
Product Liability

[23.10] Liability for defective products (“product liability”) is shared by contract, tort and statute law.¹ In the past, this combination offered greater protection to the buyer against the retail seller than to the ultimate consumer against the manufacturer. Against a seller the buyer could invoke warranties, *guaranteeing* the quality of the purchased product; against the manufacturer, however, tort liability was for long denied altogether and thereafter limited to negligence only. Contemporary demands for stronger consumer protection have now promoted a new model of strict tort liability for injury from defective products. Originating in the United States, it has since been adopted in the European Community and has spread to other countries, including Australia.

Negligence

Historical development

[23.20] Until well into the 20th century, the contractual liability of distributors to their immediate transferees for breach of warranty offered the only avenue of redress for those injured by defective products. There were many limitations to this remedy, the principal one being that it was only available against a defendant in contractual privity with the plaintiff. Those limitations became the more frustrating with the transformation in the system of producing and marketing of goods. The developing mass market entailed an almost universal dependence on wholesalers and retailers for efficient distribution of products. The intervention of these intermediaries severed privity between manufacturer and consumer and thereby impaired the effectiveness of the warranty-based remedy. By availing itself of modern advertising methods, the manufacturer was able to “produce the psychological effect of representation without incurring its penalties”.²

Yet until well within the 20th century the law of torts turned a deaf ear to pleas for extending the responsibility of suppliers to persons other than their immediate transferees. The theoretical obstacle was another version of the privity rule which derived from *Winterbottom v Wright*,³ enunciated in 1842. It was there held that one who had let a mail coach to the plaintiff’s employer with an undertaking to keep it in repair was not liable to the coachman who was injured by reason of a defective axle. Narrowly construed, the decision went no further than the axiom that A cannot found a claim against B for a breach of contract between B and C, to which A is not a party; but it was interpreted in the wider sense that conduct which constitutes a breach of a contractual obligation to C could not concurrently furnish a cause of action for breach of a *tort* duty to

1 See Waddams, “Crossing Conceptual Boundaries: Liability for Product Defects” (1999) 14 JCL 28.

2 *Foote v Wilson* 178 P 430 (Kan 1919).

3 *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402.

A. This fallacy supported the conclusion that the manufacturer of a defective article owed a duty to those alone who were in contractual privity with him. Apart from the non-sequitur, it ignored the critical distinction between non-feasance and misfeasance: in *Winterbottom* the lessor was charged merely with an omission, and a duty to act could be founded on contract alone; whereas the manufacturer would have actively created the risk in breach of a tort duty not to injure consumers. But behind the explanation that otherwise there was “no point at which such an action would stop”, there lay in all probability the conviction that it was in the best interest of the community to foster the growth of industry by arbitrarily limiting the liability of manufacturers to their immediate transferees.

Gradually, exceptions were engrafted which paved the way to its ultimate reversal.⁴ Apart from cases where the supplier had knowingly made a false representation of safety⁵ or, aware of the defect, had failed to give warning,⁶ the most disruptive force was a duty of care appertaining to articles which fell into the ambiguous and ever expanding category of “inherently dangerous” things.⁷ This formula was at best a transparent device for whittling away the immunity before the time had arrived for its outright rejection; it was arbitrary in operation and misconceived in principle because the crux of the matter was whether the article was dangerous when carelessly, not when carefully, made.

Following the momentous opinion in 1916 by Cardozo J of New York in *MacPherson v Buick Motor Co*,⁸ the House of Lords in 1932 eventually closed this lengthy chapter of equivocation by adopting, in *Donoghue v Stevenson*,⁹ the general principle of liability for articles dangerous when negligently made. The plaintiff alleged injury as the result of consuming ginger beer from an opaque bottle ordered by a friend at a local café, which allegedly contained the decomposed remains of a snail. By a narrow majority it was held that these facts, if proved, disclosed a cause of action against the maker of the beverage. The guiding principle was formulated by Lord Atkin in these terms:¹⁰

A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.

The wider rationale was that by bringing oneself into a relation with others through an activity that foreseeably exposes them to danger if proper care is not observed, one must exercise reasonable care to safeguard them from physical

4 This process of erosion is dramatically described by Levi, *Introduction to Legal Reasoning* (1950), pp 6-19.

5 *Langridge v Levy* (1837) 2 M & W 519; 150 ER 863.

6 *Heaven v Pender* (1883) 11 QBD 503 at 517.

7 See, for example, *Faulkner v Wischer* [1918] VLR 513. The test was first propounded in *Longmeid v Holliday* (1851) 6 Ex 761; 155 ER 752.

8 *MacPherson v Buick Motor Co*, 217 NY 382; 111 NE 1050 (CANY 1916). The effect of *MacPherson* on the House of Lords is discussed by Rodgers, “Lord Macmillan’s Speech in *Donoghue v Stevenson*” (1992) 108 LQR 236.

9 *Donoghue v Stevenson* [1932] AC 562. More light on the dramatis personae: Rodger, “Mrs Donoghue and Alfenus Varus” (1988) 41 Cur L Prob 1; McBryde, “The Story of the “Snail in the Bottle” Case” (1991) *The Paisley Papers* 25.

10 *Donoghue v Stevenson* [1932] AC 562 at 599.

injury. The relation arises from conduct and creates a duty notwithstanding the absence of a contractual tie between the parties.¹¹

Plaintiffs and products

[23.30] From the outset, the new mandate was implemented with little hesitation and increasing liberality. Responsibility not being tied to privity runs even beyond the ultimate consumer or user¹² to “innocent bystanders” – in short, to everyone within the foreseeable range of the product’s harmful effects. In the case of a defective car this may include, besides the driver and passenger, other road users¹³ and even car repairers¹⁴ – all alike within “the vicinity of its probable use”.¹⁵

Responsibility, far from being limited to food and drink as in *Donoghue* itself,¹⁶ was progressively applied to such varied commodities as cosmetics,¹⁷ underwear,¹⁸ motor cars,¹⁹ boats,²⁰ lifts,²¹ lawnmowers²² and chemicals.²³ It covers all products, natural or processed, that are not reasonably safe to the life, health or property of others. Excluded only are products whose sole risk is economic loss (like a carpet with a disfiguring flaw): these fall to the province of warranty, express or implied, but not of tort.²⁴

Defects

[23.40] Danger from products may stem from negligence in the process of manufacture, design or marketing. The first category, production defects (bench errors), is least problematical. By definition, the flawed product does not conform to the manufacturer’s own design specifications and is usually an isolated deviant. The proper standard of product safety is not therefore in controversy and the extent of potential liability is limited. Whether the fault be managerial or vicarious, realistically it is attributable to inadequate quality control. Both on grounds of social responsibility and economic efficiency, the cost of such failure should be borne by (internalised to) the product.

Since the civil liability legislation was passed, a manufacturer can only be found negligent in failing to take precautions against a risk of harm if the risk was foreseeable, “not insignificant” and in the circumstances, a reasonable

11 Above, [8.xxx] (Ch 8).

12 As in *Barnett v Packer* [1940] 3 All ER 575 (ultimate purchaser); *Donoghue v Stevenson* [1932] AC 562 (friend of purchaser); *Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514 and *Mason v Williams* [1955] 1 WLR 549 (purchaser’s employee); *Power v Bedford Motor Co* [1959] IR 391 (subsequent owner of repaired car).

13 *Stennett v Hancock* [1939] 2 All ER 578; *Marschler v Masser’s Garage* (1956) 2 DLR (2d) 484.

14 *Hobbs Manufacturing v Shields* [1962] SCR 716; *Daley v Gypsy Caravan* [1966] 2 NSWLR 22.

15 The formulation is that of *Rest 1st*, s 395. The phrase was changed to “endangered by its probable use” in the *Rest 2nd*, s 395.

16 *Read v Croydon Corp* [1938] 4 All ER 631 (water); *Barnes v Irwell Valley* [1939] 1 KB 21 (water); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (oysters).

17 *Watson v Buckley* [1940] 1 All ER 174.

18 *Grant v Australian Knitting Mills* [1936] AC 85; 54 CLR 49.

19 *Herschthal v Stewart & Ardern* [1940] 1 KB 155.

20 *Halvorsen Boats Pty Ltd v Robinson* (1993) 31 NSWLR 1.

21 *Haseldine v Daw* [1941] 2 KB 343.

22 *Todman v Victa Ltd* [1982] VR 849.

23 *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* (1968) 120 CLR 635.

24 Below, *Warranties and Statutory Guarantees* [23.180]ff.

person in the manufacturer's position would have taken those precautions.²⁵ In determining whether a reasonable person would have taken precautions, the court must consider the probability that harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm and the social utility of the activity that creates the risk of harm.²⁶ These statutory formulations should make it more difficult to establish liability in negligence than was formerly the case under the unamended common law.

Design defects present greater problems of proof and policy. Since the design itself is challenged, the standard of reasonable safety to which it should conform is not a "given" (unless laid down by statute)²⁷ but must be determined by balancing the risk of harm against the cost of reducing or preventing it by an alternative design. This presents little difficulty where the design is self-defeating, like a collapsing crane,²⁸ inflammable heat cladding,²⁹ or a brittle jar for sulphuric acid.³⁰ In other cases, a safer design, such as provision of a guard on a lawnmower³¹ or a bridge communication system on a floating restaurant,³² might have reduced or negated the risk, although the statutory formula for considering whether precautions ought to have been taken must always now be borne in mind.³³

Much more complex are cases where the particular design did not cause the accident but at most failed to protect against its consequences, for example in complaints that a car was not crashworthy, that is, did not offer sufficient protection in a collision caused by the driver's or a third party's negligence.³⁴ In principle, that should be no obstacle, since it is well established that negligence may consist in failing to avoid aggravation of injuries, as by omitting to wear a seatbelt.³⁵ Typically the design is the outcome of a conscious choice, often made by the manufacturer on the basis of relative cost so as to accommodate consumer preferences or even the public interest (for example, lightweight cars offer less collision protection but are cheaper and save petrol).

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- 25 *Civil Law (Wrongs) Act 2002* (ACT), s 43(1); *Civil Liability Act 2002* (NSW), s 5B(1); *Civil Liability Act 2003* (Qld), s 9(1); *Civil Liability Act 1936* (SA), s 32(1); *Civil Liability Act 2002* (Tas), s 11(1); *Wrongs Act 1958* (Vic), s 48(1); *Civil Liability Act 2002* (WA), s 5B(1), discussed [x.xxx].
- 26 *Civil Law (Wrongs) Act 2002* (ACT), s 43(2); *Civil Liability Act 2002* (NSW), s 5B(2); *Civil Liability Act 2003* (Qld), s 9(2); *Civil Liability Act 1936* (SA), s 32(2); *Civil Liability Act 2002* (Tas), s 11(2); *Wrongs Act 1958* (Vic), s 48(2); *Civil Liability Act 2002* (WA), s 5B(2).
- 27 The *Competition and Consumer Act 2010* (Cth), Part V Div 1A provides for the declaration and enforcement of product safety and information standards and the publication of warning notices about hazardous products.
- 28 *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189.
- 29 *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210.
- 30 *Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514.
- 31 *Shepherd v S J Banks* (1987) 45 SASR 437.
- 32 *Podmore v Aquatours Pty Ltd* [1984] 1 NSWLR 111.
- 33 Above n 26.
- 34 For example, *Larsen v General Motors Corp*, 391 F 2d 495 (8th Cir 1968); *Gallant v Beitz* (1983) 148 DLR (3d) 522.
- 35 *Froom v Butcher* [1976] QB 286; *Eagles v Orth* [1975] Qd R 197. In the Australian Capital Territory, New South Wales, South Australia and Tasmania, legislation mandates a finding of contributory negligence on the part of a plaintiff who failed to wear a seat belt: *Civil Law (Wrongs) Act 2002* (ACT), s 97; *Motor Accidents Compensation Act 1999* (NSW), s 138(2)(c), (d); *Civil Liability Act 1936* (SA), s 49; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas), s 22(4).

