, 4.
Prince Edward Island: Business Practices Act, S.P.E.I. 1977, c. 31, ss. 3, 5.

However, these statutes have not yet been used in this way and their impact on the common law is still moot.

The purchaser would also be protected in those provinces where he would have to rely upon the common law, namely New Brunswick and Newfoundland. In that event, his right to recover damages notwithstanding the exclusion clause would depend on his willingness to sue and the readiness of the courts to apply the doctrine of fundamental breach. The case law indicates that the doctrine is applied very often in consumer contracts as a rule of law disentitling the vendor from protection by the clause. In addition, the courts have demonstrated a growing willingness to intervene where standard form contracts containing harsh terms are imposed in conditions of gross inequality of bargaining power.

If Clause Henningsen had sued Bloomfield in Canada, he would have recovered damages for breach of the

implied warranty of merchantability and recovered damages for damage to the car and other consequential losses, awarded him in New Jersey.

Nevertheless, there is reason for concern about the lack of uniformity in the legislation concerning particularly the meaning of "consumer" sale. The small businessman is always excluded, yet he cannot choose his terms any more than the salaried consumer. In addition, the law goes no further than to impose very basic warranties. Despite recommendations by various Law Reform Commissions, the only province to provide for the possibility of imposing additional warranties based on an industry standard for a particular product (e.g. automobiles) is Saskatchewan. The relevant provisions have not yet been proclaimed.

(b) Quebec

The starting point in civil law for determining the liability of the seller to the purchaser is also the law of contract and the warranties implied by law into a contract of sale in the Civil Code.

(i) The Implied Warranties

As Article 1506 makes clear there are basically two implied warranties:

(i) title
(ii) latent defects

The latter is particularly important in the context of defective products. A latent defect is one which existed at the time of sale, was unknown to the purchaser (Art. 1523), of such a nature as to affect the enjoyment of the product and had it been known to the purchaser, he would not have bought it, at least not at the same price. There is a considerable body of jurisprudence dealing with the question whether a defect was "latent" or "apparent" and when it was discoverable by the purchaser. It seems clear that a layman buying a new car from an automobile dealer would have little to worry about. He would not be expected to make any mechanical inspection before purchase.

In general, where a purchaser can prove that there was a latent defect in a product at the time of sale and acts with reasonable diligence, he can obtain a refund of the price plus expenses -- unless the dealer has excluded the implied warranties in the contract of sale.

(a) Common Law Provinces

It is a basic rule of Anglo-Canadian law that contractual rights and duties arise only between contracting parties. No one but the parties to a contract may sue or be sued in respect of it.

If a man takes his wife out to dinner and they both suffer food poisoning, the right to sue the restauranteur for breach of contract (the implied warranties) will turn on who paid the bill. In our case, the person who paid the bill was Mr. Henningsen. If his wife, the donee, sought to recover damages for personal injuries from the dealer for breach of contract, she would encounter the barrier of privity and her action would fail. However, as the New Brunswick Law Reform commission (third Report) succinctly stated: "To say that only the parties to a contract have rights under the contract is not, of course, to say that only parties to contracts have rights. The law of tort imposes certain responsibilities on the seller of goods even in the absence of a contract. There are certain important differences between contract and tort, with regard to the obligations imposed and the interests protected. While contract imposes strict liability, tort imposes only negligent liability." (p. 135) Unlike contract, responsibility (and hence damages) may be apportioned between the parties on the basis of their respective degrees of fault. thus, the dealer is liable in contract to Henningsen for breach of the implied warranty of merchantability regardless of whether the defect was due to his fault or could not have been discovered using even the utmost care. But the dealer will be liable to Mrs. Henningsen only if proved to have been culpably negligent, i.e., in breach of his duty to take reasonable care to prevent the defective product from causing injury. This duty is owed to anyone who may foreseeably be injured.

As the law presently stands in Canada, it is unlikely that Mrs. Henningsen would succeed in tort. The cause of the steering failure was never ascertained. The dealer would not be liable in negligence unless it could be proved that the defect was discoverable by such examnation as a reasonable automobile dealer would be expected to undertake, as it was known, or ought to have been known, to the dealer. No higher standard of care is owed. (see J. fleming, Law of Torts, 512, (5th ed 1977))

Several provincial Reports have recommended the elimination of the privity doctrine in consumer transactions and the extension of the benefits of the implied warranties to the consumer to produce the same result as in Henningsen. So far, however, only one province has enacted legislation to implement such proposals.

