

THE MANUFACTURER'S LIABILITY TO THE PURCHASER OF A "LEMON": A REVIEW OF THE SITUATION IN CANADA AFTER *GENERAL MOTORS PRODUCTS OF CANADA LTD. v. KRAVITZ*

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I. INTRODUCTION

One of the risks of buying a new car, or indeed any item of mass-produced merchandise, is that it may turn out to be a "lemon"; that is, afflicted with defects affecting its performance which are seemingly untraceable or ineradicable. It is not a risk which the purchaser either voluntarily accepts or can do very much to avoid, for both Consumer Reports and the law reports show that even some of the most expensive vehicles can be lemons. At the same time, it is not a risk that he must bear without any legal recourse. However, whether the available means of recourse are adequate is another question, and the principal one to be examined in this paper.

The purchaser of a lemon has certain well-established legal rights against the dealer who sold him the car. He can sue the dealer in the contract for breach of the implied terms of the Sale of Goods Act relating to fitness for particular purpose or merchantability.¹ Depending on both the seriousness of the defects and how promptly he acts, he may rescind the contract and recover his money. Alternatively, he may retain the car and obtain damages to compensate for its diminished value and, within the rules governing remoteness of damage, recover certain consequential losses.² In most provinces, including Ontario, the implied terms cannot be overridden by an exemption clause, provided the contract of sale is a "consumer transaction" as defined by the particular provincial act.³ In

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¹ Sale of Goods Act, R.S.O. 1970, c. 421, s. 15. Similar provisions exist in sale of goods legislation in force in every province. See generally G. FRIDMAN, *SALE OF GOODS IN CANADA* ch. 8 (2d ed. 1979), and the REPORT ON SALE OF GOODS, *infra* note 9, at 210-13.

² For a discussion of the available remedies, see FRIDMAN, *id.* at ch. 16.

³ See, e.g., The Consumer Protection Act, R.S.O. 1970, c. 82, as amended by S.O. 1971, c. 24, s. 2. For a critical analysis of the equivalent provisions in other provinces and the territories, see S. WADDAMS, *THE LAW OF CONTRACT* 296-303 (1977).

cases where such an exemption clause would be valid but otherwise unfair or unreasonable in the particular circumstances, the courts have shown their willingness to invoke the doctrine of fundamental breach to nullify its effect.⁴ While the state of the law governing the purchaser's rights under the contract of sale is deficient in certain respects,⁵ it is in most cases adequate to ensure that the purchaser of a lemon has some recourse against the dealer. Provided the purchaser can prove the breach, and can afford the expense and delay of a high court action,⁶ his chances of obtaining redress from the dealer are fairly good.

However, all this is predicated on the assumption that the dealer is an available and viable defendant. If satisfaction cannot be obtained from a dealer because he is insolvent, has gone out of business, or is otherwise judgment-proof, can the aggrieved purchaser obtain redress for his economic loss directly from the manufacturer? This issue came up recently in the Supreme Court of Canada case of *General Motors Products of Canada Ltd. v. Kravitz*,⁷ a decision on appeal from Quebec which serves to contrast the relative effectiveness of civil and common law in dealing with what is in more than one sense a common problem; namely, the liability of the manufacturer to compensate the purchaser for pure economic loss, both direct and consequential,⁸ suffered as a result of buying a defective automobile.

II. THE POLICY ARGUMENTS

Although the manufacturer is not a party to the retail contract of sale, there are sound policy arguments in favour of holding him, as well as the

⁴ *E.g.*, *Cain v. Bird Chevrolet-Oldsmobile Ltd.*, 12 O.R. (2d) 532, 69 D.L.R. (3d) 484 (H.C. 1976), *varied as to damages*, 20 O.R. (2d) 569, 88 D.L.R. (3d) 607 (C.A. 1977); *Wojakowski v. Pembina Dodge Chrysler Ltd.*, [1976] 5 W.W.R. 97 (Man. Q.B.); *Neilsen v. Maclin Motors Ltd.*, 71 D.L.R. (3d) 744 (Alta. S.C. 1976); *Rossey v. Canadian Kenworth Ltd.*, 11 A.R. 91, 6 Alta. L.R. (2d) 177 (Dist. C. 1978).

⁵ See S. WADDAMS, *PRODUCTS LIABILITY* ch. 3 (1974), and note 9 *infra*.

⁶ The monetary ceilings on small claims court actions in common law provinces, which range from \$250 in Nova Scotia to \$2,000 in British Columbia, effectively exclude claims for rescission of contracts for the sale of new automobiles.

⁷ [1979] 1 S.C.R. 790, 25 N.R. 271 (English translation), 301 (French original), *aff'g* (unreported, Que. C.A. Aug. 4, 1976, no. 09-000896-74), *aff'g* (unreported, Que. C.S. Sept. 19, 1974, no. 05-759935).

⁸ Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be "out of pocket" — the difference in value between what is given and received — or "loss of bargain" — the difference between the value of what is received and its value as represented. Direct economic loss also may be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.

Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, at 918 (1966).

retailer, directly and strictly liable to compensate the purchaser if the goods do not meet the minimum standards of quality imposed on a seller by the Sale of Goods Act. These arguments, which have been canvassed and adopted in recent years by several law reform bodies in Canada,⁹ apply to the manufacturers of many mass-produced products, but acquire special weight in the case of the automobile manufacturer because of the nature of the industry, the role of the manufacturer in the marketplace and the particular hardship which can arise in the absence of such recourse. If the law accurately reflected the structure of the modern automobile industry, the manufacturer would be an appropriate first-line defendant to actions by the purchaser based on want of merchantability.

In the first place, the manufacturer and not the retailer is in most cases responsible for the existence of the defects in issue. The chronic defects that afflict the typical lemon nearly always have their origin in faulty design, manufacture, or assembly; factors under the control of the manufacturer rather than the dealer. The manufacturer rather than the dealer determines the quality of what the purchaser receives.

⁹ (1) ONTARIO LAW REFORM COMMISSION, REPORT ON CONSUMER WARRANTIES AND GUARANTEES IN THE SALE OF GOODS (1972) [hereinafter cited as the ONTARIO REPORT ON CONSUMER WARRANTIES], the first and most comprehensive report directly on point. The Commission confined its attention to "warranty problems arising out of economic losses, in short, with respect to defective goods which fail to meet the consumers' expectations". *Id.* at 10. In its recent REPORT ON SALE OF GOODS Vol. I (1979), the ONTARIO LAW REFORM COMMISSION examined the doctrine of privity in the context of commercial sales and reached broadly the same conclusions as it had in its 1972 REPORT: "The Commission supports in principle the desirability of extending the express and implied warranties of a seller in favour of a subsequent buyer." In commercial sales these warranties would otherwise be excluded, but the Commission refrained from making a recommendation to extend them for the following reasons:

After careful deliberation, however, we have decided not to take a firm position on the issue at this time, but to postpone a final decision until interested parties have had an opportunity to express their views. We adopt this position primarily because of the novelty and importance of the issue in Ontario, and because of the absence of hard data on the probable impact of such an extension of warranty liability.

Id. at 247.

(2) NEW BRUNSWICK DEPT. OF JUSTICE, CONSUMER PROTECTION PROJECT, [hereinafter cited as the NEW BRUNSWICK CONSUMER PROTECTION PROJECT], FIRST REPORT Part I (1974) and THIRD REPORT Vol. I (1976), contains a valuable re-examination of the areas studied by the Ontario Law Reform Commission and a critical evaluation of the Ontario proposals. The THIRD REPORT also contains a scholarly analysis of aspects of the jurisdictional problems in trying to impose warranty liability upon extra-provincial suppliers. *Id.* at 175-92.

(3) SASKATCHEWAN DEPT. OF CONSUMER AFFAIRS, WHITE PAPER ON CONSUMER PRODUCTS WARRANTIES (1975), is a brief outline of the major problems with proposals for solutions.

The major recommendation for reform in these provinces was that the manufacturer should be held directly liable to the consumer purchaser for economic loss suffered as a result of defects in the product. Their differences lie mainly in the extent of liability and in the means by which it should be imposed. See discussion under LEGISLATIVE REFORM, at p. 620 *infra*.

In addition to producing the product pre-packaged with all its defects, the manufacturer also plays an active role in its promotion and marketing. As the Ontario Law Reform Commission observed, in a passage especially applicable to the automobile industry:

It has often been remarked that in the modern marketing milieu it is the manufacturer who plays the dominant role. It is he who is responsible for putting the goods into the stream of commerce and, in most cases, of creating the consumer demand for them by continuous advertising. The retailer is little more than a way station. It is the manufacturer who endows the goods with their characteristics and it is he who determines the type of materials and components that shall be used and who establishes the quality control mechanism. It is also he who determines what express guarantees shall be given to the consumer and who is responsible for the availability of spare parts and the adequacy of servicing facilities. Almost all the consumer's knowledge about the goods is derived from the labels or markings attached to the goods on the sales literature that accompanies them — and these too originate from the manufacturer.¹⁰

If the manufacturer acts in many respects as the “seller” and through his advertising is responsible for creating the expectations of the purchaser, should he not also be liable if the product does not live up to those expectations because of defects that he has created?

As the law presently stands, the manufacturer can be made accountable for the economic loss suffered by the purchaser of defective products, but only by indirect and imperfect means. A seller who is strictly liable to the purchaser in contract, but not to blame for the defect, can sue his supplier for breach of their contract of sale for indemnification against the loss suffered as a result of a purchaser's successful claim. In this roundabout way, the cost of compensating the retail purchaser may be passed back along the chain of distribution to be borne ultimately by either the manufacturer who created the product with all its faults, or by the party who contractually agreed to assume the risk of a defect in issue.

This circuitous system is open to at least two objections. First, when it works, it involves multiple actions, their number depending on the length of the chain of distribution.¹¹ It would be simpler and more efficient to allow the purchaser to leap-frog intermediate parties by suing the manufacturer directly. The manufacturer could then pursue any claim for indemnification he may have in those cases where by exemption clause or insurance he has divested himself of liability. A second and more serious objection is that it does not always work because the chain of liability may be broken. When the break occurs at the first link, because the dealer though liable in law is not a viable defendant, the need for direct recourse against the manufacturer assumes its greatest practical importance. In such

¹⁰ ONTARIO REPORT ON CONSUMER WARRANTIES, *supra* note 9(1), at 65.

¹¹ This is aptly described by one author as “a cumbersome and expensive [process] . . . liable to be interrupted by insolvency, jurisdictional problems, or by an effective exclusion clause”. S. WADDAMS, *supra* note 5, at 189. See, e.g., *Kasler & Cohen v. Slavouski*, [1928] 1 K.B. 78 (1927), where five actions were necessary to shift the consumer's damages from the retailer to the manufacturer responsible for the defects.

circumstances, the purchaser without right of recourse against the manufacturer may have no remedy at all.¹² The absence of a remedy is particularly acute in the case of a defective automobile, for the ordinary purchaser obviously cannot afford to absorb the loss as he might in the case of a defective flashlight or disposable lighter. As a matter of equity,¹³ the manufacturer responsible for the existence of the defects rather than the purchaser unlucky enough to buy the lemon should bear the loss, particularly in cases where the manufacturer has played an active role in marketing and promoting the defective product. Where the unlucky purchaser is a consumer, the answer should be the same even if the manufacturer has by contract excluded his liability to the dealer for defects in the product.

In the United States, these considerations have led some courts to abandon old rules of privity which shielded the manufacturer from such claims in favour of new doctrines that are commercially more realistic and more equitable to the purchaser.¹⁴ Under one such doctrine, an implied warranty of merchantability attaches to the goods in the hands of the manufacturer, "runs with the goods" along the chain of distribution, and is enforceable against the manufacturer by any party along the way. This approach and the reasons behind it were clearly articulated in the context of automobiles, by Strutz J. in *Lang v. General Motors Corp.*:

It is perfectly clear . . . that where a sale is made under a trade name and where the manufacturer has conducted a national advertising campaign and sales are accomplished through local dealers, the demand for such products is created by

¹² See, e.g., *International Harvester Co. of Australia (Pty.) Ltd. v. Carrigan's Hazeldene Pastoral Co.*, 32 A.L.J.R. 160, 100 C.L.R. 644 (H.C. 1958) and *Stoljar, The International Harvester Case: A Manufacturer's Liability for Defective Chattels*, 32 AUST. L. J. 307 (1959).

¹³ The argument has also been put on economic grounds, weighing factors of resource allocation and risk distribution. See Symposium, *Products Liability*, 38 U. CHI. L. REV. 1 (1970); Vukelich, *Strict Products Liability: "Just(ice) Out of Reach"* — *A Comparative Canadian Survey*, 33 U. T. F. L. REV. 46, at 72-75 (1975); NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9(2), at 168-71.

¹⁴ *Santor v. A & M Karagheusian Inc.*, 44 N.J. 52, 207 A. 2d 305 (1965); *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See generally Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); Legh-Jones, *Products Liability: Consumer Protection in America*, [1969] C.A.M.B. L. J. 54; Pelster, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sale Warranties*, 64 MICH. L. REV. 1430 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). These developments are not exclusively judge-made. See UNIFORM COMMERCIAL CODE § 2-318, adopted in one of the three alternative versions by 49 states; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE ch. 11 (1972). Nor is the manufacturer's liability necessarily based on sales law. See *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 403 P. 2d 145 (1965) and RESTATEMENT OF TORTS (2d) § 402A, note 172 *infra*. See generally Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1968). The evolution in the United States of the manufacturer's strict liability to the consumer for losses resulting from defects in the product is outlined by S. WADDAMS, *supra* note 5, ch. 12, and more recently by Romero, *The Consumer Products Warranties Act*, 43 SASK. L. REV. 81 (1979).

the advertising of the manufacturer. The purpose of the advertising conducted by such manufacturer is to cultivate the ultimate consumer. Thus, where the article sold as a new article is defectively manufactured, the interests of the ultimate consumers can be protected only by eliminating the requirement of privity between the manufacturer and his dealers and the expected ultimate consumer. It would be unreasonable to hold that, if a buyer purchases, for example a 'Ford' or 'Chevrolet' or 'Cadillac' or 'Chrysler' or any other make of automobile, no implied warranty of merchantable quality can be asserted by the purchaser against the manufacturer even though the particular car delivered as a new automobile is in such bad condition and so defective in materials or construction that it cannot be operated at all and is wholly useless or unsatisfactory for the ordinary purposes which such automobile is designed to serve.

Accordingly, under modern marketing conditions, when a manufacturer puts a new truck-tractor or other new product into the stream of trade and promotes its sale to the public, an implied warranty that it is reasonably fit and suitable for use, as such, accompanies such new vehicle into the hands of the ultimate buyer. Absence of privity between the manufacturer and buyer is immaterial.¹⁵

The policy arguments are not all on one side. In the United States, where the manufacturer's strict liability to the purchaser for physical injury or damage to property caused by the defective product has long been established, the courts have been hesitant to recognize claims for pure economic loss.¹⁶ One of the reasons is that it is seen to be inappropriate to hold the manufacturer strictly and directly accountable to the purchaser for pure economic loss.¹⁷ Concerning direct economic loss, it would be appropriate because, in essence, the purchaser's complaint is that he has paid more for the goods than they are worth, and his commercial expectations as to the quality arise out of and can only be measured by reference to the bargain made between retailer and purchaser. "The plaintiff's pecuniary loss of the bargain depends upon what the bargain is"¹⁸ and it is the dealer, not the manufacturer, who sets the price and terms of the bargain and who thus determines the shortfall in the purchaser's expectations as to the quality of the goods. Holding the manufacturer strictly and directly liable for direct economic loss could, it is argued, be unfair and result in his liability to compensate a purchaser in a

¹⁵ 136 N.W.2d 805, at 809-10 (N.D. 1965). See also *Morrow v. New Moon Homes Inc.*, 548 P.2d 279 (Alas. 1976); *Nobility Homes of Texas Inc. v. Shivers*, 557 S.W. 2d 77 (Tex. 1977). *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967).

¹⁶ The courts are divided on whether a plaintiff may recover economic loss (loss of bargain and loss of profits) from a seller with whom he does not deal and by whom no express warranties have been made. The majority deny recovery in these circumstances but a healthy minority permit it. J. WHITE & R. SUMMERS, *supra* note 14, at 333. See generally Cane, *Physical Loss, Economic Loss and Products Liability*, 95 L.Q.R. 117, at 138-40 (1979); Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, at 677-82 (1976-77); Turner, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145 (1972); Appel, *Strict Liability: Recovery of "Economic" Loss*, 13 IDAHO L. REV. 29 (1976).

¹⁷ Prosser, *Products Liability in Perspective*, 5 GONZ. L. REV. 157, at 171 (1970).

¹⁸ *Id.* See also Prosser, *supra* note 14, at 823.

situation where the dealer has charged an exorbitant price and, insofar as price is related to expectations about quality, generate unrealistic expectations about the quality of the goods.

