.B. This is a joint document
f the Law Commission and the
cottish Law Commission circu-
ated for comment and criticism
nly. It does not represent
he concluded views of the two
ommissions.

The Law Commissions would be grateful for comments before the end of March 1972.

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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 39

AND

SCOTTISH LAW COMMISSION

MEMORANDUM NO:15

PROVISIONAL PROPOSALS RELATING TO

THE EXCLUSION OF LIABILITY FOR NEGLIGENCE IN THE SALE OF GOODS

and

EXEMPTION CLAUSES IN CONTRACTS FOR THE SUPPLY OF SERVICES AND OTHER CONTRACTS

27 SEPTEMBER 1971

30-94-02

THE EXCLUSION OF LIABILITY FOR NEGLIGENCE IN THE SALE OF GOODS

and

EXEMPTION CLAUSES IN CONTRACTS FOR THE SUPPLY OF SERVICES AND OTHER CONTRACTS

JOINT DOCUMENT

containing the

Provisional Proposals of the Law Commission and the Scottish Law Commission

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APPENDICES

PART I: INTRODUCTION

1. Item II of the Law Commission's First Programme provides for the examination of

(a) the desirability of prohibiting, invalidating or restricting the effects of clauses, exempting from or limiting liability for negligence;

(b) the extent to which the manner of incorporating such clauses, if permissible, should be regulated;

(c) the desirability of any extension or alteration of the doctrine of fundamental breach.

Paragraph 12 of the Scottish Law Commission's First Programme provides for the examination, within the larger framework of the law of obligations, of standard form contracts and clauses purporting to exclude liability.

2. Although initially it had been recommended by the Law Commission that the examining agency for the matters falling under (a) and (b) above should be an interdepartmental committee, it was eventually decided (with the approval of the Lord Chancellor, the Secretary of State for Scotland and the Lord Advocate) that the examination of the whole range of problems arising from exemption clauses (and not only from clauses excluding liability for negligence) should be carried out by the two Law Commissions themselves and that they should be assisted by a Joint Working Party with wide terms of reference.

3. The Working Party, the membership of which is shown in Appendix A, was established in June 1966 with the following terms of reference:

> "To consider what restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or restricting liability for negligence or any other liability that would otherwise be incurred having regard in particular to the protection of consumers of goods and users of services."

These terms of reference combine the expanded subject matter of Item II (a) of the Law Commission's First Programme with the relevant part of the Scottish Law Commission's proposed study of the law of obligations.

4. The Working Party gave priority to consideration of the problems of exemption clauses in contracts of sale of goods, and on the 19 January 1968 submitted an interim report to the two Law Commissions containing its conclusions on amendments to sections 12-15 of the Sale of Goods Act 1893 and on contracting out of the terms implied by those sections. The Law Commissions, after giving consideration to the Working Party's advice and to the comments received on their own provisional proposals,[1] proceeded in July 1969 to submit to the Ministers concerned their "First Report on Exemption Clauses in Contracts"[2] which contained a number of recommendations and draft clauses for the amendment of the Sale of Goods Act 1893.

5. In their interim report the Working Party had made no proposals on the exclusion of negligence liability in contracts of sale of goods, taking the view that it was

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1. Law Commission Working Paper No. 18, Scottish Law Commission Memorandum No. 7.

2. Law Com. No. 24; Scot. Law Com. No. 12, hereinafter referred to as the "First Report". Copies may be obtained from H.M.S.O.

better to wait until a detailed examination had been carried out of the exclusion of liability in contracts for the supply of services.[3] In their final report they dealt with the following questions which were not covered by their interim report:

(a) what restrictions, if any, should be placed on contracting out of the liability for negligence of the seller or manufacturer or intermediate distributor in contracts for the sale of goods;

and

(b) what restrictions, if any, should be placed on contracting out of the liability for negligence, or any other liability which would otherwise be incurred, of the supplier in contracts for the supply of services?

6. On those matters on which, after consideration of the Working Party's Report, the Law Commissions have reached preliminary conclusions, they have formulated provisional proposals; but on a certain number of points they have thought it appropriate not to formulate concrete proposals without first studying the views of those who read this Paper.

3. The Law Commissions endorsed this view: see First Report, paragraph 9.

PARTY II: SALE OF GOODS - Exclusion of Liability for Negligence

Introductory

7. The Law Commissions, in their earlier Working Paper, made the following observation:

> "On a sale of goods there may be a claim in negligence against the seller or against the manufacturer or, very occasionally, against an intermediate distributor. A claim against the seller will normally be an alternative to a claim under sections 12-15 of the Sale of Goods Act. The latter affords a better remedy for the buyer, since all he has to prove is that there is something wrong with the goods; he need not prove any kind of negligence on the part of the seller. Accordingly a negligence claim is rarely brought against the seller unless
>
> (i) liability under sections 12-15 has been excluded and
>
> (ii) the exemption clause is not wide enough to exclude liability for negligence."[4]

In their First Report they recommended a ban on contracting out of section 12 of the Sale of Goods Act and of sections 13-15 in a "consumer sale" (as defined in, respectively, Alternative A and Alternative B of Clause 4 of the Draft Clauses appended to that Report).[5] It is self-evident that

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4. Para. 76 of Law Com. Working Paper No. 18, Scot. Law Com. Memorandum No. 7. For an example of a negligence claim, see Clarke v. Army & Navy Co-operative Society Ltd. [1903] 1 K.B. 155.

5. See Appendix B to the present Paper.

if this recommendation of the Law Commissions were implemented by legislation, there would be still less need than there is today to have recourse to claims in negligence arising from consumer sales.

Seller's Liability in a "consumer sale"

8. None the less, the Working Party have pointed out that cases might still arise where the buyer would have no remedy under the Sale of Goods Act and, therefore, would wish to claim in tort (delict). For example, the goods sold might measure up to the requirements of merchantability but the seller might be liable in negligence for failing to give warning of the dangers involved in using the goods. Accordingly, in the light of the Law Commissions' recommendation referred to in paragraph 7 above, the Working Party unanimously recommended that in a "consumer sale" the ban on contracting out of conditions implied by the Act should also extend to the seller's liability for negligence.

9. It is the view of the Law Commissions that the considerations which justify the ban on contracting out of sections 13-15 of the Sale of Goods Act in the case of consumer sales are even stronger justification for a similar ban on contracting out of liability for negligence in the case of such sales. In modern conditions the contracting parties to a consumer sale are rarely of equal bargaining power, and unfair terms may be imposed by an economically dominant seller upon an individual consumer who, by reason of his weakness, may have no means of protecting himself against such terms and who, without any fault on his part, may suffer a potentially heavy and irrecoverable loss. Accordingly, the Law Commissions endorse the recommendation of the Working Party and propose that in a "consumer sale" any contractual provision purporting to exclude or limit the seller's liability for negligence should be

absolutely void. This should apply irrespective of whichever of the alternative definitions of "consumer sale" is ultimately adopted.

Manufacturer's "guarantee"

10. Of greater importance to consumers are provisions in the "guarantee" frequently supplied to the buyer at the time of purchase.[6] By means of such a guarantee the manufacturer or intermediate distributor often purports to exclude his common law liability for negligence in return during a specified period for free repairs or for replacement of defective parts. The evidence received by the Working Party indicated that this was a widespread practice among manufacturers of certain types of durable consumer goods, e.g. motor cars and many kinds of electrical appliances.[7] The legal effect of such guarantees is not always clear; but it would appear that in some cases a valid contract is formed between the consumer and the manufacturer; this is collateral to the contract of sale, and has the effect of the consumer surrendering his common law rights in return for some free services or replacements. In any event, whether or not the exclusions or limitations of liability contained in a "guarantee" would be upheld in a court of law, it is plain that many consumers are led to believe that they have effectively signed away their common law rights by their acceptance of a "guarantee".

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6. These were recently the subject of debates in the House of Commons: see H.C. Debs. Vol. 809 cols. 475-486, 15 Jan. 1971 and Vol. 815 cols.1183-1187 21 April 1971.

7. See Appendix C 1 and 2 pp. 74-75 for examples of terms used in guarantees on the sale of a motor-car and of an electric blanket.

11. The majority of the Working Party recommended that where there has been a "consumer sale", howsoever defined, the manufacturer or intermediate distributor should not be permitted to avoid, by means of a "guarantee" or similar document, any liability in negligence to the ultimate buyer. The minority urged that not all guarantees contained exclusion clauses, that many conferred substantial benefits which in practice were honoured, and that any interference by the law might lead to valuable rights under such guarantees being lost to consumers. It was further argued that it would be wrong for the law to interfere if a "consumer" wished to contract on terms which he fully understood and accepted after duly evaluating the risks involved.

12. The Law Commissions are unable to accept these arguments of the minority. They join in the majority view that there can be no justification for a manufacturer to avoid the normal consequences of a breach of duty of care to the consumer; that the consumer cannot be expected, before accepting a guarantee, to evaluate precisely the risk involved; and that he ought to be protected against signing away his rights. This change in the law would not, in the Law Commissions' view, be likely to lead to an end of guarantees since these are a valuable marketing inducement. Nor, it is thought, would it raise any significant problems of insurance. A disclaimer of liability in a "guarantee" is effective, if at all, only between the manufacturer and the ultimate purchaser; it does not relieve the manufacturer of liability for damage caused by a defective article to a third party. Manufacturers habitually insure themselves against the risk of such liability. From inquiries which have been made of insurance interests, it would appear that the extent to which the individual assureds have purported to exclude their liability by exclusion clauses in a guarantee is not a factor which

in practice is taken into consideration in fixing premiums. If the banning of such clauses led to an increase in claims, it could result in some increase in premiums; but the increase would be small and would not add significantly to the price of the article.

13. For these reasons the Law Commissions propose that, even if the manufacturer or intermediate distributor purported to exclude his liability in a "guarantee" or similar document, he should be bound to make reparation for his negligent acts or omissions if injury or loss is thereby caused to one who had bought under a "consumer sale" as that term is defined in any legislation implementing the recommendation in the Law Commissions' First Report referred to in paragraph 7 above.[8]

Seller's liability in a sale other than a "consumer sale"

14. In the Working Party's interim report the majority advocated that there should be no control, beyond the consumer level, of contracting out of sections 13-15 of the Sale of Goods Act. Consistently with this advice they made no recommendation for the control of contracting out of negligence liability by the seller in business sales. The arguments against and in favour of a general control of exemption clauses in business sales are set out in paragraphs 108 and 109 of the Law Commissions' First Report. The basic question in this context is whether the principle of freedom of contract, allowing the parties to regulate as between themselves the consequences of their conduct, should in certain circumstances give way to the interest of the law in protecting parties from bargains which contain an element of unfairness. On the one hand it may be argued that in business sales the parties are more frequently

8. The proposal will not prejudice any future study by the Law Commissions of products liability.

in an equal bargaining position; that there is nothing wrong in allowing losses arising from the negligence of one party to fall on the other since the departure from reasonable standards of care may be technical and may not reflect moral blameworthiness; and that in some situations it may not be unconscionable, but make commercial good sense, to allow the loss to fall on a purchaser who has knowingly accepted the risk. On the other hand it may be argued that even in business sales the parties are not always of equal bargaining power or economic strength; that on the face of it there is an element of unfairness in a contract which reverses the common law principle that losses caused by a breach of the duty of reasonable care should fall on the party at fault; and that it is wrong to allow losses arising from the negligence of one party to fall on the other.

15. The members of the two Law Commissions[9] were equally divided on the question, fundamentally one of commercial policy, whether in business sales the contracting out of sections 13-15 of the Sale of Goods Act should be subjected to any control at all; but they were all agreed that if there were to be a general control of such sales it should take the form of a reasonableness test. Clearly if it is decided to control, in business sales, contracting out of sections 13-15 of the Sale of Goods Act, at least equally stringent control should be extended to contracting out of liability for negligence. But the question arises whether, even if it is decided not to control contracting out of the statutory conditions and warranties in such sales, there should nevertheless be restrictions on freedom to contract out of liability for negligence. It is one thing to allow freedom to exclude an absolute

9. First Report para. 107

contractual duty to supply goods which measure up to a prescribed standard but quite another to allow contracting out of a common law duty to take reasonable care. Certainly, if suppliers of services are to be subject to control in that respect, it would be anomalous in the extreme to discriminate in favour of suppliers of goods. This would be to draw the sort of distinction which persuaded the Molony Committee[10] that they could not recommend control only over sellers of goods.

16. Even if there were to be no control in business sales over clauses excluding sections 13-15 of the Sale of Goods Act and no general control over exemption clauses in other types of contract, it does not necessarily follow that clauses in business sales excluding the seller's liability for negligence should be permitted. As is pointed out below[11] there is considerable support for the view that there should be selective control by direct or delegated legislation of particular types of clauses in specified types of contract. In paragraph 52 views are invited on whether there is a case for immediate legislative action in any given area. Possibly this may be one such area.

PART III: SUPPLY OF SERVICES AND OTHER CONTRACTS

Introductory

17. Having now covered exclusions of liability in respect of goods sold, the intention is to deal comprehensively with all the remaining types of contract. In relation to the use of exemption clauses, in practice by far the most important of these types are contracts

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10. Final Report of the Committee on Consumer Protection (1962, Cmnd. 1781) para. 478.

11. Paras. 46-52

for the supply of services and hence it is on them that emphasis is placed in this Part of the Paper. As the subsequent discussion points out, a solution applying to contracts generally will not preclude specific regulation of liability in relation to certain types of contract. There is already specific regulation in, for example, the Hotel Proprietors Act 1956, the Carriage by Air Acts 1932 and 1961, the Hire Purchase Acts of 1965 and the Carriage of Goods by Sea Act 1971; in relation to English law, recommendations relating to the use of exemption clauses to exclude the liability of vendors and lessors in respect of defective premises have been made in the Law Commission's Report on Defective Premises,[12] and other uses of exemption clauses in the landlord and tenant relationship and in connection with the transfer of land are under consideration.[13]

A: EVIDENCE

18. The Working Party, in response to their initial invitation to submit evidence, received memoranda from many sources; these included, in addition to the practising and academic branches of the legal profession, government departments, local authorities and organisations representing suppliers of services of many kinds. Specific mention may be made of the following areas covered by the evidence received: carriage of passengers and luggage by public transport; carriage of goods by road, rail and inland waterways; shipping; docks; airports; building and civil engineering; laundries, dyers and cleaners; furniture removal and storage; travel agents; vehicle repairs; car hire; and the renting and maintenance of security alarms and equipment.

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12. Law Com. No. 40.

13. See Law Commission's First Programme Items VIII and IX.

Standard form contracts

19. The evidence indicated that many service industries use standard form contracts. The justification for their use is said to be that they obviate time-wasting and expensive negotiations, make for ease of administration, reduce costs and permit the operation of uniform rate structures. In these standard form contracts liability for negligence is sometimes totally excluded; often there are clauses limiting liability to a specific amount or excluding liability for consequential loss, and in many cases these are coupled with a clause or clauses limiting the time within which a claim for loss or damage has to be notified to the supplier.