Some caution in reviewing such managerial decisions is appropriate because the judicial system is ill-equipped to cope with such “polycentric” issues.³⁶ Moreover, an adverse decision condemns the whole production line and therefore has far greater cost implications.³⁷

Lastly, there may be negligence in marketing the product, exemplified by wrong or misleading labelling³⁸ or failure to warn of dangerous qualities.³⁹ Many products, however carefully made, entail irreducible risks, like medical drugs with harmful side effects or cosmetics harmful only to allergic users.⁴⁰ Because their potential benefit outweighs those risks, their distribution cannot automatically be condemned as negligent, but suitable warnings must be given to render them safe or at least give the user an informed choice whether to run the risk. In the case of a prescription drug, it should be sufficient to warn the physician who exercises his or her professional judgment whether to prescribe it or not and on whose judgment, rather than on the drug manufacturer, the patient relies. The “learned intermediary” rule is generally accepted in the United States and Canada,⁴¹ although obiter doubts have been expressed about its application in Australia.⁴² Exceptional perhaps are IUDs and oral contraceptives, the choice of which is primarily dictated by the patient and in which the intermediacy of the physician plays a secondary role.⁴³ Also, the doctrine does not apply when statute or regulations require warnings to be given directly to the consumer.⁴⁴ In general, warnings are cheap and offer an easy alternative to more costly design changes; but for that very reason, the duty to warn, being lightly invoked, has explosive potential for products liability. Nevertheless, it should now be noted in this context that by operation of the

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- 36 L Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353, 394-95 borrowed the concept of the “polycentric” task from Michael Polanyi’s book *The Logic of Liberty: Reflections and Rejoinders* (1951). Fuller said that “Generally ... problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication” (at 400).
- 37 For example, *Wynngrove’s Curator v Scottish Omnibuses* [1966] SC (HL) 47 (600 buses carrying 200,000 passengers each year without such accident).
- 38 For example, *Kubach v Hollands* [1937] 3 All ER 907; *Gliderol International Pty Ltd v Skerbic* (2009) 170 ACTR 1 (CA).
- 39 See *Vacwell Engineering v BDH Chemicals* [1971] 1 QB 88 (explosion on contact with water); *Cuckow v Polyester Products* (1970) 19 FLR 122 (smoke of insulating material); *Murphy v Alt Propane* (1979) 103 DLR (3d) 545 (failure to odourise gas); *O’Dwyer v Leo Buring* [1966] WAR 67 (exploding plastic stopper inside screw top); *Distillers (Biochemicals) Ltd v Thompson* [1971] AC 458 (failure to warn of dangers of Thalidomide); *Laws v GWS Machinery Pty Ltd* (2007) 209 FLR 53 (failure to warn of dangers of fitting tractor tyre). For warnings and other precautions in handling “inherently dangerous” things see below, [xx.xxx].
- 40 *Devilez v Boots* (1962) 106 Sol J 552; *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 (Vioxx side effects).
- 41 See *Thom v Bristol-Myers Squibb Co*, 353 F 3d 848, 852 (10th Cir 2003) (noting that forty-four US jurisdictions adhere to the rule). Compare *State ex rel Johnson & Johnson Corp v Karl*, 647 SE 2d 899 (WVa 2007) (declining to adopt the doctrine in West Virginia).
- 42 *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 at 294, [797] per Jessup J.
- 43 In *Hollis v Dow Corning* [1995] 4 SCR 634, the Supreme Court of Canada held that the “learned intermediary” doctrine did not apply to breast implants. However, compare *McKee v Moore*, 648 P 2d 21 (OK, 1982); *Lacy v GD Searle & Co*, 567 A 2d 389 (Del 1989), applying the doctrine to IUDs.
- 44 *Edwards v Basel Pharmaceuticals*, 933 P 2d 298 (OK, 1997) (learned intermediary doctrine held not to apply when Food and Drug Administration regulations required warnings direct to consumer on nicotine gum).

civil liability legislation, there is only a duty to take any kind of a precaution if the risk of harm was “not insignificant”.⁴⁵

A duty to warn can of course be demanded only when the risk is known or should have been known. But it may arise not only when the product is first put on the market, but also as soon as dangerous qualities become (or should become) known thereafter. In that event, the manufacturer must either cease production or henceforth attach a warning; indeed, it may have to warn or recall items already marketed.⁴⁶ On the other hand, no warning is required against dangers that are obvious, apparent and necessarily incidental to the product’s ordinary function, so that anyone would be aware of them.⁴⁷ In New South Wales, Queensland, South Australia, Tasmania and Victoria, that is so by virtue of “obvious risk” provisions in the civil liability legislation.⁴⁸

The product must be reasonably safe not only for its intended but for its foreseeable use. Thus motor vehicles must give reasonable protection against rear-end collisions; and warning is required against leaving a toxic product within reach of little children or against accidentally spilling it over sensitive parts of the body.⁴⁹

Failure to warn must, of course, have been causal, the burden of proof being on the plaintiff that he or she would not otherwise have used the product or would have used it differently. A subjective test is here applied: would *this* person have acted differently if an adequate warning had been given?⁵⁰ However, in New South Wales, Queensland, Tasmania and Western Australia, any statement made by the injured person after suffering the harm about what he or she would have done is inadmissible except to the extent that the statement is against his or her own interest.⁵¹ The court must therefore somehow decide what the plaintiff would subjectively have done, using evidence other than the plaintiff’s own testimony. In Victoria, the plaintiff’s own testimony is admissible in these circumstances.⁵² Thus, unlike their counterparts in the four States just listed, Victorian courts are left to decide for themselves whether the plaintiff’s evidence, given with hindsight, is self-serving.

45 *Civil Law (Wrongs) Act 2002* (ACT), s 43(1)(b); *Civil Liability Act 2002* (NSW), s 5B(1)(b); *Civil Liability Act 2003* (Qld), s 9(1)(b); *Civil Liability Act 1936* (SA), s 32(1)(b); *Civil Liability Act 2002* (Tas), s 11(1)(b); *Wrongs Act 1958* (Vic), s 48(1)(b); *Civil Liability Act 2002* (WA), s 5B(1)(b).

46 *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255 at 272; *Thompson v Johnson & Johnson* [1991] 2 VR 449 at 490; *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 at 295, [799] per Jessup J. See also *Competition and Consumer Act 2010* (Cth), s 65F requiring consumer product recalls when (among other things) it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods from causing injury.

47 *Deshane v Deere & Co* (1993) 106 DLR (4th) 385 (Ont CA) (danger of harvesting machine obvious); *Brown Form Corp v Brune*, 893 SW 2d 640 (Tex App 1994) (no need to warn of the dangers of drinking large quantities of tequila in a short time); *Maneely v General Motors Corp*, 108 F 3d 1176 (9th Cir 1997) (no need to warn of the dangers of riding unrestrained in the cargo bed of a pickup truck).

48 *Civil Liability Act 2002* (NSW), s 5H(1); *Civil Liability Act 2003* (Qld), s 15(1); *Civil Liability Act 1936* (SA), s 38(1); *Civil Liability Act 2002* (Tas), s 17(1); *Wrongs Act 1958* (Vic), s 54(1).

49 *Derilez v Boots Pure Drug Co* (1962) 106 Sol Jo 552.

50 *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

51 *Civil Liability Act 2002* (NSW), s 5D(3); *Civil Liability Act 2003* (Qld), s 11(3); *Civil Liability Act 2002* (Tas), s 13(3); *Civil Liability Act 2002* (WA), s 5C(3).

52 *Wrongs Act 1958* (Vic), s 51(3).

Proof

[23.50] The standard of responsibility demanded from manufacturers quickly assumed some characteristics of strict liability through the operation of the procedural device of *res ipsa loquitur*. Less than four years after *Donoghue v Stevenson*, the Privy Council rejected the contention that the maxim was inapplicable merely because the manufacturer relinquishes control on releasing the article upon the market and intermediaries handle it before it reaches the consumer.⁵³ Control during the process of manufacture was sufficient, once the plaintiff has eliminated himself and other extraneous forces as likely causes of the injury. The maxim has been applied to toxic underwear,⁵⁴ an exploding light bulb,⁵⁵ a bone in a chicken sandwich,⁵⁶ an exploding bottle of soft drink,⁵⁷ fire in a television set,⁵⁸ a malfunctioning water-lift muffler,⁵⁹ and mercury in a tub of ice cream.⁶⁰ The inference raised in these cases is twofold: it suggests either the manufacturer's negligence in using an improper system of work or the carelessness of its employees⁶¹ in failing to carry out the system properly. The crucial point is that the plaintiff "is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong,"⁶² and, in order to exculpate itself, the defendant must produce evidence contradicting *both* hypotheses – in particular, that its employees were not negligent – a daunting task.⁶³

Res ipsa loquitur imposes an evidentiary burden on the manufacturer but the plaintiff still continues to bear the burden of proof.⁶⁴ Nevertheless, the ability to raise an inference of manufacturer negligence simply from the fact that the product caused harm is of considerable assistance to the plaintiff's case.⁶⁵

But all this is still a far cry from assuring compensation for every accident caused by a defective product. In the first place, a manufacturer is only responsible for the condition in which it released the article and not for flaws subsequently introduced in the process of marketing and use. This truism, as valid for strict liability as for negligence, defeats any recourse to *res ipsa loquitur* unless the plaintiff is able to eliminate the likelihood of other responsible causes. Hence, although the possibility of intermediate tampering or deterioration no longer categorically relieves a manufacturer and only goes to the question of

53 *Grant v Australian Knitting Mills* [1936] AC 85.

54 *Grant v Australian Knitting Mills* [1936] AC 85.

55 *Martin v Thorn Lighting Industries Pty Ltd* [1978] WAR 10.

56 *Tarling v Nobel* [1966] Arg LR 189.

57 *Fletcher v Toppers Drinks Pty Ltd* [1981] 2 NSWLR 911.

58 *MacLachlan v Frank's Rental* (1979) 10 CCLT 306.

59 *Thomas v Foreshore Marine Exhaust Systems Pty Ltd* [2005] NSWCA 451.

60 *Suthern v Unilever Australia Ltd* [2007] ACTSC 81.

61 Vicarious liability is not disproved by adequate supervision: *Martin v Thorn Lighting Industries Pty Ltd* [1978] WAR 10; *Hill v Crowe* [1978] 1 All ER 812.

62 *Grant v Australian Knitting Mills* [1936] AC 85 at 101 per Lord Wright.

63 In *Grant v Australian Knitting Mills* [1936] AC 85 it did not help the defendant that over a five-year period when five million garments were sold no complaint had been received.

64 The onus of *proof* remains on the plaintiff: *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 500; *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 132-133. This proposition is restated in the civil liability legislation: *Civil Law (Wrongs) Act 2002* (ACT), s 46; *Civil Liability Act 2002* (NSW), s 5E; *Civil Liability Act 2003* (Qld), s 12; *Civil Liability Act 1936* (SA), s 35; *Civil Liability Act 2002* (Tas), s 14; *Wrongs Act 1958* (Vic), s 52; *Civil Liability Act 2002* (WA), s 5D.

65 *Forbes v Selleys Pty Ltd* [2004] NSWCA 149 at [97].

proof, in practice it is much easier to disprove in the case of food and other products in sealed containers than articles more vulnerable to interference in the course of distribution.

In the case of exploding bottles, for example, the probability must be that the defect is attributable to the bottler (excessive carbonation or defective bottle) rather than to subsequent handling by the carrier, retailer or consumer.⁶⁶ In regard to articles for use rather than consumption, there remains the problem of the defect being due to wear and tear, inadequate maintenance or faulty repairs; and the more protracted the use, the more formidable the array of hypotheses, prone to stifle any claim against the manufacturer to extinction.⁶⁷ Finally, even if the flaw can be shown to have existed when the product left the defendant's factory, *res ipsa loquitur* may yet prove a broken reed either because the defect is traced to a component part procured from a subcontractor – and what slender authority there is disclaims any vicarious liability by the manufacturer of a finished product for the negligence of the maker of the component part⁶⁸ – or because conjecture as to the cause of the accident remains equally balanced between two components, for only one of which the defendant would be responsible.⁶⁹ The increasing complexity of modern machinery, combined with spreading reliance on outside supply for specialised parts, gives growing prominence to these difficulties of proof which are often magnified, especially in the case of motor cars, by the likelihood that the accident destroyed much of the evidence.⁷⁰

There remains one other important difference between negligence (even aided by *res ipsa loquitur*) and warranty or strict liability. In determining the requisite standard of safety, negligence does not demand more than what reasonable care should have assured. A significant contribution to accident prevention is made by statutory safety standards, violation of which, moreover, an injured plaintiff may invoke as breach of statutory duty.⁷¹ But negligence law does not demand protection against risks which the highest standard of quality control could not have eliminated. Excluded therefore are defects which are (practically) undiscoverable, like serum hepatitis in blood plasma; even more, risks which at the time were unknown and unknowable.⁷² Notably, even the new statutory regime of “strict” product liability withholds protection against unforeseeable risks.⁷³

Mass disasters resulting from harmful products often pose additional problems of proof, causation being particularly troublesome in case of pharmaceuticals and chemicals. The plaintiff may be unable to establish on a balance of probabilities which of several manufacturers of a generic product was

66 See *Kilgannon v Sharpe Bros* (1986) 4 NSWLR 600; *Fletcher v Toppers Drinks* [1981] 2 NSWLR 911.

67 For example, *Evans v Triplex Glass* [1936] 1 All ER 283 (fragmented windscreen); *Phillips v Chrysler Corp* (1962) 32 DLR (2d) 347 (intervening repairs); *Phillips v Ford Motor Co* (1971) 18 DLR (3d) 641 (repairer); *Hart v Bell Telephone* (1979) 10 CCLT 335 (TV used by eight lessees in 1 ½ years); *Price v General Motors Corp*, 931 F 2d 162 (1st Cir 1991) (second hand car driven 63,000 miles before plaintiff bought it and 15,000 miles after).