The Saskatchewan Consumer Products Warranties Act, 1977 provides in section 4 that:

> "persons who derive their property or interest in a product from or through the consumer, whether by purchase, gift, operation of law or otherwise shall ... be deemed to be given by the retail seller or manufacturer, the ame statutory warranties as the consumer ..."

The retail seller would, under this section, be liable to Mrs. Henningsen, the subsequent owner for breach of the statutory warranty of "acceptable quality". Since damages are recoverable for all losses which are reasonably foreseeable as a result of the breach (section 20), she could recover from the reailer damages for personal injuries.

The Saskatchewan Act goes further. Section 5 extends the statutory warranties imposed on the retailer to certain users of the defective product:

> "A person who may reasonably be expected to use, consume or be affected by a consumer product and who suffers personal injury as a result of a breach, by a retail seller or a manufacturer or a statutory warranty ..."

The important limitation is that the user can recover only if he has suffered personal injuries which were reasonably foreseeable as a result of the breach.

In no other common law province is the retailer liable to the donee or user for loss or injury resulting from a defective product.

(b) Quebec

So far as the law of contract is concerned the situation is not very different from that in the common law provinces. The implied warranty against latent defects in

Article 1527 of the Civil Code applies like, all other provisions in the Section on Sales, only as between vendor and purchaser. The third party, donee, has no right of action in contract against the retailer who has breached Article 1527.

The donee or user could sue the dealer in delict under Article 1053: "Every person ... is responsible for damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." The product was not merely defective but dangerously defective. However, in order to recover damages under Article 1053, the donee would have to prove "fault" by the dealer, i.e., failure to exercise reasonable care (to act as a bon père de famille). The duty of care imposed on the dealer in delict is no greater than that imposed in common law negligence. An action in delict under Article 1053 in these circumstances would product the same result as an action in negligence: no liability.

It is sometimes suggested that Article 1054, which imposes liability upon a person for "damage caused ... by the fault of ... things he has under his control", provides a method for imposing strict liability for defective products. However, the Article has not been used for this purpose and it has, in addition, not been interpreted as imposing strict liability.

II. LIABILITY OF THE MANUFACTURER

1. To the Purchaser

Liability for defective products is, in contract, imposed on the vendor. At one time this may have corresponded with the proper source of responsibility for the defect but it is clear that such an assumption is no longer valid today. In the modern market place, the retailer is often no more than a conduit for reselling pre-packaged goods. As the Ontario Law Reform Commission in the Report on Consumer Warranties and Guarantees in the Sale of Goods (1972) stated: "It is the manufacturer who endows the goods with their characteristics and it is he who determines the type of materials and components that shall be used and who establishes the quality control mechanism. It is he who determines what express warranties shall be given to the consumer and who is responsible for the availability of spare parts and the adequacy of servicing facilities. Almost all the consumer's knowledge about the goods is derived from the labels or markings attached to the goods or [sic] the sales literature that accompanies them -- and these too originate from the manufacturer." (p. 65).

If liability to compensate for losses caused by defective products should be imposed primarily on the one responsible for creating the defect, the appropriate person to bear the loss is the manufacturer rather than the retailer. Responsibility may presently be shifted to the manufacturer if the retailer sues for indemnification based on breach of the warranty of merchantability, or any other term in their contract of sale. However, the extent to which this cumbersome device is available will depend on the terms of the contract. There may exist between them the same disparity of bargaining power and imposed terms as between dealer and purchaser, but, as a "commercial" contract the terms are not subject to legislative controls or the same likelihood of judical intervention -- at least in the common law provinces. In Quebec the implied warranties will apply. Apart from the moral question of placing responsibility on those who are blameworthy, there is also the practical aspect of deterrence. As Chief Justice Laskin said in a recent case, manufacturers

> "... will be more likely to safeguard the members of the public to whom their products are marketed if they must stand behind them as safe products to consume or to use. They are better able to insure against such risks, and the cost of insurance, as

> a business expense, can be spread with less pain among the buying public than would be the case if an injured consumer or user was saddled with the entire loss that befalls him."*

Another important practical reason for providing the consumer with a right of recourse against the manufacturer is the possibility that the retailer lacks the means to satisfy the claim. The probability of this is greatly increased if the breach of contract is due to a defect in design for the retailer may be faced with many similar claims. Unless the manufacturer is an available defendant, the purchaser may have no redress at all, at least in contract.