Suppliers' reasons for the use of exemption clauses

20. The arguments put forward by the suppliers of services in justification of the use of exemption clauses may be summarised as follows:

(a) If risks are to be apportioned between the parties (and this is said to be an economic necessity), then exemption clauses must be introduced into the contract so as to make clear and certain which party has to take any particular risk; disputes and litigation can then be minimised.

(b) In many cases total exclusion of liability is necessary to avoid double insurance and to permit lower rates to be charged for the service provided. If, to take a specific example, the British Airports Authority did not exclude liability for loss of or damage to cars placed in their car-parks, the Authority would have to insure and this would be expensive. The cost of insurance

would have to be added to the parking charges and this would be unfair to the majority of car-owners who are comprehensively insured; for they would pay for insurance twice over. Another example: the majority of goods carried on inland waterways come from the ports and are still covered by marine insurance policies.

(c) Limitations of liability are economically necessary. The cost of insurance is a factor in arriving at the price to be charged for the service and this cost is affected by the extent to which an industry is subject to legal claims from its customers. In the field of carriage of goods, for example, it is said that freight earnings are not sufficiently profitable to finance unlimited claims and no underwriter will insure without limit. Fixing a financial ceiling allows the adoption of a single uniform rate structure covering both high value and low value goods. Charges for valuable commodities are, therefore, lower than they would otherwise be, and there is no necessity for a list of valuable goods similar to that in the Carriers Act 1830 which provides that in respect of certain specified articles above a stated value there is no liability on the carrier unless the goods in question are declared and the additional charges paid. Similarly, in warehousing, the limitation of liability to a specific amount permits the standard charges per package (irrespective of value) to be kept down; and the limitation of liability imposed by some laundries e.g. 20 times the cost of laundering, enables the charge to be the same for articles which differ widely in value. If unlimited liability

were to be accepted in these cases, then in order to cover the additional cost of insuring against damage to valuable articles there would have to be either (i) a charge for goods according to value, or (ii) a general increase in the standard charges. The first alternative which involves the introduction of commodity differentials would in many areas be commercially undesirable; and the second alternative would hardly be fair to owners of low value or low risk goods.

(d) The imposition of time-limits for the notification of claims for loss or damage is essential if a claim is to be thoroughly investigated when the facts are still ascertainable and fresh in persons' minds.

Users' Complaints

(a) Private users

21. Whatever may be said in favour of standard form contracts by the suppliers of services, they have the disadvantage from the point of view of the user - and in particular the private user - that, since the conditions of such a contract are more or less standard throughout the particular industry, he is unable to negotiate more favourable terms with another supplier, and, therefore, he must accept the contract as it stands, exemption clauses and all. Those representing the "consumer" interest take the view that, generally speaking, a supplier of services should not be permitted to avoid liability for damage caused by his negligence to the person or property of the private user. Specific mention may be made of the following clauses involving a total exclusion of liability at which criticism has

been directed: the clause imposed by shipping companies totally excluding liability to passengers including liability for death or personal injury;[14] the clause inserted in the contracts of some car hire firms excluding any warranty as to the car's roadworthiness;[15] and the condition imposed by some dry cleaners that goods are accepted only at "owner's risk "[16] (although the trade association concerned discourages its members from using such clauses). Prima facie the complaints about the unreasonableness of these clauses would appear to have some substance. In the case of the first example although it is always open to a passenger to take out insurance cover, it appears unrealistic to expect that he will often do so particularly in view of the fact that such disclaimers of liability are in the case of carriage by public transport on land declared void by statute;[17] in the case of the second example, even if there is insurance, this will not normally cover damage caused by the fact that the vehicle is unroadworthy; and in the case of the third the standard "All risks" policies do not normally cover damage caused to articles in the process of cleaning.

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14. For examples see Appendix C 3 pp. 76-80.

15. For example:- "The car is offered by the owners for hire without any warranty or condition (expressed or implied) as to quality, condition, fitness for use or otherwise and the owners shall be under no liability (expressed or implied) for any loss, damage, or delay the hirer may suffer through breakdown of the car or any other cause whatsoever. In the event of a serious mechanical breakdown of the car not caused through negligence on the part of the hirer the owners shall have the option either to provide a relief car or refund the hire charges for the unexpired portion of the hire."

16. For example:- "All work on the goods is done at owner's risk".

17. Road Traffic Act 1960 section 151; Transport Act 1962 section 43(7) (passengers travelling on free passes are excluded from this provision).

22. Dissatisfaction has been expressed with certain of the standard conditions of the National Association of Furniture Warehousemen and Removers,[18] in particular the term limiting liability for the loss of or damage to any article or complete case or container to the sum of £10 and the term requiring notification of claims to be made within three days after delivery. There appears to be some justification for the allegation that these terms are unduly harsh: £10 seems low at the present time; and the time-limit of three days seems unreasonably short, taking into account the fact that a large number of crates may have to be unpacked and their contents checked. Removal contractors maintain that all quotations contain a separate figure which provides full insurance at low cost. Cases, however, were brought to the notice of the Working Party where insurance through the contractors' agency was said to have proved to be almost useless in that it subsequently came to light that the terms of the policy did not effectively cover the various risks for which the contract had excluded liability. Another instance of conditions which have been subjected to criticism are those imposed by central heating contractors which exclude their common law liability and limit their liability to repair or replace to cases where defects are notified within 6 months of completion of the work, and which exclude their liability for all consequential loss or damage.[19]

18. See Appendix C 4 pp. 80-82.

19. See Appendix C 5 pp. 82-83.

23. The terms and conditions of travel agents' and tour operators' contracts continue to be a source of complaints.[20] This is a rapidly developing class of business and the evidence which reached the Working Party suggests that neither the public nor all travel agents themselves fully understand the nature of the legal relationship created when a customer arranges his holiday and travel arrangements through a travel agent. This relationship will vary according to the nature of the booking. In most cases the agent will be in the nature of a broker, i.e., an agent both for his customer and for the carriers and hotel proprietors. Occasionally, he may be merely an agent for the carriers whose tickets he sells. Sometimes he may be the agent of the customer alone. Often, when he is a tour operator, "selling" a package tour which he has organised he will, in some respects, be acting as principal. This is not the time or place to suggest imposing some prescribed form of legal relationship upon those engaged in a developing business of considerable practical importance.[21] Nonetheless it is clear that travel agents habitually use exemption clauses which, far from clarifying what the legal position would be in the absence of such provisions, seek to alter it for their protection. When the travel agent is acting as agent for the customer (whether or not he is also agent for the carrier or hotels) he clearly owes duties of care and skill to his customer. The conditions quoted in the footnotes, which are from established travel agents, purport to exclude

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20. These were recently ventilated in an Adjournment debate in the House of Commons: H.C. Official Report, Vol. 806, Cols. 1676-1694 (20th November 1970). Private members' Bills to provide for registration of travel agents and a code of conduct have been introduced on several occasions in recent years.

21. An attempt has been made to provide for the regulation of the conditions in contracts between the travel agent or tour operator and travellers by a Convention which has been produced as a result of a diplomatic conference held in Brussels in April 1970. The Convention is not yet in force.

liability for breach of such duty and not merely to make it clear that the travel agent, as agent, is not liable for the negligence or other default on the part of the carrier or hotel.[22] When a tour operator is acting as principal selling a package tour which he has organised he will commit a breach of contract if the package in fact supplied does not measure up to what he has promised. Some conditions in common use appear to be designed to exclude liability in such circumstances.[23] As a result the customer may have no remedy at all or a remedy only against the carrier or hotel - which in turn may have

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22. For example:-
(1) "In making arrangements for transport accommodation and other services, [the travel agents] are acting as agents only and neither [the travel agents] nor its servants agents or any person otherwise concerned in the arrangements shall be liable for any injury damage loss or accident delay inconvenience or irregularity which may or may not be caused or arise out of any act or default whether negligent or not of [the travel agents] or such persons ..." (italics supplied).

(2) "[The travel agents] are in no circumstances to be liable in damages to clients for any act or default, negligent or otherwise on the part of themselves, their servants or agents or of any person providing or failing to provide the services or accommodation applied for and booked." (italics supplied).

23. For example:-
(1) "... Tours Ltd. makes every effort to ensure the comfort and enjoyment of clients travelling under its arrangements and [sic] such arrangements are made on the express condition that it is not liable for any loss, accident, or mishap of any kind whatsoever notwithstanding that the same may be due to any neglect or default of any servant or agent of ... Tours Ltd."

(2) "... Travel Limited accept your booking on condition that they are not responsible for any default on the part of the conveying services of their agents nor for any loss or personal injury sustained by a client for any cause whatever nor for any negligence or breach of duty on the part of ... Travel Ltd. their servants or agents."

(3) "The Company shall not be liable in damages to any one of the passengers named overleaf for any loss or damage howsoever caused nor for the breach of any express or implied term of this contract, nor for the breach of any fundamental obligation there of. Nor shall this contract be enforceable by anyone save the Company or its duly authorised agent."

disclaimed liability - the hotel often being in a foreign country. If the client has the persistence and the means to take the matter to court the judges will do their best to find some means of holding that the exemption clause cannot be relied on, but often it will be legally effective and always it must be a powerful deterrent against bringing proceedings. The Misrepresentation Act 1967[24] has provided a remedy for the unreasonable reliance on clauses excluding liability for misrepresentations (though some travel brochures continue to purport to exclude any such liability)[25] and the provisions of the Trade Descriptions Act 1968 afford a penal deterrent against some types of false description. But neither helps if there is no mis-statement of fact but an exemption clause protecting against liability for negligence or for a failure to supply what is promised in the contract.

24. Other sources of complaint in relation to travel agents are conditions giving agents the right without notice to cancel or alter the arrangements for travel or accommodation. If the travel agent cancels, the customer is normally entitled only to the return of his deposit, while a customer who cancels loses his deposit and may be liable to a substantial cancellation charge. It was suggested to the Working Party that the customer should be entitled to claim compensation where the agent's cancellation has caused him loss and expense. It might also be useful to provide that where the agent exercises the right to alter arrangements for travel or accommodation, the customer should be entitled to reasonable notice and the option of withdrawing from the tour. Some of the conditions,

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24. The Act does not apply to Scotland.

25. For example:-
"While the representations contained in advertising matter are made in good faith, neither they nor any oral representations by employees agents or representatives of [the travel agents] will create any liability and do not form part of this agreement..."

however, are not strictly classifiable as exemption clauses, and it may be said that as such they are outside the ambit of this Paper. Indeed complaints in this as in other fields show how difficult it is to separate unreasonable "exemption clauses" from other clauses which are unfair.

25. The Law Commissions at this stage do not express a concluded view on the extent to which complaints are justified. One thing, however, is clear: the complaints are not confined to any one industry; there are many areas where exemption clauses used by suppliers of services lead private users to believe that they are not getting a fair deal.

(b) Commercial users

26. Complaints have not been limited to exemption clauses in contracts made with private users; some complaints have been received in respect of exemption clauses used in purely commercial contracts i.e. in contracts between traders. Shipowners, for example, find the U.K. Standard Towage Conditions onerous;[26] these conditions provide for:

(i) complete protection for the tug owner while towing;

and

(ii) limited protection for the tug while carrying out other services.[27]

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26. But see the remarks of Denning M.R. in Australian Coastal Shipping Commission v. Green [1971] 2 W.L.R. 243, 250.

27. The obligation of the tug-owner is merely to use reasonable care to provide a sea-worthy vessel. See Appendix C 6 pp. 83-84.

These conditions which have been in existence since 1933 when they were originally agreed with the Chamber of Shipping, have not been universally adopted, and more - and sometimes less - onerous conditions are in use in several major ports. Criticism has also been directed at clauses typified by the "London Wharfingers Clause" and the "London Lighterage Clause".[28] Both these clauses are long and complicated but their effect is to exclude liability for virtually everything except loss by pilferage or theft while on board the lighter and in the course of transit and, even then, subject to a limitation of liability. In the case of the latter clause attempts to negotiate new terms containing a more equitable division of liabilities have so far proved unsuccessful. Marine underwriters would like to see more relaxation in this type of clause. Their experience suggests that acceptance by carriers and bailees of a reasonable liability for loss or damage has a salutary effect on efforts to protect customers' property whether insured or not.

27. Criticism of a more general nature has been received from the British Shippers Council. The Council fully recognise that there is a proper place in commerce for exemption clauses which maintain a fair and reasonable balance between the respective interests of supplier and user; they distinguish exemption clauses which are the result of negotiations between representatives of the interests concerned (either directly or in connection with the negotiation by governments of international conventions) and those clauses which are "unilaterally imposed". The Council take the view that some exemption clauses in business operate unfairly even though the incidence and degree of unfairness is extremely difficult to identify: it is often lost sight of as a result of insurance

28. See Appendix C 7 pp. 85-87.

arrangements. Overall, it is their view that there would be some value in having a provision generally applied (apart from contracts governed by an international convention) whereby an exemption clause cannot be relied upon unless, having regard to the nature of the contract, it was reasonable and was freely negotiated and accepted before the contract was concluded.

28. In a different field, criticism has been directed at the practice of some producers in the entertainment industry, to require actors performing stunts to sign a "blood chit" absolving the producing company from all liability for personal injury, howsoever caused. Objection has also been taken to wide exemption clauses by State monopolies.[29]

29. In the case of commercial contracts it is more difficult to assess the fairness or unfairness of the exemption clauses used than it is in the case of contracts with private users. Some clauses of the type referred to in the preceding paragraphs appear on the face of them to be unduly harsh; but account has also to be taken of the commercial realities of the situation, and in some cases it may be that in terms of rates and insurance it is more advantageous to both parties to impose liability for all risks on the user or the service. Nevertheless cases occur where strict application of an exemption clause would have produced unfairness.[30]

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29. For an example see Appendix C 8 pp. 87-88.

30. See for example, Glynn v. Margetson & Co. [1893] A.C. 351, L.N.W. Ry Co.Ltd. v. Neilson [1922] 2 A.C. 263, Bontex Knitting Works Ltd. v. St. John's Garage [1943] 2 All E.R. 690, Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] A.C. 576, Garnham, Harris & Elton Ltd. v. Ellis (Transport) Ltd. [1967] 1 W.L.R. 940.

Incidence of Insurance

30. The Working Party were conscious of the importance of taking fully into account the insurance aspects of any proposals which would have the effect of placing on the supplier of services risks of which at the moment he can relieve himself by a clause in the contract excluding or limiting his liability. The Working Party in their final report referred to the views of insurance experts who most helpfully gave them the benefit of their advice. The proposal which was then put to the insurance experts envisaged a general rule prohibiting a supplier of services from contracting out of any liability for which he could obtain insurance cover on reasonable terms. The views expressed on that proposal may be summarised as follows:-

(a) Generally speaking it was uneconomic for the supplier to insure, since his liability might vary greatly and he would have to insure up to the maximum of any possible claim. The user of services, on the other hand, knew the limit up to which he had to insure. Liability insurance was expensive. It was also wasteful where the user was likely to effect insurance himself, often at cheaper rates. In the carriage of goods by sea, for example, it was often cheaper to insure the goods than the carrier's liability. Obvious types of cases where it would be cheaper or more convenient for the user rather than the supplier of services to effect insurance were as follows:

(i) carriage of goods;

(ii) warehousing;

(iii) inexpensive operations, such as laundering and dry-cleaning, and the processing of films;

(iv) generally, bailment where the bailee does not know the value of the goods or is unaware of the consequential liability which he may incur.

