

# Product Liability

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This paper discusses product liability under the Consumer Guarantees Act, Sale of Goods Act and Fair Trading Act. A supplier of goods may also have liability in negligence, but that is outside of the ambit of this paper.

## Consumer Guarantees Act 1993

### 1. Introduction

The Consumer Guarantees Act (“CGA”) sets out a regime of guarantees that apply when goods or services are supplied to consumers in trade. The guarantees are non-contractual and operate independently of the contract for the supply of the goods or services.

The CGA prohibits contracting out of any of the provisions of the Act except where a consumer acquires, or holds themselves out as acquiring, the goods or services for the purposes of a business. Furthermore, unlawfully attempting to contract out of the CGA is an offence.

### 2. Application of the CGA

#### 2.1 Consumer

For the CGA to apply, the supplier must supply goods or services to a “consumer”. The CGA defines a consumer as:

A person who acquires from a supplier goods or services which are ordinarily acquired for personal, domestic or household use or consumption.

A person who acquires, or holds themselves out as acquiring, goods or services for the purposes of re-supply in trade or consumption in the course of manufacture is excluded from the definition of consumer.

In *Nesbit v Porter*<sup>1</sup> the Court of Appeal held that “ordinarily” meant “as a matter of regular practice or occurrence” and that the personal, domestic or household purpose need not be the “dominant purpose” of the goods or services. The court determined that a Nissan Navarra four wheel drive vehicle was not acquired for business use, even though only 20% of utility vehicles were acquired for private use.

In *Kerry Stone v Knowles*<sup>2</sup>, the High Court held that for a re-supply to fall within the exception to the definition of “consumer” “the re-supply must be part of the purchaser’s business, not merely incidental to the purchaser’s business. In that case, the purchaser did not re-supply a Holden Avalanche in trade merely by leasing it to the purchaser’s accounting practice during business hours.

#### 2.2 Supplier

A “supplier” is defined in the CGA as a person in trade who supplies:

- (a) goods to a consumer by transfer of ownership or possession or pursuant to a gift; or
- (b) who supplies services to a consumer.

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<sup>1</sup> [2000] NZCA 288

<sup>2</sup> (2006) 11 TCLR 768

### 2.3 *Supply*

The CGA applies to supplies of goods by way of gift, sale, exchange, lease, hire or hire purchase. The supply of goods, but not services, by auction or competitive tender is excluded from the CGA.

A consumer can receive the benefit of guarantees under the CGA without being a party to a contract for supply. For example, free prizes supplied as part of a promotion will be subject to the CGA.

### 2.4 *Manufacturer*

The CGA defines a “manufacturer” as a person that carries on the business of assembling, producing, or processing goods, and includes:

- (a) any person that holds itself out to the public as the manufacturer of the goods;
- (b) any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods;
- (c) where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods.

This wide definition of a manufacturer gives consumers easy access to manufacturers of goods for redress. This is because more than one person may be liable for the manufacturer’s obligations under the CGA.

For example, the actual manufacturer of a motor vehicle will be liable as it has made the goods. However, where goods are manufactured outside New Zealand and the foreign manufacturer does not have an ordinary place of business in New Zealand, the person that imports or distributes those goods will also be liable.

## **3. Goods**

### 3.1 *Guarantee as to title*

Section 5 of the CGA provides the following guarantees:

- (d) that the supplier has a right to sell the goods;
- (e) that the goods are free from any undisclosed securities; and
- (f) that the consumer has the right to undisturbed possession of the goods (subject to any security in the goods granted by the consumer).

If a supplier breaches section 5 of the CGA, the consumer can require the supplier to remedy the breach by either curing the defective title or replacing the goods. If neither is possible or the supplier fails to remedy the breach, the consumer can reject the goods and choose to have a refund of the purchase price or replacement goods.

### 3.2 *Guarantee as to acceptable quality*

Section 6 of the CGA provides a guarantee that where goods are supplied to a consumer the goods are of “acceptable quality”. Section 7 of the CGA provides that goods are of

“acceptable quality” if they are:

- (a) fit for all the purposes for which goods of the type in question are commonly supplied;
- (b) acceptable in appearance and finish;
- (c) free from minor defects;
- (d) safe; and
- (e) durable,

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to:

- (f) the nature of the goods;
- (g) the price (where relevant);
- (h) any statements made about the goods on any packaging or label on the goods;
- (i) any representation made about the goods by the supplier or the manufacturer;
- (j) all other relevant circumstances of the supply of the goods.

