

# Introduction to the English Legal System

8 – 13 April 2019, University of Konstanz

## Schedule

Date	Time	Venue	Topic
Mon 08/04	14:30 – 18:00	A704	<b>English Legal System:</b> Sources, Institutions and Personnel of English Law. Statutory Interpretation
Tue 09/04	8:30 – 12:00	A702	<b>English Legal System:</b> The adversarial process. Principles of Constitutional Law and Human Rights. <b>Contract Law:</b> Formation
Wed 10/04	14:30 – 18:00	R611	<b>Contract Law:</b> Formation. Consideration
Thu 11/04	8:30 – 12:00	R611	<b>Contract Law:</b> Content
Fri 12/04	8:30 – 12:00	R611	<b>Contract Law:</b> Discharge and Remedies, Privity of Contract, Vitiating Factors
Sat 14/04	8:30 – 12:00	A702	<b>Tort Law / Property Law</b>

## Indicative Timetable

**Morning sessions:** 8:30 – 9:15 ■ 9:20 – 10:05 ■■ 10:25 – 11:10 ■ 11:15 - 12:00  
**Afternoon sessions:** 14:30 – 15:15 ■ 15:20 – 16:05 ■■ 16:25 – 17:10 ■ 17:15 – 18:00

## Person to contact

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## Learning outcomes

At the end of the course students will have an overview over the sources and institutions of the English legal system and a basic understanding of areas of English private law: contract, tort and property.  
Students will be familiar with the use of English as a legal language. Students will be able to identify legal problems and access relevant materials to assess them in terms of English law. Students will have an understanding of the sources of law and will be able to extract information statutory materials and judgments

## **Teaching approach**

The course will be run in workshops, combining frontal lecture techniques with small group teaching techniques. It is expected that students will contribute in class. Some materials (contained in this pack) will be studied in class and a discussion amongst students will be facilitated by the lecturer.

Lecture slides accompanying the lectures will be available via the web-pages.

## **Bibliography:**

### Dictionaries:

*Köbler*, Rechtsenglisch, 6. Auflage, 2005, Vahlen: München (y 27556)

*Dietl/Lorenz*, Wörterbuch für Recht, Wirtschaft und Politik (2 Bände, CD-Rom)

(6 jua 412.15/d42a-cdrom; 6 jua 412.15/d42a-handb.)

### In German:

*Blumenwitz*, Einführung in das anglo-amerikanische Recht, Jus-Schriftenreihe, 7. Auflage, 2003, Beck: München (juw 260/b59(7))

*Henrich/Huber*, Einführung in das englische Privatrecht, 3. Auflage, 2003, Verlag Recht und Wirtschaft: Heidelberg (juw 328/h26(3))

### In English:

*Wörten*, Introduction to English Civil Law I, 4. Auflage, 2007, AlpmannSchmidt: Münster (juw 328/w62-1(4))

*Idem*, Introduction to English Civil Law II, 3. Auflage, 2005, Alpmann-Schmidt: Münster (juw 328/w62-2(3))

### Standard work:

Halsbury's Laws of England, ed. by Lord Hailsham of St Marylebone, (juw 273:j/h15(4))

### A title especially for Continental lawyers:

*Cartwright*, Contract law: an introduction to the English law of contract for the civil lawyer, Hart: Oxford, 2007 (juw 334/c182151681)

ELIZABETH II

c. 21



# Knives Act 1997

## 1997 CHAPTER 21

An Act to create new criminal offences in relation to the possession or marketing of, and publications relating to, knives; to confer powers on the police to stop and search people or vehicles for knives and other offensive weapons and to seize items found; and for connected purposes. [19th March 1997]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### s 1 Unlawful marketing of knives.

- (1) A person is guilty of an offence if he markets a knife in a way which--
  - (a) indicates, or suggests, that it is suitable for combat; or
  - (b) is otherwise likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon.
- (2) "Suitable for combat" and "violent behaviour" are defined in section 10.
- (3) For the purposes of this Act, an indication or suggestion that a knife is suitable for combat may, in particular, be given or made by a name or description--
  - (a) applied to the knife;
  - (b) on the knife or on any packaging in which it is contained; or
  - (c) included in any advertisement which, expressly or by implication, relates to the knife.