68 Below, [23.90]ff.

69 Above, [9.xxx].

70 See, for example, *Phillips v Chrysler Corp* (1962) 32 DLR (2d) 347; *Price v General Motors Corp*, 931 F 2d 162 (1st Cir 1991).

71 See, for example, *Competition and Consumer Act 2010* (Cth), s 65C(8), (9); *Fair Trading Act 1999* (Vic), s 45; *Fair Trading Act 1989* (Qld), s 99; *Fair Trading Act 1987* (WA), s 52(2).

72 For example, *Footner v BH Smelters* (1983) 33 SASR 58 (mesothelioma, 1944-1952).

73 Below, [23.150]ff.

the one that caused his injury or that his or her injury was due to the defendant's product or emission rather than to one of natural origin in the environment. Some American courts have relaxed the traditional standard of proof by either shifting the burden to defendants once shown to have been negligent, by relaxing the conditions of joint liability for acting in concert,⁷⁴ or by allocating liability among manufacturers in accordance with their share of the national market of the product in question.⁷⁵ The high expense of separate individual actions also tends to impede access to justice and aggregative proceedings are often not available.⁷⁶

Intermediate examination

[23.60] Lord Atkin's original insistence in *Donoghue v Stevenson* that the manufacturer must have sold its products "in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him" gave some semblance of support to the argument that responsibility did not attach unless the defective article was put out in a sealed container. This restrictive interpretation was soon rejected. In *Grant v Australian Knitting Mills*,⁷⁷ underpants which contained a noxious chemical and caused dermatitis were in fact wrapped in paper packets but opened by the retailer prior to sale. The manufacturer was nevertheless held liable because the previous judicial emphasis on "control" was merely intended to draw attention to "the essential factor that the consumer must use the article exactly as it left the maker, that is in all its material features, and use it as it was intended to be used. In that sense, the maker may be said to control the thing until it is used".⁷⁸ The possibility of intermediate tampering with the article, therefore, goes only to burden of proof, not to the existence of duty.

A further and related limitation, suggested in Lord Atkin's original formulation, was that responsibility was excluded by a "reasonable possibility of intermediate examination".⁷⁹ Progressive interpretation, however, has dispelled the view that a mere possibility for inspecting the product after the defendant has parted with it is sufficient to excuse the defendant.⁸⁰ Indeed, with the decay of older causal theories of "last opportunity" and "last wrongdoer", a defendant cannot any longer even claim exemption merely because an intermediary was under a duty of inspection and was negligent in either failing to carry it out or in doing it improperly.⁸¹ Rather, the dual fault in such cases gives rise to concurrent liability, enabling the victim to have recourse against either or both.

If "possibility" of intermediate examination will not excuse, would "probability"? The answer is – only if the defendant was justified in regarding

74 See, for example, *Abel v Eli Lilly & Co*, 343 NW 2d 164 (Mi 1984).

75 See, for example, *Sindell v Abbott Laboratories*, 607 P 2d 924 (Cal 1980); *Hymowitz v Eli Lilly & Co*, 539 NE 2d 1069 (NY 1989).

76 See Fleming, "Mass Torts" (1994) 42 Am J Comp L 507.

77 *Grant v Australian Knitting Mills* [1936] AC 85.

78 *Grant v Australian Knitting Mills* [1936] AC 85 at 104. Hence, that the article was intended to be mixed or likely to be used in conjunction with some other substance does not necessarily exclude liability: *Grant v Cooper* [1940] NZLR 947; *Willis v FMC* (1976) 68 DLR (3d) 127.

79 *Donoghue v Stevenson* [1932] AC 562 at 599.

80 *Herschtal v Stewart & Arden* [1940] 1 KB 155; *Haseldine v Daw* [1941] 2 KB 343 at 375-377; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 543.

81 See *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 563-564; *Miller v Electricity Bd* [1958] SC (HL) 20; *Power v Bedford Motor Co* [1959] IR 391; *Bicer v McDonalds Australia Ltd* [2001] NSWSC 218.

the expected test as sufficient to defuse the danger prior to use and thus provide a safeguard to persons who might otherwise be harmed. A vague warning, for example, that the repair carried out on a car was only “temporary”, might not be enough to alert an ordinary customer.⁸² Nor would the mere fact of a governmental certification.⁸³ On the other hand, a hair dye manufacturer may well be entitled to rely on professional hairdressers heeding instructions specially addressed to them before applying the product to customers.⁸⁴ All the more is it a defence that some person, duty bound to deal with such a situation, acquired actual knowledge of the defect; as when a foreman, after being himself hurt by a defective tool, failed to either withdraw it from circulation or report the incident.⁸⁵

In short, the ordinary rules of what the civil liability legislation calls “scope of liability”⁸⁶ are no less applicable here than in other areas of negligence. Thus not even the unauthorised removal by an independent deliveryman of a grounding prong from a refrigerator could preclude the manufacturer from being liable to a user for an electric shock caused by defective wiring.⁸⁷ A safety feature cannot exempt a manufacturer from its duty to provide a non-defective product, when it is not foolproof and its removal is foreseeable. It was just like leaving a loaded gun around whose safety catch is later released by a meddler: no new force is added, rather a dormant force is unchained.

Contributory negligence – misuse

[23.70] Much the same applies to inspections by the ultimate consumer. Since apportionment, however, a distinction must now be drawn between mere contributory negligence by the plaintiff and the negation of all duty by the defendant: for the first (unlike the second) will now only reduce the claim instead of defeating it entirely. The tendency has become not to acquit the defendant of all responsibility, unless the victim had been aware of the defect with full appreciation of the attendant risk⁸⁸ or unless, at the very least, he or she could reasonably have been expected to make his or her own inspection sufficient to highlight the danger and confront it with safety.⁸⁹ A repairer, for example, called in to deal with the precise cause of the danger cannot recover, because he or she can be expected to look out for himself or herself.⁹⁰ Otherwise, however, the plaintiff’s failure will only be treated as contributory negligence, as when an electrician failed to “ground” a machine in the process of installation and was electrocuted owing to faulty wiring in a sealed switchbox.⁹¹

82 *Jull v Wilson* [1968] NZLR 88.

83 *Willis v FMC* (1976) 68 DLR (3d) 127.

84 *Holmes v Ashford* [1950] 2 All ER 76; *Kubach v Hollands* [1937] 3 All ER 907.

85 *Taylor v Rover Co* [1966] 1 WLR 1491.

86 *Civil Law (Wrongs) Act 2002* (ACT), s 45(1), (3); *Civil Liability Act 2002* (NSW), s 5D(1), (4); *Civil Liability Act 2003* (Qld), s 11(1), (4); *Civil Liability Act 1936* (SA), s 34(1), (3); *Civil Liability Act 2002* (Tas) s 13(1), (4); *Wrongs Act 1958* (Vic), s 51(1), (4); *Civil Liability Act 2002* (WA), s 5C(1), (4).

87 *Smith v Inglis* (1978) 83 DLR (3d) 215.

88 See, for example, *Farr v Butters* [1932] 2 KB 606; *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* (1968) 120 CLR 635.

89 See *Jull v Wilson* [1968] NZLR 88, modifying *Cathcart v Hull* [1963] NZLR 333. Some of the older cases are now tainted with obsolescence.

90 *Daley v Gypsy Caravan Co Pty Ltd* [1966] 2 NSW 22 (CA); contrast *Bus v SCC* (1989) 167 CLR 78.

91 *Hobbs Manufacturing Co v Shields* [1962] SCR 716; *Smith v Inglis* (1978) 83 DLR (3d) 215.

In this connection, no categorical distinction can be drawn between latent and patent dangers. The user, especially an employee at work, may have no practical alternative to encountering a known risk, for example in adjusting an unguarded machine while it is in operation. In that case, the manufacturer can be said to have induced him or her to incur the risk and cannot avoid responsibility by pleading that the operator assumed it with open eyes.⁹²

A manufacturer or other supplier of goods bears responsibility only for dangers they pose in the contemplated use. If rendered dangerous only because handled in an improper or otherwise unforeseeable manner, they are simply not “defective” in any relevant sense. For example, a ladder does not have to be capable of supporting the weight of two men using it as a horizontal platform between uprights.⁹³ Nor need covers or guards on a machine be designed so as to be irremovable,⁹⁴ or a beer bottle be designed so as not to break when thrown against a telephone pole,⁹⁵ or cologne be designed so as not to ignite if held over a candle flame.⁹⁶ But the usual stress in this context on “contemplated” or “intended” use is only a synonym for, and not meant to abridge, responsibility for dangers arising from any “reasonably foreseeable use”. A misuse from the manufacturer’s point of view may be a possible use or mode of operation that should have been foreseen and guarded against.⁹⁷ For example, the manufacturer of a mask caricaturing a politician may have to foresee a violent reaction against the wearer of the mask by a drunken or politically volatile person.⁹⁸ Or if the environment in which the product will probably be used poses a substantial risk of misuse, such as infants tampering with poisonous furniture polish, reasonable care may well call for a warning label or other special precaution.⁹⁹

Inherently dangerous goods

[23.80] The category of things “dangerous in themselves” or, as they are sometimes called, “inherently dangerous” goods long used to hold a special place in our law of negligence. The danger is said to be inherent when it derives from the nature of the thing itself, as opposed to hazards associated with a defectively made product that is otherwise harmless – the difference, in a nutshell, between poison, which is fraught with constant and invariable peril, and ginger beer which is ordinarily innocuous in the absence of some extraneous, hazard-creating factor.¹⁰⁰

92 *Suosaari v Steinhardt* [1989] 2 Qd R 477 (FC).

93 *Campbell v O'Donnell* [1967] IR 226; also *Poole v Crittal Metal Windows* [1964] NZLR 522 (CA). But see *Hill v Crowe* [1978] 1 All ER 812 (stood on box).

94 *Dallaire v P-E Martel Inc* [1989] 2 SCR 419.

95 *Venezia v Miller Brewing Co*, 626 F 2d 188 (1st Cir 1980).

96 *Moran v Faberge Inc*, 332 A 2d 11 (CA Md 1975).

97 *Suosaari v Steinhardt Ltd* [1989] 2 Qd R 477 at 488 per Cooper J; *Rivett Arboricultural & Waste Equipment Hire Pty Ltd v Evans* [2007] SASC 108 at [178] per Gray J.

98 *Price v Blaine Kern Artista Inc*, 893 P 2d (Nev 1995) (plaintiff entertainer sued manufacturer of caricature mask of George Bush after mask caused injury when he was pushed from behind by a spectator).

99 *Spruill v Boyle-Midway Inc*, 308 F 2d 79 (4th Cir 1962).

100 Examples of items within the category are loaded guns (*Burfitt v Kille* [1939] 2 KB 743), detonators (*McCarthy v Wellington City* [1966] NZLR 481), sulphuric acid (*Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514), mustard gas (*Swinton v China MSN* (1951) 83 CLR 553), and an explosive fluid (*Anglo-Celtic S Co v Elliott* (1926) 42 TLR 297; *Ayoub v Beaupre* [1964] SCR 448); outside it are bows and arrows (*Ricketts v Erith BC* [1943] 2 All

The only *legitimate* function that this distinction serves is to focus attention on the fact that, whereas liability for a defectively made article is primarily based on negligence in causing the defect,¹⁰¹ the hazard peculiar to inherently dangerous commodities stems from failure to give notice of the danger. In other words, the negligence, if any, is associated with the distributive rather than the manufacturing process. Unfortunately, this aspect was obscured when the category of things dangerous per se emerged in mid 19th century¹⁰² as a ploy for narrowing the immunity afforded by the privity rule to manufacturers of negligently *defective* products. Henceforth, a duty of care was demanded for the manufacture of dangerous things, though not yet of products ordinarily harmless unless negligently made. *Donoghue v Stevenson* eventually dispensed with this devious use of the category, though an analogous function in limiting the liability of contractors and landlords for negligent installations actually survived for another 25 years.¹⁰³ Its only remaining significance in this respect is a reminder that, though no longer a determinant of duty, inherently dangerous things may yet call for more in the way of fulfilling that duty, commensurate with their aggravated risk.¹⁰⁴

Thus the degree of requisite diligence has been variously described as amounting “practically to a guarantee of safety”,¹⁰⁵ requiring the observance of “consummate care”,¹⁰⁶ “approaching, even if it does not attain, strict or absolute liability”.¹⁰⁷ A warning would not be sufficient unless it is given to a competent person and is adequate to acquaint him or her fully with the dangerous properties of the substance so that he or she can adopt suitable precautions to prevent the product from becoming a source of injury to anyone.¹⁰⁸

But however strict, liability is not completely unqualified and requires some showing of fault, however slight.¹⁰⁹ Some substances, like explosives and poison, can never be made entirely safe and protected from every conceivable interference by extraneous elements. In such cases, the duty ought to be

ER 629), a catapult (*Smith v Leurs* (1945) 70 CLR 256 at 259), a long-spouted can (*Wray v Essex CC* [1936] 3 All ER 97), a locked sedan with a dog inside it (*Fardon v Harcourt-Rivington* (1932) 48 TLR 215), and a domestic steam boiler: *Ball v LCC* [1949] 2 KB 159.

