of total failure of consideration arising out of the seller's lack of title. The condition under s 12(1) had by reason of the claimant's use of the car and the passage of time become a warranty when the action was brought, and if the court had been awarding damages for breach of warranty it would have had to reduce the sum of £334 by a sum representing the value to the claimant of the use of the vehicle which he had had.

(ii) The drawback to making an allowance to the seller for use is that he gets an allowance for a car which is not his and the owner might sue the buyer in damages for conversion so that he would have to pay an allowance and damages to the true owner in conversion. In other words, pay for use twice.

(iii) It is also relevant to say that the court felt an allowance for use should not be made because the claimant had paid the price for the car to become its *owner*, and not merely to have *use* of it. So why should he be subject to an allowance for use when that is not what he wanted or bargained for? As Bankes, LJ said: 'He did not get what he paid for – namely a car to which he would have title.'

160 *Niblett Ltd* v *Confectioners' Materials Co Ltd* [1921] 3 KB 387

The defendants agreed to sell to the claimants 3,000 cases of condensed milk to be shipped from New York to London. Of these, 1,000 cases bore labels with the word 'Nissly' on them. This came to the notice of the Nestlé Company and it suggested that this was an infringement of its registered trade mark. The claimants admitted this and gave an undertaking not to sell the milk under the title of 'Nissly'. They tried to dispose of the goods in various ways but eventually discovered that the only way to deal with the goods was to take off the labels and sell the milk without mark or label, thus incurring loss.

Held – by the Court of Appeal – the sellers were in breach of the implied condition set out in s 12(1) of the Sale of Goods Act. A person who can sell goods only by infringing a trade mark has no right to sell, even though he may be the owner of the goods. Atkin, LJ also found the sellers to be in breach of the warranty under s 12(2) because the buyer had not enjoyed quiet possession of the goods.

Sale by description: Sale of Goods Act 1979, s 13 applied

161 *Beale* v *Taylor* [1967] 3 All ER 253

The defendant advertised a car for sale as being a 1961 Triumph Herald 1200 and he believed this description to be correct. The claimant answered the advertisement and later visited the defendant to inspect the car. During his inspection he noticed, on the rear of the car, a metal disc with the figure 1200 on it. The claimant purchased the car, paying the agreed price. However, he later discovered that the car was made up of the rear of a 1961 Triumph Herald 1200 welded to the front of an earlier Triumph Herald 948. The welding was unsatisfactory and the car was unroadworthy.

Held – by the Court of Appeal – the claimant's case for damages for breach of the condition implied in the contract by s 13 of the Sale of Goods Act succeeded. The claimant had relied on the advertisement and on the metal disc on the rear and the sale was one by description, even though the claimant had seen and inspected the vehicle.

Comment It is, however, necessary for the buyer to show that it was the intention of the parties that the description should be relied upon by the buyer. In *Harlingdon Ltd* v *Hull Fine Art Ltd* [1990] 1 All ER 737 Hull was a firm of art dealers controlled by Mr Christopher Hull. It was asked to sell two oil paintings described as being by Münter, a German artist of the Impressionist School. Mr Hull had no knowledge of the German Impressionist School. He contacted Harlingdon: art dealers specialising in that field. Mr Hull told Harlingdon that the paintings were by Münter. Harlingdon sent an expert to examine the paintings and at this stage Mr Hull made it clear that he was not an expert in the field. Following the inspection, Harlingdon bought one of the paintings which turned out to be a forgery. Harlingdon sued for breach of s 13. It was held by the Court of Appeal that the claim failed. Harlingdon had not relied on the description of the painting, but had bought it after a proper and expert examination. The 'description' had not, therefore, become an essential term or condition of the contract.

It should be noted that this matter was not raised in *Leaf* v *International Galleries* (1950) (see Chapter 12) because Mr Leaf did not claim a breach of s 13. Presumably, if he had done so, he would have been required to show that it was the intention of the parties that he should rely on the description that the painting was by John Constable. This will normally be fairly easy to prove where the purchaser is an inexpert consumer. However, it was held in *Cavendish-Woodhouse* v *Manley* (1984) 82 LGR 376 that a seller could show that the sale was not by description by using such phrases as 'Sold as seen' or 'Bought as seen'. Such phrases do not, however, avoid the conditions of fitness and satisfactory quality because the phrases are not regarded as general exclusion clauses.

Section 13 applies to packaging

162 ***Moore & Co* v *Landauer & Co*** [1921] 2 KB 519

The claimants entered into a contract to sell the defendants a certain quantity of Australian canned fruit, the goods to be packed in cases containing 30 tins each. The goods were to be shipped 'per SS *Toromeo*'. The ship was delayed by strikes at Melbourne and in South Africa, and was very late in arriving at London. When the goods were discharged about one-half of the consignment was packed in cases containing 24 tins only, instead of 30, and the buyers refused to accept them.

Held – although the method of packing made no difference to the market value of the goods, the sale was by description under s 13 of the Sale of Goods Act, and the description had not been complied with. Consequently, the buyers were entitled to reject the whole consignment.

Comment (i) The court seems to have adopted a somewhat purist approach to s 13 in this case and had no real regard to the effect which the breach of description had on the contract, i.e. substantially none. Decisions such as this were described by Lord Wilberforce in the *Reardon Smith* case as 'excessively technical'.

(ii) Under s 15A of the Sale of Goods Act 1979 (as inserted by the Sale and Supply of Goods Act 1994) the right of rejection in the above circumstances is retained but a business buyer will, where (as in this case) the breach is of slight or no effect, have to take delivery and sue for loss if any.

