CHAPTER V

THE IMPLICATIONS OF PRIVITY RULE.

LAW OF CONSIDERATION AND EXEMPTION CLAUSES

I

THE DEFINITION OF "CONSUMER" AND THE PRIVITY RULE

Before examining the existing provisions of law with regard to privity of contract, it appears to be essential to comment upon the definition of "Consumer" as given by Molony Committee. As already pointed out, the said Committee defines him as one who purchases or hire-purchase goods for private use or consumption. In other words, the definition reflects upon the contractual character of the consumer. It narrows down the scope of a consumer and the Committee's Consumer is a much different man than that of Lord Atkin in Donoghue v. Stevenson. It is the retailer or seller rather than manufacturer who is responsible to the consumer of goods, if anything happens to go wrong.

1. Command, 1781, Para 2

1a. (1932) A.C. 562
The remedy available under the present law:

From the provisions of Section 16 of S.G.A., it is obvious that the liability of the seller and remedy of the buyer are both riddled with the concept of privity rule. The buyer is entitled to the kind of goods reasonably fit for the purpose for which they are required. He can either reject the goods or accept it and recover damages. If he suffers injury, either physical or financial, due to use of the defective goods or product, he is entitled to sue the seller without

2. (Corresponding to Section 14 of E.A.) Section 16 reads as under:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are brought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality;

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

3. S. 12 (2) of S.G.A.

4. S. 13(1) of S.G.A. But this is subject to sub-sec(2) of the section.
proof of negligence. But this remedy is available to the buyer and buyer alone. No third party can recover anything from the seller either with or without proof of negligence and he can recover from the manufacturer only on the proof of negligence in tort. An interesting case on the point is Mason v. Williams Ltd., in which even the plea of res ipsa locitnur could not succeed against the supplier of a defective chisel. This shows as to how hard it is on the aggrieved party even in cases of tort to succeed without proof of express negligence.

The concept of privity bears some significance where the transactions are of commercial nature i.e., when

5. Refer Dr. S.M. Hasan "A Socio-Economic Re-evaluation of Tort Law of Liability for Personal Injuries" Chap.IV., PP.91-94. However, under German Law, fault is essential to bring an action for loss or damage resulting from the goods. (Professor Konrad Zueigert "Aspects of the German Law of Sale", Int.& Comp. L. Qty. Supplementary (1964) 1

6. Donoghue v. Stevenson, Supra Note 1

7. (1955) 1 W.L.R.549. The plaintiff was injured with a splinter which flew off from a chisel in course of his work. The chisel was supplied by the defendant, the manufacturer and the plaintiff's plea was that the defendant should be held liable for the defective manufacture. As he was not in a position to prove negligence, he raised the plea of Res ipsa locitnur but the same was not accepted and the plaintiff failed.
the buyers and sellers are merchants and they enter
into the transaction with "approximately equal strength". 8
If the goods are purchased for manufacturing purposes,
then it is almost in all the cases, no one but the
manufacturer will suffer the loss. But now let us take
the example of a consumer transaction wherein one member
of a family may purchase certain defective goods, the
other uses it and suffers injury. Can this injured member
of the family recover damages? If A purchases a washing
machine or a hair-dye and A's wife or his guest uses it
and due to defective manufacture or preparation of these
articles, either his clothes are burnt or he suffer physical
injury, can he recover damages from the seller in any case
or succeed against the manufacturer without proof of neglig-
gence? Definitely not. Unfortunately, such common instances
of day-to-day life go unheeded and unremedied in our legal
system. Should the judge dismiss such cases on the ground
of de-minimis non currit lex? In Priest v. Last, the

of Goods under English Law" 32 Mod. L. Rev. 1
9. In America, liability for consumer's product is strict.
See Henning Sen v. Bloom Field Motors Inc. 32 N.J. 385;
161A 2d., 69; Greeman v. Yuba Power Products , 59 Cal.2d., 57
Also Refer Alexander S. "The Influence of Common Law
Principles on the Uniform Law on the International Sale
of Goods" 15(1966) Int.& Comp.Law Qty 749 at PP.771
10. (1903) 2 K.B. 148
husband's claim for recovery of damages was restricted to claiming his expenses for her treatment of injuries, but was not awarded damages for actual injuries to her. The claim against manufacturer for suing in tort (for negligence) was ruled out as he was operating in U.S.A.

Such was the position in Godley v. Perry also.

From the consumer's point of view, the requirement of privity of contract appears to be very much unfortunate. The contractual approach to warranty was a part of the development of commercial law, an attempt by the judge to define the rights of a buyer in the market. For this, the limitations of privity were appropriate. It was reasonable to conclude that a merchant's rights were against those with whom he had dealt. It is really very strange that the plaintiff's right to sue a hotel keeper for having supplied poisonous food, should depend, in absence of negligence, on the fact whether she herself is paying for it or her host. In the classical cases of Donoghue v. 12 Stevenson and Grant v. Australian Knitting Mills Ltd., no remedy could be given for injuries suffered by actual consumers on the ground of breach of implied terms. In the former case, the lady who became severely ill as a

11. (1960) 1 All E.R. 36
14. Supra note 11 id.
15. Supra note 6 id.
result of drinking the snail-contaminated ginger beer was not the buyer; in the second case the person who was affected with dermatitis, resulting from the excess of chemicals in the underwear, was the buyer himself; but the seller in both cases merely served the article in the original condition as delivered by the manufacturer. The effectual remedy was against the manufacturers, in Tort, outside the scope of the contract, on grounds of negligence.

Absence of negligence in addition to lack of privity may mean that no remedy is available at all to the injured party. In Buckley v. La Reserve, the person who suffered illness caused by eating snail in the restaurant was a guest of the actual buyer who paid for the dinner and thus could not sue on the ground that the food was not reasonably fit for the purpose: after all he did not buy it, merely consumed it. As negligence was not alleged on the part of the restaurant, the third party unfortunately had no claim in tort either. In Godley v. Perry, it was good luck that the little boy himself purchased the catapult from the news agent, thus he was a party to the contract and could succeed on the basis that the article did not answer the description. It has been said that if he had simply pointed to the catapult, or picked it up from the counter, he might have lost his claim, could he have relied on negligence for the loss of his eye? As the manufacturer was "Hong Kong firm", apart from the difficulties of establishing negligence, he would have had a near hopeless task.

16. \(1959\) C.L.Y. 133
17. Supra note 11 id.
The Doctrine of Privity is undesirable:

The doctrine of privity is socially undesirable and is based on the doctrine of consideration. It will not be out of place to mention a few words about the circumstances and conditions prevailing in the pre-victorian era which led to its introduction. The origin of the doctrine is shrouded with uncertainties.

Sir Fredrick Pollock says that pledge of a faith, fides facta as a form of rendering the promise enforceable goes back to antiquity and it played an important role in Germanic Law. The ecclesiastical Court considered breach of faith as sin whether in England or Continent. St. Thomas of Aquino said "A simple promise made to another is a natural obligation." 21


20. R. Huebner, History of Germanic Private Law (Translated by F.S. Philbrick) P. 496

21. Walter Stern "Consideration And Gift" 14 Int. & Com.L. Quatr. 675 at 676
In middle ages it was said that Oxen are tied by their horns and men by their words". Lord Mansfield in Fillans v. Van Mierop said that consideration was only relevant for evidence purposes. Hence no consideration was needed for a written document. Swift, an American writer in his treatise says that a written contract precludes an enquiry into consideration.

Professor Holdsworth has described the doctrine as something of an anachronism, inter alia, that the law should provide that all lawful agreements should be valid contracts if the parties intended by their agreement to affect their legal relations, and either consideration was present or the agreement was put into writing and signed by all the parties thereto.

Lord Wright has remarked that the doctrine of consideration be abolished. In the well known case of the Dunlop Encrust Tyre Co. Lord Dunedin observed:

22. id. 677
23. 3 Burr, 1663, 97 Eng. Rep. (1035) K.B. 1765. However it was overruled by the House of Lords in Runn v. Hughes T.R. 350 (1778)
25. Holdworth "History of English Law" Vol. VIII, 47
26. "Genius of Common Law" 91
27. (1915) A.C. 847 at 855 H.L.
"I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration for the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair and which the person seeking to enforce it has legitimate interest to enforce."

In America too, the doctrine of consideration has received severe criticism at the hands of Dean Pound.

According to Roman-Dutch Law, a promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence can be enforced at law. The German Civil Code, similarly makes no mention of causa, and under the code, every lawful agreement entered into with the serious intention of being legally binding would directly produce an obligatory effect.

Pollock and Maitland observe that as far as it can be ascertained, the doctrine of consideration originated from Germany. Under ancient Lombard's Law, the giver of

28. Pound: "An Introduction to the Philosophy of Law" (Rev.Ed.) 155

gift used to receive some worthless trifle, in order to make the gift as exchange or bargain. Later on, this exchange or bargain principle crept into French and English Legal systems. The influence of this reciprocity was so great that even the churches desisted from taking conveyance of land without something in return. "Often a sparrow-hawk is given for a wide tract of land; and this is so, though here the bargain takes the solemnest of solemn forms".  

This makes us to conclude that the doctrine of consideration traces its origin from some continental systems which were prevalent in those days perhaps under some ethical influence and were peculiar to the conditions prevailing in those ancient days. Later on Churches affirmed and adopted this doctrine. As it was firmly established and supported by English Christian Community, the English Judges practised it with all solemnity. But how do we justify its existence in our law. 30 years after British Colonial rule has come to an end? 

As the time has totally changed and trade and industry has developed to an un-imaginable extent, it is highly desirable that our legal system should be geared and over hauled to suit the modern conditions. Certain continental countries  

31. See the recommendation of Law Revision Committee(1937), (Comnd. 5449)
in Europe, do not follow the rule of consideration or if follow, they have circumvented its evil effect in such a way that the exceptions have eaten away the rule.

**Privity rule in other Countries of the World:**

For introducing the privity rule, it is important to know the operation of *Jus suesitum Tertio* (Right of Contract cannot be conferred upon third parties) in other systems of Law.

In middle ages, most of the European nations were dominantly agriculturists. With the advent of Feudal rule, restrictions were imposed on the tenure of holdings. The aging farmer transferred the whole estate to his eldest son, subject to the condition that he will support the parents and other younger brothers and sisters. This was one of the forms of contract for the benefit of third parties.

33. See Code Civil (French) Arts. 1101, 1119 and 1120, Amos & Walton 'Introduction to French Law, PP. 144-46; Prof. Lawson "A Common lawyers Book at the Civil Law" (1955) P. 56
Subsequently, when overseas trade and Commerce
developed again there was need to make contract in
favour of third parties. Certain Writers say that
some Dutch writers of Natural Law School such as
vinnius, christian wolf and Ulrich Hueber asserted
the validity of contract in favour of third parties.
In 17th century, Dutch Courts gave effect to, stipula-
tion in contracts in favour of third parties if they had an
appreciable interest in its fulfilment.

Heinrich Dernburg states, that German Common Law
gave a direct action to the third party against the
promisor when it was the intention of the promisor and
promisee that a third party should get an enforceable
right.

Pothier, in 18th century, was the most influential
supporter of contracts in favour of third parties. French
Code Civil (1803) is based upon Pothier's writings.
Art. 1119 states the old Roman Rule that one may con-
tract for oneself only. Then Arts 1120-21, read with

34. Dekker in Van Leeuwen's Treatise on Roman Dutch Law
Vol.II P.18 note(h)quoted from 12 Int.& Com.Law.Otto,
P.318 at 319.
35."The principle that a third party may take the benefit
of stipulations made in his favour is now firmly
established by Judicialdecisions" Lee's Introduction
to Roman-Dutch Law (5th Ed)P. 243.
36. Pendekten (1903 ed.) Vol.II P. 53-54
Arts. 1165 say that once a contract has been made for the benefit of a third party and that third party has declared his intention to avail its benefit, the promisor may not be able to revoke it. Also no liabilities can be conferred upon third parties detrimental to their interest. Italian Civil Code (of 1865) and many others followed the French Civil Code.