Whatever validity these arguments may have generally, they do not apply to the automobile industry because of the role of the manufacturer in the marketplace. The manufacturer may not control the price as such, but he does determine the normal parameters of the retail price by attaching a "sticker price" to every vehicle. He also controls to a large degree the terms and conditions of sale; standard form contracts prepared by the manufacturers are used by most agency dealers. And he certainly influences the commercial expectations of the purchaser by the extensive advertising in which he engages.

Holding the manufacturer strictly and directly liable to the purchaser for economic loss does not necessarily mean that such loss should be without limits. If the dealer has charged the consumer purchaser an exorbitant price which grossly exceeds the "sticker price", itself usually higher than the real selling price, the manufacturer should be able to limit his liability. Similarly, he ought not to be liable for any additional expectations created unilaterally by the dealer's own express representation.

It is sometimes argued that holding the manufacturer directly liable to the purchaser for consequential economic loss would expose the manufacturer to liability of "unknown and unlimited" scope.¹⁹ There is force in this argument, particularly in the case of the business purchaser whose claim for consequential losses may include substantial sums for loss of profits. This may be a reason for allowing the manufacturer to qualify or limit the scope of his responsibility in such cases. However, in the case of the consumer purchaser of a defective automobile, consequential losses are likely to be small, such as the fee for registration, insurance, the rental of replacement automobile, etc., all of which would not be beyond the reasonable contemplation of the manufacturer. The purchaser's primary claim would be for the refund of the price or damages to compensate for the difference between the actual value of the goods and the value that they would have had had they not been defective. This is not to say that a consumer can never suffer serious consequential loss as a result of buying a defective product. A consumer who buys paint and uses it to have his house painted only to find that because of defects in manufacture it blisters within a few days, may be obliged to have his house repainted at considerable expense.²⁰ Nor should a manufacturer escape all liability for consequential economic losses to remote parties simply because he cannot always predict the purposes for which the defective goods may be used.

¹⁹ *Seely v. White Motor Co.*, *supra* note 14, at 22-23, 403 P.2d at 150-51. "Some courts and commentators have argued that . . . consequential economic injury is too speculative and excessive to be a calculable or insurable cost of the supplier's business." *Edmeades*, *supra* note 16, at 678.

²⁰ An example drawn from *S. WADDAMS*, *supra* note 5, at 34.

There is nothing inherent in the nature of the harm caused by the defective product which should prevent the recovery of damages for consequential economic loss. It is, after all, a well recognized head of damage in both contract and tort, and there is nothing essentially new in the problem of fixing the appropriate limits of the manufacturer's liability. At a time when the rules governing the remoteness of damage in tort and contract appear to be drawing together,²¹ it should not be too difficult to formulate appropriate rules of remoteness to contain within fair limits the manufacturer's strict and direct liability for defects affecting the merchantability of a product when the parties are not in privity.

As a matter of policy, therefore, given the nature of the product and the structure of the marketplace, the manufacturer of a defective automobile, as well as the dealer, ought to be directly liable to a consumer purchaser for pure economic loss caused by defects in the product which affect its merchantability.

However, the common law has not always kept pace with changing marketing conditions. In all common law provinces but New Brunswick and Saskatchewan,²² the purchaser of a lemon seeking redress directly against the manufacturer for pure economic loss faces formidable obstacles of substantive law.²³ In Quebec, on the other hand, although starting from applicable principles essentially similar to those at common law, the courts have developed a remedy against the manufacturer tailor-made for the purchaser of a lemon.²⁴ Hitherto controversial because it strains, if not flouts, certain traditional notions of civil law, this remedy, which had appeared in several variants over the last fifteen years, was considered by the Supreme Court for the first time in *General Motors Products of Canada Ltd. v. Kravitz*.²⁵ While its basis has now been modified, its use as a general means to enable a purchaser to recover directly from the manufacturer of a substandard product has been confirmed.

The *Kravitz* decision marks a significant step in the evolution of Quebec jurisprudence in the area of product liability. Its practical importance to the consumer will be somewhat diminished when the relevant provisions of the newly enacted Consumer Protection Act are proclaimed, but it will continue to provide a remedy outside the limited

²¹ See, e.g., *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.*, [1978] 1 All E.R. 525, at 534, [1978] 3 W.L.R. 990, at 998 (C.A. 1977) (leave to appeal to House of Lords granted). See also the observations of Estey J. in *Asamera Oil Corp. v. Sea Oil & Gen. Corp.*, [1979] 1 S.C.R. 633, at 645-47, 5 B.L.R. 225, at 236-38, 89 D.L.R. (3d) 1, at 8-10 (1978).

²² See discussion, *infra* note 145. The situation of the purchaser of farm machinery in Alberta, Saskatchewan, Manitoba and Prince Edward Island is much better: the manufacturer is strictly liable to the purchaser if the machinery is unmerchantable. See, e.g., *The Farm Implements Act*, R.S.A. 1970, c. 136, s. 5, as amended by S.A. 1973, c. 24, s. 4; S.A. 1977, c. 67, s. 5.

²³ See text accompanying notes 46-77 *infra*.

²⁴ See text accompanying notes 78-113 *infra*.

²⁵ *Supra* note 7.

sphere of consumer transactions covered by that Act.²⁶ The decision is also of comparative interest to common lawyers — and of rather more academic importance to residents of the Ottawa region contemplating the purchase of a new car. Since the decision was handed down at a time when the problem it illustrates had begun to receive legislative attention in several provinces,²⁷ it offers a timely opportunity to compare existing regimes and to evaluate newly enacted and proposed changes in the law.

III. GENERAL MOTORS PRODUCTS OF CANADA LTD. v. KRAVITZ

A. *The Facts*²⁸

In January 1968, Leo Kravitz, a Montreal lawyer, took delivery of a new Oldsmobile which he had purchased from Plamondon Chevrolet-Oldsmobile Ltée, an authorized General Motors dealer based in Montreal. The standard form contract of sale which he had signed contained the usual exemption clauses. When he took delivery of the car, he received a copy of the manufacturer's new vehicle warranty. In substance, it provided that the General Motors Company expressly warranted the car to be free of defects in workmanship or material for 24 months or 24,000 miles, whichever occurred first, and limited its obligation during that period to replacing or repairing at its option any parts it was satisfied were defective.

As Kravitz drove the car away from the show-room, he heard a disconcerting rumbling noise and a loud rattle in the front end. The following day, he took the car back to the dealer and complained about these noises. The dealer assured him that the car would be inspected, and that any defects would be repaired. When Kravitz collected the car a few days later, he was told by the dealer that the cause of the trouble had been found and the noises eliminated. But the rattles and the rumbles, later found to stem from a defective front wheel bearing and sagging front springs, which caused the front tires to rub against the inside fenders at low speed, were still there.²⁹ Indeed, they persisted despite at least ten to fifteen further visits to the dealer during the following ten months by which time other equally persistent defects, including an oil leak in a rear brake

²⁶ S.Q. 1978, c. 9. This situation will alter, however, if the proposed revisions to the chapter on Sale of the CIVIL CODE are adopted. See CIVIL CODE REVISION OFFICE, 2 REPORT ON THE QUEBEC CIVIL CODE Book 5 (1977).

²⁷ *Viz.*, Saskatchewan, Ontario, Quebec and New Brunswick. See discussion, *infra* note 145.

²⁸ The Supreme Court decision contains only a brief statement of facts. The expanded account appearing here is taken from the unreported trial judgment, *supra* note 7.

²⁹ "[O]ne gets the feeling that you are driving in a truck instead of a luxury automobile." Letter from Kravitz to the dealer, Sept. 17, 1968, Ex. P-7.

drum, had also become apparent. During this period, Kravitz lost faith in the assurances of the dealer and he complained directly to the regional office of General Motors who told him, in effect, that any problem with the car would have to be resolved through the dealer. By July 1969, Kravitz's patience was at an end and he informed by letter both General Motors and the dealer that he would allow them one last opportunity to cure the defects. He returned the automobile to the dealer who kept it for three weeks. In October 1969, after this last and longest attempt by the dealer to repair the car had failed, Kravitz by registered letter formerly tendered the car — which still had less than 8,000 miles on the odometer — to both the dealer and General Motors and demanded his money back. When this was refused, he returned the automobile to the dealer and, on November 1, 1969, instituted proceedings against both General Motors and the dealer, claiming from the dealer rescission of the contract of sale, and against the dealer and General Motors jointly and severally, reimbursement of the purchase price plus consequential damages.

The action came to trial in August 1973, before Perrault J.

B. *The Case Against the Dealer*

The action by Kravitz against the dealer was a straightforward redhibitory action under article 1530 C.C.³⁰ to cancel the contract for breach of the obligation of legal warranty against undisclosed latent defects binding the dealer under article 1522 C.C. *et seq.*³¹ Kravitz alleged first that the defects complained of were latent defects within the meaning of article 1522 C.C., namely defects which were present when he bought the vehicle and not apparent on ordinary inspection, which rendered the vehicle "unfit for the use for which it was intended or so diminished its usefulness that the buyer would not have bought it, or would not have given it so large a price had he known [of] them".³² Secondly, since the

³⁰ QUEBEC CIVIL CODE (1975).

Art. 1530. L'action rédhibitoire résultant de l'obligation de garantie à raison des vices cachés, doit être intentée avec diligence raisonnable, suivant la nature du vice et suivant l'usage du lieu où la vente s'est faite.

Art. 1530. The redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made.

³¹ For a recent, valuable discussion of the law in this area, see Cayne, *The Buyer's Remedy in Damages for Latent Defects in the Province of Quebec*, 54 CAN. B. REV. 105 (1976). See also the analysis of the problem in the Kravitz case, *supra* note 7, at 796-98, 25 N.R. at 276-77, 303-04.

³² Art. 1522. Le vendeur est tenu de garantir l'acheteur à raison des défauts cachés de la chose vendue et de ses accessoires, qui la rendent impropre à l'usage auquel on la destine ou qui diminuent tellement son utilité que l'acquéreur ne l'aurait pas achetée, ou n'en aurait pas donné si haut prix, s'il les avait connus.

Art. 1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

dealer was a "professional vendor", he was legally presumed to know of the existence of the defects.³³ Therefore, he could not rely on exemption clauses in the contract of sale³⁴ and, in addition to restoring the price of the car plus costs incurred by the purchaser arising out of the sale, as he was bound to do under article 1526 C.C., he was also liable under article 1527 C.C. to pay damages.³⁵ Thirdly, the purchaser had in the circumstances acted with reasonable diligence in bringing the redhibitory action within twelve months in accordance with article 1530 C.C. Judgment was delivered on September 1, 1976. Perrault J. held that Kravitz had established his case. The automobile had serious undisclosed latent defects which justified the rescission of the sale, plus the award of damages, under article 1527 C.C. The dealer was ordered to reimburse Kravitz the purchase price of the car and incidental expenses incurred, and to pay damages for loss of income and inconvenience suffered. His judgment on this aspect of the case was upheld by the Quebec Court of Appeal³⁶ and was not contested further before the Supreme Court.³⁷

From a comparative law standpoint, it is worth noting that Kravitz would probably have fared equally well against the dealer had the cause of action arisen in a common law province. The defects complained of and established by the plaintiff would, either singly or *en masse*, have amounted to a breach of the condition of merchantability or fitness for purpose implied in the contract of sale by the Sale of Goods Act, thus entitling him to cancel the contract, recover the price paid, and receive damages for consequential loss suffered at the moment of rejection. For example, under the Sale of Goods Act, the right to reject for breach of

³³ *Touchette v. Pizzagelli*, [1938] S.C.R. 433, [1938] 3 D.L.R. 721 (1937); *Samson & Filion v. Davie Shipbuilding & Repairing Co.*, [1925] S.C.R. 202, [1925] 2 D.L.R. 856 (1924). For analysis of the jurisprudence, see *Cayne*, *supra* note 31, at 113-16, 123-28.

³⁴ Any doubts as to the irrebuttable nature of the presumption of knowledge of the defects by the professional seller and the consequent invalidity of any exemption clause have been settled by the Supreme Court. *Kravitz*, *supra* note 7, at 799-807, 25 N.R. at 278-86, 303-04.

³⁵ Art. 1526. L'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de se faire rendre une partie du prix suivant évaluation.

Art. 1527. Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix, de tous les dommages-intérêts soufferts par l'acheteur.

Il est tenu de la même manière dans tous les cas où il est légalement présumé connaître les vices de la chose.

See *Dumford, The Redhibitory Action and the Reasonable Diligence of Article 1530 C.C.*, 9 *McGILL L.J.* 16 (1963).

³⁶ *Kravitz*, *supra* note 7 (per Tremblay C.J., Owen & Lajoie JJ.A. concurring).

³⁷ *Kravitz*, *supra* note 7. However, Pratte J. did remark that the evidence relating to the seriousness of the defects was "in many respects far from satisfactory". *Id.* at 795, 25 N.R. at 276, 303.

Art. 1526. The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.

Art. 1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.

He is obliged in like manner in all cases, in which he is legally presumed to know the defects.

condition exists only so long as the defective goods have not been accepted by the purchaser, or in the case of an unconditional contract for the sale of specific goods sold in a deliverable state, when title to the goods passes.³⁸ In situations like *Kravitz*, where the defects are latent and do not become apparent in seriousness or extent until the car has been used, perhaps for some time, the courts ensure that the purchaser will not lose his right to reject until he has had a fair opportunity to discover the defects and make his election.³⁹ Nor will he lose his right to reject if, as in *Kravitz*, he retains the car after becoming aware of the nature of the latent defects in order to give the seller one or more opportunities to cure them. In such circumstances acceptance is regarded as conditional upon satisfactory repair of the defects.⁴⁰ When the contract in *Kravitz* was signed in 1969, the statutory protection in the common law provinces against exemption clauses excluding or limiting the terms implied by the Sale of Goods Act was certainly weaker than in Quebec and, for that matter, is still weaker in some of the provinces today.⁴¹ However, then as now, the courts made liberal use of the doctrine of fundamental breach to overcome exemption clauses in cases similar to *Kravitz*.⁴²

The action by *Kravitz* against the dealer was thus unexceptional in law in Quebec and would have been so in the common law provinces. Had the matter rested there, the decision would hardly have been worthy of note. However, *Kravitz* claimed reimbursement of the price and damages from the manufacturer as well as the dealer, and the suit against the manufacturer, which raises the principal issue of legal importance, took on an added practical significance because by the time the action had come to trial, the dealer had gone out of business.⁴³

C. *The Action Against the Manufacturer*

Kravitz's action against the manufacturer was based on three grounds: (1) a legal warranty against latent defects allegedly owed by the manufacturer under the Civil Code; (2) the conventional warranty given by the manufacturer to the purchaser under the new vehicle warranty; and

³⁸ R.S.O. 1970, c. 421, ss. 12-15; s. 19, Rule 1.

³⁹ See, e.g., *Finlay v. Metro Toyota Ltd.*, 5 B.C.L.R. 137, 82 D.L.R. (3d) 440 (S.C. 1977).

⁴⁰ *Barber v. Inland Truck Sales Ltd.*, 11 D.L.R. (3d) 469 (B.C.S.C. 1970); *Lightburn v. Belmont Sales Ltd.*, 69 W.W.R. 734, 6 D.L.R. (3d) 692 (B.C.S.C. 1969).

⁴¹ At that time, no legislation existed in any of the common law provinces entrenching in the case of consumer sales the implied conditions and warranties in the Sale of Goods Act. Whether *Kravitz* would qualify for protection as a consumer under legislation enacted since 1971 would depend on the purpose for which the automobile was purchased and the province in which the purchase was made. See S. WADDAMS, *supra* note 3, at 296-303.

⁴² *F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd.*, 51 W.W.R. 124, 49 D.L.R. (2d) 670 (Man. C.A. 1965); *Lightburn v. Belmont Sales Ltd.*, *supra* note 40; *Gibbons v. Trapp Motors Ltd.*, 9 D.L.R. (3d) 742 (B.C.S.C. 1970). See also cases cited *supra* note 4, especially *Cain v. Bird Chevrolet-Oldsmobile Ltd.*, where the case law is reviewed.

⁴³ *Factum of Respondent*, at 7 (S.C.C.).

(3) the delict allegedly committed by General Motors by marketing a new car with undisclosed latent defects. His action was successful at first instance and that judgment was unanimously upheld by the Court of Appeal and, some eleven years after he had bought the automobile,⁴⁴ by the Supreme Court of Canada. Kravitz was held entitled to return the defective automobile and recover from General Motors the price he had paid for the car plus consequential damages. The success of his action at first instance and in the Court of Appeal was not surprising for, as already noted, and as will be further examined, the courts in Quebec had already developed an effective remedy against the manufacturer in similar circumstances.⁴⁵ The brief judgments of the Superior Court and the Court of Appeal in favour of Kravitz represented the application of an established line of jurisprudence which had previously been recognized by the Court of Appeal. For the Supreme Court of Canada, however, it was a case of first impression and, while it upheld the right of recourse of the purchaser, it redefined the legal basis of the manufacturer's liability with effects that are not wholly theoretical.

