

The Law Commission
and
The Scottish Law Commission

(LAW COM. No. 69)

(SCOT. LAW COM. No. 39)

EXEMPTION CLAUSES

SECOND REPORT

*Laid before Parliament by the
Lord High Chancellor and the Lord Advocate
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
5th August 1975*

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman*.

Mr. Aubrey L. Diamond.

Mr. Stephen B. Edell.

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THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION

*To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain, and
the Right Honourable Ronald King Murray, Q.C., M.P.,
Her Majesty's Advocate.**

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, on 19 July 1965 the Law Commission submitted their First Programme for the examination of several branches of the law of England and Wales, and on 16 September 1965 the Scottish Law Commission submitted their First Programme for the examination of various areas of the law of Scotland. 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. On 20 July 1969 the Law Commissions submitted their First Report on Exemption Clauses in Contracts which dealt with certain matters relating to the operation of sections 12 to 15 of the Sale of Goods Act 1893 and problems created by the practice of contracting out of the conditions and warranties implied by those sections. The Law Commissions have now completed their examination of the law relating to the exclusion of liability and have the honour to submit further proposals for the reform of this branch of the law.

Signed SAMUEL COOKE, *Chairman,*
Law Commission.

AUBREY L. DIAMOND.

STEPHEN EDELL.

DEREK HODGSON.

NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

J. O. M. HUNTER, *Chairman,*
Scottish Law Commission.

A. E. ANTON.

R. B. JACK.

T. B. SMITH.

J. B. ALLAN, *Secretary.*

30 July 1975.

* The Transfer of Functions (Secretary of State and Lord Advocate) Order 1972 (S.I. 1972 No. 2002) removes the requirement to submit reports to the Secretary of State for Scotland.

EXEMPTION CLAUSES

SECOND REPORT

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THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION
EXEMPTION CLAUSES
SECOND REPORT
PART I—INTRODUCTION
BACKGROUND

1. The Law Commissions' *First Report on Exemption Clauses in Contracts*¹ made a number of recommendations in relation to the sale of goods. These covered—

- (a) amendments to those sections of the Sale of Goods Act 1893 which imported into contracts for the sale of goods certain terms ("implied terms") relating to title, conformity with description and sample, quality and fitness;
- (b) the regulation of clauses excluding or limiting the effect of those terms.

2. The First Report indicated that it was part of a wider study of exemption clauses in contracts and that a subsequent report would be concerned "partly with exemption clauses in contracts for the supply of services and partly with certain problems common to contracts for the sale of goods and contracts for the supply of services"²; the subjects reserved for subsequent consideration included, in particular, the exclusion of liability for negligence both in contracts of sale of goods and in contracts for the supply of services³. The examination of this area of the law derives from Item II of the Law Commission's First Programme⁴ and paragraph 12 of the Scottish Law Commission's First Programme⁵.

3. The Supply of Goods (Implied Terms) Act 1973, which came into operation on 18 May 1973, has amended the law relating to the sale of goods in those areas covered by our First Report and has made corresponding changes in the law relating to hire-purchase and conditional sale agreements and the redemption of trading stamps for goods.

SCOPE OF REPORT

4. This report is concerned, therefore, with provisions excluding or restricting any legal duty or obligation which is, or otherwise would be, owed by one person to another and which does not fall within the ambit of the Supply of Goods (Implied Terms) Act 1973. (For convenience we refer to these provisions as "exemption clauses" although a few of them are in fact conditions on which licences are granted or benefits voluntarily conferred.) Though the two Commissions have reached a wide measure of agreement on the main issues, on two

¹ (1969) Law Com. No. 24; Scot. Law Com. No. 12; (1968-69) H.C. 403, hereinafter referred to as the "First Report".

² First Report, para. 1.

³ First Report, para. 9.

⁴ (1965) Law Com. No. 1.

⁵ (1965) Scot. Law Com. No. 1.

matters of fundamental importance they have reached divergent conclusions partly because of inherent differences in the systems of law for which they are respectively responsible.

5. The two Commissions have reached different conclusions as to the scope of the situations within which exemption clauses should be controlled. In Part II of the report we deal with provisions excluding or restricting certain obligations implied by law in classes of contract for the supply of goods or corporeal moveables which are not covered by the Supply of Goods (Implied Terms) Act 1973, including in particular contracts of hire or location, of exchange or barter and, so far as they are recognised as a distinct category, contracts for work and materials. The two Commissions are in agreement as to the contracts which should be subject to the recommendations in that Part. In Part III we deal with provisions exempting from liability for negligence. Here we are not in agreement. The Law Commission recommends that exemptions in contracts or notices should be controlled whether or not there is a contract between the parties and, where there is, whatever its nature⁶. The Scottish Law Commission considers, for reasons developed later in this report⁷, that its recommendations should be restricted to contracts relating to the transfer of goods or rendering of services and to licences to the extent that they may be recognised in Scotland. In Part IV we deal with a residuary group of provisions comprising those which exclude or restrict liability for breach of contract and others which, whether they are expressed as exemption clauses or not, have the same or similar effect. The Law Commission's recommendations in this Part would apply to contracts of all kinds⁸; the Scottish Law Commission again considers that its recommendations should be restricted to contracts relating to the transfer of goods or rendering of services⁹. In Part V we discuss a number of general problems.

6. The other matter on which there is a difference between the views of the two Commissions is the nature of the legislative control that should be recommended to test the reasonableness of an exemption clause in certain circumstances. Both Commissions agree that in some situations exemption clauses should be subject to a test of reasonableness and, subject to their respective views on the overall scope of the proposed legislation, they agree on what those situations should be. They are, however, at variance as to the time at which the reasonableness of an exemption should be tested, the Scottish Law Commission favouring the time of contract, the Law Commission wishing to continue with the formulation adopted in 1973 that the test should be whether it is reasonable for a party to rely on an exemption clause¹⁰.

7. Accordingly, it has been agreed that although, with the exceptions indicated, they substantially concur in the result to be achieved each Commission should prepare separate draft clauses to give effect to its proposals¹¹.

⁶ See paras. 240–247, below.

⁷ See paras. 248–257, below.

⁸ See paras. 240–247, below.

⁹ See paras. 248–257, below.

¹⁰ Both Commissions explain their views on the reasonableness test in paras. 169–196, below.

¹¹ See Appendix A for the draft clauses for England and Wales and Appendix B for the draft clauses for Scotland.

8. In this report, as in our First Report, we speak of a "ban" on exemption clauses in certain circumstances. By a "ban" on an exemption clause we mean an enactment providing that the clause shall be void or of no legal effect. We do not mean that its inclusion in a contract should be made a penal offence; the inquiry on which this report is based has been concerned solely with the civil consequences of exemption clauses. Some critics have pointed out to us that nothing in the Supply of Goods (Implied Terms) Act 1973 nor the proposals made in our joint document would prevent the inclusion of exemption clauses in contracts. In terms of the 1973 Act and our current proposals these exemption clauses would be void and lawyers would know this and consequently disregard them; but laymen might not, and it would be possible for traders to rely on the void exemptions by bluff. It would not be possible for us in this report, which is concerned solely with the civil consequences of exemption clauses, to deal with this aspect of the exemption clauses problem: but in any case Parliament has now passed the Fair Trading Act 1973, under which the Secretary of State (acting on the basis of a proposal by the Director General of Fair Trading and a report by the Consumer Protection Advisory Committee) is given powers which can be used to prohibit such practices, which would then attract the penalties imposed by the Act¹².

9. We have considered only those exemption clauses which relate to things done or left undone in the course of a business. No one has suggested to us that the use of exemption clauses in connection with services supplied in a purely private capacity is widespread or gives rise to concern; if two neighbours agree that one should repair the other's lawn-mower, motor-car or television set, there seems to be no reason why they should not make such arrangements as they please about who should bear the risk that the work may be done carelessly or unskilfully. The supplier of the service will generally be doing a favour to a friend or neighbour; the relationship between the parties is essentially a social one, and the supplier of the service will normally have a strong incentive to protect the interests of the other party. This does not mean, however, that we have reached the conclusion that there can never be a case for controlling the use or operation of exemption clauses in connection with purely private relationships. It has already proved necessary to enact that provisions excluding or restricting the liability which the user of a motor vehicle may incur in respect of the death of or injury to a passenger shall be void¹³ even if the carriage is not in the course of the business of the person using the vehicle. It is not our intention to suggest that any of the existing statutory restrictions on the use of exemption clauses in respect of services supplied even in a purely private capacity should be removed or made less strict. For the purposes of this report we have confined our attention to situations in which the use of exemption clauses appears to be the source of a social problem.

METHOD OF WORK

10. We have followed the same procedure in the preparation of this report as we did in connection with the First. Our joint Working Party¹⁴, whose

¹² Fair Trading Act 1973, ss. 22 and 23; and see *A Report on Practices Relating to the Purported Exclusion of Inalienable Rights of Consumers and Failure to Explain their Existence* by the Consumer Protection Advisory Committee, 2 December 1974, (1974-75) H.C. 6.

¹³ Road Traffic Act 1972, s. 148(3).

¹⁴ The membership of the Working Party is set out in Appendix C.

invaluable help we gratefully acknowledge, completed their consideration of the evidence submitted by bodies and individuals who had responded to the Working Party's original invitation to submit memoranda¹⁵. The Working Party then reported their conclusions to us and on 27 September 1971 we published a joint document for consultation, containing a series of provisional proposals and a number of questions¹⁶. In accordance with our usual practice we invited comment from a large number of organisations representing the practising and academic branches of the legal profession, industry and commerce, the insurance industry and consumer interests, as well as from government departments and various bodies representing local authorities¹⁷. We have received much valuable criticism; this has led us to reconsider and modify a number of the provisional conclusions put forward in our joint document and to make some additional recommendations.

THE CASE FOR CONTROL

11. It is clear that exemption clauses are much used both in dealings with private individuals and in purely commercial transactions¹⁸. We are in no doubt that in many cases they operate against the public interest and that the prevailing judicial attitude of suspicion, or indeed of hostility, to such clauses is well founded. All too often they are introduced in ways which result in the party affected by them remaining ignorant of their presence or import until it is too late. That party, even if he knows of the exemption clause, will often be unable to appreciate what he may lose by accepting it. In any case, he may not have sufficient bargaining strength to refuse to accept it. The result is that the risk of carelessness or of failure to achieve satisfactory standards of performance is thrown on to the party who is not responsible for it or who is unable to guard against it. Moreover, by excluding liability for such carelessness or failure, the economic pressures to maintain high standards of performance are reduced. There is no doubt that the misuse of these clauses is objectionable. Some are unjustified. Others, however, may operate fairly or unfairly, efficiently or inefficiently, depending on the circumstances; for example, the cost and practicability of insurance may be factors in determining how liability should be apportioned between two contracting parties. The problem of devising satisfactory methods of controlling the use of these clauses, and indeed of identifying some of them, has proved both difficult and complicated.

¹⁵ See First Report, para. 7.

¹⁶ Law Commission Working Paper No. 39; Scottish Law Commission Memorandum No. 15. We refer to this consultative document subsequently in this report as "the joint document".

¹⁷ See Appendix D.

¹⁸ We refer to a transaction where one party is, and the other is not, acting in the course of a business as a "consumer transaction" (see paras. 33 and 148-150, below, for a fuller explanation of the meaning of this expression), and to a transaction in which each party is acting in the course of a business as a "commercial transaction", using the word "commercial" in its widest sense as covering commercial, industrial, official and professional activities.

PART II—SUPPLY OF GOODS

EXISTING CONTROL OVER EXEMPTION CLAUSES—SALE AND HIRE-PURCHASE

12. The Supply of Goods (Implied Terms) Act 1973 deals with contracts of sale of goods, hire-purchase agreements and the redemption of trading stamps. The same statutory terms in relation to title, correspondence with description and sample, quality and fitness for purpose are now implied (*mutatis mutandis*) in contracts of sale of goods and in hire-purchase agreements¹⁹. Terms exempting the seller (in contracts of sale) or the owner (in hire-purchase agreements) from these statutory provisions are controlled in the same way: terms exempting from the provisions relating to title are made void²⁰; terms exempting from the provisions relating to correspondence with description or sample, quality or fitness for purpose are made void in the case of consumer sales and consumer hire-purchase agreements and are made subject to a reasonableness test in the case of other sales and hire-purchase agreements²¹. The definitions of a consumer sale and of a consumer hire-purchase agreement for these purposes are substantially the same²². Corresponding changes were made in the law relating to the redemption of trading stamps. We have thought it right to consider whether the same or a similar system of control should be applied to other contracts where the policy considerations are the same.

CASE FOR EXTENDING CONTROL

Similarity of hire, exchange etc. to sale

13. In English law there are at least three types of contract involving the supply of goods which bear some resemblance to contracts of sale of goods or hire-purchase agreements. They are the contract of hire of goods, the contract for work and materials, and the contract of exchange or barter. The contract of hire of goods is one by which the hirer obtains the right to use the goods in return for the payment to the owner of the price of the hiring²³. The essential difference between this contract and a contract of sale of goods is that there is no transfer of the ownership of the goods but instead a transfer of possession to the hirer. The contract for work and materials (sometimes described as a contract of work and labour or a contract for work, labour and materials) is for our purposes essentially one in which one person undertakes to do work for another and to provide some or all of the materials necessary for the work. The person who does the work (a cobbler who puts new soles on a pair of shoes, an artist who paints a picture for a client, a builder who, in building a house for a customer, supplies tiles for the roof) is not in English law regarded as selling the leather, the paint and canvas or the tiles, although when the work is done the ownership of those articles will be the customer's. A contract of

¹⁹ See ss. 12 to 15 of the Sale of Goods Act 1893 as amended by the Supply of Goods (Implied Terms) Act 1973, and ss. 8 to 11 of the latter Act.

²⁰ See s. 55(3) of the Sale of Goods Act 1893 and s. 12(2) of the Supply of Goods (Implied Terms) Act 1973.

²¹ See s. 55(4) of the Sale of Goods Act 1893 and s. 12(3) of the Supply of Goods (Implied Terms) Act 1973.

²² See s. 55(7) of the Sale of Goods Act 1893 and s. 12(6) of the Supply of Goods (Implied Terms) Act 1973.

²³ *Halsbury's Laws of England* (4th ed., 1973), vol. 2, p. 721.

exchange or barter may be described for present purposes as one under which the ownership of goods is transferred to another in return for goods or something else of value, not being money²⁴.

14. In Scots law the contract of hire or location of corporeal moveables corresponds to the English contract of hire of goods. The contract of exchange or barter in Scots law is one under which the ownership of goods is transferred to another in exchange for goods. The situation created by a transaction which in English law would be described as a contract for work and materials has so far been treated differently in Scotland²⁵. The person who provides the materials and does the work is often regarded as selling the materials with the result that the statutory warranties implied by sections 12 to 15 of the Sale of Goods Act 1893 apply and contracting out is now controlled, though in many cases, such as the installation of a heating system which proves defective, the appropriate remedy would be an action of damages for defective performance.

Requirements for extending control

15. We think that, before it can be decided whether the regime set up for contracts of sale and hire-purchase agreements by the Supply of Goods (Implied Terms) Act 1973 should be extended to the contracts discussed above, these questions must be answered: Are these contracts of sufficient social and economic importance to justify altering the law? Do the rights of the parties require more protection than the law at present affords them?

Social and economic importance

16. We think there can be no doubt of the social and economic importance of contracts of hire; they include such consumer transactions as television and car rentals and such commercial transactions as "equipment leasing" and "contract hire" of, for example, a fleet of trading vans or building and industrial equipment. We think too that contracts for work and materials are of considerable importance, including as they do such commercial transactions as heavy engineering contracts and such consumer transactions as a contract for the repairing of a car where spare parts are supplied.

17. In Scotland, at least, there are recent examples of the use of contracts of exchange in substantial business dealings in, for example, stocks of whisky²⁶ and in everyday matters such as exchange of livestock²⁷ or motor-cycles²⁸. Economic journals suggest that they have present and potential importance in large scale transactions, and it may well be that their use will become more common. In any case, contracts in which goods are supplied for a consideration consisting partly of money and partly of other goods are quite common, especially in the motor trade, where it has for many years been the established practice for a dealer to supply a new car to a customer for a consideration consisting partly of cash and partly of an old car "traded in" by the customer.

²⁴ *Halsbury's Laws of England* (3rd ed., 1960), vol. 34, p. 5.

²⁵ D. M. Walker, *Principles of Scottish Private Law* (1970), p. 620.

²⁶ *Widenmeyer v. Burn, Stewart & Co.* 1967 S.C. 85.

²⁷ *Macgregor v. Bannerman* (1948) 64 Sh.Ct.Rep. 14.

²⁸ *Urquhart v. Wylie* 1953 S.L.T.(Sh.Ct.) 87.

Whether such a transaction is a sale²⁹ or exchange or a mixture of both will not matter for our purposes if exemption clauses in sale and exchange are dealt with in the same way.

Implied terms in English law

18. At common law there are implied terms which confer important rights on the hirer under a contract of hire, the person for whom goods are provided under a contract for work and materials and (probably) the person to whom goods are supplied under a contract of exchange.

19. *Hire*. Although the authorities are far from clear as to the exact nature of the implied terms in favour of the hirer in a contract of hire, there is no real doubt that there are in many cases a number of implied terms on which he can rely. A term is implied that the hirer shall have quiet possession of the goods during the currency of the agreement³⁰. It is uncertain whether there is an implied term that the owner has the right to let out the goods though, apart perhaps from situations where the principle that the hirer is estopped from denying his bailor's title³¹ applies, it is difficult to see why there should not be³². There is usually an implied term that the goods will be fit for the hirer's purpose: this probably rests on the owner's awareness of the purpose for which the hirer requires the goods and the hirer's reliance on the owner's skill or judgment³³. Whether the implied term is that the goods are fit for the purpose, as in sale³⁴, or that they are as fit for the purpose as care and skill can make them³⁵, must be regarded as uncertain. For our purposes nothing turns on this distinction since we are concerned with provisions excluding the term whatever its precise nature may be. There seems no reason to doubt that there are terms relating to the correspondence of the goods with description or sample³⁶.