(4) For the purposes of this Act, a person markets a knife if--

- (a) he sells or hires it;
- (b) he offers, or exposes, it for sale or hire; or
- (c) he has it in his possession for the purpose of sale or hire.

(5) A person who is guilty of an offence under this section is liable--

- (a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
- (b) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or to both.

## **s 2 Publications.**

(1) A person is guilty of an offence if he publishes any written, pictorial or other material in connection with the marketing of any knife and that material--

- (a) indicates, or suggests, that the knife is suitable for combat; or
- (b) is otherwise likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon.

(2) A person who is guilty of an offence under this section is liable--

- (a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
- (b) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or to both.

## **s 3 Exempt trades.**

(1) It is a defence for a person charged with an offence under section 1 to prove that--

- (a) the knife was marketed--
  - (i) for use by the armed forces of any country;
  - (ii) as an antique or curio; or
  - (iii) as falling within such other category (if any) as may be prescribed;
- (b) it was reasonable for the knife to be marketed in that way; and
- (c) there were no reasonable grounds for suspecting that a person into whose possession the knife might come in consequence of the way in which it was marketed would use it for an unlawful purpose.

(2) It is a defence for a person charged with an offence under section 2 to prove that--

- (a) the material was published in connection with marketing a knife--
  - (i) for use by the armed forces of any country;
  - (ii) as an antique or curio; or
  - (iii) as falling within such other category (if any) as may be prescribed;
- (b) it was reasonable for the knife to be marketed in that way; and
- (c) there were no reasonable grounds for suspecting that a person into whose possession the knife might come in consequence of the publishing of the material would use it for an unlawful purpose.

(3) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

## **s 4 Other defences.**

(1) It is a defence for a person charged with an offence under section 1 to prove that he did not know or suspect, and had no reasonable grounds for suspecting, that the way in which the knife was marketed--

- (a) amounted to an indication or suggestion that the knife was suitable for combat; or
- (b) was likely to stimulate or encourage violent behaviour involving the use of the

knife as a weapon.

(2) It is a defence for a person charged with an offence under section 2 to prove that he did not know or suspect, and had no reasonable grounds for suspecting, that the material--

(a) amounted to an indication or suggestion that the knife was suitable for combat; or

(b) was likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon.

(3) It is a defence for a person charged with an offence under section 1 or 2 to prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

### **s 10 Interpretation.**

In this Act--

"the court" means --

(a) in relation to England and Wales or Northern Ireland, the Crown Court or a magistrate's court;

(b) in relation to Scotland, the sheriff;

"knife" means an instrument which has a blade or is sharply pointed;

"marketing" and related expressions are to be read with section 1(4);

"publication" includes a publication in electronic form and, in the case of a publication which is, or may be, produced from electronic data, any medium on which the data are stored;

"suitable for combat" means suitable for use as a weapon for inflicting injury on a person or causing a person to fear injury;

"violent behaviour" means an unlawful act inflicting injury on a person or causing a person to fear injury.

### **s 11 Short title, commencement, extent etc.**

(1) This Act may be cited as the Knives Act 1997.

(2) This section comes into force on the passing of this Act.

(3) The other provisions of this Act come into force on such date as may be appointed by order made by the Secretary of State; but different dates may be appointed for different provisions and for different purposes.

(4) Any such order may include such transitional provisions or savings as the Secretary of State considers appropriate.

(5) The power--

(a) to make regulations under section 3 or 7, or

(b) to make an order under this section,

is exercisable by statutory instrument.

(6) A statutory instrument made under section 3 or 7 shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) Except for section 8, this Act extends to Northern Ireland.

### Questions

1. What is the Short Title of this Act?
2. What is the Long Title of this Act?
3. What is the Official Citation of this Act?
4. When did this Act receive Royal Assent?
5. When did this Act come into force?
6. What are the different ways in which one can commit an offence under this Act?
7. What defences does the Act provide for?
8. Could the sale of a kitchen skewer potentially be an offence under this Act?
9. Why do you think this Act was passed? Do you think it is effectively drafted for these purposes?

