

The Consumer Product Warranty and Liability Act

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This article provides a roadmap for the Consumer Product Warranty and Liability Act. The Act reformed and modernized much of the law regarding the sale or supply of consumer products, not only for consumers but also for business buyers. The Act deals with the following matters: express warranties; implied warranties; remedies; the supplier's ability to limit liability; the supplier's rights against his own supplier; rights against the manufacturer or other distributor regardless of privity of contract; and the imposition of strict liability on suppliers for unreasonably dangerous defective products.

Cet article illustre un plan de la loi sur la responsabilité et les garanties relatives aux produits de consommation. Cet acte a réformé et modernisé considérablement la loi concernant la vente ou la fourniture de produit de consommation, non seulement au point de vue du consommateur mais aussi au point de vue de l'acheteur en activité commerciale.

L'acte traite des sujets suivant: garanties expresses; garanties tacites; recours; abilité du fournisseur de limiter sa responsabilité; recours du fournisseur contre ses propre fournisseurs; recours contre le manufacturier ou des autres distributeurs même en l'absence de liens contractuels; la responsabilité des fournisseurs pour un produit de consommation dangereux.

INTRODUCTION

The *Consumer Product Warranty and Liability Act*¹ opened up some new horizons when it came into effect on January 1, 1980.² It made important changes in warranty law and in products liability law. The purpose of this article is to outline these changes.

The Act was a long time in the making. The Law Reform Division of the New Brunswick Department of Justice initiated a warranty study

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¹S.N.B. 1978, c. C-18.1, proclaimed effective January 1, 1980 except s. 6 which was proclaimed effective January 1, 1981, as am. S.N.B. 1980, c. 12.

²Section 6 did not come into effect until January 1, 1981.

in 1972. Its first report³ was released for public study and input in 1974. A second report⁴ was released in 1975 and a third report⁵ in 1976. The Act was passed in 1978, but proclamation was delayed until 1980 to allow the business community another opportunity to make further submissions. The Act was amended in 1980 as a result of these submissions. It was my privilege to play a role throughout this process, in the reports as project director for the warranty study, and in the legislation as director of Consumer and Corporate Affairs for the Province.

SCOPE

The Act applies to any consumer product that is sold or supplied by a person who supplies products of that kind as part of his regular business.

Type of Product

The Act applies only to consumer products.⁶ "Consumer product"⁷ is defined as meaning "any tangible personal property, new or used, of a kind that is commonly used for personal, family or household purposes". The test is not whether a particular buyer intends to use the product for personal purposes but whether the product itself is the kind of product that is commonly used for personal purposes. Thus, for example, the Act would not apply to industrial equipment even when someone buys it for his own personal purposes. However, the Act would apply to the equipment if it is a type that is also commonly used by the public for personal purposes.

Type of Supplier

The Act applies only to a person who is a distributor of products of the kind supplied or who holds himself out as such.⁸ "Distributor"⁹ is defined as meaning "a person who supplies consumer products as part

³*First Report of the Consumer Protection Project: Consumer Guarantees in the Sale or Supply of Goods* (Department of Justice, New Brunswick, 1974).

⁴*Second Report of the Consumer Protection Project: Consumer Guarantees for Automobiles and Mobile Homes* (Department of Justice, New Brunswick, 1974).

⁵*Third Report of the Consumer Protection Project, Volume I: Sale of Goods (Concluded)* (Department of Justice, New Brunswick, 1976).

⁶S. 2(1).

⁷S. 1.

⁸S. 2(2) (a).

⁹S. 1.

of his regular business and, without limiting the generality of the foregoing, includes a producer, processor, manufacturer, importer, wholesaler, retailer or dealer". Thus, for example, the Act would not apply to a restaurant that is selling its delivery car because it does not supply cars as part of its regular business. The Act would apply to the food that the restaurant supplies.