20. *Work and materials*. In contracts for work and materials the authorities have in the main concerned the implied terms of fitness for purpose and quality. They establish the existence of some implied terms, though their exact nature and the circumstances in which they are implied cannot yet be regarded as beyond dispute. The similarity to sale has however often been emphasised: ". . . many contracts for work and materials closely resemble contracts of sale: where the employer contracts for the supply and installation of a machine or other article, the supply of the machine may be the main element and the work of installation be a comparatively small matter. If the employer had bought the article and installed it himself, he would have had a warranty under section 14(2) [of the Sale of Goods Act 1893] and it would be strange that the fact that the seller also agreed to install it should make all the difference."³⁷ There may well be terms as to correspondence with description and sample.

²⁹ See P. S. Atiyah, *The Sale of Goods* (4th ed., 1971), p. 5.

³⁰ This is perhaps supported by *Lee v. Atkinson and Brooks* (1609) Cro. Jac. 236.

³¹ *Biddle v. Bond* (1865) 6 B. & S. 225, 232.

³² cf. G. W. Paton, *Bailment in the Common Law* (1952), p. 289 and R. M. Goode, *Hire-Purchase Law and Practice* (2nd ed., 1970), p. 885.

³³ *Astley Industrial Trust Ltd. v. Grimley* [1963] 1 W.L.R. 584.

³⁴ *Hyman v. Nye* (1881) 6 Q.B.D. 685, 690, per Mathew J; *Star Express Merchandising Co. Pty. Ltd. v. V. G. McGrath Pty. Ltd.* [1959] V.R. 443.

³⁵ *Hyman v. Nye* (1881) 6 Q.B.D. 685, 687-8, per Lindley J; *Reed v. Dean* [1949] 1 K.B. 188.

³⁶ An implied term as to correspondence with description exists in hire-purchase: *Astley Industrial Trust Ltd. v. Grimley* [1963] 1 W.L.R. 584.

³⁷ *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454, 466-7, per Lord Reid; *G. H. Myers & Co. v. Brent Cross Service Co.* [1934] 1 K.B. 46; cf. *Gloucestershire County Council v. Richardson* [1969] 1 A.C. 480.

21. *Exchange*. There appears to be no recent English authority on the terms implied in a contract of exchange, which we use to include both a contract under which goods are exchanged for goods and one under which goods are exchanged for services or, perhaps, shares or something else. In old cases the courts appeared to treat such contracts in a similar way to sale³⁸, and Lord Blackburn said that “If the consideration to be given for the goods is not money, it might, perhaps in popular language, rather be called barter than sale, but the legal effect is the same in both cases.”³⁹ Although the codification of the law of sale has led to some divergence, we see no reason to doubt the existence at common law of terms in a contract of exchange, implied in similar circumstances to those implied in contracts of sale of goods at common law, relating to title and quiet possession, correspondence with description or sample, quality and fitness for purpose.

Implied terms in Scots law

22. *Hire*. In Scots law the obligations of the lessor in a contract of hire are akin to those of a seller under the common law of Scotland, undiminished by the modified *caveat emptor* doctrine of the Sale of Goods Act 1893. Unless otherwise agreed, he is bound to deliver the thing hired in such a condition that it may serve the purpose for which it was hired and to maintain it in suitable order and repair for the purpose of the hiring. On analogy with sale at common law, a requirement of correspondence with sample would, we think, also be implied. The lessor warrants the free use and peaceable enjoyment of the thing by the hirer (locator) during the hiring and warrants the hirer against all defects and faults in the thing which prevent or diminish its use—probably whether these are known to the lessor or not⁴⁰. Further, the lessor is bound to refund to the hirer expenses necessarily incurred by him in maintaining and repairing the same.

23. *Work and materials*. We do not exclude the possibility that the Scottish courts may eventually in some cases come to recognise a contract for work and materials as such as contrasted with a contract for the purchase of materials combined with the hiring of services. Accordingly we think that exemption clauses in such contracts (if they come to be recognised in Scotland) should be treated as they are treated in England.

24. *Exchange*. In Scotland the distinction between sale and exchange is of greater importance than in England⁴¹ and, therefore, the effect of the exclusion of exchange from the operation of the Sale of Goods Act 1893 merits closer attention. The reason for this is that that Act created in the case of a sale an exception from the general rule in Scots law that property in moveables passes only by delivery, and also cut down to some extent the protection afforded to a buyer by the common law of Scotland in respect of the warranty against latent defects and the right to delivery of a priceworthy thing. Except for the factor of price in sale and the interdependence of reciprocal deliveries in

³⁸ As in *La Neuville v. Nourse* (1813) 3 Camp. 351 (burgundy exchanged for champagne).

³⁹ *Contract of Sale* (2nd ed., 1885), p. ix. See to the like effect *Chalmers' Sale of Goods* (16th ed., 1971), pp. 53–54; *Halsbury's Laws of England* (3rd ed., 1960), vol. 34, p. 6.

⁴⁰ J. J. Gow, *The Mercantile and Industrial Law of Scotland* (1964), pp. 242–7; cf. D. M. Walker, *Principles of Scottish Private Law* (1970), p. 692.

⁴¹ R. Brown, *Treatise on the Sale of Goods* (2nd ed., 1911), especially at p. 41; D. M. Walker, *Principles of Scottish Private Law* (1970), p. 669.

implement of the contract of exchange or barter, the Scottish common law rules regarding sale and exchange were the same and are well known⁴². The practice of paying part of the price in sale by delivery of some article as well as money or combining sale with exchange was recognised in Scottish practice before the 1893 Act⁴³ but that Act, which altered the common law, made no express provision for such a situation. The rules of the common law except in so far as inconsistent with the express terms of the Act continue to apply⁴⁴, and it may well be that in such contracts the rules relating to implied warranties including those as to quality and priceworthiness are those prescribed by the common law.

Codification of implied terms

25. We make no recommendation for the amendment or codification of these implied terms uncertain as some of them seem to be. This report is the result of a study of exemption clauses; what we have been primarily concerned with is the practice of contracting out of obligations imposed by law, not with what those obligations should be. Our First Report contained recommendations for amending those provisions of the Sale of Goods Act 1893 implying terms in relation to title, correspondence with description or sample, fitness and quality⁴⁵; but we were expressly invited to consider the amendment of those provisions⁴⁶ and, accordingly, invited and received comments on the matter, which was further canvassed in our Working Paper⁴⁷. We have not carried out any consultation on the question of amending and codifying the terms implied in the classes of contract now being considered.

Control of exemptions needed

26. In all the contracts discussed in paragraphs 13 to 24 above the parties are free to contract out of terms implied by the common law in favour of the hirer, the person for whom the goods are provided under a contract for work and materials or the person to whom goods are supplied under a contract of exchange or barter. We see no reason why the rights thus conferred should not be protected so far as practicable in the same way as the corresponding rights are already protected in a contract of sale of goods or a hire-purchase agreement. Thus if a television set is sold, any exemption clause in the contract of sale would be subject to section 55 of the Sale of Goods Act 1893. If the transaction is effected by a hire-purchase agreement, exemption clauses will fall under the similar control in section 12 of the Supply of Goods (Implied Terms) Act 1973. But if the transaction takes the form of a hiring agreement there is no statutory control over exemption clauses at all. We see no reason why cases so similar should be treated differently.

⁴² *Widenmeyer v. Burn, Stewart & Co.* 1967 S.C. 85 and authorities referred to therein. T. B. Smith, "Exchange or Sale?", (1974) 48 Tul.L.R. 1029.

⁴³ J. J. Gow, *The Mercantile and Industrial Law of Scotland* (1964), p. 87. *Morison & Glen v. Forrester* (1712) Mor. 14236. It was usually treated as a sale at common law but an article so delivered would not necessarily fall within the meaning of "goods" in the Sale of Goods Act 1893.

⁴⁴ Sale of Goods Act 1893, s. 61(2).

⁴⁵ Sale of Goods Act 1893, ss. 12 to 15.

⁴⁶ First Report, para. 6.

⁴⁷ Law Commission Working Paper No. 18, Scottish Law Commission Memorandum No. 7 (May, 1968).

27. Another reason for extending the control to the contracts in question is that if they remain free from control they may be used as devices for evading the existing control over exemption clauses in contracts of sale and in hire-purchase agreements. That this is not a mere theoretical possibility is well illustrated by the following passage from the judgment of Sachs J. in the case of *Galbraith v. Mitchenall Estates Ltd.*⁴⁸:—

“So much for the issues in the case. I would add only this. It is becoming increasingly apparent from cases which come before the courts that there is a tendency on the part of some finance companies to try to use contracts of what I have referred to as simple hire in order to ensure that the hirer does not have the protection of the Hire-Purchase Acts The sooner the legislature is apprised of this tendency and the sooner it takes in hand the problem, the fewer will be the occasions when finance companies are able to inflict on an unwary hirer hardships of the type that have become manifest in the present case.”⁴⁹

It has been rightly argued too that, for the purposes of the present inquiry, some contracts for work and materials are in all essential respects so like contracts for the sale of goods that they could be used as a device to evade the protection recently conferred upon the buyer by virtue of the Supply of Goods (Implied Terms) Act 1973⁵⁰.

SCOPE OF CONTROL

28. So far we have discussed the extension of the existing control over exemption clauses in contracts of sale of goods and hire-purchase agreements only as regards contracts of hire of goods, contracts for work and materials and contracts of exchange. These are clearly the most important contracts involving the supply of goods not covered by the Supply of Goods (Implied Terms) Act 1973 but there may be others and we think that the existing control should be extended to cover them as well. It is not clear, for example, whether the letting of goods for a consideration other than money would be considered to be a contract of hire. We therefore think that the existing control should be extended to cover all contracts (other than contracts of sale or hire-purchase and the redemption of trading stamps) which involve the transfer of the ownership or possession of goods from one person to another. Since contracts for work and materials sometimes involve the use, as distinct from the supply, of materials, such as the use of a solvent to clean a painting, we think the control should extend to contracts involving the use of materials in the performance of services. We wish to make it clear that the proposed ban on contracting out of the terms implied by law in contracts for work and materials should extend to materials supplied in carrying out a contract for doing work on a building (including decorating), or land, for example, the erection of fences; it is not intended, however, that the proposed control should affect the operation, in English law, of the Defective Premises Act 1972⁵¹.

⁴⁸ [1965] 2 Q.B. 473, 485.

⁴⁹ The Consumer Credit Act 1974, when it comes fully into force, will afford protection for the hirer under a consumer hire agreement but it will not deal with exemption clauses.

⁵⁰ See D. W. Greig, “A Distinction Recreated?”, (1972) 122 N.L.J. 884.

⁵¹ For the relationship between the proposed control and existing legislation, see paras. 258–276, below.

FORM OF CONTROL

General

29. As we do not propose any amendment of the terms implied by the common law in the contracts now under consideration the only question that remains is what form the control of exemption clauses in those contracts should take. The result we wish to produce is that any exemption clause purporting to exclude or restrict the operation of such terms as are implied in any of these contracts of supply as to the right to transfer ownership or possession, quiet possession, correspondence with description or sample, fitness and quality, should be subject to control and this can be done quite satisfactorily in general terms. Subject to the difference of opinion between the two Commissions to which we have referred⁵², the control should so far as practicable follow the pattern of section 55 of the Sale of Goods Act 1893. There is, however, one respect in which by common agreement this will not be practicable. The outright ban imposed by section 55(3) of the Sale of Goods Act 1893 on any exemption from the terms of section 12 of that Act (implied undertakings as to title etc.) is not appropriate for any of the contracts with which we are now concerned.

Implied terms as to title, etc.

30. Section 55(3) of the Sale of Goods Act 1893, introduced by the Supply of Goods (Implied Terms) Act 1973, now provides that in a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 12 of that Act (which sets out the seller's undertaking as to his right to sell, the freedom of the goods from charges and encumbrances and the buyer's right to quiet possession) shall be void. Section 12(2), however, makes special provision as to the undertakings to be implied in a contract of sale where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should transfer only such title as he or a third person may have; in this case there is no implied undertaking as to the seller's right to sell and the undertakings as to charges or encumbrances and quiet possession are correspondingly limited. Thus, despite the complete ban on contracting out of the undertakings as to title imposed by section 55(3) of the Sale of Goods Act 1893, the parties do by virtue of the recent amendment of that Act enjoy a certain degree of freedom to give and accept more restricted undertakings where the intention is that only a limited title is to be transferred. It might be reasonable for the parties to a contract of supply of the type now under consideration also to be able to qualify the terms as to the right to supply and quiet enjoyment which they give and accept. Thus a receiver appointed over the affairs of a hire-purchase finance company may find that there is some doubt about the company's title to a number of lorries that it has repossessed from the hirers. If he wishes to let the lorries on simple hire he cannot give the hirer an absolute undertaking for peaceful enjoyment. Under the present law, we believe, such an undertaking is implied but the parties can contract out of it. We think that the parties to such a transaction should continue so far as possible to enjoy the same degree of freedom as they would enjoy by virtue of section 12(2) if the goods were being sold. As we have indicated above⁵³, we do not think it

⁵² See para. 6, above.

⁵³ See para. 25, above.

would be appropriate for us in this report to make recommendations for amending the law relating to the terms implied in the contracts of supply to which we propose the existing control should be extended. There are therefore two ways in which the parties to such a contract may be afforded the freedom they should continue to enjoy in this respect: exemption clauses affecting the terms implied by law as to title might be left free of control or they might be subjected to a reasonableness test. There should be some control over such clauses and we propose that it should take the form of a reasonableness test.

Other implied terms

31. Exemption clauses affecting the terms as to correspondence with description or sample, quality and fitness should be controlled as they are by section 55 of the Sale of Goods Act 1893: in a consumer transaction they should be made void, in a commercial transaction they should be made subject to a reasonableness test⁵⁴.

Recommendation

32. (a) *We recommend that provisions excluding or restricting the obligations imposed by the terms mentioned below which are implied by the common law in contracts for the supply of goods (other than contracts of sale or hire-purchase agreements⁵⁵) should be subject to control where the supplier of the goods entered into the contract in the course of a business.*

(b) *Provisions excluding or restricting the obligations imposed by any term so implied as to the right to supply and the right to quiet possession of goods should be subject to a reasonableness test whether or not the contract is a consumer transaction.*

(c) *Provisions excluding or restricting the obligations imposed by any term so implied as to correspondence with description or sample, quality or fitness should be made void in a consumer transaction and subject to a reasonableness test in any other transaction where the supplier entered into the contract in the course of a business.*

(d) *For the purposes of the preceding recommendations a contract should be regarded as a contract for the supply of goods if it involves the transfer of the ownership or possession of goods from one person to another or the use of goods in the performance of any services.*

(Paragraphs 12–31.)

DISTINCTION BETWEEN CONSUMER AND COMMERCIAL TRANSACTIONS

33. In this Part, as elsewhere in this report⁵⁶, we are concerned only with those exemption clauses which affect obligations and duties arising in the course of a business. Within that broad category we distinguish between

⁵⁴ See n. 18, above.

⁵⁵ These are dealt with in the Supply of Goods (Implied Terms) Act 1973.

⁵⁶ See para. 9, above.

consumer and commercial transactions⁵⁷ and we have recommended that exemption clauses in consumer transactions for the supply of goods should, where appropriate, be treated differently from those in commercial transactions⁵⁸. In the definition of a “consumer sale” in section 55(7) of the Sale of Goods Act 1893 there are three elements:—

- (i) the seller must act in the course of a business,
- (ii) the purchaser must neither buy nor hold himself out as buying in the course of a business, and
- (iii) the goods must be of a type ordinarily supplied for private use or consumption.

The case for following the pattern of section 55(7) of the Sale of Goods Act 1893 is strong. We have already noted indications that contracts of simple hire have been used as a device to evade the provisions of the legislation relating to hire-purchase agreements⁵⁹. A customer who would be protected as a “consumer” if he took goods under a hire-purchase agreement should also be protected as a consumer if he takes the same goods under a contract of simple hire. For the purpose therefore of distinguishing between consumer and commercial contracts we think the pattern of section 55(7) of the Sale of Goods Act 1893 should be followed, adapted—as it already has been for hire-purchase agreements⁶⁰—to take account of the fact that the goods are not being sold. In addition, we consider that the onus of proving that a contract is not a consumer contract should be on the party so contending; again, this follows the precedent of section 55 of the Sale of Goods Act 1893⁶¹.

Recommendation

34. (a) *We recommend that a contract for the supply of goods should be treated as a consumer transaction if—*

- (i) *the person supplying the goods contracts in the course of a business;*
- (ii) *the person for whom the goods are supplied is not contracting and does not hold himself out as contracting in the course of a business; and*
- (iii) *the goods are of a type ordinarily supplied for private use or consumption.*

(b) *The onus of proving that a contract is not a consumer transaction should lie on the party so contending.*

(Paragraph 33.)

NO SPECIAL CONTROL OVER EXEMPTION CLAUSES IN RELATION TO GIFTS

35. It has been suggested to us that there are two kinds of gifts which are commonly made in the course of a business and that exemption clauses used in relation to them should be controlled. The first is where a customer purchasing goods from a shop is offered a “free gift” of goods in addition to those he

⁵⁷ See n. 18, above.

⁵⁸ See para. 32, above.

⁵⁹ See para. 27, above.

⁶⁰ Supply of Goods (Implied Terms) Act 1973, s. 12(6).