### Problem Questions

1. Dennis has a selection of combat knives which he advertises in arms industry publications and sells at UK and European arms fairs. Has he committed an offence under the Act?
2. Mark produces hard plastic spikes with handles which advertises in underground magazines as being “...light, lethal and easily concealed...” and “...invisible to X-ray...”, Has he or the magazine publishers committed an offence under the Act?
3. Mary owns a combat knife that she bought in 1992. Is she committing an offence by continuing to possess it? Can she sell it to Tom?
4. Eliza produces high quality knives for hunting and fishing. She advertises her knives in the specialist *hunting Today* and her adverts include the text “sharp steel blades excellent for gutting and skinning...” Has she or the publisher of *Hunting Today* committed an offence under the Act?
5. Michael owns a Victorian reproduction samurai sword. It is stolen from his house during a burglary and is later found being sold at a car boot sale together with army surplus clothes and other weapons. Dave, the person selling the sword is arrested and charged under s1 of the Knives Act. How likely is it that Dave will be convicted?

## 2. Contract Law: A case study

### **\*256 Carlill v Carbolic Smoke Ball Company.**

In the Court of Appeal.

7 December 1892

**[1893] 1 Q.B. 256**

Lindley , Bowen and A. L. Smith , L.JJ.

1892 Dec. 6, 7.

Contract— Offer by Advertisement— Performance of Condition in Advertisement— Notification of Acceptance of Offer— Wager— Insurance— 8 & 9 Vict. c. 109 — 14 Geo. 3, c. 48, s. 2 .

The defendants, the proprietors of a medical preparation called “ The Carbolic Smoke Ball,” issued an advertisement in which they offered to pay 100l. to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100l. in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109 , nor a policy within 14 Geo. 3, c. 48, s. 2 ; and that the plaintiff was entitled to recover.

APPEAL from a decision of Hawkins, J. <sup>1</sup>

The defendants, who were the proprietors and vendors of a medical preparation called “ The Carbolic Smoke Ball,” inserted in the *Pall Mall Gazette* of November 13, 1891, and in other \*257 newspapers, the following advertisement:

“ 100l. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000l. is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

“ During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

“ One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London.”

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100l. The defendants appealed.

*Finlay, Q.C.*, and *T. Terrell* , for the defendants. The facts shew that there was no binding contract between the parties. The case is not like *Williams v. Carwardine* <sup>2</sup> , where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza - an event over which she had no control. The words express an intention, but do not amount to a promise: *Week v. Tibold* . <sup>3</sup> The present case is similar to *Harris v. Nickerson* . <sup>4</sup> The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be \*258 impossible to disprove it. *Guthing v. Lynn* <sup>5</sup> supports the view that the terms are too vague to make a contract, there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: *Gerhard v. Bates* <sup>6</sup> The present case differs from *Denton v. Great Northern Ry. Co.* <sup>7</sup> , for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This

principle was laid down by Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* <sup>8</sup> The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109 Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

*Dickens, Q.C.*, and *W. B. Allen*, for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public - as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in *Brogden v. Metropolitan Ry. Co.* <sup>9</sup>, shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended \*259 that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in *Spencer v. Hardin* <sup>10</sup> *Williams v. Carwardine* <sup>11</sup> shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* <sup>12</sup> It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In *Gerhard v. Bates* <sup>13</sup>, Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was \*260 no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

*Finlay, Q.C.*, in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay 100l. to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* <sup>14</sup> The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In *Denton v. Great Northern Ry. Co.* <sup>15</sup> the fact was ascertained by a public, not a secret act. The respondent relies on *Williams v. Carwardine* <sup>16</sup>, and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: *Lampleigh v. Braithwait* <sup>17</sup>; and here there was no request. Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some \*261

limit, and three limitations have been suggested. The limitation “ during the prevalence of the epidemic” is inadmissible, for the advertisement applies to colds as well as influenza. The limitation “ during use” is excluded by the language “ after having used.” The third is, “ within a reasonable time,” and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY, L.J.