"Business"¹⁰ is defined to include "a profession and the activities of any government department or agency, of any municipality or agency thereof, and of any Crown corporation". The Crown is bound by the Act.¹¹ The Act exempts any person who is acting as a trustee in bankruptcy, receiver, liquidator or sheriff, or who is acting under a court order.¹²

Private sellers are not only exempt from the Act but are also protected from certain indemnification claims. Section 3 provides:

Notwithstanding any agreement to the contrary, a person who incurs any liability in relation to a consumer product, other than liability under section 8 of this Act, cannot recover indemnification or damages in respect of that liability from or against any seller or supplier of that consumer product who is not a distributor of consumer products of that kind and does not hold himself out as such, unless he incurs the liability because of that person's fraud.

The purpose of this provision, which will operate mainly in used goods cases, is to prevent a dealer who is buying goods from a private seller from taking an indemnity from him for any liability for the goods that the dealer incurs to his own buyer when he resells. There are two exceptions to this: (1) where there is a title defect, and (2) where the private seller is guilty of fraud.

Type of Transaction

The Act is not restricted to the sale of goods but applies to any contract for the sale or supply of a consumer product, which means:

- (a) a contract of sale of a consumer product, including a conditional sale agreement;
- (b) a contract of barter or exchange of a consumer product;
- (c) a contract of lease or hire of a consumer product, whether or not there is an option to purchase it; or

¹⁰*Ibid.*

¹¹S. 2(5).

¹²S. 2(2) (b).

(d) a contract for services or for labour and materials if a consumer product is supplied along with the services or labour.

Furthermore, the product liability part of the Act (section 27) applies to dangerously defective consumer products regardless of whether there is any contract. For example, it would apply to a gift.

Type of Buyer

The Act applies to all buyers of consumer products including those who are buying for business purposes. Generally speaking, however, as will be clear from the discussion that follows, the Act gives more protection to the consumer buyer than it does to the business buyer.

Conflicts

The Act applies notwithstanding any agreement or other thing to the contrary.¹³ The Act also takes precedence if there is a conflict between it and any other Act.¹⁴ However, the Act is not a self-contained code. Section 28 provides:

The rights and remedies provided in this Act are in addition to any other rights or remedies under any other law in force in the Province, unless a right or remedy under such law is expressly or impliedly contradicted by this Act.

WARRANTIES

The Act uses the terminology "express warranties" for the rights that are based on the supplier's promises or other statements about the product, and "implied warranties" for the rights that are not dependent on his statements.

All the warranties under the Act, express and implied, apply in favour of all buyers so that, for example, a dealer gets the same kind of warranties from his supplier as the consumer gets from the dealer. Suppose, for example, that a retailer buys a product from a wholesaler and then sells it to a consumer. It turns out that the product is completely useless because of faulty manufacture, but this is not discovered until it reaches the consumer. The retailer is responsible to the consumer for the faulty product, and the wholesaler is responsible to the retailer. The wholesaler in turn has rights against his own supplier, and so on back to the manufacturer.

¹³S. 2(3).

¹⁴S. 2(4).

Express Warranties

In determining the supplier's responsibilities for what he promises or says about the product, the Act has abandoned the traditional intention test as the basis for responsibility and substituted a reasonable reliance test. Any oral statement about the product that the supplier makes to the buyer will be an express warranty, unless either (1) the circumstances show that the buyer does not rely on the statement, or (2) the circumstances show that it would be unreasonable for the buyer to rely on the statement.¹⁵ "Statement" is defined to mean "a promise or representation of fact or intention that is made before or at the time of the contract".¹⁶ For written statements and public statements (e.g. advertising), the supplier is responsible regardless of whether there is actual reliance by the buyer, unless the circumstances show that it would be unreasonable to rely on the statement.¹⁷ Thus, for example, the buyer will get the benefit of a written guarantee on the label of a product even though he does not read it before making his purchase.

The supplier is deemed to make any statement that his agent or employee makes, unless he proves that the agent or employee was acting outside the scope of his usual or apparent authority.¹⁸ The supplier is also deemed to make any statement that any distributor (e.g. the manufacturer) prints on the product or its container or in accompanying documents.¹⁹

The parol evidence rule has also been abolished. Section 5 provides:

Where there is a written contract, oral and other extrinsic evidence is admissible in any court to establish an express warranty notwithstanding that it adds to, varies or contradicts the written contract.

