tion that a manufacturer, and to a lesser extent a seller, was aware of a hidden defect; and if this presumption is not overcome the purchaser has a right to rescission and to damages. If the presumption is rebutted, the plaintiff can obtain only rescission and reimbursement of expenses caused by the sale.

(2) Recovery on the contract can be severely restricted by limitations in the contract on the seller's warranty, although limitations on liability, whether on tort or on contract, are strictly construed and may not be valid in cases where the manufacturer or seller was deemed to have acted in bad faith. Furthermore, the law itself stipulates a short period of limitations upon which a plaintiff can sue.

(3) Where the purchase contract does not otherwise preclude his doing so, the plaintiff-purchaser can avail himself of a tort theory. Subsequent purchasers would appear to have a choice of suing on a tort or contract basis; and, of course, persons having no contractual connection whatever with the manufacturer or seller can sue only on a tort theory.

(4) The principal difficulty with the tort theory is the necessity of proving fault, except in the special case where the defendant is a so-called "guardian."

England

I. ARNOLD ROSS *

The hard and fast rule reached in *Winterbottom v. Wright* [1] in 1842, that privity of contract must exist between manufacturer and seller as a condition to holding the former liable for a condition not readily viewable, and that a third party could not recover damages from the manufacturer because of latent defect in his product, was the standard in England for almost 90 years before the English courts reexamined the problem in the light of changes in thinking. In *Winterbottom* the plaintiff, a mail coach driver employed by a con-

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[1] 152 Eng. Rep. 402 (Ch. 1842).

tractor who had agreed to convey the mail bags along a certain route, sought to recover damages for an injury he sustained when the coach broke down because of latent defects in its construction. He brought his action against the supplier of the coach to the Postmaster General. The court found that the supplier of the coach owed no duty to the driver. That conclusion was the basis of the decision in *Earl v. Lubbock*,[2] decided in 1905, in denying to a third party any relief against a manufacturer or supplier of the product with the latent defect.

In 1916 *Judge Benjamin N. Cardoza* of the New York Court of Appeals broke the impact of that rule, which had been followed in New York, in writing for that Court in *Mac Pherson v. Buick Motor Co.*[3] that third parties may hold a manufacturer liable for articles which would be dangerous if negligently made. It was not until 1932 that the British House of Lords by a divided court of 3 to 2 in *M'Allister (or Donoghue) v. Stevenson*[4] held a manufacturer liable to third parties for the manufacture of articles which were dangerous owing to unknown defects.

A proper discussion of the subject requires consideration of the pertinent provisions of contract and negligence law as they are applied in England.

Contract Law

Parties to a contractual relationship may exclude by express terms the warranty requiring fair warning of the probable danger owing to unknown defects; by such a disclaimer a manufacturer would then escape any judgment for damages flowing from that warranty,[5] although the English courts are reluctant to construe a contract to effect that result.[6]

The English cases treating this subject have held to a strict construction of the contract between the parties, when liability was based on a breach of warranty, and the article in question was likely to be dangerous to those who might come in contact with it. In 1912 in *Blacker v. Lake and Elliot, Ltd.*,[7] the court held that it, and not a jury, should conclude whether the article in question was dangerous

[2] [1905] 1 K. B. 253.
[3] 217 N. Y. 382, 111 N. E. 1050 (1916).
[4] [1932] A. C. 562 (H. L.).
[5] Sale of Goods Act of 1893, 56 & 57 Vict., c. 71.
[6] Lowe v. Lombank, Ltd., [1960] 1 All E. R. 611.
[7] 106 L. T. 533 (D. C. 1912).

and that such determination pertained to a question of law. It further held that a manufacturer of an article, whose dangerous nature he has declared or is apparent, is under no obligation to a third person who is injured because of imperfect manufacture. A person knowingly dealing with an article of a dangerous nature has a duty to warn the person to whom he has handed or delivered the article of the potential danger, as well as a duty to warn those who, to his knowledge, might use it. The liability of the seller is limited to the purchaser or the one whom the purchaser mentioned as its user and not to a recipient, other than those mentioned, to whom the seller might deliver or permit use of the article if it was not a dangerous thing of itself. That part of the opinion which pertained to the liability of the manufacturer to third persons is no longer the view of the courts.

According to the law of negligence, a person who manufactures and sells an article owes a duty to take reasonable care in its design and manufacture.[8] This requirement extends to motor vehicles.[9] The duty arises when the manufacturer sells the article in such a form as to show that he intended that it reach the user without reasonable likelihood of an intermediate examination which would have revealed the danger.[10] Knowledge of the defect by the user precludes liability of the manufacturer.[11] His duty is discharged by giving a warning of the defect or dangerous characteristic to a competent person.[12] The manufacturer's or supplier's liability does not arise if a probable examination by the user at the time of purchase is likely to disclose the danger and he can be held liable, in the absence of notice, if discovery of the defect becomes known only after use.[13] The user must employ the article for the purpose originally disclosed and not for a materially different one.