[The Lord Justice stated the facts, and proceeded:— ] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay 100l. in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable —

“ 100l. reward will be paid by the Carbolie Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball.”

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: “ 1000l. is deposited with the Alliance Bank, shewing our sincerity in the matter.” Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in \*262 aid by the advertiser as proof of his sincerity in the matter - that is, the sincerity of his promise to pay this 100l. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100l. to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams v. Carwardine* <sup>18</sup>, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, “ Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified.” Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required - which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden v. Metropolitan Ry. Co.* <sup>19</sup> - if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he \*263 does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise - that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the 100l. is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has

made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the “ increasing epidemic” (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to \*264 any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100l. will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention - that is, the consideration. It has been argued that this is nudum pactum - that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing \*265 to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of Gerhard v. Bates<sup>20</sup>, which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L.J.

I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. \*266 The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made - that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had pre- \*267 viously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "100l. will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be \*268 sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the 100l. should, if the conditions were fulfilled, be paid? The advertisement says that 100l. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100l. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise 100l. to a person who used the smoke ball unless you could check

or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world - that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. \*269 That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in *Spencer v. Harding*.<sup>21</sup> "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating \*270 acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case*<sup>22</sup>, and the very instructive judgment of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*<sup>23</sup>, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly

indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a \*271 nudum pactum - that there was no consideration for the promise - that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors v. Davies* <sup>24</sup> and Serjeant Manning's note to *Fisher v. Pyne* <sup>25</sup>, which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's *Nisi Prius*, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant* <sup>26</sup>, is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all - that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard v. Bates* . <sup>27</sup> In *Gerhard v. Bates* <sup>28</sup>, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the \*272 promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public - a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100l., it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you 5l.," and he uses it, there is ample consideration for the promise.

A. L. SMITH, L.J.

The first point in this case is, whether the defendants' advertisement which appeared in the *Pall Mall Gazette* was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in *Denton v. Great Northern Ry. Co.* <sup>29</sup>, whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "100l. reward will be paid \*273 by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5s." If I may paraphrase it, it means this: "If you" - that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition — "will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you 100l. if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100l." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000l. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the

1001. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honour or an agreement or a contract in honour - whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is nudum pactum, and about nudum pactum I will say a word in a moment. \*274 In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of Williams v. Carwardine<sup>30</sup>, and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a persona designata and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that \*275 it was nudum pactum. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

**Representation** Solicitors: J. Banks Pittman ; Field & Roscoe .

Appeal dismissed. (H. C. J. )

1. [1892] 2 Q. B. 484 .

2. 4 B. & Ad. 621 .

3. 1 Roll. Abr. 6 (M.) .

4. Law Rep. 8 Q. B. 286 .

5. 2 B. & Ad. 232 .

6. 2 E. & B. 476 .

7. 5 E. & B. 860 .

8. 2 App. Cas. 666 .

9. 2 App. Cas. 666 .

10. Law Rep. 5 C. P. 561 .

11. 4 B. & Ad. 621 .

12. 2 App. Cas. 666 .

13. 2 E. & B. 476 .

14. 2 App. Cas. 692 .

15. 5 E. & B. 860 .

16. 4 B. & Ad. 621 .

17. 1 Sm. L. C. 9th ed. pp. 153, 157, 159 .

18. 4 B. & Ad. 621 .

19. 2 App. Cas. 666, 691 .

20. 2 E. & B. 476 .

21. Law Rep. 5 C. P. 561, 563 .

22. Law Rep. 7 Ch. 587 .

23. 2 App. Cas. 666, 691 .

24. 12 M. & W. 758 .

25. 1 M. & G. 265 .

26. 3 Scott, 238, 250 .

27. 2 E. & B. 476 .

28. 2 E. & B. 476 .

29. 5 E. & B. 860 .

30. 4 B. & Ad. 621 .

### 3. Contract Law: Statutes

#### CONSUMER RIGHTS ACT 2015

##### 1 Goods to be of satisfactory quality

(1) Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.