(b) In some consumer services such as film processing or laundering the cost of insurance might be unduly high because of the administrative work involved in dealing with small claims, and in some instances because of the possibility of high consequential damages. A large part of the insurance market would not be interested in providing this sort of cover. The only practicable scheme would be for the supplier of the service to meet small claims out of his own pocket, say up to £10, and for the insurer to handle claims in excess of that figure. If the claim of the user of the services were limited to the value of the goods to which the service applied, there would be less difficulty in providing cover on an "excess" basis. But the supplier of the service would have to make a material increase in his charges to cover the full amount of the small claims for which he would be liable.

The insurance experts were asked whether restricting the control of exemption clauses to certain selected services was preferable to a wide general rule on the lines of the one which was under discussion. Their answer was to the effect that the selective approach was preferable; and that in the selected fields they would prefer an outright ban to a reasonableness test.

B: CONTRACTING OUT OF LIABILITY

Introductory

31. The following paragraphs are concerned with various methods of controlling exemption clauses in contracts for the supply of services. In considering these methods of control the Law Commissions have confined themselves to contracts made by suppliers "in the course of a business". It has not been suggested to them, nor do they wish to suggest, that where a contract is made by a person in his private capacity (e.g. he agrees to repair a friend's car), he should not be allowed to stipulate that the risks should be borne by the other party.

32. The phrase "in the course of a business" is intended to cover all transactions of the supplier of a service, other than those entered into in a purely private capacity. So long as the supplier makes his contract in the course of his business it does not matter whether the service contracted for is of a kind which he undertakes habitually. These propositions follow closely those already made by the Law Commissions with reference to section 14 of the Sale of Goods Act.[31] As for the word "business", the Law Commissions have suggested that for the purpose of the Sale of Goods Act it should be given a definition wide enough to include "a profession and the activities of any government department, local authority or statutory undertaker".[32] The question now arises whether "business" should be given a similarly wide meaning for contracts for the supply of services, and notably whether "the professions" should be included.

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31. See First Report, paras. 31 and 46, and Appendix A, draft clause 3.

32. See First Report, para. 90, and Appendix A, draft clause 7(1).

The professions

33. The Working Party recognised that the problems of the professions were special. Although a number of professions, notably the legal and medical, do not exclude their liability for negligence, there may be some which do, or might wish to, limit their liability. Solicitors and some barristers are covered by insurance; but in exceptional circumstances their liability could be very heavy with damages amounting to an uninsurable figure. Other professional men, consultant engineers and architects, for example, face similar difficulties. Although the special problems of the professions were fully appreciated by the Working Party, it was generally agreed that, as a matter of principle, there would be no justification for excluding them from any scheme for the control of exemption clauses that might be adopted.

34. The Law Commissions are also well aware of the difficulties with which the professions are faced; but, as at present advised, they agree with the Working Party's conclusion. Though it may be true that heavy damages awarded against a professional man may be catastrophic in their consequences, while a similar award against an industrial or commercial supplier of services, such as a transport undertaking, is not likely to be so, it would be hard to justify a distinction being made between the two in the matter of controlling exemption clauses; for both the professional man and the industrial or commercial enterprise are in the business of supplying services. Of course, in some respects the professional man is at a disadvantage compared with the businessman. First, some professions are precluded from operating in the form of a limited liability company; and secondly, it may well be that in practice it is more difficult for the individual professional man to obtain insurance cover, at any rate on terms that he would regard as reasonable, and that the

insurance premiums may represent a substantially larger proportion of income than in the case of a commercial concern. But even so, it is the Law Commissions' provisional view that the professions have nothing to fear from the kind of control of exemption clauses proposed in paragraphs 57-65 below; these would permit reasonable limitations of liability and this, it is thought, will provide the professions with sufficient protection.

Method of controlling exemption clauses

35. The Working Party considered a number of different methods of control which in effect fell into three groups:

(1) variants of a type of control limited to contracts for the supply of services to the "consumer";

(2) control applied only in selected areas of activity ("selective" control);

(3) a general scheme of control applicable to all contracts ("across the board" control).

These methods of control are discussed in the next following paragraphs.

(1) Control limited to "consumer" contracts

36. The Law Commissions in their First Report recommended that, for the purposes of controlling contracting out of the implied conditions of sections 13-15 of the Sale of Goods Act, a distinction should be made between "consumer" sales and others.[33] The Working Party considered whether and to what extent a distinction should similarly

33. See paras. 67-95, and Appendix A, draft clause 4: see Appendix B to this Paper.

be drawn between private users and business users in the supply of services. In favour of such a distinction it was said that

(a) the private user was at a disadvantage in the matter of bargaining power; normally he had no alternative but to accept the terms and conditions of a standard form contract imposed on him by a monopolistic or near-monopolistic industry; and

(b) the private user was less likely to be covered by insurance than the business user.

37. Those members of the Working Party who favoured giving special protection to private users argued that when one considered a supplier's duty of care to a private user there was in general no justification for the supplier to exclude or limit his liability. Therefore it should be the general rule that in contracts with private users exemption clauses should be prohibited altogether. It was conceded, however, that if such a ban applied to all contracts with private users, it would prove to be too rigid. In certain classes of contracts, e.g. carriage of goods, a limitation of liability by the carrier would normally be reasonable and should be permitted; furthermore, even a total exclusion of liability could not be objected to if the carrier offered a fair choice between "company's risk" and "owner's risk" terms. Accordingly, it was suggested that the proposed general ban on contracting out should be qualified: in certain classes of contracts (e.g. carriage of goods) clauses limiting liability to specific amounts should be permissible and even clauses totally excluding liability should be allowed if the customer was offered a fair

alternative of two rates. If it was found impracticable to lay down the details of such specific exceptions in an Act of Parliament, power should be given to the Board of Trade[34] to deal with such details by delegated legislation, subject to some appropriate form of parliamentary control.

38. The majority of the Working Party rejected the distinction between private and commercial users. They argued that in the case of a monopolistic or near-monopolistic industry the commercial user was in the matter of bargaining power at the same disadvantage as a private user. They also argued that it was very difficult to devise a satisfactory definition of a "consumer" services contract; and that even if this difficulty could be overcome, there were formidable practical objections to drawing a distinction in relation to services between "consumer" contracts and others. They pointed out that:

(a) In some service industries (e.g. laundries, dyers and cleaners) which have a large "consumer" trade and which already to some extent differentiate between private and business users (laundries, for instance, have special bulk contracts with hotels and similar establishments) a distinction between the two types of user might be workable; but in others particularly in the field of transport where the classification is simply into "passengers" and "goods", the distinction would be meaningless and impracticable.

34. Or, now, the Department of Trade & Industry.

(b) In the sale of goods the trade buyer often purchases on trade terms which are different from those offered to private purchasers. In contrast, in some of the service industries there are no differential rates at all. Standard contracts are in common form and, for example, in the carriage of goods the carrier often contracts on the same terms whether or not the consignor is using the service for private or commercial purposes.

(c) A distinction between private and business users would in many service industries require the creation of a rate structure involving at least two rates. This might be administratively impracticable and commercially undesirable. Even where practicable, the operation might involve an increase in administrative costs and these would normally be passed on to the users of the service.

39. All members of the Working Party were in no doubt that it would be desirable to have as much consistency as possible between the control of exemption clauses in the sale of goods and in the supply of services; and accordingly the Working Party considered the practicability of adapting to contracts for the supply of services the alternative definitions of a "consumer sale" suggested by the Law Commissions in their First Report.[35] The Working Party agreed unanimously that it was virtually impossible to formulate a viable definition treating a business user on a par with a private user where the service provided was not an essential part of his business activities; and

35. Appendix A, draft clause 4, Alternatives A and B: see Appendix B to the present Paper.

accordingly the Working Party attempted a narrower definition, on the following lines:

> "A 'consumer services contract' means the provision of services by a supplier in the course of a business where the services -
>
> (a) are of a kind normally provided for private use;
>
> and
>
> (b) are supplied to a person who does not use or hold himself out as using them in the course of a business."

40. The majority of the Working Party took the view that it would be difficult to apply a definition of this kind to certain types of service. In the carriage of goods, for example, the carrier would have, in many cases, no means of knowing whether the consignor's goods were being carried for business or private purposes. He would be even less likely to know in the case of carriage of passengers. Eventually, after carefully considering the whole problem of definitions, the Working Party, by a majority, reached the following conclusions:

> (a) it is impracticable to formulate a definition of "private user" or "consumer" which would allow contracts with such persons to be treated, as regards exclusions or limitations, differently from business users: and
>
> (b) even if such a distinction were practicable, control ought not to be restricted to contracts with "private users" or "consumers".

Preliminary conclusions on control limited to consumer contracts

41. As at present advised the Law Commissions endorse these conclusions of the majority of the Working Party, but would welcome comments on this matter.

(2) "Selective" control

42. A majority of the Working Party advocated a selective approach to the problem of the control of exemption clauses. Freedom of contract was to remain paramount, and the law ought not to interfere unless that freedom was abused; the Hire Purchase Acts were good examples of the kind of situation where intervention by the legislature was justified. On these premises two types of "selective" control were considered:

(A) control through the Restrictive Practices Court or some similar tribunal; or

(B) specific legislation, direct or delegated.

(A) Control through the Restrictive Practices Court

43. This form of control would involve a procedure for the prior validation of exemption clauses, a solution embodied in the Israeli Standard Contracts Law 1964. There are a number of variants of this procedure; but the only practical possibility is thought to be a procedure whereby the Registrar of Restrictive Trading Agreements would be empowered on complaint or on his own initiative to bring before the Restrictive Practices Court clauses which he regarded as unfair, possibly combined with facilities for suppliers of services or other interested parties to have standard clauses brought before the Court for advance approval.[36]

36. See First Report, paragraph 106.

44. The Law Commissions considered this procedure in the context of sale of goods and concluded that the possible advantages were outweighed by the disadvantages, in particular that:-

(i) it would be cumbersome, slow and expensive.

(ii) it would not be suitable for the scrutiny of individual (non-standard) contracts.

(iii) the scrutiny of standard contracts would be inconclusive since it is the practice to change standard clauses from time to time.[37]

Furthermore, even if the procedure were appropriate for dealing with clauses which are unfair at the time of contracting it would not be suitable for dealing with clauses which are prima facie fair but may be unfair if enforced in certain circumstances. Accordingly the suggested procedure might have to be combined with a power in the ordinary Courts to strike down unreasonable clauses or reliance on them; and this would operate as a further disincentive to any resort to the Restrictive Practices Court.

Preliminary conclusions on control through the Restrictive Practices Court.

45. In the context of the supply of services only one member of the Working Party proposed that a Government department should be empowered to refer exemption clauses in particular categories of contracts to the Restrictive Practices Court, on the footing that the clauses would remain valid unless and until they are struck down by the Court. With this one dissentient vote the Working Party

37. It would, however, be possible to control changes in contracts by the insertion of a term in the court order that there should be no substituted agreement without prior notice to the Registrar.

rejected any proposed solution on the lines referred to in paragraph 43 above. The Law Commissions agree with the majority view, essentially on the same grounds as those on which they rejected this solution in the context of sale of goods.

(B) Control by specific legislation

46. If this approach were adopted, the control of exemption clauses could take one of two forms:

either (i) direct legislation, whereby the statute itself would lay down or set limits to the terms and conditions on which the services of a particular industry are to be rendered; the Hotel Proprietors Act 1956, the Carriage by Air Acts 1932 and 1961, the Hire Purchase Acts of 1965 and the Carriage of Goods by Sea Act 1971 are examples of this method;

or (ii) legislation, direct and delegated, whereby in designated areas of trade certain unreasonable exemption clauses would be declared void; some areas would be designated by the statute itself, but the power would be conferred on some Department or other body to extend control to other areas by subordinate legislation.[38]

38. This would produce, by legislation, a result somewhat similar to that reached by judge-made law in the U.S.A. where, in a wide range of contractual relationships, clauses excluding liability for negligence have been held invalid as contrary to public policy: see, for a review of the case law, Bisso v. Inland Waterways Corpn. (1955) 349 U.S. 85; Tunkl v. Regents of University of California (1963) 32 Cal. Rptr. 33, 383 P 2d. 441.

If power to control exemption clauses was conferred upon Government departments by statute, the principle of control in appropriate areas would have been established. Thereafter what would be involved would be a departmental inquiry into the facts of any particular business or industry in order to determine whether the introduction of some measure of control is justified. Admittedly such an inquiry would involve a wide ranging investigation and would be time consuming.

(a) Arguments for control by legislation

47. The main arguments of those who favour legislation as the method of controlling exemption clauses are briefly as follows:-

(i) It encroaches upon the important principle of freedom of contract only in those areas where there is evidence of abuse of that freedom. Any interference with such a fundamental principle must be justified by cogent evidence of existing injustice or unfairness.

(ii) It has the advantage that it allows all kinds of unfair contractual provisions, and not only exemption clauses, to be dealt with.

(iii) It is more effective than a ban on exemption clauses since that could be evaded by skilfully drawn provisions which so define and delineate the rights and obligations of the parties to the contract as to achieve the same result as an exemption clause.[39]

39. See Coote (1970) 34 Conv. (N.S.) 254.

(iv) There is already legislative control in certain areas where its practicability and efficiency have already been demonstrated.

(b) Arguments against control by legislation

48. The main arguments of those who are against legislation as the method of control are briefly as follows:-

(i) It would be a formidable legislative task to lay down the conditions for all the various types of services involved. The complexity of the pre-parliamentary, parliamentary and departmental processes would render it too slow a method of coming to grips with the widely dispersed phenomena of exemption clauses in contracts for the supply of services.

(ii) In practice the control would be applied only in areas where there was already widespread abuse, and even then would be slow in operation.

(iii) There would effectively be no control in areas where there was abuse by a small minority or a possibility of future abuse. The proper function of the law is to act so as to prevent abuse not merely to intervene after abuses have occurred.

(iv) Whether control was effected by direct legislation or by means of the exercise by Government departments of delegated powers, the procedural difficulties and

> delays would be formidable. Thorough investigation would in practice be required not only to ascertain the truth of the complaints, but also into the wide-ranging issues of economic and social policy which would be involved in deciding upon the degree of restraint (and in some cases perhaps the form of clauses) which might have to be imposed. The existing resources of any Government department might well be overstrained if the department had to carry out these investigations and the subsequent consultations in preparation for what would understandably be regarded by the trades concerned as discriminatory legislation.

49. Despite the administrative difficulties referred to in the preceding paragraph, the majority of the Working Party maintained that, if control of exemption clauses was necessary, selective control was clearly the right way and that a further full inquiry should be made into its practicability with existing departmental resources, or into the possibility of providing additional resources either within the existing departments or by the creation of one or more statutory bodies.