Where goods fail to comply with the guarantee as to acceptable quality because the goods are unsafe, then the defect is of a substantial character entitling the consumer to reject the goods and receive a refund of the purchase price.

### *3.3 Reasonable fitness for purpose*

Section 8 of the CGA provides two guarantees:

- (a) that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and
- (b) that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

These guarantees do not apply to manufacturers as only the supplier is in direct contact with the consumer and able to assess the consumer's purpose.

The CGA also provides that the guarantees do not apply where the consumer does not rely on the supplier's skill or judgement or if it is unreasonable for the consumer to rely on the supplier's skill or judgement.

### *3.4 Reasonable correspondence with description and sample*

Where goods are supplied by description, section 9 of the CGA provides that the goods must reasonably correspond with their description. The description of goods is likely to include specifications, pictures on packaging, a website or other marketing material and other representations made in store, on a website or on other marketing material.

Section 10 of the CGA also provides that goods must comply with any sample or demonstration model shown to the consumer. This guarantee does not apply to

manufacturers.

### 3.5 *Guarantee of reasonable price*

Where the contract for the supply of goods does not specify a purchase price, the CGA provides that the consumer will not be liable to pay more than a reasonable price.

### 3.6 *Guarantee of availability of repairs and spare parts*

Section 12 of the CGA provides that the manufacturer guarantees to take reasonable action to ensure that facilities for the repair of goods and supply of parts are reasonably available after the goods are supplied.

The CGA does not define “reasonably available” so this will be left to be determined by the facts and circumstances of each case.

The guarantee does not apply where reasonable steps are taken by the manufacturer to notify the consumer who first acquires the goods from a supplier in New Zealand that the manufacturer does not provide repair facilities and spare parts for the goods or that repair facilities and spare parts will only be available for a specified period.

### 3.7 *Express guarantees*

Section 13 of the CGA provides that any express guarantees given by a manufacturer will be binding on the manufacturer as follows:

- (a) where a document containing the guarantee is given to the consumer by the supplier in connection with the supply of the goods with the actual or apparent authority of the manufacturer;
- (b) an express guarantee included in a document relating to goods which appears to have been made by the manufacturer will be presumed to have been made by the manufacturer in the absence of proof to the contrary; and
- (c) an express guarantee is binding on a manufacturer whether or not the consumer was induced into purchasing the goods on the basis of the guarantee.

Due to the above provisions of the CGA, it is no longer necessary for the consumer to sign and return the manufacturer’s warranty card in order for the manufacturer’s warranty to be legally binding on the manufacturer.

### 3.8 *Failure of a substantial character*

Section 21 of the CGA provides that a failure to comply with a guarantee is of a substantial character when:

- (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the defect;
- (b) the goods depart in one or more significant respects from the description by which they were supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model;
- (c) the goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose; or

(d) the goods are not of acceptable quality because they are unsafe.

In *Cairney v Ellis Utting Motors Limited*<sup>3</sup> the defendant sold an 8 year old BMW with mileage of 85,000 km. The vehicle had suffered numerous problems including a defect with its transmission. The court found that the defective transmission was a failure of a substantial character as the vehicle would not have been purchased by a reasonable consumer fully acquainted with the nature and extent of the defect.

#### **4. Consumer Remedies**

##### *4.1 Remedies against suppliers of goods*

Where the failure of goods to comply with a guarantee under the CGA is not substantial and can be remedied, the consumer can require the supplier to remedy the defect pursuant to section 18(2) of the CGA. The supplier can then choose whether to:

- (a) repair the goods;
- (b) replace them with goods of the identical type; or
- (c) provide a refund.

If the supplier refuses to remedy the defect, neglects to remedy the defect or does not succeed in remedying the defect within a reasonable time, the consumer can then have:

- (a) the defect remedied elsewhere at the supplier's cost; or
- (b) reject the goods.

Where the failure of goods to comply with a guarantee under the CGA cannot be remedied or where there is a defect of a substantial character, the consumer may:

- (a) reject the goods;
- (b) obtain damages from the supplier.

If a consumer rejects the goods, the consumer can elect to have the goods replaced with goods of an identical type or obtain a refund of the purchase price.