Fitness for the purpose: no need to reveal a usual purpose but a special purpose must be disclosed

163 ***Priest* v *Last*** [1903] 2 KB 148

The claimant, a draper who had no special knowledge of hot-water bottles, bought such a bottle from the defendant who was a chemist. It was in the ordinary course of the defendant's business to sell hot-water bottles and the claimant asked him whether the india-rubber bottle he was shown would stand boiling water. He was told that it would not, but it would stand hot water. The claimant did not state the purpose for which the bottle was required. In the event the bottle was filled with hot water and used by the claimant's wife for bodily application to relieve cramp. On the fifth time of using, the bottle burst and the wife was severely scalded. Evidence showed that the bottle was not fit for use as a hot-water bottle.

Held – the claimant was entitled to recover the expenses he had incurred in the treatment of his wife's injuries for the defendant's breach of s 14(3) of the Sale of Goods Act. The circumstances showed that the claimant had relied on the defendant's skill and judgement, and although he had not mentioned the purpose for which he required the bottle, he had in fact used it for the usual and obvious purpose.

Comment There was no question of the wife suing the chemist under Sale of Goods legislation because she was not a party to the contract. She could today have sued the manufacturer or the chemist in negligence (see *Donoghue* v *Stevenson* (1932)) if she could have proved negligence in either of them. A claim against the manufacturers could now be brought under the Consumer Protection Act 1987, even where negligence cannot be proved (see further Chapter 21).

164 ***Griffiths* v *Peter Conway Ltd*** [1939] 1 All ER 685

The defendants, who were retail tailors, supplied the claimant with a Harris tweed coat which was made to order for her. The claimant wore the coat for a short time and then developed dermatitis. She brought this action for damages alleging that the defendants were in breach of s 14(3) of the Sale of Goods Act because the coat was not fit for the purpose for which it was bought. Evidence showed that the claimant had an abnormally sensitive skin and that the coat would not have affected the skin of a normal person.

Held – the claimant failed because s 14(3) did not apply. The defendants did not know of the claimant's abnormality and could not be expected to assume that it existed.

Comment A claim against the manufacturer of the tweed under the Consumer Protection Act 1987 is not appropriate here. Although the Act does not require negligence to be proved, it is necessary to prove causation, and the effective cause here was the claimant's sensitive skin, not the coat.

Fitness for the purpose: reliance on the seller's skill and judgement readily inferred unless the seller is known to sell only one brand of goods

165 ***Grant* v *Australian Knitting Mills Ltd*** [1936] AC 85

This was an appeal from the High Court of Australia to the Privy Council in England by a Dr Grant of Adelaide, South Australia. He bought a pair of long woollen underpants from a retailer, the respondents being the manufacturers. The underpants contained an excess of sulphite, a chemical used in their manufacture. This chemical should have been eliminated

before the product was finished, but a quantity was left in the underpants purchased by Dr Grant. After wearing the pants for a day or two, a rash, which turned out to be dermatitis, appeared on the appellant's ankles and soon became generalised, compelling the appellant to spend many months in hospital. He sued the retailers and the manufacturers for damages.

Held – (*a*) the retailers were in breach of the South Australian Sale of Goods Act 1895 (which is in the same terms as the English Act of 1979). They were liable under s 14(3) because the article was not fit for the purpose; they were liable under s 14(2) because the article was not of merchantable (now satisfactory) quality; (*b*) the manufacturers were liable in negligence, following *Donoghue* v *Stevenson*. This was a latent defect which could not have been discovered by a reasonable examination. It should also be noted that the appellant had a perfectly normal skin. (Compare *Griffiths* v *Peter Conway Ltd* (1939) above.)

Comment (i) Section 13 (sale by description) also applied even though this was a sale of a specific object which was seen by the purchaser. On the issue of reliance, Lord Wright said: 'The reliance will be in general inferred from the fact that a buyer goes to the shop in confidence that the tradesman has selected his stock with skill and judgement.'

(ii) This case provides an interesting contrast between the liability of the supplier who was liable although not negligent, Sale of Goods Act liability being strict, and the liability of the manufacturer where the claimant was put to the extra burden of proving the manufacturer negligent (but see now Consumer Protection Act 1987 in Chapter 21).

166 *Wren* v *Holt* [1903] 1 KB 610

The claimant was a builder's labourer at Blackburn, and the defendant was the tenant of a beerhouse in the same town. The beerhouse was a tied house so that the defendant was obliged to sell beer brewed by a company called Richard Holden Limited. The claimant was a regular customer and knew that the beerhouse was a tied house, and that only one type of beer was supplied. The claimant became ill and it was established that his illness was caused by arsenical poisoning due to the beer supplied to him. He now sued the tenant.

Held – there was no claim under s 14(3) because the claimant could not have relied on the defendant's skill and judgement in selecting his stock, because he was bound to supply Holden's beer. However, s 14(2) applied, and since the beer was not of merchantable (now satisfactory) quality, the claimant was entitled to recover damages.

Fitness: second-hand goods: where defects occur fairly quickly after sale

167 *Crowther* v *Shannon Motor Company* [1975] 1 All ER 139

The claimant, relying on the skill and judgement of the defendants, bought a second-hand car from them. After being driven for over 2,000 miles in the three weeks after the sale, the engine seized and had to be replaced. In his evidence, the previous owner said that the engine was not fit for use on the road when he sold it to the defendants, and on that basis the Court of Appeal *held* that there was a breach of s 14(3) at the time of resale. The fact that a car does not go for a reasonable time after sale is evidence that the car was not fit for the purpose at the time of sale.