(2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—

- (a) any description of the goods,
- (b) the price or other consideration for the goods (if relevant), and
- (c) all the other relevant circumstances (see subsection (5)).

(3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of that kind are usually supplied;
- (b) appearance and finish;
- (c) freedom from minor defects;
- (d) safety;
- (e) durability.

#### PART 2 UNFAIR TERMS

*What contracts and notices are covered by this Part?*

##### S 61 Contracts and notices covered by this Part

(1) This Part applies to a contract between a trader and a consumer.

(2) This does not include a contract of employment or apprenticeship.

(3) A contract to which this Part applies is referred to in this Part as a “consumer contract”.

(4) This Part applies to a notice to the extent that it—

- (a) relates to rights or obligations as between a trader and a consumer, or
- (b) purports to exclude or restrict a trader’s liability to a consumer.

(5) This does not include a notice relating to rights, obligations or liabilities as between an employer and an employee.

*What are the general rules about fairness of contract terms and notices?*

##### 62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined—

(a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

(6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

(7) Whether a notice is fair is to be determined—

(a) taking into account the nature of the subject matter of the notice, and

(b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.

(8) This section does not affect the operation of—

(a) section 31 (exclusion of liability: goods contracts),

(b) section 47 (exclusion of liability: digital content contracts),

(c) section 57 (exclusion of liability: services contracts), or

(d) section 65 (exclusion of negligence liability).

### **63 Contract terms which may or must be regarded as unfair**

(1) Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part.

(2) Part 1 of Schedule 2 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 62 unless section 64 or 73 applies to it.

...

### **64 Exclusion from assessment of fairness**

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

### **65 Bar on exclusion or restriction of negligence liability**

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

(3) In this section "personal injury" includes any disease and any impairment of physical or mental condition.

(4) In this section "negligence" means the breach of—

(a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,

(b) a common law duty to take reasonable care or exercise reasonable skill,

(c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957, or

(d) the duty of reasonable care imposed by section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

(5) It is immaterial for the purposes of subsection (4)—

(a) whether a breach of duty or obligation was inadvertent or intentional, or

(b) whether liability for it arises directly or vicariously.

(6) This section is subject to section 66 (which makes provision about the scope of this section).

...

### **67 Effect of an unfair term on the rest of a contract**

Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect.

### **68 Requirement for transparency**

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

### **69 Contract terms that may have different meanings**

(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

(2) Subsection (1) does not apply to the construction of a term or a notice in proceedings on an application for an injunction or interdict under paragraph 3 of Schedule 3.

## **SCHEDULE 2 CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR**

### **PART 1 LIST OF TERMS**

1A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.

2A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

3A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

4A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.

5A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.

6A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

7A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

8A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

9A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.

10A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

11A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

12A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

13A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

14A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

15A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

16A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

17A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

18A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

19A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

20A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—

(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,

(b) unduly restricting the evidence available to the consumer, or

(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

**Problem question:**

1. Mary regularly parks her car in the customers' car park at Jones Ltd department store. Inside the car park at all exit points are large notices stating in bold letters "Cars parked at owners' risk". Underneath is displayed in smaller letters a series of terms and conditions. One of the terms states:

The company, its employees and agents accept no responsibility for any damage to customers' vehicles whatsoever and howsoever caused. Any term, condition or warranty, whether express, implied or statutory covering damages to customer vehicles is hereby specifically excluded.

The next occasion Mary uses the car park she fails to see a notice placed at the entrance before the automatic ticket barrier which states

Jones Ltd regrets the inconvenience caused to customers during the refurbishment and modernisation work. Customers are strongly advised to seek alternative parking during this period but may still use areas of the car park not undergoing refurbishing on the clear and express understanding that they do so entirely at their own risk and that the company, its employees and agents accept no responsibility whatsoever for any losses or damage howsoever caused.

Mary takes her ticket from the automatic machine and enters the car park. She suffers facial injury and damage to the car when a brick is dropped through the car windscreen.

Advise Mary whether she can recover damages for her own injuries and for the damage to the car.