101 In exceptional cases it may also be based on failure to detect a defect by reasonable inspection.

102 *Longmeid v Holliday* (1851) 6 Ex 761; 155 ER 752.

103 *Billings (AC) v Riden* [1958] AC 240.

104 *Donoghue v Stevenson* [1932] AC 562 at 596; *Todman v Victa Ltd* [1982] VR 849; *Beckett v Newalls* [1953] 1 WLR 8 at 15; *Rae v Eaton Co* (1961) 28 DLR (2d) 522.

105 *Donoghue v Stevenson* [1932] AC 562 at 612 per Lord Macmillan. This has been repeatedly endorsed, for example, *Ayoub v Beaupre* [1964] SCR 448 at 451; *Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514 at 523 per Starke J; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 554 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

106 *Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514 at 522-523 per Starke J.

107 *Hackshaw v Shaw* (1984) 155 CLR 614 at 630 per Murphy J.

108 Compare *Norton v Streets Ice Cream* (1968) 120 CLR 635 (“highly inflammable” sufficient) with *Lambert v Lastoplex* [1972] SCR 569 (insufficient). Also *Streets Ice Cream v Australia Asbestos* [1967] 1 NSW 50; *Anderson v Enfield City Corp* (1983) 34 SASR 472 (“caution” held to be too mild a warning). Products for the retail market should carry prominent warning on their labels, but if for specialist use only, like hair dye supplied to hairdressers, it is sufficient to warn the latter alone and rely on them to take the directed precautions: *Holmes v Ashford* [1950] 2 All ER 76.

109 *Hercules Textile Mills v K & H Textile Engineers* [1955] VLR 310 at 313; *Todman v Victa Ltd* [1982] VR 849. The dangerous nature of the article, if not notorious, must have been known to the defendant: *Imperial Furniture v Automatic Fire Sprinklers* [1967] 1 NSW 29.

regarded as discharged if the custodian selects a method of storing which, so far as humanly possible, eliminates the danger of explosion and reduces to a minimum the possibility that persons unacquainted with its dangerous character could gain access to it. Yet how exacting the standard is in practice is dramatically illustrated by a New Zealand decision¹¹⁰ which declined to excuse a defendant for storing detonators in a metal box on a high shelf in a dark corner of a disused house on an isolated farm, when a labourer who took shelter there from the rain on his way to work cleaned out the detonator in ignorance of its nature and was killed by an explosion.

Nor is the duty in cases such as these owed only to persons who unwittingly pick up the explosive or perhaps those who are injured in the immediate vicinity. It has been held to be foreseeable, for example, that teenagers might break into an insufficiently secured safe in an open quarry containing detonators and, unaware of the risk, give them to another child who inadvertently sets off an explosion after having taken them home.¹¹¹

Responsibility for taking precautions rests not only on the manufacturer of the highly dangerous product but on everyone alike who transfers it to another or has custody or control over it.¹¹² Here, at any rate, it is irrelevant that the defendant is only a gratuitous bailor, donor¹¹³ or mere distributor who has not himself increased the hazard inherent in the object beyond creating an opportunity where it might cause harm to others, as when a shopkeeper sold a dangerous toy pistol to a child of 12 who injured a companion with blank ammunition.¹¹⁴ The nature of a product such as a gun leads to a duty that requires the person in control of the gun to take care as to the persons allowed to use the gun.¹¹⁵

Manufacturers and other suppliers

[23.90] The responsibility laid upon manufacturers by *Donoghue v Stevenson* has been progressively extended to makers of component parts integrated into a final product by someone else,¹¹⁶ to repairers,¹¹⁷ repackagers,¹¹⁸ erectors,¹¹⁹ assemblers,¹²⁰ and modifiers.¹²¹ Beyond that, reasonable care demands from those handling or distributing goods some measure of inspection to detect defects in the creation of which they may not have had a hand at all. The maker

110 *Marcroft v Inger* [1936] NZLR 121. But a trespasser was disqualified in *Clayton v Victoria* [1968] VR 562 (sulphuric acid in school laboratory).

111 *McCarthy v Wellington City* [1966] NZLR 481 (CA); *Holian v United Grain* (1980) 112 DLR (3d) 611.

112 See, for example, *Rivett Arboricultural & Waste Equipment Hire Pty Ltd v Evans* [2007] SASC 108 (FC) (duty owed by owner of wood-chipping machine as well as by manufacturer).

113 See *Ball v LCC* [1949] 2 KB 159. In relation to food donors see n 147.

114 *Burfitt v Kille* [1939] 2 KB 743.

115 *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241 per Brennan J.

116 *Evans v Triplex Glass* [1936] 1 All ER 283 at 286 (windscreen).

117 *Haseldine v Daw* [1941] 2 KB 343; *Jull v Wilson* [1968] NZLR 88; *Godfrey's v Ryles* [1962] SASR 33. But the repairer may well have been justified in relying on an intermediate examination.

118 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40 (FC).

119 *Brown v Cottrill* (1934) 51 TLR 21.

120 *Stennett v Hancock* [1939] 2 All ER 578; *Howard v Furness Houlder* [1936] 2 All ER 781; *Malfoot v Noxal* (1935) 51 TLR 551.

121 *Stillwell Trucks v McKay* [2002] NSWCA 292.

of a beverage, for instance, owes a duty to inspect the bottles it uses,¹²² even if this need not be nearly as exacting as the tests for flaws required from the bottle manufacturer, since to demand more would be needlessly wasteful and often impracticable. Similarly, people who loan out equipment¹²³ must carry on a reasonable system of maintenance and inspection to minimise the risk of injury to likely users, such as dock workers operating a rented truck¹²⁴ or using slings furnished by stevedores for the purpose of their common task of unloading a ship.¹²⁵

Nor are manufacturers of composite products like motor cars absolved from all responsibility for component parts or other fabrication of subcontractors. Their duty of reasonable care is not necessarily exhausted in the selection of specialists who are competent. Car manufacturers, for example, were held remiss in not addressing their engineering skill to the design of a carburettor obtained from a large-scale supplier.¹²⁶ More commonly, however, a less exacting standard has been posed, so that if nothing looked amiss to the naked eye, no more probing tests with special equipment were required.¹²⁷ So far at least there has been no disposition¹²⁸ to adopt the growing American doctrine of making manufacturers of completed products responsible for negligence by anyone in the production process, outsiders no less than their own employees, in token of the consumer reliance on the brand name of the final product sedulously fostered by advertising.¹²⁹ Nor is an electricity supplier connecting up a new circuit under any duty to check that the particular unit to be hooked up is safe and properly installed. Earthing a washing machine, for instance, is the job of the electrical contractor who installed it and on whose competence the electricity supplier may rely, at least in the absence of suspicious circumstances.¹³⁰ To ask more from the supplier would increase costs with no commensurate benefit of added safety.

Distributors

[23.100] There must be something more than a mere relationship of seller and buyer for a duty in negligence to be owed by the former to the latter.¹³¹ However, retail dealers and other distributors are not altogether exempt from responsibility for defective products manufactured by others. Besides being

122 *Hart v Dominion Stores* (1968) 67 DLR (2d) 675; *Adelaide Chemical Co v Carlyle* (1940) 64 CLR 514 (unsuitable container).

123 *White v John Warwick* [1953] 1 WLR 1285; *Godfrey's v Ryles* [1962] SASR 33.

124 *Sullivan v Gallagher* [1959] SC 243.

125 *Oliver v Saddler* [1929] AC 584.

126 *Winward v TVR Engineering* [1986] BTLC 366 (CA) imposed on a small firm a duty even to conduct its own engineering review of a Ford design.

127 *Taylor v Rover Co* [1966] 1 WLR 1491 (hardening chisels).

128 *Peake v Steriline Mfg* (1988) ATR 80-154 (regretfully). Contrary (semble) *Farro v Nutone* (1990) 68 DLR (4th) 268 (Ont CA).

129 For example, *Boeing Airplane Co v Brown* 291 F 2d 310 (9th Cir 1961); *Rest 2nd*, s 400 (1965). Indeed, "channelling" liability from the component manufacturer to the final assembler makes more insurance sense. See *Goldberg v Kollsman Instruments*, 191 NE 2d 81 (NY 1963) (defective altimeter).

130 *Sellars v Best* [1954] 1 WLR 913.

131 *Laundess v Laundess* (1994) Aust Torts Reps ¶ 81-316 at 61,874 per Mahoney JA (with whom Meagher JA and Powell JA agreed); *McPherson's Ltd v Eaton* [2005] NSWCA 435 at [81] per Ipp JA.

strictly liable for breach of warranty to their own customers,¹³² they may also owe an independent duty of care to them and to third parties if that “something more” is present in the relationship.¹³³

A seller owes a duty to warn of dangers of which it knows or has reason to know.¹³⁴ There is no duty to inspect the goods for latent defects, so the seller owes no duty to warn of dangers of which it would have been aware if it had made such an inspection.¹³⁵ Even if the commodity is not packed in a sealed container, the retailer would not be bound to subject it to elaborate tests, since the maker is usually better equipped to do so. The retailer should not, however, be excused from measures which a qualified dealer in that class of merchandise could expediently adopt for the better protection of the consumer, such as a visual inspection of the product for patent defects. A department store, for example, failed that test in not detecting a nail protruding from the inner sole of a shoe offered to a customer.¹³⁶ Responsibility is enhanced by representing that the article is safe.¹³⁷ A dealer has a duty to warn even when becoming aware of the defect only after the sale.¹³⁸

Dealers are of course liable also for creating risks themselves. Their negligence may arise from their manner of handling the product, as when a pharmacist supplies a doctor with belladonna instead of dandelion extract¹³⁹ or a grocer stores tinned food in such a manner that it perishes.¹⁴⁰ It may also consist in selling a chattel to a purchaser whom the dealer knows to be incompetent to handle it safely (like entrusting a gun or a car to a child)¹⁴¹ or to be bent on using it for a dangerous purpose (like selling a light tyre for a heavy truck).¹⁴²

Even a non-commercial seller, like the private owner of a used car, is under a duty to warn at least if aware of any very real danger of driving it without further examination.¹⁴³ This duty does not extend to risks that only an inspection would have revealed.¹⁴⁴

Donors

[23.110] In the traditional view, a donor or gratuitous bailor of a chattel is treated just like a licensor of old: indeed, it was donors who originally set the pattern for the familiar formula colloquially epitomised in the axiom “one must

132 Below, [23.180]ff.

133 *Laundess v Laundess* (1994) Aust Torts Reps ¶ 81-316 at 61,874 per Mahoney JA (with whom Meagher JA and Powell JA agreed); *McPherson's Ltd v Eaton* [2005] NSWCA 435.

134 *Rest 2nd*, s 402 postulates liability only for dangers of which distributors know or “have reason to know”. See, for example, *Cuckow v Polyester Reinforced Products Pty Ltd* (1970) 19 FLR 122 (distributor of polyurethane foam known to be a potential fire hazard).

135 *Elliott v Bali Bungy Co* [2002] NSWSC 906 at [24]-[31] per Young CJ in Eq; *Laundess v Laundess* (1994) Aust Torts Reps ¶ 81-316; *McPherson's Ltd v Eaton* [2005] NSWCA 435.

136 *Santise v Martins*, 17 NYS 2d 741 (1940) (store held liable).

137 *Watson v Buckley* [1940] 1 All ER 174; *Andrews v Hopkinson* [1957] 1 QB 229; *Pack v Warner County* (1964) 44 DLR (2d) 215.

138 *Rivtow Marine v Washington Iron Works* [1974] SCR 1189.

139 *Thomas v Winchester*, 6 NY 397 (1852); cited with approval in *Donoghue v Stevenson* [1932] AC 562 at 617.

140 *Gordon v M'Hardy* (1903) 6 Fraser 210 at 212.

141 See *Burfitt v Kille* [1939] 2 KB 743 (selling pistol to 12-year-old); *Murphy v D & B Holdings* (1979) 98 DLR (3d) 59 (selling with knowledge that buyer would misuse).

142 *Murphy v D & B Holdings* (1979) 98 DLR (3d) 59 (warning insufficient).

143 *Hurley v Dyke* [1979] RTR 265 at 290, 303 (HL).