Comment This case makes clear that there is an obligation of reasonable durability on the seller of goods.

Fitness and satisfactory quality: s 14(3) can operate independently

168 *Baldry* v *Marshall* [1925] 1 KB 260

The claimant was the owner of a Talbot racing car and was anxious to change it for a touring car because his wife refused to ride in the Talbot. The claimant wrote to the defendants asking for details of the Bugatti car for which they were agents. The claimant knew nothing of the Bugatti range, but asked for a car that would be comfortable and suitable for touring purposes. The defendants' manager said that a Bugatti would be suitable. The claimant later inspected a Bugatti chassis and agreed to buy it when a body had been put on it. When the car was delivered it was to all intents and purposes a racing car and not suitable for touring. The claimant returned the car, but he had paid £1,000 under the contract and now sued for its return on the ground that the defendants were in breach of s 14(3) of the Sale of Goods Act, the car not being fit for the purpose.

Held – the claimant had relied on the skill and judgement of the defendants and it was in the course of their business to supply cars. Therefore, there was a breach of s 14(3).

Comment It will be appreciated that the Bugatti was of merchantable (now satisfactory) quality.

Resale price has some bearing upon satisfactory quality

169 ***BS Brown & Son Ltd* v *Craiks Ltd*** [1970] 1 All ER 823

Brown and Son ordered a quantity of cloth from Craiks who were manufacturers. Brown's wanted it for making dresses but did not make this purpose known to Craiks who thought the cloth was wanted for industrial use. The price paid by Brown's was 36.25p per yard, which was higher than the normal price for industrial cloth but not substantially so. The cloth was not suitable for making dresses and Brown's cancelled the contract and claimed damages. Both parties were left with substantial quantities of cloth but Craiks had managed to sell some of their stock for 30p per yard. Having failed in the lower court to establish a claim under s 14(3), since they had not made the purpose known to Craiks, Brown's now sued for damages under s 14(2).

Held – by the House of Lords – the claim failed. The cloth was still commercially saleable for industrial purposes though at a slightly lower price. It was not a necessary requirement of merchantable (now satisfactory) quality that there should be no difference between purchase and resale price. If the difference was substantial, however, it might indicate that the goods were not of merchantable (now satisfactory) quality. The difference in this case was not so material as to justify any such inference.

Comment (i) Even where the goods are not purchased for resale the purchase price may be relevant. Thus, the sale of a car with a defective clutch would be sale of unsatisfactory goods, but if the seller makes an allowance in the price to cover the defect, it may not be (*Bartlett* v *Sydney Marcus Ltd* [1965] 2 All ER 753).

(ii) The case also decides that goods may be satisfactory if they are fit for one of the purposes for which they might be used even though they are unfit when used for another purpose.

Implied terms relating to fitness and satisfactory quality: items supplied with the goods

170 ***Geddling* v *Marsh*** [1920] 1 KB 668

The defendants were manufacturers of mineral waters and they supplied the same to the claimant who kept a small general store. The bottles were returnable when empty. One of the bottles was defective, and whilst the claimant was putting it back into a crate, it burst and injured her.

Held – even though the bottles were returnable, they were supplied under a contract of sale within s 14 of the Sale of Goods Act. The fact that the bottles were only bailed to the claimant was immaterial. There was an implied warranty of fitness for the purpose for which they were supplied, and the defendant was liable in damages.

Comment Bray, J was careful to point out that his decision was an interpretation of s 14 of the Sale of Goods Act only. It does not decide that the liability of a bailor is the same as that of a vendor.

171 ***Wilson* v *Rickett, Cockerell & Co Ltd*** [1954] 1 QB 598

The claimant, a housewife, ordered from the defendants, who were coal merchants, a ton of 'Coalite'. The Coalite was delivered and when part of it was put on a fire in an open grate, it exploded causing damage to the claimant's house. In this action the claimant sought damages for breach of s 14 of the Sale of Goods Act. The county court judge found that the explosion was not due to the Coalite but to something else, possibly a piece of coal with explosive embedded in it, which had got mixed with the Coalite in transit and had not come from the manufacturers of the Coalite. Therefore, he *held* that s 14(3) applied only to the Coalite and dismissed the action since the Coalite itself was fit for the purpose. The Court of Appeal, however, in allowing the appeal, pointed out that fuel of this kind is not sold by the lump but by the bag, and a bag containing explosive materials is, as a unit, not fit for burning. The explosive matter was 'goods supplied under the contract' for the purposes of s 14 and clearly s 14(2) applied, because the goods supplied were not of merchantable (now satisfactory) quality. Damages were awarded to the claimant. Regarding the applicability of what is now s 14(3), the Court of Appeal did not think this applied since the sale was under a trade name, and the claimant had not relied on the defendant's skill and judgement in selecting a fuel.

Comment The assumption of no reliance where goods are purchased under a trade name no longer applies under the 1979 Act.

172 ***Wormell* v *RHM Agriculture (East) Ltd*** [1986] 1 All ER 769

Mr Wormell, an experienced arable farmer, was unable by reason of cold, wet weather to spray his winter wheat crop to kill wild oats until much later than usual in the spring of 1983. He asked the defendants to recommend the best wild-oat killer which could be used later than normal. The agricultural chemical manager recommended a particular herbicide and Mr Wormell bought £6,438 worth of it.

The instructions on the cans stated that it ought not to be applied beyond the recommended stage of crop growth. It was said that damage could occur to crops sprayed after that stage and the herbicide would give the best level of wild-oat control at the latest stage of application consistent with the growth of the crop.