To a common lawyer, what is striking about the *Kravitz* decision is the contrast it provides with the present situation at common law. Kravitz succeeded in his action against the manufacturer at every stage of the proceedings in Quebec, but he would have failed had the facts arisen in any of the common law provinces in 1969. Even today he could only be assured of success in Saskatchewan (and New Brunswick, as of January 1, 1980) where legislative reform has since taken place. To illustrate the contrast, it is proposed, before examining the significance of *Kravitz* in terms of Quebec law, to analyze briefly Kravitz's rights such as they would have been had the action fallen to be decided at common law. This will provide a comparative background for the review of developments in Quebec, the analysis of the Supreme Court decision, and the subsequent discussion of legislative reforms.

1. *The Situation at Common Law*

In Ontario and seven other provinces where the issue is still governed by common law, rules of privity insulate the manufacturer from the contract of sale concluded between the dealer and the purchaser, and thus,

⁴⁴ The long delays — three and a half years for the case to come to trial, a year for trial judgment, three years between the trial judgment and the judgment of the Court of Appeal and a further three years before the Supreme Court judgment was delivered — are deplorable, but unfortunately not exceptional. However, the recent amendments to the CODE OF CIVIL PROCEDURE raising the limits of the monetary jurisdiction of the Small Claims Court to \$6,000 may serve to expedite proceedings in the future. Loi modifiant le Code de Procédure civile. S.Q. 1979, c. 37, s. 8. It generally takes about six months for an action in that court to come to trial. However, with inflation, the car for which Kravitz paid \$3,500 in 1969 would today probably cost more than \$6,000. Total damages would thus exceed the jurisdiction of the Small Claims Court.

⁴⁵ See text accompanying notes 78-113 *infra*.

from any liability under statutory terms relating to quality implied in that contract by Sale of Goods legislation.⁴⁶ The dealer may be described as an "authorized agent" of the manufacturer and may in general commercial terms be so viewed by the general public. However, so far as the substance of the contract of sale is concerned, the dealer is in law the sole principal and the sole vendor.⁴⁷ Any action by Kravitz against the manufacturer based on the retail contract of sale with the dealer would therefore have foundered on the fundamental, if anachronistic, rule of common law — lack of privity.

The same objection would not apply to a second possible means of recourse; a contractual action based on the manufacturer's new vehicle warranty. A preliminary hurdle is to establish the existence of a binding contract between manufacturer and purchaser. This might be difficult if the courts insisted on strict proof of knowledge of the offer or tested the adequacy of the consideration furnished by the purchaser by the standards applied in other areas of contract. However, as Lord Wilberforce observed in *The Eurymedon*,⁴⁸ manufacturers' guarantees are one of those areas of contract where relations between the parties fit uneasily into the marked slots of offer, acceptance and consideration, and, while courts remain committed in theory to this artificial analysis, the result in such cases is usually dictated by commercial realities.⁴⁹ So whatever the theoretical niceties of the question, it may be assumed that the manufacturer's new vehicle warranty in *Kravitz* constituted a binding contract between manufacturer and purchaser. This could be concluded either through the agency of the dealer or by performance of those trivial acts such as completing and returning the warranty or registering the warranty with the dealer, which the court seems willing to accept as sufficient consideration moving from the purchaser in the realm of manufacturer's warranties. Although a contractual document, the manufacturer's new vehicle warranty would be of little value to the purchaser in a case like *Kravitz*. It is not a contract of sale, so it is outside the ambit of the Sale of Goods legislation. Therefore, it contains no statutory terms relating to minimum quality or prescribed remedies as are found in the contract with the dealer.⁵⁰ The express terms of the manufacturer's warranty, which

⁴⁶ See, e.g., *Davis v. Chrysler Canada Ltd.*, 26 N.S.R. (2d) 410 (S.C. 1977); *Chapman v. Seven-Up Sussex Ltd.*, 2 N.B.R. (2d) 909, at 914 (Q.B. 1970) (*per* Dickson J.). See also *International Harvester*, *supra* note 12. A valuable critique of these problems set in the Canadian context can be found in the NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9, at 131-41.

⁴⁷ *International Harvester*, *supra* note 12. BENJAMIN'S SALE OF GOODS 461 (A. Guest ed. 1974).

⁴⁸ *New Zealand Shipping Co. v. A.M. Satterthwaite & Co.*, [1975] A.C. 154, at 167, [1974] 1 All E.R. 1015, at 1020 (P.C.).

⁴⁹ See, e.g., *Fuller v. Ford Motor Co. of Canada*, 22 O.R. (2d) 764 (Cty. Ct. 1978). Sometimes, however, the courts do cling to the artificial rules, at the expense of commercial expediency. See *Trueman v. Maritime Auto & Trailer Sales Ltd.*, 19 N.B.R. (2d) 8, 30 A.P.R. 8 (C.A. 1977); *Reiner v. Custom Motors Ltd.*, 20 N.S.R. (2d) 341 (S.C. 1975).

⁵⁰ This, as the editor of BENJAMIN'S SALE OF GOODS, *supra* note 47, points out, is not always appreciated by the consumer — nor by the courts. See *Ryan Co. v. Crossroads*

ordinarily comprise the entire content of the contract, are not of much use to the purchaser of a lemon, even if honoured to the letter. Indeed, it is usually the inadequacy of these terms that is the source of the purchaser's dissatisfaction. The General Motors new vehicle warranty in *Kravitz* is typical in this respect. It guarantees the vehicle against defects in materials or workmanship for a stipulated period. The manufacturer expressly limits his obligations to making good any defects which developed during that period and excludes liability for any consequential losses. All this amounts to small comfort for the purchaser of a lemon. What the purchaser wants is a reliable new car or his money refunded. What he is promised by the manufacturer are free repairs for a limited period, but no possibility of any exchange, refund or damages to compensate the purchaser for the diminished value of a substandard vehicle. The warranty does not indicate what relief, if any, will be offered if a defect cannot be satisfactorily diagnosed or cured within the warranty period. The terms of the warranty in *Kravitz* do not differ markedly from those of the other principal automobile manufacturers⁵¹ and, while it has since been revised in certain respects, its basic terms and thus, its basic limitations, remain largely unchanged.⁵²

Equipment Co., 16 N.B.R. (2d) 122, at 132 (S.C. 1976); *Thauberger v. Simon Fraser Sales Ltd.*, 3 B.C.L.R. 193 (Small Cl. Ct. 1977).

⁵¹ But one very recent case, in a bold and unorthodox approach to the problem, applied a doctrine akin to fundamental breach called the "lemon law" to overcome the limitations of a manufacturer's warranty. In *Maughan v. Silver's Garage Ltd.*, 6 B.L.R. 303 (N.S.S.C. 1979), Hallett J. awarded substantial damages against the manufacturer to the purchaser of a backhoe, holding that the restrictions on the purchaser's remedies under the manufacturer's express warranty were effective only if the basic undertaking — that the product was free from defects — was complied with in its essential respects.

In my opinion, [the manufacturer's] limited obligation to repair and replace is . . . only effective to limit liability with respect to defects in equipment that can be remedied by repair or replacement The limitation provision in the warranty implies that the backhoe could be effectively repaired; such was not the case. To apply the limitation clause on the facts of the case would be to totally negate the warranty that the backhoe was free from defects, which it clearly was not.

Id. at 322. The persistent failure of the braking and pumping system caused by defective assembly by the manufacturer was such as to amount to a fundamental breach of the warranty.

A manufacturer who warrants a piece of new equipment should not escape liability by a carefully worded clause limiting or excluding liability where the equipment entirely fails to perform. Such a proposition makes common sense to anyone; the rationalizing of the proposition in terms of fundamental breach has become an accepted approach by the Courts to this problem.

Id. at 324. It remains to be seen whether this innovative judgment, which, it should be noted, concerns a commercial and not a consumer transaction, will be followed by other courts. The decision is under appeal.

⁵² See ONTARIO REPORT ON CONSUMER WARRANTIES, *supra* note 9(1), at 82-84. Although the warranty in *Kravitz* was issued in connection with a car sold in Quebec, the same basic document, the North American Warranty, is used in all provinces, and in all States. Certain changes have been made since that time: the duration of the warranty has been reduced from 24 months/24,000 miles to 12 months/20,000 kilometers and the extended warranty on the power train eliminated altogether. The Warranty is now called a "Limited

Although not incorporated by statute, it has been suggested that the implied terms and remedies in the Sale of Goods Act will be judicially implied into manufacturers' warranties by the courts.⁵³ If this were generally the case, the position of the purchaser in the *Kravitz* situation would be considerably strengthened, for the courts would in effect have adopted the principle of the extended warranty extant in some parts of the United States. Unfortunately, judicial support for such a proposition is thin and is based principally on a *dictum* of the Appellate Division of the Alberta Supreme Court in *Traders Finance Co. v. Haley*.⁵⁴ Read in context, both the *dictum* and the case as a whole tend to support the orthodox, if unsatisfactory, position that there are no implied terms of merchantability or fitness for purpose given by the manufacturer to the purchaser unless the manufacturer is also the "seller" of the goods.⁵⁵

In *Traders Finance Co. v. Haley*, a haulage contractor was persuaded to buy from a dealer three Ford trucks by assurances from a Ford representative that the T850 model was the best suited for hauling gravel. However, the trucks proved wholly inadequate to the task and repeatedly broke down. The purchaser sued Ford alleging breach of the implied condition of fitness for purpose under the Sale of Goods Act. At trial, he failed to get relief on this ground, because Manning J. held that Ford was not a party to the contract of sale. However, he awarded damages against Ford for breach of a collateral contract composed of the statements of the Ford representative which in law were express warranties and had induced the purchaser to buy the trucks. The Appellate Division disagreed with this interpretation of the facts and Johnson J.A., delivering judgment for the court, said:

Where, as here, a purchaser goes to a manufacturer, makes known the purpose for which he acquires equipment, is told that specific pieces of equipment

Warranty", in order to comply in the United States with the Federal Magnuson-Moss Warranty Act, Pub. L. No. 93,637, 88 Stat. 2183 (1975), rather than in recognition of its shorter term. The dubious clause which used to make the manufacturer sole judge of the existence of defects covered by the warranty has been deleted, again probably in response to the Magnuson-Moss Act. That clause — if it was ever enforceable at common law (*see* BENJAMIN'S SALE OF GOODS, *supra* note 47, at 466) — might also have run afoul of the Trades Practices legislation in Canada since it is certainly "excessively one-sided in favour of someone other than the supplier". *See, e.g.*, Business Practices Act 1974, S.O. 1974, c. 131, s. 2(b)(v). The overall reduction in the coverage of the basic New Vehicle Warranty offered by the major North American automobile manufacturers has been accompanied by the appearance of an optional extended warranty which the purchaser may acquire from the manufacturer at an extra charge when he buys the new vehicle. The G.M. "Continuous Protection Plan" — which differs little from its competitors — extends the repair or replacement of parts warranty to 36 months/36-50,000 kilometers and covers the cost of renting a temporary replacement car in case of breakdowns.

⁵³ *See* *Thaubergger*, *supra* note 50; *cf.* Tobin, *Products Liability: A United States Commonwealth Comparative Study*, 3 N.Z.U.L.J. 377, at 391-92 (1969).

⁵⁴ 57 D.L.R. (2d) 15 (Alta. C.A. 1966), *varied as to damages sub nom.* Ford Motor Co. of Canada v. Haley, [1967] S.C.R. 437, 62 D.L.R. (2d) 329.

⁵⁵ *Johnson v. Relland Motors (Melfort) Ltd.*, 14 W.W.R. 159, [1955] 2 D.L.R. 418 (Sask. C.A. 1954); *Drury v. Victor Buckland Ltd.*, [1941] 1 All E.R. 269, 85 Sol. J. 117 (C.A.).

shown to him would do the required job, then, notwithstanding who may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion, the seller within the *Sale of Goods Act*.⁵⁶

It should be noted that this was no ordinary transaction between franchised dealer and customer for the purchase of Ford trucks for it seems that Ford had participated in arrangements to enable the plaintiff to acquire trucks at a substantial discount by bypassing its own authorized dealers. To comply with its franchise requirements the deal was put through a Ford agent but no money changed hands and the garage in question appears to have been used as a form of conduit for delivery of the trucks to a non-franchised dealer with whom the conditional sales contract was made. Thus while the trial judge was correct in principle that conditions and warranties implied by the *Sale of Goods Act* apply only to parties to a contract of sale, it is arguable that the Appellate Division was justified on the special facts in holding that Ford was in law the seller. However, it is clear that Johnson J.A. did not intend to alter the general principle and although the *dictum* might conceivably provide a valuable foothold for future judicial reform, it seems more likely that legislation would be required to bring about such a change in the law.

Returning to the *Kravitz* situation, the new vehicle warranty would therefore not have availed *Kravitz* in the common law provinces in 1969, nor would it outside Saskatchewan today. The purchaser of a substandard car seeking to pursue the manufacturer in contract for compensation for his economic loss thus faces a double hurdle at common law. He must establish the existence of a contract over and above that created by the manufacturer's new vehicle warranty. He must also prove that the terms of that contract included an express warranty by the manufacturer that the vehicle is sound and durable. Then he can prove the breach. Where such collateral contracts occur, as in *Traders Finance Co. v. Haley*, they usually consist of statements about the quality of goods found in the promotional material of the manufacturer or made by its representatives, which induce the purchaser to buy the car from a dealer. When their existence can be proved, they constitute an effective means of holding the manufacturer liable to compensate the purchaser in such situations. The device is as old as *Carlill v. Carbolic Smoke Ball Co.*⁵⁷ and valuable as a proven means of overcoming lack of privity.⁵⁸ But reported examples of its use are rare, probably due to the strict requirements of proof,⁵⁹ although

⁵⁶ *Traders Finance*, *supra* note 54, at 18. See also the unreported trial judgment (case on appeal to the Supreme Court (1966), Vol. 1074, at 1115-16).

⁵⁷ [1893] 1 Q.B. 256, [1891-94] All E.R. Rep. 127 (C.A. 1892).

⁵⁸ *Wells (Merstham) Ltd. v. Buckland Sand & Silica Ltd.*, [1965] 2 Q.B. 170, [1964] 1 All E.R. 41 (1963); *Shanklin Pier Ltd. v. Detel Prods. Ltd.*, [1951] 2 K.B. 854, [1951] 2 All E.R. 471; *Brown v. Sheen & Richmond Car Sales Ltd.*, [1950] 1 All E.R. 1102, [1950] W.N. 316 (K.B.).

⁵⁹ *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, 82 L.J.K.B. 245 (H.L. 1912).

there are signs recently that it is coming back into favour.⁶⁰ However, as far as *Kravitz* is concerned, there is nothing in the facts to indicate that the choice of a 1968 Oldsmobile was influenced either by advertisements or statements by a General Motors representative.⁶¹ There was no collateral contract, so this possible avenue of recourse would be unavailable in the *Kravitz* situation.

These difficulties in contract cannot be easily circumvented by suing the manufacturer in tort.⁶² Apart from the fact that the manufacturer may exclude liability in negligence by express words in the manufacturer's guarantee, as was done by General Motors in *Kravitz*,⁶³ putting a defective vehicle into the stream of commerce is not *ipso facto* actionable in tort. Liability in tort depends on proof of negligence, and the conditions for establishing negligence make it unlikely that the purchaser in the *Kravitz* situation could succeed. In the first place, the purchaser must prove that the defects were such as to render the vehicle harmful to life or property — for only then does a duty of care arise — and that they were present when the vehicle left the manufacturer's hands.⁶⁴

The orthodox view is that the protection of tort law does not extend to defective products that are shoddy but not unsafe.⁶⁵ Unless it can be shown that the vehicle was not merely defective but dangerously defective, no duty of care is owed by the manufacturer.⁶⁶ This may not present an insuperable obstacle in a case like *Kravitz*; it should not be too difficult to prove that a vehicle with defects that include a faulty front wheel bearing is

⁶⁰ *Murray v. Sperry Rand Corp.*, 23 O.R. (2d) 456, 5 B.L.R. 254 (H.C. 1979). This case also reviews the English decisions, *supra* note 58.

⁶¹ Thus ruling out any possibility of recovery under Federal or provincial legislation against misleading advertising. See *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 37, as amended by S.C. 1974-75-76, c. 76, s. 18; *The Business Practices Act*, 1974, S.O. 1974, c. 131, s. 2.

⁶² See generally R. CRANSTON, *CONSUMERS AND THE LAW* ch. 5 (1978); J. FLEMING, *THE LAW OF TORTS* 502-15 (5th ed. 1977); A. LINDEN, *CANADIAN TORT LAW* 480-509 (1977); C. MILLER & P. LOVELL, *PRODUCT LIABILITY* Part II (1977); S. WADDAMS, *supra* note 5, ch. 2.