⁶¹ Sale of Goods Act 1893, s. 55(8).

agrees to buy. We think that in this case, in English law at least, the “free” gift is already covered under the Sale of Goods Act 1893 as “goods supplied under a contract of sale”⁶² so that exemption clauses, if any, are controlled by section 55 of that Act. In Scots law there may be a contract or promise of donation implemented by delivery. The second case where it has been suggested that exemption clauses relating to gifts made in the course of a business should be controlled is where “gifts” or “free samples” are distributed from door to door or by post as a form of sales promotion. In this case there is no contractual relationship between the donor and donee, and there is potential liability only for negligence. If the donee is injured because the goods are dangerous, any attempt to exclude liability for the negligence, incurred in the course of a business, will be regulated if the recommendations made in Part III of this report are accepted. If in any particular case it is held that there is a contract under which there is liability for breach of implied terms as to title, description, quality or fitness, the proposals we have made for controlling exemption clauses in contracts for the supply of goods⁶³ will come into play. We do not believe that exemption clauses are used in relation to such “gifts” to such an extent that special provisions to control them are justified.

⁶² Sale of Goods Act 1893, s. 14(1). See *Gedding v. Marsh* [1920] 1 K.B. 668 and *Wilson v. Rickett Cockerell & Co. Ltd.* [1954] 1 Q.B. 598.

⁶³ See para. 32, above.

PART III—"NEGLIGENCE"

SCOPE OF PART III

36. Exclusion of liability for "negligence" seems a convenient way of describing the effect of the provisions now under consideration. The use in this context of the expression "negligence" corresponds neither with the technical meaning of "negligence" in the English law of tort nor with *culpa* in the Scots law of delict. We use the expression "negligence" in the sense of the breach, whether deliberate or inadvertent, of a duty or obligation, whether imposed by the common law or by an express or implied term in a contract, to take reasonable care or exercise reasonable skill, but not any stricter duty; and, since the effect of the Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960 is to reformulate the common law rules as to the standard of care required of occupiers of premises, we also regard a failure to take the care required by those statutes as "negligence" for the purpose of this report. "Exclusion" is used to include limitation or restriction and references to the exclusion of liability for breach of a duty or obligation to take care include references to the exclusion, limitation or restriction of the duty or obligation itself. Provisions having this effect usually take the form of provisions in connection with contracts for the supply of services, but they occasionally take the form of conditions on which licences are granted or benefits voluntarily conferred. It may be convenient to remind the reader that we are concerned only with liability incurred in the course of a business.

37. It is a common practice for the suppliers of certain services to exclude or limit liability for negligence either specifically or by the use of general words, and similar provisions often appear in manufacturers' "guarantees" supplied to buyers at the time of purchase. It is in contracts for the supply of services that the practice is of greatest importance and causes most dissatisfaction; it is therefore discussed primarily in connection with those contracts, although later in this Part we discuss the problems arising from the practice of excluding liability for negligence in connection with contracts for the supply of goods⁶⁴, and, indeed, our general conclusions apply to the exclusion of liability for negligence in contractual and in some non-contractual situations.

PRESENT FORMS OF CONTROL

Rules of construction

38. Apart from a number of statutory provisions dealing with special cases, there is at present no restriction either by statute or at common law on the freedom of a person to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care or to exercise reasonable skill. By making special provisions, which go back as far as the Carriers Act 1830, Parliament has already recognised that, in the special situations to which those provisions apply, this freedom is likely to operate unreasonably. The courts, however, have long recognised that an exemption clause may have unreasonable consequences not only in a limited number of cases involving such relationships as those between employer and employee or carrier and

⁶⁴ See paras. 106 and 107, below.

passenger, but in any case where one person may suffer injury or damage owing to the negligence of another. Faced with provisions excluding liability for negligence, the courts, while feeling constrained to accept the parties' right to agree to such provisions, have applied and developed a number of rules of construction which have had the effect in a wide variety of cases of enabling claimants to recover damages for negligence despite the presence of exemption clauses.

39. It has been held in a long series of cases that exemption clauses will be effective to exclude liability for negligence only if their meaning is clear and unambiguous. Thus if a clause is capable of bearing more than one of the following meanings—

- (a) that it excludes both liability for negligence and some other liability;
- (b) that it excludes only that other liability;
- (c) that it is simply a warning of the limits of the legal liabilities of one of the parties,

the ambiguity, in accordance with the general rule of construction *contra proferentem*, will be resolved against the party relying on the clause, which will thus be held not to exclude liability for negligence. The precise formulation of this general rule in its application to clauses which are claimed to exclude liability for negligence has led to some difference of judicial opinion. It has been said that, if the act causing the damage can give rise not only to liability for negligence but also to some other liability, a clause containing general words excluding the liability of the person responsible for that act *cannot* exclude his liability for negligence⁶⁵ and that a clause containing general words excluding liability arising from an act which can give rise to liability for negligence and to no other liability *must* operate to exclude liability for negligence⁶⁶. Both these propositions have been criticised on the ground that they are stated as if they were rules of law rather than rules of construction to be used for the guidance of the court in ascertaining the intention of the parties⁶⁷.

40. Whatever differences there may be about the formulation of the rule, the reported cases show an unmistakable disinclination to construe exemption clauses as covering negligence even when in their ordinary meaning they may be wide enough to do so. Different reasons are given for this. In the recent case of *Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd.*, Buckley L.J. said:—

“It is, however, a fundamental consideration in the construction of contracts of this kind that it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence.”⁶⁸

He added later:—

“It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended.

⁶⁵ *Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192, 208.

⁶⁶ *Alderslade v. Hendon Laundry Ltd.* [1945] K.B. 189, 192.

⁶⁷ *Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd.* [1973] Q.B. 400, 414, *per* Lord Denning M.R.; *Hollier v. Rambler Motors (A.M.C.) Ltd.* [1972] 2 Q.B. 71, 80, *per* Salmon L.J.

⁶⁸ [1973] Q.B. 400, 419.

The court must attempt to discover what they did in fact intend. In choosing between two or more equally available interpretations of the language used it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result.”⁶⁹

Lord Denning M.R., however, in the same case said that although the judges in sanctioning a departure from the ordinary meaning of an exemption clause had done it under the guise of “construing” the clause, the justification for doing so is “because the clause (relieving a man from his own negligence) is unreasonable, or is being applied unreasonably in the circumstances of the particular case.”⁷⁰ He went on to say:—

“The time may come when this process of ‘construing’ the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago: ‘there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused’: *John Lee & Son (Grantham) Ltd. v. Railway Executive*⁷¹. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.”⁷²

The common law in England may possibly develop in this way but it is fair to say that the predominance of current authority both in England and in Scotland recognises the theoretical freedom, subject to the restrictions imposed by statute in particular cases, of one person to contract out of his liability to another for negligence if he does so clearly and unambiguously.

The doctrine of “fundamental breach”

41. While the law recognises a general right to contract out of liability for negligence, the courts in England have frequently refused to give effect to an exemption clause where there has been a breach of the contract of which the clause forms part if the breach is sufficiently serious to justify the application of the doctrine of “fundamental breach” or “breach of a fundamental term”. The doctrine of fundamental breach seems possibly to have been construed somewhat differently in Scots and English law, and the doctrine seems to have been considered by the Scottish courts only on rare occasions. While it seems clear that unjustified deviation will debar a carrier from relying on contractual exemption from liability⁷³ the leading Scottish case on attempted contractual exclusion of common law liability⁷⁴ seems to have rested upon principles of interpretation. Though Lord Dunedin referred to “total breach of contract”⁷⁵ in fact the contract in question—a contract to supply marine engines which turned out to contain a congeries of defects—was not repudiated by the buyer, who had elected to accept and to sue for damages.

⁶⁹ *ibid.*, p. 421.

⁷⁰ *ibid.*, p. 415.

⁷¹ [1949] 2 All E.R. 581, 584.

⁷² [1973] Q.B. 400, 415–416.

⁷³ *Polwarth v. North British Railway* 1908 S.C. 1275.

⁷⁴ *Pollock v. Macrae* 1922 S.C.(H.L.) 192.

⁷⁵ At p. 199.

A rule of law or a rule of construction?

42. It has been said by the English courts that if the effect of the breach is to bring the contract to an end, either because it makes further performance impossible or because the innocent party exercises his right to refuse further performance, an exemption clause excluding or limiting the liability of the party in breach ceases to have effect even if it is in terms wide enough to cover that breach. On one view, this is a rule of law operating without reference to the intention of the parties; on another, it is a rule of construction which must yield to words or circumstances indicating that the clause should apply to the event constituting the breach. The views expressed in the speeches delivered in the House of Lords in the case of *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*⁷⁶ were widely regarded as approving this latter view. In the subsequent case of *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*⁷⁷, however, the Court of Appeal held that the defendant was liable for the full damage flowing from his negligence—a breach of contract which clearly made further performance impossible—despite the existence of an exemption clause purporting to limit his liability in terms which the majority of the court considered to be applicable on their true construction to the consequences of the act constituting the breach. This decision appeared to treat the doctrine of fundamental breach as a rule of law—subject to the qualification that, if the innocent party elects to affirm the contract, the question whether the exemption clause applies to the breach must be settled by ascertaining the intention of the parties, that is, as a matter of construction⁷⁸. In the case of *Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd.*⁷⁹ Donaldson J. interpreted the decisions of the Court of Appeal in the *Harbutt* case and in the later case of *Farnworth Finance Facilities Ltd. v. Attryde*⁸⁰ as meaning that the doctrine was to be applied as a rule of law only where the fundamental breach consisted of what Lord Wilberforce had described in the *Suisse Atlantique* case as “a performance totally different from that which the contract contemplates”⁸¹ or what Donaldson J. himself described (using the term in a wider sense than that in which it is used in maritime cases) as a “deviation”⁸².

43. Confining our observations on the law as stated in these authorities to its effect on exemption clauses, we consider that, at least in English law, it is most unsatisfactory. In the first place, there is great uncertainty, which only the House of Lords can clear up, about whether and how the decision in the *Harbutt* case can be reconciled with the opinions expressed in the *Suisse Atlantique* case. Secondly, if the law is as stated in the *Harbutt* case, the fate of an exemption clause may depend on a fortuitous circumstance, whether the injured party elects to affirm a contract after a fundamental breach; if he affirms, the court will give effect to the intention of the parties; if not, the clause will cease to have effect irrespective of their intention. Finally, and this perhaps is only another aspect of the second criticism, it seems to us a strange and

⁷⁶ [1967] 1 A.C. 361.

⁷⁷ [1970] 1 Q.B. 447.

⁷⁸ [1970] 1 Q.B. 447, 467, *per* Lord Denning M.R.

⁷⁹ [1971] 1 W.L.R. 519, 531.

⁸⁰ [1970] 1 W.L.R. 1053.

⁸¹ [1967] 1 A.C. 361, 431.

⁸² [1971] 1 W.L.R. 519, 531.

unacceptable paradox that a contractual clause, freely negotiated and commercially reasonable, which was clearly intended to cover an event is to be deprived of effect when the event does happen.

Need for stricter control

44. The comments we have received leave us in no doubt that clauses or notices exempting from liability for negligence are in many cases a serious social evil and our review of the powers at present at the disposal of the court for dealing with such clauses shows that they are far from adequate. The case for some stricter form of control seems to us to be unanswerable.

WHAT FORM OF CONTROL IS DESIRABLE?

Various forms considered

45. In our joint document we canvassed proposals for three broad types of control over exemption clauses in the field of contracts for services, namely—

- (a) control limited to contracts for the supply of services to “consumers”, such control taking the form of a complete ban;
- (b) control limited to selected industries or selected areas of activity (“selective” control), taking the form either of control by the Restrictive Practices Court or some similar tribunal or of specific legislation, statutory or delegated;
- (c) a general scheme of control applicable to all contracts⁸³.

We reached, and invited comments on, the following provisional conclusions:—

- (i) that it was neither practicable nor desirable to limit control to “consumer” transactions in the way proposed⁸⁴;
- (ii) that control through the Restrictive Practices Court or any other tribunal would be unsatisfactory⁸⁵; that there were advantages in dealing with some subjects by specific legislation, but that this would not be satisfactory as the sole method of control⁸⁶;
- (iii) that there should be a general scheme of control “across the board” and that, except for certain specified cases, the control should take the form of a reasonableness test to be applied by the courts to consumer and commercial contracts alike⁸⁷.

46. The comments we have received on these provisional conclusions have caused us to modify some of the proposals made in our joint document. But the support for our main conclusion has confirmed our view that a general scheme of control is needed and that this should take the form of a reasonableness test that would apply to exemptions from liability in both consumer and commercial contracts. In some special cases, however, there would be control in the form of a complete ban on such exemptions.

⁸³ Joint document, paras. 35–65.

⁸⁴ Joint document, para. 41.

⁸⁵ Joint document, para. 45.

⁸⁶ Joint document, paras. 50–52.

⁸⁷ Joint document, paras. 57–65.

47. In reviewing the considerations that have led us to this conclusion two main questions arise. The first is whether the control over exemptions in respect of negligence should apply to all transactions which fall within the scope of this report, or only to some transactions or areas of activity. The second is as to the nature of the control, whether it should be a complete ban on certain provisions or whether a discretion should be exercised. Our discussion will deal first with the possibility that there should be no control over commercial contracts and then with the forms of "selective" control mentioned in our joint document. Then we shall consider control by means of a complete ban and finally come to our conclusions on the reasonableness test.

Control over commercial contracts?

48. The first question is whether there should be complete freedom to contract out of liability for negligence in commercial contracts. It is arguable that the question whether it is cheaper for the supplier or the customer to insure is essentially a matter of business judgment and that in a commercial contract the parties should be free to make their own arrangements. There is some force in this view where the parties are negotiating from positions of relatively equal strength and are fully advised as to the legal consequences. This, however, is by no means always the case even in commercial contracts, and there are many commercial contracts in which the position of the person to whom a service is supplied is much weaker than that of the person supplying the service. We therefore think there must be some control over contracting out of liability for negligence even in commercial contracts.

"Selective" control?

49. The two varieties of "selective" control mentioned at paragraph 45 above and canvassed in our joint document were put forward and considered as alternatives to a general reasonableness test; their main advantage was said to be that by confining control to selected cases or selected areas of activity they would limit interference with freedom of contract to the necessary minimum. It will be convenient to deal first with the proposal that control should be exercised through specific legislation, statutory or delegated, dealing with selected areas of activity and then with the proposal that the selective control should be exercised through the Restrictive Practices Court or some similar tribunal.

50. A majority of our Working Party considered that control should take the form of legislation, direct or delegated, confined to specific areas of trade. The arguments in favour of this view were summarized in paragraph 47 of our joint document 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;

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

51. Even if the evidence we have received had suggested that such exemption clauses had caused injustice only in a few areas, we would not draw from that the conclusion that control should take the form of legislation dealing with, or providing power to deal with, only those areas. We consider that the law should in this respect try to anticipate injustice by having a remedy available before it occurs and not simply to provide one *ad hoc* when injustice is shown to have occurred⁸⁸. The comments we have received, however, indicate that clauses exempting from liability for negligence are an actual or potential source of injustice over a very wide area. It follows from this that any attempt to deal with such injustice area by area by specific legislation would be a formidable task, which must inevitably take a considerable time; while this process was going on there would be no remedy for injustice either in the suspect area or in other areas in which it might appear. We think this applies with equal force whether the control is to be imposed by means of direct legislation or by means of subordinate legislation made by a government department under powers conferred by statute, or a combination of the two. Some, but by no means all, of the advocates of selective control argue that powers of controlling exemption clauses should be conferred upon the appropriate government department, or other comparable body, and that this would drastically reduce the delay involved in direct legislation. We think this argument is unrealistic. Even if the delay involved in the process of Parliamentary legislation were avoided, the exercise of the delegated power would involve careful and often lengthy preliminary investigation and negotiation with the trade or industry affected; in the meantime there would still be no remedy for injustice. In any case not all advocates of selective control favour the suggestion that the main control over exemption clauses should be imposed by subordinate legislation; objection has been raised to this suggestion by lawyers in private practice and by business organisations on the ground that government departments are not qualified to exercise wide-ranging powers either to identify the cases in which such a control would be necessary or to decide on the right form of control. Some lawyers in the public service have also argued, and we think with some force, that to make this the main method of control would impose upon officials a responsibility for taking decisions on questions of economic and social policy which are more appropriate for Parliament.

52. Although we cannot regard selective control by means of subordinate legislation either alone or in combination with direct legislation as a satisfactory alternative to a general control, and despite the strength of the opposition to delegating powers of control to government departments, we do see some force in the argument that the very existence of delegated powers might have a salutary effect on the conduct of suppliers. In our view, however, such a power, to be really effective, would have to be conferred in relation to certain clearly specified areas. We believe that the exercise of such powers would in most areas of trade involve a complex and therefore lengthy process of investigation. The existence of the power would soon lose its effect when it became clear that

⁸⁸ For the reasons stated in paras. 248–257, below, however, the Scottish Law Commission do not consider that their proposals should apply to all contracts.

it was unlikely to be exercised either quickly or frequently. There may, however, be exceptional cases in which the existence of such a power would have the desired effect⁸⁹.

53. The arguments set out in paragraph 51 above seem to us to apply with equal force to the proposal that the only form of control should be through the Restrictive Practices Court (or some other tribunal) in selected cases or selected classes of case. The quite different proposal that there should be a system of preliminary validation through the Restrictive Practices Court, but in combination with a general reasonableness test, is discussed later in this report⁹⁰.

Complete ban in all transactions?

54. Before discussing the proposal that control over the exclusion of liability for negligence should take the form of a complete ban limited to consumer transactions, we propose to discuss the more radical proposal not canvassed in our joint document but put forward by some of those who commented on it, namely, that the exclusion of liability for negligence should be banned outright in commercial transactions and in consumer transactions alike. This proposal has at first sight certain attractions. We are not concerned with a strict or absolute duty; liability for negligence presupposes fault, a failure to take reasonable care or to exercise reasonable skill in circumstances where there is a legal duty to take such care or to exercise such skill. It may be said that to permit a person who owes such a duty to contract out of liability for the breach of it is tantamount to giving him a licence to behave carelessly. This, it may be said, is both unjust and socially inexpedient: unjust because it deprives the person to whom the duty is owed of a right he is legally and morally entitled to; socially inexpedient because it tends to reduce standards of care and competence.