Mr Wormell felt that the need to kill the wild oats was so important that he would risk some damage to the crops by applying the herbicide quite late. From his understanding of the instructions the risk was not that the herbicide would not be effective on the wild oats, but if the spray was used after the recommended time then the crop might be damaged. The herbicide was applied but proved to be largely ineffective.

Mr Wormell claimed damages for breach of contract in respect of the sale of the herbicide. He alleged that it was not of merchantable (now satisfactory) quality contrary to s 14(2) of the Sale of Goods Act, nor was it fit for the purpose for which it was supplied, namely to control weeds, and in particular, wild oats, contrary to s 14(3) of the same Act.

RHM argued that since the herbicide would kill the wild oats, the fact that the instructions caused it to be applied at a time when it was not effective did not make the herbicide itself unmerchantable (now unsatisfactory) or unfit for the purpose.

Piers Ashworth QC sitting as a Deputy Judge of the High Court, said that one had to look at how Mr Wormell understood the instructions and how a reasonable user would understand them. Mr Wormell understood the instructions to mean that the herbicide would be effective if it was sprayed at any time, but if sprayed late there was a risk of crop damage. The judge concluded that a reasonable farmer would have understood the instructions in the same way. He thought that the instructions were consequently misleading.

For the purposes of the Sale of Goods Act, 'goods' included the container and packaging for the goods and any instructions supplied with them. If the instructions were wrong or misleading the goods would not be of merchantable (now satisfactory) quality or fit for the purpose for which they were supplied under s 14(2) and (3). This statement was approved in a 1987 appeal to the Court of Appeal, though on the facts the court reversed the decision of the High Court, having found the instructions adequate.

Comment The decision was reversed by the Court of Appeal because the instructions were adequate but merely misunderstood. However, the Court of Appeal agreed that there is a legal obligation to give adequate guidance as to how the product is to be used.

Retailer does not warrant safety of goods used by the buyer after buyer knows of their defects

173 *Lambert* v *Lewis* [1981] 1 All ER 1185

Mr Lewis owned a Land Rover and a trailer. His employee, Mr Larkin, was driving it when the trailer broke away. It collided with a car coming from the opposite direction. Mr Lambert, who was driving that car, was killed and so was his son. His wife and daughter, who were also passengers, survived and then sued Mr Lewis for damages in negligence. He joined the retailer who sold him the towing hitch which had become detached from the trailer and was basically the cause of the collision. The retailer was sued under s 14 (goods not fit for the purpose nor of merchantable (now satisfactory) quality). The court found that the towing hitch was badly designed and a securing brass spindle and handle had come off it so that only dirt was keeping the towing pin in position. It had been like that for some months and Mr Lewis had coupled and uncoupled the trailer once or twice a week during that time and knew of the problem.

The claimants succeeded in their action against Mr Lewis. He failed in his claim against the retailer. The House of Lords decided that when a person first buys goods he can rely on s 14. However, once he discovers that they are defective but continues to use them and so causes injury, he is personally liable for the loss caused. He cannot claim an indemnity under s 14 from the retailer. The chain of causation is broken by the buyer's continued use of the goods while knowing that they are faulty and may cause injury.

Comment The above summary does not concern itself with the possible liability of the manfacturers in terms of the design problem. However, a point of interest arises in connection with it. The issue of the manufacturers' liability was taken by an action in negligence. The court refused to construe a collateral contract between Mr Lewis and the manufacturers although he bought the hitch on the strength of the manufacturers' advertising. (Compare *Carlill* (Chapter 9), where such a contract was rather exceptionally construed.)

Sale by sample: what is a reasonable examination?

174 *Godley* v *Perry* [1960] 1 All ER 36

The first defendant, Perry, was a newsagent who also sold toys, and, in particular, displayed plastic toy catapults in his window. The claimant, who was a boy aged six, bought one for 6d. While using it to fire a stone, the catapult broke and the claimant was struck in the eye, either by a piece of the catapult or the

stone, and as a result he lost his left eye. The chemist's report given in evidence was that the catapults were made from cheap material unsuitable for the purpose and likely to fracture, and that the moulding of the plastic was poor, the catapults containing internal voids. Perry had purchased the catapults from a wholesaler with whom he had dealt for some time, and this sale was by sample, the defendant's wife examining the sample catapult by pulling the elastic. The wholesaler's supplier was another wholesaler who had imported the catapults from Hong Kong. This sale was also by sample and the sample catapult was again tested by pulling the elastic. In this action the claimant alleged that the first defendant was in breach of the conditions implied by s 14(2) and (3) of the Sale of Goods Act.

The first defendant brought in his supplier as third party, alleging against him a breach of the conditions implied by s 15(2)(c), and the third party brought in his supplier as fourth party, alleging breach of s 15(2)(c) against him.

Held –

(*a*) the first defendant was in breach of s 14(2) and (3) because:
  (i) the catapult was not reasonably fit for the purpose for which it was required. The claimant relied on the seller's skill or judgement, this being readily inferred where the customer was of tender years (s 14(3));
  (ii) the catapult was not merchantable (now of satisfactory quality) (s 14(2));

(*b*) the third and fourth parties were both in breach of s 15(2)(c) because the catapult had a defect which rendered it unmerchantable (now unsatisfactory) and this defect was not apparent on reasonable examination of the sample. The test applied, i.e. the pulling of the elastic, was all that could be expected of a potential purchaser. The third and fourth parties had done business before, and the third party was entitled to regard without suspicion any sample shown to him and to rely on the fourth party's skill in selecting his goods.