144 Above n 135.

not look a gift horse in the mouth” – that is, that a gratuitous transferor or licensor need do no more than warn of defects actually known to him or her,¹⁴⁵ besides abstaining from creating sources of danger by active negligence, like manufacturing a defective product and then giving it away as an advertising sample.¹⁴⁶ But as already noted, the modern attitude has become distinctly unsympathetic to continuing discrimination against gratuitous relations.¹⁴⁷ Accordingly, there is quite sufficient latitude for nowadays allowing a donee the same claim to neighbourly consideration of care (including an affirmative duty to inspect the article for patent defects) as is due to anybody else.¹⁴⁸

Economic loss

[23.120] The purpose of this branch of law being the promotion of safety, its concern is primarily with physical injury.¹⁴⁹ The range of protection has however been progressively extended beyond bodily injuries at least to all forms of property damage. Thus liability may now attach to a product whose *sole* foreseeable risk is damage to property, as in the case of mislabelled herbicide, noxious dog food or sheep dip.¹⁵⁰ Nor is it necessary that the product actually cause the damage; it is sufficient that it failed in its function to protect against damage, for example, fungicides or alarm systems.¹⁵¹

More controversial is damage to the article itself.¹⁵² It was once thought that such damage could be classified as “damage to property”,¹⁵³ but this has now been emphatically rejected: such loss is to be treated as “purely economic”.¹⁵⁴

One possible line of distinction might have been between dangerous products and products that are merely qualitatively substandard (shoddy), such as leaky roof tiles¹⁵⁵ or a big game rifle that failed during a tiger shoot.¹⁵⁶ The former

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- 145 *Gautret v Egerton* (1867) LR 2 CP 371; *Coughlin v Gillison* [1899] 1 QB 145; *Oliver v Saddler* [1929] AC 584 at 596.
- 146 *Hawkins v Coulsdon UDC* [1954] 1 QB 319 at 333; *Levi v Colgate-Palmolive* (1941) 41 SR (NSW) 48; *Pease v Sinclair Refining*, 104 F 2d 183 (2d Cir 1939).
- 147 For example, Lord Devlin in *Hedley Byrne v Heller* [1964] AC 465 at 526-527. Limited statutory protection exists for food donors, *Civil Law (Wrongs) Act 2002* (ACT), ss 11A, 11B; *Civil Liability Act 2002* (NSW), ss 58A – 58C; *Civil Liability Act 2003* (Qld), s 38A; *Civil Liability Act 1936* (SA), s 74A; *Civil Liability Act 2002* (Tas), ss 35D – 35F; *Wrongs Act 1958* (Vic), ss 31E – 31H.
- 148 *Griffiths v Arch Engineering* [1968] 3 All ER 217 at 220; *Hawkins v Coulsdon UDC* [1954] 1 QB 319 at 333; Marsh, “Liability of the Gratuitous Transferor: A Comparative Study” (1950) 66 LQR 39. Cf *Fraser v Jenkins* [1968] NZLR 816 (no liability to one who appreciated risk); *Pivovarov v Chernabaeff* (1978) 21 SASR 1 at 32-33.
- 149 Including indemnity claims in respect of liability for personal injury: for example, by employer (*Suosaari v Steinhardt* [1989] 2 Qd R 477 (FC)) or distributor against manufacturer (*Lambert v Lewis* [1982] AC 225 at 278 (Lord Diplock)); *Southern Water v Carey* [1985] 2 All ER 1077 at 1092.
- 150 *Grant v Cooper* [1940] NZLR 947; *Siemens v Pfizer* (1988) 49 DLR (4th) 481.
- 151 See *Nunes Diamonds v DEP* [1972] SCR 769.
- 152 See Feldthusen, *Economic Negligence* (5th ed, 2008), ch 4; Cane, “Physical Loss, Economic Loss and Products Liability” (1979) 95 LQR 117; Schwenzer, “Products Liability and Property Damages” (1989) 9 Tel Aviv Stud L 127 (comparative).
- 153 *Anns v Merton LBC* [1978] AC 728.
- 154 *D & F Estates v Church Commrs* [1989] AC 177; *Murphy v Brentwood UDC* [1991] AC 398; *Bryan v Maloney* (1995) 182 CLR 609; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
- 155 *Young & Marten v McManus* [1969] 1 AC 454 at 469; *Simaan v Pilkington (No 2)* [1988] QB 758 (CA) (unsuitable glass panels); *CBD v Ace Ceramics* (1992) ATR 81-359.
- 156 *Thomas v Olin Mathieson*, 255 Cal App 2d 806 (Cal 1967).

are closer to the central concern of torts with safety, while the latter merely suggest that the purchaser made a bad bargain for which the remedy lies exclusively in contract. This approach would permit at least reimbursement of expenses incurred in repairing the dangerous product for the sake of averting future injury, though not necessarily damages for loss of profits.¹⁵⁷ Nor would this portend unlimited liability (“floodgates”). But the predominant view has been to focus exclusively on the type of injury.

Although there is no general duty not to cause economic loss to subsequent purchasers of a defective product,¹⁵⁸ Australian courts have carved out an exception for defective *premises*, where a subsequent purchaser may be owed a duty of care by the builder, depending on the circumstances, including in particular the subsequent purchaser’s vulnerability.¹⁵⁹ There is no obvious reason why similarly restrictive principles should not be applied to fashion a duty in relation to defective goods, too.¹⁶⁰

Strict Liability

The road from negligence to strict liability

[23.130] The second half of the 20th century saw the emergence of a new principle of tort law: “strict liability” for producers of defective products. Originating as a judge-made doctrine in the United States,¹⁶¹ it has been adopted by statute in the European Union,¹⁶² Australia,¹⁶³ and Japan.¹⁶⁴ Until these developments, strict liability had been associated exclusively with

157 Thus Laskin J in *Rivtow Marine v Washington Iron Works* [1974] SCR 1189.

158 For example, *Minchillo v Ford* [1995] 2 VR 594 (AD); *East River SS v Transamerica*, 476 US 858 (1986) (liability for damage caused by product not for defect in the product itself). See also *Natcraft Pty Ltd v Det Norske Veritas* [2001] QSC 348 (no duty owed by classification society overseeing construction of defective catamaran).

159 *Bryan v Maloney* (1995) 182 CLR 609; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515. See above, Ch 22.

160 See, for example, *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1.

161 Strict liability for defective products was first suggested in the famous concurring opinion of Traynor J of the Supreme Court of California in *Escola v Coca Cola Bottling Co of Fresno*, 150 P 2d 436 (Cal 1944). The doctrine was first adopted by the whole Supreme Court of California in *Greenman v Yuba Power Products Inc*, 377 P 2d 897 (Cal 1963). In 1965, it was enshrined in the *Rest 2nd*, s 402A, although it was hardly then well enough entrenched around the United States to qualify for a true “restatement”. The *Rest 3rd: Products Liability* was promulgated in 1997 but it has not proved to be influential in changing state laws. The evolution of American doctrine is described by Stapleton, *Product Liability* (1994), ch 2.

162 European Council Directive 85/374/EEC, amended by European Council Directive 1999/34/EC. The Directive was implemented in the UK by the *Consumer Protection Act 1987*. See Howells, *Comparative Product Liability* (1993); Fairgrieve (ed), *Product Liability in Comparative Perspective* (2005).

163 *Australian Consumer Law*, Part 3-5 (formerly *Trade Practices Act 1974* (Cth), Part VA). (The *Australian Consumer Law* is Sch 2 to the *Competition and Consumer Act 2010* (Cth). For the history of Part VA, see Harland, “The Influence of European Law on Product Liability in Australia” (1995) 17 *Syd L Rev* 336.

164 See Kobayashi & Furuta, “Products Liability Act and Transnational Litigation in Japan” (1999) *Tex Int’l LJ* 93; Nottage, “A Decade of Strict Liability Litigation under Japan’s Product Liability Law of 1994” (2005) 16 *APLR* 65.

abnormally dangerous things and activities, but the marketing of ordinary products does not fit that description. Its rationale is different.¹⁶⁵

Both fairness for the consumer and accident deterrence combine in placing responsibility for defective products squarely on the manufacturer. Through marketing techniques manufacturers seek to create implicit consumer reliance on product safety. Consumers are ill equipped to make their own assessment of a product's safety, while the manufacturer is in a strategic position to control quality of production and design. The cost of accidents should be "internalised" to the enterprise that is the best cost-avoider; and in so far as that cost is passed on by the producer to the customer, it may not only reflect itself in competitive pricing but the cost will be spread among all consumers of the product. The price of the product will in effect include the cost of insurance¹⁶⁶ for injury from defective products.

The negligence regime only imperfectly achieves these objectives. The injured consumer is in a singularly disadvantageous position in carrying the burden of proof. Strict liability already controls the relation between buyer and seller because of the warranties in the contract of sale; to extend it between manufacturer and ultimate consumer merely permits a direct action where formerly the same result could mostly be achieved by successive claims up the ladder of vertical privity.

The warranties implied by statute into a contract for the sale of goods¹⁶⁷ served as a bridge to strict liability in tort. American courts simply discarded the privity requirement and extended the contractual warranties to consumers not in privity with the seller.¹⁶⁸ Australian courts were not so bold but the bridge was made for them by legislation. Enacted in 1978, the *Trade Practices Act 1974* (Cth) Part V, Division 2A originally extended warranties, more modestly, only to the ultimate purchaser, thereby replacing contractual by vertical privity (warranties run "with the goods") and leaving only non-buyers (bystanders) beyond the pale.¹⁶⁹ The last step was to complete the transformation by extending protection to any person injured by the defective product. That was done in 1992, with the enactment of Part VA of the *Trade Practices Act 1974* (Cth). Part V, Division 2A applied only to consumer goods; Part VA applied to all goods.¹⁷⁰ With effect from 1 January 2011, Part VA became Part 3-5 of the *Australian Consumer Law* and the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth).¹⁷¹ The implied warranties created by Part V, Division 2A were replaced by a set of statutory guarantees in Subdivision 1A of Part 3-2 of the *Australian Consumer Law*.

Although the *Competition and Consumer Act 2010* (Cth), s 131C clearly provides that nothing in the *Australian Consumer Law* is intended to exclude or limit the concurrent operation of any State or Territory law "whether written or unwritten", questions have been raised on several occasions, including once in

165 See the extended discussion by Stapleton, *Product Liability* (1994), Part 2 (Theory); also Richardson, "Towards a Test for Strict Liability in Tort: A Modified Proposal for Australian Product Liability" (1996) 4 TLJ 24.

166 For the role of insurance see ALRC, *Product Liability Research Paper No 2* (1989), ch 5.

167 These warranties are considered below, in [23.180]ff.

168 Prosser, "The Assault Upon the Citadel" (1960) 69 Yale LJ 1099 and "The Fall of the Citadel" (1966) 50 Minn L Rev 791.

169 See [23.210] below.

170 *Laws v GWS Machinery Pty Ltd* (2007) 209 FLR 53 at 85, [161]-[162] (Part V, Div 2A did not apply to tractor tyre; Part VA did).

171 The *Australian Consumer Law* is Sch 2 to the *Competition and Consumer Act 2010* (Cth).

the High Court of Australia, about whether the statutory remedies previously found in the *Trade Practices Act 1974* (Cth) pre-empt the common law of negligence, creating an exclusive regime for recovery from manufacturers.¹⁷² As this possibility seems not to have progressed beyond casual musing, it is probably safe to assume that it is still possible to make claims in negligence and under the *Australian Consumer Law* as alternatives.

Defectiveness

[23.140] It is possible to conceive a genuinely strict liability rule, making a manufacturer liable for all injuries caused by its products.¹⁷³ Such, however, was never contemplated: echoing the element of merchantability in warranty law, liability is instead limited by the requirement of “defect”.

Like the *EC Product Liability Directive*¹⁷⁴ on which it is based, the *Australian Consumer Law* uses the consumer expectation test for defectiveness, stipulating that goods have a “safety defect” if “their safety is not such as persons generally are entitled to expect”.¹⁷⁵ The standard is an objective one; it is based upon what the public at large, rather than any particular individual, including the plaintiff, is entitled to expect.¹⁷⁶

Liability is imposed on a manufacturer if it “supplies ... goods in trade or commerce” and the goods have a “safety defect” that causes injury.¹⁷⁷ The definition of “manufacturer” is extended to include any person who allows his or her (or its) business name or brand or trademark to be applied to the goods,¹⁷⁸ and importers if the manufacturer has no place of business in Australia.¹⁷⁹ An injured person may proceed against both the foreign manufacturer and the importer as deemed manufacturer.¹⁸⁰

“Supply” is defined to include supplying (including re-supplying) by way of sale, exchange, lease, hire or hire-purchase.¹⁸¹ Liability is imposed on a corporation that supplies the goods, whether or not it supplied them directly to the plaintiff.¹⁸² A corporation that supplies services in relation to the goods but that does not supply the goods themselves is not liable for injury caused by the goods.¹⁸³

Defectiveness is easy to determine in relation to manufacturing defects, that is to say deviants from the standard set by the manufacturer himself. Although

172 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 591, [129]-[130] per Gummow and Hayne JJ, 622, [228] per Kirby J; *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853 at [215] per Kiefel J.