Gone are the days when a supplier could avoid responsibility for his oral statements simply by inserting a clause in the written contract that purported to limit the supplier's responsibility to what was contained in the written contract.

¹⁵S. 4(1) (a).

¹⁶S. 4(4) (b), as am. Prior to the 1980 amendment, statement was defined as meaning "a statement that is made before or at the time of the contract and includes a promise and a representation of fact, intention or opinion".

¹⁷S. 4(1) (b) and (c).

¹⁸S. 4(2) (a).

¹⁹S. 4(2) (b).

Implied Warranties

Title

There is an implied warranty

(a) that the seller has a right to sell the product, or will have a right to sell the product at the time of its delivery to the buyer;

(b) that the product is free, or will be free at the time of its delivery to the buyer, and will remain free from any interest, lien, charge or encumbrance not actually known to the buyer before the contract is made; and

(c) that the buyer will enjoy quiet possession of the product except so far as it may be disturbed by any person entitled to any interest, lien, charge or encumbrance actually known to the buyer before the contract is made.²⁰

In the case of a lease without an option to purchase, the supplier needs only the rights to supply and to give quiet possession.²¹

Unused

There is an implied warranty that the product is unused, unless the buyer knows or ought to know that the product is used or is likely to be used. There will be no breach of this warranty if the product has been used only to test, service or deliver it, provided such use has not been to an unreasonable extent.²²

Quality and Fitness

The product must comply with "all mandatory federal and provincial standards in relation to health, safety and quality".²³

There is also an implied warranty

that the product is of such quality, in such state or condition, and as fit for the purpose or purposes for which products of that kind are normally used as it is reasonable to expect having regard to the seller's description of the product, if any, the price, when relevant, and all other relevant circumstances.²⁴

²⁰S. 8(1).

²¹S. 8(2).

²²S. 9, as am.

²³S. 10(1) (b).

²⁴S. 10(1) (a).

It will be noted that there is no requirement that the product be sold by description. The warranty does not apply

- (a) as regards any defect that is known to the buyer before the contract is made;
- (b) as regards any defect that the seller has reason to believe exists and that he discloses to the buyer before the contract is made;
- (c) if the product is a used product and the buyer examines it before the contract is made, as regards any defect that that examination ought to reveal; or
- (d) if there is a sale or supply by sample, as regards any defect that a reasonable examination of the sample ought to reveal.²⁵

There is also an implied warranty that the product is reasonably fit for any purpose, normal or special, that the buyer makes known to the supplier before the contract is made, unless the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the supplier's skill or judgment.²⁶

Durability

Section 12 provides:

12(1) In every contract for the sale or supply of a consumer product there is an implied warranty given by the seller to the buyer that the product and any components thereof will be durable for a reasonable period of time.

12(2) In determining a reasonable period of time for the purposes of subsection (1), regard shall be had to all relevant circumstances, including the nature of the product, whether it was new or used, its use as contemplated by the seller and buyer at the time of the contract, its actual use and whether it was properly maintained.

REMEDIES

Unlike the warranties, the remedies for breach of warranty differ depending on whether the buyer is a consumer buyer or a business buyer.²⁷ The Act gives special remedies to the consumer buyer. But it leaves the business buyer (i.e. one who buys or holds himself out as buying in the course of a business²⁸) to the remedies that would normally

²⁵S. 10(2).

²⁶S. 11.

²⁷Where the buyer acquires a product for both personal and business purposes, the primary purpose governs whether he is to be treated as a consumer or a business buyer: s. 1(2).