⁶³ One reason for offering an express warranty may be to disclaim liability in negligence. See *Rees, Legal Effect of Manufacturers' Guarantees*, 104 SOL. 879 (1960).

⁶⁴ See *Smith v. Inglis Co.*, 25 N.S.R. (2d) 38, 83 D.L.R. (3d) 215 (C.A. 1978); *Evans v. Triplex Safety Glass Co.*, [1936] 1 All E.R. 283 (K.B.).

⁶⁵ *Dutton v. Bognor Regis U.D.C.*, [1972] 1 Q.B. 373, at 414, [1972] 2 W.L.R. 299, at 329 (C.A. 1971) (*per Stamp L.J.*).

I may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose.

⁶⁶ "I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it; but the duty does not extend to putting out carelessly a defective or useless or valueless thing." *Id.* at 415, [1972] 2 W.L.R. at 329 (*per Stamp L.J.*).

not merely substandard but also unsafe. However, if the problems with the car were such as to render it totally immobile, it could hardly be considered dangerous and, consequently, no duty of care would arise. Secondly, the purchaser must establish that the existence of the defects in question are due to want of reasonable care by the manufacturer.⁶⁷ While the element of fault has been reduced in some cases to virtual strict liability, notably those involving adulterated food or drink,⁶⁸ or products which historically have been recognized as "inherently dangerous things" such as furnaces or fireworks, these instances are still by way of exception in Canada.⁶⁹ Whatever potential hazards they may pose to life and property, defective cars are outside that category of things in respect of which there arises a virtually irrebuttable presumption that defects causing damage are due to the culpable negligence of the manufacturer. As the Ontario Court of Appeal stated in a case concerning a Lincoln Continental with faulty brakes:

Our courts do not, in product liability cases impose on manufacturers, distributors or repairers, as is done in some States of the American union, what is virtually strict liability. The standard of care exacted of them under our law is the duty to use reasonable care in the circumstances and nothing more.⁷⁰

The plaintiff must prove that the defect caused the damage and that the manufacturer was somehow negligent in allowing the defective product to find its way into the chain of distribution.⁷¹ The onus of proof on a plaintiff may be significantly eased, however, by the doctrine of *res ipsa loquitur* which the courts sometimes apply in product liability cases.⁷² The fact that the vehicle in *Kravitz* is still intact should also make it easier to pinpoint the defects and ascribe them to faulty manufacture. Nevertheless, proving that the manufacturer was at fault may in practice still pose difficult problems of factual proof and require the assistance of expert (expensive) witnesses.⁷³

⁶⁷ *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, at 568, 101 L.J.P.C. 119, at 136 (H.L.).

⁶⁸ The standard of care, according to Evans J.A., as he then was, "approximates to and almost becomes an absolute liability" in such cases. *Heimler v. Calvert Catering Ltd.*, 8 O.R. (2d) 1, at 2, 56 D.L.R. (3d) 643, at 644 (C.A. 1975). See also *Mathews v. Coca Cola of Canada Ltd.*, [1944] O.R. 207, [1944] 2 D.L.R. 355 (C.A.); *Arendale v. Canada Bread Co.*, [1941] O.W.N. 69, [1941] 2 D.L.R. 41 (C.A.); *Curll v. Robin Hood Multifoods Ltd.*, 14 N.S.R. (2d) 252, 56 D.L.R. (3d) 129 (S.C. 1974).

⁶⁹ See A. LINDEN, *supra* note 62, at 499-502.

⁷⁰ *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637, at 653, 18 D.L.R. (3d) 641, at 657 (C.A.) (*per* Schroeder J.A.). The purchaser in this case failed, *inter alia*, for lack of proof of negligence.

⁷¹ See *Phillips v. Chrysler Corp.*, [1962] O.R. 375, 32 D.L.R. (2d) 347 (H.C.).

⁷² This is not always the case. See, e.g., *Stewart v. Chrysler Canada Ltd.*, 13 N.B.R. (2d) 53 (Q.B. 1975). Nor is this a panacea to problems of proof. See A. LINDEN, *supra* note 62, at 505-08.

⁷³ "To establish negligence . . . may require knowledge of the manufacturing process, the means of quality control or the system of supply and distribution. Manufacturers will not divulge such information freely." R. CRANSTON, *supra* note 62, at 152.

Thirdly, the loss suffered by the plaintiff must be of a kind recognized by the law of negligence and, as a general rule, pure economic loss is not compensable in the law of tort if the only cause of action is negligence in the manufacture of the product.⁷⁴ If the plaintiff in a case like *Kravitz* succeeds in overcoming the obstacles posed by the first two conditions, he will surely fail here. As Ritchie J., endorsing the prevalent judicial opinion in the United States, stated in *Rivtow Marine*:

[T]he liability for the cost of repairing damages to the defective article itself and for economic loss flowing directly from the negligence is akin to liability under the terms of an express warranty of fitness and if it is contractual in origin it cannot be enforced against the manufacturer by a stranger to the contract.⁷⁵

In other words, tort and contract protect different spheres of interests, and as the law presently stands in Canada, a case like *Kravitz* falls into the gap between the two. An action for compensation for disappointed expectations belongs to the contractual sphere, but if recovery in contract is barred because of lack of privity, the unfortunate consequences cannot be avoided by suing in tort.^{75a} The purchaser's dilemma was recently illustrated in the case of *Ital-Canadian Investments Ltd. v. North Shore Plumbing & Heating Ltd.*⁷⁶ The plaintiff bought from, and had installed by, a dealer gas fueled heating units manufactured by the defendant. The heating units broke down continually and eventually the entire heating system had to be replaced. The plaintiff sued the manufacturer for damages for direct

⁷⁴ See generally Salomon & Feldthusen, *Recovery for Pure Economic Loss: The Exclusionary Rule*, in A. LINDEN, *STUDIES IN CANADIAN TORT LAW* 167 (L. Klar ed. 1977). The major exception is negligent mis-statement where the damage is purely pecuniary in nature. See *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.); cf. *Algoma Truck & Trailer Sales Ltd. v. Bert's Auto Supply Ltd.*, [1968] 2 O.R. 153, 68 D.L.R. (2d) 363 (Dist. C.) *sed quaere*.

⁷⁵ *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, at 1207, 40 D.L.R. (3d) 530, at 541 (1973), endorsing *T.W.A. v. Curtiss-Wright Corp.*, 148 N.Y.S. 2d 284 (1955). See also *Young & Marten Ltd. v. McManus Childs Ltd.*, [1969] 1 A.C. 454, at 469, [1968] 2 All E.R. 1169, at 1174 (H.L.). However, the courts are straining against these artificial boundaries and there are signs in areas other than products liability that the barrier to recovery for pure economic loss caused by negligent acts is giving way. See *dicta* by Lord Denning M.R., in *Dutton v. Bognor Regis*, *supra* note 65, *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] Q.B. 27, at 39, [1972] 3 All E.R. 557, at 564 (C.A.) (*per* Edmund-Davies L.J. dissenting). See also *Anns v. Merton London Borough Council*, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (H.L.); *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"*, 11 A.L.R. 227 (H.C. 1976), discussed in Glass, *Duty to Avoid Economic Loss*, 51 *Aust. L. J.* 372, at 383 (1977). In Canada, see *Yumerovski v. Dani*, 18 O.R. (2d) 700 (Cty Ct. 1977); *Gypsum Carrier Inc. v. The Queen*, 78 D.L.R. (3d) 175 (F.C. Trial D. 1977); *Trappa Holdings Ltd. v. Surrey*, [1978] 6 W.W.R. 545, 95 D.L.R. (3d) 107 (B.C.S.C. 1978). Cf. *Thomas v. Whitehouse*, 24 N.B.R. (2d) 485, 95 D.L.R. (3d) 762 (C.A. 1979).

^{75a} Even if the requirement of privity is satisfied but an action in contract is blocked by an exemption clause, the "independent tort" doctrine may bar any recourse in tort. See *Nunes Diamonds Ltd. v. Dominion Elec. Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

⁷⁶ [1978] 4 W.W.R. 289 (B.C.S.C.). See also *Cane*, *supra* note 16.

economic loss suffered as a result of what the plaintiff claimed was negligence in the manufacture of the heating units. The action was struck out on a preliminary motion that the statement of claim disclosed no cause of action.

There is no contractual relationship, express or implied between the plaintiff and the manufacturer so the plaintiff cannot succeed on this basis. The plaintiff cannot succeed [in negligence] against the defendant for recovery of damages for economic loss where there has been no damage to persons or property.⁷⁷

In sum, had the claim in *Kravitz* been decided today in any of the common law provinces, the result would have been different everywhere except Saskatchewan. The action of contract would have foundered on rules of privity and, even if liability had not been excluded by the manufacturer's new vehicle warranty, an action in negligence would not have succeeded.

2. The Situation in Quebec

Many of the basic legal objections to imposing liability on a manufacturer at common law also hold in an analogous fashion in the civil law of Quebec.⁷⁸ Thus, while the vendor owes the purchaser certain warranties under the Sale provision of the Civil Code, including a legal warranty against latent defects, these apply in principle only between parties to the contract of sale. Article 1023 C.C. provides: "Contracts have effect only between the contracting parties: they cannot affect third parties . . .". There are exceptions to this rule, notably stipulations made

⁷⁷ *Id.* at 291-92. Anderson J. cited the judgment of Ritchie J. in *Rivtow Marine*, *supra* note 75, in support of his conclusion. The action in negligence was also held to be statute-barred. This decision represents the orthodox approach to the law, but there is a recent Ontario County Court decision on point which goes the other way. Relying exclusively on the judgment of Laskin J., as he then was, in the *Rivtow Marine* case, Houston Cty. Ct. J. in *Fuller v. Ford Motor Co. of Canada*, *supra* note 49, held a manufacturer liable in negligence for the cost of repairing a new Ford truck which had veered off the road into a culvert because of a defective axle. Although the courts did not state as much, it can be assumed that this was a defect which rendered the vehicle unsafe as well as shoddy, thus overcoming the initial hurdle of establishing a duty of care. However, Laskin J. was a dissenting judge in the *Rivtow Marine* case and his progressive views on the right to recover the cost of repairing a defective product in order to remove the threat it poses to persons or property or physical damage to the product caused by the defect were not shared by the majority of the Court. The *Fuller* decision is, for this reason, doubtful, although it might possibly be supported on the alternative ground laid down by the court — breach of the manufacturer's warranty. However, if the warranty in question was the standard one, restricted to the replacement or repair of defective parts and excluding other forms of liability, the decision would remain questionable on this ground as well. (See *Johnson v. Relland Motors*, *supra* note 55). The report is too sketchy to arrive at any firm conclusion.

⁷⁸ See Foster, *Products Liability — A Comparative Study*, 3 U.B.C.L. REV. 161 (1968).

for the benefit of third parties,⁷⁹ but in theory, at least, vertical privity is as much an elementary part of the law of sale in Quebec as it is at common law. In principle, therefore, the purchaser of defective goods in Quebec has no direct remedy against the manufacturer under article 1527 C.C., unless the manufacturer of the defective product was also the direct seller, and thus in privity with the purchaser.⁸⁰

Although the manufacturer's warranty constitutes in Quebec a binding innominate contract with a purchaser (a conventional warranty), the same problems arise in principle with regard to the content of that contract as exist at common law. A contract of guarantee is not a contract of sale, and therefore is not subject to the legal warranty provisions in the chapter on Sale of the Civil Code. As a result the contractual obligations of the manufacturer who is not also vendor are in principle limited to those he expressly assumes under the conventional warranty.

Similarly, the ordinary law of delict has not advanced much beyond tort in evolving a general doctrine of product liability.⁸¹ Liability in delict is based on proof of fault, and is, under article 1053 C.C., the primary source of the manufacturer's delictual liability. Fault is not established by proof alone of defects in the manufactured product.⁸² The legal standard to which the manufacturer is bound under article 1053 C.C. is not strict liability or "an obligation of result", but "an obligation of means . . . to take reasonable care and attention which the bon père de famille would ordinarily take so as not to cause damage to his neighbour".⁸³ The conditions for establishing fault under article 1053 C.C. correspond

⁷⁹ *E.g.*, Art. 1029. On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'un contrat que l'on fait pour soi-même, ou d'une donation que l'on fait à un autre. Celui qui fait cette stipulation ne peut plus la révoquer si le tiers a signifié sa volonté d'en profiter.

Art. 1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have [*sic*] signified his assent to it.

To contrast the position at civil law with that at common law, see *Hallé v. Canadian Indemnity Co.*, [1937] S.C.R. 368, [1937] 3 D.L.R. 320, and *Vandepitte v. Preferred Accident Ins. Co. of New York*, [1933] A.C. 70 (P.C. 1932), *aff'g* [1932] S.C.R. 22, [1932] 1 D.L.R. 107 (1931).

⁸⁰ *Gauvin v. Canada Foundries & Forgings Ltd.*, [1964] C.S. 160, at 161; *Legault v. Chateau Paint Works Ltd.*, [1960] C.S. 567, at 571 (1959); *Ferstenfeld v. Kik Co.*, 77 C.S. 165, at 166 (1939); *Heller, Manufacturer's Liability for Defective Products*, 15 MCGILL L. J. 142, at 143-46 (1969); *Baudouin, La responsabilité civile du fabricant en droit québécois*, 8 R. D. U. S. 1, at 3-12 (1977).

⁸¹ See *Foster*, *supra* note 78; *Vukelich*, *supra* note 13.

⁸² Art. 1053. Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.

Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

⁸³ *Crépeau, Liability for Damage Caused by Things*, 40 CAN. B. REV. 222, at 224 (1962). See generally *Côté, La responsabilité du fabricant vendeur non-immédiat en droit québécois*, 35 R. DU B. 3, at 12-27 (1975).

broadly to those required for common law negligence.⁸⁴ Unfortunately, this close parallel also extends certain shared limitations so far as their utility in product liability claims for pure economic loss against the manufacturer of substandard goods is concerned. In particular, on its accepted interpretation, it appears that "fault" under article 1053 C.C. arises only in respect of defective things that are likely to cause "harm to life and property", so that it is doubtful whether an action can lie in delict against the manufacturer of a shoddy but not unsafe product.⁸⁵ In addition, while article 1053 C.C. refers to liability for "damage" without further definition or refinement, damages in delict have traditionally been confined to physical injury or property damage, and have only on occasion been held to include certain kinds of economic loss.⁸⁶ It does not appear to extend generally to pure economic loss in the form of reduction in the pecuniary value of the product which is suffered by the purchaser of a lemon.

Nevertheless, the purchaser in Quebec has fared rather better than his Ontario counterpart, for the Quebec courts, departing when necessary from traditional principles, have displayed considerable ingenuity in devising a just solution to the problem at hand. In a series of controversial cases, most of which have involved consumers and defective automobiles, the manufacturer has been held jointly and severally liable to compensate the purchaser for pure economic loss. A variety of judicial techniques have been used to justify the result in the particular cases, but if the controversial line of jurisprudence which has emerged has been effective to provide a remedy in individual cases, it suffers from certain basic weaknesses that reflect its ad hoc origins, particularly as regards the source and juridical nature of the manufacturer's obligation.⁸⁷ Three such cases

⁸⁴ See Foster, *supra* note 78; Vukelich, *supra* note 13. See also Cohen v. Coca Cola Ltd., [1967] S.C.R. 469, 62 D.L.R. (2d) 285; Masoud v. Modern Motor Sales Ltd., [1951] R.L. 193 (K.B. 1950), *aff'd* without stated reasons [1953] S.C.R. 82; Cie F.-X. Drolet v. London & Lancashire Guarantee & Accident Co. of Canada, [1943] B.R. 511, *aff'd* [1944] S.C.R. 82, [1944] 1 D.L.R. 561.

⁸⁵ "On peut fabriquer et vendre tant que l'on voudra des objets défectueux pourvu évidemment qu'ils ne soient pas dangereux." Monsanto Oakville Ltd. v. Dominion Textile Co., [1965] B.R. 449, at 451 (1964) (*per* Tremblay C.J.). The manufacturer owes "a duty to take reasonable care that the products which he manufactures and issues to the public are free from defects which are likely to cause harm to the life or property of the ultimate user, with whom he stands in no contractual relationship." Cie F.-X. Drolet, *supra* note 84, at 517 (*per* McDougall J.).

⁸⁶ *E.g.*, Doucet v. Canadian General Electric Co., [1975] R.L. 157 (C.P.).