Where goods have breached a guarantee under the CGA, the consumer can also recover from the supplier any reasonably foreseeable further loss or damage pursuant to section 18(4) of the CGA. This could include:

- (a) loss of use of the goods;
- (b) stress and inconvenience;
- (c) loss of wages or income;
- (d) transport or insurance costs;
- (e) business losses; and

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<sup>3</sup> (DC Auckland, NP 2828-99, 3 Oct 2000, Barber J)

- (f) the cost of reinstalling goods.

In *Hosking v The Warehouse Limited*<sup>4</sup> a defective electric blanket caused a house fire. The court awarded damages of \$50,000 for repairs to the consumer's house and \$7,500 for stress and inconvenience.

#### 4.2 Loss of right to reject goods

Section 20 of the CGA provides that a consumer will lose their right to reject goods when:

- (a) the right is not exercised within a reasonable time;
- (b) the goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier;
- (c) the goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or
- (d) the goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.

A "reasonable time" means the period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to:

- (a) the type of goods;
- (b) the use to which the consumer is likely to put them;
- (c) the length of time for which it is reasonable for them to be used;
- (d) the amount of use to which it is reasonable for them to be put before the defect becomes apparent.

In *Nesbit v Porter* the court held that the purchasers of the motor vehicle should have rejected the vehicle as soon as the substantial defects were identified. The Court noted that:

"a defect is not "apparent" until its cause has been identified and the buyer knows what has to be done to fix it, and what that will cost; in other words, until the buyer is in a position to determine whether the defect is substantial."

As the purchasers did not reject the vehicle as soon as it failed its warrant of fitness check, the purchaser lost their right to reject the vehicle and could only receive damages for the cost of repairs.

In *Cooper v Ashley & Johnson Motors Ltd*<sup>5</sup> the court held that a consumer's election to repair a defective vehicle did not mean that the consumer had lost the right to reject the vehicle if the consumer was not fully acquainted with sufficient information to decide whether to exercise the right to reject the vehicle.

In the matter of the Motor Vehicle Disputes Tribunal<sup>6</sup> the purchaser of a vehicle worth

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<sup>4</sup> (DC Auckland, NP 1476/97, 5 Oct 1998, Judge Field)

<sup>5</sup> [1997] DCR 170

<sup>6</sup> MVD 50/2008 (AK) [2008] NZMVD 73 (9 May 2008)

\$11,995 had lost her right to reject the vehicle because the vehicle had been damaged after delivery to the purchaser. The Tribunal determined that it had no power to waive the provisions of section 20(1)(c) of the CGA even though the damage would only cost \$1,000 to repair.

In a further Motor Vehicle Disputes Tribunal<sup>7</sup> case, a purchaser of a motor vehicle claimed that the motor vehicle purchased from the dealer was not of acceptable quality because its suspension had been modified and it had subsequently failed its warrant of fitness check. The Tribunal held that the purchaser had lost her right to reject the vehicle because she had noticed the low suspension in August 2007 but had not rejected the vehicle until it failed its warrant of fitness check in November 2007 which was over 5,000 km and four and a half months after the date of sale.

#### *4.3 Remedies against manufacturers*

Consumers must exhaust their rights under an express guarantee given by a manufacturer prior to commencing any other action under the CGA against the manufacturer.

Consumers can only claim against a manufacturer for the reduction in value of goods after the manufacturer has neglected, refused or failed to remedy any defects within a reasonable time. Consumers have no right to reject goods and claim replacement goods or a refund of the purchase price from the manufacturer. However, damages for the loss in value of goods are likely to be similar in value to the original purchase price of the goods.

Consumers can also claim against manufacturers for any reasonably foreseeable consequential losses or damages.

### **5. Services**

#### *5.1 Guarantee as to reasonable skill and care*

Section 28 of the CGA provides that services supplied to a consumer must be carried out with reasonable skill and care.

If a consumer pays a higher price for the services due to the supplier's greater level of experience and skill, then the required standard of care would be higher.

#### *5.2 Guarantee as to fitness for purpose*

Section 29 of the CGA requires that the service, and any product resulting from the service, must be:

- (a) reasonably fit for any particular purpose; and
- (b) of such a nature and quality that it can reasonably be expected to achieve any particular result,

that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that:

- (c) the consumer does not rely on the supplier's skill or judgment; or

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<sup>7</sup> MVD 302/07 (AK) [2008] NZMVD 19 (25 February 2008)

- (d) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

### 5.3 *Guarantee as to time of completion*

Section 30 of the CGA provides that where services are supplied to a consumer, the services must be completed within a reasonable time. The CGA also provides that this guarantee does not apply where the time for the service to be carried out has been:

- (a) fixed by contract;
- (b) left to be fixed in a manner agreed by the contract; or
- (c) left to be determined by the course of dealing between the parties.