EXCLUSION CLAUSES

Exclusion clauses: the effect of signing a document containing such a clause: effect of misrepresentation as to contents

175 ***L'Estrange* v *Graucob (F)*** [1934] 2 KB 394

The defendant sold to the claimant, Miss L'Estrange, who owned a café in Llandudno, a cigarette slot machine, inserting in the sales agreement the following clause: 'Any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded.' The claimant signed the agreement but did not read the relevant clause, apparently because she thought it was merely an order form, and she now sued for breach of what is now s 14(3) of the Sale of Goods Act 1979 (goods not fit for the purpose) in respect of the unsatisfactory nature of the machine supplied which often jammed and soon became unusable.

Held – the clause was binding on her, although the defendants made no attempt to read the document to her nor call her attention to the clause. 'Where a document containing contractual terms is signed, then in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he had read the document or not.' (*Per* Scrutton, LJ)

Comment (i) The ruling in this case would appear to apply even where the party signing cannot understand the document as where the signer cannot read or does not understand the language in which the document is written (*The Luna* [1920] P 22). This would not, of course, apply if the person relying on the clause *knew* that the other party could not read (*Geir* v *Kujawa* [1970] 1 Lloyd's Rep 364). It will, of course, be realised that s 6(3) of the Unfair Contract Terms Act 1977 would now apply so that the clause could only be effective if reasonable. In addition, s 3 of the 1977 Act would require reasonableness because the contract was on the supplier's standard terms which were applicable to everyone and could not be varied.

(ii) The ruling in the *Geir* case has assumed more importance now that business within Europe has expanded and indeed because of the increase in international trade generally. Where such trade is with a country in which English is not the first language, exclusion clauses and other terms should be translated as appropriate. In a case involving Allianz, a German company, the court decided that an exclusion clause in an insurance policy issued by Allianz in France but without a translation into French did not apply. However, illiteracy or failure to understand English in the UK business scene is still no defence and an English clause will apply (see *Thompson* v *LMS Railway* (1930) below).

176 ***Curtis* v *Chemical Cleaning and Dyeing Co*** [1951] 1 All ER 631

The claimant took a wedding dress, with beads and sequins, to the defendant's shop for cleaning. She was asked to sign a receipt which contained the following clause: 'This article is accepted on condition that the company is not liable for any damage howsoever arising.' The claimant said in evidence: 'When I was asked to sign the document I asked why? The assistant

said I was to accept any responsibility for damage to beads and sequins. I did not read it all before I signed it.' The dress was returned stained, and the claimant sued for damages. The company relied on the clause.

Held – the company could not rely on the clause because the assistant had misrepresented the effect of the document so that the claimant was merely running the risk of damage to the beads and sequins.

Comment It will be appreciated that the assistant's statement was true as far as it went. As we have seen, half-truths such as this can amount to misrepresentation (see Chapter 13).

Communication of exclusion clauses: in contractual and non-contractual documents

177 ***Thompson* v *LMS Railway*** [1930] 1 KB 41

Thompson, who could not read, asked her niece to buy her an excursion ticket to Manchester from Darwin and back, on the front of which was printed the words, 'Excursion. For conditions see back.' On the back was a notice that the ticket was issued subject to the conditions in the company's timetables, which excluded liability for injury however caused. Thompson was injured and claimed damages.

Held – her action failed. She had constructive notice of the conditions which had, in the court's view, been properly communicated to the ordinary passenger.

Comment (i) The railway ticket was regarded as a contractual document. (Contrast *Chapelton* below.)

(ii) The injuries, which were caused when the train on returning to Darwin at 10 pm did not draw all the way into the station so that the claimant fell down a ramp, would have been the subject of a successful action at law today because the Unfair Contract Terms Act 1977 outlaws exclusion clauses relating to death and personal injury. Thus, on its own facts, this case is of historical interest only, though still relevant on the question of constructive notice.

178 ***Chapelton* v *Barry Urban District Council*** [1940] 1 All ER 356

The claimant Chapelton wished to hire deck-chairs and went to a pile owned by the defendants, behind which was a notice stating: 'Hire of chairs 2d per session of three hours.' The claimant took two chairs, paid for them, and received two tickets which he put into his pocket after merely glancing at them. One of the chairs collapsed and he was injured. A notice on the back of the ticket provided that: 'The council will not be liable for any accident or damage arising from hire of chairs.' The claimant sued for damages and the Council sought to rely on the clause in the ticket.

Held – the clause was not binding on Chapelton. The board by the chairs made no attempt to limit the liability, and it was unreasonable to communicate conditions by means of a mere receipt.

Comment The defendants would now have an additional problem, i.e. the 1977 Act outlaws such clauses.

Exclusion clause: communication at or before the contract essential

179 ***Olley* v *Marlborough Court Ltd*** [1949] 1 All ER 127

A husband and wife arrived at a hotel as guests and paid for a room in advance. They went up to the room allotted to them; on one of the walls was the following notice: 'The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody.' The wife closed the self-locking door of the bedroom and took the key downstairs to the reception desk. There was inadequate and, therefore, negligent staff supervision of the keyboard. A third party took the key and stole certain of the wife's furs. In the ensuing action the defendants sought to rely on the notice as a term of the contract.

Held – the contract was completed at the reception desk and no subsequent notices could affect the claimant's rights.

Comment (i) It was said in *Spurling* v *Bradshaw* [1956] 1 WLR 461 that if the husband and wife had seen the notice on a previous visit to the hotel it would have been binding on them, though this is by no means certain in view of cases such as *Hollier* v *Rambler Motors* [1972] 1 All ER 399, which suggest that in consumer transactions previous dealings are not necessarily incorporated unless perhaps the dealings have been frequent.