²⁸"Business" is defined in s. 1.

be available under the law for breach of the warranty.²⁹ It should be noted that "warranty"³⁰ is used in the Act in the wide sense as meaning simply a term of the contract rather than the narrow sense of meaning a term of the contract that is less important than a condition, so that the warranty-condition dichotomy of the *Sale of Goods Act* has been avoided. The special consumer remedies are also unavailable in the case of a consumer product supplied under a contract for services or for labour and materials.³¹

If the supplier is in breach of a warranty, the consumer may recover damages for any reasonably foreseeable loss caused by the breach.³²

Normally the consumer is under an obligation to give the supplier a reasonable opportunity to rectify the breach.³³ The supplier may require the consumer to return the product for this purpose, unless it would cause significant inconvenience to the consumer. The supplier is liable for the cost of return. The consumer has no duty to give the supplier an opportunity to rectify where either (1) the consumer is unable to do so or would suffer significant inconvenience, or (2) the breach is a major breach.

In addition to his damages remedy, the consumer may also be able to reject the product if the supplier does not rectify the breach.³⁴ The consumer can reject if he discovers the breach within sixty days after delivery and he rejects within a reasonable time after he discovers the breach. The sixty day time limit does not apply where there is a major breach. The only time limitation for a major breach is that the consumer must reject the product within a reasonable time after he ought to have discovered the breach.

It will be noted that the Act has abandoned the warranty-condition approach. The consumer can reject the product for the breach of any warranty under the Act. The Act has also changed the bars to rejection. No longer can a consumer lose his right to reject simply because the contract was for the sale of specific goods and the property has passed to him.³⁵ Apart from the time limits outlined above, the only other limitation is that the consumer must be able to give back the product to the supplier free from any right against it in favour of a third party.³⁶

²⁹S. 13(a).

³⁰"Warranty" is defined in s. 1 as "a term of the contract that is a promise".

³¹S. 13(b).

³²S. 15.

³³S. 14. *Audet v. Central Motors Ltd.* (1981), 35 N.B.R. (2d) 143 (N.B.Q.B.).

³⁴S. 16.

³⁵*Sale of Goods Act*, R.S.N.B. 1973, c. S-1, as am., s. 12(4).

³⁶S. 21, as am.

Even this is subject to exceptions, the major one³⁷ being that the granting of a security interest by the consumer to a third party (e.g. a chattel mortgage) is not a bar to rejection if the amount owing by the consumer to the third party is less than the amount due from the supplier to the consumer.³⁸ The rationale for this exception is that the security interest can be discharged with the money due from the supplier to the consumer, and to this end the Act allows the supplier to pay off the third party with that money. The third party is not entitled to any prepayment penalty in such a case.

If the consumer rejects the product, he is released from his obligations under the contract and can recover any "payments on the price"³⁹ and damages for any reasonably foreseeable loss caused by the breach.⁴⁰ However, the supplier is entitled to deduct from the refund or recover "an amount that is equitable in the circumstances for the benefit, if any, that the buyer derived from use of the product". Furthermore, the consumer is responsible for any damage to the product that is not attributable to the supplier's breach, and for any deterioration of the product beyond that attributable to reasonable wear and tear for the period of time that it was used by the consumer.

There is also an important provision regarding trade-ins. Subsection 19(2) provides:

Where the buyer gives consideration other than money, in whole or in part, the seller or the buyer may elect to treat it as if it were money, the amount of which shall be deemed to be the monetary value of such consideration at the time it was given.

Thus, for example, if a consumer traded in his old car on a new one and later rejected the new car for breach of warranty, instead of taking back the old car the consumer could elect to take its monetary value.

The consumer is entitled to retain possession of the product until the supplier makes the required refund of payments on the price.⁴¹ However, the consumer has no lien for damages. Special provision is made to help resolve disputes that may arise where the supplier claims the right to deduct from the refund an amount for benefits, damage or

³⁷The other exceptions are (1) where the third person's rights were already in existence at the time of supply and were not attributable to the consumer; and (2) where the third person is claiming through the supplier: s. 21(2), *as am.*

³⁸S. 20, *as am.*

³⁹"Payments on the price" include (1) any finance charges or other credit costs that the consumer has reasonably incurred, whether paid to the supplier or another party; and (2) any consideration that the consumer gives to the supplier, whether or not it is money: s. 19(1).