Preliminary conclusions on control by specific legislation

50. The Law Commissions have given careful consideration to the arguments set out in paragraphs 47-48 above. They consider that a statute which authorised control of exemption clauses by Government departments would be valuable. The enactment of such a statute would involve a recognition that the general law was in need of some measure of reform to restrain abuses but would encroach on the

principle of freedom of contract only where the evidence of abuses justified that course. The existence of such departmental powers would of itself have a salutary effect upon the use of unreasonable exemption clauses since it would induce suppliers of services to exercise voluntary control so as to avoid the imposition of statutory restraints.

51. However, the balance of opinion of members of the Commissions is that control by direct and delegated legislation on its own would not be a satisfactory method of controlling exemption clauses. In practice it would be likely to affect only industries in which there was already evidence of widespread abuse, and even then would take time to operate. In areas in which abuse was not widespread it would be unlikely to operate at all even though there was abuse by a small minority or possibility of future abuse. There is great force in the argument that the proper function of the law is to act so as to prevent abuses, not solely to intervene after abuses have occurred. Furthermore, since the fairness or unfairness of an exemption clause could hardly be considered in isolation from the other terms of the contract, it might well be that, at the end of the day, there would be no alternative but to produce standard contracts for some of the areas under review. Any scheme of control on these lines would, as with the Restrictive Practices Court procedure, have to be combined with some general power in the courts, in which case the establishment of such complex and cumbersome machinery covering the same area could hardly be justified. It is recognised, however, that in certain fields direct legislation would play a valuable part in combination with such a general power over the remaining areas. It may well be that there is a case for extending legislative intervention in this field by an Act

which would enable the appropriate Ministry, by statutory instrument -

(a) to lay down standard terms and conditions, and

(b) to ban particular types of clauses

either in certain areas specified in the statute or generally subject to Parliamentary control over each statutory instrument.

52. The Law Commissions invite comments on the points of principle involved in controlling exemption clauses by means of direct and delegated legislation and on the question whether, in the experience of those who read this Paper, there is a sufficiently strong case for immediate legislative action in any given area.

(3) Control "across the board"

53. The arguments for and against a general control of all contracts for the supply of services by means of a reasonableness test applied by the courts are similar to those set out in the First Report[40] in relation to sale of goods. But the issues are in certain respects somewhat more difficult in the present context. In the sale of goods there has been a growing movement of opinion and of legislation, more particularly since the Final Report of the Molony Committee on Consumer Protection[41] in favour of consumer protection. This movement has made less progress in relation to the supply of services. Moreover the problem of producing a workable definition of a "consumer sale" is less difficult than that of producing a workable

40. Paragraphs 108 and 109.

41. (1962) Cmnd. 1781.

definition of a "consumer services contract". In the final result, therefore, the arguments must be reconsidered in the present context where, it seems, control if it is introduced must extend beyond the private consumer.

(a) Arguments against control across the board

54. The main arguments against a general control of exemption clauses in contracts by means of a judicial test of reasonableness would seem to be the following:-

(i) It may be necessary in particular circumstances to interfere with freedom of contract either on the grounds of public policy or for the benefit of private users or other parties who need the protection of the law against unfair or oppressive conditions. But a case must be made out for such intervention, and on the evidence at present available it cannot be said that a sufficiently strong case has been made out for controlling the entire range of contracts under which services are supplied.

(ii) There is a considerable body of opinion, particularly among practitioners in commercial work in the legal profession, which is adverse to the introduction of any general control of exemption clauses in contracts for the supply of services by way of a reasonableness test. The majority of the Working Party were opposed to any form of a reasonableness

test. There is no sufficient justification for ignoring or overriding these opinions.

(iii) The application of a general test of reasonableness would depend upon the view taken by a judge at the trial of what he regards as being reasonable. This would face those engaged in business with contingent liabilities of unacceptable uncertainty. The considerations which might guide the courts in making a decision are so varied[42] that it would be impracticable, at least until a sufficient number of decisions are available, to frame clauses limiting liability with any certainty that they could be relied on.

(iv) Since there would be a risk that exemption clauses could not be relied upon, the traders concerned would be forced to increase their charges in order to cover the cost of insurance or where this is unobtainable to make reasonable provision for claims. Alternatively relatively simple rates might have to be replaced by more complex and, therefore, more inconvenient scales of rates depending, for example, upon the value of goods or the degree of risk inherent in the transaction. The likely result would be over-insurance and in the case of

42. For various considerations which might be relevant see paragraph 64 below.

some services a situation where owners of goods of low value might be subsidising the owners of goods of higher value.

(v) Increased insurance premiums, and consequential increases in charges, would be inevitable unless there was certainty that clauses limiting liability to a specified sum could be relied on.

(b) Arguments for control across the board

55. The main arguments of those who favour a general control of exemption clauses by means of a reasonableness test are briefly as follows:-

(i) The evidence supports the case for some form of control to prevent the abuse of exemption clauses.

(ii) Of the alternatives to a general control by the application of a reasonableness test the only one which has received any substantial support is some form of selective control. There may well be a strong argument in theory for the view that enactments for the control of exemption clauses should be 'tailored' to suit the circumstances of the traders concerned. But in practice this would necessarily involve a slow process to determine whether the abuse of exemption clauses is sufficiently widespread to justify legislation, to define the type of transaction to which the control is to be applied and to prepare and bring

legislation into effect. Moreover, there are many services where most traders do not seek to rely on unreasonable exemption clauses, and which would therefore be likely to slip through the net, but where a minority continue to do so.

(iii) In many important fields of commerce there are limits of liability which are widely accepted; about their reasonableness there can be little question either because they have been negotiated between representative organisations of suppliers and users, or because they have been generally accepted by usage. Fairness and reasonable certainty can be achieved by discussions between the appropriate representative bodies.

(iv) Problems such as over-insurance and the complication of rate structures would continue only so long as it was uncertain to any substantial degree whether an exclusion or limitation of liability by an exemption clause would be upheld by the courts. This uncertainty would tend to diminish with the passage of time and with the emergence of case law; the process could be speeded up if the task of the courts was made easier by negotiations between representatives bodies, of the kind referred to in sub-paragraph (iii) above. In fact the habit of using over-protective exemption clauses has somewhat diminished in recent years. What

is now required is not detailed legislation covering a multiplicity of traders (though it may be needed in some trades), but the possibility in any trade of unreasonable clauses being struck down by the courts. This would produce a 'shake-out' of those types of manifestly unreasonable clauses which still persist.

(v) Hence a reasonableness test would be likely to lead to greater certainty than the present law under which the various devices adopted by the courts to control exemption clauses[43] do not enable the parties, or their insurers, to be certain that such clauses, however reasonable, can be relied on. Moreover for sound commercial reasons traders are reluctant to invoke such clauses when it is unreasonable to do so.

(vi) The fears of uncertainty arising from a power in the courts to refuse to allow reliance on unfair exemption clauses seem unreal when it is remembered that such a power exists in a number of advanced commercial states[44] and the Commissions have no evidence that it has had any deleterious effect.

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43. These include strict construction, reliance on the existence of a collateral warranty, refusal to allow a clause to be relied on if its effect has been misrepresented, and the doctrine of fundamental breach, on which see Appendix D.

44. See, for example, U.S.A., West Germany and Israel.

(c) The reasonableness test

56. When the Working Party came to consider whether, in the control of contracts for the supply of services, there was room for a reasonableness test, the majority were strongly against, mainly on the ground that such a test would produce uncertainty and increase litigation. The minority thought that these fears were exaggerated, and that the present position manifestly did not produce certainty or avoid litigation. They argued that a reasonableness test was the only form of flexible control applicable to all varieties of contracts for the supply of services. These debates in the Working Party also covered two ancillary questions which would arise if a reasonableness test were adopted:

(i) Should the onus of proof lie on the party challenging the clause or should it lie on the party seeking to rely on the exemption?

(ii) Should the reasonableness test be applied to the clause itself as at the time when the contract was made, or should it be applied to the reasonableness of relying on the clause in the particular circumstances, including those which arose after the contract had been made?

On the first question the majority of the Working Party were of opinion that if no distinction was made between consumer and non-consumer transactions, the onus should lie on the party challenging the clause. As for the second question, opinions were almost equally divided. It was, however, the unanimous conclusion of the Working Party that if a reasonableness test was adopted, guidelines should be laid down for the assistance of the court,

similar to those which the Law Commissions recommended for the testing of exemption clauses in the sale of goods.[45]

Preliminary conclusions on control "across the board"

57. The Law Commissions think that a study of the evidence received and of the reported cases shows that the problem of exemption clauses is not confined to one or two industries and that abuses occur in many areas. At the present time the courts exercise some form of control over the unreasonable enforcement of exemption clauses by various techniques,[46] principally by the restrictive interpretation of terms and by the application of the doctrine of fundamental breach which is discussed in Appendix D to this Paper. The recent decision of the Court of Appeal in Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.[47] has caused some disquiet in commercial and industrial circles - and understandably, since it shows that if a contract, freely negotiated at arm's length with an exemption clause, ends as a result of fundamental breach the exemption clause, however reasonable, cannot be relied on even though the parties contemplated that it should apply in that event and even though it might be wholly reasonable to apply it. This present form of control does not produce satisfactory results either by affording certainty or preventing unfairness in the use of the exemption clauses.

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45. First Report, paragraph 113.

46. See n. 43 above.

47. [1970] 1 Q.B. 447.

58. Those who favour control by legislation alone, whilst they accept the fact that the situation could not be remedied, even after the lapse of several years, by a series of statutes dealing with each industry piecemeal, doubt whether the mischief is so great as to justify control across the board. They think that a reasonableness test, applied generally, would cause widespread uncertainty over the whole field in order to provide a remedy in the restricted number of areas where it is required. Though they concede that the doctrine of fundamental breach is an unsatisfactory form of control, they argue that cases in which it can be pleaded are relatively few and, though its replacement by a general reasonableness test would be an advantage, it would only be at the expense of introducing uncertainty in the vastly greater number of cases involving breach of contract where no question of fundamental breach could arise.

59. The balance of opinion in the Commissions is that a case has been made out for a general power of control being vested in the ordinary courts and that the most satisfactory method would be the judicial application of a test of reasonableness. If the Law Commissions were to propose legislation as the sole method of control it would mean that instead of recommending a solution to the problem of exemption clauses as they are required to do, they were transferring to the Government and Legislature the responsibility of dealing with the matter. Even with the further advantage of the comments resulting from the circulation of this Paper, it would be unthinkable that the Commissions themselves would acquire the expertise which would enable them, in a way which could hope to inspire confidence, to identify the relevant industries, to assess the extent of the abuses and to draft fair terms and conditions.

60. The introduction of a test of reasonableness would leave no place for the doctrine of fundamental breach[48] as a means of preventing parties from relying unreasonably on exemption clauses. The doctrine could become a true rule of construction as the House of Lords in the Suisse Atlantique case sought to make it.[49] The task of the court would be greatly simplified. It would merely have to do the following:

(a) to construe the clause (without any temptation to construe it unnaturally);

(b) to decide whether it covered the breach that had occurred; and

(c) if it did, to decide whether in the circumstances it was unreasonable to rely on the exemption clause.

The nature of the breach would no doubt be a relevant factor in deciding (c); but the court would no longer be required to attempt to draw what is often a somewhat artificial distinction between fundamental and non-fundamental breaches and, contrary to normal principles, to hold that the effect of the former is to cause the exemption clause automatically to become totally ineffective.

61. If a judicial test of reasonableness were adopted, the courts would have wider and more flexible powers to deal with unfair exemption clauses; and the test would be easier to apply, and more realistic, than the somewhat artificial interpretative techniques at present employed. The courts would normally be relieved of the difficult

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48. A subject which the Law Commission is required to examine under Item II (c) of its First Programme: see paragraph 1 above.

49. See Appendix D to the present Paper.

tasks of deciding whether the breach which has occurred is fundamental, and of "strictly" construing a sometimes long and complicated exemption clause so as to avoid having to hold that it covered the breach when that would produce unfairness. Furthermore the courts would be enabled to deal with exemption clauses in "small print" about which members of the public and those representing the consumer interest continually complain (see guideline (d) in paragraph 64 below). If a general test of reasonableness were introduced, the Law Commissions would expect that the effect would be to bring to light and test the justification of complaints which have not, in the past, become sufficiently articulate. If in any given industry the complaints when tested were sufficiently numerous and weighty, it might turn out to be the case that the most efficient way of dealing with the situation would be by direct regulatory intervention; and this would not necessarily be confined to those clauses strictly classifiable as exemption clauses but might extend to other terms and conditions which are current in the trade concerned, whether in the form of standard contracts or otherwise.

62. The kind of reasonableness test which the Law Commissions have in mind would be a formula similar to that recommended in their First Report,[50] namely, that exemption clauses will be ineffective if it is shown to the satisfaction of the Court or arbitrator that it would not be fair or reasonable in all the circumstances of the case to allow reliance on the clause. The Law Commissions think that, as in the Misrepresentation Act, the test of reasonableness should be applied to the reliance on the exemption clause in the light of the circumstances rather than to the clause itself, since, in their view, in many cases the mischief of an exemption clause is not so much

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50. Paragraph 110: see Alternative B in Appendix B to this Paper.

that it is unreasonable per se but that a party may seek to rely on it in circumstances when it is wholly unreasonable to do so. For example, some service industries, notably in the field of carriage of goods, impose time-limit clauses for the notification of claims for loss or damage: generally speaking it is reasonable to insert such clauses but circumstances may occur in which it would be wholly unreasonable to rely on them.[51] This, moreover should be more acceptable to a number of the industries affected which say that they only invoke exemption clauses when the claims made against them are unreasonable.

63. It is for consideration whether the test should be worded in such a way as to enable the courts, where there is a clause limiting liability to a sum which they regard as unreasonably low, to award damages for such higher sum as they would regard as a reasonable limitation, rather than for the full amount of the damages. The argument in favour of this is that in cases where, say, it would have been reasonable to allow reliance on a clause limiting liability to £10,000 but where it is not reasonable to rely on the actual clause limiting it to £5,000, it seems unfair to make the supplier liable for the full amount of the damages (say, £25,000) merely because he happened to have chosen the wrong figure to insert in the limitation clause. The arguments against are that this would, in effect, enable the courts to re-write the parties' contract, and would encourage suppliers to insert a limitation of liability clause with an unreasonably low figure knowing that the courts would allow reliance on it to whatever figure they thought reasonable in the circumstances. It could also be argued that such a power is not needed since, in a commercial transaction, it is

51. See, for example, the case of Garnham, Harris & Elton Ltd. v. Ellis (Transport) Ltd [1967] 1 W.L.R. 940.

unlikely that the court would refuse to allow reliance on a limitation clause unless the limiting sum was so absurdly low as to smack of over-reaching. The prevailing view of the Law Commissions is, at present, that the arguments against are, on balance, the more powerful, but they would welcome views.