Negligence Law

Lord Justice Thankerton of the House of Lords, in *M'Allister (or Donoghue) v. Stevenson,*[14] *supra,* stated the requirements for negligence actions by third persons against manufacturers or suppliers of products which have latent defects or dangerous characteristics.

[8] M'Allister (or Donoghue) v. Stevenson, [1932] A. C. 562 (H. L.).

[9] Donnelly v. Glasgow Corp., [1953] Sess. Cas. 107.

[10] London Graving Dock Co. v. Horton, [1951] A. C. 737, at 750 (H. L.).

[11] Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85, at 105 (P. C.).

[12] Holmes v. Ashford, [1950] 2 All E. R. 76; Bottomley v. Bannister, [1932] 1 K. B. 458, at 473.

[13] Denny v. Supplies and Transport Co., [1951] 2 K. B. 374.

[14] M'Allister (or Donoghue) v. Stevenson, [1932] A. C. 562 (H. L.).

That case, which has been cited in more than one hundred later decisions, was brought by a consumer against the manufacturer of ginger beer. A sealed bottle of ginger beer contained a snail which rendered the product dangerous and harmful, and the plaintiff suffered substantial damages from drinking it. The court awarded the plaintiff compensation, Lord Justice Thankerton and Lord Macmillan differing somewhat on the basis for liability. Noting that no contract existed and that the offensive article was not in itself dangerous, the Lord Justice stated that liability arose only if a "special relationship of duty" existed between the manufacturer and the consumer. The Lord Justice found such a relationship in the facts that the product was made solely for ultimate purchase by a consumer and that the method of packaging—by sealed bottle—excluded interference with or examination of the article by intermediate handlers. Lord Macmillan preferred to emphasize that the product was made for consumption; he offered a general rule that a manufacturer regularly processing food products always owes a general duty toward his customers. Both justices, of course, required a proof of negligence and expressly assumed the possibility of a defense of intervening causation through the actions of intervening third parties, such as wholesalers and retailers.

Although both rationale have been put forward in later cases, the Lord Justice's arguments, having broader applicability, seem to dominate later product liability cases, and several courts have brought his standards to bear in cases involving motor vehicles. For instance, it has been held that the duty to disclose latent defects and possible danger in the use of motor vehicles extends to those who for a consideration assemble parts [15] or repair the product.[16] Dealers who sell or rent them may be liable for defects or dangerous characteristics.[17] Liability extends also to those who lend their article for the sole benefit of the lender.[18] Where special precautions are required, the degree of care required almost amounts to a guaranty of safety.[19]

In *Malfroot v. Noxal, Ltd.*,[20] decided in 1935, the plaintiff had a sidecar fitted to his motorcycle. Shortly after leaving the shop

[15] Malfroot v. Noxal, Ltd., 51 T. L. R. 551 (1935).

[16] Stennett v. Hancock and Perry, [1939] 2 All E. R. 578; Herschtal v. Stewart and Ardern, Ltd., [1940] 1 K. B. 155.

[17] White v. Steadman, [1913] 3 K. B. 340.

[18] Chapman (or Oliver) v. Saddler & Co., [1929] A. C. 584 (H. L.).

[19] M'Allister (or Donoghue) v. Stevenson, [1932] A. C. 562 (H. L.).

[20] 41 T. L. R. 551 (1935).

where the attachment was made, the sidecar detached from the motorcycle, and the plaintiff and his lady passenger were injured. The court held that the defendents were liable to the male occupant, both in negligence and in contract, and to the female plaintiff in tort.

Herschetal v. Stewart & Arden, Ltd., [21] was a 1939 motor vehicle case in which the court applied the principle stated in *M'Allister (or Donoghue) v. Stevenson* to suppliers and repairers of motor vehicles. The defendants had sold to the plaintiff a reconditioned automobile. The morning after its receipt the plaintiff, in using it for his business, and while turning a corner, was injured because a rear wheel came off the car. The court held that the defendant owed a duty to the plaintiff to see to it that the wheels were properly affixed to the car, that the motor vehicle was free of any defects which would prevent normal use by the plaintiff, and that it was in a safe condition. The Court held that where an article is known to be required for immediate use, the test of liability in an action for negligence resulting from a defect in the article is not whether the injured party had an opportunity for intermediate examination, but whether such an examination could reasonably be anticipated by the supplier. A negative conclusion to such reasonable anticipation made the supplier liable for the negligence.

The amount of time that passed from purchase to discovery of the defect of auto parts has a bearing on the supplier's liability. In *Evans v. Triplex Safety Glass Co.*,[22] decided in 1936, the plaintiff had bought a car fitted with a Triplex Toughened Safety Glass windshield which the defendants had manufactured. Plaintiff suffered an injury when the windshield broke. The Court held that a manufacturer would not be liable (1) when there was a material lapse of time between the purchase of the car with the equipment and the accident, (2) if there was the possibility that the glass might have been strained when screwed into its frame, (3) when there was an opportunity for examination by the intermediate seller, and (4) if the breaking of the glass might have been caused by something other than a defect in manufacture.