⁴⁰S. 17, *as am.*

⁴¹S. 18.

deterioration. The supplier may deduct any amount that is not in dispute, pay the amount in dispute into court, and pay the balance to the consumer. If he does this, he is entitled to get the goods back. If the supplier does not bring an action to realize his claim within fifteen days of payment into court, the money is to be paid out to the consumer.

After rejection, the consumer must take reasonable care of the product and, subject to his lien rights, allow the supplier to take it back.⁴² In fact the supplier can require the consumer to return the product, unless this would cause significant inconvenience to the consumer. The supplier is liable for the cost of return.

EXCLUSION AGREEMENTS

The Act distinguishes between consumer buyers and business buyers on the issue of contracting out of the warranties and remedies provided by the Act.

Consumer Buyers

Warranties

A supplier cannot contract out of the express or implied warranties vis-à-vis a consumer buyer.⁴³ This does not mean that a supplier will be responsible for every statement and for every defect, because the warranties do not impose such responsibilities. The main effect of the ban on contracting out of the express warranties was outlined in the reports as follows:

If implemented, our recommendations [that a supplier should not be able to contract out of the express warranties] would render ineffective the presently permissible practice of taking away the buyer's rights without the buyer realizing it. Under the present law, the seller can take away with the written contract what he purported to give in the oral dickering, simply by inserting a general disclaimer provision, which may go unread or which, if read, may be misunderstood by the buyer in its applicability to particular promises. Under our recommendations, a seller could only retract his promise or representation if he made it clear to the buyer that he was retracting that promise or representation. The buyer would no longer lose his rights simply because there was a provision in the written contract purporting to take them away.⁴⁴

With regard to implied warranties, apart from health and safety standards the Act does not regulate standards but simply gives the consumer

⁴²S. 22.

⁴³S. 24.

⁴⁴*Supra*, footnote 3, at 178.

protection against unknown and unexpected defects, as far as it is practical to do so.

It should also be noted that an express warranty does not exclude or restrict an implied warranty.⁴⁵ For example, the fact that the supplier has given a thirty day guarantee would not exempt him from the implied warranty of durability.

Remedies

A supplier cannot contract out of the remedies for breach of the implied warranties.⁴⁶ However, he can exclude or restrict the remedies for breach of the express warranties, subject to two exceptions.⁴⁷ First, in cases of sale by description,⁴⁸ there can be no modification of remedies for breach of an express warranty that forms part of the description. Second, any agreement to exclude or restrict a remedy "shall be ineffective to the extent that it is shown that it would not be fair or reasonable to allow reliance on such agreement".

A supplier cannot avoid these controls by manipulating the form in which he makes his express warranty. Section 6 provides:

Any express warranty given by the seller to the buyer to repair, replace, make a refund or do anything else if the product is defective, breaks down, malfunctions or fails to meet his specifications shall be deemed to include an express warranty that the product is not defective or will not break down, malfunction or fail to meet his specifications, as the case may be, during the term of the express warranty.

The rationale for section 6 was stated in the reports as follows:

...we were very much bothered by the fact that a simple prohibition of limitation of remedies for breach of the express terms would operate very haphazardly. This is because remedies depend on the form in which a promise is made, and promises may be made in different forms. In this respect promises pose a difficulty that implied terms and representations of fact do not.

For example, a seller who guaranteed that the goods were in perfect condition but went on to purport to limit his liability to fifty per cent of the cost of repairing any defects would be unsuccessful in his purported limitation, and would be liable for the full cost of repairs and other consequential damages caused by the goods being defective. But a seller could achieve the

⁴⁵S. 7.

⁴⁶S. 24.

⁴⁷S. 25.

⁴⁸S. 25(5) provides that "...a sale or supply of a consumer product shall not be prevented from being a sale or supply by description by reason only that the product is a specific product that is seen, examined, tested or selected by the buyer."

limitation he desired by recasting the form in which he makes his guarantee so that, instead of making a promise that the goods are in perfect condition, he promises that if they are not in perfect condition then he will pay fifty per cent of the cost of repairing any defects. By making his promise in this form, the seller would not run afoul of the rule prohibiting the limitation of remedies and yet would be successful in limiting his liability to fifty per cent of the repair cost and consequential damages arising only from breach of the obligation to pay fifty per cent of the repair costs.