(a) Common Law Provinces

The purchaser may have a remedy in contract or tort against the manufacturer. The remedy in contract is rather tenuous and will be dealt with first.

The fact that the manufacturers created the defect in the automobile which amount to a breach of the implied warranty of merchantability in the contract between purchaser and dealer does not give the purchaser any recourse in contract against the manufacturer. The manufacturer was not a party to the sale and the doctrine of privity would bar any such claim.

In order to recover damages from the manufacturer, the purchaser would first have to establish that a contract existed between them. If he could get over this obstacle, he would then have to prove that the manufacturer had warranted that the vehicle was of merchantable quality. It is worth explaining at this point that the statutory warranties of merchantability, fitness for purpose, etc. in the Sale of Goods Acts are implied only in the contract of the sale, i.e., the contract between purchaser and retailer. No warranties are implied by law into any contract between purchaser and manufacturer, assuming there is to be one.

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* Rivtow Marine Ltd. v. Washington Iron Works, [1973] 40 D.L.R. (3d) 530, 551 (Laskin C.J. dissenting).

Whether a contractual link can be established between manufacturer and purchaser depends on finding a collateral contract, that is whether the purchase was made in reliance on a promise by the manufacturer that if the purchaser went out and bought the product it would conform to certain standards. For example, if the purchaser had seen an advertisement declaring a product to be "durable and sound" and on the strength of that bought the product from a dealer only to discover that it was fragile and defective, he could sue the manufacturer for breach of an express warranty in their collateral contract. However, easy as such contracts are to conceive of in abstraction it is difficult to prove the elements of prior knowledge and reliance and there are very few reported cases where the rules of privity were successfully circumvented in this way.*

If the purchaser is able to prove that false advertising had occurred and he had suffered loss or damage as a result of relying on it, it could make a difference to his rights. In the first place, if the advertising were in breach of Part V of the Combines Investigation Act, R.S.C. 1970, c. C-23, as recently amended, he might try to recover damages under section 31.1. That section has not yet been tested and its effects are contraversial. Alternatively, false advertising would also constitute an "unfair or deceptive act, representation or practice" and it might also have a remedy in damages against the manufacturer under the unfair trades practices legislation in British Columbia (Trade Practices Act, S.B.C. 1974, c. 96 as amended, ss. 1, 2, 20) and Alberta (Unfair Trade Practices Act, S.A. 1975, c. 33, ss. 1(b), 4, 11.).

In Henningsen, the New Jersey Supreme Court held that the purchaser and manufacturer had concluded a collateral contract, consisting of an offer by the manufacturer (extended through the dealer) of its "New Car Warranty" in consideration for the purchase by Henningsen of a Plymouth car from the dealer. The collateral contract was of little use to the purchaser because the terms of the express warranty promised no protection against defects of merchantability. Even if such a warranty were to be implied -- and as already noted none would be implied in Canada -- the term of the express warranty would have excluded it.

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* Trueman v. Maritime Auto & Trailer Sales Ltd., 19 N.B.R. (2d) 8 (N.B.C.A. 1977)

The legislative restrictions on excluding conditions in consumer contract apply, with only one exception (Saskatchewan), to contracts governed by the Sale of Goods Act.

Alternatively, the purchaser could sue in tort and prove that the manufacturer had been negligent. (The general conditions were mentioned earlier in the context of Mrs. Henningsen's action against the dealer.) There are, however, two major obstacles. The first relates to proof of negligence where, as here, the cause of the damages is unknown. The standard of care depends on the degree of risk created by the product. But only in cases involving food, drink and certain inherently dangerous chattels -- such as explosives, but not automobiles -- does the standard of care approach strict liability. In other cases proof of fault is needed. It must be shown that her injury was caused by a defect in the product, and that the product was defective when it left the manufacturer. This can be difficult where, as in our case, the product was destroyed. Although the courts have demonstrated a growing willingness to attribute fault to the manufacturer where the cause of the defect is unknown and require it in effect to "disprove" negligence, it is premature to conclude that the era of strict product liability has arrived in Canada.

In 1972, Professor Linden (now Mr. Justice Linden) wrote: "It is time for the Canadian law of product liability to relieve the injured consumers from the onerous burden of proving fault, and so require manufacturers to stand behind their defective products, whether they were negligently produced or not ... If the courts do not act soon, we can expect the legislatures to fill the vacuum." (Linden, Canadian Tort Law 425 (1972). The same passage is to be found in the latest edition of this standard text published in 1977.