⁸⁷ Gougeon v. Peugeot Canada Ltée, [1973] C.A. 824; Lavoie v. C.R.S. Caravane Ltée, [1976] C.S. 611; Létourneau v. Beupré Autos Ltée, [1976] C.S. 1820; Lachance v. Gravel, [1976] C.S. 785; Desaulniers v. Ford Motor Co. of Canada, [1976] C.S. 1609; Fleury v. Fiat Motors of Canada Ltée (unreported, Que. C.S. Sept. 10, 1975, no. 05-005217-748); Gagnon v. Ford Motor Co. of Canada, [1974] C.S. 422; Bertrand Godbout Inc. v. John Deere Ltd., [1972] C.S. 380 (1970); Mathieu v. Les Grands Garages de Québec Ltée & Peugeot Canada Ltée (unreported, Que. C.S. Sept. 28, 1971, no. 813.663-73); Duhamel v. Lanrol Motors (1960) & Chrysler Canada Ltd. (unreported, Que. C.S. May 5, 1971, no. 704-669); Rioux v. G.M. Prods. of Canada Ltd., [1971] C.S. 828 (1970); Lazanik v. Ford Motor Co. of Canada (unreported, Que. C.S. June 15, 1965, no.

may be briefly examined to illustrate the variety of means used by the courts and the inherent weaknesses of the resulting jurisprudence.

In *Lazanik v. Ford Motor Co. of Canada*,⁸⁸ one of the earliest Superior Court decisions on point, the manufacturer of a 1963 Galaxie 500 which had a defective transmission, clutch, differential and generator and which had to be repaired on at least twenty occasions during a six-month period, was held jointly and severally liable with the dealer to reimburse the price of the car plus consequential damages for economic loss suffered by the purchaser. The source of the dealer's liability was clear: it arose from the redhibitory action to cancel the contract of sale for breach of the legal warranty against latent defects owed to the purchaser under article 1522 C.C. The manufacturer's liability was also said to stem *ex contractu* from a legal warranty against latent defects owed by the manufacturer. But the source of this obligation is not at all clear.

The action must be maintained also against Ford Motor Company because it is bound as the manufacturer of the defective automobile to legal warranty just as is the vendor, and the two are bound jointly and severally. This may be seen in the judgment of the Supreme Court of Canada in *Ross v. Dunstall*, [1921] *sic* 62 S.C.R. 393 at page 419.⁸⁹

In the above passage which contains virtually all that was said in the judgment about the liability of the manufacturer, Challies A.C.J. attributes the source of the legal warranty binding the manufacturer to a passage from the judgment of Mignault J. in *Ross v. Dunstall*. However, the passage in question deals with the situation of the manufacturer acting as direct seller.⁹⁰ In that case, of course, the manufacturer *qua* vendor would owe the retail purchaser a warranty against latent defects under article 1522 C.C. But there is nothing in that passage nor indeed in the rest of Mignault J.'s judgment to support the entirely different proposition for which it was apparently cited by Challies A.C.J.; namely, that a manufacturer owes the retail purchaser a legal warranty against latent defects, notwithstanding that he is not a direct vendor and, therefore, not a party to the contract of sale.⁹¹ Indeed, as Mignault J. made clear, outside the contractual link the

623-504); *Danson v. Château Motors Ltd.*, [1976] C.P. 247; *Insurance Co. of N. America v. G.M. of Canada Ltd.* (unreported, Que. Prov. Ct. 1974, no. 02-066.523-72). See Baudouin, *supra* note 80; Cayne, *supra* note 31; Côté, *supra* note 83, at 8-11; Larouche, *Droit des obligations*, 9 R. GÉN. 73, at 112-15 (1978); Perret, *La garantie du manufacturier: récents développements et perspectives futures en droit québécois*, 10 R. GÉN. 156 (1979); Tancelin, Comment, *Responsabilité directe du fabricant vis-à-vis du consommateur*, 52 CAN. B. REV. 90 (1974).

⁸⁸ *Supra* note 87.

⁸⁹ *Id.* at 14.

⁹⁰ *Ross v. Dunstall*, 62 S.C.R. 393, at 419, 63 D.L.R. 63, at 79-80 (1921). See the analysis by Cayne, *supra* note 31, at 119-20.

⁹¹ "La cour se basait . . . sur une interprétation erronée de l'arrêt *Ross* auquel elle donnait une portée de beaucoup plus large." Baudouin, *supra* note 80, at 10. Moreover, as Professor Cayne has pointed out in an incisive analysis of the cases:

It is . . . curious that the opinion . . . which added nothing, either by way of reason or authority to support the central contention, did not even refer to the

plaintiff must rely on delict. Since delict was the basis on which the plaintiff's action was upheld in that case, Mignault J.'s observations on contract, even if they were apposite, which they were not, suffer from the further weakness that they were all *obiter dicta*. The source of the legal warranty binding the manufacturer is obscure but if, as it would seem, it is the warranty owed by the dealer in the retail contract of sale, the purchaser was purporting to exercise against the manufacturer a right created by a contract of sale, to which the manufacturer was not a party, in respect of an obligation he has never owed. Such an analysis is in direct conflict with articles 1522 and 1527 C.C. and cannot be reconciled with any of the recognized exceptions to article 1023 C.C. Thus, however desirable the result, there is force in the criticism of one commentator that as a legal manoeuvre, it represents a "crude and analytically unsupportable departure from a basic tenet of contractual responsibility".⁹²

Another controversial aspect of Chailles A.C.J.'s judgment concerns the extent to which a manufacturer could by conventional warranty limit his liability to the retail purchaser in respect of the latent defects. If the legal warranty against latent defects, which binds the manufacturer whatever its source, corresponds in kind to that binding the retailer, it is difficult to see how the manufacturer as a "professional" could limit his liability for latent defects any more than the professional dealer can. Yet in *Lazanik*, Chailles A.C.J. intimated that such a limitation by the manufacturer might well be effective, although since Ford did not rely on any written guarantee limiting its liability for latent defects, the point did not arise in the case before him.⁹³

In *Gougeon v. Peugeot Canada Ltée*,⁹⁴ the first Court of Appeal decision to consider the manufacturer's liability to the purchaser of a lemon, the manufacturer was ordered to compensate the purchaser of a defective Peugeot which suffered from recurrent mechanical problems of the same order as those of the Ford Galaxie in *Lazanik*. There too the basis of the manufacturer's liability was, it seems, a legal warranty against latent defects, but unlike *Lazanik*, the contractual framework for that warranty was, at least in the opinion of one judge,⁹⁵ the conventional warranty rather than the retail contract of sale.

In view of the apparent divergence between the two principal judgments and the paucity of legal analysis, it is difficult to extract any

judgment of Anglin J. in *Ross*. Of the six judges in the *Ross* case, he alone held that the remedy of Art. 1527 is available to non-contracting parties. Although the statement was merely a dictum, and although Anglin J. cited no doctrine upon which the codifiers relied when drafting the article, it is surprising that . . . Chailles . . . [did not even mention] this sole, although weak and isolated source of support to lend credibility to an otherwise novel assertion.

Supra note 31, at 120.

⁹² Cayne, *supra* note 31, at 120. See also, Baudouin, *supra* note 80, at 11.

⁹³ *Lazanik*, *supra* note 87, at 14.

⁹⁴ *Supra* note 87.

⁹⁵ *Gougeon*, *supra* note 87, at 824 (*per* Deschênes J.A.).

firm conclusions about the juridical nature and source of the manufacturer's obligation.⁹⁶ No doubt the formulation of the remedy in *Gougeon* was influenced by the unusual course of the proceedings followed. Instead of promptly instituting actions against both dealer and manufacturer, the purchaser initially sued only the manufacturer on the conventional warranty (the manufacturer's new vehicle warranty) and it was not until some two years after the car had been purchased that she brought a redhibitory action against the dealer. Viewed in isolation, the right to bring a redhibitory action against the dealer had by that time been lost by prescription. Under article 1530 C.C., a redhibitory action must be brought with "reasonable diligence" from the time the defects become apparent, and two years was held to be too long a delay. But if, as *Lazanik* has held, the manufacturer and the dealer were jointly bound by a legal warranty that the automobile was free from undisclosed latent defects, then the action brought so promptly against the manufacturer would have also interrupted the period of prescription running against the dealer, for under article 2231 C.C.: "An act which interrupts prescription by one of joint and several debtors interrupts it with regard to all." The redhibitory action instituted against the dealer could then be maintained in *Gougeon* since, in law, the delay in suing the dealer is considered no greater than that in proceeding against the manufacturer.⁹⁷

The action against the manufacturer in *Gougeon* did succeed, although the precise legal grounds are difficult to determine. Kaufman J.A., who delivered one of the two judgments of the court, seems to have resolved the issue by applying *Lazanik* and to that extent, his judgment suffers from the same weaknesses as that decision.⁹⁸ Deschênes J.A. adopted a different theoretical approach, for although he too held that the basis of the manufacturer's liability was a legal warranty against latent defects, the contractual framework for that manufacturer's obligation was the conventional warranty, an independent innominate contract between the manufacturer and purchaser. In effect, he superimposed on that contract a legal warranty against latent defects.⁹⁹ This technique is not open to all the same objections as that implied in *Lazanik* for the manufacturer is at least a party to the contract under which his contractual liability arises. It also answers one question left open by *Challies A.C.J.*: the legal warranty cannot be limited or excluded by the terms of a conventional warranty. But Deschênes J.A.'s analysis has problems of its

⁹⁶ See Baudouin, *supra* note 80; Tancelin, *supra* note 87. Subsequent cases have also differed about the source of the manufacturer's obligation: e.g., *Kravitz*, *supra* note 7 (contract); *Lavoie*, *supra* note 87 (delict).

⁹⁷ La clé du litige, c'est donc le mérite de l'action contre Peugeot. Valable, elle a interrompu la prescription contre Bellehumeur et les deux intimés doivent être condamnés; au cas contraire, Peugeot et, par voie de conséquence nécessaire, Bellehumeur doivent être exonérés.

Gougeon, *supra* note 87, at 825 (*per* Deschênes J.A.).

⁹⁸ *Id.* at 829-30. See also Côté, *supra* note 83, at 10-11.

⁹⁹ *Gougeon*, *supra* note 87, at 824-25.

own. As was pointed out earlier, the legal warranty against latent defects is, under the Civil Code, applicable only to contracts of sale. A conventional warranty is not a contract of sale, so the extension apparently envisaged by Deschênes J.A. is certainly novel and of dubious legal validity.¹⁰⁰

Secondly, if the contractual liability of the manufacturer for latent defects to the purchaser is tied to the existence of a conventional warranty, the resulting doctrine would be narrower in scope than the solution proposed by Kaufman J.A. It could not, for example, be used to impose liability on a manufacturer who chose not to offer a conventional warranty with the goods. However, as already noted, the remedy in these cases tends to be an ad hoc response to the particular circumstances. In the absence of a conventional warranty, the manufacturer's obligation would, no doubt, be drawn from another source.¹⁰¹ Moreover, the solution advanced by Deschênes J.A. is not itself necessarily or indissolubly linked to the conventional warranty for he also expressly agreed with the reasoning behind the conclusions of Kaufman J.A.¹⁰² The third member of the court, Beetz J.A.,¹⁰³ and this, as much as anything else, makes it difficult to draw from the decision any firm conclusions as to the precise nature of the manufacturer's obligation. The legal basis of the doctrine is indeed "vague and ill-defined".¹⁰⁴

A further weakness affecting both judgments concerns the nature of the award against Peugeot. Since both the dealer and Peugeot were held liable on a legal warranty against latent defects, albeit perhaps arising from different sources as this was a commercial matter, their liability was *in solidum* under article 1105 C.C.¹⁰⁵ But as Deschênes J.A. observed, the

¹⁰⁰ "Se baser . . . sur l'existence de la garantie *conventionnelle* du fabricant pour lui appliquer les dispositions de la loi concernant la garantie *légale* du vendeur est illogique et contraire à l'esprit même des textes." Baudouin, *supra* note 80, at 11.

¹⁰¹ As it was in *Lavoie*, *supra* note 87 (delict), which is discussed *infra*.

¹⁰² *Supra* note 87, at 825-26.

¹⁰³ *Id.* at 832.

¹⁰⁴ Cayne, *supra* note 31, at 120.

¹⁰⁵ Art. 1104. L'obligation peut être solidaire quoique l'un des codébiteurs soit obligé différemment des autres à l'accomplissement de la même chose: par exemple, si l'un est obligé conditionnellement, tandis que l'engagement de l'autre est pur et simple; ou s'il est donné à l'un un terme qui n'est pas accordé à l'autre.

Art. 1105. La solidarité ne se présume pas; il faut qu'elle soit expressément stipulée.

Cette règle cesse dans les cas où la solidarité a lieu de plein droit en vertu d'une disposition de la loi.

Elle ne s'applique pas non plus aux affaires de commerce, dans lesquelles l'ob-

Art. 1104. An obligation may be joint and several although one of the co-debtors be obliged differently from the others to the performance of the same thing; for example, if one be obliged conditionally while the obligation of the other is pure and simple, or if one be allowed a term which is not granted to the other.

Art. 1105. An obligation is not presumed to be joint and several; it must be expressly declared to be so.

This rule does not prevail in cases where a joint and several obligation arises of right by virtue of some provision of law.

Nor is it applicable to commercial transactions, in which the obligation is

manufacturer could not be jointly liable with the dealer to restore the cost of the car as the dealer was bound to do under the redhibitory action since Peugeot had never received the price from the plaintiff. However, he said, "[R]ien ne l'empêchait [la Cour] d'évaluer à un montant équivalent à ce prix les dommages que lui avait causés l'impéritie du manufacturier."¹⁰⁶ This award of damages against the manufacturer in an amount equal to the price is in its own way as questionable as an order against Peugeot to refund the price for, under article 1526 C.C.,¹⁰⁷ the obligation of the vendor to reimburse the price paid the purchaser is dependent on the surrender of the defective product. Peugeot's liability in damages was not linked to such a condition and would have been greater than the supposed joint liability of the dealer, a problem which was taken up by the Supreme Court of Canada in *Kravitz*.¹⁰⁸ Notwithstanding their inherent weaknesses, the solutions devised by the courts in *Lazanik* and *Gougeon* have been applied in a number of cases, and formed the basis of decision in *Kravitz* at first instance and in the Court of Appeal.¹⁰⁹

The liability of the manufacturer has so far been regarded as contractual in nature, although the basis for such formulation differs among judgments. However, according to some cases, the manufacturer's obligation arises in delict. For example, in *Lavoie v. C.R.S. Caravane Ltée*,¹¹⁰ the purchaser brought an action against the seller and the manufacturer of a trailer, claiming rescission of the sale for latent defects and damages consisting of the purchase price plus a certain additional sum for inconvenience. The latent defects in question were essentially that the trailer was leaky, and this was proved to the satisfaction of the court. The dealer was ordered to reimburse the purchase price and to pay some \$200 in damages for inconvenience under article 1527 C.C. since the vendor as a professional seller was presumed to be aware of the latent defects affecting the trailer. The court also upheld the action against the manufacturer. Although there was in this case no conventional warranty given by the manufacturer to the purchaser, the plaintiff could, neverthe-

ligation est présumée solidaire, excepté dans les cas régis différemment par des lois spéciales.

¹⁰⁶ *Gougeon*, *supra* note 87, at 825.

¹⁰⁷ Art. 1526. L'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de se faire rendre une partie du prix suivant évaluation.

¹⁰⁸ See text accompanying notes 117-26 *infra*.

¹⁰⁹ In *Kravitz*, the Court of Appeal disposed of the manufacturer's appeal against liability thus:

[L]a responsabilité du fabricant dans le cas de vente d'une automobile affectée de défauts cachés fut étudiée par notre Cour dans l'arrêt récent et unanime *Dame Gougeon v. Peugeot Canada Limitée et al.* . . . et résolue dans un sens favorable à l'acheteur. Je ne crois pas opportun de réouvrir la discussion.

Supra note 7 (*per* Tremblay C.J., Owen & Lavoie J.J.A. concurring).

¹¹⁰ *Supra* note 87. See also Larouche, *supra* note 87, at 112-15.

presumed to be joint and several, except in cases otherwise regulated by special laws.

Art. 1526. The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.

less, sue the manufacturer in delict under article 1053 C.C. and recover damages. The judge referred to the judgment of Deschênes J.A. in *Gougeon* without, however, showing how that case supported the existence of a delictual action against the manufacturer. He concluded that in the absence of contradictory evidence, it appeared that the trailer "n'était pas construite selon les règles de l'art et la défenderesse Roulotte Carmen Inc., qui était fabricante de cet objet savait ou devait savoir qu'il présentait des défauts de fabrication".¹¹¹ raising a presumption of fact that the defects were due to "faute" by the manufacturer. The plaintiff was entitled to damages for foreseeable losses resulting from such negligence, which were assessed as the purchase price paid by the plaintiff for the defective trailer. The result was then identical to that in *Gougeon*; the liability of the defendants was *in solidum*, but the basis of their respective liabilities was different.¹¹²

General Motors Products of Canada Ltd. v. Kravitz was therefore something of a test case. When it came up in February 1978, the Supreme Court of Canada had to consider for the first time a legal doctrine composed of several strands which, though laudable in its aims and reasonably effective if judged by its results, was seriously deficient from a technical standpoint. It had effectively overcome certain archaic aspects of the law which blocked the way of a purchaser seeking compensation from a manufacturer of a substandard product for defects of its creation resulting in pure economic loss to the purchaser. Evaluated in terms of social policy, these decisions had achieved much that, in other jurisdictions, still awaited legislative reform. In purely legal terms, however, the legal doctrine was analytically weak in a number of important respects.