The result would be that the "smart" seller who used the right formula could effectively limit his liability, while the unsuspecting seller who used the wrong formula would fail in his attempt at limitation, even though in substance both of them were out to accomplish the very same thing, limited liability. It would be wrong to say "I promise X but I limit my liability to Y", but it would be all right to say "If X does not occur then I will do Y".

After reflection, however, we have concluded that it is possible for the consumer protection legislation to avoid these haphazard results and achieve uniform standards by enacting an appropriate deeming provision. The legislation could deem any promise that the seller makes if the goods fail to meet the specifications set forth in his promise to be a promise that the goods will meet the specifications set forth in the promise. The door would thus be closed to limiting the remedies that the law would otherwise provide by manipulation of the form in which the promise is made, and all sellers would be treated on an equal basis.⁴⁹

Business Buyers

A supplier can contract out of the Act's warranties or remedies vis-à-vis a business buyer⁵⁰ (i.e. one who buys or holds himself out as buying in the course of a business⁵¹). There is, however, one major exception. An agreement to contract out "shall be ineffective with respect to any consumer loss for which the seller would be liable if no such agreement had been made". "Consumer loss" has been defined to include "a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity".⁵²

The exception is demonstrated in the following hypothetical. Suppose that a manufacturer sells chocolates to a wholesaler. The chocolates are inedible because of faulty manufacture, but no one knows this. The contract between the manufacturer and the wholesaler purports to contract out of the Act. The wholesaler sells the chocolates to a retailer and he also purports to contract out of the Act. The retailer in turn sells the chocolates to a consumer, who discovers that they are inedible. The retailer would be liable to the consumer, of course, regardless of any disclaimer. The retailer in turn could obtain indemnification from the

⁴⁹*Supra*, footnote 3, at 180-182.

⁵⁰S. 26.

⁵¹"Business" is defined in s. 1.

⁵²S. 1.

wholesaler. The wholesaler's disclaimer would be ineffective because the retailer's claim would fall within the definition of "consumer loss". The wholesaler in turn could obtain indemnification from the manufacturer. The manufacturer's disclaimer would be ineffective because the wholesaler's claim would also fall within the definition of "consumer loss".

In giving the dealer non-excludable recourse rights against his own supplier, the Act adopts a policy to impose ultimate responsibility for consumer protection on the one who caused the problem in the first place, rather than stopping at the dealer's doorstep.

PRIVITY OF CONTRACT

Another important change in the law is found in section 23, which makes fundamental changes in the doctrine of privity of contract. It provides:

Where the seller is in breach of a warranty provided by this Act, any person who is not a party to the contract but who suffers a consumer loss because of the breach may recover damages against the seller for the loss if it was reasonably foreseeable at the time of the contract as liable to result from the breach.

It is easy to see that the section changes the so-called "horizontal privity" rules. A subsequent purchaser of the product from the original consumer buyer, a donee, a user, or any other person who suffers a reasonably foreseeable consumer loss because of the seller's breach of warranty can now recover damages from the seller for his loss. "Consumer loss"⁵³ includes its normal meaning of "a loss that a person does not suffer in a business capacity", and "loss"⁵⁴ means "loss or damage of any kind, including economic loss, damage to property and personal injury".

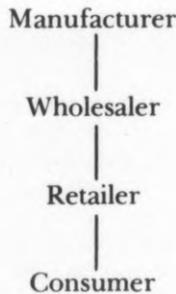
The section also changes the so-called "vertical privity" rules. This becomes clear when it is remembered that the warranties under the Act apply in favour of all buyers, whether they are consumer buyers or business buyers. The seller may be a manufacturer, an importer, a wholesaler, a retailer or other distributor. For example, if a manufacturer sells a consumer product to a retailer, who resells it to a consumer, and the manufacturer is in breach of his warranty to the retailer, the consumer will be able to recover damages against the manufacturer for any reasonably foreseeable consumer loss that he suffers because of the