55. We do not find the argument of moral principle altogether convincing. If the situations in which the law now imposes a duty to take care or to exercise skill had been selected on strictly moral grounds there would indeed be a strong case for saying that it is morally wrong to permit a person on whom the duty is imposed to contract out of it. In fact, however, the evolution of the law on this subject has been governed by considerations of social expediency just as much as by moral principle. There are situations where current opinion would recognise a moral duty but where there is no legal duty; there are also situations in which the law imposes liability on a person who is free from any moral fault or requires a standard of skill which the person of whom it is required cannot fairly be expected to possess. Thus most people would consider that a person who sees another in immediate danger is under a moral duty to do what he reasonably can to help him; except in special cases, however, the law seemingly imposes no such duty. On the other hand, an employer may be liable for the negligence of an employee in doing something the employer has expressly warned him not to do; this is socially expedient, but there may be no moral fault. Again, it has been held that a learner driver when driving a motor car on the road must exercise the skill of a competent driver⁹¹. These considerations lead us to the

⁸⁹ See paras. 95–97, below.

⁹⁰ See paras. 290–314, below.

⁹¹ *Nettleship v. Weston* [1971] 2 Q.B. 691.

conclusion that the moral argument is inconclusive and that the proposal must be judged not solely on grounds of strict morality but on grounds of social and commercial expediency as well.

56. What we have to consider, therefore, is the effect on the interests of those it is intended to protect of imposing a complete ban on exemptions from liability for negligence. The immediate effect would be to make a person supplying services in the course of his business the insurer of the person to whom a service is supplied (whether the latter is acting in the course of a business or not) against loss or damage due to the negligence of the supplier. There is nothing inherently unreasonable about that, so long as it is the most economical way of providing cover for the customer. Our Working Party were advised, however, by the insurance experts, whose valuable assistance we have already acknowledged in our joint document, that there are many cases in which it is more economical for the person to whom the service is supplied to effect a separate insurance. In one way or the other, it is said, the customer must always pay for the insurance cover in the form either of an extra charge or of insurance premiums. If that cover is provided by the supplier, he will either insure his liability with an insurance company or, as some very large undertakings do, act as his own insurer. In either event the cost of insurance will normally be added to the supplier's charges to his customer. If it costs more for the supplier than for the customer to cover the risk of loss or damage, it would pay the customer to agree that the supplier should not be liable, to effect his own insurance and to pay a lower charge for the service. We are told that it is in fact generally cheaper for the customer to insure, at any rate for part of the risk, especially in those cases where he knows, and the supplier cannot know, the limit up to which the insurance is required⁹²; in such cases the supplier is very likely to over-insure because he will feel that he has to insure up to the maximum of each claim. Common examples are the carriage and warehousing of goods and operations like laundering, or the processing of films, where the charge bears no relation to the loss which the negligence of the supplier of the service may cause⁹³. In other cases, we were advised, the administrative costs of dealing with a large number of small claims would be so heavy that most insurers would be unwilling to cover the liability of the supplier of the service, while those who were willing to insure would be compelled to charge very high premiums. If the supplier could not insure his liability, the customer would be forced either to run the risk of suing a supplier who could not pay or to pay a far higher charge. Laundering and dry cleaning (whether for an hotel or a housewife) are quoted as examples of the services of which this is true.

57. These considerations have satisfied us that a complete ban would not always operate to the advantage of customers generally and that it might in some circumstances operate to their disadvantage. This, however, is not necessarily conclusive: we are concerned not only with the interests of customers generally but with protecting individual customers from hardship in particular cases. It is no consolation to a customer who, because of an exemption clause, cannot recover damages for loss due to his supplier's negligence to be told that

⁹² We think that the man in the street would readily recognise that a carrier may reasonably refuse to accept liability for more than £X in respect of a sealed packet whose contents were unknown to him; it might contain a diamond necklace.

⁹³ We deal with contracts of this type in more detail in paras. 116-118, below.

he is suffering for the benefit of other customers who, because of that exemption clause, are obtaining the services of that supplier at a cheaper rate than they would otherwise. We think, however, that a complete ban will not be necessary even in the interests of the individual customer. The facts put before us have satisfied us that there will be cases in which it is cheaper for him to insure and reasonable to expect him to do so and that these cases include both commercial and consumer transactions.

Complete ban in consumer transactions ?

58. It may still be said, however, that although a complete ban on exemptions from liability for negligence applicable to consumer and commercial transactions alike cannot be justified, there should be a complete ban in relation to consumer transactions. The arguments advanced in favour of this proposal are that the private consumer is at a serious disadvantage in the matter of bargaining power since normally he has 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 that he is less likely to be insured than is a person receiving the service in the course of his business. Our Working Party rejected this proposal as being too rigid and in our joint document we agreed with their conclusion. There are many situations in which the arguments in support of the proposal should prevail, but we are convinced from the evidence we have summarised in the two preceding paragraphs that there are also situations in which such a ban would not operate to the advantage of consumers. Suppliers are not all monopolists; monopolists do not always insist on using standard forms of contracts which they will not vary; customers are sometimes given a choice between accepting the risk of loss and paying a lower rate for the service or paying a higher rate and leaving the risk with the supplier. In any event, where the liability in question is liability for death or personal injury the distinction between "commercial" and "consumer" transactions is irrelevant. In our view it would not be right to recommend a complete ban on exclusion or restriction of liability for negligence in all consumer transactions.

Different treatment for total exemptions and limitations of liability ?

59. A further question that must be considered in the context of exemptions from liability for negligence is whether a distinction should be made between—

- (i) clauses totally excluding liability, and
- (ii) clauses limiting liability to a fixed sum.

In our discussion of the effect of a complete ban on exemptions we saw that there may be cases where a provision limiting liability to a stipulated sum is justifiable⁹⁴. This was one consideration that led us to the conclusion that a complete ban on exemptions would not be desirable. It might, however, be said that the proper conclusion is that clauses totally excluding liability should be banned but that clauses limiting liability should be permitted, subject, perhaps, to some measure of control.

⁹⁴ See n. 92, above.

60. We think it is clear that some control over clauses which merely limit liability is essential. Liability might be limited to an unreasonable extent. Moreover, if clauses totally excluding liability were banned it would be possible to evade the ban on total exclusion by limiting liability to a low figure if there were no control.

61. One method of controlling clauses limiting liability would be to impose a minimum figure for limitations of liability, fixed by statute or regulation, below which limitations would be ineffective. Since no single figure would be appropriate for all types of transaction and all kinds of injury or loss this would necessarily be a type of "selective control". It would no doubt be necessary to distinguish between liability for personal injuries and other liability. In fixing a minimum figure for limitations of liability in respect of personal injuries it might be necessary to fix different minimum amounts for death and for injuries not resulting in death, or to fix different amounts for different types of activity. In fixing a figure for loss of or damage to property different types of transaction might need to be separately considered. Even in one type of activity it might be difficult to select an appropriate fixed minimum: for example, in the carriage of goods different contract terms which we have seen include a wide variety of provisions for limitation of liability. Moreover any figures which were selected might require to be adjusted in the light of economic conditions. There is, too, always the risk that the figure laid down may be lower than the amount which might have been chosen by the parties themselves, and this could have the effect of encouraging the use of the lower figure. Our conclusion is that statutory minimum amounts would not usually be a desirable form of control for provisions limiting liability.

62. Another method would be to subject all limitations of liability to a test of reasonableness. There would seem to be practical difficulties involved in a scheme combining a ban on total exclusion of liability with a reasonableness test over clauses limiting liability. No doubt a limitation of liability to a purely nominal amount would be regarded by the courts as an attempted evasion of the ban on total exclusion of liability and would not be upheld. But there might be considerable difficulty in deciding whether a clause limiting liability to a low figure was attempted evasion or should be upheld. For example, it might be thought that in many circumstances it would be reasonable for a party to limit his liability to the contract price, but if the contract price were £10 and the damage arising were £1,000 the limitation of liability might appear to be an evasion of the ban on total exclusion of liability. These difficulties would not be so acute if the court did not have to decide either to uphold the limitation as it stood or to reject it but had the power to award damages for such higher sum as they would have regarded as a reasonable limitation. We do not think, however, that this would be an appropriate power to confer on the courts, for it is difficult to see how they would arrive at the amount, less than the normal amount of damages, which would have been a reasonable limitation. The overwhelming objection to this solution is that it would encourage persons seeking to rely on the limitation of liability to insert a limitation with an unreasonably low figure knowing that the courts could amend the limitation to whatever figure they thought reasonable in the circumstances.

63. The advantages of a complete ban which applies both to the total exclusion of liability and to clauses limiting liability are that both parties can be clear as to their legal position from the outset and that appropriate arrangements as to insurance can be made. (There are similar advantages if provisions excluding or limiting liability are valid.) These advantages would be lost if, although total exclusions of liability were banned, limitations on liability were subject to a reasonableness test. Moreover, there would be, as we have seen, practical difficulties in combining a complete ban on total exclusion with a reasonableness test on limitation of liability. We therefore reject a complete ban applying only to exemption clauses which totally exclude liability for negligence.

A general reasonableness test?

64. In paragraphs 49 to 58 above we have set out in detail our objections to the proposals that control over the exclusion or limitation of liability for negligence⁹⁵ should (i) take the form of a complete ban, whether in all transactions or in consumer transactions, or (ii) be limited to specific activities. Our objection to the former is, in essence, that it goes too far; to the latter that it does not go far enough. We agree with the protagonists of a complete ban in thinking that there should be a general control but we consider that the control should be one which subjects any provision excluding liability for negligence to a test of reasonableness; we agree with the protagonists of selective control in thinking there are special classes of activity which call for special measures of control. We propose therefore that there should be a general control in the form of a reasonableness test, supplemented where necessary by special provision for specified activities. We think this has the merits of both the other forms of control proposed and has positive advantages over each of them. After a careful consideration of the comments made in response to our joint document we still think that the advantages of our proposal outweigh its disadvantages and, indeed, that these disadvantages are less serious than the critics suggest.

65. We think the relative advantages of a reasonableness test are clear. It would provide the general control we think necessary. It would operate flexibly, enabling account to be taken of the great variety of situations to which any general control must apply and without interfering unduly with arrangements which have long operated to the advantage of suppliers and consumers alike. Finally, it would not be exclusive but would leave room for special treatment for selected cases. The main argument against it is that it would introduce an undesirable, some say intolerable, uncertainty into the law. It has also been criticised on the ground that it would involve an undue interference with freedom of contract.

66. We agree that the introduction into this field of a general reasonableness test will involve some uncertainty. We do not, however, believe that it will, as its critics seem to suggest, create uncertainty where there is now certainty. We have already recorded our view⁹⁶ that the means evolved by the courts for

⁹⁵ Hereinafter we revert to the use of "exclusion" to include limitation or restriction: see para. 36, above.

⁹⁶ See paras. 38-44, above.

striking down unreasonable exemption clauses, while they have no doubt prevented injustice in particular cases, are inadequate to deal with the problem and that the present state of the law, especially that relating to the effect on exemption clauses of a fundamental breach, is, in England at least, complicated, uncertain and in some respects unsatisfactory in its operation. Those who favour a general reasonableness test point out that similar criteria are applied by many jurisdictions in the United States without apparently producing the untoward results which it is said would follow its introduction into the jurisdictions of England and Scotland. We recognise that this argument is not conclusive. The fact, if fact it be, that a similar test has not created a harmful degree of uncertainty in other jurisdictions is not necessarily a reliable indication of how it would operate on our own jurisdictions. We are more impressed by the argument that in England and Scotland the courts have long applied a test of reasonableness in deciding whether contracts in restraint of trade are enforceable⁹⁷, and in determining, in a wide variety of situations, the standard of care one person owes to another. A reasonableness test has recently been introduced into the law of England by the Misrepresentation Act 1967 and into the laws of England and Scotland by the Supply of Goods (Implied Terms) Act 1973. We doubt if either Act has been in operation long enough to settle beyond argument whether or not the test creates an undesirable degree of uncertainty, although we note with interest that The Law Society in their comments on our joint document say that, on the whole, time has shown that section 3 of the Misrepresentation Act 1967 (the section which introduces a reasonableness test) has not caused such difficulties as were predicted when it was passed. We attach some importance, however, to the history and effect on commercial practice of a much earlier example of a statutory reasonableness test, namely, section 7 of the Railway and Canal Traffic Act 1854. This section, after providing that the companies to which it applied were to be liable for loss of or damage to goods due to the negligence or default of the companies' servants or agents, contained a proviso saving such conditions as should be "adjudged by the court or judge . . . to be just and reasonable." This section and the wide interpretation put upon it by the courts⁹⁸ were strongly criticised at the time, but in practice the courts, even when lamenting the necessity⁹⁹, do not seem to have found much difficulty in recognising unjust and unreasonable exemptions when they saw them¹⁰⁰. The 1854 Act was repealed by the Transport Act 1962 and the exclusion of liability for negligence in contracts for the carriage of goods by rail or canal is no longer subject to a statutory reasonableness test. But the current practice followed by carriers by rail of offering their customers a choice between having their goods carried at owner's risk or at a higher rate at carrier's risk, which is generally recognised as being advantageous to customers, is based on the interpretation placed by Victorian judges on the proviso cited above to section 7 of the 1854 Act.

⁹⁷ *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* [1974] 1 W.L.R. 1308, 1315, per Lord Diplock.

⁹⁸ The leading case was *Peek v. North Staffordshire Ry. Co.* (1863) 10 H.L.C. 473.

⁹⁹ ". . . here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business." See the judgment of Lord Bramwell in *Manchester, Sheffield and Lincolnshire Ry. Co. v. Brown* (1883) 8 App. Cas. 703, 716.

¹⁰⁰ See *Halsbury's Laws of England* (3rd ed., 1960), vol. 31, cases cited on p. 748 in notes (b) to (i) and on p. 749 in note (m).

67. The objection that the introduction of a general reasonableness test would involve unjustifiable interference with freedom of contract is essentially an objection to any general control over exemption clauses. It is convenient, however, to deal with it here because we think the objection can be considered in better perspective at this stage in our discussion. It is valid only to the extent that there is true freedom of contract to interfere with, and the objection has no validity where there is no real possibility of negotiating contract terms, or where a party is not expected to read a contract carefully or to understand its implications without legal advice. In our view no legislative formula can distinguish between situations where there is genuine freedom of contract and those where there is not. Only individual scrutiny of all the circumstances to take into account the strength of the bargaining positions of the parties, the knowledge and understanding of the term in question, the extent to which one party relied on the advice or skill of the other, and every other relevant fact, can lead to a valid distinction. This is why a test of reasonableness is needed.

68. We have concluded that a general control over the exclusion of liability for negligence is desirable and that the only form in which it can be imposed satisfactorily is that of a reasonableness test. We have also reached the conclusion that the drawbacks of a reasonableness test have been exaggerated. Against this background we are, therefore, faced with a clear choice between having no control in situations in which we think there should be control or imposing a general reasonableness test, with its attendant drawbacks. We should be justified, therefore, in rejecting a general reasonableness test only if we were satisfied that the disadvantages attendant upon imposing such a test were greater than the disadvantages of having no control at all over a wide range of situations in which we think there should be control. We have little doubt that the balance of advantage lies with the introduction of a general reasonableness test.

Recommendation

69. (a) *We recommend that within the scope of the respective proposals of the two Commissions all provisions excluding or restricting liability for negligence incurred in the course of a business should be made subject to some form of control.*

(b) *For this purpose "negligence" should be taken to mean the breach of a duty or obligation imposed by the common law or by contract to take reasonable care or to exercise reasonable skill, but not any stricter duty, or the breach of the duty of care imposed upon occupiers of premises by the Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960.*

(c) *The provisions to be subject to control include not only contractual terms but such provisions as conditions attached to licences and the voluntary conferring of other benefits.*

(d) *There should, in the first place, be a general control in the form of a reasonableness test.*

(Paragraphs 36-68.)

COMPLETE BAN IN SPECIAL CASES

70. Our conclusions that exemptions from liability for negligence should be subject to control, and that this control should generally take the form of a reasonableness test, do not mean that there are not some special situations where the reasonableness test would be inadequate. There are in our view a number of cases where a complete ban on such exemptions is necessary.

71. There are in the present law a number of situations where statute already imposes a complete ban on exemptions in relation to death or personal injury. Broadly speaking, these are in connection with the liability of an employer to employees, and with the carriage of passengers. We consider not only that these existing prohibitions on exemptions should remain, but that they should be extended. We do not, however, think that there should be a general prohibition of exemptions in all situations if death or personal injury is negligently caused. We propose first to explain why we do not think there is a case for a general ban on exemptions relating to liability for death or personal injury and then to consider the special situations where a complete ban is called for.

(a) Death or personal injury

General ban inappropriate

72. As our joint document indicated¹⁰¹, the Working Party on exemption clauses were of the opinion that the type of damage wrongfully caused was irrelevant to the question whether exemptions from liability were acceptable and that there should be no differentiation between the treatment of clauses exempting from liability for death or personal injury and those exempting from liability for damage to property. The Law Commissions reached the opposite conclusion, mainly because it was felt that a civilised society should attach greater importance to the human person than to property. We thought that there was a *prima facie* case for an outright ban on clauses totally excluding liability for death or personal injury due to negligence. We suggested, however, that there was no case for an outright ban on exemptions which limited liability to a fixed sum, and many of those we consulted thought similarly.

73. The difficult question is how an attempt to restrict liability to a specified figure should be controlled. We have already discussed the control of such provisions in a wider context¹⁰², and our conclusion that statutory minimum amounts would not usually be a desirable form of control seems to us to be equally valid in relation to liability for death or personal injury. There is no clear principle which could lead us to recommend any particular amount. Should the limitation represent the sort of sum that would be recovered in an action brought by an injured person or his estate? If so, should we be guided by awards in the higher range? One reason for a limitation is so that insurance can be obtained sufficient to cover the maximum amount of possible liability, and clearly there should be no encouragement to inadequate insurance. From this point of view the figure of £10,000, which we put up as an example in our joint document¹⁰³ of a fixed sum which might be prescribed for all industries, is much too low. But there may be situations where the cost of insurance

¹⁰¹ Joint document, paras. 66–68.

¹⁰² See paras. 60–62, above.

¹⁰³ Joint document, para. 68.

premiums is an important factor in calculating prices, where the bargaining position of the parties is equal and where both have considered their individual insurance cover and are content with a low figure. There must, we think, be a more flexible form of control than attempting to legislate for the precise amount of permitted limitation, which would probably get out of date if the experience of international agreements relating to carriage by air is any guide.

74. The only form of control which is sufficiently flexible in our view is the test of reasonableness, and we have already explained our conclusion that a reasonableness test over limitations of liability is not really possible in conjunction with a ban on total exclusions of liability¹⁰⁴. There are only two possibilities for practical purposes: a complete avoidance of all provisions excluding or restricting liability, or a general reasonableness test over both limitations and total exclusions of liability. The case for the former is in essence that persons injured (or the estates of those killed) as a result of another's negligence must always be entitled to full compensation from him or his insurer. We think that there will be many cases where this argument holds, but it ignores situations where the parties have equal bargaining strength and have consciously agreed the proportions in which insurance cover should be provided. Whether or not the risk of potential liability has a deterrent effect in discouraging negligence, we do not feel able to recommend a total ban on all exemptions from and restrictions on liability for death or personal injuries caused by negligence. We do, however, believe that a total ban on exemptions is called for in certain situations where one party, in a relatively weak bargaining position, places a high degree of reliance for his personal safety on the care and skill of the other. These situations are typified by those provisions in the present law where there is a total avoidance of exemptions in respect of death or personal injury as between employer and employee and as between carrier and passenger. Sometimes there is no practical prospect of negotiation of terms. Sometimes, although bargaining may be possible, the position of the employee or passenger is so weak that there is no prospect of terms being amended in his favour. The brief review of these provisions in paragraphs 75 to 84 below indicates how limited is the field of application of the existing legislation and the nature and extent of the gaps that exist even within that limited field. It will also enable us to explain how we propose that the control should be extended and the gaps filled.

Current legislation on exemptions

75. *Employers' liability.* There is now a complete ban on an employer's contracting out of his liability in respect of the death of or personal injury to an employee if the liability arises from (a) the negligence of another employee¹⁰⁵ or (b) the provision of defective equipment, if the defect is due to the fault of someone other than the employer¹⁰⁶. The fact that the employer is still free to exclude or limit his liability at common law for his own personal negligence is a strange gap in this legislation, all the stranger in that he is now required by the Employers' Liability (Compulsory Insurance) Act 1969 to insure against liability for bodily injury or disease sustained by his employees, arising out of and in the course of their employment.

¹⁰⁴ See para. 62, above.

¹⁰⁵ Law Reform (Personal Injuries) Act 1948, s. 1(3).

¹⁰⁶ Employer's Liability (Defective Equipment) Act 1969, s. 1(2).

76. *Carriage by motor vehicle*. Section 151 of the Road Traffic Act 1960 provides that:—

“A contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void”.

This provision is limited to carriage by “public service vehicles” and even within that limited field applies only in favour of passengers under a “contract”. Whereas Scots law accepts the concept of a gratuitous contract of carriage, it has been held in England that a pass issued to an employee entitling him to travel free on his employer’s omnibus is for this purpose a mere licence and not a “contract”¹⁰⁷.

77. Section 148(3) of the Road Traffic Act 1972 imposes a complete ban on any attempt to negative or restrict the liability of the user of a motor vehicle in respect of the death of or personal injury to a person carried in it, or to impose conditions on the enforcement of such liability. It also provides that the fact that the passenger has accepted as his the risk of negligence on the part of the user shall not be treated as negating any such liability of the user. For historical reasons, not relevant to this report, the application of section 148(3) is limited to cases in which the system of compulsory third party motor insurance covers passengers. As a result the section does not cover the use of motor vehicles except on a road¹⁰⁸, there are many cases where it does not apply at all¹⁰⁹, it does not cover “contractual liability”¹¹⁰, and it does not apply to the Crown¹¹¹. These are all serious gaps.

78. The Carriage of Passengers by Road Act 1974, which has not yet been brought into operation, contains provisions for giving effect to the Convention on the Contract for the International Carriage of Passengers and Luggage by Road. The Convention makes the carrier liable for the death of or personal injury to a passenger carried under international contract by road, but he is relieved of his liability if the accident was caused by circumstances which a carrier, using the diligence which the particular facts of the case call for, could not have avoided and the consequences of which he could not prevent. Any stipulation purporting to exclude this liability is made void. Article 13 of the Convention limits the carrier’s liability, but, by virtue of section 3 of the Act, this would not apply where the carrier had his principal place of business in the United Kingdom.

¹⁰⁷ *Wilkie v. London Passenger Transport Board* [1947] 1 All E.R. 258; but see *Gore v. Van Der Lann* [1967] 2 Q.B. 31 (issue and acceptance of a free pass for use by an old age pensioner on a corporation’s buses held to constitute a “contract”).

¹⁰⁸ Because third party insurance is required only in respect of user on a road: Road Traffic Act 1972, s. 143(1).

¹⁰⁹ Because they are exempted from the requirement of third party insurance by s. 144: they include the use of a vehicle owned by a person who has deposited £15,000 with the Supreme Court and all vehicles owned by certain local government authorities or a police authority, while being driven under the owner’s control.

¹¹⁰ By virtue of s. 145(4)(b).

¹¹¹ See s. 188(1) of the Road Traffic Act 1972.

79. *Carriage by rail.* Section 43(7) of the Transport Act 1962 provides that:—

“The Boards¹¹² shall not carry passengers by rail on terms or conditions which—

- (a) purport, whether directly or indirectly, to exclude or limit their liability in respect of the death of, or bodily injury to, any passenger other than a passenger travelling on a free pass, or
- (b) purport, whether directly or indirectly, to prescribe the time within which or the manner in which any such liability may be enforced,

and any such terms or conditions shall be void and of no effect”.

80. By virtue of section 52(4), the provisions of section 43(7) do not apply in respect of the carriage of passengers on certain light railways. This and the exclusions from the benefit of section 43(7) of passengers travelling on a free pass are serious gaps in the control. By virtue of section 1(1) of the Carriage by Railway Act 1972, certain international contracts of carriage by rail are now subject to the provisions of the international convention set out in the Schedule to the 1972 Act. As regards claims arising from accidents occurring in the United Kingdom any attempt to exclude or limit liability in respect of the death of, or personal injury to, a passenger is made void.

81. *Carriage by air.* The Carriage by Air Act 1961 provides, in relation to carriage by air to which the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 applies, that “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void . . .”¹¹³. The same ban is also imposed in relation to carriage by air to which the Warsaw Convention applies in its original form¹¹⁴. The ban forms part of the closely integrated system for regulating carriage by air embodied in the Convention. For our present purposes the essential features of that system may be briefly summarised as follows:—

- (i) the carrier is placed under a statutory liability for the death of or bodily injury to a passenger, unless he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures;
- (ii) liability is limited to a specified sum but this may be increased by special contract;
- (iii) the parties may not exclude the statutory liability nor may they fix a limit of liability lower than that specified.

¹¹² The “Boards” are the British Railways Board, the British Transport Docks Board and the British Waterways Board (Transport Act 1962, s. 1(1)); by virtue of s. 6(2)(g) of the Transport (London) Act 1969, the provisions of s. 43(7) above also apply to carriage by rail by the London Transport Executive and, by virtue of s. 52(2) of the 1962 Act, s. 43(7) applies to carriage by any independent railway undertaking the carrying on of which is authorized by, or by an order made under, an Act of Parliament.

¹¹³ Carriage by Air Act 1961, Schedule 1, Article 23(1).

¹¹⁴ Carriage by Air Acts (Application of Provisions) Order 1967, Article 5(1), S.I. 1967 No. 480.

This system, without any alteration of the features mentioned above, has been extended to “non-international” carriage, that is, in effect, purely domestic carriage or carriage between the United Kingdom and a country which is not a party to the Warsaw Convention either in its original or its amended form¹¹⁵.

82. This system of regulation, including the ban on contracting out, applies only in relation to carriage falling within the 1961 Act, that is, only if the carriage is performed for reward or if it is gratuitous carriage by an air transport undertaking. Gratuitous carriage of a passenger by any person other than an air transport undertaking is therefore governed by the common law even if it is performed in the course of a business: the carrier is liable if the death or personal injury is shown to be due to his negligence but the parties are free to exclude or limit such liability.

83. By virtue of section 1 of the Hovercraft Act 1968 and the Hovercraft (Civil Liability) Order 1971¹¹⁶ control of clauses excluding or limiting liability for death or injury to passengers carried by hovercraft is similar to the control in relation to carriage by air. The provisions apply to all carriage by hovercraft for reward and to gratuitous carriage by hovercraft performed by a hovercraft transport undertaking.

84. *Other forms of carriage of passengers.* As regards other forms of carriage of passengers, there is no control over the carrier’s freedom to exclude or restrict his liability for the death of or personal injury to his passenger. This applies to carriage by land in any vehicle other than a motor vehicle, to carriage on any lake or inland waterway and, most important of all, to carriage by sea. Indeed, there is a provision, section 503 of the Merchant Shipping Act 1894, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act 1958, for the limitation, in certain circumstances, of the liability of the shipowner and others to a “global” amount. The amount is “global” in the sense that the total liability of the shipowner for death or personal injury incurred on any distinct occasion is limited to a sum computed by reference to the tonnage of the ship. If the total of claims arising on such an occasion exceeds the global amount each claim is proportionately abated. The provision is restricted to liability in respect of certain occurrences which take place without the “actual fault or privity” of the shipowner. Provision for this type of limitation of liability has long formed part of our law; it is now required by international convention¹¹⁷. For the purposes of this report, the main significance of the provision is that it limits the vicarious liability of the shipowner or charterer for the negligence of the master or crew.

Inadequacy of current legislation

85. *General.* We have already indicated¹¹⁸ that we believe that in certain situations, where one party in a comparatively weak bargaining position places a high degree of reliance for his personal safety on the care and skill of another, a total ban on exemption from liability for death or personal injury is called

¹¹⁵ *ibid.*, Article 4(1).

¹¹⁶ S.I. 1971 No. 720, Article 3.

¹¹⁷ *The International Convention relating to the Limitation of the Liability of the Owners of Sea-going Ships*, (1957) Cmnd. 357.

¹¹⁸ See para. 74, above.

for. We can see no justification for the gaps in the control imposed in respect of contracts of employment, carriage in motor vehicles or carriage by rail. We have already indicated these gaps. They may be summarised as follows. The employer is still free to contract out of his liability in respect of the death of or personal injury to an employee if it is due to the employer's own personal negligence. A carrier by motor vehicle, unless it is a public service vehicle, is free to exclude his liability to a passenger in cases where the use of the vehicle is not required to be insured against third party risks. The carrier by public service vehicle, if he is not required to be insured against third party risks, is still free to exclude his liability to a passenger who is not travelling under a "contract". Carriers by rail are free to exclude liability to passengers travelling on a free pass. The carrier on land by means of any vehicle other than a motor vehicle, the carrier by an inland waterway and, most important, the carrier by sea, are still free to exclude liability for the death of or personal injury to a passenger. We propose that there should be a total ban applicable both to contracts of employment and to all carriage of passengers. The most important effect of implementing this proposal would be that carriers by sea would no longer be free to contract out of their liability. In view of the social and economic importance of this form of carriage we should perhaps explain why we think this extension of the ban is necessary.

86. *Carriage by sea.* The exemption clauses used in connection with carriage by sea are among the most sweeping we have examined. The passenger by sea, however, is as much in need of protection as a passenger by air, motor vehicle, or by rail, and in principle the freedom currently enjoyed by the carrier by sea seems to us to be indefensible. We have been told that shipping companies rarely take advantage of these exemption clauses and that the passengers who suffer injury or the dependants of passengers who are killed as a result of the negligence of the shipping company can expect to receive adequate *ex gratia* payments. It is argued that shipping companies are so vulnerable to vexatious and unreasonable claims by passengers that they are forced in self-defence to contract out of the liability outright. It is argued too that carriage by sea is subject to intense international competition and that it would place the British carrier at a serious competitive disadvantage if he had to bear a heavier burden of liability than his foreign competitor. We are not impressed by the first of these arguments; passengers by sea, like other customers, may sometimes make unreasonable claims, but we do not think that the supplier of a service should be free to set himself up as the absolute judge of what claims he should meet and what he should not. This is especially so in the case of carriage by sea, where the passenger is an individual usually entering into the contract without legal advice, unable to modify the terms of the contract under which he is to be carried, and often not adequately insured. The first argument has not prevailed in the case of carriage by air or carriage by rail, and we see no reason why it should prevail in the very similar circumstances of carriage by sea. There is more substance in the second argument; indeed, it is plainly desirable, in the interests both of passengers and of carriers, that there should be international agreement on the rules applicable to carriage by sea. The terms of an international convention on this matter, the Athens Convention on the Carriage of Passengers and their Luggage by Sea, have recently been settled and the convention has been opened for signature. If the United Kingdom accedes to it, the legislation necessary for the purpose of implementing it will include

provisions for controlling exemption clauses in contracts for the carriage of persons by sea which differ in some respects from our proposal; the most important difference would be that, although the total exclusion of liability would not be possible, the limitation of liability for death or personal injury due to the negligence of the carrier would be permitted so long as the amount so fixed was not less than the amount prescribed in the legislation. It is not intended that our proposals should affect control imposed by that legislation¹¹⁹.

87. *Movement by mechanical device.* We think there are many activities which, although they do not involve the "carriage" of persons in the ordinary sense, so strongly resemble it in all essential respects that the same control on exemption clauses should be applied. A member of the public who uses a lift or an escalator in a department store or takes a ride in a "Big Dipper" at a fun-fair certainly places a high degree of reliance on the care and skill of the person who operates the device and his bargaining power is no stronger than that of an ordinary passenger by motor car or by train. It may be said that the person who takes a ride in a "Big Dipper" is not entitled to the same degree of protection as the person who uses a lift or an escalator because he does it purely for his own entertainment and he does not in any sense need to use it. We do not think that this is a valid distinction. The degree of dependence on the care and skill of the person operating the device is the same and in all such cases the bargaining position of the person making use of the device is weak in comparison with that of the person operating it. We think there should therefore be a total ban on excluding or limiting liability for death or personal injury due to negligence suffered by any person as the result of the defect, malfunction or mismanagement of any device for the movement of persons. This would cover lifts, escalators, and "travelators" as well as such devices as the "coaster train", the carrying of persons in which was recently held not to be the "transport of passengers" for the purposes of value added tax¹²⁰.

88. *Car parks.* The criteria we have adopted in recommending that in certain circumstances exemptions from liability for negligence should be made void in relation to liability for death or personal injury are these: that one party is in a relatively weak bargaining position, and that he places a high degree of reliance for his personal safety on the other's lack of negligence¹²¹. Car parks need to be considered in the light of these criteria. Many operators of car parks rely on exemption clauses; attempts may be made to introduce such clauses by notices or by tickets or by some combination of notices and tickets. These exemption clauses have been the subject of much criticism both in and outside Parliament, and have been attacked as being unreasonable and unfair.

89. We are of course discussing this question solely in the context of negligence. The potential liability for death or personal injury which rests on the operator of a car park, whether under the Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960 or at common law, depends on negligence. Negligence might, for example, arise out of a lack of care in the design of the car park, the regulation of traffic or the operation of an internal system of traffic lights, or it might involve the lack of care of employees in controlling machinery or in driving vehicles within the car park. There is no

¹¹⁹ For the relationship between the proposed controls and existing legislation see paras. 258-276, below.

¹²⁰ *Customs and Excise Commissioners v. Blackpool Pleasure Beach Co.* [1974] 1 W.L.R. 540.

¹²¹ See para. 74, above.

presumption of negligence: it is for the claimant to prove his case. The mere fact that someone has been injured in a car park does not necessarily mean that the operator of the car park is under any liability.

90. On the assumption that the operators of a car park, or their employees, have been negligent, the question we have to consider is the extent to which exemption clauses purporting to relieve them from liability for death or injury should be subject to control. Under the proposals made above they would be subject to the reasonableness test: is this a sufficient control, or is something more rigorous needed?

91. It is clear that the user of a car park has little chance of negotiating the terms on which he is admitted. Megaw L.J. has described the difficulty, in one case, of finding the conditions:

“It does not take much imagination to picture the indignation of the defendants if their potential customers, having taken their tickets and observed the reference therein to contractual conditions which, they said, could be seen in notices on the premises, were one after the other to get out of their cars, leaving the cars blocking the entrances to the garage, in order to search for, find and peruse the notices!”¹²²

However well displayed the conditions are, the impossibility of actually discussing and attempting to amend them does not need describing. Moreover many such conditions actually provide that no employee has authority to vary them. In theory, no doubt, the motorist could refuse to accept the conditions and drive away, but that might be physically impossible without actually entering the car park and coming out again, while it must be recognised that often the operator of the car park is virtually a monopolist, especially in those areas where local authorities follow a policy of discouraging parking in the streets.

92. The other criterion we suggested is a reliance on the care or skill of another for one's personal safety. It is not, we think, unfair to compare a car park in which vehicles are driven to a road. To a pedestrian in the car park—and everyone using a car park is a pedestrian at some stage—the premises are at least as dangerous as any road. Yet we have seen conditions that even purport to exempt from liability for the negligent driving of motor vehicles by employees. There is, in the present state of the law, no compulsion for the operator of the car park to insure against liability to third parties arising out of driving accidents, for the compulsory insurance under the Road Traffic Act 1972 is limited to the use of motor vehicles on a road¹²³. Apart from accidents where vehicles are driven by employees, accidents may, as we have seen, be caused for example by the negligent design of the car park or the negligent operation of machinery¹²⁴. Whether or not it is compulsory, we have no doubt that it would be prudent for car park operators to insure their liability, whether personal or vicarious. It would not be reasonable to expect individuals to take out personal accident insurance before entering a car park. In our view the operator of a car park

¹²² *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163, 173.

¹²³ Road Traffic Act 1972, s. 143(1); the definition of “road” is in s. 196(1).

¹²⁴ *cf. Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163.

should not be permitted to exclude or restrict liability for death or personal injury as the result of his negligence or that of his employees, and such exemptions should be made void.

93. A word must be added about the expression “car park”, which is used to cover a wide variety of situations. There is the unsupervised open space adjacent to a hotel or shop where no charge is made, though a notice may attempt to confine its use to customers or patrons. There is the privately owned field near a beauty spot which is normally available for free parking though on bank holidays the owner may charge for entry. There is the multi-storey car park in a city centre or airport, more or less mechanised, where substantial prices are charged for parking. This list is obviously not exhaustive. The car park may be operated by a commercial concern, perhaps specialising in car parks, or by a municipality; some local or public authorities delegate the operation of their car parks to commercial undertakings. We believe that many of the critics we have mentioned have in mind car parks operated by commercial undertakings as an independent, profit-making business. Our study of exemption clauses, as we have said earlier¹²⁵, is directed at exemptions relating to liabilities which arise in the course of a business: this is wide enough to cover not only the non-profit-making activities of local authorities but also a car park available as a free service to customers patronising a shop or hotel, or a car park adjacent to a block of flats belonging to a property company. We doubt if all the critics have been thinking of such car parks. We have considered how far any proposals we make might be confined to, say, car parks where a separate charge is made for parking; but we have reached the conclusion that such a distinction would not be justified. The possibility of liability for negligence is very much less where the car park is an unattended open space, and we do not think it unreasonable to expect the car park operator to insure against possible liability to entrants. We therefore think that all car parks—by which term we include lorry parks and indeed all parking facilities for motor vehicles—which are operated in the course of a business should be treated alike, even if the business is not that of providing parking facilities.

Recommendation

94. *We recommend, as regards liability incurred in the course of a business for death or personal injury due to negligence, that provisions excluding or restricting liability should be made void in the following circumstances:—*

- (a) *where a person is killed or injured in an accident arising out of and in the course of his employment and the liability is that of his employer (paragraphs 75 and 85);*
- (b) *where a person is killed or injured while being carried as a passenger by land or water or in the air and the liability is that of the carrier (paragraphs 76–86);*
- (c) *where a person is killed or injured in consequence of a defect, malfunction or mismanagement of a device for the movement of persons (paragraph 87);*
- (d) *where a person is killed or injured while making use of a car park (by which we mean any facilities for parking motor vehicles) and the liability is that of the occupier or manager of the car park (paragraphs 88–93).*

¹²⁵ See para. 9, above.

Power to extend ban in personal injury cases

95. If the recommendations we have made for extending the existing statutory controls are accepted, there will be in addition to the general reasonableness test a complete ban on excluding liability for negligence causing death or personal injury over a wide area where experience has shown that such a ban is needed, namely, situations involving the relationship of employee to employer, the carriage or movement of persons and the operation of car parks. We have come to the conclusion, however, that there is room for the extension of a complete ban to other situations which are essentially similar. As we have pointed out¹²⁶, the essential features of the situations noted above are (i) that the employee or passenger places a high degree of reliance for his personal safety on the care and skill of the employer or carrier and (ii) that in relation to exemption clauses the bargaining position of the employer or carrier is usually strong and that of the individual employee or passenger relatively weak. We think, however, (iii) that the ban should be extended only where it seems that there is a danger that exemption clauses may be used unfairly or unreasonably. It is not difficult to suggest a situation in which the first two requirements are satisfied: a patient who has agreed to undergo an operation is very largely dependent on the care and skill of the surgeon and his operating team and the bargaining position of a person in need of an operation is not of the strongest. This situation satisfies the first two requirements. On the other hand, patients awaiting operation are not required to agree that the surgeon and his team should be exempt from liability for negligence. The form of consent which a patient normally signs is not in any sense an exemption clause and we have no reason to suppose that it will ever become the practice to require patients to agree that the liability for negligence of surgeons should be excluded. We have deliberately chosen this far-fetched example as illustrating the need for all three requirements to be satisfied before a complete ban could be justified. We do not believe that it would be appropriate to extend the ban by means of a general provision in an Act of Parliament, leaving it to the court to decide whether the requirements indicated above are satisfied. The process of identifying situations satisfying those requirements is likely to involve detailed preliminary inquiry into the class of activity affected and the taking of decisions in the light of considerations of public policy which cannot be determined in advance. These operations are more appropriate to the legislative or administrative process than to the judicial; on the other hand we think the general characteristics of the situations concerned are sufficiently well identified to justify our recommending that there should be a power to extend the ban by delegated legislation, with the attendant saving of Parliamentary time.

96. We therefore think that the Secretary of State should be empowered to specify classes of activity to which a complete ban on excluding liability for death or personal injury due to negligence should be extended. We think the power should be exercisable only when the Secretary of State has received the assurance of a competent and independent authority that its exercise will be justified. The functions of the Director General of Fair Trading under section 2 of the Fair Trading Act 1973 include receiving and collating evidence of practices which may adversely affect the health or safety of consumers in the United

¹²⁶ See para. 74, above.

Kingdom. By virtue of sections 17 and 19 of the Fair Trading Act 1973, the Director General may initiate a procedure which will result in the Secretary of State's making an order for the purpose of preventing the continuation of certain practices which the Director General considers have the effect or are likely to have the effect of prejudicing the interests of consumers. His office has already acquired skill and knowledge in this field. We therefore propose that the Secretary of State should exercise this power in relation to any particular class of activity only if a recommendation to that effect has been made by the Director General. The Secretary of State should, however, be free to give partial or modified effect to the Director General's recommendation: a power merely to accept a recommendation in its entirety or to reject it might prove too inflexible in practice. The Director General should make a recommendation only when he is satisfied that the situation to which his recommendation relates is one in which the protection of a complete ban on exemptions from liability for death or personal injury due to negligence is needed because the situation seems to him to satisfy the three requirements specified in paragraph 95 above as justifying the extension of the ban. In view of the importance of the power and its far-reaching effect on the interests of the suppliers of services, we would suggest that the power be made exercisable only when a draft of the necessary instrument has been approved by both Houses of Parliament. We also think that the Secretary of State should be required to lay a copy of any recommendation received from the Director General before each House of Parliament and to arrange for it to be published.

Recommendation

97. (a) *We recommend that the Secretary of State, acting on a recommendation made by the Director General of Fair Trading, should have power to direct by order that, in circumstances described in the Director General's recommendation, provisions excluding or restricting liability incurred in the course of a business for death or personal injury due to negligence shall be void. The Secretary of State should be free to give partial or modified effect to a recommendation made by the Director General.*

(b) *The Director General should be empowered to make a recommendation only if he is satisfied that in the case described in his recommendation persons need protection because, in his opinion,*

- (i) *they specially depend for their personal safety on the skill and care of others;*
- (ii) *either they are not in a position to negotiate or, if they are, their bargaining position in relation to exemption clauses is weak; and*
- (iii) *they are exposed to the unfair or unreasonable use against them of exemption clauses.*

(c) *The power proposed in sub-paragraph (a) above should be exercisable only after a draft of the order has been approved by an affirmative resolution of each House of Parliament.*

(d) *The Secretary of State should be required to lay a copy of recommendations made by the Director General before each House of Parliament and to publish them.*

(Paragraphs 95 and 96.)

(b) Loss which includes damage to property

98. The proposals made in paragraphs 94 and 97 above for the total avoidance of exemption clauses all relate to provisions exempting from liability for negligence in personal injury cases. As we have already indicated, we think that, as a general rule, the reasonableness test will provide an adequate measure of control over provisions exempting from liability for negligence so far as loss of or damage to property is concerned. We have considered, however, whether there should be any exceptions to this general rule and have given particular attention to a number of transactions in which, because of their importance to ordinary members of the public and because of the disparity in the bargaining strength of the parties to them, it might be argued that there should be a complete ban even as regards loss of or damage to property. We consider these in paragraphs 99 to 126 below.

Manufacturers' "guarantees"

99. A buyer of goods who suffers loss, including here death or personal injury as well as damage to property, because the goods are dangerous or defective may have a remedy not only against the seller for breach of the terms implied by sections 13 to 15 of the Sale of Goods Act 1893 but against the manufacturer on the ground that the injury is due to the negligence of the manufacturer. The Supply of Goods (Implied Terms) Act 1973 has implemented a recommendation in our First Report that, in the case of a "consumer sale", the seller should not be permitted to contract out of the obligations imposed upon him by sections 13 to 15 of the Sale of Goods Act 1893 as now amended. In our joint document we expressed the view that a manufacturer should similarly be prevented from contracting out of his common law liability for negligence to a buyer who acquires the goods under a consumer sale¹²⁷.

100. The exemption clauses which we proposed should be banned are normally found in, or in connection with, manufacturers' "guarantees". The "guarantee" document offered by the manufacturer to the ultimate buyer is now a familiar feature in the sale of such durable consumer goods as motor-cars, television sets and washing machines. It normally takes the form of a promise on the part of the manufacturer to repair or replace defective goods, free of charge or at a reduced rate, within a prescribed period. Such guarantees are advantageous to the consuming public and we should be reluctant to suggest anything that would discourage them. The buyer, however, may be required to exempt the manufacturer from any common law liability the latter may incur to him for negligence. In our view, the buyer in a consumer sale who accepts such a guarantee is just as much in need of protection against the manufacturer as he is when dealing with the immediate seller. The guarantee is attractive because it offers him a cheap and simple alternative to an action for damages against the seller if the goods are defective. At the time when the buyer accepts it he may not contemplate the possibility of suffering personal injury or damage to his property because the goods are defective or dangerous and, even if he does, he is not in a position to evaluate the relevant advantages of the guarantee on the one hand and the common law remedies on the other. It is obvious that cases can arise in which he will have abandoned rights far more valuable than those he has gained. Such an exemption clause is a potential

¹²⁷ Joint document, paras. 12 and 13.

trap and we think it should be made void. It has been argued that the proposed ban would discourage manufacturers from offering guarantees and thus deprive the consuming public of a worthwhile service. In our view this result is unlikely. The offering, and especially the widespread advertising, of guarantees is a valuable form of sales promotion and we do not think that the proposed ban would lead manufacturers to abandon it. It has been suggested, too, that the ban would involve manufacturers in paying increased premiums for insurance and that this increase in the manufacturers' costs would inevitably be passed on to consumers generally in the form of higher prices. The answers to the inquiries we have made of insurance interests in relation to this matter lead us to the conclusion that the proposed ban is not likely to lead to any significant increase in insurance premiums or therefore in prices to the consuming public.

101. Another objection to our proposal rested on the assumption that it might be reasonable for the manufacturer to exclude liability for certain types of loss. The suggestion was, we think, that although a complete ban on exemptions in respect of death or personal injury or damage to property other than the goods guaranteed might be justified, a case could be made out for permitting the manufacturer to exclude liability for, perhaps, the loss of use of the goods themselves or economic loss such as loss of profits. How far the manufacturer is liable for such loss in the present state of the law is perhaps controversial¹²⁸, but if the manufacturer would be held liable for negligence in respect of a particular head of loss had there been no guarantee then reliance on an exemption if there does happen to be a guarantee seems to us to be an unsatisfactory way of determining the extent of liability. It may be as well to point out that we are not here concerned with losses such as those caused by the cutting off of power to the factory in the *Spartan Steel* case¹²⁹, since we are dealing only with the consumer situation.

102. The vast majority of "guarantees" of the kind now under consideration are no doubt accepted by buyers under a "consumer sale" as now defined in section 55(7) of the Sale of Goods Act 1893. They may, however, be accepted by persons who have acquired the article to which they relate under other contracts, such as a hire-purchase agreement, a contract of hire, a contract for work and materials or a sale which is not a consumer sale or as a gift. The persons in whose interest we are proposing that such exemptions should be avoided are consumers but we do not think that consumers can be distinguished from non-consumers by reference to the character of the transaction under which the article was acquired. For the purpose of determining the respective obligations and rights of seller and buyer, lessee and hirer and so on it is of course the character of that transaction that is decisive, but what has to be determined here is the rights of the user or consumer against the manufacturer. For that purpose the nature of the transaction under which the user/consumer acquired the article is irrelevant. In our view the user/consumer should benefit from our proposal (a) if the goods are of a type usually supplied for private use or consumption, and (b) if the loss or injury arose from the use of the goods in a

¹²⁸ *S.C.M. (United Kingdom) Ltd. v. W. J. Whittall & Son Ltd.* [1971] 1 Q.B. 337; *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27; *Dynamco Ltd. v. Holland & Hannen & Cubitts (Scotland) Ltd.* 1971 S.C. 257.

¹²⁹ *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27. See also *Dynamco Ltd. v. Holland & Hannen & Cubitts (Scotland) Ltd.* 1971 S.C. 257.

private capacity, not from their use exclusively for the purposes of a business. If these criteria are not met there will still be control but the control will take the form of the reasonableness test.

103. Although we have spoken in these paragraphs of the liability of a manufacturer for negligence, other persons in the chain of distribution may incur liability for negligence¹³⁰, including persons who assemble parts manufactured by others and retailers¹³¹. Some persons who market products under their own names are not in fact the manufacturers, though they may well become liable if they fail to take reasonable care and damage or injury is caused as a result. If any of these persons seek to rely on an exemption clause in a “guarantee” we would wish our proposal to apply; it would be unfortunate if someone who had been found to be negligent in these circumstances could attempt to shelter behind an exemption on the ground that he was not in reality the “manufacturer”. We therefore propose that the control put forward in paragraph 100 above should apply not only to manufacturers but also to other distributors.

104. The peculiar mischief of the situation we have discussed in paragraphs 100 to 103 above arises when the exemption clause operates to deprive the victim of the guarantor’s negligence of his only remedy against the guarantor. If the guarantor is also the supplier of the goods, damages for any injury or loss suffered by the person supplied owing to a defect in the goods may be recoverable, for example, in an action for the breach of the term of fitness for purpose or merchantability implied in a contract of sale or hire-purchase. We do not consider, therefore, that an exemption clause of the sort in question should be avoided where it appears in or in connection with a guarantee given by the supplier of goods to the person to whom he has supplied those goods under a contract between himself and that person.

Recommendation

105. *We recommend that provisions excluding or restricting liability for loss or damage arising while goods are in consumer use, due to the negligence of a person concerned in the manufacture or distribution of goods, should be made void if they are contained in a guarantee of the goods. This recommendation does not apply when the guarantee relates to goods supplied by the person giving the guarantee to the person accepting it in pursuance of a contract between them.* (Paragraphs 99–104.)

Supply of goods

106. Our joint document provisionally concluded that in a “consumer sale” any contractual provision purporting to exclude or limit the seller’s liability for negligence should to that extent be void¹³². We recognised that the buyer in a consumer sale would rarely need to have recourse to an action for negligence once a complete ban had been imposed on contracting out of the provisions of sections 13 to 15 of the Sale of Goods Act 1893, but we accepted the argument that cases might arise where the buyer would have no remedy under the Sale of

¹³⁰ *Malfrout v. Noxal Ltd.* (1935) 51 T.L.R. 551.

¹³¹ *Kubach v. Hollands* [1937] 3 All E.R. 907; *Fisher v. Harrods Ltd.* [1966] 1 Lloyd’s Rep. 500.

¹³² Joint document, paras. 8 and 9.

Goods Act 1893 and would therefore wish to claim in tort or delict. The sort of case we had in mind was one where the seller's negligence consisted not in supplying goods which were defective or inherently dangerous but in failing to warn the buyer of the dangers involved in using them without taking the appropriate precautions¹³³. Our provisional view was that the considerations which justified the ban on contracting out of sections 13 to 15 of the Sale of Goods Act 1893 in the case of consumer sales were an even stronger justification for a similar ban on contracting out of liability for negligence in the case of such sales. This conclusion was generally accepted by those whom we consulted and, despite a suggestion that the matter was of little practical importance, there was no positive objection.

107. We have reconsidered this conclusion in the wider context of our proposals for controlling exemption clauses in contracts other than contracts of sale or hire-purchase involving the supply of goods (Part II of this report) and contracts for the supply of services. In the interests of simplicity we think it desirable that the same regime should so far as practicable apply to exemption clauses in all types of contract involving the supply of goods. If we adhered to our original proposal, it would mean that an exemption from liability for negligence would be void in a consumer sale of goods and subject to a reasonableness test in a consumer contract for the supply of goods, which we consider would be difficult to justify. If such clauses were to be made void in all consumer contracts for the supply of goods, there would then be a distinction between the method of control in these contracts and in contracts for the supply of services, where only a reasonableness test would apply. This in turn would create difficulties in the case of consumer contracts for work and materials where, if logic were to be followed, exemption clauses would require to be treated differently depending on whether they referred to the supply of goods or to the element of services. Bearing in mind the small number of cases in contracts for the supply of goods where the supplier's negligence would not also constitute a breach of an implied term as to the quality or fitness for purpose of the goods, we consider that there is no need to single out negligence in consumer contracts of sale or supply of goods for special treatment and that the general reasonableness test recommended at paragraph 69 above should apply.

Carriage of goods

108. Both in England and Wales, and in Scotland, the distinction between common carriers and private carriers is recognised. In both jurisdictions the common law principles of liability—that the common carrier is liable virtually as an insurer and that the private carrier is liable for negligence—may be varied by contract, subject, in relation to common carriers, to the Carriers Act 1830.

109. If we consider the rules governing the carriage of goods in different legal systems, in international conventions, and under contractual provisions, we find three broad patterns of liability. The first is that the carrier may be liable for the loss of or damage to the goods without proof of fault (often called "strict liability"), though possibly subject to certain specified defences which are to be proved by the carrier, such as the "inherent vice" of the goods

¹³³ Joint document, para. 8.

carried¹³⁴. The second is that the carrier may be liable for negligence. The third is that the carrier may be under no liability at all, except, possibly, for his deliberate or intentional acts.

110. The first pattern of liability is illustrated by the common law position of the common carrier and the contractual position of the carrier under "carrier's risk" conditions¹³⁵. Other examples can be found in many of the international conventions relating to the carriage of goods¹³⁶. Contractual provisions of this type, and the international conventions, usually incorporate an upper limit on the liability¹³⁷. In none of these examples is the carrier absolutely liable, in the sense that he has no defence at all; in every case there is the possibility of his proving one or more of a number of exonerating circumstances. The smallest number of these defences applies to the common carrier at common law; the four "excepted perils" are act of God, act of the Queen's enemies, the inherent vice of the goods and the consignor's own fault. As additional defences are provided by a contract or a convention, the carrier's liability tends to approximate ever closer to a liability for negligence with the onus of proof that there has been no negligence resting on the carrier. Consider, for example, the effect of a defence that the carrier or his servants "have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"¹³⁸ or that the loss was caused through "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent."¹³⁹

111. The second pattern of liability—liability for negligence—is illustrated by the common law position of the private carrier, on whom lies the burden of proving the absence of negligence whether the carriage is gratuitous or for reward. As we have indicated, this is not far removed from the liability placed on the carrier under some of the international conventions. The third pattern of liability—or lack of liability—is typified by contractual terms, such as owner's risk conditions, which incorporate wide-ranging exemptions.

112. Each of these three broad patterns of liability has different implications in relation to insurance. The strict liability of the common carrier is sometimes spoken of as liability as an insurer: the practical consequence in relation to the first pattern of liability is that the carrier must insure, or "carry his own

¹³⁴ "Inherent vice" means a defect in the goods themselves which by its development tends to the destruction or injury of the goods: see, e.g., *Blower v. Great Western Ry. Co.* (1872) L.R. 7 C.P. 655, 662, per Willes J.

¹³⁵ See, e.g., British Railways Board, General Conditions of Carriage, Board's Risk.

¹³⁶ Such as the Warsaw Convention as amended by the Hague Protocol (see Carriage by Air Act 1961, Schedule 1) and the Convention on the Contract for the International Carriage of Goods by Road (see Carriage of Goods by Road Act 1965, Schedule). The statutory regime for international carriage of goods by air imposed in pursuance of the Warsaw Convention, as so amended, has in fact been applied to purely domestic carriage by air (see the Carriage by Air Acts (Application of Provisions) Order 1967, Article 5(1), S.I. 1967 No. 480).

¹³⁷ e.g., £1000 per metric tonne weight for the loss of a whole consignment in the British Railways Board, General Conditions of Carriage, Board's Risk; 250 gold francs ("Poincaré francs") per kg. for cargo under the Carriage by Air Act 1961 (equal to £8.73 per kg.: Carriage by Air (Sterling Equivalents) Order 1974, S.I. 1974 No. 528); 25 gold francs ("Germinal francs") per kg. under the Carriage of Goods by Road Act 1965 (worth in the region of £3.50 per kg.).

¹³⁸ Carriage by Air Act 1961, Schedule 1, Article 20; cf. *Grein v. Imperial Airways Ltd.* [1937] 1 K.B. 50, 69, per Greer L.J.

¹³⁹ Carriage of Goods by Road Act 1965, Schedule, Article 17, para. 2.

insurance”, up to the full value of the goods he carries. It is in this context that the practical need for an upper limit to his liability arises. Insurance for an unlimited amount, even if it is possible, is seldom practicable in relation to the carriage of goods, and however high the carrier’s insurance cover he faces the risk that any particular parcel may have a value which exceeds it. The preamble to the Carriers Act 1830 reminds us that this is no new problem. It recited the increase in the responsibility of common carriers “by reason of the frequent practice of bankers and others of sending . . . parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass”: “through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such . . . carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, . . . they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses”. Common carriers, who were not only liable as insurers but were unable to refuse goods, were in a particularly vulnerable position in the absence of a limitation of liability, but the problem exists to some extent for all carriers. It is therefore understandable that the carrier should seek to limit his liability to a stated sum in the absence of a declaration by the consignor that the goods have a higher value. Whether on the one hand the carrier is willing to increase his liability on payment of an additional sum (which it is not inappropriate to regard as being in the nature of an insurance premium) or whether on the other hand it falls to the consignor to take out his own insurance for the excess does not, it seems to us, raise any question of fundamental principle. It will usually fall to the consignor to arrange insurance to cover the “excepted perils” if he so wishes. It has been said that this pattern of allocation of the risks of loss of or damage to goods in transit has been in practice the most economical.¹⁴⁰

113. The converse situation to the *prima facie* liability of the carrier subject to specified defences and an upper limit is the total absence of liability (except, perhaps, for intentional acts), as in owner’s risk conditions. Here it is clearly up to the owner or consignor to arrange his own insurance for the full value of the goods. Although it might well be thought unreasonable for a carrier to refuse to carry at all except on owner’s risk terms, it will frequently be advantageous to all parties for the carrier to offer a choice between carrier’s risk terms and owner’s risk terms. This was the criterion adopted by the courts in determining whether exemptions were just and reasonable under section 7 of the Railway and Canal Traffic Act 1854¹⁴¹, and we see nothing wrong with it. If contractual provisions excluding or limiting liability for negligence were to be made void, this choice between carrier’s risk and owner’s risk would be ruled out since owner’s risk terms could not be offered. This would not, we think, benefit the customer. Broadly speaking, the insurance burden falls on the carrier under carrier’s risk terms (except as to the excess and to excepted perils) and falls on the owner under owner’s risk terms. But under the ordinary common law liability for negligence both carrier and owner must insure: the owner cannot rely on the carrier’s liability because the goods may be lost without the carrier’s negligence, while the carrier still needs liability insurance because of the risk of negligence.

¹⁴⁰ Lord Diplock, “A Combined Transport Document”, [1972] J.B.L. 269 at p. 273.

¹⁴¹ See para. 66, above.

114. Our conclusion therefore is that so long as the private carrier's liability is based on negligence, the law should adopt a flexible approach, and the reasonableness test is the best way to achieve this. Accordingly we do not recommend any special treatment for exemption clauses in contracts for the carriage of goods.

Warehousing and storage

115. Like the carrier, the warehouseman or storage contractor is liable if the goods are lost or damaged through his negligence, and the onus of proving that he has not been negligent rests on him. Save in exceptional circumstances he is not liable in the absence of negligence. Similar considerations in respect of insurance also apply. We think the conclusion to which we came in the last paragraph in relation to carriage is equally valid in relation to storage, and we do not therefore propose any special treatment.

Laundering, dry cleaning and similar contracts

116. At first sight the similarity between contracts for laundering, dry cleaning and similar contracts on the one hand and warehousing on the other suggests that the conclusion that no special treatment of exemption clauses is needed should apply almost automatically here. We think, however, that other considerations must be taken into account before a decision is made.

117. These contracts require the person undertaking the service to play a more active part than a warehouseman necessarily does, and as a consequence there will usually be a greater risk of failure to exercise reasonable care. There is, too, a possibility that the owner's insurance policy will not cover the risk of loss of the goods, even by theft or other insured cause, while they are not in his possession, and a probability that it will not cover damage caused by the cleaner or launderer. There is, too, little likelihood that the owner will take out *ad hoc* insurance to cover these risks. It may well be, therefore, that the customer is at greater risk in these contracts, and is more likely to need to rely on his rights in respect of the contractor's negligence. There is at first sight a case for making void terms excluding or limiting liability for negligence—at least in relation to consumer contracts or contracts made on standard terms. However, as we have indicated above¹⁴², these services are instances of operations where the charge bears no relation to the loss which the negligence of the supplier may cause. A laundry, the bulk of whose work consists of handling sheets, towels and cotton tablecloths, might reasonably ask customers entrusting it with valuable antique table linen to disclose its nature and value and might reasonably wish to limit its liability in the absence of disclosure: this would not be possible if exemptions from liability for negligence were made void.

118. On balance we have concluded that we should not recommend special legislative provisions to deal with exemption clauses in contracts of this nature. Our view is that the control of exemptions from negligence which we have already recommended—the reasonableness test—is the appropriate way of dealing with exemption clauses in these contracts. What would be far more useful than special provisions to deal with exemptions would be an agreed code

¹⁴² See para. 56, above.

of practice which defined the obligations to be undertaken by launderers and cleaners and set out the circumstances and manner in which the obligations might be qualified or limited.

Loss of or damage to vehicles and other property in car parks

119. The question of loss of or damage to vehicles and other property in car parks looks at first remarkably similar to that canvassed in relation to warehousing and storage of goods¹⁴³, but the position is in fact much more complicated. Apart from the potential lack of care in permitting access to vehicles or permitting the removal of goods and vehicles, which may have a resemblance to storage, there is also the possible lack of care in the more positive manner described above in relation to personal injuries in car parks¹⁴⁴. There are also significant differences in the insurance arrangements, while in English law there is an important distinction in the nature of the liability from which exemption is sought. We deal with this last point first.

120. In English law the storage of goods involves a bailment, and possession of the goods passes to the bailee. The bailee is under a duty to take reasonable care of the goods bailed, and if he fails to return the goods or returns them in a damaged condition the onus is on him to show that the loss or damage occurred without negligence on his part¹⁴⁵. If he deals with goods in his possession in a manner fundamentally inconsistent with the nature of the bailment he comes under strict liability for loss or damage¹⁴⁶. All this is clear law, and applies to the carriage of goods and to bailments involving the doing of work on goods, such as repairing or cleaning, as well as to storage. But what is uncertain is whether, and if so, when, the car parking contract involves a bailment at all. In *Ashby v. Tolhurst*¹⁴⁷ an attendant permitted a stranger to take a car out of a car park without producing the ticket (which contained a disclaimer of responsibility). "Parking a car", said Greene M.R., "is leaving a car and, I should have thought, nothing else . . . [T]he relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations on the part of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there"¹⁴⁸. It is plain that this conclusion did not rest on the disclaimer in the ticket, for he went on to show that bailment would have produced the "surprising result" that possession of the car would have become vested in the owners of the car park who could then have maintained an action for trespass or conversion if their special property in the car was interfered with¹⁴⁹. A similar result was arrived at in *Tinsley v. Dudley*¹⁵⁰ where a motor-cycle was left in an unattended "covered yard and garage" next to a public house. It was held that there was no bailment and that accordingly no duty of care was owed. Jenkins L.J. said that "the defendant here can only be fixed

¹⁴³ See para. 115, above.

¹⁴⁴ See paras. 88-93, above.

¹⁴⁵ *Doorman v. Jenkins* (1834) 2 Ad. & E. 256; *Coldman v. Hill* [1919] 1 K.B. 443.

¹⁴⁶ *Lilley v. Doubleday* (1881) 7 Q.B.D. 510; *Edwards v. Newland & Co.* [1950] 2 K.B. 534.

¹⁴⁷ [1937] 2 K.B. 242.

¹⁴⁸ At p. 249.

¹⁴⁹ At p. 250. It may be that Romer L.J.'s finding that there was no bailment was influenced by the exemption clause: at pp. 255-6; so, too, Scott L.J. at p. 258.

¹⁵⁰ [1951] 2 K.B. 18.

with liability if the inference can properly be drawn from the circumstances that there was an actual or constructive delivery of the plaintiff's motor-cycle into his safe keeping¹⁵¹. These cases do not decide that parking a car can never constitute a bailment, and it may be that they do not support the belief that without a bailment a duty of care in respect of goods left can never be owed¹⁵². Nevertheless, they justify the view that in English law the nature of the liability of the operator of a car park is not necessarily to be equated with that of the warehouseman.

121. Scotland does not know the "bailment" of English law. A strict form of liability based upon the Edict of the Roman praetor has been widely adopted into the legal systems of Europe including that of Scotland. Shipmasters, innkeepers and stable keepers, "having once received the goods under their charge, must at all hazards answer for their restitution"¹⁵³. Liability is imposed irrespective of fault, and the only competent defences—the onus of proving which lies on the defender—are fault of the owner, act of the Queen's enemies and *damnum fatale*¹⁵⁴. Though the liability of carriers by sea and hotel keepers has now been expressly regulated by statute, the liability of stable keepers is still in Scotland regulated by the Edict. It might be thought that in modern times the same degree of liability should rest upon those who garage motor vehicles or operate car parks for profit—as contrasted with those who provide parking facilities as an ancillary to their main business, such as supermarkets. Though the matter has not been determined judicially in Scotland, there are dicta indicating reluctance to extend the Edict to garage proprietors¹⁵⁵.

122. Insurance arrangements, too, may well differ in relation to car parks as compared with the storage of goods. Where a motorist has a comprehensive policy some of the risks which we are now discussing may be covered by it, though not all motorists are insured comprehensively. It may be argued that where the motorist is in fact covered by his own policy, the imposition of liability on the operator of the car park in effect requires double insurance. The position is further complicated, however, by the "no claims bonus" which the motorist stands to lose if he relies on his policy, and by the "excess" under many policies which is not covered (for example, the first £25 of his claim).

123. Some operators of car parks believe that they are more exposed to fraudulent claims than, say, a laundry or drycleaner or a warehouseman. This is because the individual inspection of each car entering the car park is not feasible, so that the condition of the car and the details and condition of its contents cannot be recorded. Although the onus is probably on the owner of the car to prove negligence, if there is such liability, it may be difficult if not impossible to cast doubt on an allegation that a car was damaged in the

¹⁵¹ [1951] 2 K.B. 18, 32.

¹⁵² cf. *Mendelssohn v. Normand Ltd.* [1970] 1 Q.B. 177 and *Fairline Shipping Corporation v. Adamson* [1974] Q.B. 180, 190, per Kerr J. See, too, the Occupiers' Liability Act 1957, s. 1(3)(b).

¹⁵³ Bell, *Commentaries* (7th ed., 1870), vol. i, p. 495; J. Mackintosh, "The Edict Nautae Caupones Stabularii", (1891) 3 J.R. 306; *Mustard v. Paterson* 1923 S.C. 142.

¹⁵⁴ D. M. Walker, *Principles of Scottish Private Law* (1970), p. 628.

¹⁵⁵ *Central Motors (Glasgow) Ltd. v. Cessnock Garage and Motor Co.* 1925 S.C. 796, 803; *Sinclair v. Jumer* 1952 S.C. 35, 39, 45. In *Burns v. Royal Hotel (St. Andrews) Ltd.* 1956 S.C. 463 (a case which began before the Hotel Proprietors Act 1956) Lord Guthrie held that the defenders (innkeepers) could not exclude or modify edictal liability for damage to the pursuer's motor-car by exhibiting a notice.

car park. Against this, it may be that proof that a car was damaged while in a car park, without evidence to link the damage to a particular person, will not suffice to make the operator of the car park liable: cars may be damaged by the negligence of other persons parking their own cars, and proof of some act or omission on the part of the car park operator or his staff may be necessary. We are aware of the particular criticism of exemption clauses where a car is taken for a joy-ride by an employee of the car park operator. We have also been told that it would be unfair on the owners of old or small cars if car park operators passed on the cost of insurance, necessarily based on the value of more expensive cars, to all their customers by increasing charges for parking.

124. In the light of all these considerations we have come to the conclusion that some control over exemption clauses used in car parks is essential, but that, having regard to the wide variety of types of car parks and types of vehicles and to the fact that an upper limit on liability might well be justifiable, we could not recommend that such clauses should be made void. In the type of legislation that we are considering, which would be of general application, we think that a reasonableness test would be the best way of controlling car park exemption clauses, and accordingly our proposals in this report—that there should be such a test in relation to liability for negligence—are appropriate. We think that the real problem in relation to car parks may be that the basis of liability, if any, is so uncertain¹⁵⁶ that a clarification of the liability would be a necessary part of any prohibition on the use of exemption clauses in this sphere.

Travel agents

125. The exemption clauses used by travel agents are another source of complaint. There are two aspects of the operation of these exemptions that we have considered: one is the purported exemption from liability for negligence, to which our discussion in this Part of the report is relevant; the other is the attempt to exempt from liability for non-performance or defective performance of the contractual obligations, which we discuss in Part IV, below.

126. The subject is extraordinarily complex, and the exact legal position of the travel agent is far from clear. He may be a principal agreeing to provide travel and accommodation for his customer. He may be an agent for the customer in contracting with transport undertakings, hotels and other travel agents. He may be an agent for the transport undertakings, hotels or other travel agents in contracting with the customer. He may act in one capacity in relation to some aspects of the travel and in other capacities elsewhere. The true legal analysis, which will determine the precise nature of his contractual obligations, will depend on the terms of the contract and the surrounding circumstances. As we have indicated, more than one travel agent may be involved; we suspect that members of the public do not always understand with whom they are contracting when their local travel agent offers them a package tour. In view of this complexity and uncertainty, we think that the general avoidance of exemption clauses would be inappropriate, and that the flexibility afforded by the reasonableness test in relation to liability for negligence will give the courts the powers they need to do justice in relation to these contracts. We understand that the Director General of Fair Trading has been instrumental

¹⁵⁶ See paras. 119–122, above.

in negotiating Codes of Practice with the Association of British Travel Agents, and in these circumstances we do not propose to make any special recommendations.

VOLUNTARY ACTIVITIES IN THE COURSE OF A BUSINESS

127. Our recommendations in this Part of the report are intended to apply to exclusions of liability for negligence where the liability is incurred in the course of a person's business¹⁶⁷. We consider that they should apply even in cases where the person seeking to rely on the exemption clause was under no legal obligation (such as a contractual obligation) to carry out the activity. This means that, for example, conditions attached to a licence to enter on to land, and disclaimers of liability made where information or advice is given, should be subject to control. Two objections may be made against this proposal: first, that where a person providing a service obtains no benefit from the arrangement he should be free to disclaim the burden of possible liability for negligence; secondly, that persons providing benefits voluntarily will cease to do so if they are not free to exclude their liability.

128. The first objection depends on the proposition that a person voluntarily providing a service or benefit receives no benefit from doing so. This is not necessarily so. It must be remembered that our proposals apply only to situations where the person seeking to rely on the exemption clause has acted in the course of his business. In most cases where a service is provided voluntarily in the course of a business the provider receives some benefit whether by way of goodwill or otherwise. For example a shopkeeper is under no obligation to allow others to enter his premises but it is quite obvious that he benefits from doing so. Another argument against this objection is that, whether or not a benefit is provided voluntarily, a duty of care is imposed by law in relation to the activity. The fact that the service is provided voluntarily will be taken into consideration in deciding whether or not the provider of the service has been in breach of the duty of care. Furthermore, in most cases the control of exemption clauses we recommend is not a complete ban but a reasonableness test and the voluntary nature of the act can be taken into account in deciding whether or not reliance on the exemption clause is reasonable. We believe that these considerations give sufficient flexibility to prevent injustice.

129. The second objection to the proposed control is that the provider of the benefit would cease to provide it if he were not permitted to exclude liability for negligence. We do not believe that this will often be so. We have already stated that a person providing a service voluntarily in the course of his business usually obtains some commercial benefit and again in most cases the control we recommend is the application of the reasonableness test and not a complete ban.

130. We believe that this control should also apply to non-commercial undertakings which provide free services such as information and advice. It is often part of the general functions of government departments to provide advice and information to the public and we believe that they should exercise reasonable care in performing that function; if a duty of care is imposed by law we see no reason why disclaimers of liability should not be subject to control.

¹⁶⁷ See para. 9, above.

Recommendation

131. *We recommend that the control of provisions excluding liability for a person's negligence incurred in the course of a business should apply even where that person was acting voluntarily.*

(Paragraphs 127–130.)

THE DEFENCE OF “VOLENTI NON FIT INJURIA”

132. The defendant in an action for negligence will sometimes succeed by invoking the principal expressed in the maxim *volenti non fit injuria*, that is, by showing that the plaintiff accepted the legal risk of the defendant's failure to take reasonable care. In order to succeed the defendant must show that the plaintiff acted with full knowledge of the nature and extent of the risk and voluntarily, free from any external pressure. The controls proposed earlier in this Part would not affect the operation of this defence where there has been no purported exclusion of liability on the part of the defendant, whether by contract or otherwise. The question arises, however, as to the availability of the defence in a case where there is such an exclusion, either in a contract or in a notice or some other form of warning.

133. In the case of *Buckpitt v. Oates*¹⁵⁸ a minor who gave a lift in a car to another minor, and by negligent driving injured his passenger, successfully pleaded the defence of *volenti* on the ground that there was a notice on the fascia panel of the car warning passengers that they rode in the car at their own risk¹⁵⁹. It was conceded by counsel for the defendant, with the approval of the judge, John Stephenson J., that if there had been a contract between plaintiff and defendant to carry the plaintiff in the defendant's car, and it was a term of that contract that the plaintiff should be carried at his own risk, the contract would be void¹⁶⁰ and the defendant would be unable to rely on the notice.

134. Our view is that the validity or invalidity of the contractual term or notice is not in itself conclusive. If such a term or notice is valid, a defendant will not be liable in any event, regardless of the plaintiff's conduct. If the term or notice is invalid, however, it will still be necessary to have regard to the plaintiff's conduct in order to determine whether such conduct constituted voluntary assumption of risk. The plaintiff's awareness of the content of the term or notice is a matter to take into account, but cannot of itself be regarded as conclusive: the courts must still have regard to all the relevant facts of the case. We think that, if our proposals are accepted, there is a case for making this clear in the legislation.

Recommendation

135. *We recommend that where under the proposals in this report a provision is void or ineffective the fact that a person agreed to or was aware of the term or notice should not of itself be regarded as sufficient evidence that he knowingly or voluntarily assumed the risk.*

(Paragraphs 132–134.)

¹⁵⁸ [1968] 1 All E.R. 1145.

¹⁵⁹ By virtue of s. 148(3) of the Road Traffic Act 1972 this defence would no longer be available to a defendant in a similar case.

¹⁶⁰ Because the plaintiff was a minor and the contract was not for his benefit.

PART IV—CONTRACTUAL OBLIGATIONS

SCOPE OF PART IV

136. In this Part of the report we are concerned with two classes of provisions. The first consists of provisions which have the effect of excluding or restricting liability for breach of contractual obligations. Protection against clauses excluding or restricting liability for breach of certain contractual obligations which are implied by law, such as the obligation that goods sold will be of merchantable quality, was given by the Supply of Goods (Implied Terms) Act 1973, but that Act does not, for example, control exclusion or restriction of liability for breach of the term implied by section 29 of the Sale of Goods Act 1893 to deliver the goods within a reasonable time. In Part II we have recommended control over provisions excluding or restricting liability for breach of certain terms implied in other contracts for the supply of goods, and in Part III we have proposed control over provisions excluding or restricting liability for breach of obligations arising from an express or implied term of a contract to take reasonable care or exercise reasonable skill. There is, however, no general control over excluding or restricting liability for breach of other contractual terms which arise by express or implied agreement between the parties or by implication of law. We discuss this type of provision in paragraphs 141 and 142 below. The second class consists of provisions which are not exemption clauses in the ordinary sense of the word but have the effect of depriving persons against whom they are invoked of contractual rights which those persons reasonably expected to enjoy. We discuss this class of provision in paragraph 143 to 146 below.

137. We should perhaps emphasise at the outset the scope of our discussions. As with the rest of this report, we are concerned only with clauses in contracts invoked by a party who has entered into the contract in the course of a business; we are not concerned with purely private transactions¹⁶¹. As to the nature of contracts to which this Part applies we have already indicated¹⁶² that this is a matter on which the two Commissions are not in agreement. The Law Commission takes the view that the recommendations should apply to all types of contract whatever their subject matter¹⁶³. The Scottish Law Commission considers that the recommendations in this Part should apply only to contracts relating to the transfer of goods or the rendering of services¹⁶⁴. The recommendations themselves are the subject of unanimous agreement.

THE CASE FOR CONTROL

138. Particular difficulties arise in connection with those contractual obligations whose nature and extent can be ascertained only by reference to the precise terms of an agreement between the parties. A number of critics of our joint document argued that legislation aimed at controlling exemption clauses would be unlikely to achieve its purpose; a skilled draftsman, it was said, could always evade a law aimed at exemption clauses by expressing a contract in positive and limited form instead of by following the present practice of expressing it in general terms and limiting its scope by specific exceptions. It is also

¹⁶¹ See para. 9, above.

¹⁶² See para. 5, above.

¹⁶³ See paras. 240–247, below.

¹⁶⁴ See paras. 248–257, below.

arguable that there is no justification for attempting to control exemption clauses which affect contractual obligations; since the effect of such provisions is simply to indicate what obligations (if any) the relevant contract imposes, any interference with them would be tantamount to remaking the parties' contract for them.

139. The general proposition that exemption clauses can never be effectively controlled by legislation is clearly too wide. Where the obligations in question can be defined independently of the contract, for example, the obligation to take reasonable care or to exercise reasonable skill, there is a limit to the extent to which any rewriting of the contract can evade a ban on contracting out of that obligation. On the other hand, there is some force in the contention that exemption clauses affecting contractual obligations operate to delimit the substance of the promisor's obligation and, indeed, if drawn widely enough, can prevent the obligation from accruing; the provision, for example, that a party shall incur no liability if he is in breach of an obligation he purports to assume, or that the other party shall have no remedy to enforce any liability incurred by the breach of that obligation, could, in theory, be regarded as preventing any such obligation from arising¹⁶⁵. We do not conclude from this, however, that there is no case for controlling such clauses or that the purpose of such control could be defeated by re-writing the contract. We believe that in some circumstances the practice of expressing promises in wide terms and then cutting them down by means of exemption clauses can operate unfairly. As Professor Coote puts it, the promisor "can enjoy all the advantages of having made a positive contractual promise without necessarily having to bear the burden of corresponding liabilities"¹⁶⁶. This seems to us to be a complete answer to the theoretical argument that there can be no justification for interfering with provisions of this sort because their function is simply to delimit obligations to which they refer. If such clauses can, as we believe, operate unfairly the law should provide a remedy for the injustice.

CLAUSES TO BE SUBJECT TO CONTROL

140. The next question that arises is how to identify the provisions which we think need to be controlled.

Exemption from liability for breach

141. One category can readily be identified: it comprises those provisions which exclude or restrict the exercise of a right or remedy or any liability arising out of the breach of any obligation, express or implied, in the contract. Examples of this type of exemption clause are:—

- (a) a provision that a carrier shall not be liable for loss from a consignment unless he is advised of the loss in writing within 7 days from the date for delivery;
- (b) a term in a building contract that the builder's liability for failure to complete within the contract period shall not exceed £x.

¹⁶⁵ See, e.g., B. Coote, *Exception Clauses* (1964), at p. 10: "In so far as the 'unenforceable right' would be illusory (that is, would have no existence as a contractual right), exceptions of this type would, accordingly, have the effect on primary rights of preventing their accrual."

¹⁶⁶ *ibid.*, p. 141.

Here the danger of injustice is aggravated by the fact that the promisee will normally assess the value of the contract on the assumption that it will be performed; he may not pay much attention to the provisions for dealing with the consequences of breach. In our view there is a clear case for imposing some degree of control on clauses of this sort, even when the obligations to which they relate can be ascertained only by reference to the express terms of an agreement between the parties.

142. It will no doubt be said that the only effect of controlling such clauses will be that promisors will express their obligations positively but in limited form and that the purpose of the control will thereby be defeated. We are not convinced that such redrafting of contracts is very likely or that it will always be a practical possibility. It is not easy to see, for example, how a clause providing that no claim should be made more than *x* days after the alleged breach can conveniently be expressed without using some words of exception.

Other “exemption clauses”

143. There is another and less easily distinguishable class of provisions. These differ from provisions of the category described at paragraph 141 above in that they are expressed not as excluding or restricting liability for the breach of subsisting obligations but as preventing the obligations to which they relate from arising or as providing that such obligations are to arise only in restricted or qualified form. Many such provisions are of course unobjectionable. If a decorator agrees to paint the outside woodwork of a house except the garage doors, no-one can seriously regard the words of exception as anything but a convenient way of defining the obligation; it would surely make no difference if the promise were to paint the outside woodwork with a clear proviso that the contractor was not obliged to paint the garage doors, or if there were a definition clause brought to the promisee’s attention saying that “outside woodwork” did not include the garage doors. Such provisions do not, like those discussed in Parts II and III of this report, deprive the promisee of a right of a kind which social policy requires that he should enjoy, nor do they, like the provisions excluding liability for breach of contractual obligations discussed at paragraph 141 above, give the promisor the advantage of appearing to promise more than he is in fact promising. On the other hand, provisions which have the same substantive effect as those discussed above have been the subject of complaint on the ground that they deprive the persons against whom they are invoked of contractual rights which those persons legitimately expected to enjoy. They can be so expressed that the promisee may think that the promisor is undertaking an obligation which is more valuable to the promisee than in fact it is. It may be said that these cases are the same in principle as those described in paragraph 141; whether they are or not, we do not think they can be treated in the same way. At paragraph 141 we were able to identify that feature of clauses excluding or restricting liability for breach of a contractual obligation which made them objectionable, namely, the combination of an apparently unqualified promise with the exclusion or restriction of liability for breach of that promise. In the cases we are considering now there is no such convenient identifying feature, but the mischief we wish to control can be recognised; it is the likelihood (in the light of the surrounding circumstances including the way in which the contract is expressed) that the promisee might reasonably have misunderstood the extent of the promisor’s obligation.

144. A good example of such a clause is that which was the subject of litigation in the case of *Anglo-Continental Holidays Ltd. v. Typaldos Lines (London) Ltd.*¹⁶⁷ The defendants, who were travel agents, agreed to book for the plaintiffs, who were also travel agents, cruises on a named ship following a fixed itinerary; the agreement was subject to the following clause, which was printed on the back of their handbook:—

“Steamers, Sailing Dates, Rates and Itineraries are subject to change without prior notice”.

Relying on this clause, the defendants offered the plaintiffs cruises on a different ship following a different itinerary; it was found as a fact that the substituted ship was inferior to the ship originally named and that from the plaintiffs' point of view the new itinerary was inferior to the original. The history of the case in the county court and later in the Court of Appeal is instructive. The judge in the county court was prepared to assume that the clause relied upon on behalf of the defendants had been incorporated in and therefore formed part of the contract, but he held that the conduct of the defendants was both a fundamental breach of contract and a breach of a fundamental term and that they could not therefore rely upon “any exclusion clause such as I am dealing with in the present case”¹⁶⁸. In the Court of Appeal Lord Denning M.R. doubted if the clause relied upon by the defendants formed part of the contract: but, on the assumption that it did, he held that the defendants could not “rely on a clause of this kind so as to alter the substance of the transaction”¹⁶⁹. The cases cited in support of this view¹⁷⁰ suggest that Lord Denning, with whose views Davies L.J. agreed, regarded the clause as an exclusion or exemption clause. Russell L.J., however, said that it was not an exemption clause: “It is a clause under which the actual contractual liability may be defined, and not one which will excuse from the actual contractual liability . . . I prefer to state it as being a matter of construction of a general clause, and the propounder of that clause cannot be enabled thereby to alter the substance of the arrangement”¹⁷¹.

145. We think that the existing rules which the courts apply to cases of this sort—those dealing with the incorporation of terms into contracts and with the construction of contract terms—cannot control the abuse of such clauses satisfactorily. The rule which enabled the Court of Appeal to strike down the offending clause in *Anglo-Continental Holidays Ltd. v. Typaldos Lines (London) Ltd.* was apparently a rule of construction. In a passage we have already cited, from his judgment in the case of *Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd.*¹⁷², Buckley L.J. indicated the limited value of rules of construction in such cases when he said—

“It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers

¹⁶⁷ [1967] 2 Lloyd's Rep. 61.

¹⁶⁸ At p. 63.

¹⁶⁹ At p. 66.

¹⁷⁰ e.g., *Glynn v. Margetson & Co.* [1893] A.C. 351 and *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* [1959] A.C. 576.

¹⁷¹ [1967] 2 Lloyd's Rep. 61, 67.

¹⁷² [1973] Q.B. 400, 421, cited at para. 40, above.

that it would have been fair or reasonable for the parties to have intended. The court must attempt to discover what they did in fact intend¹⁷³.”

It is true that Buckley L. J. was there speaking of clauses excluding liability for negligence, but we think the principle is exactly the same as that we are now considering. The courts are sometimes able to control unreasonable clauses on the ground that they were not properly incorporated in the contract; the weakness of this as a means of controlling such a clause is that if a party against whom it is invoked has signed the contract in which it appears the courts have, it seems, no alternative but to find that it is part of the contract¹⁷⁴. The flaw in the weapons the courts now have at their disposal for dealing with cases of the sort under consideration is that they are not sufficiently flexible to deal with what appears to us to be the essential danger, namely that the relatively unsophisticated or unwary party will not realise what or how little he has been promised, although the legal scope and effect of the contract may be perfectly clear to a lawyer. This no doubt is the sort of danger which the Jenkins Committee on Company Law had in mind when they recommended¹⁷⁵ that a party should not be deprived of his right to enforce an *ultra vires* contract on the ground that he had actual knowledge of the contents of the Memorandum of Association at the time of entering into the contract if he honestly and reasonably failed to appreciate that it had the effect of prohibiting the company from entering into the contract in question.

146. We do not think it would be appropriate for us to put forward proposals for controlling every provision in a contract which may operate unfairly against one of the parties because he honestly failed to appreciate its effect. The subject we have been considering and on which we have conducted our consultations is the desirability of controlling provisions exempting from, or restricting, liability for negligence or any other liability that would otherwise be incurred. We have felt impelled to consider the possibility of controlling the exclusion or restriction not merely of obligations that have been undertaken but also of obligations which the promisee might honestly believe to have been undertaken, but we do not think we can go beyond provisions which in some way deprive persons against whom they are invoked of contractual rights which those persons reasonably expected to enjoy. We do not propose to define exemption clauses in general terms; we regard this expression not as a legal term of art but as a convenient label for a number of provisions which may be mischievous in broadly the same way. Their mischief is that they deprive or may deprive the person against whom they may be invoked either of certain specific rights which social policy requires that he should have (for example the right of a buyer in a consumer sale to be supplied with goods of merchantable quality, or the right of a person to whom a service has been supplied to a reasonable standard of care and skill on the part of the supplier) or of rights which the promisee reasonably believed that the promisor had conferred upon him. It is with the last class of restriction or exclusion that we are concerned here. We propose that a term should be subject to control if it has the effect of enabling the promisor

¹⁷³ [1973] Q.B. 400, 421. Buckley L.J. did however continue as follows: “In choosing between two or more equally available interpretations of the language used it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result.”

¹⁷⁴ *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394.

¹⁷⁵ *Report of the Company Law Committee* (1962), