stomachs. Suppose further that he or she orders a pig food from a supplier who supplies pig food which would be entirely suitable for pigs with normally robust digestive systems. In that case, if that is all that has happened the supplier will not be in breach of contract since although what has happened has revealed the ordinary purpose for which the goods were required, it does not reveal the extraordinary requirements of the buyer. In order to be able to complain that the pig food was not suitable for the pigs, the buyer would need to have made it clear to the supplier more precisely what his or her requirements were.[31]

Alternatively, the goods may be capable of being used for a range of purposes which are different, as in *Kendall v Lillico,* where the goods were suitable for feeding cattle but not suitable for feeding poultry. A buyer could recover on these facts if, but only if, he or she had made it clear to the seller that the purpose was to buy food for feeding poultry. In fact, in that case, it was held that the seller did have a sufficient knowledge of the buyer's purpose to make him liable, and this case is therefore an example of goods which were of merchantable quality as cattle feed but which were not fit for the buyer's purpose.[32] Similarly, in *Ashington Piggeries v Christopher Hill,* the goods did comply with the contract description so that there was no liability under s 13 but it was held that the buyer had adequately disclosed to the seller his intention to feed the compound to mink and therefore to found liability on s 14(3).

Finally, it should be emphasised that liability under this sub-section, as indeed under s 14(2), turns on the goods not being of satisfactory quality or fitness for purpose respectively. It is no defence for the seller to show that he or she did all that could possibly have been done to ensure that the goods were fit for the purpose or were of satisfactory quality if in fact they are not.

Sales by sample

Section 15 of the Sale of Goods Act 1979 provides: **8–29**

> (1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.
> (2) In the case of a contract for sale by sample, there is an implied term:

31 *Slater v Finning Ltd* [1996] 3 All ER 398 is a good example of such a case. See, also, *Rotherham Metropolitan Borough Council v Frank Haslam Milan* (1996) 59 Con LR 33 for a case where the buyer did not rely on the seller's skill and judgment.

32 It is doubtful, however, whether the goods would now be found to be of satisfactory quality—see the discussion on p 123 above.

(a) that the bulk will correspond with the sample in quality;
(b) [repealed];
(c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

(3) As regards England and Wales and Northern Ireland, the term implied by sub-s (2) above is a condition.

The Act contains no definition of what is a sale by sample other than the wholly unhelpful statement in s 15(1) which leaves quite in the air the question where there is an implied term that the sale is by sample. It is easy enough to see what is the central transaction to which this section applies. Sales by sample are common in the sale of bulk commodities because a seller can display to the buyer a sample of what he or she has and the buyer can agree that he or she will take so many pounds or tons. The sample here in effect largely replaces the need for any description by words of the goods and it is therefore natural to imply, as in s 15(2)(a), a term that the bulk will correspond with the sample in quality.

8–30 However, there are other transactions of a quite different kind which could be regarded as sales by sample. So, for instance, a fleet manager of a large company may be deciding what car to buy for the company's representatives. He or she might very well be shown an example of a particular car and as a result place an order for 200. Would it follow that the 200 cars should be identical in quality with the one which he or she was shown?

Other implied terms

The terms set out in ss 13, 14 and 15 of the Sale of Goods Act 1979 are the basic implied terms which will be incorporated into every contract of sale subject to the possibility of the seller successfully seeking to exclude them in the contract. However, there is nothing in the Act to say that this list is complete. In principle, there seems to be no reason why the general principles about implication of terms in the general law of contract should not apply. So, if a contract of sale is made against a background of a particular trade or local custom, it will be open for one party to seek to show that the custom exists, is reasonable and that contracts of sale made in this particular context are regarded by those in the trade or living in the locality as subject to this implied term.

Similarly, there is no reason why a party should not seek to show that in a particular contract a term is to be implied in order to give business efficacy to the contract. Perhaps the best example of an

implied term which is not explicitly set out in the Act but which has been recognised is shown in *Mash and Murrell v Joseph I Emmanuel* (1961).[33] In this case, there was a contract for the sale of Cyprus potatoes cif Liverpool. On arrival in Liverpool, the potatoes were found to be uneatable but the evidence was that they had been eatable on loading in Limassol. Diplock J said that liability turned on the reason why the potatoes were uneatable. There were various possible reasons such as bad stowage or inadequate ventilation during the voyage. These would not have been the seller's fault and the risk of these possibilities would pass to the buyer on shipment, leaving the buyer to an action against the carrier. However, one possibility was that the potatoes, although edible when shipped, had not been in a fit state to withstand a normal voyage from Cyprus to Liverpool. Diplock J said that it was an implied term of the contract in the circumstances that the goods would be fit to withstand an ordinary journey. The Court of Appeal differed with the conclusion that Diplock J reached but not with his analysis of this point.

Rights and remedies

8–31 The Law Commission produced a consultative document in 1983 and a full report in 1987. The report shows that there is a tension between the definition of the seller's obligations which we have just discussed and the buyer's remedies for breach of those obligations which is discussed in Chapter 10. Under the existing framework of the Sale of Goods Act, each of the implied obligations in ss 13, 14 and 15 is said to be a condition and, as will be explained in Chapter 10, this is taken to mean that, if there is any breach of the obligation, the buyer is entitled to reject the goods. Courts have sometimes thought that, although the goods were defective, the defects were not of a kind which ought to have entitled the buyer to reject the goods. The leading example of this is *Cehave v Bremer* (1976).[34] That was a contract for the sale of citrus pulp pellets which were intended by the buyer to be used for animal feed. There was damage to the goods and the buyer purported to reject them. There was then a forced sale by the Admiralty Court in Holland at which the buyer rebought the goods at a much lower price and used them for feeding cattle. In these circumstances, the Court of Appeal was looking for a good reason to find that the buyer was not entitled to reject. What it did was to hold that the defect in the goods did not make them unmerchantable though it clearly reduced somewhat their value.

33 [1961] 1 All ER 485; [1962] 1 All ER 77.
34 [1976] QB 44.

The problem with this approach is that although it may be perfectly reasonable to restrict the buyer's right to reject the goods, it does not usually follow from this that the buyer should be left without any remedy at all. Often, the buyer ought to have a remedy at least in money terms to reflect the difference in value between what he or she contracted for and what he or she has received. There is also an important difference as far as rejection is concerned between consumers and those who buy goods commercially, particularly those who buy goods for resale. It is often perfectly reasonable to say to such buyers that they ought to put up with the goods and be satisfied with a reduction in price; it is much less commonly reasonable to say this to a consumer. This perception underlies further changes made by the Sale and Supply of Goods Act 1994 which are discussed in Chapter 10.

LIABILITY IN TORT

8–32 This book is primarily concerned with liability in contract between buyer and seller but completeness requires some mention of claims which the buyer may have against other people, especially the manufacturer. In some circumstances, the buyer may have a contract claim against the manufacturer. Sometimes, indeed, the manufacturer and seller are the same person and in that case, of course, no problem arises. In other cases, although the manufacturer and seller are not the same person, the manufacturer may have entered into a separate contract with the buyer. The most obvious way in which such a contract might come about is by the operation of the manufacturer's guarantee. Most consumer durables are now issued accompanied by a guarantee in which the manufacturer typically promises to repair or replace the goods if they do not work within a period, generally a year.

Curiously enough, there is surprisingly little authority in English law on whether manufacturers' guarantees give rise to a contract between manufacturer and customer. The leading case is the classic one of *Carlill v Carbolic Smokeball Co* (1893).[35] In this case, the plaintiff, Mrs Carlill, bought a smokeball manufactured by the defendant from a retail chemist, relying on elaborate advertising by the defendant in which it offered to pay £100 to anyone who used the smokeball according to the directions and then caught flu. The plaintiff used the ball as directed, and then caught flu. The manufacturer was held liable to pay the £100, under a contract between it and the plaintiff. This is a rather special case because the claims made by the manufacturer were very explicit

35 [1893] 1 QB 256.

and specific. Typically, modern manufacturers' advertising tends to be couched in much less contractual language. The technical problem with giving contractual force to the manufacturer's guarantee is that often the customer will not know of the guarantee until after he or she has bought the goods and further he or she will often not have done anything in exchange for the guarantee. So there may be difficulty in satisfying the technical requirement of the English law of contract that promises are only binding if they are supported by consideration. On the other hand, it is reasonable to assume that a reputable manufacturer would be very reluctant to go back on the guarantee because of the very bad adverse publicity which would be attracted. This no doubt accounts for the absence of reported cases on the subject. Nevertheless, the situation is not wholly satisfactory especially as many guarantees are couched in somewhat evasive language or impose onerous restrictions such as that the goods should be returned in the original packaging if they fail to work. The practice of consumer guarantees was the subject of a report issued by the Director General of Fair Trading in June 1986, urging higher standards on those who issue guarantees and hinting at the possibility of legislation in the long run. The whole question of consumer guarantees is now the subject of a European Directive. To some extent, this replicates existing English law, but it also involves substantial changes, particularly as to remedies. Its implementation into English law would appear to require careful drafting.

8–33 Of course, the manufacturer will often be liable in contract to the person to whom it has supplied the goods and the buyer may therefore be able to start off a chain of actions in which the buyer sues the retailer, the retailer sues the wholesaler and the wholesaler sues the manufacturer. By this means, if the fault in the goods is due to the manufacturer, liability can often be shunted back to it by a series of actions. However, this would not always be possible. The manufacturer may in fact be outside the country and difficult to sue; someone may have successfully sold the goods subject to an exclusion or limitation clause which prevents liability being passed up the chain or it may be that the chain breaks down in some other way. For instance, in *Lambert v Lewis* (1982),[36] the buyer complained of a defective towing hook which had been fitted to his Land Rover. The buyer knew who had fitted the towing hook and it was clear who the manufacturer was, but the garage which had supplied the towing hook did not know from which of a number of possible wholesalers it had bought the towing hook. In these circumstances, the garage which had supplied the towing hook could not pass liability back because it could not identify the other party to

36 [1982] AC 225.

the contract and it was not allowed to jump over this chasm and sue the manufacturer direct.

8–34 The question arises whether the buyer can sue the manufacturer direct in tort. Before 1932, it was widely believed that the answer to this question was no and that the only actions in respect of defective goods were contractual actions. This was clearly revealed to be wrong by the majority decision of the House of Lords in *Donoghue v Stevenson* (1932).[37] In this case, two ladies entered a café in Paisley and one bought for both of them ice cream and ginger beer. When the second lady poured part of the ginger beer on her ice cream, a snail came out of the bottle. On these facts, the plaintiff had no contract with anyone because she had not bought the ginger beer and, of course, her friend was not liable in contract since she had given it to her. The majority of the House of Lords held that, on such facts, the plaintiff could sue the manufacturer on the basis that the manufacturer owed her a duty of care to prepare the product with reasonable care; that a reasonably careful manufacturer of ginger beer would not allow snails to get into the bottle; that, since the bottle was opaque, there was no reasonable possibility of intermediate examination which might detect the snail before it reached the plaintiff and that the plaintiff reasonably foreseeably suffered physical injury as a result. It has never since been seriously doubted that this decision is correct and many decisions have followed and built upon it.

Although it is common to talk of liability in terms of manufacturers, liability in fact rests upon any person who produces or handles goods in circumstances where it is reasonably foreseeable that carelessness in the handling of the goods will cause physical injury or property damage and there is in fact carelessness. So, in appropriate cases, liability can attach to wholesalers, repairers, those who service goods and indeed on sellers. So, for instance, a seller of a motor car would normally do a detailed check on the car before delivering it in order to discover defects. The seller who failed to do this would be liable in tort not only to the buyer (who has, in any case, an action in contract) but to anyone else foreseeably injured, for example, a member of the buyer's family (who would, of course, have no contract action).

8–35 The defendant will not be liable in such an action unless he or she can be shown to have been negligent. This is a fundamental difference between tort actions and actions for breach of the implied terms in ss 13–15 of the Sale of Goods Act. The latter do not require any proof of negligence. In a case such as *Donoghue v Stevenson,* the requirement to prove negligence was not a serious limitation on the plaintiff's chances

37 [1932] AC 562.

of success, since, in practice, a court is likely, very easily, to infer that careful bottling should exclude the possibility of snails getting into the bottle. In practice, the manufacturer in such a case has to lead evidence of his or her system and is likely to be impaled on one limb or other of a dilemma. Either he or she shows that the system is usually foolproof, in which case it is likely to be inferred that it must have broken down in the particular case, or he or she shows the system is vulnerable in which case he or she is negligent for not having a foolproof system. Malfunctions in the production system of this kind are reasonably easy for plaintiffs to contend with. Plaintiffs have much more difficulty when they wish to argue that all specimens of a particular product are defective. This was the problem which confronted the victims of the drug thalidomide who had to show not only that the drug was harmful to foetuses, but that the manufacturers and distributors were negligent not to have realised this. In practice, in a contested action, a plaintiff has very serious difficulty in doing this. It is this, amongst other things, which has led to the introduction of a regime of product liability (see below).

There is another major limit on liability in tort. As the law is currently understood, it seems that plaintiffs can recover only where they have suffered either physical injury or property damage. So, if a manufacturer of a motor car negligently installs a braking system and the plaintiff has an accident and is injured, the plaintiff should be able to recover but if the plaintiff discovers that the braking system is defective and stops driving the car before having an accident, he or she will not be able to recover in tort against the manufacturer for the loss of value of the car because it is not as good a car as it was thought to be. To put it another way, actions for shoddy goods lie in contract and not in tort.

8–36 The difficulty of proving negligence in certain types of defective product have led to calls for the adoption of a regime in which the liability of the manufacturer is strict, that is, liability should depend solely on the establishment that the goods were defective, and not on a requirement to prove that the manufacturer was at fault. Such a system was adopted in the United States by judicial development, but it was always assumed that in this country the change would require legislation. Both the Law Commission (in 1977) and the Royal Commission on Civil Liberty and Compensation for Death or Personal Injury, usually called the Pearson Commission (in March 1978), recommended statutory change to introduce such a regime. It appeared that this advice had fallen on deaf ears until, in July 1985, the European Community adopted a product liability directive, and the British

Parliament enacted Pt I of the Consumer Protection Act 1987, which from 1 March 1988 introduced a product liability regime into English law. This Act does not remove any of the existing remedies which somebody damaged by defective goods may have. What it does is to introduce an additional set of remedies. In practice, it is likely that plaintiffs injured by defective goods after 1 March 1988 will seek to argue for liability both in contract or negligence under the old law, and also under the Consumer Protection Act. Although, where the Act applies, plaintiffs would usually be better off suing under the Act than in an action in negligence, they would often still be better off pursuing a contract action, if they have one.

8–37 To give a detailed account of the Act would be out of place here, but some mention should be made of the main features. The primary thrust of the Act is to increase the possibility of an effective remedy for someone who suffers personal injury or death. There is, however, a subsidiary right in respect of damage to the property of individuals (though not of companies) subject to a minimum of £275. Liability attaches to the producer, who is in most cases the manufacturer, but there are certain situations where someone else is treated as the producer. So, if the goods are manufactured outside the European Union, the first person to import them into the Union is treated as the producer. This is so as to ensure that there is an effective defendant within the Union. Similarly, if people hold themselves out as the producer by putting their own name on the goods, as in the case of own brand goods sold by supermarkets, they become the producer, as may someone who having supplied the goods, fails to comply with a request from someone injured by the goods to identify either the producer or the importer.

8–38 Liability relates to defective products but a defective product is defined in terms of safety. A product is defective if it is not as safe as 'persons generally are entitled to expect'. For the purpose of assessing this, a court is required to take into account all the relevant circumstances and, in particular:

(a) the manner and purposes for which the product has been marketed and any instructions or warnings which accompany it;
(b) what might reasonably be expected to be done with or in relation to the product; and
(c) the time when the product was supplied by its producer to another.

So, the court needs to consider both the purposes for which the goods are put into circulation and also the ways in which they might be used. Many of the leading cases in the United States have involved misuse

of the product by the consumer and it is thought that a prudent producer should anticipate likely forms of misuse, though no doubt there are some forms of misuse so gross that the manufacturer should not be expected to guard against them. The form in which instructions for the use of the product is given will be very important. The manufacturer needs to give thought not only to the content of the instructions but also to practical ways of keeping the instructions in a way which is effectively close to the product. In many cases, instructions are put in booklets which are put in drawers and lost or in cardboard slips which were attached to a product when bought but soon become detached. So, for instance, if you want to make sure that someone does not open the back of a television set when it is connected to the power supply, it would be much more effective to do this by some clearly readable sign on the back of the set than by a note in the instructions. Undoubtedly, manufacturers need to give urgent attention to this question.