64. It was the unanimous conclusion of the Working Party that, if the general judicial test of reasonableness is to be introduced, guide lines should be laid down for the assistance of the courts in applying it. If guide-lines are to be provided, the Law Commissions suggest that the courts might have regard to the following considerations in so far as they are relevant in the particular case:

(a) the bargaining position of the user of the service relevant to the suppliers;

(b) the availability of other sources of supply not subject to a similar provision excluding or limiting liability;

(c) whether the provision excluding or limiting liability is clear in its wording and scope of operation;

(d) whether the steps taken to bring the provision to the attention of the user were reasonable in the circumstances including any customs of the trade and any previous course of dealing;

(e) whether the user has been offered and accepted a material benefit in consideration of agreeing to the provision;

(f) whether the user was offered the alternative of a contract containing terms less restrictive of the supplier's liability at a fair increased rate;

(g) where the provision excludes or restricts liability unless certain conditions are complied with (for example, claiming within a prescribed time) whether it was, in the events which have occurred, reasonably practicable to comply with those conditions;

(h) which party was in practice in the better position to mitigate the effect of the risk dealt with by the clause, for example, by insuring against that risk.

The Law Commissions feel that these are the sort of factors to which the court would have regard, whether directed to or not,[52] and views are sought on the advisability or not of specifically enacting these or similar guide-lines in any legislation implementing the reasonableness test.

65. The question of whether the onus of proof should lie on the supplier to establish that reliance on the exemption clause was reasonable or on the customer to establish that it was unreasonable is one on which we invite comments. In the common run of contracts with private customers it might seem harsh to impose the burden of proof on the latter, but in many such cases the circumstances would speak for themselves and, accordingly, the onus of proof would be relatively unimportant. In commercial contracts, however, the courts might sometimes feel that they did not know sufficient about the economics or organisation

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52. In Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co.Ltd. [1971] 1 W.L.R. 519, Donaldson J. in refusing to construe an exemption clause restrictively said at p 533, "If it occurred in a printed form of contract between parties of unequal bargaining power, it would be socially most undesirable, but of no less legal validity. The redress of such inbalance and relief from its consequences are matters for Parliament rather than the courts: see the speech of Lord Reid in Suisse Atlantique [1967] 1 A.C. 361, 406. But here, of course the parties are, or should be assumed to be, of equal bargaining power and the storage rates may be expected, whatever the facts may be, to have taken account of the protection afforded to the defendants."

of the industry concerned to reach a clear decision. When this was so, the onus of proof would be all-important. In such commercial contracts it may well be that there is no justification for assuming that exemption clauses are prima facie unreasonable and, since it seems impracticable to draw a clearly defined distinction between "consumer" and "non-consumer" contracts, it is not feasible to say that the onus of proof should be on the supplier in the former case and on the customer in the latter. That being so, the Working Party concluded that the onus should always be on the customer. The Law Commissions incline to the view that this conclusion is correct, but would welcome views.

Special problems of control

(a) Liability for death or personal injury

66. The Working Party considered the question whether clauses purporting to exempt the supplier of a service from liability for death or personal injury caused by his negligence should be governed by different rules from those which are to govern liability for damage to property. Account was taken of the fact that in some cases the legislature has already intervened to render such exclusion clauses void; for example, in the carriage of passengers by train[53] or by public service vehicles[54]. The Working Party saw no reason why control should not be extended at least to contracts for the carriage of passengers by sea.[55] Furthermore, moral considerations and accident prevention apart, there is a cogent argument in favour of distinguishing between the two types of

53. Transport Act 1962 section 43 (7).

54. Road Traffic Act 1960 section 151.

55. If the Brussels Convention of 1961 were incorporated into United Kingdom Law, shipowners would no longer be entitled to contract out of liability, but this liability would be limited to £6,000 per passenger.

of liability: the majority of the public do not normally carry personal accident insurance (nor is it reasonable to expect them to do so) whereas property is more generally covered by the owner's insurance. On these grounds the Working Party were at first inclined to the view that all clauses excluding or limiting liability for death or personal injury should be made void: but at a later stage they concluded that the type of damage wrongfully caused was irrelevant to the question whether it was reasonable for the supplier of a service to contract out of liability. The final consensus of opinion in the Working Party was against differentiation.

67. It seems to the Law Commissions that a civilised society should attach greater importance to the human person than to property and that accordingly the two types of liability deserve separate consideration. When so considered it appears to them that there is one further argument in favour of banning clauses excluding or limiting liability for death or personal injury. Whereas in general an exemption clause will not affect tortious (delictual) liability to those who are not parties to the contract in which the clause is embodied, this is not necessarily so in the field of personal injuries since the rights of third parties are sometimes dependent on liability to the person who suffered the physical injury. Thus in the Scottish case of McKay v. Scottish Airways[56] the mother of an air passenger killed in a crash failed in an action to recover damages for solatium and loss of support because the air ticket totally excluded the

56. 1948 S.C. 254. Although the particular case might now attract a different solution in the light of the Carriage by Air Act 1961, Sched. I, Chap.111. art.23 and the Carriage by Air (Non-International Carriage) (United Kingdom) Order 1952 and the Carriage by Air (Non-International Carriage) (United Kingdom) Amendment Order 1952, art. 3(2), it still represents the common law of Scotland.

carrier's liability to passengers. And a similar result would follow in England in a claim by dependants under the Fatal Accidents Acts 1846-1959 since liability towards the dependants is conditional on the tortfeasor being liable to the deceased.[57]

68. Accordingly the Law Commissions think that the balance of the arguments is in favour of differentiation between the two types of liability. It is their provisional view that exemption from liability for death or personal injury requires special treatment. There is a case, however, for making a distinction between

(i) clauses totally excluding liability for death or personal injury and

(ii) clauses limiting liability for death or personal injury to a fixed sum.

Under the present law there is no such distinction: all such clauses are effective unless either they are prohibited by statute[58] or the purported limitation is less than a sum prescribed by statute[59]. The Law Commissions consider that there is a prima facie case for an outright ban on all clauses that purport totally to exclude liability for death or personal injury but not for an outright ban on clauses merely limiting such liability. If exclusion clauses were to be banned, the question of the effectiveness of limitation clauses remains. There

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57. See The Stella [1900] P. 161. But if the contract merely limits the amount recoverable, the cause of action of the dependants is not barred and they may even recover more than the limited amount: see Nunan v. Southern Ry. [1924] 1 K.B. 223, Grein v. Imperial Airways [1937] 1 K.B. 50.

58. See n. 53 and n. 54 above.

59. See Carriage by Air Act 1961 Sched. I arts. 22 and 23 and Merchant Shipping Act 1894 section 503 (1) as amended by Merchant Shipping (Liability of Shipowners and Others) Act 1958.

are at least three possible ways of dealing with limitation clauses, viz.,

(a) they could be made subject to a general judicial test of reasonableness; or

(b) they could be made subject to a general prohibition except in those areas expressly permitted by legislation; or

(c) they could be allowed to operate in so far as expressly permitted by legislation and, in all other cases, in so far as they pass the judicial test of reasonableness.

Legislative limitation would necessitate the specification of a limit below which contracting out would be disallowed: otherwise it would be easy to evade the ban on total exclusions by limiting liability to a ridiculously low figure. One solution would be to prescribe a fixed figure, say £10,000, for all industries; but such a figure might be unreasonably low for some industries and unreasonably high for others. Furthermore such a solution might have the effect of inducing those industries which at present limit their liability to a higher figure, to lower their liability to the statutory figure and those industries which do not at present exclude or limit their liability, to limit their liability in the future. It would, therefore, be necessary to decide in what areas limitations of liability should be permissible and to prescribe a figure which is reasonable for each specific area: this might involve government departments in a difficult and lengthy process of investigation. The arguments for and against legislation in specific areas are the same as those set out in paragraphs 47-48 above, in relation to damage to property.

69. The Law Commissions would welcome views on the following questions:

(1) Should exemption from liability for death or personal injury be subject to the same rules as exemption from liability for damage to property or are there good reasons for differentiation?

(2) Should all clauses totally excluding liability for death or personal injury be void?

(3) If so, should all clauses purporting to limit liability for death or personal injury to fixed sums also be void?

(4) If the answer to question 3 above is in the negative, should such clauses

(a) be subjected to a general judicial test of reasonableness; or

(b) be prohibited except in those areas expressly permitted by direct or delegated legislation; or

(c) be allowed to operate in so far as expressly permitted by legislation and in all other cases only in so far as they pass the judicial test of reasonableness?

70. A case can be made for selecting the relationship of employer and employee for special treatment in this field. An employer cannot now contract out of or limit his liability to an employee or apprentice in respect of personal injuries caused to an employee or apprentice by the negligence of persons in common employment with him (see Law Reform (Personal Injuries) Act 1948, section 1(3)); and the Employer's Liability (Defective Equipment)

Act 1969 renders void any agreement in so far as it purports to exclude or limit any liability of an employer arising under that Act. It is for consideration whether these exceptions should be extended under a general rule rendering void any clause that purports to exclude or limit the liability of an employer for injuries caused to an employee or apprentice in the course of his employment and through the negligence of the employer or any person for whom the employer is vicariously liable. Views are invited on this also.

71. Under some legal systems clauses purporting to exclude or limit liability for the consequences of intentional or reckless misconduct are regarded as void on the ground that it is contrary to public policy to allow anyone with impunity to injure the person or property of another. Under the Carriage by Air Act 1961 Sched. I, art. 25 the limits of liability specified in art. 22 do not apply if "it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result." It may already form part of our general law that a person cannot contract out of liability for wilful misconduct; even so, in view of the notorious difficulty of proving an intent to injure, it is for consideration whether clauses which purport to exclude or limit liability for wilful, or for reckless, misconduct should be void. Views are further invited on this.

(b) Existing legislation

72. The Working Party advised that whatever new legislative provisions may be made for the general control of exemption clauses in contracts for the supply of services, these should not apply to contracts already covered by

special legislation, e.g. the Hotel Proprietors Act 1956, the Carriage of Goods by Air Act 1961 and the Hire-Purchase Acts 1965. The Law Commissions, while noting this recommendation of the Working Party, are not in favour of any a priori assumption that existing legislation can in all cases remain unaffected by whatever general legislation may be introduced for the control of exemption clauses.

(c) International conventions

73. The Working Party advised that provisions for the general control of exemption clauses should not apply to contracts covered by an international covention in so far as the application of the control would create inconsistency with the convention.

74. The Law Commissions provisionally endorse this conclusion on the footing that, while it should be impermissible to fix by domestic legislation a lower limit of compensation than that which the convention provides, the fixing of a higher limit would not be ruled out.

(d) Gratuitous provision of services

75. The Working Party considered the question whether any provision which might be recommended for the control of exemption clauses in contracts for the supply of services should also apply where services were provided gratuitously on condition that the supplier was exempt from any liability to the user. The matter was complicated because in English law many such arrangements were, in the absence of consideration, no more than gratuitous licences (and as such outside the Working Party's terms of reference), whereas in Scottish law they would often be binding contracts. Particular concern was expressed

at the practice of public transport undertakings of issuing free travel passes to old-age pensioners, blind persons and employees, subject to a disclaimer of liability for death or personal injury. In view of these complications the Working Party decided to refer the whole subject to the Law Commissions for examination.

76. Before 1967 it was generally considered on the authority of the Court of Appeal's decision in Wilkie v. L.P.T.B.[60] that under English law the "free pass" on public transport involved a licence and not a contract and that the provision now in section 151 of the Road Traffic Act 1960 did not apply to any disclaimer of liability attached to the issue of the pass. However, in Gore v. Van Der Lann[61] (a case concerning an old-age pensioner) the Court of Appeal found that there was consideration sufficient to support a contract, so that the disclaimer of liability was void under section 151 of the Road Traffic Act 1960. Wilkie's Case was distinguished on the ground that in that case there was no contractual intention; there the disclaimer of liability was contained in a free pass issued to an employee as one of the privileges attached to his employment, and the free pass itself was a licence and not a contract.

77. It is understood that even before the decision of the Court of Appeal in Gore's Case some local authorities had already ceased to attach disclaimers of liability to free passes issued to persons other than employees; and it may well be that the effect of that decision will in time lead to a total discontinuance of such disclaimers by operators of public service vehicles. But at present the disclaimers still remain in respect of employees of

60. [1947] 1 All E.R. 258.

61. [1967] 2 Q.B. 31.

some public transport undertakings; and, in the case of the railways, "free pass" passengers are specifically excluded from the protection afforded by section 43(7) of the Transport Act 1962, though in practice the Railways Board meets the claims of such persons. It is the provisional view of the Law Commissions that there is no justification for public transport undertakings to discriminate between paying and non-paying passengers; they should be equally liable to both. In view of the comparatively small number of persons carried without charge in proportion to the total number of passengers, the extension of liability to those travelling on a free pass could hardly impose a greatly increased burden of risk on the public transport undertakings concerned. It is accordingly suggested that section 151 of the Road Traffic Act 1960 and section 43(7) of the Transport Act 1962 should apply to all persons including employees carried by public transport on a free pass. Views on this proposal are invited, especially those of the transport authorities and trade unions concerned.

78. Free passes are but one example of the gratuitous provision of services. The banks give advice as to credit-worthiness free of charge, but subject to a disclaimer of liability. Government departments have advisory services which give advice on a variety of topics, sometimes free and sometimes on payment of a fee. The main advisory services of the Ministry of Agriculture, Fisheries, and Food, for example, are concerned with improved farming, estate management and agricultural production and with the provision of assistance to the fishing industry. Advice is given free and without disclaimer, and any proposals to introduce disclaimers following the Hedley Byrne decision[62] have been rejected

62. Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. [1964] A.C. 465: but see Mutual Life and Citizens Assurance Co. Ltd. v. Evatt [1971] 2 W.L.R. 23.

as unjustifiable. The Ministry is satisfied that the issue of formal disclaimers of liability for negligence would seriously impair the work of the advisory services on which the improvement of agricultural productivity significantly depends. The Ministry also provides miscellaneous services, of which some are free and some are for payment: and sometimes formal disclaimers are issued, for example, where the advice has commercial value and it is felt that the recipient should bear the risk, or where in special cases damages could be so high that in the absence of a disclaimer advice would not be given.[63]

79. The question arises whether, where a person in the course of his business provides services gratuitously, any conditions imposed by him which purport to exclude or limit his liability should be subject to the same type of control as if he charged a fee. It is difficult to distinguish between the two cases in principle, particularly if in the one case services are provided free in consideration of past or expected future benefits. Furthermore in relation to the giving of advice the imposition of control on the use of disclaimers of liability might have the desirable effect of making persons more careful in the advice which they give and the terms in which it is expressed. On the other side, there is the strong practical argument that the control of exemptions might lead to the discontinuance of some services which at the moment confer considerable benefits on users. Where the risks were high and the provisions of the service brought minimal benefits to the supplier, he could hardly be blamed if he declined to provide it without a disclaimer of liability which he could be sure would be effective. However, if exemption clauses were subjected to a reasonableness test,

63. A recent White Paper (January 1971) Cmnd. 4564 proposes the reorganisation in England and Wales of the services, including advisory services, provided by the Ministry with the setting up of a new unified Agricultural Development and Advisory Service (ADAS).

it would be open to the court to take into account the gratuitous nature of the service in deciding whether or not it was unreasonable to rely on a clause excluding or limiting liability.