The second obstacle relates to the loss claimed by Henningsen. His principal claim is for "direct loss", i.e., damage to the product itself and while such damage is recoverable for breach of contract, it is not clear that such damage is recoverable in tort where the basis for recovery is negligence in the manufacture of a defective product.

It seems appropriate at this stage to compare the approach taken by the New Jersey Supreme Court. The Court stated:

> "... where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they so occur ..."
>
> "We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile."

There was, the court held, an implied warranty of merchantability which ran with the goods from the manufacturer to ultimate consumer.

> "[W]e hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate consumer."

Chrysler, by its express warranty had specifically excluded any implied warranties. The court held otherwise: "[W]e are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."

Thus the American court developed, via the law of implied warranties, a doctrine of strict liability imposed on the manufacturer of defective products.

Several reports have advocated the enactment in Canada of a similar doctrine of strict product liability based on implied warranties running with the goods.

So far, only one province, Saskatchewan, has acted on these recommendations.

By Section 13 of the Consumer Products Warranties Act 1977, manufacturers are "deemed" to give statutory warranties. Section 14 abolishes the rule of vertical

privity and is combined with sections 4 and 5 to permit the purchaser, donee or user to sue the manufacturer directly for breach of statutory warranties. For this purpose "manufacturers" can include importers and distributors of imported products, processors, assemblers of goods, etc.

Other provisions (not yet in force) deal with difficult problems of attributing liability for express warranties where, for example, they consist of advertising or labels attached by the manufacturer before they reach the retailer (section 10).

It is possible that in practice the reach of the provisions imposing liability on manufacturers may be shorter than intended. As the New Brunswick Law Reform Commission (Third Report) pointed out, difficult questions of a constitutional and procedural nature arise when it is sought to impose liability on extra-provincial suppliers (pp. 175-195). A manufacturer located in Ontario who sells in Ontario defective products to a Saskatchewan retailer may be beyond the jurisdictional reach of Saskatchewan legislation. (It is assumed that he has no office in Saskatchewan.) Yet, according to section 33(2) he may be "indirectly market[ing] consumer products in Saskatchewan". Service of process and enforcement of judgments obtained against extra-provincial suppliers are additional problems.

The New Brunswick Report recommended a tort law approach since that was considered to offer a more secure basis for imposing liability for acts which were mainly extra-provincial. Product liability would be made a tort of strict liability allowing the purchaser or user to sue either the retailer or manufacturer for damages for economic loss or for personal injuries.

However, it is doubtful whether the juridictional and procedural problems can be solved by one province acting alone.

(b) Quebec

As noted earlier, the implied warranty against latent defects in Article 1527 of the Civil Code applies only between vendor and purchaser. In principle the same barrier of privity operates between manufacturer and purchaser in Quebec as in the common law provinces.

While that is the case in principle, there have been a few decisions in recent years which have ignored the rules of privity to hold the manufacturer strictly liable to the purchaser for latent defects causing damage or loss. These cases, which are few in number, usually concern defective automobiles.* They have been criticized as anomalous departures from established principles and represent the imposition of liability in delict using the absolute duty imposed on the vendor in contract. However, it is thought that having been accepted by the Quebec Court of Appeal, one route to imposing strict liability upon the manufacturers has now been opened.

If the Draft Bill for a new Consumer Protection Act is enacted as proposed, the purchaser will have direct recourse against the manufacturer who will be strictly liable for breach of any of the listed implied warranties (see Title III, Chapter I).

The established means for suing the manufacturer where there is no privity, is in delict, and the development towards strict liability under Article 1053 of the Civil Code match -- but go no further than -- those in common law for the tort of negligence. For food, drink and commodities, a presumption of fault (under Aticle 1238) is cast upon the manufacturer. In practice, the standards of care in this limited area approach strict liability.**

In other cases, the duty imposed on manufacturers by Article 1053 is in principle "a duty to take reasonable care that the products he manufactures and issues to the public are free from defects which are likely to cause harm to life, or property of the ultimate user, with whom he stands in no contractual relationship".*** The duty of care has in fact been equated with that demanded in common

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* Lazanek v. Ford Motor Co., (1977) R.L. 262; Gougeon v. Peugeot Can. Ltée., (1973) C.A. 824; Building Products of Can. v. Sauvé Constr., (1976) C.A. 420.