(ii) A further illustration is provided by *Thornton* v *Shoe Lane Parking Ltd* [1971] 1 All ER 686 where the Court of Appeal decided that the conditions exempting the company from certain liabilities on a ticket issued by an automatic barrier at the entrance to a car park were communicated too late. The contract was made when the claimant put his car on the place which activated the barrier. This was before the ticket was issued.

Exclusion clause: ineffective where there is an express undertaking running contrary to the clause

180 ***J Evans & Son (Portsmouth) Ltd* v *Andrea Merzario Ltd*** [1976] 2 All ER 930

The claimants imported machines from Italy. They had contracted with the defendants since about 1959 for the transport of these machines. Before the

defendants went over to the use of containers the claimants' machines had always been crated and carried under deck. When the defendants went over to containers they orally agreed with the claimants that the claimants' goods would still be carried under deck. However, on a particular occasion a machine being transported for the claimants was carried in a container on deck. At the start of the voyage the ship met a swell which caused the container to fall off the deck and the machine was lost. The contract was expressed to be subject to the printed standard conditions of the forwarding trade which contained an exemption clause excusing the defendants from liability for loss or damage to the goods unless the damage occurred whilst the goods were in their actual custody and by reason of their wilful neglect or default, and even in those circumstances, the clause limited the defendants' liability for loss or damage to a fixed amount. The claimants sued for damages against the defendants for the loss of the machine, alleging that the exemption clause did not apply. It was *held* by the Court of Appeal that it did not apply. The printed conditions were repugnant to the oral promise for, if they were applicable, they would render that promise illusory. Accordingly, the oral promise was to be treated as overriding the printed conditions and the claimants' suit succeeded, the exemption clause being inapplicable.

Comment The court may also regard these oral promises as collateral contracts (see also Chapter 9), i.e. in this case a collateral contract to carry the machine under deck, that collateral contract not having an exclusion clause in it.

Exclusion clause: overcoming the privity rule

181 ***The New Zealand Shipping Co Ltd* v *A M Satterthwaite & Co Ltd*** [1974] 1 All ER 1015

In this case the makers of an expensive drilling machine entered into a contract for the carriage of the machine by sea to New Zealand. The contract of carriage (the bill of lading) exempted the carriers from full liability for any loss or damage to the machine during carriage and also purported to exempt any servant or agent of the carrier, including independent contractors employed from time to time by the carrier. The machine was damaged by the defendants, who were stevedores, in the course of unloading, and the question to be decided was whether the defendant stevedores, who had been employed by the carrier to unload the machine, could take advantage of the exemption clause in the bill of lading since they were not parties to the contract. It was decided by the Privy Council that they could. The stevedores provided consideration and so became parties to the contract when they unloaded the machine (*Carlill* v *Carbolic Smoke Ball Co* (1893) (see Chapter 9) applied). The performance of services by the stevedores in discharging the cargo was sufficient consideration to constitute a contract, even though they were already under an obligation to the carrier to perform those services because the actual performance of an outstanding contractual obligation was sufficient to support the promise of an exemption from liability given by the makers of the drill to the shippers, who were in effect third parties to the contract between the carrier and the stevedores (*Shadwell* v *Shadwell* (1860) in Chapter 10 applied).

Comment (i) It is not easy to see when and where the relevant offers and acceptances were made in this case but, as we have already noted, a court can construe a contract from the circumstances without a precise application of the offer and acceptance formula (see *Rayfield* v *Hands* (1958) in Chapter 9).

(ii) The case is and will remain an example of the ingenuity of the common law to reach conclusions which are thought to be fair in the circumstances of the case. The Contracts (Rights of Third Parties) Act 1999 now provides the answer by allowing the contracting parties to confer third-party rights as required in terms at least of exclusion clauses in these contracts. The rights of persons involved in the performance of the contract may be implied by the court unless it appears that the main parties did not intend them to apply or they had specifically excluded the operation of the Act.

An ambiguous exclusion clause is construed against the party who put it in the contract

182 ***Alexander* v *Railway Executive*** [1951] 2 All ER 442

Alexander was a magician who had been on a tour together with an assistant. He left three trunks at the parcels office at Launceston station, the trunks containing various properties which were used in an 'escape illusion'. The claimant paid 5d for each trunk deposited and received a ticket for each one. He then left saying that he would send instructions for their dispatch. Some weeks after the deposit and before the claimant had sent instructions for the dispatch of the trunks, the claimant's assistant persuaded the clerk in the parcels office to give him access to the trunks, though he was not in possession of the ticket. The assistant took away several of the properties and was later convicted of larceny (now theft). The claimant sued the defendants for damages for breach of contract, and the defendants pleaded the following term which was contained in the ticket and which stated that the Railway Executive was 'not liable for loss

mis-delivery or damage to any articles where the value was in excess of £5 unless at the time of the deposit the true value and nature of the goods was declared by the depositor and an extra charge paid'. No such declaration or payment had been made.

Held – the claimant succeeded because, although sufficient notice had been given constructively to the claimant of the term, the term did not protect the defendants because they were guilty of a breach of a fundamental obligation in allowing the trunks to be opened and things to be removed from them by an unauthorised person.

Comment (i) Devlin, J said that a deliberate delivery to the wrong person did not fall within the meaning of 'mis-delivery', and this may be regarded as the real reason for the decision, as it involved the application of the *contra proferentem* rule.