C. The Supreme Court of Canada Decision in *Kravitz*

In the Supreme Court of Canada, the action was based on the same three grounds as in the courts below, namely the legal warranty against latent defects, a conventional warranty given by the manufacturer, and delictual liability arising from the act of putting into the stream of commerce a defective substandard automobile. However, since the claim based on the legal warranty against latent defects was upheld, the Court found it unnecessary to consider the remaining grounds. There are indications, though, at least in the case of the claim in delict, that they would not have succeeded.¹¹³

Pratte J. who delivered judgment for the Court, noted that in Canada, the right of a remote purchaser to sue the manufacturer for breach of a legal

¹¹¹ *Lavoie*, *supra* note 87, at 612.

¹¹² Contrast this result with that in the common law case of *Trueman v. Maritime Auto & Trailer Sales Ltd.*, 19 N.B.R. (2d) 8 (C.A. 1977), which involved identical complaints about a similar trailer. The plaintiff failed in his contractual claim against the manufacturer for, *inter alia*, lack of privity.

¹¹³ *Kravitz*, *supra* note 7, at 818, 25 N.R. at 297, 325-26.

warranty against latent defects had never been decided by the Supreme Court. In France, the purchaser has such an action — the *action directe en garantie*. Certain *dicta* by Anglin J. in the Supreme Court's decision of *Ross v. Dunstall*¹¹⁴ lent support to the existence of a similar right of action in Canada, but, as Pratte J. observed, since Anglin J.'s observations were delivered in the context of a delictual action based on article 1053 C.C., they could not be relied upon as the source of any action *ex contractu* against the manufacturer for breach of a legal warranty against latent defects.¹¹⁵

Thus, Pratte J. impliedly rejected *Lazanik*, *Gougeon* and the controversial remedy developed in those cases so far as it was founded on *dicta* in *Ross v. Dunstall*. But he continued, “[n]evertheless, in my view, Anglin, J.’s opinion is correct. I think that we must acknowledge the existence of a direct remedy in warranty by a subsequent purchaser against the original seller.”¹¹⁶ If in Quebec the purchaser of a defective automobile were to have a direct right of action for economic loss against the manufacturer as well as the retailer, a new legal basis for that recourse would have to be laid. Drawing extensively on French doctrine and jurisprudence, that is precisely what the learned judge proceeded to do.

There were, he noted, two contracts of sale in the *Kravitz* situation, (1) the wholesale contract between the manufacturer and the dealer under which the defective vehicle was sold to the dealer, and (2) the subsequent retail contract between the dealer and Kravitz. Whereas earlier cases had concentrated on the retail contract and had attempted to spell out a right of action against the manufacturer for breach of the legal warranty against latent defects contained in the retail contract of sale, the Supreme Court now rejected that remedy. Pratte J. focused his attention on the contract between the manufacturer and the retailer. Under that contract, General Motors, as vendor, owed a legal warranty to the dealer, as purchaser, that the vehicle was free from any undisclosed latent defects. General Motors was a professional vendor, albeit selling to a professional purchaser, and was conclusively presumed to be aware of any undisclosed latent defects, so any attempt to limit or exclude that warranty by the terms of their contract would be ineffective.

By selling to the dealer the defective car that was subsequently bought by Kravitz, the manufacturer was in breach of its legal warranty against latent defects, thereby entitling the dealer to bring a redhibitory action to rescind the contract and recover the price plus damages. The warranty owed to the dealer, Pratte J. held, was an accessory to the thing sold and

¹¹⁴ *Supra* note 90, at 400-01, 63 D.L.R. at 67.

¹¹⁵ *Kravitz*, *supra* note 7, at 813, 25 N.R. at 292, 320. Pratte J. did suggest that “in the appropriate circumstances”, the remote purchaser might, by subrogation, bring a redhibitory action and a claim for damages against a manufacturer in breach of his legal warranty against latent defects owed to the dealer. However, he did not indicate what these circumstances might be, nor upon which article of the CIVIL CODE such an action could be based.

¹¹⁶ *Id.* at 813, 25 N.R. at 292, 320.

was automatically transferred, together with the defective car, by the dealer to Kravitz under the retail contract of sale.

A claim in warranty against latent defects is not one that is personal to the purchaser in the sense that he is entitled to it *intuitu personae*; the purchaser is entitled to it as the owner of a thing. As we have seen, it is a claim that is tied to the thing to which it relates. It is therefore transferred to the successor by a particular title at the same time as the thing itself in that the initial seller is liable on it to any purchaser of a thing sold.¹¹⁷

So Kravitz, when he purchased the automobile from the dealer, received in addition to the dealer's legal warranty that the car was free of undisclosed latent defects, the benefit of the legal warranty against undisclosed latent defects owed by the manufacturer to the dealer under the wholesale contract of sale. Pratte J. put it succinctly: "When he purchased the automobile [from the dealer, Kravitz] thereby became the creditor of G.M.'s warranty against latent defects."¹¹⁸

Thus, Kravitz had not only a right of action *ex contractu* against the dealer to rescind the contract and recover damages for breach of article 1527 C.C., but as creditor of a dealer's right to sue the manufacturer for breach of the legal warranty against latent defects in their contract of sale, he had a similar right of action directly against the manufacturer. The nature of the recourse against the manufacturer was summarized as follows:

[W]hen a subpurchaser acquires ownership of the thing he becomes creditor of the legal warranty against latent defects owed by the first seller to the first purchaser. As we know such a claim has two main objects, the first is the cancellation of the sale and the second is payment of damages. Hence the claim transferred to the subpurchaser includes both the right to cancel the sale made by the first seller to the first purchaser and the right to the damages. The claim is transferred to the subpurchaser in its entirety . . .¹¹⁹

Pratte J. went on to clarify two further aspects of the subpurchaser's direct action against the manufacturer. First, since the subpurchaser's rights against the manufacturer were derived from the contract between the dealer and the manufacturer, it followed that in order to recover from the manufacturer he would have to take the necessary steps to rescind the contract between the manufacturer and the dealer. To do this, he had to return or at least tender the defective vehicle to General Motors for, in redhibitory action, "the seller's obligation to reimburse the price is dependent on the return of the thing sold".¹²⁰ As the judgment makes clear, it is neither necessary nor sufficient for the subpurchaser to take steps to cancel his contract with the dealer in order to avail himself of the right of action against the manufacturer he now has by virtue of the Supreme Court's decision. The Court held on the facts that Kravitz had

¹¹⁷ *Id.* at 813, 25 N.R. at 293, 320-21.

¹¹⁸ *Id.* at 816, 25 N.R. at 296, 324.

¹¹⁹ *Id.* at 813-14, 25 N.R. at 293, 321.

¹²⁰ *Id.* at 814, 25 N.R. at 294, 322.

taken the necessary steps to cancel the contract between General Motors and the dealer, as well as his retail contract with the dealer.¹²¹

Secondly, the price to be restored by the dealer under the redhibitory action instituted by the retail purchaser will be the wholesale price paid by the dealer to the manufacturer. This follows from the derivative nature of the purchaser's claim. As Pratte J. stated:

[T]he price that is thus subject to be reimbursed is that of the sale that is cancelled, namely the price of the first sale. Indeed, it is difficult to see how the first seller could be required to return something he did not receive. When the price of the second sale (retail price) is higher than that of the first sale (wholesale price), the sub-purchaser cannot obtain more than the wholesale price as reimbursement.¹²²

However, this does not mean that the purchaser who paid the dealer the retail price will be out of pocket. As a professional vendor, the manufacturer is presumed to be aware of the existence of the defects and, in addition to restoring the price of the good, is therefore liable to pay damages under article 1527 C.C. To the question of whether the difference between the wholesale price and the retail price can be recovered from the manufacturer as damages under article 1527 C.C., Pratte J. replied:

In my view there is no doubt that the answer must be in the affirmative; this is a profit that the retailer has lost because of the cancellation of the sale and which he is entitled to claim from the first seller as damages.¹²³

Similarly, General Motors was liable for consequential damages suffered by Kravitz. Thus, the extent of its liability, if not the source, was identical with that found by the courts below.¹²⁴

One of the principal arguments raised by General Motors against the existence of legal liability to the remote purchaser was that to extend the benefit of the legal warranty against latent defects created under the manufacturer's contract of sale to the retail purchaser would conflict with article 1023 C.C. and with the rule that contracts take effect only between the contracting parties — the civil law equivalent of privity of contract. Pratte J., however, took a robust view of the scope of article 1023 C.C.:

[T]he principle of the relative effect of contracts is not contrary to the recognition of a direct action in warranty. This principle is not as absolute in the civil law as it is in other legal systems, and to deny the transfer of the claim in warranty against latent defects to the sub-purchaser of the thing would be to attribute to this principle a rigour that is inconsistent with the principles of the

¹²¹ Tender of the automobile had been made by letter to both the dealer and the manufacturer, and while Kravitz had returned the car to the dealer shortly before instituting suit, it was in G.M.'s possession at the time of the hearing. If the pleadings were not perfectly drafted on the point, that was purely a question of form and no objection was raised by G.M. *Id.* at 820, 25 N.R. at 299, 327-28.

¹²² *Id.* at 815, 25 N.R. at 294, 322.

¹²³ *Id.* at 815, 25 N.R. at 294, 322.

¹²⁴ This was a liability *in solidum* with the dealer under article 1105 C.C. *Id.* at 821, 25 N.R. at 300, 328.

Code. Also, such an approach to the law of obligations would be too individualistic and ill-suited to present-day realities.¹²⁵

Article 1023 C.C. is therefore, by its terms, subject to certain exceptions, including an exception for rights closely identified with or accessory to the thing transferred.

Where an obligation is identified with the thing transferred or is the accessory thereof, the successor by a particular title of the first seller is not regarded as a third party and it is considered normal that he be automatically substituted for the previous creditor of such obligation. . . .

The warranty against latent defects, like the warranty against eviction, is clearly an accessory of the thing sold.¹²⁶

In the result, therefore, the Supreme Court upheld the award of the lower courts, but shifted its basis to new grounds. But how firm is the ground on which the purchaser's remedy now rests? In France, the purchaser's right to sue the manufacturer directly for breach of the legal warranty against latent defects, the *action directe en garantie*, is well established.¹²⁷ However, it is recognized to be very much a praetorian remedy, "[une] solution [qui] semble s'imposer par sa commodité",¹²⁸ which fits uneasily into any of the orthodox exceptions to the principle that contractual rights take effect only between parties to the contract. As a result, courts and commentators have differed about the theoretical foundation of the *action directe en garantie* as a transmissible right to subsequent purchasers, without, however, disputing its legitimacy as a means of recourse to them. The notion of the legal warranty as a *droit accessoire du produit* which accompanies the product along the chain of distribution is one of at least three theoretical justifications for the *action directe en garantie* advanced by writers, none of which is wholly convincing. These were recently summarized as follows:

Pour certains auteurs, l'action en garantie serait transmise aux acquéreurs successifs à titre d'*accessoire du produit*. Pour d'autres, cette transmission de l'action serait la conséquence d'une *manifestation de volonté tacite*, dont, il faut bien le dire, la constatation n'est pas toujours dépourvue de quelque artifice. Les uns expliquent ainsi l'action directe du sous-acquéreur par une *stipulation pour autrui*. Les autres en font la conséquence d'une *cession de créance tacite*.

Ces diverses explications ont été présentées par certains comme également bonnes, par d'autres comme également mauvaises.

¹²⁵ *Id.* at 813, 25 N.R. at 293, 321.

¹²⁶ *Id.* at 809, 25 N.R. at 289, 316-17.

¹²⁷ Pratte, J., in his judgment, discusses in detail the French *jurisprudence* and *doctrine* in point. *Id.* at 807-16, 25 N.R. at 286-96, 314-24. He rejected as "ill-founded" the recent and controversial limitation imposed by the Court of Cassation, Cass. comm. 27 fév. 1973, Bull. 1973. IV. no. 105, at 89, which allows the subpurchaser a right against the manufacturer to recover damages but not to rescind the contract. *Supra* note 7, at 813-14, 25 N.R. at 293-94, 321-22.

¹²⁸ Ghestin, *L'application des règles spécifiques de la vente à la responsabilité des fabricants et distributeurs de produits en droit français*, in LA RESPONSABILITÉ DES FABRICANTS ET DISTRIBUTEURS 65 (Colloque, Université de Paris I 1975).

De fait, la référence à la notion d'accessoire peut apparaître comme une pétition de principe. Quant à la manifestation de volonté tacite, elle n'est guère satisfaisante; l'existence d'une stipulation pour autrui n'est pas toujours vraisemblable, et la cession de créance peut n'être pas voulue par le créancier initial de l'obligation de garantie.¹²⁹

In Quebec, the *action directe en garantie*, as has been seen, made certain headway in the courts in various guises, but although it provided a valuable means of recourse to the purchaser of shoddy goods against the manufacturer, it was unsatisfactory as a legal doctrine because it conflicted baldly with several positions of the Civil Code. The notion of the legal warranty binding the manufacturer *qua* vendor as an accessory right which accompanies the product upon resale to subsequent purchasers is novel in Quebec, at least so far as moveables are concerned,¹³⁰ but it avoids many of these legal objections. And if it does not fit neatly into any of the exceptions to the rules governing the relative effect of contractual obligations, it offers a rationale for the purchaser's direct right of action against the manufacturer which is more harmonious with article 1023 C.C. and the principles of the Civil Code than any of the devices previously used by the Quebec courts, including the contractual recourse based on the conventional warranty and the remedy in delict. Furthermore, it has the practical advantage of allowing the purchaser to by-pass the dealer altogether and seek his remedy initially and exclusively against the manufacturer, something which was not possible under the remedies formulated before the Supreme Court's decision in *Kravitz*. In these respects, the new formulation by the Supreme Court in *Kravitz* constitutes an improvement in the law: it is more satisfying in terms of legal theory

¹²⁹ Some authors regard the direct action in warranty as an accessory of the product transmissible to successive transferees. Others view it as the result of an implied intention, an explanation which in some cases may seem rather artificial. Some explain the transferee's direct action in warranty as a stipulation in favour of a third party while others view it as the assignment of an implied charge on the product.

The various explanations have been accepted by some as having equal merit and condemned by others as being equally unsatisfactory.

In truth, the notion of the direct action in warranty as an accessory of the product would seem to be a *petitio principii*. To attribute its existence to the implied intention of the transferor would seem to be scarcely better. Finding a stipulation in favour of a third party is not always convincing. Finally, to regard the transfer as a conveyance of an implied charge ignores the possibility that the prior holder of such a charge had no wish to convey it. [Author's translation].

Id. at 65-66. See also J. Revel, *La responsabilité civile du fabricant* (Thesis, Université de Paris II 1975).

¹³⁰ It is already recognized in the case of immoveables. Had the Court wished to link the introduction into Quebec of the *action directe en garantie* by way of analogy to existing jurisprudence, it might have referred to its own decision in *McGuire v. Fraser*, 40 S.C.R. 577 (1908), where, on the basis of article 1688 C.C., a builder was held liable to the subpurchaser of a building for damage to his wine cellar caused by latent defects in its construction.

and, possibly more advantageous in practice than its predecessors. It is, however, not without its own shortcomings.

One weakness in the legal doctrine recognized in France may be illustrated by the following example.¹³¹ If a dealer buys a product from the manufacturer, discovers that it has latent defects, and on account of these defects, is obliged to resell it at a lower price than normal, it is doubtful whether he could then recover his consequential loss from the manufacturer on the basis of the legal warranty against latent defects. For if a legal warranty is an accessory to the product, it has passed under the subsale to the retail purchaser, leaving the dealer with no basis on which to sue the manufacturer.

Another and potentially more serious problem of a constitutional and private international law nature appears when the French legal doctrine is imported into Quebec. This concerns the problem posed by interprovincial contracts and the difficulty of holding a manufacturer liable to the retailer by an *action directe en garantie* where the contract between the dealer and the manufacturer is made outside Quebec.

Under section 92(13) of the British North America Act, a province has jurisdiction over "Property and Civil Rights in the Province". A contract if concluded beyond the legal boundaries of a province will be subject to its jurisdiction only if, according to the rules of private international law, the proposed law of the contract is the law of that province.¹³² In *Kravitz*, the situs and law governing the contract between manufacturer and dealer were not raised before the court and the case proceeded on the assumption that it and the retail contract were both made in Quebec and governed by Quebec law. Under Quebec law, the manufacturer *qua* vendor owes to the dealer *qua* purchaser a non-excludable legal warranty against latent defects. This was held by the Supreme Court, in *Kravitz*, to be transmissible with the car to the retail purchaser. Suppose, however, that the dealer had purchased the car from General Motors' headquarters in Ontario and that, while both parties were resident in Quebec and subject to its jurisdiction, the contract was made and governed by Ontario law. Rules of private international law might dictate that the contractual law to be applied to the manufacturer's contract of sale from which, according to *Kravitz*, the retail purchaser's right of action ultimately stems, is the law of Ontario.¹³³ But under Ontario law, as has been noted,¹³⁴ the terms of the contract of sale between manufacturer and dealer give rise to nothing equivalent to the non-excludable legal

¹³¹ Ghestin, *supra* note 128, at 64.