** Cohen v. Coca Cola, 62 D.L.R. (2d) 285 (S.C.C. 1967).

*** Masoud v. Modern Motor Sales Ltd., [1951] R.L. 193.

law jurisdictions.* However, the law in this area is in a state of flux: the courts seem to be intent on developing a doctrine of strict product liability as the Civil Code Revision Office has recommended.** But they still have some way to go.

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* Cie F.X. Drolet v. London & Lancashire Guarantee Accident Co., [1943] Que. K.B. 511, aff'd [1946] S.C.R. 82.

** Report on Obligations, Art. 103.

2. Liability to Injured Third Party

(a) Common Law Provinces

At common law, an action against the manufacturer in contract would have foundered for the same reason as an action against the dealer: absence of privity. In view of the state of the law of tort (mentioned above), an action in negligence would also be unlikely to succeed -- although if it did, Mrs. Henningsen could recover damages for her personal injuries.

It seems likely, therefore, that, in the absence of legislation, a donee or user would have no remedy at common law.

The situation should be contrasted with the result in Henningsen v. Bloomfield Motors and later American developments. In Henningsen, the New Jersey court held that the implied warranty of merchantability ran from manufacturer to ultimate user. Mrs. Henningsen was therefore able to recover damages for personal injuries. Later American cases have shifted the basis of liability from implied warranties in contract to strict liability in tort.* The remedies of injured consumers, it was thought, should not depend on the intricacies of the law of sales -- but they do in the common law provinces, and on a very inadequate law.

(b) Quebec

As discussed in the context of the dealer's liability to the injured user, Mrs. Henningsen would have little chance of recovering damages in Quebec. There is clearly no contractual link between the manufacturer and the user -- and the line of jurisprudence extending liability for breach of implied warranties to the manufacturer so far affects only the purchaser. There is no doctrine of strict liability in delict imposed on the manufacturer to the ultimate user for defective and dangerous automobiles. Mrs. Henningsen's recourse would depend on proof of fault and satisfying the general conditions in Article 1053.

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* Restatement Second on Torts, Section 402A

CONCLUSION

As the preceding analysis shows, the law in Canada apportions liability for losses resulting from defective products rather differently than in the United States.

A. In the Common Law Provinces

With the exception of Saskatchewan,

1. The seller is strictly liable in contract only to the purchaser and his obligations may be varied or waived if the transaction is not a consumer transaction.

2. The seller is not liable without proof of fault to the injured third party.

3. The manufacturer is not liable without proof of fault either to the purchaser or the injured third party. There is no general doctrine of strict product liability: liability is "strict" only in cases involving food, drink, cosmetics and a limited category of "inherently dangerous chattels".

In Saskatchewan, recent legislation has imposed strict liability on the retailer and the manufacturer for loss caused by defective products. This strict liability extends to the purchaser, donee and user of the product. The Act is new, parts of it are unproclaimed and it remains to be seen how effectively it has dealt with the difficult procedural and jurisdictional problems in imposing liability on extra-provincial suppliers.

B. Quebec

1. The seller is strictly liable in contract only to the purchaser.

2. The seller is not liable without proof of "fault" to third parties.

3. The manufacturer may be strictly liable to the purchaser of a defective product for personal injuries and property damages, but the basis for this is only a few recent cases rather than any established principle.

4. The manufacturer is not liable without proof of "fault" to the injured third party. There is no general doctrine of strict product liability. Liability is virtually "strict" only in cases involving food, drink or cosmetics.

With the exception of Saskatchewan, the present law governing liability for defective products in Canada embodies most of the substantive criticisms made by the English and Scottish Law Commissions in a recent report about their own applicable law.

(a) In the absence of proof of fault on the part of the manufacturer, only a person standing in a contractual relationship with the supplier of goods has a right and remedy. Where the injured person was not the buyer, he must bear the loss himself.

(b) In the absence of proof of fault on the part of the manufacturer, a person standing in a contractual relationship with the supplier has rights and remedies only against him - usually a retailer. Thus liability will often fall not on the manufacturer - who may commonly be regarded by members of the public and others as being responsible for the quality and safety of the product - but upon a retailer, who from a practical point of view is seldom nowadays regarded as being so responsible.

(c) In a number of situations including that envisaged in the preceding paragraph, it may be necessary for each party in the chain of distribution to claim against his immediate supplier for breach of contract, and in consequence the existing law may multiply litigation.

(d) A person who claims against a producer in tort or delict has to establish first that his injury was caused by a defect in the product, and second that the defect existed in the product when it left the hands of the producer. The latter burden, in particular, he may be unable to discharge.