⁵³*Ibid.*

⁵⁴*Ibid.*

breach. Furthermore, the manufacturer will not be able to avoid this result by contracting out of the Act in his contract with the retailer because the disclaimer is ineffective vis-à-vis a consumer loss.⁵⁵

A dealer himself can use section 23 to reach a remote supplier, if he suffers a consumer loss. Since "consumer loss" is also defined to include "a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity", there is great potential. For example, suppose the following chain of distribution of a defectively manufactured product:



The consumer can use section 23 vis-à-vis the wholesaler and the manufacturer, and the retailer can use section 23 vis-à-vis the manufacturer for the retailer's own liability to the consumer. Again the legislation adopts a policy to stream legal liability back to the source of the problem.

The third party has no rights against the seller unless the seller is in breach of warranty to his own buyer.⁵⁶ For example, suppose that a manufacturer sells the goods as "seconds" to a retailer, who in turn passes them off as "first class" to the consumer. The consumer will not have any rights against the manufacturer for this, but, of course, he will have rights against the retailer.

PRODUCT LIABILITY

Given the changes in privity rules discussed in the preceding section, it may well be asked why there is any need for a separate product liability provision. There is indeed much overlap between section 23 and section 27, the product liability section, but there are also important differences. Of particular importance is that section 23 would not apply where the

⁵⁵Ss. 24, 26.

⁵⁶S. 23 is also subject to s. 25: s. 25(6).

product was not supplied under any contract, e.g. a free sample provided by a manufacturer. Neither would section 23 apply where the product was supplied under a contract but the contract was not governed by New Brunswick law. However, section 27 can apply in both these cases.

Subsection 27(1) provides:

A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a consumer loss in the Province because of the defect, if the loss was reasonably foreseeable at the time of his supply as liable to result from the defect and

- (a) he has supplied the consumer product in the Province;
- (b) he has supplied the consumer product outside the Province but has done something in the Province that contributes to the consumer loss suffered in the Province;⁵⁷ or
- (c) he has supplied the consumer product outside the Province but the defect arose in whole or in part because of his failure to comply with any mandatory federal standards in relation to health or safety, or the defect caused the consumer product to fail to comply with any such standards.

And subsection 27(4) provides that "the liability of a person under this section does not depend on any contract or negligence".

Since section 27 imposes strict liability on a supplier irrespective of contract, it is not surprising that it is restricted in scope to defective products that pose a safety hazard. Section 23 is not limited to such products but applies whenever the seller is in breach of a warranty under the Act.

A supplier is not liable under section 27:

- (a) for any loss that is caused by a defect that is not present in the consumer product at the time he supplies it; or
- (b) for any loss that is caused by a defect that he has reason to believe exists and that he discloses to the person to whom he supplies the consumer product before the loss is suffered, if the defect does not arise in whole or in part because of his failure to comply with any mandatory federal or provincial standards in relation to health or safety and the defect does not cause the consumer product to fail to comply with any such standards.⁵⁸

Because of the wide definition of "consumer loss"⁵⁹, section 27 is available not only to a consumer but also to a supplier himself for his

⁵⁷S. 27(2) provides: "For the purposes of paragraph (1) (b), where a person has done anything in the Province to further the supply of any consumer product that is similar in kind to the consumer product that caused the loss, it shall be presumed that he has done something in the Province that contributed to the consumer loss suffered in the Province, unless he proves irrefragably that what he did in the Province did not in any way contribute to that loss."

⁵⁸S. 27(3).

⁵⁹S. 1. See the discussion on privity of contract above.

liability to the consumer. Again the object is to stream legal liability back to the source of the problem. For example, suppose that a candy manufacturer distributes a free sample of his candy in New Brunswick. Suppose that he gives it to a wholesaler, who gives it to a retailer, who gives it to a consumer. Suppose further that the candy is dangerously defective because of faulty manufacture and that it causes physical injury to the consumer. The consumer can recover against the retailer, the wholesaler or the manufacturer. The retailer can recover against the wholesaler or the manufacturer for his liability to the consumer. And the wholesaler can recover against the manufacturer for his liability to the consumer or the retailer.