(ii) Note also that the receipt or ticket for the goods deposited was held to be a contractual document. (Contrast the *Chapelton* case.)

(iii) A further example of the use of the *contra proferentem* rule is to be found in *Williams* v *Travel Promotions Ltd (T/A Voyages Jules Verne), The Times*, 9 March 2000, where the claimant spent part of the last day of his holiday in Zimbabwe travelling to a different hotel nearer to the airport to save an early start. The contract allowed changes to be made in hotels 'if necessary'. This change, said the court, while it might be 'sensible' was not 'necessary'. A wider expression should have been used to cover the change in this case. The claimant succeeded.

Rules of construction: repugnancy and the four corners rule

183 *Pollock* v *Macrae* [1922] SC (HL) 192

The defendants entered into a contract to build and supply marine engines. The contract had an exclusion clause which was designed to protect them from liability for defective materials and workmanship. The engines supplied under the contract had so many defects that they could not be used. The House of Lords struck out the exclusion clause as repugnant to the main purpose of the contract, which was to build and supply workable engines. The claimant's action for damages was allowed to proceed.

184 *Thomas National Transport (Melbourne) Pty Ltd and Pay* v *May and Baker (Australia) Pty Ltd* [1966] 2 Lloyd's Rep 347

The owners of certain packages containing drugs and chemicals made a contract with carriers under which the packages were to be carried from Melbourne to various places in Australia. The carriers employed a subcontractor to collect the parcels and take them to the carriers' depot in Melbourne. When the subcontractor arrived late at the Melbourne depot it was locked and so he drove the lorry full of packages to his own house and left it in a garage there. This was in accordance with the carriers' instructions to their subcontractors in the event of late arrival at the depot. There was a fire and some of the packages were destroyed. The cause of the fire was unknown. However, the alleged negligence of the carriers consisted in their instruction to the subcontractors to take the goods home. The court said it was unthinkable that valuable goods worth many thousands of pounds should be kept overnight at a driver's house, regardless of any provision for their safety. The owners sued the carriers who pleaded an exemption clause in the contract of carriage.

Held – by the High Court of Australia – the claimants succeeded. There had been a fundamental breach of contract. The intention of the parties was that the goods would be taken to the carriers' depot and not to the subcontractor's house, in which case the carriers could not rely on the clause.

Comment (i) The decision, which was partly based on fundamental breach of contract (see below), is perhaps better founded on the four corners rule, i.e. the exclusion clause is available only so long as the contract is being performed in accordance with its terms.

(ii) For the avoidance of doubt, Australian courts' decisions are of persuasive authority in UK courts.

Exclusion clauses: no rule of fundamental breach

185 *Photo Production Ltd* v *Securicor Transport Ltd* [1980] 1 All ER 556

The claimant company had contracted with the defendant security company for the defendant to provide security services at the claimant's factory. A person employed by the defendant lit a fire in the claimant's premises while he was carrying out a night patrol. The fire got out of control and burned down the factory. The trial judge was unable to establish from the evidence precisely what the motive was for lighting the fire – it may have been deliberate or merely careless. The defendant relied on an exclusion clause in the contract which read:

> Under no circumstances shall the company (Securicor) be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer . . .

It was accepted that Securicor was not negligent in employing the person who lit the fire. He came with good references and there was no reason for Securicor to suppose that he would act as he did. It was *held* by the House of Lords that the exclusion clause applied so that Securicor was not liable. All the judges in the House of Lords were unanimous in the view that there was no rule of law by which exclusion clauses became inapplicable to fundamental breach of contract, which this admittedly was. Although the Unfair Contract Terms Act 1977 was not in force at the time this action was brought and so could not be applied to the facts of this case, the existence of the Act and its relevance was referred to by Lord Wilberforce who said that the doctrine of fundamental breach had been useful in its time as a device for avoiding injustice. He then went on to say:

> But . . . Parliament has taken a hand; it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance . . . there is everything to be said. . . . for leaving the parties free to apportion the risks as they think fit. . . .

Comment (i) In *Harbutt's Plasticine Ltd* v *Wayne Tank & Pump Co Ltd* [1970] 1 All ER 225 Lord Denning accepted that the principle which said that no exclusion clause could excuse a fundamental breach was not a rule of law when the injured party carried on with (or affirmed) the contract. Where this was so rules of construction must be used and the exclusion clause might have to be applied. However, if the injured party elected to repudiate the contract for fundamental breach and, as it were, pushed the contract away, the exclusion clause went with it and could never apply to prevent the injured party from suing for the breach. The same, he said, was true where the consequences were so disastrous (as they were in *Photo Production*) that one could assume that the injured party had elected to repudiate. The *Photo Production* case overrules *Harbutt*, as does s 9(1) of the Unfair Contract Terms Act 1977. This provides that if a clause, as a matter of construction, is found to cover the breach and if it satisfies the reasonableness test, it can apply and be relied on by the party in breach, even though the contract has been terminated by express election or assumed election following the disastrous results of the breach.

(ii) The House of Lords also allowed a Securicor exemption clause to apply in circumstances of fundamental breach in *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* [1983] 1 All ER 101. In that case the appellants' ship sank while berthed in Aberdeen harbour. It fouled the vessel next to it which was owned by Malvern. The appellants sued Malvern. Securicor was the second defendant. Securicor had a contract with the appellants to protect the ship. The accident happened as a result of a rising tide. At the time, the Securicor patrolman had left his post to become involved in New Year celebrations. Although there were arguments by counsel to the contrary, the House of Lords *held* that the exclusion clause covered the circumstances of the case, provided the words were given their natural and plain meaning. It, therefore, applied to limit the liability of Securicor, and the appellants failed to recover all their loss.