80. Views are invited as to whether, where a person in the course of his business provides services gratuitously, any conditions imposed by him which exclude or limit his liability should be subject to the same type of control as would apply if the services were not gratuitous.

(e) Occupier's liability

81. It is for consideration how far the foregoing proposals should apply to the exclusion of an occupier's liability by virtue of his occupation or control of the premises. At present under the Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960 his duty is to take reasonable care "except in so far as he is entitled to and does extend, restrict, modify or exclude..." his duty.[64] The question, therefore, is whether the foregoing proposals should control the extent to which he is entitled to "restrict, modify or exclude". It will be appreciated that in any event these proposals would not have any application unless the occupier allows visitors to enter his premises as part of his business activities. If he does so a strong case can be made for saying that he should be subject to the same control as any other supplier of services or facilities, and that no valid or workable distinction can be drawn between liability for defective services, and liability for defects in the premises where they are supplied or for things done thereon as occupier.[65] On the other hand, it could

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64. Section 2(1) of each Act.

65. The 1957 and 1960 Acts apply both to dangers "due to the state of the premises or to anything done or omitted to be done on them..." (s.1(1) of each Act) but relate only to duties qua occupier as opposed to duties qua a supplier of goods or services.

be argued that a distinction could and should be drawn between dangers in or on the business premises themselves (for example, the shop, public house, sports stadium or railway platform or train) and those in or on premises, such as a car park,[66] supplied merely as an incidental facility. The Law Commissions would welcome views on these points.

PART IV: SUMMARY OF PROVISIONAL CONCLUSIONS

Sale of Goods

82. (a) In a "consumer sale" any contractual provision purporting to exclude or limit the seller's liability for negligence should be void. (Paragraph 9).

(b) If injury or loss is caused to the purchaser in a "consumer sale" because of the negligence of the manufacturer or intermediate distributor he should be bound to make reparation even if he purported to exclude

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66. Exemption clauses are commonly used in relation to car parks: For example:- "Motor vehicles are parked subject to accommodation being available and to the conditions that the Board, their servants or agents, accept no responsibility in respect of loss or misdelivery of or damage to the motor vehicle the contents thereof or accessories thereto, or in respect of any injury to the occupants, by whomsoever caused and whether or not occasioned by the negligence of the Board, their servants or agents." For a similar condition see Thornton v. Shoe Lane Parking Ltd.[1971] 2 W.L.R. 585, a case involving personal injury, in which the Court of Appeal held that a notice displayed at the entrance to the effect that cars were parked at owners' risk did not exclude liability for personal injury, and that a statement in small print on a ticket received from a machine after payment that it was "issued subject to the conditions of issue as displayed on the premises" was insufficient notice to make such an exclusion a term of the contract.

this liability in a "guarantee" or similar document. (Paragraph 13).

(c) In a sale other than a "consumer sale"

(i) if provisions contracting out of the conditions and warranties implied by sections 13 to 15 of the Sale of Goods Act 1893 are subject to a reasonableness test, any contractual provision purporting to exclude the seller's liability for negligence should be subject to the like test; or

(ii) if there is no control over contracting out of these conditions and warranties but restrictions are proposed upon contracting out of liability for negligence in relation to suppliers of services generally, any contractual provision purporting to exclude the seller's liability for negligence should be subject to the like restrictions;

(iii) it is for consideration whether, in any event, clauses which purport to exclude or limit the seller's liability for negligence should be banned by legislation.[67] (Paragraphs 14-16).

Supply of Services etc.

(d) It is impossible, for the purposes of contracts other than those for the sale of goods to formulate a workable definition of "private user" or "consumer" which would allow contracts with such persons to be treated, as regards exclusions

67. cf (e) below.

or limitations, differently from business users; and even if such a distinction were practicable, control ought not to be restricted to contracts with "private users" or "consumers". (Paragraphs 40-41).

(e) Legislation, direct and delegated, dealing separately with individual types of contract or exemption clause is not a satisfactory method on its own for the control of exemption clauses but would play a valuable part in combination with a general power in the courts. (Paragraphs 50-52).

(f) Exemption clauses other than those which relate to liability for death or personal injury should be subject to a test of reasonableness to be applied by the courts in the light of the particular circumstances. It is for consideration whether guide-lines should be laid down for the assistance of the courts, and whether the onus of proof should lie on the party challenging the clause or on the party seeking to rely on it. (Paragraphs 57-65).

(g) Clauses which purport totally to exclude liability for death or personal injury should be void: but it is for consideration whether clauses limiting liability to a fixed sum should be either

(i) subjected to a general judicial test of reasonableness; or

(ii) prohibited except in those areas expressly permitted by legislation; or

(iii) allowed to operate in so far as expressly permitted by legislation and in all other cases only in so far as they pass the judicial test of reasonableness. (Paragraphs 68-69).

(h) It is for consideration whether clauses which purport to exclude or limit the liability of an employer for injuries caused to an employee or apprentice in the course of his employment through the negligence of the employer or any person for whom the employer is vicariously liable, should be void. (Paragraph 70).

(i) It is for consideration whether clauses which purport to exclude or limit liability for wilful or reckless misconduct should be void. (Paragraph 71).

(j) To the extent that provisions for the general control of exemption clauses would be inconsistent with the provisions of an international convention enforceable in Great Britain they should not be applicable to contracts covered by the convention. (Paragraphs 73-74).

(k) It is for consideration whether, where a person in the course of his business provides services gratuitously, any conditions imposed by him which exclude or limit his liability should be subject to the same type of control as would apply if the services were not gratuitous. (Paragraph 80).

(l) It is for consideration how far the proposals in (f) (g) (i) and (k) above should apply to the liability of an occupier of land. (Paragraph 81).

It is emphasized that these conclusions are purely provisional and that views on them are sought.

APPENDIX A

JOINT WORKING PARTY ON EXEMPTION CLAUSES IN CONTRACTS

Joint Chairmen:	The Hon. Lord Kilbrandon	(Chairman of the Scottish Law Commission)
	Mr Andrew Martin, Q.C.	(The Law Commission)
	Professor T.B. Smith, Q.C.	(The Scottish Law Commission)
	Mr L.C.B. Gower	(The Law Commission)
	Mr M. Abrahams	(The Law Commission)
	Mrs E.L.K. Sinclair	(Board of Trade: till February 1967)
	Mr S.W.T. Mitchelmore	(Board of Trade: from February 1967)
	Miss G.M.E. White	(Board of Trade: till August 1968)
	Mr M.J. Ware	(Board of Trade: from August 1968)
	Mr J.A. Beaton	(Scottish Office)
	Mr J.B. Sweetman	(Treasury Procurement Policy Committee)
Appointed after consultation with the organisation shown in brackets	(Mr Stephen Terrell, Q.C.	(The Bar Council)
	(Mr M.R.E. Kerr, Q.C.	(The Bar Council: appointed February 1967)
	(Mr Peter Maxwell, Q.C.	(The Faculty of Advocates)
	(Mr W.M.H. Williams	(The Law Society: resigned February 1968)
	(Mr J.H. Walford	(The Law Society: appointed February 1968)
	(Mr G.R.H. Reid	(The Law Society of Scotland)
	(Mr R.G. Scriven	(Association of British Chambers of Commerce)
	(Mr W.E. Bennett	(The Confederation of British Industry)

Appointed after consultation with the organisation shown in brackets	(Professor G.J. Borrie	(The Consumer Council)
	(Mrs Beryl Diamond	(The Consumer Council: resigned February 1967)
	(Mrs L.E. Vickers	(The Consumer Council: appointed February 1967)
	Secretary: Mr R.G. Greene	(The Law Commission)
	Assistant Secretary: Mr J.A.W. Strachan	(The Law Commission)

APPENDIX B

CLAUSE 4 OF DRAFT CLAUSES

IN

APPENDIX A OF LAW COMMISSIONS' FIRST REPORT ON EXEMPTION CLAUSES IN CONTRACTS

Exemption clauses.

4.— Section 55 of the principal Act (exclusion of implied terms and conditions) shall be renumbered as subsection (1) of that section and at the end there shall be inserted the following subsections:-

"(2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.

(3) Notwithstanding anything in subsection (1) of this section, any term -

(a) which is contained in or applies to a contract of sale and which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of section 12 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision; or

(b) which is contained in or applied to a contract for a consumer sale and which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of sections 13 to 15 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision;

shall be void."

Alternative A

"(4) In this section "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods -

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business for one of the purposes mentioned in subsection (5) below.

(5) The said purposes are -

(a) disposing of the goods by way of sale, hire or purchase in the course of the buyer's business;

(b) consuming or processing them in the course of that business;

(c) using them for providing a service which it is an object of that business to provide.

(6) In the case of a consumer sale where the goods are sold to a person who buys or holds himself out as buying them in the course of a business but for a purpose other than one mentioned in subsection (5) above, the court may treat the sale for the purposes of this section as not being a consumer sale if satisfied that, having regard to the size and terms of the transaction, and all other relevant circumstances, it is reasonable to do so.

(7) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(8) This Section is subject to the provisions of section 61 (6) of this Act."

Alternative B

"(4) Any term which is contained in or applies to a contract of sale of goods other than a consumer sale and which purports to exclude or restrict, or has the effect of excluding, the operation of all or any of the provisions of sections 13 to 15 of this Act or any liability of the seller for breach of a condition or warranty implied by any such provision shall not be enforceable to the extent that it is shown that it would not be fair or reasonable in the circumstances of the case to allow reliance on the term.

(5) In this section "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods -

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

(6) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(7) This section is subject to the provisions of section 61 (6) of this Act."

APPENDIX C

Examples of Exemption Clauses

1. MOTOR VEHICLE

(Extract from guarantee.)

"... Motors Limited, as Manufacturer, warrants each new motor vehicle and chassis including all equipment and accessories thereon (except tyres and tubes), manufactured or supplied by ... Motors Limited, to be free from defects in material and workmanship under normal use and service, ... Motors' obligation under this warranty being limited to repairing or replacing at its option any part or parts thereof which shall, within twelve (12) months after delivery of such vehicle or chassis to the original purchaser, or before such vehicle or chassis has been driven twelve thousand (12,000) miles, whichever event shall first occur, be returned to an authorised ..... dealer at such Dealer's place of business and which shall prove to have been thus defective. The repair or replacement of defective parts under this warranty will be made by such Dealer without charge for parts, and, if made at such Dealer's place of business, without charge for labour.

.....

This warranty is expressly in lieu of any other warranties, express or implied, including any implied warranty of quality or fitness for a particular purpose, and of any other obligations or liability on the part of the Manufacturer, and ... Motors Limited neither assumes nor authorises any other person to assume for it any other liability in connection with such motor vehicle or chassis."

2. ELECTRIC BLANKET
(Extract from guarantee.)

"... Appliances Limited (hereinafter called the Company) guarantee this Electrically Heated Blanket of the type reference overleaf, for a period of three years from the date of purchase by the user.

1. In lieu of warranty, condition or liability implied by law, our liability in respect of any defect in or failure of the goods supplied or for any loss, injury or damage attributable thereto, is limited to making good by replacement or repair defects which under proper use, appear therein and arise solely from faulty design, materials, or workmanship within a period of three years from the date of purchase by the user, at the termination of which period all liability on our part ceases, provided always that such defective goods are promptly returned to the address given below, carriage paid, unless otherwise arranged.

2. This Electric Blanket is sold on the express condition that ... Appliances Limited shall not be liable except as above mentioned for any damage that may be caused by the use or misuse of this appliance."

3. SHIPPING
(Extract from conditions of carriage.)

(A) PASSENGER LINER

"1. (a) Notwithstanding the other conditions and terms whether express or implied and whether statutory or otherwise to which the contract contained in or evidenced by this Ticket and its performance by or on behalf of the Shipowner may or might otherwise be subject, the Shipowner shall be exempt from all liability in respect of any detention, delay, over-carriage, loss, expenses, damage, sickness or injury of whatever kind, whenever and wherever occurring and however and by whomsoever caused of or to any Passenger or of or to any person or child travelling with him or her or in his or her care or of or to any baggage, property, goods, effects, articles, matters or things belonging to or carried by, with or for any Passenger or any such person or child. The above exemption from liability shall equally apply to any ancillary contract or service, e.g., the sale of wines, spirits or beers, made or provided during or in connection with the performances of the contract contained in or evidenced by this Ticket.

(b) If any claim against the Shipowner be prosecuted in any jurisdiction where the limitations and exemptions contained in sub-paragraph (a) hereof are legally unenforceable, then in such event the Shipowner shall not be liable for any claim for loss of or damage to baggage or arising out of delay of baggage or the Passenger, or out of bodily injury or illness, or medical or surgical treatment thereof, including death, of any Passenger arising out of any cause of whatsoever nature if not shown to have been caused by the Shipowner's negligence; and the burden of proving negligence shall be on the party asserting it. No inference of negligence

may be drawn from the fact or extent of loss, damage, delay or injury, and it is stipulated between the Passenger and the Shipowner that the Shipowner in all events and in all contingencies shall be presumed to have exercised due care and due diligence. In any event, the liability of the Shipowner in respect of loss or Passengers' baggage, effects or property shall be limited to £15 sterling or 50 United States dollars for each Passenger. Further the Shipowner shall not be under any liability in respect of any claim whatsoever unless written notice of the claim is presented to the Shipowner within six months from the date on which the claim arose and unless a suit or action is brought within one year from that date.

2. By accepting or receiving this Ticket each Passenger agrees without prejudice to the other provisions hereof and both on his or her behalf and on behalf of any person or child travelling with him or her or in his or her care that all rights, exemptions from liability, defences and immunities of whatsoever nature referred to in this Ticket applicable to the Shipowner shall in all respects enure also for the benefit of any servants or agents of the Shipowner acting in the course of or in connection with their employment so that in no circumstances shall any such servant or agent as a result of so acting be under any liability to any Passenger or to any such person or child greater than or different from that of the Shipowner and for the purpose of the foregoing the Shipowner is or shall be deemed to be acting as agent or for and on behalf and for the benefit of all persons who are or may be its servants or agents from time to time and all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidenced by this Ticket."

(B) FERRIES

Example (1)

3. "... Ferries shall not be liable for the death or any injury, damage, loss, delay or accident to Passengers, their apparel or baggage, whensoever, wheresoever and howsoever caused and whether by negligence of their servants or agents or by unseaworthiness of the vessel (whether existing at the time of embarkation or sailing, or at any other time) or otherwise.

4. The exemption from liability contained in Clauses 3 and 11 (a) hereof extends to all employees servants and agents of ... Ferries while acting in the course of or in connection with their employment and for this purpose ... Ferries are or shall be deemed to be acting on behalf of and for the benefit of all persons who are or may be its employees servants or agents from time to time and all such persons shall to this extent be deemed to be parties to the Contract contained herein.

.....

6. A Passenger accepts that ... Ferries give no condition or warranty express or implied that the vessel used for the carriage is fit for the Carriage of Passengers their baggage or accompanied vehicles.