In addition, the supplier will have no liability for a breach of this guarantee where the failure to comply with the guarantee occurs due to events outside of the supplier's control.

### 5.4 *Guarantee as to price*

Section 31 of the CGA sets out a guarantee that a consumer does not have to pay more than a reasonable price for services except where the price has been:

- (a) fixed by contract;
- (b) left to be fixed in a manner agreed by the contract; or
- (c) left to be determined by the course of dealing between the parties.

### 5.5 *Failure of a substantial character*

Section 36 of the CGA provides that a failure of a substantial character occurs in relation to services where:

- (a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- (b) the product of the service is substantially unfit for a purpose for which services of the type in question are commonly supplied and the product cannot easily and within a reasonable time be remedied to make it fit for the purpose; or
- (c) the product of the service is unfit for a particular purpose, or is of such a nature and quality that the product of the service cannot be expected to achieve any particular result, made known to the supplier and the product cannot easily and within a reasonable time be remedied to make it fit for the particular purpose or to achieve the particular result; or
- (d) the product of the service is unsafe.

In *Cooper v Ashley & Johnson Motors Limited*<sup>8</sup> the Court held that the accumulation of more minor defects which in themselves could not be described as "substantial" could together be a failure of a substantial character. The Court noted that these defects could accumulate over a period of months, although it would be unlikely that a Court would allow defects accumulating over a period of years to be regarded as a failure of a substantial character.

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<sup>8</sup> [1997] DCR 170

## **6. Remedies**

### *6.1 Failure of a substantial character*

If the failure is of a substantial character or is incapable of remedy, then the consumer will have a right to cancel the contract or obtain damages for the loss in value of the service.

Section 35 of the CGA provides that where the supply of the service is merely incidental to the supply of goods and the consumer has or had the right to reject the goods, then the right to cancel the contract is lost.

Section 38 of the CGA sets out the effect of cancellation of a contract for the supply of services. These are that:

- (a) the consumer shall be entitled to recover from the supplier a refund of any money paid or other consideration provided in respect of the services unless a Court or Disputes Tribunal orders that the supplier may retain the whole or part of the money paid or other consideration provided by the consumer;
- (b) so far as the contract has been performed at the time of the cancellation, no party shall, by reason of the cancellation, be divested of any property transferred or money paid pursuant to the contract, except as otherwise provided above;
- (c) so far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further.

### *6.2 Failure is not substantial and is capable of remedy*

Where the failure is not substantial and is capable of remedy, section 32 of the CGA provides that a consumer may require the supplier to remedy the failure within a reasonable time. If the supplier refuses or neglects to remedy the failure within a reasonable time, then the consumer may have the failure remedied elsewhere at the supplier's cost or cancel the contract.

In *Cooper v Ashley & Johnson Motors Limited*<sup>9</sup> the Court held that the dealer had to pay the full costs of repair of a motor vehicle after the dealer had failed to repair the motor vehicle within a reasonable time.

### *6.3 Damages*

In addition to the above remedies, a consumer may obtain from a supplier damages for any loss or damage resulting from the supplier's failure to comply with a guarantee under the CGA.

## **7. Jurisdiction**

Disputes under the CGA may be heard in the:

- (a) Disputes Tribunal for claims up to \$15,000 or up to \$20,000 if both parties agree;
- (b) Motor Vehicle Disputes Tribunal for claims up to \$50,000 or higher if both parties agree;
- (c) District Court for claims up to \$200,000; and

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<sup>9</sup> [1997] DCR 170

(d) High Court for all other claims.

## **8. Contracting out of the Consumer Guarantees Act**

The provisions of the CGA can only be excluded in a written contract between a supplier and a business consumer. If a supplier contracts out of the CGA for a supply to a business consumer, then that contracting out also protects the manufacturer of the goods.

A manufacturer should therefore require its suppliers to contract out of the CGA to the maximum extent permitted by the law and require an indemnity from the supplier for any losses the manufacturer incurs as a result of the supplier failing to contract out of the CGA.

If a supplier attempts to contract out of the CGA in any other circumstances, such contracting out will be ineffective and will also be a breach of the Fair Trading Act 1986 for which the supplier could be liable for fines of up to \$200,000.