¹³² For a good short discussion of the point, see NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9(2), at 176-80. See also S. WADDAMS, *supra* note 5, at 173.

¹³³ But see *General Motors Acceptance Corp. of Canada v. Beaudry*, [1977] C.S. 1017, where Ontario law was held inapplicable to enforce in Quebec a conditional sales contract made in Ontario, on the grounds that the Ontario law was contrary to "ordre public".

¹³⁴ See text accompanying notes 50-55 *supra*.

warranty against latent defects, and rules of privity prevent such warranties as may exist from accompanying the goods when they are resold to subsequent purchasers. Applying the reasoning of the Supreme Court to this situation, the purchaser's action against General Motors would then fail. Ironically, before the Supreme Court's decision in *Kravitz*, the purchaser would not be faced with this possible problem in the same situation because then the courts focused on the retailer's contract of sale and held the manufacturer liable jointly with the dealer on the legal warranty against latent defects created under that contract, which was, of course, made and governed by Quebec law. The fact that the wholesale contract was concluded extra-provincially was legally irrelevant so long as the manufacturer was resident in the Province and subject to its jurisdiction at all material times. Here lies the latent defect in the new remedy. Outside the province of Quebec, the manufacturer is not generally liable to the subsequent purchaser for latent defects in the merchandise. As has been seen, the concept of a non-excludable legal warranty owed by the manufacturer to the dealer which accompanies the goods to the subsequent purchaser is unknown at common law.¹³⁵ Under rules of private international law, and subject to public policy, the proper law which governs the contract may be determined by stipulation of the parties,¹³⁶ and the *de facto* immunity of interprovincial contracts offers a convenient loophole to the manufacturer. It would be unfortunate if, in attempting to strengthen the theoretical foundations of the *action directe en garantie* in Quebec, the Supreme Court should have thus reduced the scope of its practical application.

The decision also leaves unanswered several other important questions. One concerns its effect on horizontal privity.¹³⁷ As formulated in *Kravitz*, the *action directe en garantie* in favour of remote purchasers overcomes the barrier of vertical privity. Would it also enure to the benefit of, say, the donee of the retail purchaser? The issue was never raised in those cases before *Kravitz* where the purchaser had a remedy against the manufacturer. It was generally assumed that the remedy was confined to the purchaser and, since the source of the purchaser's rights against the manufacturer was as a party to the retail contract of sale or the conventional guarantee, it might seem to follow that persons who are not party to such contract have no rights. However, now that *Kravitz* has shifted the basis of the purchaser's rights and established that the warranty against latent defects is an accessory to goods, if title to the goods is transferred by way of gift to the retail purchaser's wife, it should be possible for the wife, as successor in title to the goods, to bring an *action directe en garantie* against the manufacturer. Since the principle of *droit accessoire* should

¹³⁵ *Id.*

¹³⁶ See A. DICEY & J. MORRIS, CONFLICT OF LAWS 721-30 (9th ed. J. Morris 1973).

¹³⁷ In principle, horizontal privity is as much a part of the law of sale in Quebec as is vertical privity. If there are a few isolated cases where the donee of the purchaser has been entitled to maintain an action under article 1522 C.C., the point has slipped by unnoticed. See, e.g., *Parent v. Ruitshausen*, 63 B.R. 226 (1937).

logically also apply to the legal warranty given to the retail purchaser, her action should be valid against the dealer as well.

Another question relates to the extent of the manufacturer's liability in damages to the remote purchaser for consequential economic losses. The general principle for assessing damages for inexecution of a contractual obligation is contained in article 1074 C.C.:¹³⁸ a reasonable foreseeability at the time the contract is made. However, a professional vendor who is liable for damages under article 1527 C.C. is subject to a harsher measure of damages because by not disclosing the defects presumed to be within his knowledge, he has in effect committed *dol* or a fraud on the purchaser, and the measure of damage in the case of fraud is severe: liability extends to all damage which is the immediate and direct consequence of inexecution of the obligation.¹³⁹ Thus, in *Kravitz*, the manufacturer was liable for all direct loss resulting from the breach of the legal warranty owed to the dealer under article 1522 C.C., whether or not such loss was foreseeable when the contract was made. This clearly included the loss of profits suffered by the dealer in having to refund to Kravitz the retail price of the car as well as the other items of consequential loss proved in that case. But would it also extend to loss of profits suffered by the remote purchaser as a result of the defects?

This question, which is implicit in article 1075 C.C.,¹⁴⁰ has recently been answered in the affirmative in *Gascon v. Bonaventure Ford Sales Ltd.*,¹⁴¹ the first case to apply the *Kravitz* decision. There, the purchaser bought a new Ford truck for use in his haulage business. Due to latent defects, it broke down repeatedly during the nine months which elapsed before he instituted proceedings for a redhibitory action against both the dealer and the manufacturer for breach of their respective warranties against latent defects in the retail and wholesale contracts of sale. Among consequential damages sought was a claim for income lost by reason of the truck being off the road for repairs. While the plaintiff did not recover the whole of the sum claimed under this head because of lack of proof, the court did award an amount to cover loss of profits caused by the defects in the vehicle. In the particular circumstances, the claim for loss of profits presents few problems. A heavy truck is by its nature a profit-earning product and it would have been within the contemplation of the

¹³⁸ Art. 1074. Le débiteur n'est tenu que des dommages-intérêts qui ont été prévus ou qu'on a pu prévoir au temps où l'obligation a été contractée, lorsque ce n'est point par son *dol* qu'elle n'est point exécutée.

¹³⁹ Art. 1075. Dans le cas même où l'inexécution de l'obligation résulte du *dol* du débiteur, les dommages-intérêts ne comprennent que ce qui est une suite immédiate et directe de cette inexécution.

¹⁴⁰ *Id.*

¹⁴¹ (Unreported, Que. C.S. May 1, 1979, no. 550-05-002377-74).

Art. 1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

Art. 1075. In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

manufacturer at the time he sold the truck to the dealer for resale that if the truck was defective, it would probably result in a loss of profits to the purchaser. As a head of damage, the loss of profits was therefore a reasonably foreseeable consequence, as well as the direct result, of the breach of that contract. Moreover, the amount of the claim by the purchaser was relatively small.

The measure of damages recoverable from the manufacturer by a remote purchaser under the *action directe en garantie* could pose problems in other situations. Suppose that Kravitz were an itinerant salesman who had purchased the automobile for use in his business. The product itself is neutral so far as evincing to the manufacturer that it would be put to commercial use by the ultimate purchaser. Yet, the loss of profits resulting from the latent defects in the automobile would be a direct consequence of the breach of the legal warranty in article 1527 C.C. implied in the manufacturer's contract with the dealer for which damages could be recoverable by the remote purchaser. In addition, it would not be possible for the manufacturer to limit this liability by disclaimer clauses as it would be in a similar contract at common law.¹⁴² One of the principal objections against allowing the retail purchaser to recover for consequential economic losses caused by the defective product stem from the difficulty of circumscribing the liability of the manufacturer. The manufacturer's potential liability could be of unknown proportions since he could not predict the uses for which the goods would be used by the remote purchaser and what loss of profits might thereby result from the defects in the product. It would appear that the objections are well founded if the manufacturer is liable for all damages that are the direct and immediate consequence of the defects, especially since this measure is strictly applied by the courts.¹⁴³

The *Gascon* case illustrates another aspect of the *Kravitz* decision: the *action directe en garantie* formulated therein is a remedy of general application available to all purchasers, and not merely to consumers. It will therefore continue to be of considerable value even after the warranty provisions of the new Quebec Consumer Protection Act¹⁴⁴ are proclaimed.

IV. LEGISLATIVE REFORM

As indicated earlier, legislative reform has taken place in three provinces, Saskatchewan, New Brunswick and Quebec, although the relevant provisions of the new legislation have not been proclaimed in

¹⁴² *E.g.*, Sale of Goods Act, R.S.O. 1970, c. 421, s. 53.

¹⁴³ In actions for damages under article 1527 C.C. against a professional vendor, the courts sometimes merge the technically distinct tests of remoteness under articles 1074 and 1075, holding that liability for direct loss under article 1075 is no more extensive than liability for foreseeable losses under article 1074. See *Gauthier v. Comité de réalisation de la Cité Jardin*, [1955] B.R. 100. The same judicial limitation might be carried over to the manufacturer's liability to the remote purchaser under the *action directe en garantie*.

¹⁴⁴ *Infra* note 145(3).

Quebec, and will not be in effect in New Brunswick until January 1, 1980.¹⁴⁵ All three Acts have certain features in common. They apply only to consumer transactions, they effect major reforms in the area of products liability, and all three are intended, *inter alia*, to cover, in the context of consumer transactions, the situation in *Kravitz*. However, there are major differences in scope and effect. For example, the Quebec Consumer Protection Act is a comprehensive Act based on a government White Paper published in 1976. It covers in separate chapters many aspects of consumer protection, ranging from credit to unfair business practices, used cars and itinerant vendors, and while it is not wholly self-contained, it is designed to replace the existing Consumer Protection Act first enacted in 1971. In contrast, the Saskatchewan and New Brunswick Acts are by way of supplemental legislation designed to cure major problems in a limited area. There are also significant differences between the New Brunswick and Saskatchewan Acts in the ways they work to cure these problems, differences that reflect their particular influences and origins. The Saskatchewan Act was the result of a White Paper published in 1975, but the schema of the Act and the content of many of its concrete provisions were clearly modelled on specific recommendations of the Ontario *Report on Consumer Warranties*. The Saskatchewan Act has in many respects implemented the Ontario Law Reform Commission proposals ahead of Ontario. The New Brunswick Act on the other hand follows closely the recommendations of the Reports of the New Brunswick Consumer Protection Project.¹⁴⁶ These Reports, published between 1973 and 1976, considered and adopted many of the recommendations of the Ontario Law Reform Commission, but in certain areas, proposed different means for achieving the desired results.

Each of these Acts will be briefly considered to determine how they would deal with the *Kravitz* situation and with some of the points left open

¹⁴⁵ (1) Consumer Products Warranties Act 1977, S.S. 1976-77, c. 15 (now R.S.S. 1978, c. C-30). The provisions governing statutory warranty obligations of vendors and manufacturers were proclaimed November 6, 1977.

(2) Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1. With the exception of s. 6, the Act has been proclaimed as of January 1, 1980 (Order-in-Council 79-711).

(3) Consumer Protection Act, S.Q. 1978, c. 9. The procedural provisions governing the establishment and administration of the Office de la Protection du consommateur and the power to make regulations were proclaimed April 25, 1979. The substantive provisions governing the rights and liabilities of suppliers and consumers have not yet been proclaimed.

(4) In 1976, Ontario introduced Bill 110 to implement certain proposals of the ONTARIO REPORT ON CONSUMER WARRANTIES, which had been adopted as government policy in a GREEN PAPER ON CONSUMER PRODUCT WARRANTIES IN ONTARIO (Min. of Consumer and Commercial Relations 1973). When the Legislature was dissolved in 1977, the Bill died on the Order Paper. The provisions of Bill 110, which were inadequate in a number of respects, were critically examined by Cooper Mont, *Comment on Ontario's Bill 110 — An Act to Provide for Warranties in the Sale of Consumer Products*, 4 DALHOUSIE L. J. 201 (1977).

¹⁴⁶ *Supra* note 9(2).

by the Supreme Court decision; namely, the issue of horizontal privity, whether the right of action against the manufacturer extends to persons who acquire defective goods other than by purchase from a merchant, and the liability of the extra-provincial supplier.

A. *Quebec*

When the relevant provisions of the new Quebec Act are proclaimed, the question will not be so much whether the purchaser in the *Kravitz* situation will have a remedy, but rather, whether the remedy in that Act will be superior to that formulated by the Supreme Court.

One chapter of the new Consumer Protection Act is devoted to "Warranties"¹⁴⁷ in which Quebec appears to have adopted the implied warranties in the Sale of Goods Act as the basic pattern for the seller's statutory obligations. The commercial vendor of consumer goods to a "consumer"¹⁴⁸ in Quebec is strictly bound under sections 37 to 40 of the Act to ensure that the goods conform to their description, are fit for their intended purpose, and are of reasonable durability. If the goods are substandard and defective, two provisions in this chapter enable the consumer purchaser to take action against the manufacturer as well as the seller. Section 53 in substance gives legislative effect to the result arrived at in *Kravitz* and its jurisprudential predecessors.

Section 53.

A consumer who entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.

.....

The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.

The rights of action against the manufacturer may be exercised by any consumer who is subsequent purchaser of the goods.¹⁴⁹

¹⁴⁷ Consumer Protection Act, S.Q. 1978, c. 9, Title I, c. III, s. 1.

¹⁴⁸ S. 1(e): "Consumer" means a natural "person except a merchant who obtains goods or services for the purpose of business".

S. 2: The Act covers "every contract for goods or services entered into between a consumer and a merchant in the course of the business."

¹⁴⁹ Art. 53. Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le manufacturier un recours fondé sur un vice caché du bien qui a fait l'objet du contrat, sauf si le consommateur pouvait déceler ce vice par un examen ordinaire.

.....

Ni le commerçant, ni le manufacturier ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.

Le recours contre le manufacturier peut être exercé par un consommateur acquéreur subséquent du bien.

Section 54 does likewise with specific reference to breaches of the statutory warranties.

Section 54.

A consumer having entered into a contract with a merchant may take action directly against the merchant or the manufacturer to assert a claim based on an obligation resulting from section 37, 38 or 39.

Rights of action against the manufacturer based on an obligation resulting from section 37 or 38 may be exercised by any consumer who is a subsequent purchaser of the goods.¹⁵⁰

Either of these sections would cover the situation in *Kravitz* and in neither case could the manufacturer nor the dealer have limited or excluded his statutory liability. Both give rise to the same range of civil remedies which are set out in section 272 of the Act, namely rescission of the contract, damages, or both.¹⁵¹ Both sections are subject to the same prescription period, one year from the date the cause of action arose.¹⁵² In view of this, what then, is the difference between these sections, and which would be more appropriate to cover the situation in *Kravitz*?

From the consumer's point of view, in a case like *Kravitz* it would be more advantageous to proceed under section 54 because it may be easier to establish that the car is simply not durable, or that it is unfit for its normally intended purpose, which is all that is required to succeed. It is probably more difficult to prove that the source of the latent defects is either defective design or faulty manufacture, as is required under section 53. Furthermore, unlike section 53, section 54 does not qualify the consumer's rights by reference to the apparent or latent nature of the defects, or place the consumer under any obligation to examine the goods. In section 53, the right of the consumer is lost if the defect complained of is, or would have been, apparent upon ordinary examination.

The mention of latent defects in section 53 raises another question, the relationship between the statutory remedies under the Consumer Protection Act and the existing remedies developed under the Civil Code. Section 270 provides that the remedies under the Consumer Protection Act are "in addition to those available under any act granting a right or recourse to the consumer". There will be an overlap between the provisions of the new Act when they are proclaimed and the chapter on Sale in the Civil Code, and the relationship between them remains to be worked out. In view of the one-year prescription period imposed under the

¹⁵⁰ Art. 54. Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le manufacturier un recours fondé sur une obligation résultant de l'article 37, 38 ou 39.

Un recours contre le manufacturier fondé sur une obligation résultant de l'article 37 ou 38 peut être exercé par un consommateur acquéreur subséquent du bien.

¹⁵¹ Although the measure of damages is not specified in the Act, the manufacturer's statutory liability is not related to *dol* or fraud as in article 1527 C.C. Therefore, the general measure of foreseeability under article 1074 C.C. would probably apply.

¹⁵² S. 274.

new Act for actions based on sections 53 and 54, it is possible to envisage circumstances where a consumer purchaser might lose his statutory right of action under section 53 in respect of a warranty against undisclosed latent defects and yet still retain certain remedies under the Civil Code, including the possibility of a redhibitory action under article 1530 C.C.

While the new Act eliminates the barrier of vertical privity, its effect on the existing requirement of horizontal privity is uncertain. The English versions of sections 53 and 54 expressly refer to "consumers" who have entered into a contract with a merchant, and to "subsequent purchasers", which seems to suggest that consumers who acquire title to a defective product by other means, such as by gift, would not have any recourse under the Act. But the French text refers to *un consommateur acquéreur subséquent du bien* without further qualification, which would seem to indicate that the *action directe en garantie* would be available to donees.¹⁵³

The Act contains no provisions specifically designed to deal with the problem of extra-provincial suppliers. The term "manufacturer" is defined to include an importer where the actual manufacturer has no establishment in Canada,¹⁵⁴ but it does not purport, as indeed might not be possible for constitutional reasons, to impose on extra-provincial suppliers the full force of the provincial Consumer Protection Act. However, it does make the retail contract the basis of the manufacturer's liability, avoiding in this way one of the possible problems arising from the *Kravitz* decision.