173 Linked perhaps to a narrower formulation of causation than the “but for” rule.

174 EC Directive 85/374/EEC Art 6(1).

175 *Australian Consumer Law*, s 9(1) (formerly *Trade Practices Act 1974* (Cth), s 75AC(1)).

176 *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853 at [186] per Kiefel J; *Glendale Chemical Products Pty Ltd v ACCC* (1999) 90 FCR 40 at 47 (FC).

177 *Australian Consumer Law*, s 138(1) (formerly *Trade Practices Act 1974* (Cth), s 75AD).

178 *Australian Consumer Law*, s 7(1)(c) (formerly *Trade Practices Act 1974* (Cth), ss 74A(3)(b), 75AB); see *Glendale Chemical Products Pty Ltd v ACCC* (1999) 90 FCR 40.

179 *Australian Consumer Law*, s 7(1)(e) (formerly *Trade Practices Act 1974* (Cth), ss 74A(4), 75AB).

180 *Leeks v FXC Corp* (2002) 189 ALR 288.

181 *Australian Consumer Law*, s 2(1) (former *Trade Practices Act 1974* (Cth), s 4(1)(a)).

182 *Spittles v Michael's Appliance Services Pty Ltd* (2008) 71 NSWLR 115 at 118, [14], per Handley AJA.

183 *Spittles v Michael's Appliance Services Pty Ltd* (2008) 71 NSWLR 115.

foolproof quality control may in practice be unattainable and not even economically optimal, the risk must be shouldered by the manufacturer and cannot be escaped by pleading that inevitable and unpredictable flaws are unavoidable nor that the extra cost of super-controls would be unjustifiable. Here liability is truly strict.

If the plaintiff establishes the existence of a defect in the product and the fact of injury, the court will infer liability unless the manufacturer proves, on the balance of probabilities, that the defect was not present when it supplied the goods.¹⁸⁴

The consumer expectation standard presents more difficulty in relation to design defects and failure to warn. Easy enough are malfunctioning products such as collapsing jacks or sticking carburettors. The difficulty concerns cases where the appropriate standard of safety is a matter of opinion, especially where the particular design was consciously adopted in preference over competing alternatives. To vet the designer's choice may involve the judicial process in unfamiliar, even unjustifiable, inquiry, exacerbated by the fact that an adverse conclusion will condemn a whole production line rather than merely a single item. How safe is safe enough? The roof of a car overturned in a collision might not have collapsed if the steel had been stronger and the car had been equipped with a roll bar ("crash-proof"). But such added safety would have been at the cost of consumer appeal and fuel economy. It would be different if an alternative design or additional safety device were readily available at small cost.

The consumer expectation test predicated by the *EC Directive* and adopted in the *Australian Consumer Law* has lost much of its credibility in the United States, at least in relation to design defects.¹⁸⁵ It makes little sense to use it in relation to complex products, the design and operation of which are beyond the everyday experience of ordinary consumers.¹⁸⁶ As well, it precludes (instead of merely being relevant to) a finding of defectiveness for obvious dangers.¹⁸⁷ As a result, courts in the United States increasingly supplement or replace use of the consumer expectation test with an alternative test known as the risk/utility test.¹⁸⁸

The risk/utility (or cost/benefit) test calls for weighing the likelihood that the product would cause the plaintiff's harm against the burden on the manufacturer to design a product that could have prevented that harm. Essentially, it requires a comparison with a suggested alternative design, from the viewpoint of the reasonable person.¹⁸⁹ In short, it is the traditional reasonableness test in

184 *Australian Consumer Law*, s 142(a)(ii) (formerly *Trade Practices Act 1974* (Cth), s 75AK(1)); *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; *Effem Foods Ltd v Nicholls* [2004] NSWCA 332.

185 A few states continue to use only the consumer expectation test: see, for example, *Green v Smith & Nephew AHP, Inc*, 629 NW 2d 727 (Wis 2001).

186 *Soule v General Motors Corp*, 882 P 2d 298 (Cal 1994) (consumer expectation test not to be used for complex products).

187 *Camacho v Honda Motor Co Ltd*, 741 P 2d 1240 (Co 1987) (consumer expectation test not to be used for products posing obvious dangers, such as a motorcycle without ankle protectors).

188 Several states have abandoned the consumer expectation test altogether: see, for example, *Nichols v Union Underwear Co Inc*, 602 SW 2d 429 (Ky 1980); *Sperry-New Holland v Prestage*, 617 So 2d 248 (Miss 1993).

189 See, for example, *Banks v ICI Americas Inc*, 450 SE 2d 671 (Ga 1994). The *Rest 3rd: Products Liability*, s 2(b) would make proof of a reasonable alternative design (RAD) a necessary condition. As noted above, n 161, no state has yet adopted this Restatement.

negligence, despite the pretence that strict liability focuses on the product, not the producer and its role in the design process.¹⁹⁰

Presumably exempt are generically “unavoidably unsafe” products, such as alcoholic beverages, butter,¹⁹¹ drugs and even asbestos. These contain irreducible risks and cannot be charged with design defect because they cannot be made safer. Such products can, however, be regarded as “defective” if suitable warnings do not accompany their distribution.¹⁹²

On its face the consumer expectation standard does not appear to make allowance for any distinction between manufacturing and design/warning defects. Whether or not an attenuated standard for the latter category would have developed anyway, as occurred in the United States, strict liability is expressly mitigated for design defects¹⁹³ by the so-called development risks or “state of the art” defence. The producer may show that “the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered”.¹⁹⁴ This defence limits liability to foreseeable risks as determined not by hindsight, but by knowledge prevailing when the product was put into circulation.¹⁹⁵ It thus covers not only unforeseeable risks but also undiscoverable defects, such as blood plasma infected with serum hepatitis. This wide-ranging exclusion, of special significance to the pharmaceutical industry,¹⁹⁶ has been criticised as a betrayal of the compensation objective and of the claim that the liability is not conduct-based.¹⁹⁷ It is defended on the ground that otherwise the marketing of novel products would be inhibited and because insurance would be unavailable. In the upshot, the fault standard has largely survived in relation to defective design and failure to warn cases, except that the burden of proof is reversed.¹⁹⁸

Finally, failure to warn of the risks may make a product defective.¹⁹⁹ Warnings may either reduce risks or help potential users to make an “informed choice”. Unavoidably dangerous products, like drugs with dangerous side effects, and other products which cannot be made safer but are sufficiently

190 See Owen, “Defectiveness Restated: Exploding the “Strict” Products Liability Myth” (1996) U Ill L Rev 743, a myth retained by *Rest 3rd: Products Liability*, s 2.

191 *Rest 2d*, s 402A cmt i.

192 See *Rest 3rd: Products Liability*, s 2, cmt c.

193 Though not specifically stated, it has been assumed that the defence is not available for manufacturing defects: see *BGH* (1995 NJW 2162).

194 *Australian Consumer Law*, s 142(c) (formerly *Trade Practices Act 1974* (Cth), s 75AK(1)(c)), based on European Council Directive 85/374/EEC Art 7(e). See Newdick, “Risk, Uncertainty and Knowledge in the Development Risk Defence” (1991) 20 Anglo-American L Rev 309.

195 Reinforced by European Council Directive 85/374/EEC Art 6(2) and *Australian Consumer Law*, s 9(3) (formerly *Trade Practices Act 1974* (Cth), s 75AC(3)) (defect not to be inferred from the sole fact that a better product is subsequently marketed). See Newdick, “Risk, Uncertainty and Knowledge in the Development Risk Defence” (1991) 20 Anglo-Am L Rev 309.

196 See, for example, *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 at 331-332, [926]-[930] per Jessup J (successful s 75AK(1)(c) (now s 142(c)) “start of the art” defence in relation to Vioxx; manufacturer’s own knowledge held to be the “state of the art”).

197 Stapleton, “Product Liability Reform – Real or Illusory” (1986) 60 JLS 392; *Three Problems with the New Product Liability*, in “Essays for Atiyah” (1991), ch 11; see also Beylereld & Brownsword, “Impossibility, Irrationality and Strict Product Liability” (1991) 20 Anglo-Am L Rev 257.

198 See Newdick, “The Future of Negligence in Product Liability” (1987) 103 LQR 288.

199 See, for example, *Gliderol International Pty Ltd v Skerbic* (2009) 170 ACTR 1 (CA) (defective instructions accompanying garage roller door).

beneficial to escape interdiction must be accompanied by suitable warnings. So, perhaps, must products injurious only to an irreducible minority of allergic users.²⁰⁰

Strict liability does not require, as negligence does, proof of failure to use reasonable care, such as that practised by other producers: as long as the defect was discoverable in the light of scientific and technical knowledge, a defendant cannot excuse itself by showing that reasonable care or the practice of others in the scientific community did not call for warning.²⁰¹ A duty to warn may arise even after the product is marketed, as knowledge, actual or imputed, reaches the producer.²⁰²

Defences

[23.150] If, with full appreciation of the danger posed by a defective product, the consumer continued to use it, there is reason to believe that he or she voluntarily assumed the risk of injury.²⁰³ It is not clear, however, that in Australia the consumer's claim against the manufacturer should fail completely as a result. There is room for doubt whether the common law defence of voluntary assumption of risk should be available as a defence to a statutory cause of action. Voluntary assumption of risk is not one of the statutory defences listed in the *Australian Consumer Law*, s 142 (formerly *Trade Practices Act 1974* (Cth), s 75AK). There is even more room for doubt that the consumer's claim should fail because of the "obvious risk" provisions in the civil liability legislation in New South Wales, Queensland, South Australia, Tasmania and Victoria.²⁰⁴ A federal statutory cause of action should not be qualified by a State statutory defence. In any event, the relevant State provisions speak in terms of there being no duty to warn of an obvious risk. That is the language of negligence not strict liability. As a result, it seems that if the consumer continues to use an obviously defective product, the consequence should be a reduction in his or her damages by operation of the *Trade Practices Act 1974* (Cth) s 137A(1) (formerly s 75AN(1)),²⁰⁵ not failure of the claim by reason of voluntary assumption of risk. If the plaintiff's claim is to fail, it should be because s 137A(1) authorises a reduction to nil if the court thinks it fit.

Short of that, however, contributory fault on the part of the plaintiff will merely reduce damages.²⁰⁶ Such will be the case where the plaintiff negligently uses the product, like the driver who after losing control of his car was ejected

200 *Rest 3rd: Products Liability*, s 2, cmt k: "Warnings: adverse allergic or idiosyncratic reactions".

201 See, for example, *Carlin v Superior Court*, 920 P 2d 1347 (Cal 1996).

202 Above, n 46.

203 See, for example, *Moran v Raymond Corp*, 484 F 2d 1008 (7th Cir 1973); *Bowen v Cochran*, 556 SE 2d 530 (CA Ga 2001). See *Rest 2nd*, s 402A, cmt n.

204 *Civil Liability Act 2002* (NSW), s 5H(1); *Civil Liability Act 2003* (Qld), s 15(1); *Civil Liability Act 1936* (SA), s 38(1); *Civil Liability Act 2002* (Tas), s 17(1); *Wrongs Act 1958* (Vic), s 54(1).

205 It is not clear why this defence continues to appear in the body of the *Competition and Consumer Act 2010*, rather than the *Australian Consumer Law* itself.

206 *Competition and Consumer Act 2010* (Cth), s 137A(1) (formerly *Trade Practices Act 1974* (Cth), s 75AN(1)); European Council Directive 85/374/EEC Art 8. The theoretical difficulty of relating contributory negligence to strict liability (above, Ch 12) is largely avoided by the negligence element in design and warning cases.

due to a faulty door latch.²⁰⁷ But mere failure to discover the defect or risky conduct which the design or warning should have prevented ought not to be given much, if any, weight.²⁰⁸

Misuse of the product will provide a complete defence if unforeseeable,²⁰⁹ such as using a sharp knife as a toothpick or pouring perfume over a lighted candle.²¹⁰ The *Australian Consumer Law* specifically directs that, in determining “safety defect”, account must be taken of “what might reasonably be expected to be done with or in relation to” the product.²¹¹ The product must be proof, however, against foreseeable misuse so as, for example, to require warning against drugs or toxic household substances accessible to little children.²¹² Alterations of the product like dismantling of guards or other safety features would also preclude liability, because the defect would then not have existed at the time the product left the manufacturer.²¹³

Producers and products

[23.160] American law imposes strict liability on all commercial sellers of a product: manufacturers, intermediaries and retailers.²¹⁴ This stems from its origin in sellers’ warranties and is defended on the ground that the consumer should be free to select from whom to claim, leaving the ultimate allocation of the loss to the potential defendants. The UK statute, following the *EC Directive*, confines liability to the producer, anyone who has held itself out as such, like “own-brand” suppliers, and any importer.²¹⁵ Other suppliers are exempt, unless they fail to identify on request anyone of the previously mentioned class.²¹⁶ Curiously, belying the rhetoric of the reform, the classes mentioned, other than the producer, are the only ones to bear real strict liability, analogous to vicarious liability for the *fault* of another: here, the producer.