.....

8. In the event of the Passenger causing damage to the vessel or its furnishing or equipment or any property of ... Ferries whether caused directly or indirectly in whole or in part by a wilful or negligent act or omission of the Passenger the Passenger shall be fully liable to .. Ferries and shall indemnify .. Ferries in respect of any liability incurred by ... Ferries to third parties or to its employees servants or agents for personal injuries, death or damage to property caused by the Passenger directly or indirectly in whole or in part by wilful or negligent act or omission of the Passenger.

.....

11. The following conditions apply to accompanied vehicles and are in addition to the foregoing conditions.

(a) ... Ferries are not liable for the loss of or damage or delay to accompanied vehicles, loose parts or equipment or personal property left in accompanied vehicles whensoever, wheresoever, and howsoever caused and whether by negligence of their servants or agents or unseaworthiness of the vessel (whether existing at the time of embarkation or sailing or at any other time) or otherwise.

(b) ... Ferries reserve the right to carry accompanied vehicles on the open "C" deck of the vessel.

(c) A Passenger travelling with an accompanied vehicle agrees to indemnify ... Ferries in respect of all loss or damage suffered by ... Ferries and against all claims made against ... Ferries in respect of personal injuries or loss of life and loss or damage or delay to property due to or emanating from the accompanied vehicle and whether or not the proximate cause of such loss damage or delay is due to the wrongful act neglect or default of ... Ferries or its servants or agents.

(d) It is agreed that general average will be settled in London according to York/Antwerp Rules 1950."

Example (2)

".... LIMITED will not be responsible for any loss of life, injury, damage, loss or delay wheresoever or whensoever occurring to passengers or their luggage - personal, labelled or otherwise - goods, or property, or live stock, either on board the ships, ferries and vehicles (subject in the case of such vehicles to the provisions of the Road Traffic Acts), or in boats, waiting rooms, piers, bus stations, garages, or in any place whatever, in transit, or on shore, and whether or not such loss of life, injury, damage, loss or delay is due to unseaworthiness, or unfitness of the ships, and/or ferryboats or vehicles, or their appurtenances at or after the commencement of the voyage, acts, neglects, errors in judgment, or defaults of master mariners engineers, or others of the

crew of the ships, or of agents, stevedores, pier masters, boatmen, drivers, conductors or other servants of theirs connected with the service in any way whatsoever, it being distinctly agreed to and understood that passengers, their luggage, goods and property are carried at passengers' own risk, and they are recommended to insure against anything of this kind."

4. FURNITURE REMOVAL AND STORAGE
(Extract from Standard Conditions of the National Association of Furniture Warehousemen and Removers.)

"15.—(a) The Contractors shall not under any circumstances be liable for any loss or damage caused by or resulting from or in connection with fire (howsoever caused).

(b) The Contractors shall not under any circumstances (howsoever caused) be liable for any loss, failure to produce or damage caused by or arising out of flood, moth, vermin, insects, mildew, damp, rust, burglary or house-breaking, Act of God, riot, civil commotion, invasion, war, explosion, railway or road accidents, marine risks, labour troubles, aircraft or things dropped therefrom or for deterioration, leakage or deficiency of articles of a perishable or leaky nature, or for any consequential loss, or loss or damage due to causes beyond their immediate control or the acts of third parties whether criminal or otherwise.

(c) In the event of the goods being so lost or damaged The Contractors shall be at liberty to take whatever steps they think necessary to try to recover or salvage the goods and all expenses of their so doing shall be recoverable by them from the customer.

16. The Contractors shall not be liable for loss or, failure to produce or damage (howsoever caused) to (a) any goods during transference to or from boat or ferry and transit by water whether on deck or otherwise, or (b) any articles in wardrobes or drawers or in any package, bundle, case or other container not both packed and unpacked by The Contractors' employees (c) jewellery, currency notes or coins of any description (d) livestock (e) anything removed from or to a public sale room (f) goods removed from or into premises where there are other workmen unless a detailed claim in writing is given at the time (time being of the essence of the contract) (g) plaster casts or statuary of whatever kind of material or plaster or composition picture frames (h) the mechanism and/or adjustment of clocks, barometers, pianos, wireless apparatus, scientific, musical and other instruments, electrical apparatus or refrigerators, nor shall they be liable for the renovation or replacement of any article which is brittle or inherently defective or in such a condition that it cannot be removed without risk of damage.

17. The liability (if any) of The Contractors for any loss, failure to produce or damage shall be limited to either (a) the cost of repairing or replacing the damaged or missing article or (b) to Ten Pounds for any one article, suite, service or complete case or package or other container and the contents thereof respectively (including plate, plated goods and/or other valuables) whichever is the smaller sum. The Contractors shall have the option of either repairing or replacing any damaged or missing article and if The Contractors repair any article no claim shall be made against them for depreciation. The Contractors if requested in writing (verbal instructions are insufficient) and provided the premium is duly paid or arrangements as to payment have been made with The Contractors will endeavour to effect insurance against fire or for any greater loss or damage. Liability (if any) for damage to premises, private roads, drains, bridges, or culverts is also limited to Ten Pounds and the customer shall indemnify The Contractors against all claims, costs, charges and expenses beyond that sum.

18. When goods are only packed or only packed and despatched by The Contractors no claim shall be made against them after the goods leave their hands for any damage or loss howsoever caused.

19. All claims for damage to or loss of or failure to produce any goods shall be made in detail in writing (time being of the essence of the contract) (a) as to goods removed from The Contractors' warehouse by any persons other than The Contractors at the time the goods are removed and (b) in all other cases within three days after delivery of the goods alleged to be damaged or in the case of goods alleged to be lost or which The Contractors fail to produce within three days after the time when the goods should in the ordinary course have been delivered alone or with other goods and The Contractors shall be under no liability unless a claim is so made within the time stipulated. All damage to premises must be pointed out to The Contractors' foreman in charge at the time and confirmed in writing within forty-eight hours after the damage is alleged to have occurred (time being of the essence of the contract) otherwise The Contractors shall not be liable."

5. CENTRAL HEATING
(Extract from Standard Conditions of the Association of Heating, Ventilating and Domestic Engineering Employers.)

9. "GUARANTEE - In place of any other conditions or warranties whether imposed by Statute or implied by Common Law, we undertake as follows: We will repair or, if necessary, replace free of charge any materials or work found to be defective if the defect is due to faulty manufacture or bad workmanship and is brought to our attention within six months of the completion of the work provided nevertheless that:-

(a) We accept no responsibility for any drawing, design or specification not prepared by us, and submission of this tender does not constitute any warranty, guarantee, representation or opinion of the practicability of construction

or of the efficacy, safety or otherwise of materials to be supplied or work to be executed by us in accordance therewith and the cost of any additional work caused by defects in any such drawings, designs or specifications shall be chargeable as an extra under Clause 3(a) hereof;

(b) We shall not be liable for any consequential loss or damage caused directly or indirectly by any defect or otherwise howsoever;

(c) We shall not be liable for any loss or damage direct or indirect nor for any extra work entailed due to the apparatus being put into operation by the Customer or by us at his request before it is handed over for beneficial use."

6. TOWAGE
(U.K. Standard Towage Conditions.)

"1. For the purpose of these Conditions the phrase "whilst towing" shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the Hirer's vessel to pick up ropes or lines, or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the Hirer's vessel to cast off ropes or lines have been carried out, or the tow rope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connection with holding, pushing, pulling or moving the ship.

2. On the employment of a tug the Master and Crew thereof become the servants of and identified with the Hirer and are under the control of the Hirer or his servants or agents, and anyone on board the Hirer's vessel who may be employed and/or paid by the Tugowner shall be considered the servant of the Hirer.

3. The Tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the Hirer's vessel, or for loss of or damage to anything on board the Hirer's vessel, or for loss of

the tug or the Hirer's vessel, or for any personal injury or loss of life, arising from any cause, including negligence at any time of the Tugowner's servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed or otherwise, and the Hirer shall pay for all loss or damage, and personal injury or loss of life, and shall also indemnify the Tugowner against all consequences thereof, and the Tugowner shall not, whilst at the request expressed or implied of the Hirer rendering any service other than towing be held responsible for any damage done to the Hirer's vessel and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the Tugowner to make his tugs seaworthy for the navigation of the tugs during the towing or other services - the burden of proof of any failure to exercise such reasonable care being upon the owner of the tow.

4. The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the Tugowner may have in Admiralty or at Common Law against the Hirer.

5. The Tugowner may substitute one tug for another and may sub-let the work, wholly or in part, to other Tugowners who shall also have the benefit of and be bound by these Conditions.

6. The Tugowners will not be responsible for the consequences of War, Strikes, Lock-outs, Riots, Civil Commotions, Disputes or Labour Disturbances (whether they be parties thereto or not) or anything done in contemplation or furtherance thereof, or delays of any description, however caused, including negligence of their servants or agents."

7. DOCK SERVICES

(A) LONDON WHARFINGERS CLAUSE

"All operations and services, including (without prejudice to the generality of the previous words) the stevedoring, handling, storage and transportation of goods, are undertaken and performed only under the terms of the London Wharfingers' Clause, as follows:

> THE LONDON WHARFINGERS CLAUSE. The rates charged or quoted by the Company are upon the express condition that the person with whom the Contract is made is either the owner or the authorised agent of the owner of the goods and accepts the terms herein contained for himself and all other interested parties, (hereinafter called "the Customer"). The terms of this Clause shall apply to and be deemed to form part of the contract between the Company and the Customer. The Company shall not be liable for loss, detention, delay, mis-delivery or damage of or to or in connection with the goods (however conveyed), howsoever and whensoever caused and of what kind soever whether or not such loss, detention, delay, mis-delivery or damage is the result of any act, neglect or default of the Company or its servants or of others for whom it may be responsible, and even though such loss, detention, delay, mis-delivery or damage is caused by unfitness or unseaworthiness of any lighter or tug on loading or at the commencement of the transit or at any other time, or by failure to collect the goods and even though any lighter carrying the goods may have deviated or departed from the intended transit, and though the goods may have been loaded in a lighter with other goods. Provided nevertheless that the Company shall be liable in respect of loss by pilferage or theft of goods whilst on board lighter in course of transit, but such liability shall not in any circumstances whatever exceed the amount that may be in fact recoverable from the owner of such vessel. The Company shall be entitled to employ or contract with tug-owners, lightermen and other persons of every kind to perform any part or parts of the services to be rendered under or in connection with the contract with the Customer and such tug-owners, lightermen and other

persons shall have no greater liability to the Customer than that which the Company has to such Customer hereunder. The term "Company" includes company, person or firm as the case may be; and the term "Lighter" includes lighter, barge or other vessel, and the term "Lightermen" includes the owners or users thereof. The Company shall have a general as well as a particular lien on all goods for unpaid accounts.

The Customer shall re-imburse the Company in respect of any expenses incurred by the Company pursuant to statute or common law and arising from or in connection with the goods."

(B) LONDON LIGHTERAGE CLAUSE

"The rates charged by us are for conveyance only, and are exclusive of dock dues, demurrage disbursements, or other charges. They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained. The goods are carried only at Owners' and/or Customers' risk, excepting loss arising from pilferage and theft of goods on board the barge whilst in course of transit, liability for such loss or damage being limited at our option to £40 per package or unit or to £100 per ton. Save as aforesaid we will not be liable for any loss of or damage to goods entrusted to us for lighterage or for any loss damage or expense occasioned to the Owners of the goods or to the Customers, howsoever, whensoever, or wheresoever such loss damage or expense be occasioned, and whether or not such loss damage or expense be occasioned by unseaworthiness of craft or by any negligence, wrongful act, or default of our

servants or agents, or other persons for whose acts we might otherwise be liable, or be occasioned by any delay or failure in collecting carrying or delivering the goods and although the barge for any reason may have deviated or departed from the intended transit with the goods and although the goods may have been loaded in the barge with other goods; provided always that the foregoing exemption excluding us from any liability arising from unseaworthiness of craft shall not apply unless we are able to establish that we have not knowingly or recklessly supplied an unseaworthy barge for the service at the time of the commencement of the voyage to the ship wharf or quay to load. We will not be liable to contribute in general average. We will not be responsible for any consequences arising from strikes, lock-outs, or other labour difficulties. We are to be at liberty to employ any lighter tug or vessel belonging to other owners or to sublet the whole or any portion of the of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods Owner or Customer and such other Owners or Sub-contractors."

8. POST OFFICE TELECOMMUNICATIONS

(Extract from Standard Terms and Conditions.)

"The Post Office shall not be liable to the Subscriber for or on account of or in respect of any loss or damage suffered by reason of

(a) any failure to provide, or delay in providing, under this Agreement, telecommunication service, any equipment or apparatus, or any service ancillary thereto.

(b) any failure, interruption, suspension or restriction of telecommunication service or a service ancillary thereto, provided under this Agreement.

(c) any delay of, or fault in, communication by means of telecommunication service provided under this Agreement.

(d) any error in, or omission from, a directory for use in connection with such telecommunication service.

The Subscriber shall not be entitled to any abatement of rental in connection with any of the matters aforesaid."

APPENDIX D

The Doctrine of Fundamental Breach [1]

1. This Appendix is concerned primarily with English law. As far back as Pollock & Co v. Macrae,[2] Scots law recognised a doctrine of 'total breach' resulting from a 'congeries of defects'. Moreover, the opinions expressed in the House of Lords in the Suisse Atlantique Case[3] would have very strong persuasive authority in any Scottish case which raised the same problems as those which were considered in that case. However, the Scottish Courts were not concerned with the now discredited doctrine of 'fundamental term', nor do they recognise the dichotomy of 'conditions' and 'warranties' in the English sense. It cannot safely be assumed that Scottish Courts would accept certain recent formulations by the Court of Appeal in England of the law of fundamental breach.

A: Before Suisse Atlantique

2. The doctrine of fundamental breach is a relatively modern development. The growth after the First World War of standard form contracts, or contracts of adhesion as they are sometimes called, led the courts into devising techniques to protect the weaker party from the unfair enforcement of exemption clauses. The strict application of the contra proferentem rule in construing the terms of a contract achieved this end where a clause contained words capable of bearing a narrow construction. But the rule clearly had its limitations: if the clause was

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1. For a full discussion of the topic see Coote "Exception Clauses". (1964)

2. 1922 S.C. (H.L.) 192.

3. Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361.

unambiguous and all-embracing, as has been suggested of the clause in the case of L'Estrange v. Graucob,[4] the court was deprived of the power to exercise control by this method. An additional and less restricted method had to be devised.

3. The doctrine of fundamental breach (and its twin concept, breach of a fundamental term)[5] would appear to have evolved from two main streams of authority:

(a) the rules applicable to deviation cases in contracts of carriage of goods;

(b) the rule in Gibaud's case.[6]

(a) Deviation

As a result of a number of cases covering a period of 100 years the principle had been established that any unjustified departure from the agreed or customary route deprived the carrier of the benefit of any special terms, including exemption clauses, contained in the contract of affreightment. Furthermore there was authority at one time for the proposition that deviation ipso facto terminated the contract of carriage. In Hain S.S. Co.Ltd. v. Tate & Lyle Ltd.,[7] however, a case involving carriage of goods by sea, the House of Lords settled the law by holding that deviation amounted to a breach of condition; as such it did not automatically terminate the contract but merely gave the

4. [1934] 2 K.B. 394.