(iii) The Unfair Contract Terms Act 1977 gives its strongest protection to those who deal as consumers. The contracts in *Photo Productions* and *Ailsa Craig* were non-consumer contracts where both parties were in business. It by no means follows that in a consumer transaction (see below) the court would have allowed a defendant to rely on a 'Securicor' type of clause. It might well be regarded as unreasonable in that context.

(iv) The apportionment of loss referred to by Lord Wilberforce and as applied in the *Photo Production* case and the *Ailsa Craig* case will result in the claimant's insurance company bearing the loss. Many cases, particularly in business and personal injury, are, in effect, battles between insurance companies in regard to liability. They always sue or defend through their clients since the loss is not directly that of the insurance company but if the loss is the fault of the individual or organisation insured the insurance contract requires the insurance company to indemnify the client. That is the nature of the insurance company's interest in the case. An insurance contract will commonly contain an express condition that the insured can be required by the insurer to bring a claim before or after the insurer has paid the insured.

Exclusion of inducement liability: reasonableness

186 *Walker* v *Boyle* [1982] 1 All ER 634

The vendor of a house was asked in a pre-contract enquiry whether the boundaries of the land were the subject of any dispute. The vendor asked her husband to deal with the enquiries. He said that there were no disputes. There were, in fact, disputes but the husband did not regard them as valid because he believed that he was in the right and his view could not be contradicted. His answers were nevertheless wrong and misleading. Contracts were later exchanged. These contracts were on the National Conditions of Sale (19th Edition) produced under the aegis of the Law Society. Condition 17(1) excluded liability for misleading replies to preliminary enquiries. The

purchaser later heard of the boundary disputes and claimed in the High Court for rescission of the contract and the return of his deposit. Dillon, J held that condition 17(1) did not satisfy the requirements of reasonableness as set out in s 3 of the Misrepresentation Act 1967 (as substituted by s 8(1) of the Unfair Contract Terms Act 1977). The claimant, therefore, succeeded.

Comment (i) The National Conditions of Sale have been revised and, as regards misrepresentation, the contract now only attempts a total exclusion of the purchaser's remedies if the misrepresentation is not material or substantial in terms of its effect and is not made recklessly or fraudulently.

(ii) The provisions relating to inducement liability were also applied in *South Western General Property Co Ltd* v *Marton, The Times*, 11 May 1982; the court *held* that conditions of sale in an auction catalogue which tried to exclude liability for any representations made, if these were incorrect, were not fair and reasonable. The defendant had relied upon a false statement that some building would be allowed on land which he bought at an auction, even though the facts were that the local authority would be most unlikely to allow any building on the land. The clauses excluding liability for misrepresentation did not apply and the contract could be rescinded.

Exclusion clauses and reasonableness

187 *Mitchell (George) (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 1 All ER 108

This case is a landmark. It was the last case heard by Lord Denning, one of the foremost opponents of exclusion clauses that could operate unfairly, in the Court of Appeal. In it he gave a review of the development of the law relating to exclusion clauses in his usual clear and concise way. The report is well worth reading in full. Only a summary of the main points can be given here.

George Mitchell ordered 30 lb of cabbage seed and Finney supplied it. The seed was defective. The cabbages had no heart; their leaves turned in. The seed cost £192 but Mitchell's loss was some £61,000, i.e. a year's production from the 63 acres planted. Mitchell carried no insurance. When sued Finney defended the claim on the basis of an exclusion clause limiting their liability to the cost of the seed or its replacement. In the High Court Parker, J found for Mitchell. Finney appealed to the Court of Appeal. The major steps in Lord Denning's judgment appear below:

(*a*) *The issue of communication – was the clause part of the contract?* Lord Denning said that it was. The conditions were usual in the trade. They were in the back of Finney's catalogue. They were on the back of the invoice. 'The inference from the course of dealing would be that the farmers had accepted the conditions as printed – even though they had never read them and did not realize that they contained a limitation on liability . . .'.

(*b*) *The wording of the clause.* The relevant part of the clause read as follows: 'In the event of any seeds or plants sold or agreed to be sold by us not complying with the express terms of the contract of sale or with any representation made by us or by any duly authorized agent or representative on our behalf prior to, at the time of, or in any such contract, or any seeds, or plants proving defective in varietal purity we will, at our option, replace the defective seeds or plants, free of charge to the buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid.'

Lord Denning said that the words of the clause did effectively limit Finney's liability. Since the Securicor cases (see *Photo Production* and *Ailsa Craig*), words were to be given their natural meaning and not strained. A judge must not proceed in a hostile way towards the wording of exclusion clauses as was, for example, the case with the word 'mis-delivery' in *Alexander* v *Railway Executive* (1951).

(*c*) *The test of reasonableness.* Lord Denning then turned to the new test of reasonableness which could be used to strike down an exclusion clause, even though it had been communicated, and in spite of the fact that its wording was appropriate to cover the circumstances. On this he said: 'What is the result of all this? To my mind it heralds a revolution in our approach to exemption clauses; not only where they exclude liability altogether and also where they limit liability; not only in the specific categories in the Unfair Contract Terms Act 1977, but in other contracts too. . . . We should do away with the multitude of cases on exemption clauses. We should no longer have to harass our students with the study of them. We should set about meeting a new challenge. It is presented by the test of reasonableness.'

(*d*) *Was the particular clause fair and reasonable?* On this Lord Denning said: 'Our present case is very