(e) A person who claims against a producer in tort or delict has a third task, that of establishing that the defect was there because of fault on the part of the producer. Experience shows that if the claimant in tort or delict surmounts the two earlier hurdles he may often be able to surmount the third, because he is aided by the doctrine of res ipsa loquitur or its

practical equivalents. He is, however, at a disadvantage in relation to access to the relevant evidence and scientific expertise, and this may be a real barrier to the initiation of an action on his part.

(Law Comm. No. 82, 1977 para. 29)

The detailed policy guidelines formulated by the Law Commissions might be very helpful in determining the reforms to the law of product liability in Canada.

(a) The loss should lie primarily on the person who created the risk: we are convinced that, particularly when a product is mass-produced, this solution makes sense as a matter of economics. If 10,000 products are manufactured in the same run and one of them, being defective, causes an accident, the easiest way of spreading the loss fairly is to place it on the manufacturer, who can recover the cost of insuring against the risk in the price that he charges for his product.

(b) Liability should be imposed on those in the chain of manufacture and distribution who are in the best position to exercise control over the quality and safety of the product: this gives a producer an incentive to improve the safety standard of the product and to reduce the risk of further accidents. A product may be handled by many persons on its way to the buying public, some of whom control its quality, others of whom, such as wholesalers and distributors, usually do not. The person best able to control the quality of the product is, almost invariably, the producer and it is to him that the liability ought accordingly to be channelled. So far as practicable, however, this should be done in a way which will not inhibit technical innovation or progressive industrial development. The possible incidence of spurious claims should also be taken into account.

(c) It is desirable that the risk of injury by defective products should be borne by those who can most conveniently insure against it. In the existing state of the law most producers insure against their liability in tort or delict or in contract. First party insurance in respect of personal injury is

comparatively rare and comprehensive cover is expensive. The producer is likely to be in the best position to insure against the risk. By putting on the producer the risk of injury caused by a defect in his product and by taking it away from the person injured one would be adding, no doubt, to the insurance premium otherwise payable by the producer, to an extent which, it must be conceded, is speculative until claims experience is acquired: but we believe that it would be a cheaper and administratively more convenient way of providing compensation for the person injured than to leave individuals to arrange their own first party insurances[28].

(d) Public expectations should be taken into account in determining where the loss should lie. It is in the main the producer rather than the retailer whose name is linked in the public mind with the product, and our impression is that when the product turns out to have a defect which causes an accident public expectation is that the producer should provide redress. Public expectations in the safety and performance of products may be raised by advertising and promotional material emanating from the producer.

(e) It is desirable to remove difficulties of a procedural or evidenitary character which impede rather than assist the course of justice ..... , actions in tort or delict against manufacturers of defective products often pose such difficulties, because the circumstances under which the product has been designed, made and tested may be exclusively within the knowledge of the manufacturer.

(f) The policy of the law should be to discourage unnecessary litigation: it is not our function in this report to examine this problem in detail but we are persuaded that the competency of a direct action by the injured person against the person ultimately responsible for causing the injury can only serve to keep litigation to a minimum.

(g) It would not be in the public interest to discourage first party insurance in the circumstances in which it is at present usual and appropriate. There are some kinds of risk for which first party insurance is normal, the most significant being the risk of damage to property. The discussion that follows relates only

to claims arising out of personal injury and death ....
ve reject the suggestion that strict liability for defective products should extend to property damage or other heads of damage, such as pure economic loss.

(h) The number of persons in the chain of manufacture and distribution who should be liable to third parties should not exceed the number needed to ensure that adequate rights and remedies are available to injured persons. Otherwise costs, and with them the price to the ultimate consumer, are likely to increase. Many different persons and organisations may be involved in the production and distribution of a single product. In some legal systems, notably the State of California, the risk of an accident caused by a defect in a product is put on every member in the "producing and marketing enterprise"[29] including retailers, wholesalers, distributors, those who supply goods on hire and even financing institutions who provide the loan capital for manufacturing companies[30]. If each and every member is liable and has to arrange his own insurance cover, the extra administrative costs and the extra litigation costs mean an increase in the ultimate price to the public of the product ... On the other hand special considerations apply where the defective product has been manufactured abroad.

(i) As a matter of general importance, the laws ... should not put such heavy additional liabilities on ... producers as (i) to place them at an undue competitive disadvantage in the international market or (ii) to inhibit technical innovation or research or (iii) to cause reputable manufacturers to cease production in altogether.

(Law Comm. No. 82, 1977 Para. 38)

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