5. In the Suisse Atlantique case only Viscount Dilhorne and Lord Upjohn drew a distinction between the two concepts.

6. Gibaud v. Great Eastern Ry.Co. [1921] 2 K.B. 426.

7. [1936] 2 All. E.R. 597.

charterers the right to treat the contract at an end, a right which could be lost by waiver. If the charterers elected to treat themselves as discharged from further performance, the shipowner could not claim the benefit of any stipulations in the contract which were intended only to apply if he adhered to the agreed route. A significant aspect of the case is that Lord Atkin and Lord Wright described deviation as a "fundamental breach"; and Lord Wright and Lord Maugham spoke of it being " a fundamental condition of the contract" that the vessel should follow the contract route.

(b) The Gibaud rule

The rule was stated by Scrutton L.J. in this case as follows:[8]

> "The principle is well known,' ... that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions, which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it."

Although looked at in one way the rule stated a principle of interpretation, looked at in another way it could be regarded as drawing a line beyond which exemption clauses would not be allowed to operate. It was in the latter form that the rule was

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8. Op. cit. (n.6 above) at p. 435.

developed by the courts. Lord Greene M.R. re-expressed the principle in Alderslade v. Hendon Laundry Ltd.[9] where he said:

> "....a limitation clause of this kind only applies where the damage in respect of which the limitation clause is operative takes place within the four corners of the contract."

Such an approach envisaged a concept that every contract contained a "core" or "fundamental obligation" from the performance of which no exemption clause could give protection.

4. The special meaning which came to be attached to the terms "fundamental breach" and "fundamental term" arose out of three decisions of Devlin J.

(i) In Chandris v. Isbrandtsen-Moller Co. Inc.,[10] a case involving the shipment of dangerous cargo in breach of contract, he cited Hain v. Tate & Lyle and referred to breach of "some fundamental or basic condition of the contract such as is involved, for example, in a deviation from the contract voyage", describing deviation as "a fundamental breach going to the root of the contract". Later in his judgment, he spoke of a fundamental obligation as "a condition going to the root of the contract, the breach of which entitled the owner to rescind".

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9. [1945] K.B. 189, 192.

10. [1951] 1 K.B. 240.

(ii) In the later case of Alexander v. Railway Executive[11] once again relying on Hain v. Tate & Lyle he described the act of a bailee in allowing unauthorised access to bailed goods as "a fundamental breach" and as a "breach of a fundamental term", the effect of which was that, unless or until the aggrieved party elected to affirm it, the special terms of the contract (including the exemption clauses) could not be relied upon by the party in breach. By this time, the term "fundamental breach" was used to cover not only deviation in contracts of carriage but analogous breaches in other types of bailment.

(iii) Finally in Smeaton Hanscomb v. Sassoon I. Setty Son & Co. (No.1),[12] a case which concerned the sale by description of round mahogany logs of given specifications, Devlin J, giving judgment on the question whether the buyer's claim was barred by the time limit clause in the contract, said:

> "It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract; and that a clause requiring the claim to be brought within a specified period is an exception for this purpose.... I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance

11. [1951] 2 K.B. 882.

12. [1953] 1. W.L.R. 1468, 1470.

> becomes something totally different from that which the contract contemplates."

The concept as here enunciated, though expressed as being the application of a principle of construction, in effect amounted to an application of a rule of law.

5. In Karsales (Harrow) Ltd. v. Wallis,[13] Denning L.J. sought to establish fundamental breach as a single unified principle when he said:

> "Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of breach which goes to the very root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses... The principle is sometimes said to be that a party cannot rely on an exempting clause when he delivers something 'different in kind' from that contracted for, or has broken a 'fundamental term' or a 'fundamental contractual obligation'. However, I think that these are all comprehended by the general principle that a breach which goes to the root of the contract disentitles that party from relying on the exempting clause."

By 1965 it appeared that there was a rule of law that a party who had been guilty of a fundamental breach of contract could not rely on an exemption clause inserted in the contract to protect him.

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13. [1956] 1 W.L.R. 936, 940.

B: Suisse Atlantique

6. The House of Lords decisively rejected the principle of law enunciated by Lord Denning and Lord Devlin that, however the exclusion clause was expressed, it could not protect a party in fundamental breach of contract. Their Lordships reverted to the judgment of the House in Hain v. Tate & Lyle, and held that there was no doctrine of fundamental breach with special rules, and that the general principles of contract applied: if, as in the instant case, the innocent party affirmed the contract, it remained in force together with its special terms, and it became a matter of the true construction of the contract whether an exemption clause applied to the breach. They approved, however, the dictum of Pearson L.J. in U.G.S. Finance Ltd. v. National Mortgage Bank of Greece[14] that "there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract." Though their Lordships agreed that it was generally reasonable to suppose that neither party had in contemplation a breach which went to the root of the contract, they did not exclude the possibility of an exemption clause being devised which could not be restricted by applying the ordinary principles of construction and which would apply at least to some cases of fundamental breach. At the same time Lord Reid and Lord Upjohn affirmed the principle, for which there was authority in the deviation cases relating to carriage of goods by sea, that if there is a fundamental breach in respect of which the innocent party declines to exercise his right of waiver, the contract is at an end, and the guilty party cannot rely on any special terms in the contract.

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14. [1964] 1 Lloyd's Rep. 446, 453.

C: After Suisse Atlantique

7. (i) In Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.,[15] Lord Denning M.R. referred to the principle enunciated by Lord Reid and Lord Upjohn that where an innocent party elects to treat a fundamental breach of contract as having discharged him from further performance, the guilty party is disentitled from relying on an exemption clause in respect of the breach; and he extended and applied this principle to the facts of the instant case where as a result of the defendant's fundamental breach the contract was automatically at an end without the innocent party having an election. The Suisse Atlantique case, he said, "affirms the long line of cases in this court that when one party has been guilty of a fundamental breach of the contract, that is, a breach which goes to the very root of it, and the other side accepts it, so that the contract comes to an end - or if it comes to an end anyway by reason of the breach - then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach". Accepting that it was a matter of construction whether a guilty party could rely on an exception clause where the innocent party affirmed the contract, Lord Denning cited Lord Reid to the effect that the courts might reject, as a matter of construction, even the widest exemption clause if it "would lead to an absurdity or because it would defeat the main object of the

15. [1970] 1 Q.B. 447.

contract, or perhaps for other reasons. And where some limit must be read into the clause it is generally reasonable to draw the line at fundamental breaches."

(ii) In Farnworth Finance Facilities v. Attryde,[16] a case involving the hire purchase of a motor-cycle which because of a large number of defects was unroadworthy, the Court of Appeal applied the law which they had laid down in the Harbutt's "Plasticine" case. The court concluded that the defects of the machine amounted to fundamental breaches of contract and that since the hirer had not affirmed the contract, the finance company was disentitled from relying on the exemption clauses. In saying that the first thing to do was to construe the contract, Lord Denning M.R. referred to the proposition of Pearson L.J. in the U.G.S. Finance Ltd. case which was approved by the House of Lords in the Suisse Atlantique case, and said "... we must see if there was a fundamental breach of contract. If there was, then the exempting condition should not be construed as applying to it."

8. It appeared as a result of these decisions of the Court of Appeal that fundamental breach might be summarised in the following propositions:-

(a) Where one party has been guilty of a fundamental breach of contract i.e. a breach which goes to the root of it, then, if either (i) the innocent party elects to treat the contract at an end,

or (ii) the breach automatically brings the contract to an end,

16. [1970] 1 W.L.R. 1053.

the guilty party cannot rely on any exemption or limitation clause to escape liability for the breach.

(b) Where one party has been guilty of a fundamental breach of contract, then, if the innocent party with knowledge of the facts elects to treat the contract as still subsisting, it is a matter of construction whether the exemption clause applies to the breach. But, normally an exemption clause is not to be construed as applying to a fundamental breach of contract.[17]

9. This formulation of the doctrine incorporates both the deviation rule and the Gibaud rule which as laid down by the House of Lords in Suisse Atlantique are both true rules of construction; they are based on the view that the parties could not have intended the exception clause to apply in the circumstances which have occurred. However as interpreted by the Court of Appeal in Harbutt[18] and in Farnworth the doctrine goes considerably further: even though the clause was intended to apply, it does not do so because fundamental breach has brought the contract to an end. Such an interpretation, as has often been pointed out, conflicts with the general principles of the law of contract since breach only terminates the contract for the future and does not disentitle the parties from relying on clauses (e.g. an arbitration clause) in relation to events occurring before termination. Despite the decision of the

17. This is probably over simplified. For a more elaborate formulation see (1970) 86 L.Q.R. 513 at 523.

18. For criticisms of this decision see (1970) 33 M.L.R. 441; (1970) 86 L.Q.R. 513; [1970] C.L.J. 189 and 221; (1970) 67 L.S. Gazette 721.

House of Lords in Suisse Atlantique, the principle propounded by Lord Denning in Karsales v. Wallis appears to have been resuscitated. As the learned editor of Chitty on Contracts points out:[19]

> ... "the universality of such a principle is open to certain objections. In the first place, the exemption clause may itself purport to exclude the right to treat the contract as discharged. Secondly, what might otherwise be a breach of contract may not in fact be a breach by reason of the operation of the exemption clause. Indeed, in his speech, Lord Wilberforce said:[20] 'An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause.' Thirdly, despite the fact that one party has elected to treat himself as discharged, the contract does not necessarily cease to exist, and may remain alive for certain purposes, such as the assessment of damages or the operation of an arbitration clause."

D: The doctrine as a method of control of exemption clauses.

10. At one time there was a tendency in the courts, when deciding whether the breach of contract which had occurred entitled the innocent party to treat himself as discharged, to look mainly at the quality of the term and to categorise it as either a "condition" or a "warranty". The importance of this difficult dichotomy of conditions and warranties has fortunately been reduced as a result of the decision of the Court of Appeal in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.,[21] which established the principle that, unless the term in question was one which statute or case law had declared to be a condition or unless the

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19. 23rd Edition Volume I paragraph 738.

20. Suisse Atlantique case (see n. 3 above) at p.431E.

21. [1962] 2 Q.B. 26.

contract expressly provided that in the event of a breach of a particular term the innocent party was entitled to treat himself as discharged, the Court should not categorise terms into conditions and warranties, but should consider the results of the breach rather than the quality of the term breached in deciding whether the victim of the breach had a right to bring the contract to an end.

11. The doctrine of fundamental breach has, however, added a further complication. It now seems that there is a three-fold distinction: that between (a) breaches of warranties, (b) breaches of condition and (c) fundamental breaches. It appears that an exemption clause has to be construed to see whether it applies only to (a) or also to (b), or to (c) as well. However even if on its true construction the clause applies to (c), it cannot be relied on if the fundamental breach has brought the contract to an end. Furthermore a combination of various breaches of warranties or conditions may elevate them to the category of fundamental breaches. Lord Denning M.R. applied this approach in Harbutt and in Farnworth. In the latter case he held that not only did the defects in the machine amount to breaches of the implied terms of the contract, but also, citing Lord Dunedin in Pollock & Co. v. MacCrae & Co.,[22] that there was "such a congeries of defects" as to amount to a fundamental breach of contract. This was also the approach advocated by Holdroyd Pearce L.J. in Yeoman Credit Ltd. v. Apps.[23]

12. Quite apart from the uncertainty of the doctrine (which some writers welcome as giving a flexible discretion to the courts) demarcation problems arise in its application. It is difficult to see how the doctrine in its modern form would be applied to the contrasting cases of Alexander v.

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22. Op. cit. (n.2 above).

23. [1962] 2 Q.B. 508.

Railway Executive[24] and Hollins v. J. Davy Ltd.[25] Both cases involved a contract of bailment; in both cases the plaintiff's goods were lost through the defendants' negligence; and in both cases the applicability of a similar exemption clause was in issue. In the former case it was held that the doctrine operated so as to prevent the defendants relying on the exemption clause, whereas in the latter case it was held that the breach was not so fundamental as to preclude reliance on the clause. Cases such as these illustrate the "hit and miss" aspect of the doctrine which makes it such an unsatisfactory method of control of exemption clauses. As Lord Reid pointed out in the Suisse Atlantique case[26] "it does not seem to me to be satisfactory that the decision must always go one way if, e.g., defects in a car or other goods are just sufficient to make a breach of contract a fundamental breach but must always go the other way if the defects fall just short of that".

13. In Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co.[27] Donaldson J. considered the decision of the House of Lords in Suisse Atlantique as interpreted by the Court of Appeal in Harbutt and Farnworth. Saying that the inter-relationship between those three cases was not free from difficulty, he based his judgment on the dictum of Lord Wilberforce in Suisse Atlantique[28] that a fundamental breach of contract denotes ----"two quite different things, namely,

(i) a performance totally different from that which the contract contemplates,

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24. Op. cit. (n.11 above).

25. [1963] 1 Q.B. 844.

26. Op. cit.(n.3 above) at p. 406.

27. [1971] 1 W.L.R. 519.

28. Op. cit.(n.3 above) at p. 431.

(ii) a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance under the contract."

Into the first category he placed "deviation cases", the word "deviation" having a wider meaning than in the maritime sense. As he understood Suisse Atlantique it was only in this type of case that the construction of the exemption clause could be ignored or treated as inapplicable. If, however, the innocent party with knowledge of the breach affirmed or failed to disaffirm the contract, the case was taken out of the first category and the question of the construction of the exemption clause became relevant. In all other cases it was a problem of construction whether the exemption clause applied to the breach which had occurred and whether the breach was one which entitled the innocent party to treat himself as discharged from further performance: if he was so entitled, then the exemption clauses could not protect the guilty party thereafter. Donaldson J. interpreted the judgments of the Court of Appeal in Harbutt and Farnworth as having placed both cases within Lord Wilberforce's first category.

14. This case illustrates the difficulties which face a court at the present time in determining both the scope and application of the doctrine of fundamental breach. Furthermore, as Donaldson J. made clear by his reference to the case of Williams v. Glasbrook Bros. Ltd.,[29] if the Court of Appeal in Harbutt and Farnworth misinterpreted the judgment of the House of Lords in Suisse Atlantique, only the House of Lords can correct the error. Although in the hands of a resourceful judiciary the doctrine has proved its value, it is open to criticism both as a rule of law and as a rule of construction in that it does not

29. [1947] 2 All. E.R. 884.

satisfactorily distinguish between objectionable and unobjectionable exemption clauses and is an imperfect instrument for preventing reliance on exemption clauses in circumstances which are objectionable. This is the crux of the problem which as Lord Reid went to say[30] "intimately affects millions of people and it appears to me that its solution should be left to Parliament. If your Lordships reject this new rule [as in the event was the case] there will certainly be a need for urgent legislative action, but that is not beyond reasonable expectation".

30. See n.26 above.