The *Australian Consumer Law* is closer to the British position than the American. The Law imposes liability not on all suppliers but on “a manufacturer” (s 138(1) (formerly s 75AD)); it includes importers if the manufacturer has no place of business in Australia (s 7(e) (formerly s 75AB)) and suppliers who fail to identify the manufacturer (s 147 (formerly s 75AJ)).

“Goods” are defined in the *Australian Consumer Law* to include: (a) ships, aircraft and other vehicles; (b) animals, including fish; (c) minerals, trees and crops, whether on, under or attached to land or not; (d) gas and electricity; (e)

207 *Daly v General Motors*, 575 P 2d 1162 (Cal 1978).

208 *General Motors Corp v Sanchez*, 997 SW 2d 584 at 594 (Tx 1999) (“Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence”). See also *Rest 3rd: Products Liability*, s 17, cmt d.

209 The Preamble of the European Council Directive 85/374/EEC speaks of misuse “not reasonable in the circumstances”.

210 *Moran v Faberge Inc*, 332 A 2d 11 (CA Md 1975).

211 *Australian Consumer Law*, s 9(2)(e) (formerly *Trade Practices Act 1974* (Cth), s 75AC(2)(e)).

212 See above, [23.70].

213 *Australian Consumer Law*, s 142(a)(ii) (formerly *Trade Practices Act 1974* (Cth), s 75AK(1)(a)).

214 *Rest 2nd*, s 402A imposes on “One who sells any product in a defective condition unreasonably dangers to the user or consumer ...”

215 European Council Directive 85/374/EEC Art 3(1), (2); *Consumer Protection Act 1987* (UK), s 2(2).

216 European Council Directive 85/374/EEC Art 3(3); *Consumer Protection Act 1987* (UK), s 2(3).

computer software; (f) second-hand goods; and (g) any component part of, or accessory to, goods.²¹⁷ The inclusion of computer software in this list makes clear something that was left unsettled in the *Trade Practices Act 1974* (Cth). Software flies aircraft, runs household appliances and helps to drive cars: it is capable of causing serious physical injury. Nevertheless, in the United States, the prevailing position is that academic writings favour treating software as a “product” for product liability purposes but the cases do not.²¹⁸ Even when software is transferred in a physical medium, such as a computer disk, the thing of value that is being bought is the information contained on the disk and, more importantly, the right to use it. A software purchase is, in essence, the purchase of a licence to use intellectual property.²¹⁹ Nevertheless, computer software is now clearly “goods” for the purposes of Australian products liability law.

“Manufacturer” is defined to include a person who “grows, extracts, produces, processes or assembles” goods.²²⁰

Broad though the definition of “goods” now is, the *Australian Consumer Law* still does not cover liability for harm caused by the provision of information or services, despite the fact that the legislation clearly contemplates that information may be the cause of harm. Limiting protection to physical dangers from goods seems inconsistent with the specific declaration that misleading or inadequate warnings may make an accompanying product defective.²²¹ In any event, what is the reason for drawing this distinction between goods and services, seeing that the rationale for the former – consumer protection – seems to apply equally to the latter? The distinction is doctrinally difficult to justify, seeing that the human element, albeit masked, is as much involved in the creation of products as in services and that the accident-preventive rationale necessarily targets human behaviour.²²² The reasons are accidental and pragmatic. Foremost is the provenance of warranties attached to the sale of goods, from which the seminal American tort liability derived. More fundamental may be the fact that professional services are excluded because their product is furnished for one client at a time so that the cost of liability cannot be spread as widely as over a whole line of tangible products; also that they typically cause economic loss (which is excluded in any event) rather than physical injury.

Damages

[23.170] The only loss for which protection is countenanced is personal injury (or death)²²³ and damage to other goods “of a kind ordinarily acquired for

217 *Australian Consumer Law*, s 2(1).

218 A useful survey of the position can be found in Zollers, et al, “No More Soft Landings for Software: Liability for Defects in an Industry that has Come of Age” (2005) 21 *Santa Clara Computer & High Tech LJ* 745.

219 See Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions*, “in *Sharing International Law across National Boundaries*” (Anderson & Schroeter eds, 2008) p 514 re the analogous question of what are “goods” for purposes of the UN *Convention on the International Sale of Goods* (CISG).

220 *Australian Consumer Law*, s 7(1)(a) (formerly *Trade Practices Act 1974* (Cth), s 75AA).

221 *Australian Consumer Law*, s 9(2)(d) (formerly *Trade Practices Act 1974* (Cth), s 75AC(2)(d)); *Consumer Protection Act 1987* (UK), s 3(2)(a).

222 Stapleton, “Problems with the New Product Liability”, in *Essays for Atiyah* (1991), ch 11.

223 *Australian Consumer Law*, s 138(3) (formerly *Trade Practices Act 1974* (Cth), s 75AD) picks up State or Territory fatal accident legislation when the injured person dies as a result of the injuries caused by the defective product.

personal, domestic or household use” (including land and fixtures),²²⁴ but not damage to or loss of the defective product itself.²²⁵ Commercial entities therefore cannot sue at all. The exclusion of purely economic loss resolves an otherwise agitated question. Personal injury presumably includes psychiatric injury, which recent case law has placed on the same footing as recovery for bodily injury.²²⁶

The *Australian Consumer Law*, s 139 (formerly *Trade Practices Act 1974* (Cth), s 75AE) specifically contemplates recovery by third persons who suffer “loss” because of injuries caused to an individual by a defective product.²²⁷ It provides a remedy to dependants reliant upon the injured person,²²⁸ and possibly to bystanders who suffer emotional harm as a result of witnessing the injury, but it does not provide a right of indemnity to a tortfeasor who has also been held liable for the injuries sustained by the individual.²²⁹ The section specifically excludes recovery by those who have suffered loss because of a business or professional relationship with the injured individual,²³⁰ which is defined to include the relationship of employer and employee, or a similar relationship.²³¹

So far as bystanders are concerned, American case law has applied the same conditions on recovery as in negligence cases, for example excluding claims by unrelated bystanders.²³² A similar approach in Australian cases should use the common law approach to bystander recovery, which is relatively liberal.²³³ State legislation restricting recovery for “pure mental harm” (as opposed to mental harm consequential upon physical injury) should not be applicable, both because State legislation cannot restrict a remedy provided by federal legislation and because the State legislation speaks in terms of a duty of care not to cause mental harm,²³⁴ which is irrelevant in the context of strict product liability.

The *Australian Consumer Law* provides a three year period of limitation from the time the claimant became, or ought to have become, aware of both the

224 *Australian Consumer Law*, ss 140, 141 (formerly *Trade Practices Act 1974* (Cth), ss 75AF, 75AG). Compare European Council Directive 85/374/EEC Art 9; *Consumer Protection Act 1987* (UK), s 5(3).

225 American law agrees, following *East River SS v Transamerica* 476 US 858 (1986).

226 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

227 But not a loss that has been compensated under a workers’ compensation law: *Australian Consumer Law*, s 146 (formerly *Trade Practices Act 1974* (Cth), s 75AI(a)).

228 *Erwin v Iveco Trucks Australia Ltd* (2010) 267 ALR 752 at 784, [128] per Sackville AJA (with whom Basten & Campbell JJA agreed), citing the Explanatory Memorandum to the Trade Practices Amendment Bill 1992.

229 *Erwin v Iveco Trucks Australia Ltd* (2010) 267 ALR 752; *Cheong v Wong* (2001) 34 MVR 359; *Stegenga v J Corp Pty Ltd* (1999) ATPR ¶ 41-695.

230 *Australian Consumer Law*, s 139(1)(e) (formerly *Trade Practices Act 1974* (Cth), s 75AE(1)(e)).

231 *Australian Consumer Law* s 2(1) (formerly *Trade Practices Act 1974* (Cth), s 75AE(2)(b)).

232 See *Kennedy v McKesson* 448 NE 2d 1332 (NY 1983); *Sease v Taylor’s Pets* 704 P 2d 514 (Or 1985).

233 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

234 *Civil Law (Wrongs) Act 2002* (ACT), s 34(1); *Civil Liability Act 2002* (NSW), s 32(1); *Civil Liability Act 1936* (SA), s 33(1); *Civil Liability Act 2002* (Tas), s 34(1); *Wrongs Act 1958* (Vic), s 72(1); *Civil Liability Act 2002* (WA), s 5S(1). There is no equivalent legislation in Queensland or the Northern Territory.

damage and the identity of the producer.²³⁵ Claims are further subject to a long stop of 10 years from the date of supply.

Warranties and Statutory Guarantees

Historical development – the persistence of privity

[23.180] Historically, the liability of distributors to their immediate transferees depended on the nature of their relationship and terms of agreement. As between buyer and seller of goods it was largely controlled by certain implied warranties which, during the 19th century at the crest of imaginative judicial reform, progressively replaced an earlier individualistic philosophy epitomised in the maxim “caveat emptor”. By attaching “implied” warranties to the contract, reflecting the parties’ presumed intent, the seller in effect became an insurer of his goods with respect to their quality and fitness. The two principal warranties are now implied into contracts by the State and Territory Sale of Goods Acts:²³⁶ (1) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which they are required (so as to show that the buyer relies on the seller’s skill and judgment) and the goods are of a description which it is in the course of the seller’s business to supply, there is an implied warranty that the goods shall be reasonably fit for such purpose, except where the sale is of a specified article under its patent or other trade name; and (2) where goods are bought by description from a seller who deals in goods of that description, there is an implied warranty of merchantable quality, provided that if the buyer has examined the goods there is no warranty as regards defects which such examination ought to have revealed. Similar provisions are found in most Australian jurisdictions implying identical warranties in consumer sale contracts.²³⁷ Unlike the Sale of Goods Act warranties, the consumer protection implied warranties cannot be excluded by contract.²³⁸

Although originating in the desire to protect the commercial buyer against financial loss in marketing the goods,²³⁹ the old implied contractual warranties attained added and, for present purposes, momentous significance as their reach expanded to property damage²⁴⁰ and eventually to personal injury.²⁴¹ Thereby a mercantile concept became a device for consumer protection, the more remarkable for ensuring strict liability long before the courts were ready to endorse so much as a tort duty sounding in negligence. For these warranties,

235 *Australian Consumer Law*, s 143 (formerly *Trade Practices Act 1974* (Cth), s 75AO). See also *Consumer Protection Act 1987* (UK), s 6(6).

236 *Sale of Goods Act 1954* (ACT), s 19; *Sale of Goods Act 1923* (NSW), s 19; *Sale of Goods Act* (NT), s 19; *Sale of Goods Act 1896* (Qld), s 17; *Sale of Goods Act 1895* (SA), s 14; *Sale of Goods Act 1896* (Tas), s 19; *Goods Act 1958* (Vic), s 19; *Sale of Goods Act 1895* (WA), s 14. These provisions are based on the *Sale of Goods Act 1893* (UK) (now 1979), *Sale of Goods Act 1893s 14* (but not the *Sale and Supply of Goods Act 1994* (UK), which substituted “satisfactory” for “merchantable”).

237 *Fair Trading Act 1987* (NSW), s 40Q; *Consumer Affairs and Fair Trading Act* (NT), s 64; *Consumer Transactions Act 1972* (SA), s 6(3), (4); *Fair Trading Act 1999* (Vic), ss 32I, 32IA; *Fair Trading Act 1987* (WA), s 38.

238 See below, n 256.

239 Hence the name *merchantable* (that is, saleable) quality. See also *Sale of Goods Act 1979* (UK), s 53(3) which contemplates only commercial loss in prescribing the measure of damages for breach of warranty.

240 *Smith v Green* (1875) 1 CPD 92; *Randall v Newson* (1877) 2 QBD 102.

notwithstanding their ancestral link with deceit, withstood the corroding influence of the fault doctrine,²⁴² and survived into modern law as absolute guarantees even against latent and undiscoverable defects²⁴³ or against contributory negligence,²⁴⁴ although this last feature has since been reversed by legislation in Australia permitting reduction of damages on account of contributory negligence in contract claims.²⁴⁵

The “logic” of this development, however, was not (until very recently) pursued to the point of jettisoning the privity requirement which continued to deny the benefit of warranties to all but the immediate purchaser. That eventually had to be done by legislation. Warranties did not run with the goods, nor was there any “vertical” privity between the manufacturer and the ultimate retail purchaser, let alone with users and consumers outside the chain of commercial distribution or, better still, a mere “bystander”. And only exceptionally could the purchaser recover for an injury suffered by a third party, as in the case of an injury²⁴⁶ or death²⁴⁷ to the purchaser’s spouse or child (action for loss of services)²⁴⁸ or when the purchaser bought as agent²⁴⁹ or expressly for the benefit²⁵⁰ of another.