B. Saskatchewan

The Saskatchewan Consumer Products Warranties Act¹⁵⁵ is, as already mentioned, the first and presently the only Act whose relevant provisions are in force. It rationalizes and enlarges the content of the statutory warranties which the supplier of consumer goods owes to a consumer purchaser. Apart from adding durability as an additional implied warranty,¹⁵⁶ the Act closes the gaps left in the Sale of Goods Act by providing that the consumer product supplied shall be of "acceptable quality".¹⁵⁷ This means, in effect, that the product shall be free from undisclosed defects affecting its merchantability.

¹⁵³ It seems likely that the broader French text will prevail — whatever the fate of art. 9 of the Charte de la langue française, S.Q. 1977, c. 5, the constitutionality of which was challenged in *Blaikie v. Attorney-General of Quebec*, heard by the Supreme Court in June, 1979. Aside from provincial linguistic considerations, giving priority to the French text would seem to reflect the spirit of the new Act which in s.26 resolves divergences between the French and English versions of contracts governed by the Act by giving effect to the version more favourable to the consumer.

¹⁵⁴ See s. 2.

¹⁵⁵ See R.S.S. 1978, c. C-30.

¹⁵⁶ S. 11(7).

¹⁵⁷ S. 11: Where a consumer product is sold by a retail seller, the following warranties shall be deemed to be given by the retail seller to the consumer:

....

4. that the product supplied under the contract is of acceptable quality, except that no such warranty shall be deemed to be given:

The *Kravitz* situation is clearly covered by section 13 by which the manufacturer of consumer products is deemed to give the same statutory warranties as the retail supplier.¹⁵⁸ Each is liable for his own warranties and his own breach. In order to drive home the point that absence of privity is no bar to an action against the manufacturer, section 14 expressly provides that: "[L]ack of privity of contract between the person bringing the action and the . . . manufacturer . . . shall not be a defence and the . . . manufacturer . . . shall be conclusively presumed to have received consideration."

In order to recover from the manufacturer, the consumer must prove that the product was defective and that the defects were due to the manufacturer's own breach of his warranty obligations. To assist the consumer in overcoming what would otherwise be difficult evidentiary problems, the Act provides that once the existence of the defects has been established, a presumption arises that they are due to a breach of the statutory warranty.¹⁵⁹ The manufacturer may rebut this presumption by proving that the defects or malfunctioning of the product are attributable to some other cause. Thus, provided the transaction was a consumer transaction within the ambit of the Act,¹⁶⁰ the Saskatchewan Act would provide a purchaser in the *Kravitz* situation with a direct right of action against the manufacturer.

The remedies of the consumer against either the retail purchaser or the manufacturer turn on the seriousness of the breach and the remediability of the defects. The Act provides that, if in a case like *Kravitz*, the breach is substantial and the defects are not remediable, the purchaser can reject the goods and recover from the manufacturer the price he paid for the defective product, subject to certain deductions for benefits received, plus damages for losses suffered that were "reasonably foreseeable as liable to result from the breach".¹⁶¹ In other cases where the breach is not substantial, the consumer may require the party in breach to repair the defects and may recover damages, but he cannot reject the goods.¹⁶²

Unlike the Quebec Act, the Saskatchewan Act clearly abolishes horizontal as well as vertical privity. This is evident from section 4 which provides that —

(a) with respect to defects specifically drawn to the consumer's attention before the contract is made; or

(b) where the consumer examines the product before the contract is made, with respect to defects that that examination ought to have revealed;

¹⁵⁸ S. 13(2): Subject to subsection (3), the manufacturer of consumer products shall be deemed to give to consumers of his products the same statutory warranties with respect to his products as the retail seller is deemed to have given under paragraphs 2 to 8 of section 11.

¹⁵⁹ S. 15.

¹⁶⁰ A "consumer" who acquires a "consumer product" for a purpose other than resale, or for a use that is predominantly for business purposes. See s-ss. 1(d), (e).

¹⁶¹ S. 20(b). See also s. 23.

¹⁶² S. 20(a).

[P]ersons who derive their property or interest in a product from or through the consumer, whether by purchase, gift, operation of law or otherwise shall . . . be deemed to be given by the retail seller or manufacturer the same statutory warranties that the consumer was deemed to have . . .

In other words, the transferee of the consumer product acquires with the goods the warranties which were owed to the transferor. In this respect, the Saskatchewan Act resembles the solution formulated by the Supreme Court in *Kravitz*, but unlike that case, makes it clear that all successors in title, whether for value or not, acquire a right of action against the party in breach.

The Saskatchewan Act contains several provisions dealing with the thorny question of the applicability of the statutory warranties to extra-provincial suppliers.¹⁶³ Section 33(1) provides that manufacturers "who carry on business in Saskatchewan" are subject to the provisions of the Act. This alone is unexceptionable. The real question is what is meant by "carry on business" for the purposes of imposing statutory liability. Would it, for example, cover the situation of the manufacturer without an office or any representative in Saskatchewan who supplies consumer products to retailers in the province under contracts concluded elsewhere? Section 33(2), in amplifying the general statement in 33(1), deems a manufacturer subject to the provisions of the Act provided one or more of the following conditions are met:

- (a) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;
- (b) he maintains an office, warehouse or place of business in Saskatchewan;
- (c) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;
- (d) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;
- (e) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;
- (f) he directly or indirectly markets consumer products in Saskatchewan; or
- (g) he otherwise carries on business in Saskatchewan.

Subsections (f) and (g) would seem to cover the situation posited. But are such provisions constitutional? Or to put the question in a form in which it was recently posed by the Supreme Court: can Saskatchewan legislation apply to a manufacturer in Ontario simply because that manufacturer's goods are sold to a Saskatchewan retail dealer who resells them in the ordinary course of his own business?¹⁶⁴ Until very recently, the general view was that such legislation was invalid as exceeding the constitutional limits of provincial jurisdiction over contracts and rights in the province.¹⁶⁵

¹⁶³ See NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9, at 175 *et seq.* for a discussion on this point.

¹⁶⁴ *The Queen v. Thomas Equipment Ltd.*, 26 N.R. 499 (S.C.C. 1979), *rev'g* 8 A.R. 269 (Alta. C.A. 1978).

¹⁶⁵ See *Royal Bank of Canada v. The King*, [1913] 3 W.W.R. 994, 9 D.L.R. 337 (P.C.); *Gray v. Kerslake*, [1958] S.C.R. 3, 11 D.L.R. (2d) 255 (1957).

But in light of a recent majority decision of the Supreme Court, it would appear that such a provision is constitutional and enforceable. In *The Queen v. Thomas Equipment Co.*,¹⁶⁶ a New Brunswick manufacturer was held liable for breach of the Alberta Farm Implements Act¹⁶⁷ where he sold, under a contract made in New Brunswick, farm machinery to an Alberta dealer for resale in Alberta. It did not matter that the manufacturer had no office or representative in Alberta, nor that the contract which conflicted with statutory terms imposed by the Alberta Act was by its express terms to be governed by New Brunswick law. The thrust of the majority decision was that having chosen to have his goods sold in Alberta, the manufacturer must comply with the "rules of the game" laid down by the Alberta legislature. The ramifications of the majority decision, which prompted a strong dissent by Laskin C.J.,¹⁶⁸ remain to be seen, but the principle would seem to encompass extra-provincial manufacturers, statutory warranties and the "rules of the game" as laid down by The Saskatchewan Consumer Products Warranties Act.

C. New Brunswick

It is uncertain whether the New Brunswick Consumer Product Warranty and Liability Act¹⁶⁹ will provide a remedy for the consumer in the *Kravitz* type of situation. Certainly this was one of the objectives of the Act; that is quite clear from the Reports of the Consumer Protection Project upon which the Act is based.¹⁷⁰ But as drafted, it is unclear whether the courts would construe the Act as having this effect.

There are two sections which fall to be considered. The first, section 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;

¹⁶⁶ *Supra* note 164.

¹⁶⁷ R.S.A. 1970, c. 136, s. 22, *as amended by* S.A. 1971, c. 33, s. 9, S.A. 1977, c. 67, s. 21.

¹⁶⁸ For a non-resident of New Brunswick to invoke the operation of the law of his Province of residence, here Alberta, against his New Brunswick co-contractor simply because of the presence in Alberta of goods which had been purchased from the New Brunswick manufacturer is to me an attempt to give Alberta law an extra-provincial application.

Supra note 164, at 513 (*per* Laskin C.J. dissenting, Ritchie & Spence JJ. concurring)

¹⁶⁹ S.N.B. 1978, c. C-18.1.

¹⁷⁰ See NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9, at 164. The difficult topic of the relationship between the conflict of laws and constitutional law was recently examined in a valuable article by Hertz, 'Interprovincial', *the Constitution and the Conflict of Laws*, 26 U. TORONTO L.J. 84 (1976).

- (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; 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.

Section 27 introduces into New Brunswick the concept of strict products liability. As section 27(4) states: "The liability of a person under this section does not depend on any contract or on negligence". This section is reminiscent of § 402A of the U.S. *Restatement (Second) of Torts*.¹⁷¹ It is, however, both broader and narrower in scope than its American counterpart. It is broader because it covers pure economic loss, and narrower because it, like the whole Act, applies only to consumers.

Assuming that the term "supplier", which is not defined in the Act, includes the manufacturer, it is still uncertain whether section 27 would assist a purchaser in the *Kravitz* situation. Liability arises only in respect of a consumer product that is "unreasonably dangerous to person or property because of its defects". This would cover the situation where the article is unsafe and shoddy, but not where the consumer product is substandard, but quite safe. As already pointed out, the defective automobile in *Kravitz* may have in fact been "unreasonably dangerous," but nothing turned on that possibility. The remedy formulated by the Supreme Court is one that would apply equally well to products that are shoddy but safe. The effect of section 27 is to offer a remedy of strict liability in circumstances where the supplier would at common law owe a duty of care, but negligence could not be proved, or where the type of loss suffered was not compensable in tort.

The other section to be considered is section 23 which is headed "Remedies Where No Privity of Contract". This section 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.

¹⁷¹ Section 402A

Special Liability of Seller of Product for Physical Harm to User or Consumer.

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

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

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

(2) The rule stated in Subsection (1) applies although

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

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

It will be noted that there is no explicit reference to the "manufacturer" in section 23, only to the "seller". Therefore, one reasonable interpretation of this section would be to construe it as abolishing at the level of the retailer the requirement of horizontal privity. In other words, the retailer of a consumer product would be liable for a breach of warranty, not merely to the purchaser, but also to the donee or transferee of the purchaser. This is certainly a desirable advance upon the common law, but not one that would resolve the situation in *Kravitz*.

To interpret section 23 in a manner which would impose direct liability on the manufacturer to the remote purchaser for breach of warranty requires careful study of the definition of a "seller" and a thorough search of the Act. Under section 1 of the Act, the term "seller" is defined as "the person who is the supplier under a contract for the supply or sale of a consumer product." The route to holding the manufacturer liable under section 23 requires first, recognizing that the manufacturer was at one stage "a seller" of the consumer product, and second, that the implied warranties are owed by every seller of consumer products in every contract. From this, it is possible to arrive at the desired conclusion that under section 23 the manufacturer can be the seller in breach of warranty who is liable to the remote purchaser for any consumer loss caused by the breach of warranty. Thus interpreted, the section abolishes vertical privity as well as horizontal privity, and would cover the situation in *Kravitz*. However, it is open to question, in face of the opaque drafting of the Act and the intricate cross-referencing required to arrive at what is an uncertain conclusion, that a court applying the literal rule or even the golden rule, would give section 23 the desired interpretation. And even if the courts can and are prepared to interpret the Act as imposing direct liability on the manufacturer in the *Kravitz* situation, the intent is too well-hidden to be discovered by the average consumer.

Assuming that the purchaser in *Kravitz* would have recourse against the manufacturer under the New Brunswick Act, the remedies under the New Brunswick Act follow fairly closely the scheme of the Saskatchewan Act. In order to rescind the contract, the breach must be a major breach, or the seller, in breach of warranty, must be allowed an opportunity to repair if the goods in their present state would cause significant inconvenience to the buyer. Where a major breach occurs "the buyer may reject the product . . . within a reasonable time after he ought to have discovered the breach". For any other breach, the right to reject the goods is subject to a time limit of sixty days after delivery of the product.¹⁷²

One of the principal differences between the Saskatchewan Act and the New Brunswick Act lies in the methods used to extend the reach of the legislation to extra-provincial suppliers. The New Brunswick Report, on which the New Brunswick Act is based, reviewed in detail the

¹⁷² S. 16; cf. Consumer Products Warranties Act, R.S.S. 1978, c. C-30, s. 20

jurisdictional problems which arise in the case of extra-provincial suppliers, and after considering the possibilities open in contract, opted instead for a remedy in tort.¹⁷³ In recent years, the Supreme Court has demonstrated a greater willingness to vest jurisdiction in tort in the province where the damage has occurred.¹⁷⁴ Thus, the New Brunswick Law Reform Commission concluded that it would be preferable to impose strict and direct liability on extra-provincial suppliers by making the distribution of defective products in New Brunswick a tort, rather than by attempting to extend the reach of the provincial law to extra-provincial suppliers by means of contract.¹⁷⁵ This was done in section 27, which is designed to impose liability on those extra-provincial suppliers who, in the opinion of the New Brunswick Law Reform Commission, would otherwise be beyond the reach of section 23. This tort is one of strict liability for all kinds of loss and attaches to the supplier of a product who, although outside the province, has done something inside the province to contribute to the consumer loss which is recoverable under the Act.

As has clearly been noted, section 27 imposes liability only in respect of products that are unreasonably dangerous and not merely defective. In the case of a defective product which is not unsafe, the liability of the extra-provincial manufacturer remains governed by section 23, and there is no attempt in that section, or elsewhere in the Act, to extend the jurisdiction of the province in the way that it has been done in Saskatchewan.¹⁷⁶

V. CONCLUSION

In this paper, it has been argued that the purchaser of a "lemon" should have a right of recourse not only against the dealer who sold him the goods but also against the manufacturer, if he is responsible for the defects, and that the manufacturer's liability should be co-extensive with that of the dealer. That is to say the manufacturer should be strictly and

¹⁷³ NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9, at 175-95.

¹⁷⁴ See *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at 409, 43 D.L.R. (3d) 239, at 250-51 (1973), where Dickson J. says:

[W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.

See also *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (1975).

¹⁷⁵ NEW BRUNSWICK CONSUMER PROTECTION PROJECT, THIRD REPORT, *supra* note 9(2), at 187.

¹⁷⁶ But *quaere* the effect of *The Queen v. Thomas Equipment Ltd.*, *supra* note 164.

directly liable for pure economic loss, as well as for other types of losses, caused by the defects in the product.

In Quebec, the courts have developed an effective remedy for the consumer which was recently examined and reformulated by the Supreme Court in *General Motors Products of Canada Ltd. v. Kravitz*. The common law, adhering strictly to rules of privity — that "anachronism of strict English legalistic logic"¹⁷⁷ — has lagged behind, and reform is necessary to improve the rights of the consumer purchaser. Judge-made law could achieve this more swiftly and efficiently than separate enactments by provincial legislatures, but since the traditions of the Supreme Court make it unlikely that a remedy comparable to that in *Kravitz* would be created for the common law provinces, reform will have to come through legislation. It is important that legislative reform proceed in a standardized and comprehensive manner so as to ensure that the rights of consumers throughout Canada are both uniform and adequate. Otherwise, there is a danger of developing a patchwork of conflicting and competing consumer legislation,¹⁷⁸ the disadvantages of which should be evident from the experience with Trades Practices legislation.¹⁷⁹ Unfortunately, the beginnings of legislative reform in this area do not augur well so far as uniformity is concerned. The brief comparison between The Saskatchewan Consumer Product Warranties Act and the New Brunswick Consumer Product Warranty and Liability Act reveals significant differences between the approaches taken and the effects of those Acts. Rather than proceeding independently, efforts should be directed by the provinces to drafting and implementing, on a uniform basis, a model act to cure the problems in this area.

¹⁷⁷ D. ROTHCHILD & D. CARROLL, *CONSUMER PROTECTION, TEXT AND MATERIALS* 593 (2d ed. 1977).

¹⁷⁸ Waddams, *Legislation and Contract Law*, 17 *WESTERN ONT. L. REV.* 185, at 193 (1979).

¹⁷⁹ See Belobaba, *Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection*, 15 *OSGOODE HALL L. J.* 327 (1977).