## **9. Conclusion**

Because of the limited size of most claims relating to the CGA, it is often not worthwhile for consumers to pursue their claims through the Courts. For this reason, there is a limited body of case law on the interpretation of provisions of the CGA which can often make assessing liability on a particular case a difficult exercise.

## **Sale of Goods Act 1908**

### **1. Introduction**

The Sale of Goods Act (“SOGA”) implies warranties and conditions into contracts for the supply of goods. The SOGA differs from the CGA in that it applies to all contracts for the supply of goods, not just contracts with consumers.

In addition, the warranties and conditions implied by the SOGA can be varied or negated by the terms of the contract between the parties.

### **2. Implied conditions**

#### *2.1 Price – section 10*

If the contract does not fix the purchase price or provide a mechanism for fixing the purchase price, the buyer must pay a reasonable price only.

#### *2.2 Title – section 14*

The SOGA implies three conditions or warranties into contracts:

- (a) the seller has the right to sell the goods;
- (b) the buyer shall have and enjoy quiet possession of the goods; and
- (c) the goods are free from any charge or encumbrance in favour of a third party which is not declared to the buyer when the contract is made.

#### *2.3 Correspondence with description – section 15*

In a contract for the sale of goods by description, the SOGA implies a condition that the goods will correspond with that description. In a contract for the sale of goods by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if they fail to correspond with the description.

#### *2.4 Fitness for purpose – section 16(a)*

The SOGA implies a warranty that goods must be fit for their particular purpose where the purpose is expressly or by implication made known to the seller, in circumstances which show that the buyer relies on the skill or judgement of the seller.

#### *2.5 Merchantable quality – section 16(b)*

The SOGA also provides that where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.

In *Nesbit v Porter*<sup>10</sup>, the court determined that goods are of merchantable quality if they are “of use for any purpose for which goods which complied with the description under which they were sold would normally be used.” This effectively means that goods are of merchantable quality if they are “saleable”. This is a lower standard than the “acceptable quality” standard imposed by the CGA.

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<sup>10</sup> [2000] NZCA 288

## *2.6 Terms implied by trade usage and express terms – section 16(c)*

An implied warranty or condition as to quality or fitness for a particular purpose may result from trade usage so that if such a warranty is to be excluded it must clearly be done so by the terms of the contract.

## *2.7 Correspondence with sample – section 17*

The SOGA implies the following conditions in a contract for the sale of goods by sample:

- (a) that the bulk shall correspond with the sample in quality;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

## **3. Remedies**

A party will be able to bring proceedings for breach of contract against a party who breaches a condition implied into the contract by the Sale of Goods Act.

The measure of damages for breach of an implied condition will be the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of the implied condition.

In the case of a breach of warranty of quality, such loss will be the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had met the warranty.

## **4. Effect of Consumer Guarantees Act on Sale of Goods Act**

Section 56A of the SOGA provides that if the CGA applies to a supply of goods then none of the implied terms or warranties set out above nor any of the provisions of the SOGA relating to buyer's remedies apply to that supply of goods.

## **5. Contracting out of the Sale of Goods Act**

The terms implied by the SOGA can be excluded or varied by:

- (a) express agreement between the parties;
- (b) course of dealing between the parties;
- (c) trade usage.

This differs from the CGA which can only be excluded in limited circumstances.

## **Fair Trading Act 1986**

A buyer claiming for defective goods will often include a breach of the FTA as a cause of action.

The key provisions of the Fair Trading Act ("FTA") relating to misleading and deceptive conduct are:

- (a) section 9 which prohibits misleading or deceptive conduct in the course of trade;
- (b) section 10 which prohibits conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose or quantity of goods; and
- (c) section 13 which prohibits false or misleading misrepresentations about a variety of matters where the representations are made in trade in connection with the supply or promotion of goods.

The FTA also includes provisions dealing with:

- (a) compulsory product recalls of goods which do not comply with product safety standards;
- (b) the false offer of gifts and prizes;
- (c) the prohibition of bait advertising;
- (d) restrictions on referral selling;
- (e) physical harassment and coercion;
- (f) prohibition on pyramid selling schemes; and
- (g) prohibition of importation of goods bearing false trade descriptions.

Penalties imposed for breaches of the FTA can be up to \$60,000 for individuals or \$200,000 for companies. Proceedings will often be brought by the Commerce Commission for breaches of the FTA, although any person can make a claim for damages or apply for an injunction restraining a person from breaching the FTA.