Andrews v. Hopkinson,[23] decided in 1956, presented in interesting situation. The plaintiff in that case had visited the showroom of a car dealer and evinced a desire to purchase a second-hand car. On the basis of representations by defendant's sales manager ("It's a

[21] [1940] 1 K. B. 155.
[22] [1936] 1 All E. R. 283.
[23] [1957] 1 Q. B. 229.

good little bus. I would stake my life on it. You will have no trouble with it"), plaintiff decided to purchase the car on time payments. The dealer then sold the car to a finance company, and the latter in turn sold it to the buyer on the agreed terms. Eight days after purchase, the car collided with a motor bus because of a failure in the drag-link joint of the steering mechanism. The car was not safe or fit for use on the highway. The owner brought an action against the dealer, and the Court held: (1) that despite the circuitous method by which plaintiff acquired the car, he could hold the dealer on the warranty that the car was in good condition; (2) that the damages recoverable, despite the normal limits for a breach of warranty, should include those for the personal injury which flowed from the consequences of the breach; and (3) that the defendent was also liable in negligence for delivering a car in dangerous condition, in light of the facts that the defect could have been discovered by reasonable diligence and defendant failed either to have the car examined or to warn the plaintiff that it had not been examined.

The relatively few negligence cases based on hidden defects in motor vehicles are attributable to the firm stand the British Parliament has taken concerning vehicle construction and use which is spelled out in the Road Traffic Act of 1960.[24] Its 271 sections, which consolidated the provisions of various prior enactments and provided additional safeguards enforceable in England, Scotland, and Wales, include provisions which make it criminal to violate the statute and empower local prosecutors to enforce the statute.

The pertinent provisions applicable to the construction and use of motor vehicles and the necessary equipment thereof are set out in sections 64 through 69. They include provisions regulating the construction, weight, equipment, and use of vehicles; for conducting tests to establish the road worthiness of vehicles; requiring such test certificates to be obtained; and prohibiting the sale of vehicles in unroadworthy condition.[25]

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[24] 8 & 9 Eliz. II, c. 16.

[25] Authority to regulate the construction of motor vehicles is detailed in section 64 which states:

"*Regulation of construction, weight, equipment and use of vehicles.*

(1) The Minister may make regulations generally as to the use of motor vehicles and trailers on roads, their construction and equipment and the conditions under which they may be so used, and in particular, but without prejudice to the generality of the foregoing provisions, may make regulations with respect to any of the following matters:—

(a) the width, height and length of motor vehicles and trailers and the load

Conclusion

Product liability, as applied to motor vehicles in Great Britain, is now firmly established. The relatively few cases which reach the courts is the result of the effective regulations which appropriate

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carried thereby, the diameter of wheels, and the width, nature and condition of tyres, of motor vehicles and trailers;

(b) the consumption of smoke and the emission of visible vapour, sparks, ashes and grit;

(c) excessive noise owing to the design or condition of a vehicle, or the loading thereof;

(d) the maximum weight unladen of heavy motor cars, and the maximum weight laden of motor vehicles and trailers, and the maximum weight to be transmitted to the road or any specified area therof by a motor vehicle or trailer of any class or description or by any part or parts of such a vehicle or trailer in contact with the road, and the conditions under which the weights may be required to be tested;

(e) the particulars to be marked on motor vehicles and trailers;

(f) the towing of or drawing of vehicles by motor vehicles;

(g) the number and nature of brakes, and for securing that brakes, silencers and steering gear shall be efficient and kept in proper working order;

(h) the testing and inspection, by persons authorised by or under the regulations, of the brakes, silencers, steering gear, tyres, lighting equipment and reflectors of motor vehicles and trailers on any premises where they are, subject however to the consent of the owner of the premises;

(i) the appliances to be fitted for signalling the approach of a motor vehicle, or enabling the driver of a motor vehicle to become aware of the approach of another vehicle from the rear, or for intimating any intended change of speed or direction of a motor vehicle, and the use of any such appliance, and for securing that they shall be efficient and kept in proper working order;

(j) for prohibiting the use of appliances fitted to motor vehicles for signalling their approach, being appliances for signalling by sound, at any times, or on or in any roads or localities, specified in the regulations;

and different regulations may be made as respects different classes or descriptions of vehicles or as respects the same class or description of vehicles in different circumstances and, in the case of regulations made for the purpose specified in paragraph (j) of this subsection, as respects different times of the day or night and as respects roads in different localities.

(2) Subject to the provisions of this section, it shall not be lawful to use on a road a motor vehicle or trailer which does not comply with any such regulations as aforesaid, applicable to the class or description of vehicles to which the vehicle belongs, as to the construction, weight and equipment thereof; and a person who uses a motor vehicle or trailer in contravention of this subsection, or causes or permits the vehicle to be so used, shall be liable on summary conviction to a fine not exceeding twenty pounds, or in the case of a second or subsequent conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding three months.

(3) Where any such regulations as aforesaid contain provisions varying the requirements as regards the construction or weight of any class or description of vehicles, provision shall be made by the regulations for exempting for such