2. Mary again. This time she parks her car in the car park in the centre of town. As there is always a shortage of parking spaces, the car park operating council have introduced a maximum stay of two hours to allow other shoppers and users of the town's facilities to obtain parking.

There is a prominent display at various points outside and inside the car park saying "PARKING. First two hours FREE. Parking fee for longer stays £150".

Mary parks for several hours and when she returns finds a "parking fine notice" attached to her windscreen demanding payment of £150 for overstaying. Does she have to pay?

**Tip:** Statutes and statutory materials are available online at the webpages of the Office for Public Sector Information ([www.opsi.gov.uk](http://www.opsi.gov.uk)), at least since 1988, some earlier.

#### 4. Tort: Case study

[1932] A.C. 562  
[HOUSE OF LORDS.]

**M'ALISTER (OR DONOGHUE) (PAUPER), APPELLANT;  
AND  
STEVENSON, RESPONDENT.**

1932 May 26.

Negligence - Liability of Manufacturer to ultimate Consumer - Article of Food - Defect likely to cause Injury to Health.

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:-

**So held, by Lord Atkin, Lord Thankerton and Lord Macmillan;** Lord Buckmaster and Lord Tomlin dissenting.

**APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).**

By an action brought in the Court of Session the appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The appellant by her condescendence averred that the bottle of ginger-beer was purchased for the appellant by a friend in a café at Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which \* 563 was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

The respondent objected that these averments were irrelevant and insufficient to support the conclusions of the summons.

The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof.

The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action.

**LORD BUCKMASTER** [...] The general principle of [*Langridge v Levy, Longmeid v Holliday* and *Winterbottom v Wright*] is stated by Lord Sumner in the case of *Blacker v. Lake Elliot, Ltd.* (106 L. T. 533, 536.), in these terms: "The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective."

From this general rule there are two well known exceptions: (1.) In the case of an article dangerous in itself; and (2.) where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason, and this is known to the manufacturer. Until the case of *George v. Skivington* (L. R. 5 Ex. 1.) I know of no further modification of the general rule.

As to (1.), in the case of things dangerous in themselves, there is, in the words of Lord Dunedin, "a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity": *Dominion Natural Gas Co., Ltd. v. Collins Perkins*. ([1909] A. C. 640, 646.) And as to (2.), this depends on the fact that the knowledge of the danger creates the obligation to warn, and its concealment is in the nature of fraud. In this case no one can suggest that ginger-beer was an article dangerous in itself, and the words of Lord Dunedin show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

[Lord Buckmaster went on to survey other authorities and continued:] In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate purchaser are *ex hypothesi* immaterial. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder \*578 exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognized, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that, with the exception of *George v. Skivington* (L. R. 5 Ex. 1.), no case directly involving the principle has ever succeeded in the Courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been waste of time...

**LORD ATKIN.** My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article \*579 is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law; and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they

exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on.

**\*580** In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v. Pender* (11 Q. B. D. 503, 509.), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This appears to me to be the doctrine of *Heaven v. Pender* (11 Q. B. D. 503, 509.), **\*581** as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould*. ([1893] 1 Q. B. 491, 497, 504.) Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of *Heaven v. Pender* (11 Q. B. D. 503, 509.) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender* (11 Q. B. D. 503, 510.) of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used **\*582** or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould* ([1893] 1 Q. B. 491.), I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven v. Pender* (11 Q. B. D. 503.) were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any

purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the \*583 manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser - namely, by members of his family and his servants, and in some cases his guests. I do not think so in of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also \*584 formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

**LORD MACMILLAN.** [...] The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the \*619 legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom \*620 does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness," and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I \*621 do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

[Having quoted from Parke B's judgment in *Longmeid v Holliday*, Lord Macmillan continued:] \*622 I read this passage rather as a note of warning that the standard of care exacted in human dealings must not be pitched too high than as giving any countenance to the view that negligence may be exhibited with impunity. It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded. It is doubtful whether in such a case there is any redress against the retailer: *Gordon v. M'Hardy*. (6 F. 210)

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be both averred and proved. The appellant accepts this burden of \*623 proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.