8–39 Safety is of course an evolving concept. This is clearly illustrated for instance in relation to motor cars where many modern cars have features which would have been unthinkable 30 years ago. Similarly, today, expensive cars have features, such as special braking systems, which are not to be found in cheaper cars. In the case of a car, which is very likely to be in circulation for 10 and maybe for 20 or 30 years, a critical question is the time at which safety is to be tested. From the point of view of the producer, the critical time is when the goods are put into circulation. So a car sold for the first time in 1970 should be judged by 1970 and not by 1990 standards.

Manufacturers are not permitted to seek to contract out of liability under the Act but they may rely on the plaintiff's contributory negligence as reducing, or in extreme cases extinguishing, liability. Claims will be subject to the normal periods of limitation; that is that the actions must be brought within the appropriate time from the time the injury is suffered but, in addition, no action may be brought more than 10 years after the goods have first been put into circulation. In order to take full advantage of this defence, manufacturers will need to be able to prove when the particular article which has done the damage was put into circulation. The Act contains a number of defences. Of these, the most controversial is the so called 'development risk' defence under which the Act provides:

> …that the state of scientific and technical knowledge at the relevant

> time was not such that the producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.

8–40 In effect, this re-introduces, by way of defence, a plea that the defendant was not negligent though with the burden of disproving negligence being on the producer. This defence will not be relevant where what has happened is a miscarriage of a normally safe production process or where the danger arises from inadequate warnings. It will be very important, however, where the allegation is that the producer has brought forth a new product which is unsafe. This can be perhaps most easily illustrated in relation to pharmaceuticals which is one of the areas where the defence will be most important. Under the pre-Act law, the plaintiff has to prove that the manufacturer or distributor of a new drug has been negligent in putting or keeping it on the market. In practice, this involves seeking to establish that the manufacturer's testing either on animals or on humans during the clinical testing stage was not as careful as it should have been. This presents enormous practical and cost problems for a private individual. If the Consumer Protection Act 1987 had not contained the development risk defence, the plaintiff would simply have had to prove that the drug was dangerous and, in the case of a drug like thalidomide, that would have been relatively easy though a plaintiff would still have to prove that his or her mother had in fact taken thalidomide produced by the defendants, while she was pregnant (which can give rise to serious problems where the same drug is put on the market at the same time by different manufacturers under different brand names). Under the provision in the Act, manufacturers will have the possibility of establishing that in the light of scientific and technical knowledge at the relevant time, they could not have been expected to discover the defect. This brings the law quite close to where it was already in relation to new products of this kind. The great difference is that the burden of proof will be on the manufacturer. This will mean that, in practice, it has to give evidence about the nature and extent of its research. In some cases, manufacturers may choose not to do this or at least to make better offers than they would have done under the pre-Act regime in order to try to avoid having to do this.

CRIMINAL LIABILITY

8–41 Many of the changes which have taken place in the law discussed in this chapter in recent years have been driven by consumerism, that is, the development of consumers as an organised group able to lobby for laws which protect their interests. One of the major problems with protecting the consumer is that changes in the substantive law of contract and tort do not help very much if the sums at issue are small and the cost of using lawyers is large. One way of dealing with this has been to provide special systems for trying small consumer cases in county courts from which lawyers are excluded. Another important development has been the building up of criminal law in the field of consumer protection. The great advantage of this from the consumer's point of view is that it has no cost since the operation of the criminal law is a service provided by the state. The disadvantage is that usually one does not receive financial compensation for one's own particular loss, though the courts have been given power in the course of criminal proceedings to make compensation orders for those who have been injured by criminal behaviour. Nevertheless, at the prevention level, it is clear that the criminal law is of fundamental importance. Dishonest second hand car dealers are much more likely to refrain from turning back the mileometers of cars they sell because of the fear that they may be caught and prosecuted than because of the fear that a customer to whom they sell a car will sue.

The notion that criminal law had a role to play in the fair regulation of the market is very old since it goes back to rules designed to produce fair weights and measures which have existed since medieval times. Again, it is not possible to do more here than pick out a few salient points.

The most important Act in practice is the Trade Descriptions Act 1968 which gives rise to over 30,000 prosecutions a year. This makes it a criminal offence to apply a false trade description to goods in the course of a trade or business or to offer to supply any goods to which a false trade description is applied. The concept of trade description is very wide and has been treated as embracing eulogistic statements such as describing a car as a beautiful car or in 'immaculate condition' which would probably be regarded as not giving rise to liability in contract at all. Section 11 contains elaborate provisions about false or misleading indications as to the price of goods which have been replaced by Pt III