Less constrictive a corollary of the privity requirement was that it compelled the consumer to look to the retailer rather than the manufacturer for recovery. This seemingly capricious allocation of responsibility was in practice redressed by means of successive indemnities which ordinarily (that is in the absence of a missing link in the chain of distribution,²⁵¹ of exemption clauses, jurisdictional obstacles, or time bars) allowed the loss to be shifted to its ultimately

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- 241 *Wren v Holt* [1903] 1 KB 610 (arsenic in beer); *Preist v Last* [1903] 2 KB 148 (bursting hotwater bottle); *David Jones v Willis* (1934) 52 CLR 110 (shoe); *Grant v Australian Knitting Mills* [1936] AC 85; 54 CLR 49 (dermatitis from underpants); *Andrews v Hopkinson* [1957] 1 QB 229 (car).
- 242 Some (non-sales) warranties were reduced to mere warranties (or duties) of due care, for example, carriers of passengers: *Readhead v Midland Rly* (1869) LR 4 QB 379.
- 243 *Hill v Ashington Piggeries* [1972] AC 441 at 498.
- 244 Plaintiff’s misconduct might, however, be such as to put the injury outside reasonable contemplation and thus too remote, for example, by use with actual knowledge of the defect: see *Lambert v Lewis* [1982] AC 225.
- 245 *Civil Law (Wrongs) Act 2002* (ACT), s 101; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 8; *Law Reform (Miscellaneous Provisions) Act* (NT), s 15(1); *Law Reform Act 1995* (Qld), s 5; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 3; *Wrongs Act 1954* (Tas), s 2; *Wrongs Act 1958* (Vic), s 25; *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA), s 3A.
- 246 *Preist v Last* [1903] 2 KB 148 (CA).
- 247 *Jackson v Watson* [1909] 2 KB 193 (husband’s claim includes damages for wife’s death). Cf *Woolworths Ltd v Crotty* (1942) 66 CLR 603 (son’s death confers fatal accident claim on mother).
- 248 *Square v Model Farm Dairies* [1939] 2 KB 365. Victoria and the Northern Territory have still not either abolished the action for loss of consortium, as the Australian Capital Territory, New South Wales, Tasmania and Western Australia have (*Civil Law (Wrongs) Act 2002* (ACT), s 218; *Law Reform (Marital Consortium) Act 1984* (NSW); *Common Law (Miscellaneous Actions) Act 1986* (Tas), s 3; *Law Reform (Miscellaneous Provisions) Act 1941* (WA)), or extended it to both husband and wife, as Queensland and South Australia have: *Law Reform Act 1995* (Qld), s 13; *Wrongs Act 1936* (SA), s 33.
- 249 For example, *Lockett v Charles* [1938] 4 All ER 170.
- 250 Cf *Jackson v Horizon Holidays* [1975] 1 WLR 1468 (CA) where a father recovered for the inconvenience, disappointment etc of his wife and children over a spoiled holiday.
- 251 As in *Lambert v Lewis* [1982] AC 225 at 259-267 (claim by retailer v manufacturer, wholesaler not identified).

responsible source;²⁵² besides offering the consumer the advantage of a readily identified target and thus relieving him or her of the burden of tracing, perhaps even chasing abroad, the retailer's far off sources of supply.

By far the most serious handicap for consumers in the past was the law's tolerance of exemption clauses in form contracts whereby the buyer could unwittingly sign away his or her protection under the statutory warranties. The courts, however strict in their construction of these clauses,²⁵³ in the end proved no match to the drafting ingenuity of sellers, so that eventually legislation had to come to the rescue. Contracting-out was first severely restricted in the case of hire-purchase, on the view that the instalment buyer was in greater need of protection than the cash buyer because he or she had generally more at stake and was less able to look after himself or herself.²⁵⁴ Eventually, in the 1970s, legislation was passed in the United Kingdom²⁵⁵ and Australia²⁵⁶ prohibiting contracting out of the implied warranties in *consumer* sales.

Finally, in 2010, the *Australian Consumer Law* replaced the traditional system of implied contractual warranties with a new series of statutory guarantees, thereby at last unhitching consumer protection from the concept of contractual privity. The principal statutory guarantee is that goods are of "acceptable quality",²⁵⁷ which is extensively defined, the basic idea being that to be "acceptable", goods must be "fit for all the purposes for which goods of that kind are commonly supplied".²⁵⁸ Similarly, the *Australian Consumer Law* creates statutory guarantees of compliance with description (s 56), and repairs and availability of spare parts (s 58). Other guarantees continue to be owed only by the supplier of the goods to the consumer: a guarantee as to title (s 51), a guarantee as to undisturbed possession (s 52), a guarantee as to undisclosed securities (s 53), a guarantee as to fitness for a purpose disclosed to the supplier (s 55) and a guarantee of compliance with a sample or demonstration model (s 57). None of the statutory guarantees can be excluded by contract.²⁵⁹

Express warranties

[23.190] Express warranties followed much the same rut as implied warranties. In particular, the privity requirement precluded recourse by anyone not privity to the contract of sale.²⁶⁰ Only in a few cases was it possible to evade this restriction and hold manufacturers directly liable to the retail purchaser by artificially construing their representations as the basis of a "collateral contract"

252 See *Kasler v Slavouski* [1928] 1 KB 78 (involving no less than four successive indemnities of the retailer's liability to the purchaser).

253 See also above, [13.xxx] (Ch 13).

254 *Australian Consumer Law*, s 2 defines "acquire" to mean "acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase" (see previously the definition of "acquire" in *Trade Practices Act 1974* (Cth), s 4).

255 *Supply of Goods (Implied Terms) Act 1973*; *Unfair Contract Terms Act 1977* (UK) (applicable to sale, hire purchase and other contracts passing possession or ownership of goods; for non-consumers the terms must be "reasonable").

256 *Trade Practices Act 1974* (Cth), s 68; *Fair Trading Act 1987* (NSW), s 40M; *Consumer Affairs and Fair Trading Act* (NT), s 68; *Consumer Transactions Act 1972* (SA), s 8(1); *Fair Trading Act 1999* (Vic), s 32L; *Fair Trading Act 1987* (WA), s 34.

257 *Australian Consumer Law*, s 54.

258 *Australian Consumer Law*, s 54(2)(a).

259 *Australian Consumer Law*, s 64.

260 Not so American law: *Rest 2nd*, s 402B.

with the purchaser.²⁶¹ This tactic however was ordinarily not available against advertising to the general public, supposedly because such representations are not intended as promissory.²⁶² For English law, in contrast to American, has insisted (with admittedly lessening severity in application) that express warranties must be promissory and intended to be contractual as distinct from mere representations inducing the contract.²⁶³ In the result, much sales talk reasonably relied upon by trusting buyers proved to be a broken reed. In South Australia and the Northern Territory such misrepresentations, if negligent, were declared by statute to be actionable in damages; elsewhere doubts remained as to the common law position.²⁶⁴

Here, too, the *Australian Consumer Law* has remedied the situation by creating a statutory guarantee that goods must conform to any express warranty given by the manufacturer.²⁶⁵ As the States and Territories become “participating jurisdictions” by adopting the *Australian Consumer Law*, this concept will become uniformly part of Australian law.

Quasi-sales

[23.200] The strict liability incident to the sale of goods has had an osmotic effect on related transactions. An obvious extension was to instalment sales, whether by hire-purchase or otherwise.²⁶⁶ The *Australian Consumer Law* now creates statutory guarantees that services will be rendered with due care and skill, that they will be fit for any particular purpose for which the services are acquired by the consumer and that they will be supplied within a reasonable time.²⁶⁷ None of the statutory guarantees can be excluded by contract.²⁶⁸

Transcending privity

[23.210] Privity of contract remained a recalcitrant obstacle to the extension of warranties between buyer and manufacturer. A first step in extending protection for consumer injuries was to replace privity of contract with privity of title to include the relation between manufacturer and the retail *buyer*. Following pioneering statutes in South Australia and the Australian Capital Territory,²⁶⁹

261 *Shanklin Pier v Detel Products* [1951] 2 KB 854; *Wells v Buckland Sand* [1965] 2 QB 170; *Jones v Grais* (1961) 78 WN (NSW) 955. All involved economic loss. More venturesome Canadian cases are discussed by Clarke, “Product Liability Actions in Australia: Is the Collateral Contract Remedy an Option?” (1989) 5 QUTLJ 111.

262 *Lambert v Lewis* [1982] AC 225 at 262 (CA); contra: *Murray v Sperry Rand* (1979) 96 DLR (3d) 113; *Leitz v Sask Drug* (1980) 112 DLR (3d) 106.

263 Below, [28.xxx] (Ch 28).

264 Below, n 269).

265 *Australian Consumer Law*, s 59.

266 *Australian Consumer Law*, s 2 defines “acquire” to mean “acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase” (see previously the definition of “acquire” in *Trade Practices Act 1974* (Cth), s 4).

267 *Australian Consumer Law*, ss 60 – 62. See also *Fair Trading Act 1987* (NSW), s 40S; *Consumer Affairs and Fair Trading Act* (NT), s 66; *Consumer Transactions Act 1972* (SA), s 7; *Fair Trading Act 1999* (Vic), s 32]; *Fair Trading Act 1987* (WA), s 40, creating implied contractual warranties.

268 *Australian Consumer Law*, s 64.

269 Respectively, *Manufacturers Warranty Act 1974* (SA) (still in force) and *Law Reform (Manufacturers Warranties) Act 1977* (ACT) (since repealed). Both extended *all* warranties

the Australian national *Trade Practices Act 1974* (Cth) was amended in 1978²⁷⁰ to impose the familiar express and implied sales warranties²⁷¹ on manufacturing corporations²⁷² in favour of the consumer to whom defective “goods of a kind ordinarily acquired for personal, domestic or household use or consumption”²⁷³ were supplied and, in the case of unmerchantable quality, to anyone deriving title through such a purchaser. Other users and “innocent bystanders” had to await the introduction of strict liability by the more recent reform discussed in *Strict Liability* ([23.130]ff).

The parallel schemes in Part VA and Part V Div 2A of the *Trade Practices Act 1974* (Cth) were widely regarded as confusing, particularly given their intention to protect consumers. The traditional procedure of implying contractual warranties, which was extended by Part V Div 2A, required consumers to have at least some understanding of the law of contract. The *Australian Consumer Law* simplified the position in relation to the former warranties of merchantable quality and compliance with description by transforming them into statutory guarantees, which can be enforced directly against manufacturer or supplier,²⁷⁴ thereby finally freeing these guarantees from the shackles of contractual privity. Because the statutory guarantees relate to the goods themselves, they are not limited to personal injury and (other) property loss, but include economic loss, such as the depreciated value of, or damage to, the defective product itself.²⁷⁵ Also, because an action under the statutory guarantees is not subject to the “state of the art” defence that applies to actions under Part 3.5 of the *Australian Consumer Law*,²⁷⁶ it is possible for the former to succeed when the latter would fail.²⁷⁷

to the purchaser and anyone deriving title through the purchaser, and complemented the federal *Trade Practices Act 1974* (Cth). There is similar legislation in New South Wales and the Northern Territory: *Fair Trading Act 1987* (NSW), Part 4, Div 5; *Consumer Affairs and Fair Trading Act* (NT), Part 5, Div 3.

270 *Trade Practices Act 1974* (Cth), Part V, Div 2A.

271 Somewhat more qualified, for example, when the defect is attributable to someone else’s Act or default or to a cause independent of human control.

272 Because the *Trade Practices Act 1974* (Cth) was passed pursuant to the “corporations” power.

273 Including prescription medicines: see *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 at 334, [937] per Jessup J. In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853, Kiefel J held that a claim under s 74B failed, but not on the ground that a mitral heart valve was not the kind of product to which the *Trade Practices Act 1974* (Cth) Part V, Div 2A applies.

274 *Australian Consumer Law*, s 54 (acceptable quality), s 56 (compliance with description), s 58 (availability of spare parts and repairs).

275 Exemplary damages were not available under the *Trade Practices Act 1974* (Cth): *Musca v Astle Corp* (1988) 80 ALR 251 at 262; *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453.

276 See above nn 194-198.

277 See, for example, *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 266 ALR 1 re the equivalent provisions in the *Trade Practices Act 1974* (Cth).