Real progress was made in Germany by the German Bürgerliches Gesetzbuch (of 1896) wherein paras 328-35 deal with the rights of third parties under various types of contracts.

The new Italian Civil Code follows the German Code very closely. Encyclopaedia of the Laws of Scotland says that a right of a third party is to be recognised when it is intended by the promisor and the promisee that the contract should be for the benefit of third parties.

37. Art. 1128
38. Belgium and Luxemburg introduced it during Napoleonic era and it is still in force. Netherlands Civil Code (of 1838) is largely (Art.1153) upon it.
39. 12 Int. & Comp. Law 'uar. PP. 322-23
40. 1927 ed. Vol. IV P. 434
As early as 1859, the New York Court broke with the rigid requirement of privity by stating that where a promise is "made to one for the benefit of another" he for whose benefit it is made may bring an action for its breach.

Historical Background:

Following is the brief history of the cases in which the privity rule was tested in India and England.

The first noted case on the point under English Law is that of Joscelyn v. Shelton, in which propriety of action, that the consideration did not move from the plaintiff was not questioned. This was followed by Provender v. Wood and Dutton v. Poole, where though privity and absence of consideration was pleaded as defence but it was rejected by the

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41. Lawrence v. Fox 20 N.Y. 268
42. (1557) 3 Leonard 4 (Plaintiff sued for payment of money which defendant promised to pay in consideration of his son marrying the daughter of the defendant)
43. 1830) Hetley 30
44. (1681) 2 Lev. 210 (The sister was entitled for a specific sum under contract by tax made between her father and brother. In an action by the sister held, though the sister was no party to the contract yet she was entitled to succeed as consideration moved indirectly from her).
court. In equity Tomlison v. Gill enforced the right of beneficiary under the contract. Then came the fateful judgment in the case of Tweedle v. Atkinson, in which the defense of privity of contract prevailed and though the contract was made for the benefit of the plaintiff between his father and that of his wife, no relief was granted to him.

It may be noted that the facts in this case and Dutton v. Poole were identical but the previous authority was overruled on the ground that it was old enough to be followed and a good precedent was disregarded, setting the course of law in a wrong direction. The case of Bourne v. Mason is also an old authority in which defense of privity prevailed.

45. (1756) Ambler 330; Refer Simpson L.C. Supra note 18 id. it PP. 848-53

46. (1861) 1 B. & S. 393. Whether historically correct or not, the House of Lords in Dunlop v. Self Ridge (1915) A.C. 847 approved the privity rule. This doctrine was much criticised and Lord Denning in cases Smith and Snipe's Hall Farm Ltd. v. River Douglas Catchment Board (1949) 2 K.B. 500 and Drive yourself Hire Co. (London) Ltd. v. Strutt (1954) 1 Q.B. 250, disposed and denied its existence. But in Scruttons v. Midland Silicons (1962) A.C. 440; the House of Lords affirmed its existence. There was a set back again to this doctrine in Beswick v. Beswick (1966) 3 All E.R. 1, where the privity rule was circumvented and the relief granted.

47. Supra note 44 id.

48. (1661) 1 venture 6. See Fifoot "Sources & History of Common Law" (Third Impression 1960) at 424. This case does not appear to have been followed in Tweedle v. Atkinson, supra note 46.
However Dutton v. Poole supra was relied in Rock Wood's case. In an Indian case Venkata Chinnava
Garu v. Venkata Ramaya Garu, Dutton v. Poole was
cited as precedent, and Tweedle v. Atkinson was distinguished by
Innes J. on the ground that "The plaintiff did not
lose anything by the arrangement between two
parents, nor was he worse off from the non-fulfilment
if of the promises than he would have been if they had not
been made, nor did the promises result in any present
benefit to the persons promising to the detriment of
the plaintiff so that there was no consideration moving
directly or indirectly from him to the defendants".
It is submitted that the facts of Tweedle v. Atkinson
and Dutton v. Poole were similar and the distinction
drawn by his Lordship is not tenable. It may be added
hurriedly that the interpretation given by his learned
Lordship was a most appropriate and befitting one.

49. Supra note 44 id.
50. Cited without reference at 139 of (1881) 4 Mad. 137
(The younger brothers successfully maintained suit
against eldest brother, despite privity of contract.)
51. (1881) 4 Mad. 137
52. Supra note 44 id.
53. Supra note 46
54. Supra note 51 id at 139
55. Supra note 46 id.
56. Supra note 44 id.
motivated to do Justice. With due regard to precedence, his lordship did not over-rule the decision directly, but interpreted the law swinging the balance of Justice in favour of the plaintiff. Another case of Samuel v. Anantha-Nath was decided with disregard to the privity rule.

Mr. Justice Keman observed that

the absence of consideration between the plaintiff and the defendant is not material under the circumstances as the defendant received consideration from the administratrix.

In this case also despite privity, full justice was done to the creditor holding that consideration moved indirectly from the plaintiff to the defendant. Dutt v. Mondol is another case, in which the privity rule was disregarded and the creditor of the promisee, though an stranger to the contract, enforced successfully the contractual obligation in his favour from the promisor, defendant.

Most American Jurisdictions, following the famous case of Lawrance v. Fox, allow a creditor whose debtor has

57. (1883) 6 Mad. 351
58. id. at 354
60. 20 N.Y. 268
been given a promise to pay the debt, a direct action at the Law against the promisor. A few Courts give relief in equity. The case is an instance of the tendency of modern Courts to give direct relief to third party beneficiary in disregard to the privity rule.

In the case of Subbu Chetty v. Aruna Chalam Chettiar, (a full bench decision of Madras High Court) a divergence of opinion was expressed on the point whether a stranger to a contract could sue. It was held that no stranger to the contract could sue.

61. Meyer v. Lowell, 44 Mo. 328, Lord v. Forarity 15 R.I 518,
Forbes v. Thorpe, Mass 570; 95 N.E. 955
Also refer Williston 15 Harv. L. Rev. 775
63. "Suits by third person Not Parties to the Contract"27 Harv. L.Rev. 181
64. (1930) 53 Mad. 270. The facts are that the first defendant executed a sale deed in favour of third defendant for Rs. 3,500 and he directed the buyer to pay to the plaintiff Rs. 1,200 which the first defendant owed to the plaintiff. The plaintiff sued to recover the sum of Rs. 1,574-10-3, the balance which was due on a promissory note executed by first and second defendants. He made the third defendant a party on the ground that he was a vendor from the 1st defendant under an obligation to pay the debt due by the 1st defendant to the plaintiff.

The third defendant pleaded that there was no privity between him and plaintiff and so he could not sue on it. On remand from High Court, the third defendant was held liable. In the second appeal referred to the full bench, it was held on the ground of the decision in Tweedle v. Atkinson that the third defendant was not liable.
following the analogy of a bad precedent, in Tweedle
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v. Atkinson. The cases of Jamna Das v. Ram Autar
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Pande, Itti Panku Menon v. Dharmen Achan, Iswaran
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Pillai v. Sonni Vaveru Taragan, and Krishna Lal
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Sadho v. Pramila Bala Das, etc. were cited in support
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of this view.

It was argued from the side of plaintiff that
a direction to pay created a trust in favour of the suit
are parties to the 
/person to be paid. Moreover, if the parties to the
contract, an action is maintainable and the cases of
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Kuni Sami Naikar v. Vedachella Naikar, Peria Thiruvadi
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Avvangar v. Pokutti Janaki, Areti Singaravva v. Areti
72 73
Subbavva, Krishna Swami Battar v. Gopal Krishna Reddiar,
74 75
Debnaraya Dutt v. Chunilal Ghosh Gandy v. Gandy were

cited in support of it.

65. Supra note 46 id.
66. (1911) I.L.R. 34 All. 64
67. (1917) I.L.R., 41 Mad. 488
68. (1913) I.L.R. 38 Mad. 753
69. (1928) I.L.R. 55 Cal. 1315
70. A.I.R. 1928 Mad. 23.
71. (1923) 45 M.L.J. 693
72. (1924) 47 M.L.J. 517
73. (1926) 25 L.W. 190
74. (1913) I.L.R. 41 Cal. 137
75. (1885) 30 Ch.D. 57
It is submitted with due respect that their Lordships could very well have implied a trust against the third defendant, in favour of the plaintiff for money retained by him. As the said defendant retained the money in trust for benefit of the plaintiff, he could have been compelled in equity to disgorge the money for "prevention of unjust enrichment". "The doctrine enunciated by Lord Mansfield in Mosea v. Macforlan is that if the defendant be under an obligation, from the ties of natural justice to refund, the law implies a debt, and gives this action, founded in the equity, of the plaintiffs' case as if it were upon 'contract'." This is very sound proposition of law that despite privity, equity should step in and aid the plaintiff. It may be noted that in this case (Subbu Chetty v. Aruna Chalam Chettiar) all the parties to the contract were present before the court and their Lordships could have ordered the third defendant to pay what he undertook to pay and retained the money belonging to the plaintiff.

The leading case of Khiwaja Mohammad Khan v. Hussaini Begum is an authority for the proposition that in equity a beneficiary is entitled to enforce a contract made for

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76. (1760) 2 Bur. 10: 97 ER 676
77. (1910) 32 All. 410
his benefit. In this case also, Tweedle v. Atkinson was cited by defendant pleading privity of contract. But their Lordship, refused to follow the principle with due regard to the circumstances and facts of the case.

In the case of Shirode Behari v. Managobind, it was held, that even without the aid of equity, a person who takes a benefit under a contract may sue on the contract.

A recent judgment of Calcutta High Court may be mentioned on the point, namely the case of Modi Vanaspati Manufacturing Company v. Katihar Jute Mills (Pvt.) Ltd.

78. Note 46 id.
79. (1934) 61 Cal. 841
80. A.I.R. (1969) Cal. 496. M/s Bhaduris entered into a contract with the plaintiff to supply two generating sets. M/s Bhadaris entered into a separate contract with M/s Modis under which M/s Modis agreed to supply these sets. An advance was made by the plaintiff to M/s Bhaduris towards payment of the said sets, who, in turn handed over this money to the Modis. M/s Bhaduris acted as middleman and there was no direct contract between plaintiffs and Modis. On default in delivery of second set, the plaintiff sued Modis to recover the advance, Modis pleaded that the action was barred on the ground of privity of contract. Held the plaintiff was entitled to recover the advance on ground of "prevention of unjust enrichment".
Mr. Justice A.N. Ray (Ex-Chief Justice, Supreme Court) observed in this case that where A, the purchaser contracting with B for purchase of goods, pays all moneys to C, through B for purchase of goods, and the purchaser A has no intention to pass property in the money to C, until goods are delivered, then in spite of absence of privity of contract, C is bound to return the money to A for "prevention of unjust enrichment."\(^{31}\)

An implied promise to repay will arise if it established that the money which C received belonged to A and A did not want the property in the money to pass to C without consideration. When the goods are not delivered by C and C retains the money advanced through B depriving A of the delivery of goods, then the law implied an obligation to repay that money to A.\(^{82}\)

Note: It will be observed that the provision of S.S. 69 and 70 of Indian Contract Act 1872 are only applicable to parties to the contract, yet his Lordship remarkably circumvented the harshness of privity under the doctrine of "prevention of unjust enrichment".

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\(^{81}\) Id. at 497
\(^{82}\) Id. at 509
After having examined the Indian and English authorities on the point we have observed that a state of uncertainty looms in this field of law. It is hard to guess as to whether a stranger to a contract entitled to receive some benefit thereunder will really receive it even after he enjoins the parties to the contract.

We have observed from the above, that the exception of Trust is unreliable. Sir William Anson, while discussing about the Doctrine of Trust, under privity rule concludes "But it is not a very satisfactory device as the circumstances in which it will be applied cannot be predicted with certainty.".... The courts discourage the device of trust of a contractual right and it is not now a major exception to the doctrine of privity of contract.


84. Sir William Anson "Principles of the English Law of Contract" 22nd ed. (1964) at 376

85. Id. at 377.
Though the privity rule has been relaxed to certain extent in commercial transactions, yet it substantially remains intact. Anson feels that recent decisions have "resulted in a tightening" of the rule. This makes the need for reform imminent.

Criticism of the Doctrine:

Following points are advanced in criticism of the doctrine:

1) It only serves to defeat and frustrate the legitimate expectations of third party beneficiaries.

86. Cheshire & Fifoot Op.cit Supra note 83 id. at 408
88. Simpson L.C. says:

The basic concept of denial of right to third party beneficiary is not understood for the reason that if two persons make a contract in which one person promises to render performance to third person, all the three may be willing that such third person shall have all the rights of a contracting party, including the right to enforce the promise. If so, law must carry the intention of the parties into effect. Though liability cannot be imposed on a stranger to a contract, but rights can be conferred on him. 15 Int. & Comp. L. Guar. 893
2) The doctrine is commercially and practically inconvenient, expensive, evasive of just obligations and very often than not assists the contracting parties in perpetuating fraud.

3) Though the doctrine is absent from the law of Scotland and United States, yet those systems work well.

4) As privity rule is by-product of the doctrine of consideration which is much under criticism, it is advisable that reform in the field of consideration should bring in its wake the abolition of privity rule.

5) In ordinary consumer transactions, the seller may be exposed to the risk of litigation and the manufacturer may go scotfree for his faulty products. Further, in arrangement of "Commercial Credits" between buyer and sellers, if the bank refuses to honour its obligations, the seller may have no remedy against the bank.

89. Read R.S. Pasley "The Protection of the Purchaser and Consumer under the Law of USA" (1969) 32 Mod.L.Rev. 241
90. Note 84 id. at 381
92. Refer J.A. Jolowicz. Supra note 8 id. R.S. Pasley, Supra note 87 id. Indian Law Institute, New Delhi, (Joint Work of Six authors) "Warranties And Privity of Contract- A United States Example of Judicial Law Making" (1964) 6 J.I.L.I. 87
Amendment suggested:

At times the hardship caused to the plaintiff is so great, that the abolition of the doctrine is favoured by eminent text book writers like Anson and Cheshire and Fifoot. It is proposed that its evil effect must be circumvented by adding as an explanation to §2(d), the recommendations of The Law(English) Revision Committee 1937, which disfavours the idea of trust and prefers to give a direct right to sue the third party beneficiary. The Committee recommended

"Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defence that would have been valid between the contracting parties. Unless the contract otherwise provides, it may be cancelled by mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct."94

The recommendations, if incorporated will have the following salutory effects:

93. Supra note 83, Cheshire and Fifoot observe that "Thus the doctrine of privity, while not an irrational inference from the nature of contract in general and of English Contract in particular, has in its incidence worked injustice and proved inadequate to the modern needs (p. 408). Refer also Sixth Interim Report of the Law Revision Committee (1937) at p. 28

94. Sixth Interim Report para 50(9)
(1) The third parties entitled to enforce the contract will be those and only those who were in contemplation of the parties contracting, while forming the contract. This will deny a remedy to 'incidental beneficiaries', that is, those persons who may benefit incidently by the performance of contract, between the contracting parties.

(2) The right of the beneficiary shall be subject to all those defences (fraud, mistake etc.), which could have been available to the defendant against the other contracting party.

(3) The parties to the contract shall be at liberty to cancel or vary the terms of contract, unless and until the beneficiary, after having received notice of contract, has adopted it.

95. American Restatement SS. 133(1) 147.
II

ARGUMENTS IN SUPPORT OF HOLDING
THE MANUFACTURER OF FAULTY PRODUCTS
LIABLE INSTEAD OF SELLER

It is submitted that for the following reasons, the manufacturer should directly be held responsible to the ultimate consumer in almost all the cases, subject to the exception that in case of imported goods, the importer should be held responsible.

(1) Advertisements:

The modern advertising is a mode of promoting sale of the products of a particular manufacturer. It is common knowledge that in this modern, complex world, the conventional modes of advertising have been replaced by cinemas, radios, televisions etc. which have impact on the mind of people of every walk of life. There is hardly any advertisement that "Bata Shoes" of X & Co. are best in the country. But there is advertisement that "Murphy Radios", "Bush Radios", "Usha Sewing Machines" are standard goods and it is their proprietors who extensively invite the public and inject confidence in them about the

96 Jolowicz J.A. Supra note 8 id. at P. 16
quality of their goods, through modern advertising media and it is merely fortuitous that these products are kept for sale in X & Co. or Y & Co., (shops of the grocer). Then it is only a matter of common sense that it is the manufacturer who should bear the risk, for having induced the public to purchase his products, which turn out to be defective.

(2) Packaging:

The modern mode of packaging of the goods is so complicated that the manufacturer intends and insists that the goods be opened only at the time of consumption and the packing should not be disturbed unless the goods are required for actual use. This is done partly to avoid adulteration of the standard products and partly due to the reason that certain packings are air-tight. In other words, the possibility of intermediate examination is excluded. Then how does the law impose the liability on the seller or retailer? In Gordon v. M'Hardy (scottish case) in an action to recover damages from the grocer, for the death of the plaintiff's son due to eating tinned Salmon, Lord Justice Clerk said that the grocer

97. Baxter v. Ford (1932) 12 P. 2 d. 409
98. (1903) 6 F. (ct. of Cess ) 210
could not be liable for the defects in the goods
because he was not expected to examine the contents
of the tin without destroying the very condition
which the manufacturer has imposed, in order to
preserve the contents, "the tin not being intended
to be opened until immediately before use".

An experience of mine may be narrated here:
Recently, I purchased from a shop a tin of "Milk Maid"
brand, condensed milk. The label or instructions did
not indicate the date of its manufacture. When I
used the contents of the tin, I suffered from vomiting
sensation and realised that this is all due to contami­
nation of milk. Here, we will see that the seller
had no chance of exercising his skill and judgment,
though the purpose of their use was already known to him.
When I reported this matter to the selling agent, he
immediately responded to my request for replacement,
but was unable to do so unless I lodged a formal com­
plaint to the manufacturer. This was done and the
selling agent replaced it. If this is the position
and the seller feels sorry for inconvenience and the
manufacturer realises his responsibility to replace or
repair the faulty goods then is it the law which should
become an instrument of oppression in the hands of a
crooked manufacturer of bogus products who should deny his responsibility on such an absurd legal principle as privity?

This point also strengthens the argument that it is the manufacturer who is responsible for having supplied a defective product.

(3) Labelling:

The modern method of labelling the products is also another reason why the manufacturer only should be responsible. As early as 1932, the Supreme Court of the State of Washington held that the manufacturer of an automobile was responsible to the buyer for having represented through advertising and sales literature that the wind-shield was made of non-shatterable glass. The representation proved to be false and the aggrieved buyer was allowed to succeed against the manufacturer, despite the absence of privity.

In Randy Knitwear Inc. v. American Cyanamid Company, the plaintiff was a merchant buyer, who suffered


100. 11 N.Y. 2d, 5; 181 N.E. 2d, 399, 399, 226 N.Y.S. 2d, 363 (1962)
economic loss on false representations made by manufacturers in their advertisements, direct mailings and labels, Judge Fuld said:

"It may once have been true that the warranty which really induced the sale was normally an actual term of the contract of sale. Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer, through mass advertising and labelling to ultimate business users or to consumers with whom he has no direct contractual relationship."

"The word of merchantising is, in brief, no longer a word of direct contract, it is, rather a word of advertising..."

"Equally sanguine representations on packages and labels frequently accompany the article through out its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs against the manufacturer whose published representation caused him to make the purchase..."  


102. The decision in the case was unanimous.

103. 11 N.Y. 2d. 512; 181 N.E. 2d. 393, 402; 226, N.Y.S. 2nd 363, 367
The impact of modern advertising and labelling by the manufacturer is so great that his representation to "ultimate buyer and consumer often reduces the retailer to the subordinate role of merely delivering goods, the customer has already decided to buy." 104

Whether acting on advertising, labelling etc., constitutes consideration:

Should we not apply the maxim of *Carlill v. Carbolic Smoke Ball Co.* in the cases of sale of goods through labelling and mass advertising, which has the affect of attracting the masses and turning them into potential and prospective buyers of the products of advertising manufacturer. We may recall that in the above cited case, the defendants inserted in various newspapers the following advertisement; "100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza after having used the ball three times daily for two weeks according to the printed direction supplied with each ball. £1070 is deposited with Alliance Bank.

104. Leys W.C.S. "Privity to be or Not to be" (1965) 28 Mod. L. Rev. PP. 96, 725
105. (1893) 1 Q.B. 256 at P. 269
Regent Street, showing our sincerity in the matter. This was a representation which induced the plaintiff to use the smoke ball and obviously this was made by manufacturers for sale promotion of their products. The plaintiff relied and acted upon the representation and hence she was entitled to the reward as advertised. Bowen L.J. said, that it is sufficient acceptance, if any person acts on the offer and accepts it in the mode advertised by the offeror. Further, as the act has been done "at the desire of the promisor", it constitute a valuable consideration in the eye of law. There is no necessity to give the notice of acceptance to the advertiser as he intends to dispense with such notice.

107. Supra n. 105
108. S.2(d) of Indian Contract Act 1872
109. ".... as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose that there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification "per Bowen L.J. in *B. 256 at 269 quoted from Pollock & Mulla on "Indian Contract - Specific Relief Acts" (1957 ed.) pp. 62-63
even if we take on the requirement of privity, there shall be deemed to be a valid contract between the manufacturer, consumer or intermediate buyer, other sellers or retailers being merely conduit pipes through whom the finished goods pass.

Let us treat Carbolic Smoke Ball supra in a different perspective. Suppose the plaintiff would have sustained some bodily injury due to faulty preparation of smoke ball, could she recover the damages from the defendants, leave aside the award? If we turn on logic, there is a valid offer and acceptance, there is consideration, for reasons already stated above. If all these are put together, then there is a contractual proximity and hence privity. It is sure, had their Lordships been asked to decide this issue, they would have definitely decided in favour of the plaintiff. If not, it is illogical and like breathing hot and cold together.

The above argument is in line with the decision of the American Courts, where the requirement of privity was relaxed to some degree even in commercial sales, provided the buyer purchased the goods on the ground of advertising, packing labelling and relied upon the superior knowledge of the manufacturer.

110. Leys I.C.S. Supra note 104 at 726
(4) **Multiplicity of action:**

The manufacturer should be held liable to the buyer in order to avoid the multiplicity of action. If A sells to B, B to C, C to D, D to E and E suffers damage by using the defective goods, then E, instead of suing A, the manufacturer, has to sue D, D to C, C to B and B in turn to A. The case of Kasler and Cohen v. Salvonski, is relevant on the point. The facts are:

B, a wholesale furrier, bought some dyed rabbit skins from A for the purpose of making collars. This purpose was known to A, B having made collars from rabbit skins, resold it to C, C to D and D to E, a draper. E then sold a coat to F with one of these collars attached to the coat. F developed "fur dermatites", owing to antimony in the fur. F sued E for breach of implied warranty of merchantability and fitness. Subsequently, E gave notice of the action to D, D to C, C to B and B to A. F won his case and ultimately in line of chain action, B recovered from A, £599 as damages for breach of original warranty of merchantability in the sale of the skins.112

111. (1923) 1 K.B. 78

112. Noted from D.F. :ulla's "Indian Contract Act" (Ninth ed.) P. 131
This amount swelled up from few pounds to £699, because the cost of litigation was also added to the damages, and the cost increased enormously, as a result of multiplicity of action. That the small rabbit skin can play so much of havoc is inconceivable without the prevalence of the rule of privity. Hence it is submitted that the multiplicity of action is much undesirable on the following grounds:

(a) All the parties have to entangle themselves in the suit and this will entail financial loss and wastage of time. Time is money; sometimes much more than that for a modern man. One may have a lot a power and pelf but no time, Should it be dissipated in litigating in such a fashion? This is against the spirit of U.C.C. and such action is not called for.

(b) As we all know, business is a means to an end. That end is earning of profit. If A is made liable to pay damages with cost, then it is sure that if E has suffered damages to the extent of £. 10/-, A may be held liable to pay at least about £. 1000/- in long chain of action. If A is made to pay this much, is he going to pay from his own pocket?
Certainly not. A will add it with the cost of the goods and increase the price. In the ultimate analysis, it is the buyer or consumer who loses.

(c) It has been seen in very many cases, that the immediate seller is an insolvent person against whom no damages can be recovered. Professor Prosser, while justifying the imposition of strict liability against the supplier is of the opinion, that courts have a leaning to impose liability against the manufacturer, instead of enforcing the same by a series of actions, for breach of warranty, "because this is wasteful, expensive, and time consuming. Moreover, there are always the possibilities of intervening insolvency, lack of jurisdiction, disclaimers, running of the statute of limitation and the like".

(5) Display in show cases by manufacturers:

Now-a-days, a practice has become prevalent that the manufacturers of their products display them in show cases and open their own fair price shops. This is an inducement to the consumer or buyer to rely that the goods are of merchantable quality and free from any defect. In 1944, Mr. Justice Traynor,

113. Prosser Torts (3rd ed. 1964) Sec. 97 P. 673
114. Quoted from (1967) 32 Mod. L.R. 241 at 256
in a case, went to the extent of telling that the manufacturer incurs absolute liability, in all those cases, where he sends his products in the market, intending it to be used without intermediate examination, and due to defective preparation, it causes injury to the purchaser. The public policy demands that the liability should be fixed on him without proof of negligence, in order to "effectively reduce the hazards to life and health inherent in defective products that reach the market". Though the manufacturer is not negligent in producing it, yet he is responsible for sending it to the market.

6. Distribution of risk of loss:

Distribution of risk of loss is of utmost significance. Professor Prosser quotes a passage from the judgment of the case Henningsen v. Bloomfield Motors Inc., in this connection, which is:

"The burden of losses consequent upon use of defective article is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur...."117

115. Bacola v. Coca-Cola Bottling Co. 24 Cal. 2d 451, 461
117. Also refer Dr. S. S. Hasan op. cit Supra note 5 id. at 57.
117. Professor Prosser "The Fall of the Citadel (Strict Liability to the Consumer)" (1963) 50 Minn. L. Rev. 731
If we see the problem in this perspective, we will come to the conclusion that it is the manufacturer of products who can control the danger and also place the losses equitably on the consumer. This view finds support from Justice Traynor's concurring opinion in Escola v. Coca Cola Bottling Co. where he says that the manufacturer is in the best position to distribute the loss equitably arising due to preparation of faulty product. He can take out risk insurance and include it in the cost. Perhaps this was the driving force which persuaded their Lordships of New York Court of Appeal in Goldberg v. Kollsman Instrument Corporation to hold liable the manufacturers of complete Air Craft, the Lock Heed Airways Corporation Ltd. The case being significant, its facts are briefly as follows:

Action was brought by the administratrix of fare paying passenger of American Air Line Inc. who died of plane accident. The plane disaster took place due to faulty altimeter supplied by Kollsman Instrument Corporation and fitted by Lock Heed Airways Corporation in its manufacturing process. The administratrix sued the American Air Line Inc. with Kollsman and Lock Heed Airways as Co-defendants.

118. 24 Cal. 2d. 453
The Court held the air craft manufacturer and the American Air Lines Inc. liable, excluding Kollsman.

The decision was that the implied warranty of fitness of aeroplane manufacturer ran in favour of aeroplane passengers boarding such plane, despite the lack of privity of contract. Desmond C.J. said "Adequate protection is provided for the passengers by casting in liability the aeroplane manufacturer, which put into the market, the completed air craft". The aircraft manufacturer and the transport company could distribute the risk equally on all, by increasing the prices of air-craft and fares. Further, they were also financially well off to bear the risk. This is in accord with the observations of Salmond.

120. Ibid at P. 595

121. An idea is developing which is known as "Insurance Idea", liability should be imposed upon those able to pass the loss on the public, the so called insurance idea. "We were all to bear the losses falling upon any of us as risks of loss in civilised society, and, as means of achieving that just distribution of the burden of loss the law should impose the loss in the first instance upon those able to pass it on the benefit at large through charges for services in the case of public utilities, or price of goods manufactured, in case of the produce of the factory.... Lastly, parallel with or else out of the so called insurance idea, a new basis of liability has been increasingly advocated in recent years and is making Headway. It looks like an idea of greater ability to bear the loss as a ground of liability". Pound "Justice According to Law" (Yale, U.P, 1951) P. 11 quoted from Salmond on Law of Torts.
Now the gap between Tort and Contract is becoming narrower and narrower. American Courts have already started affording relief, under contract, from remedies available in tort. Seen from this angle also, the decision in Gold-bergh v. Kollemann Instrument Corporation supra is correct and hence many of the queries raised by U.C.S. leys, in connection with this case, appear to have been solved.

Coming back to the point, suppose the seller is asked to bear the risk of loss as is the law now, he will not be able to distribute such risk on the consumers equally as his area of operation is limited. The climatic conditions of certain regions may be adversely affecting the goods and that of other may be favourable to them. There the risk of loss is greater, the insurance premium will also range higher, pushing the price upward and thus creating disparity in price structure, regionwise. From this point of view also, we come to the same conclusion that the risk of faulty products should be borne by manufacturer.

(1965 ed.) at 33. Further Lord,Sumner said: The object of civil inquiry into cause and consequences is to fix responsibility on some responsible person in order to make him liable for award of damages suffered and not inflict punishment for disregard of duty. See Leyd. Plundell v. Stephens (1920) A.C. 956 at 986

122.See Leys U.C.S. supra n. 104 id.
(7) Issue of guarantee cards by manufacturers:

The issuing of guarantee cards by manufacturers for their goods to the consumers is a clear indication and strengthens the view that it is the manufacturer who is prima facie responsible to rectify the mistake in the goods supplied. If he is responsible to rectify the mistakes in the goods supplied, naturally he must also bear the consequences directly flowing from the supply of defective goods.

(8) Business policy:

It is a sound business policy that manufacturer should stand behind his product.

(9) Prevention of negligence:

It will have the salutory effect of preventing the manufacture of defective products caused due to negligence. This is needed in India, specially at present, when the manufacturer has got a protected market. The deterioration in quality of goods is taking place day by day. As the manufacturer knows very well that government has imposed ban on import, the consumers are many, suppliers are few, and hence whatever will be produced is liable to be sold. He, therefore concentrates
on quantity and quality is no more his concern, unless there is keen competition, between manufacturers. This is very much against the national interest, and trade and business of the country, in the long run. 123

(10) Duty to protect against novel and unforeseen hazards:

Many of the difficulties faced by injured parties are brought out by the facts of Thalidomide—a product of a British Company manufactured under licence from a German Company-case. On wide prescription and use, it was revealed that the product was harmful in pregnant women, as it prevented forming of organs of a child in its mothers' womb. How can a malformed child can subsequently bring an action against the Company for negligence? Suppose the lady brings an action against the retailer for injury to her child, how should he be held liable for he rarely has the opportunity or expertise to assure himself of the satisfactory nature of goods he sells.

124 The Ontario Law Commission reported recently that in modern marketing milieu, the manufacturer is responsible for putting his product in the stream of Commerce and in most cases for creating demand for them by continuous advertising "The retailer is a little more

123 Dr. S. M. Hasan, Op. cit, supra n. 5 at pp. 96-101
124 Report on Consumer Warranties And Guarantees In The Sale of Goods, Toronto, June 1972, Chapter V, para 1a
than a way station". He determines the material and components and controls the quality of the goods. He determines the guarantees for his customers and is responsible for the spare parts and service facilities.

"Almost all the consumer's knowledge about the goods is derived from the labels or markings attached to the goods or sales literature that accompanies them and these too originate from the manufacturer". It is therefore unrealistic that our "consumer law" like the Canadian, should still be based principally upon the philosophy of code that grew out of a trading system based upon personal contract between manufacturer and buyer and upon genuine power of selection by the retailer as to whose products he purchased to supply his customer.

**Exception:**

Let us suppose that the buyer's complaint is that the goods were not fit for the purpose for which he bought. In other words, the buyer relies upon the skill and judgment of the seller when he tells, "I want such and such goods for such and such purposes. Will it be all right"? Thereupon the seller affirms that "yes it will be alright" and if after that he supplies goods which are not reasonably
fit for the purpose for which they are required, then the seller, should be responsible for such loss or damage which the buyer suffers. In other words, if the goods are of merchantable quality but not fit for the purpose for which they are acquired, then seller must suffer for his sale inducing device. But the present application of the section goes too far. The seller is also held responsible for any inherent defect in the production of the goods, causing loss or damage to the buyer or consumer. This is anomalous. In public interest, the responsibility should be fixed against the manufacturer of faulty products.

III

Suggestions to introduce amendments:

Keeping in view the problems arising out of the present state of law, we shall examine the provisions of Uniform Commercial Code and see as to how far is it useful for our country. The relevant section reads as follows:

Section 2-318 Third party Beneficiaries of Warranties Express or Implied.

125. Kasler & Cohen v. Salvonski, supra n. 111

Godley v. Perry (1960) 1 W.L.R. 9
A seller's warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is a guest in his home, if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The section makes no major assault on the privity. However, it is far more satisfactory than our law on the point. It covers all the members of the buyer's household and his guests and relatives. Comment 3 to the section is explicit on the point and expressly states that the section does not intend "to enlarge or restrict the developing case law on whether the seller's warranties, given to the buyer who resells, extend to other persons in the distributive chain".

The other effect of adopting the provisions of this proposed amendment will be that the definition of Consumer given by Molony Committee shall be no longer effective as now every member of the household of the buyer.

126. Molony Committee defines consumer as "one who purchases goods for private use or consumption". (Commnd. 1781) para 2
plus his guests are covered under the definition of consumer. This takes us nearer the literal meaning of consumer and also that of Lord Atkin in Donoghue v. Stevenson.

Limitations:

Sec. 2 318 suffers from certain limitations and they are that (1) recovery for wrongful death's is excluded (2) the buyer must within a reasonable time, after he discovers any breach, notify the seller of such breach, failing which his action may be barred. However, rigour of this rule is relaxed by comment 4 to the above provision which says that the time of notification is to be determined, by keeping in view the nature of transaction, because the rule of requiring notification is designed to defeat commercial bad faith and not to deprive a good faith consumer of his remedy.

In the light of this comment, it was held in Pritchard v. Liggett & Myer Tobacco Co., that even a

127. Supra n. 1
128. Prosser, Op. cit, Supra N. 113 Sec. 95 P. 652
129. U.C.C. 2-607(3)(a). This provision is similar to Section 49 of Uniform Sales Act
130. 295 F. 2d. 292 (ed. Cir. 1961)
long delay is reasonable. In another case, it has been observed that the requirements of notice are not relevant, in cases of personal injuries. Prosser is of the view that this requirement does not hold good for parties who have not bought and sold with one another.

Another difficulty the consumer may face under the code is that the seller may expressly exclude or disown liability against implied warranties. However, this is subject to the following limitations:

(1) Under 5,2-316,(2) the exclusion of merchantability should be conspicuously stated, mentioning the word "With all faults" etc. We have already seen that the last part of 5,2-318 expressly prohibits the exclusion of the provisions meant to protect the interests of third party beneficiaries.

Though the seller is permitted to limit the remedies in breach of warranty under the code, he will be held liable for consequential damages for breach of

131. Wojcink v. United States Rubber Co., 19 Wis 2d. 224, 122, N.W. 2d. 737 (1963)
132. Prosser Op.cit.n. 113 Sec,97 P,680;Greenman v. Yuba Power Products Co. 59 Cal. 2d. 57 at 72
133. U.C.C. 2-316
134. U.C.C. 2-316(3)
135. U.C.C. 2-316(4)
such warranty, if such disclaimer is unconscionable. The code encourages good faith, by not enforcing unconscionable bargains. Disclaimer clauses have been declared invalid or cancelled by the Court, under contract of sale of food stuffs, drugs etc., on the ground of unconscionability.

Though sec. 2-318 relaxes the privity rule to a great extent but it is curious to note as to what could be the reason for limiting the liability of seller to the buyer of the members of his family and friends but not others when there is no logical justification for doing that. Perhaps this was done as a result of stiff resistance from those business circles who otherwise might have opposed the enactment of such legislation.

136. U.C.C. 2-719(3)
137. U.C.C. Secs. 1-203 and 2-103
138. U.C.C. 2-302
139. The 1951 draft of the section extended recovery of damages by any one whose relationship to the buyer was such as to make it reasonable to expect that such person might use, consume or be affected by the goods.
As a result thereof, 20 states have either omitted or altered the provisions of section 2-318 and a more comprehensive remedy of strict liability in Tort has developed which renders the section almost absolute.  

The anomaly, existing in the cases of relief to non-buyers affected by defective goods e.g. a pedestrian being run-over or hurt by a defective car, has been removed by inserting section 402 A in the Second Restatement of Tort by the American Law Institute in 1965 which reads as follows:

**Special Liability of Seller of Product for physical Harm to User or Consumer:**

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in sub-section(1) applies although

(a) The seller has exercised all possible care in
the preparation and sale of his product, and

(b) The user or consumer has not bought the product
from or entered into any contractual relation with the
seller.

Thus the scope of protection in Tort is widened
by the Restatement. It extends to "the ultimate user or
consumer" even though there is no privity of contract
between such user and the seller. Comment to this section
is also parallel to official comment to Section 2-318 and
the American Law Institute says that:

The institute expresses no opinion as to whether
the rules stated in this section may not apply—- to harm
to persons other than users or consumers.

A comment clarifies by mentioning that a "consumer"
includes one preparing food for consumption by another,
and that "user" includes one passively enjoying the bene-
fit of a product or doing work on it. Thus the passenger in
a defective car who is injured, when it goes berserk is
able to recover from the seller, but pedestrian and other
motorists injured by the same occurrence are without a similar remedy. The above distinction is unwarranted and has been rejected in a number of cases. As a matter of fact, the by-stander deserves much more sympathy, as he had no chance of inspecting the defective goods at all. Perhaps the above mentioned persons are left out to prove their case under negligence.

Apart from the similarities mentioned above, there are many differences between the uniform commercial code and section 402A of Restatement of Tort:

For an example, under the former, the liability for defects may be excluded by agreement; whereas under the latter, it cannot be done. It is submitted that section 402A which has been subsequently framed is based upon sound footing and is intended to cover the areas delimited by implied warranties. This accords with equity and is in consonance with public policy.

143. Sections 2-302, 2-316, 2-719
144. Comment "m" to section 402A
The Law Commissioners' working paper referred to Section 2-318 of U.C.C., and pointing out its defects, proposed the following:

"... that in consumer sales the benefit of the seller's obligation under Sections 12-15 of the Sale of Goods Act 1893 should be extended to any person who may reasonably be affected by the goods".

These recommendations are closer to the section 402A of Restatement of Torts mentioned herein-above, and are perhaps based on these provisions. They are also similar to the provisions of German Law, where in Donoghue v. Stevenson like situation, the manufacturer of ginger beer is responsible from wholesaler to ultimate consumer and this is based on positive violation of contract.


146. "The carelessness of marketing ginger-beer with a hidden defect, definitely endangers the whole purpose of the contract. The retailer's purpose is to satisfy his customer. The customer's purpose is either to consume the article, or to give it to his family and friends for consumption and enjoyment. If instead of satisfaction and enjoyment, the result is dissatisfaction and injury to health, the purpose of the contract is far from being achieved" (15 Int.& Comp.Law Qtlly, p. 749 at p. 777)
On this basis, in 

Codley v. Perry

like situation, the boy could claim damages irrespective of the fact whether he was buyer or not or if the friend of the boy sustained injuries, he could also claim damages. Apart from these characteristics, it is suggested that the provisions of Section 402A are quite suitable and are preferable to the one enacted by Section 2-318 or the working party's recommendations for the following reasons:

(1) The Restatement does not allow a seller to limit or exclude his liability for negligence. As stated earlier, this is in consonance with public policy and if contrary is permitted, it will defeat the provision of Law of Tort and any attempt by the seller to do away his liability for negligence etc. should be treated as void. 147 The working party did not recommended that the seller should not be allowed for excluding his liability for negligence for the reason that the subject requires further study. 148

147. Sec. 23 of Indian Contract Act 1872

148. "Conscious of the desirability of avoiding anomalous distinctions between contract of sale of goods and contracts for the provision of services, the working party took the view that the recommendations regarding exclusion of liability for negligence in contracts of sale of goods could not be made until a full examination has been carried out of the exclusion of liability for negligence in contracts for the supply of services also", supra note 126 id. at para 78
It is submitted that the seller should not be allowed to exclude his liability for negligence. Such an exemption clause in a contract should be declared as void on the ground that if permitted it would defeat the provisions of law of Torts. This aspect does not require any study at all. This view finds support from the French Law where tortious remedies cannot be excluded by contract.

(2) The working party's proposal is limited to consumer sales only. All the definitions of consumer sale exclude sale by a manufacturer of a product to a wholesaler or retailer buying for resale in the course of his business. As a result thereof, the seller becomes strictly liable to injured third parties whereas, the manufacturer is liable only on proof of negligence. It is submitted and has been argued elsewhere that there are greater justifications to hold the manufacturer strictly liable for his products. An explanation to section 16 should be added which may read as follows:

149. Section 23(b) of Indian Contract Act 1872
"Explanation":

"Seller includes manufacturer and importer of goods".

The explanation will provide a chance to the buyer or ultimate user or consumer of defective goods to sue the importer or manufacturer as the case may be. This may happen in a case where the manufacturer, residing in a foreign country, cannot be sued for lack of jurisdiction. 151

IV

Relaxation of Privity Rule and Development of Theory of Strict Liability in America

At the earlier stages, American Courts were reluctant to impose or enforce product liability in negligence, beyond the contracting parties. This was due to the impact of Winterbottom v. Ertight 153 in England.

152. In Gearing v. Berkeon 223 Mass. 257 (1916), defence of privity prevailed. However, in Kennedy v. F.W. Woolworth Co., 205 A.D. 648 (1923), such defence was disregarded.
153. (1842) 10 M & W 109, Lord Abindger said, that unless the maxim of privity of Contract is enforced in Contract, the most "absurd and outrageous, Consequences" may follow (P) 114. Alderson B. was also apprehensive of such consequences (P. 115).
The causes of relaxation of the rule:

The rule of privity slowly relaxed for protecting the consumer from spurious drugs, unwholesome foods and drinks, dangerous things or chattels from which he may sustain damages. The modern labelling and advertising by the manufacturers is also the reason (to relax the rule) which induces the retailer and buyer to stock and purchase their products.

It was held in Thomas v. Winchester, (1882), (a leading case from New York) that the supplier of a drug was responsible to the consumer, though there was no privity between him and the supplier. In this case, the supplier falsely labelled belladona, a poisonous drug as "extract of dandelion" a relatively harmless drug, and sold it to a retailer, from whom the plaintiff's husband had bought. She sustained injury due to its use and sued the manufacturer successfully. It will be observed that the privity rule was relaxed in this case from the side of buyer as well as seller.

154. Supra n. 11 Id.
155. 6 N.Y. 397
The case of *Mazetti v. Armour & Co.* (1913)

appears to be the first case in which strict liability was imposed in tort for foods and drinks, irrespective of the proof of negligence. Then comes the case of

*Ryan v. Progressive Grocery Store Inc.* decided in 1931 in which a pin was found in sealed package of bread.

Now the manufacturers of cosmetics, hair tints, hair dressings, hair dyes etc. are being held liable to the ultimate users under the rule of "strict tort theory" of product liability.

156. 75 Wash 622; 135 pac. 633 (1913)

157. 255 N.Y. 388, 175 N.E. 105 (1931). In this case, manufacturer was held liable for breach of warranty of merchantability. Compare this case with *Daniel v. White & Sons* (1938) 4 All E.R. 258 in which plaintiff bought a bottle of white lemonade and having drunk its content, suffered injury, as it contained carbolic Acid. In an action against the retailer and manufacturers, Lewis J. held the retailer liable but left the manufacturers for want of privity. The manufacturers were not liable in tort for negligence, because they used fool proof method of cleansing and filling the bottle.

158. *Markovich v. Mc. Kesson & Robbins* 106 Ohio App. 265; 149 N.E. 2d. 181 (1958). Compare the rule in the case with the English case of *Parker v. Dloxo Ltd.* and *Senior* (1937) 3 All. E.R. 524, where the plaintiff suffered acute attack of dermatites and nervous trouble, because of use of defective hair dye. She was entitled to succeed against the hair dresser for breach of warranty of merchantability and against the supplier under tort for negligence. Had there been want of negligence, she could not recover from the supplier. Also refer Garn H.W. & Thomas C.B."Uniform Commercial Code Handbook" P.25
Judge Cardozo appears to be the champion of consumer's protection. When on New York Court of appeal, he delivered his celebrated judgment in *MacPherson v. Buick* in 1916. So far the principle of strict liability in tort had not developed beyond foods and drinks. In this case, defendant was a manufacturer of automobile and he sold an automobile to a retailer. While plaintiff was using it, the car broke down due to wheel being made of defective wood. The wheel was purchased from another manufacturer and the defect could have been detected on careful inspection which was omitted. The charge was not of fraud but of negligence. The honourable judge held the manufacturer liable on the ground that, as the car was defectively manufactured, it was "a thing of danger".

If there is knowledge that the thing will be used without new tests, then irrespective of contract, the manufacturer of the dangerous thing is under a duty to make it carefully.

159. 217 N.Y. 382; III N.E. 1050 (1916)

160. Ibid. at P. 1053 Please compare the facts of this case with that of *Goldberg v. Kollman Instrument Corp.* 12 N.Y. 2d, 432, 191 N.E. 2d, 81 (1963) which are similar except the fact that under the present case there was no inspection of the wheel but in the other case, there was faulty inspection which amounted to no inspection. The judgment of the latter case is quite consistent with that of the former.
R.S. Pasley criticises the judgment on the ground that judge Cardozo "had gone much further" and argues that if a manufactured automobile is "a thing of danger" then it can be said of any defective article. It is submitted that judge Cardozo confines his judgment to those cases which come within the limit of his observation and if they come within those limits, then the ratio decidendi of the case should be a guiding principle. The only proof necessary in consumers' product liability is that the product was sold in defective condition and the defect caused injury to normal people, while being used normally. Proof of reasonable care by supplier in preparation of the product is no defence.

Where the goods are "imminently dangerous", the consumer requires greater protection is clear from Henning Sen v. Bloomfield Motors Inc. In this case,

161. Supra n. 89 id. at P. 244
162. id.
163. Compare the case with Henning Sen v. Bloomfield Motors Inc. 32 N.J. 358
164. Supra n. 104 id. see also Daniel v. White & Sons, supra n. 157
165. 32 N.J. 358, 161 A 2d, 69 (1966); 75 A.L.R. 2d. 1 (1960)
dealer supplied a car whose steering gear failed while driving. It was held that there was breach of implied warranty of fitness from manufacturer which extended from dealer to the ultimate user, whether he be a member of the family of buyer or a guest or any one sitting in the car with his consent and the privity was no bar to recover loss or damage in such a case.

In Greenman v. Yuba Power Products Inc., the plaintiff was injured, while using a power tool purchased by his wife. Greenman filed a suit for breaches of express warranty and negligence against the seller and manufacturer. The jury found the manufacturer liable and not the retailer. If we compare the above two cases and Thomas v. Winchester with the English case Mason v. Williams & Williams Ltd., we will find that the American legal approach is much more rational than the conventional classical approach of British system, riddled with certain set of principles whose roots are well entrenched in the annals of antiquity. It can sacrifice a pious and sacred angel of justice for its legal dogmatic fictions.

166. 59 A.C. 67, 377 P. (2d.) 897; 27 Cal. rptr. 679 (1963)
167. Supra note 155
168. Supra n. 7
The theory of fault liability is now gradually replacing the theory of strict liability, and the manufacturer is being held liable independent of negligence. This theory was applied later on, to the case of "inherently" or "imminently" dangerous products. In 1944, Mr. Justice Traynor urged that the broader basis of liability, that is, liability without fault should have general application. When in 1966, in Henning Sen v. Bloomfield Motors Inc., the above rule was applied, Professor Prosser commented that the rule in the case has given birth to the general theory of strict liability in tort and this has led to the "fall of the citadel of privity". The rule of Macpherson v. Buick supra was that a defective Car is a thing of danger and later on this was extended to all products under the exception of "inherently" and "imminently" dangerous things. Gradually "the special rule as to food and drink was expanded to engulf the rest".

169. Escoto v. Coca Cola Bottling Co., 24 Cal. 2d 453
        461 (1944)
170. Supra n. 165
171. Supra n. 159
172. Prosser, Supra n. 117
Greenman v. Yuba Power Products Co., reformulated the theory of strict liability in tort. In this case, the jury did not find the retailer liable but returned the verdict against manufacturers, for substantial damages. On appeal, defendant pleaded that unreasonable delay by plaintiffs to give notices barred their claim for breach of warranty. Mr. Justice Traynor remarked, that to impose strict liability on the manufacturer, it was not necessary for the plaintiff to establish an express warranty as defined in Section 1732 of the Civil Code. A manufacturer is strictly liable in Tort for placing an article on the market, knowing that it is to be used without inspection and which, proves to have a defect that causes injury to a human being. He further observed:

"Rules defining and governing warranties that were developed to meet the needs of the commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products, unless those rules also serve the purpose for which such liability is imposed." 174

173. 59 Cal. 2d. 57; 377 P. 2d. 897; 27 Cal. Repr. 697 (1963)
In 1960 William Prosser took stock of cases relating to foods and drinks decided in U.S.A. under the theory of "strict liability". Manufacturers were held liable under this rule for the breach of warranty of merchantability and fitness for a particular purpose, even though the product was manufactured according to the government standard and there was no proof of negligence on the part of manufacturer and no privity of contract on that of consumer.

By 1966, Courts of 18 states of U.S.A. had accepted the principle of strict liability in tort for manufacturers of all products, six adopted it by statute and six only accepted such liability for foods and drinks. Drugs and vaccine are also included in food.

Need for a unitary system of product liability:

A single unified system of law relating to products liability is needed. This can best be accomplished through codification. The scholars in both the tort field and the commercial law should communicate with each other and incorporate the best ideas from both.

175. Prosser "The Assault upon the Citadel (Strict Liability to the consumer)" (1960) 69 Yale L.J. 1099
176. Prosser op.cit. Supra n.113 id at P.P. 793-794
Professor Shanker observes that-

"Should this not be done and if instead there is a continuation of a jurisprudence which emphasizes eclipses and pigeon-holes (i.e. the exclusiveness of one body of law from the other), then it is submitted that the confusion and injustice which has long reigned in the law of products liability will likely to continue." 177

It is a valuable suggestion and the Court should reconcile itself with all the conflicting and competing theories in the field of contract and tort to meet the requirement of law not at the cost of justice but rather justice should be a dominant factor, while interpreting the law. This brings home the unitary concept of product liability. 178

It can be said definitely that to some extent, the theory of strict liability has induced the manufacturers to improve their product to avoid physical injury to consumers and consequent liability for damages.

177. Shanker "Strict Tort Theory of Product Liability and The Uniform Commercial Code" (1965) 17 Western Reserve L. Rev. 5 at 47

178. Dr. S.M. Hasan, Op.Cit 5 Chapter VI
There is also fear of wide publicity which may be given to such matters and ultimately the fear of drastic legislations also keeps them hard on their heels. Automobile manufacturers call for their product, immediately they detect a defect in its spare parts and replace it free of cost. Apart from this many legislations have been passed in this direction. It is suggested that, under Indian conditions, though strict liability should be imposed against manufacturers of defective products, yet to extend the theory in other field, a probe in a particular industrial economy is called for.

EXEMPTION CLAUSES AND MANUFACTURER'S GUARANTEES

The manufacturer supplies printed papers known as guarantee cards, containing terms and conditions relating replacement or repair of defective spare parts. He, in turn negatives all other implied Conditions and Warranties. He does not guarantee the goods free from

179. R.S. Pasley, Supra n. 89 at 259-260
180. Dr. S.M. Hasan, op.cit., Supra n. 5 at p. 97
defect and also excludes his liability for almost all consequential damages. The position of buyer vis-à-vis retailer and manufacturer is given hereunder, in order to appreciate the liability of each of them.

Buyer and Retailer:

Prima facie the guarantee exempts the manufacturer. The seller cannot seek relief on them because he is an stranger to such contract. He may be held liable for breach of his duties under the Act.

Buyer and Manufacturer:

The buyer may sue the manufacturer on guarantees. Alternatively he may sue in Tort.

If manufacturer relies upon the guarantees, he must prove a bilateral contract with buyer, to exclude this liability. Atiyah says that a manufacturer cannot be exempted from liability for negligence, if the terms of exemption are vague. It is submitted that the

manufacturer should not be allowed to escape liability in tort even by express and unambiguous term as under French Law. The learned author further queries as to what could be the position of a buyer who comes to know about the guarantee cards, after having affected a purchase. That is, he purchased without relying on such cards and hence there was no consideration for that. It is submitted that in such situations and a situation like Roscorla v. Thomas, the courts should not allow the sellers or manufacturers to evade their contractual obligations for mere technicalities. The spirit of law is that consideration should precede a sale or bargain. Once this is present that should suffice to hold the parties liable on their promise.

183. Alexander S., Supra n. 150
184. Supra n. 182
185. (1842) 3 C.B. 234 (Warranty of Soundness of horse given after purchase)
186. Section 2-209 of UCC; Garn H.W. & Thomas, C.B. op.cit, Supra n. 158 at 10
Statements or promises are known as terms of contract when the parties intend them to treat as such. 187 These terms may be sometimes implied by law, even though the parties do not mention them expressly, for the reason that they must be presumed to have them in contemplation, while making such contracts. 188 They are implied into a contract in the guise of furthering the unexpressed intention of the parties. 189 Sometimes, they are mentioned expressly. Generally, an express term in a contract may exclude or limit liability which would have arisen in absence of such terms. If these terms deny the existence of such an intention, the court may be bound to exclude them. Apart from it, obligations may be imposed by common law e.g. liability for negligence in tort. A term, in contract may attempt to exempt a party from such liability. The

187. Sutton & Shannon on Contracts (7th ed.) p. 86
188. Implied Conditions and Warranties Under Sections 14-17 of S.G.A.
189. Sections 12 and 13 of S.G.A.
190. The term limiting or excluding the liabilities of the parties to the contract are known as Exemption Clauses. In absence of mistake or misrepresentation, whether fraudulent or innocent, a party is bound by the contractual terms he has signed, even though he did not read or understand it. So far as tickets or notices are concerned, it is not sufficient that the plaintiff was given such tickets or notices but it must be proved as a matter of fact that the term limiting or excluding the liability of the defendant were specifically brought to the knowledge of the plaintiff. In absence of this proof, the Courts will

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190. New Section 55(9) of E.A.

"An exemption clause is a term which purports in general terms to curtail or exclude the liability of a party which would otherwise arise, if he fails to perform his obligations, or some aspects of them, under the contract." Craig D.D.

Op.cit., supra n. 181 at 274


Supra n. 182, id. at p. 117 et. seq. "Kempin v. Bloomfield" 74 Har. L. Rev. 630


refuse to enforce the exemption clause against the plaintiff.\textsuperscript{194} This is not the only exception to the general rule but Gower has mentioned eight different methods by which the Courts have endeavoured to circumvent the vicious effect of these exemption clauses.\textsuperscript{195} This is how the judiciary has hit hard at the freedom of contract and adapted itself to the growing paternalism of welfare State. The Courts have done this by applying contra proferentum rule.

\textsuperscript{194} Richardson v. Rountree (1894) A.C. 217; Read Pollock and Mulla "Indian Contract and Specific Relief Acts (9th ed.)" P.P. 62-66

\textsuperscript{195} Gower L.C.B. "Exemption clauses: Contractual And Tortious Liability," 17 Mod. L. Rev. 155. The learned author says that the following methods have been devised by the Court to nullify or mitigate the hardships created by the exemption clauses. (i) The Court may rule that contracting out is barred by special legislative measure e.g. exclusion clauses under consumer sales, Supply of Goods (Implied Terms) Act 1973 Section 55(4). (ii) The exemption clause was never incorporated into Contract (iii) The agreement was obtained by fraud or misrepresentation; (iv) The clause may be construed strictly not to cover the specific circumstances in question e.g. exclusion of "Warranties" may not cover "Conditions" Wallis v. Pratt (1911) A.C. 394 (v) A Contract for the sale of pease cannot be performed by delivery of beans (Andrew v. Singer (1934) 1 K.B. 17; (vi) There is a fundamental breach of contract. (vii) The written terms are modified by a later express warranty. (viii) Notwithstanding the exclusion of liability in contract, the defendant is liable in Tort.

\textsuperscript{196} The doctrine that the construction least favourable to the person putting forward an instrument should be adopted against him. Osborn "A concise Law Dictionary" Fifth Ed. P. 87. Also refer Sutton & Shannon, Op.cit. Supra n. 187, P.P. 110-112
So in Wallis and Sons v. Pratt, an exemption clause, excluding all express and implied warranties was held not to exclude implied conditions. Again in Andrews v. Singer, it was held that a clause excluding implied conditions and warranties did not exclude express conditions. The New South Wales Court of Appeal dealt with, in a case, an interesting rule of construction. A contract relating to sale of tractors incorporated a clause "This warranty is expressly made in lieu of all warranties express or implied and of all other obligations and liabilities on our part". The court said the phrase "other obligations and liabilities was confined to warranties only and did not include conditions".

It was said that where general words follow particular words the general words are confined to the same meaning which is attributed to particular words. In another case from West Indies, Persaud J.A. said, the question whether

197. (1911) A.C. 394, Also Baldry v. Marshall (1929) 1 K.B. 260
198. (1934) 1 K.B. 17
199. Eimco Corp. v. Tutt Bryant Ltd. (1970) 2 N.S.W.R. 249
an exception clause could be relied upon as one of construction, and if there was a fundamental breach, the exclusion clause could be of no use to guilty party.

The learned law lord said that the contract referred to the mill being in good condition and did not refer to its capacity and hence the exception clause did not apply. In Tricco v. Haynes where within a fortnight of the sale, the car was condemned by an appropriate authority, the sale was successfully rescinded on the ground that "the doctrine of fundamental obligation" cancels an exception clause. It has been commented upon by Clarke P.J. and Furmaton M.P. that Parl-by Construction Ltd. v. Stewart Equipment Co., Ltd. relating to an attack on exemption clause was not decided on a sound footing as "implying fraud in this situation is cavalier and sets a dangerous precedent". It is submitted

201. Citing Karsales (Harlow) v. Wallis (1956) 2 All E.R. 866; Charter House Credit v. Tolly (1963) 2 Q.B. 683
202. (1971), 2 Nfld. & P.E.I.R. 53. A car was advertised in "good condition" but when sold the sales slip stated "as is, where is".
204. (1972) 1 W.U.R. 503
205. Supra n. 203
that the case has been decided correctly which will be borne out of its facts which are:

The defendants, an auctioneer advertised a tractor as "very good" and having "a new under carriage, very good". The catalogue "contained conditions of sale" excluding liability for misdescription and to this effect the plaintiff had to sign a registration Card before auction. After the sale, the tractor proved unsatisfactory and in an action by the plaintiff, it was held that the advertisement was fraudulently made hence the plaintiff had right to rescind the contract.

It may be observed that any statement made without belief in its truth or without caring whether it is true or false amounts to fraud.

In Beck & Co. Ltd. v. Szymanowski & Co. Ltd. where the buyers sued the sellers for short supply of threads,

206. Derry v. Peek (1889) 14 App. Cas. 337; 58 L.J. (Ch.) 864; 61 L.T. 265
207. (1924) A.C. 43. The Contract provided "The goods delivered shall be deemed to be in all respect in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly, unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the Contract". After 18 months, the buyers detected that the reels contained 12 yds. of less cotton than contracted.
long after the period stipulated in the contract, the Court held the seller liable on the ground that the damages demanded did not relate to goods supplied but for those not supplied. In another case, where the right to complain in respect of quality of goods was limited to 60 days, the Court granted relief even thereafter, when the goods were damaged due to faulty packing. In a converse situation, the Court held that merchantability includes their state of packing and labelling also.

An exemption clause shall not be so construed as to exclude liability for negligence in Tort unless the clause mentions it in an unambiguous language or must mean this (i) for the reason that it covers all the liabilities in clear terms or (ii) there is no other liability to which the exclusion refers. Clauses exempting from all damages, "however caused" may usually exempt a person from liability for negligence, unless it can be attached exclusively to some other liability.

208. Minister of Materials v. Steel Bros. & Company Ltd. (1952) 1 T.L.R. 499
209. Niblett v. Confectioner's Materials Ltd. (1921) 3 K.B. 387
210. Alderslade v. Hendon Laundry Ltd. (1945) 1 All E.R. 244
Exemption clauses do not protect a stranger to a contract due to dominant application of privity rule.

With regard to specific things, circumstances imply certain terms as fundamental about them e.g. an opaque bottle on the counter of a self-service cafeteria implies that the drink is fit for human consumption. The matter is decided under the head of mistake. Thus House of Lords in Bell v. Lever Bros ruled that in cases of specific things, there are no underlying assumptions as to quality, description etc., unless the mistake was of such nature as to render it a thing of different kind e.g. a pine log supplied as mahogany wood. In Warley v. Whip, delivery of a dented and quite old reaper in place of "second hand reaper nearly new" was held to have amounted to non-performance of contract. It is submitted that the Court implicitly applied the doctrine of breach of "fundamental Term" in this case as supplying old machine for new one constituted it to be a thing of different kind e.g. supplying peas instead of beans.

212. (1932) A.C. 161
213. (1900) 1 Q.B. 513
Fundamental Breach & Fundamental Terms: There is a division of opinion in the academic circles whether 'Fundamental breach' and 'Fundamental terms' are one and the same thing. This is so because the above terms have been used by the courts indiscriminately as if they meant the same thing. Reynolds favours the former term while Melville and Cheshire and Fifoot favour the latter. Certain terms are treated as "Fundamental terms" in the sense that any breach of them is not to be covered by an exception clause. However, breaches of other terms may also be treated as "fundamental" because the breach itself is "radical" or amounts to "repudiation of the whole contract" or "destroys the substratum of the contract". Under such circumstances, the exclusion clause shall be so construed as not to include that particular breach.

214. For these views refer Guest 77 L. Quar Rev. 98
Wedderburn (1960) CLJ 11, Montrose (1964) CLJ 60, 254
215. Reynolds "Warranty Condition And Fundamental Term" 79 L. Quar. Rev. 534
217. Suisse Atlantique (1967) 1 AC 361 P. P. 393, 491 per Lord Denzil, Upjohn and Dilhorn
218. Champanhac & Co., Ltd. v. Waller & Company Ltd. (1948) 2 All E.R. 724
It is essential to know the difference between a fundamental "term" or "breach". Some decisions have treated a "fundamental term" as narrower than a condition, while others have equated them and are of the view that they confer a right to repudiate by the innocent party.

Under sale of goods, total misperformance of contract i.e. seller delivering beans instead of peas chalk instead of cheese will amount to fundamental breach.

219. Smeaton Hanscombe case 2 All. E.R. 1473
Devlin J. observed: "It must be something, I think, narrower than a condition of the contract... It is, something which underlines the whole contract so that if it is not complied with the performance becomes something totally different from that which the contract contemplates."

220. "A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach" Suisse Atlantique case, supra at P.P. 397, 422, Also refer Montrose, Supra n. 214, Devlin (1966) C.L.J. 192; Jenkins (1969) C.L.J. 251


222. Chatter v. Hopkins (1838) 4 M & W 399 at 404 per Lord Abinger; Pinnock Bros v. Lewis & Peat Ltd. (1923) 1 K.B. 690
Also, where the goods to be delivered have been fundamentally changed before delivery, such a breach is presumed to have taken place. So in a case where a Car has been altered so much so as to no longer look like a Car or where a Car with Congres or accumulation of defects has been delivered under a hire-purchase contract and could still be driven, the court held that due to fundamental breach, the protection afforded by exemption clauses was not available to the defendants.

If the breach is intentional though quantitatively minor, it may be regarded as fundamental, but if it is the result of negligence, the Court may not declare it to be so.

While the fundamental term in a Contract of sale or hire-purchase is to be deduced from the description of the contract, which will be ascertainable independently of the terms of exemption clause, the question whether

223. Karsales (Harrow) Ltd. v. Wallis (1956) 2 All E.R. 866
225. Grunfeld, 24 Mod. L.Rev. at 75
226. Wedderburn, Supra n. 214, Alexander v. Railway Executive (1951) 2 K.B. 282; (1951) 2 All. E.R. 442
breach is fundamental can only be decided from the terms of contract as a whole, in the light of the attending circumstances of the case. Circumstances include consequences flowing out of such breach.

The distinction may be further illustrated with Ashington Piggeries Ltd. v. Christopher Hill and Herbutts Plasticine, Ltd. v. Wayne Tank & Pump Co., Ltd. The buyer would have succeeded in the former case in spite of an exemption clause, as loss of minks due to eating poisonous food made the breach as fundamental, like the latter term. There are

227. In Suisse Atlantique, Supra, the House of Lords, approving the dictum of Pearson L.J. in UGS Finance Ltd. v. National Bank of Greece (1964) Lloyd's Rep. 446 at 453 said that there is a rule of construction by which an exemption clause could not apply to a situation created by fundamental breach of the Contract. It is a rule of construction, based on the presumed intention of the parties and is not an independent rule of law imposed by the Court (per Lord Upjohn) (1967) 1 A.C. 361 at 421-422 (1966) 2 All E.R. 61 at 86

228. Sze Hai Tong Bank Ltd. v. Rambler-Cycle Co., Ltd. (1956) A.C. 576 at 588-89 Karsales Harrow Ltd. v. Wallis, Supra n. 201, Lord Reid said in Suisse Atlantique case, (1967) 1 A.C. at p. 398 (1966) 2 All E.R. at p. 71 "The fact that the breach was deliberate might be of great importance" Also refer J. Spurling Ltd. v. Bradshaw (1956) 2 All E.R. 121 at 126 per Denning L.J.

229. Herbutts Plasticine Ltd. v. Wayne Tank & Pump Co., Ltd. Supra n. 221

230. (1972) A.C. 441 (1971) 1 All. E.R. 847

231. Supra n. 229
certain terms whose breach shall be treated as fundamental no matter that consequences of its breach are trivial. In cases of non-fundamental term, a breach is only fundamental breach if its gravity or consequences justify such course. Atiyah argues rightly that the Court should look more to the gravity of consequence of such breach, rather than the breach itself. This is because, it encourages the parties to repudiate contract for no genuine reasons. Reynolds pleads in his article, that the doctrine should be termed as "fundamental breach" and not as "fundamental term". This is because one must see as to what is the purpose of the contract. If the breach is such which frustrated the purpose of contract, no exemption clause could protect the guilty party because it "would in effect be an attempt to exclude liability for breach of contract altogether". Further, if gravity or consequences of the breach are trifling, it should be disregarded, even though of fundamental term. However, the manner of breach is also material. It is submitted that the contention of the author is correct.

232. RE Moors & Co. v. Laundauer & Co. (1921) 2 K.B. 519
233. Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd. Supra n. 221 id. at 235
235. Supra n. 215
In nutshell, (1) the doctrine is a rule of construction and (2) it is clear that no exclusion clause, however sweeping, could protect a party from the consequences of breach who delivered goods under a contract for the sale of goods. However, the parties could arrange the delivery of goods or goods at the option of the seller.

Though it is a fact that courts have been at pains to render justice to the anticipated parties or victims of exclusion clauses by interpretation there in most favorable cases to the aggrieved or by applying contra proferentem rule, yet these have been serious limitations to their effort, due to the rule of lallegans-faite and the contractual certainty and thus sometimes sacrificing the public policy on alter of individual freedom of contract. It is very well known that one of the parties to the contract, being fully aware of the potential risk devices such clauses which seek to exempt him from liability, the party is presented with those contractual terms known as standard form contract, and signs to abide by them more often than not, not realising the far reaching implications and repercussions of it. In J. E. Strange v. Brauch, the plaintiff failed, because of the presence of an exclusion clause.

236, (1934) 2 K, 394 (‘plaintiff purchased a slot machine which was worthless piece of metal’).
relieving the defendants of all express and implied conditions "except so far as stated herein". It is submitted that in the interest of justice, the seller should be fixed with a liability to supply things that not only look like things they are intended to represent, but are also in such condition as can be made to function, by a competent person, in the capacity normally expected of the thing, and, moreover, can be made to function without extensive work or expense on it. It makes mockery of a contract that I promise to do this and this but I am not liable for not doing it. A major break through has been made in America. In Henningsen v. Bloomfield, the standard disclaimer clause of the Automobile Manufacturer's Association, incorporated in the contract of sale, limiting the dealer's and manufacturers liabilities to replacing defective parts at the factory, was declared void, as against public policy. This case is first unequivocal holding by the highest Court of a State that privity is unnecessary to warranty liability.

237. 74 Har. L. Rev. 630- 632
238. Supra n. 165
239. Supra n. 237 at 630
The Court, while considering the theory of notice of disclaimer clauses, observed that such a clause is imposed by a non-competitive industry, giving the vendee the choice of buying the Car under that contract or purchase none.240

It was also discussed that how a non-enforceable clause may be adjudged as "unconscionable" and make prima facie unconscionable any limitation of damages for personal injury resulting from a breach of warranty on consumer goods. "The principle of "unconscionability" should be extended, to any imposition of standard provision, found unreasonable in the particular commercial situation. Since most courts do not permit the parties to contract away negligence liability where bargaining power is grossly desperate, it is proper to permit judicial examination of exemption clause relating to implied obligations under Sale of Goods Act, when the buyer has no real choice among sellers and lacks the bargaining power to change the provisions of the agreement with the particular seller.

241. U.C.C. Sections 2-302 (1), 715 (2) and 719 (3)
242. Refer Prosser, Torts Section 55 at 305-07 (2d. ed. 1955)
In England, certain legislative changes have taken place in this direction, which nullify the effect of an exemption clause, the most important among them are Misrepresentation Act, 1967 and Supply of Goods (Implied Terms) Act 1973. Section 3 of Misrepresentation Act 1967 reads as follows:

3. If any agreement (whether made before or after the commencement of this Act) which would exclude or restrict-

   (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

   (b) any remedy available to another party to the contract by reason of such a misrepresentation; that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the Court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.

The section centres round the words, a provision which would exclude or restrict any liability or any remedy which would otherwise arise from the misrepresentation. It applies to any provision which would exclude or restrict, firstly a claim for damages by the misrepresentee, either for fraud or for negligence under Sec. 2(1)
and, secondly, the right to rescind the contract (or to get damages in lieu), and consequential claims for the recovery of money or property by the misrepresentee.

Court has wide discretionary power not only to uphold or reject the exclusion clause but to uphold it "to the extent (if any) that the Court finds fair and reasonable in the circumstances". It may rewrite an exclusion clause so as to enable it to award damages to a figure which it thinks reasonable and do the same so as to leave the misrepresentor protected in respect of some of the matters covered by misrepresentation, while leaving him liable in respect of some other matters. 243

Supply of Goods (Implied Terms) Act 1973, under the New Section 55 has introduced very important changes in the law relating to limitation placed on exclusion of liability by the manufacturers and suppliers of goods.


244. 55. Exclusion of implied terms and conditions—

(1) Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract, but the foregoing provision shall have effect subject to the following provisions of this section.

(2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.
The main changes are contained in Section 55(3) and (4). Sub-section (3) says that unless a person is expressly or by clear inference transferring such title as he or a third person may have, he is guaranteeing his right to sell, etc. under section 12(1) and in case of limited sale, he is unable to exclude liability for breach of the warranties implied by section 12(2).

(3) In the case of a contract of sale of goods, any other contract exempting from all or any of the provisions of Section 12 of this Act shall be void.

(4) In the case of a contract of sale of goods, any term of that or any other contract, exempting from all or any of the provisions of sections 13, 14, or 15 of this Act shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.

(5) In determining for the purposes of sub-section(4) above whether or not reliance on any such term would be fair or reasonable, regard shall be had to all the circumstances of the case and in particular to the following matters:
(a) the strength of the bargaining position of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;
(b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;
(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;
(d) where the term exempts from all or any of the provisions of Section 13, 14 or 15 of this Act if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(e) whether the goods were manufactured, processed, or adapted to the special order of the buyer.
By sub-section (4), Section 55 contemplates no exemption from its application. Rather, it reinforces the point by laying down that it covers both, the contract itself "or any other contract" so that it is not possible to evade Section 55 by means of a collateral contract. Nor can the seller rely upon any collateral term, incorporated in the contract by virtue of any term in the contract of sale (Section 55 (10)).

(6) Sub-section (5) above shall not prevent the Court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any of the provisions of Section 13, 14 or 15 of this Act is not a term of the contract.

(7) In this section "consumer sale" means a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods—
   (a) are of a type ordinarily bought for private use or consumption; and
   (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

(8) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(9) Any reference in this section to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.
Sub-section (9) says that an exclusion clause must be a term and according to sub-section (10), a reference to a term "includes a reference to a term which although not contained in a contract is incorporated in the contract by another term of the contract". Christopher C. says that if a person enters a shop and asks for certain goods which are presented to him, the notice which is conspicuously written on the wall excluding the liability of the seller may not amount to a term under sub-section (10). But if the sales assistant specifically draws the attention of the buyer to the notice, then it may amount to a term. But at common law, the notice may amount to term under both the situations. This is a cause of concern to the author and he says that "The 1973 Act would have been better without such provision". It is submitted that one of the reasons for incorporating sub-section (10) was to limit the operations of such notices and not to treat them as term. So that the Court may have no difficulty in declaring them as unenforceable, contrary to common law rules.

(10) It is hereby declared that any reference in this section to a term of a contract includes a reference to a term which although not contained in a contract is incorporated in the contract by another term of the contract.

(11) This section is subject to Section 61(6) of this Act.
Sub-section (6) proceeds to say that the Court may declare an exemption clause, under any contract, purporting to exclude or limit the liability under Sections 13 to 15 of this Act, as "not a term of the contract". This may under certain circumstances relieve the unwary buyer from the clutches of a shrewd seller.

**Non-consumer sales**—They comprise of all the sales excluded from the category of consumer sales. The provision of section 55(4) is a compromise between the two groups in Law Commission—One favouring contracting out of business sales and the other disfavouring it. But all agreed to the view that there should be reasonable restriction on business sales. As part of compromise, the onus of proof was placed upon the party (normally the buyer) asking to show that it would not be fair or reasonable to show reliance on the clause in question. The wordings not be enforceable to the extent suggested the possibility of severence of fair from unfair term. However, the Courts will be unwilling to rewrite the exclusion clauses for the parties "if a partial exclusion would not make them fair".

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246. id. at 526
Due to vehement criticism of the "fair and reasonable test", the Law Commission had laid down the following guidelines in its final Report to enable the Court to ascertain it. They are as under:

1. The bargaining position of the parties:

The main reason for judicial hostility towards exemption clauses was that there was no "freedom of contract". This can be still illusory where the buyer's choice is limited to getting a supplier. Hence the Act took into consideration the possibility of getting an alternative product or sources of supply, while deciding "fair and reasonable".

2. Inducement to accept the exemption clause:

Clause (b) of Section 55(2) says that mere inducement by giving small discount in price or so will not make it "fair and reasonable" but rather it should be fair compensation to the buyer.

3. Knowledge of the term and its effects:

It is open to a Court to hold that a particular exemption clause does not form part of the contract of sale at all. However, it is a very uncertain rule.

247. Section 55(6)
Sometimes a party may bind himself by certain contractual term of which he was not aware. Therefore, under such circumstances, the Court may hold that the seller should not rely upon the excluding terms as it will not be fair and reasonable for him.

4. Exemption if the buyer does not comply with condition specified:

There are the cases where a period is stipulated within which the buyer must report the defect in the goods. As per this provision, the Court may give relief to the buyer if it comes to the conclusion that the period of notifying defect in the goods to the buyer was not reasonable.

5. When the goods are made or adapted to the buyer's order:

In construing the exemption clause, the Court may take into consideration whether the seller manufactured the goods for the first time on the order of the buyer or he has previously done so.

248. Section 55(5) (d)
Section 55A is added to ensure that any seller does not attempt to evade the provisions of Sections 12 to 15 and 55 by substituting the law of some other country in those cases where proper law of contract should be English Law, but the seller attempts to avoid this provision by an exemption clause.

From the above discussion, it has emerged that all the transactions can be broadly divided into two categories namely-

(i) Consumer sales and (ii) non-consumer or commercial sales. Each of them has been discussed here-under separately under sale of goods Act and Common Law.

(1) Consumer Sales: New Section 55(7) of E.A. says that a consumer sale is one made in the course of a business where the goods,

(a) are of type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

250. See note 244 for Section 55(7) of E.A.

251. In Henningsen v. Bloomfield (1960) 116A 2d 89 at P.P. 80-81 it was said that consumer signified such person who in the reasonable contemplation of the parties to the sale, might be expected to use the product.
The definition of section 55(7) is based upon three main criteria:

1. The status of the seller: A sale "in the course of a business" is of wide application. Therefore, the activities of a number of individuals may be included in this formula. However, suppose a typewriter is bought for typing private and business letters or a person buys a car, uses it for few months and then sells it, does he buy them in the course of a business?

2. The status of the buyer: What is meant by "holding out"? If a group of doctors buys the car to use them in their practice, does it amount to purchase "in the course of a business"? What if a doctor says "I want a reliable car for my practice"?

3. The type of goods being purchased: It is easy to know as to what amounts to consumer sale, but problems may arise in marginal cases. Thus what specific meaning should be attached to "type"? If there are six different models of a product, all of which perform the same function, but one of six is not "ordinarily bought for private use or consumption", can the sale be a consumer sale? Even if it is presumed that the seller is selling them in the course of his business and the buyer was purchasing for private use
or consumption, bringing his case under section 55(4), the seller may still avoid the operation of that provision by mentioning that the goods are not "of a type ordinarily bought for private use or consumption". One person may buy electric fans for his factory, other may buy for his private use. Similarly cement, paint, Motor or cycle spare parts may be bought in course of trade and also for private use or consumption. How are we to ascertain as to whether the goods have been sold out in the course of their business or for private use? Probably, it may be ascertained from the quantity purchased. However, it is not always possible to ascertain it. Because sometimes few persons may join together and purchase the goods in bulk for their own convenience and later on divide it among themselves but still for their private use or consumption. In the case of spares for motor cars, generally private repairs are not done but if some one undertakes it, can the seller say that the spare parts are not the goods "of a type ordinarily bought for private use or consumption" and hence he is not liable. It is suggested that under such circumstances the seller should be held liable if he has notice of the fact that the goods are purchased for
private use or consumption. Hence a provision should be added to section 55(7) which may be as follows:

"Provided a purchase of goods not ordinarily for private use or consumption would nevertheless constitute a consumer sale if the seller was aware that the goods were in fact for private use." For the purpose of granting relief in the capacity of a buyer, in all those cases, where the subject matter of sale is utilised for private and business purpose both, it should be treated as consumer sale. But in the capacity of a seller, they should be treated as selling goods in the course of business. This will afford the buyer maximum protection and the seller cannot escape liability by telling that it is a commercial sale and hence should be given due benefit of exemption clause.

Words "other than a sale by auction or by competitive tender "under sub-section (7) requires scrutiny. It has been mentioned somewhere else that a sale by auction should be treated like any other sale 252 and hence it should not be excluded from the purview of the "Consumer Sale".

251. Refer Chapter VI for the rule of Market overt.
So far as sale by competitive tender is concerned it may be excluded for the reason that such sales and purchases are ordinarily made by professional buyers and sellers. Hence the words "sale by auction" should be deleted from section 55(7).

In view of the foregoing discussion, Section 55(7) of E.A. should read as follows:

"In this section "Consumer sale" means sale of goods (other than a sale by competitive tender) by a seller in the course of business for private use or consumption to a person who does not buy them for resale in the course of a business."

By sub-section (8), the onus of proof that a particular sale is not a consumer sale lies upon the person contending it. This provision is favourable to the buyer. It will be a tough job for the seller to prove so while trying to evade his liability under exclusion clauses.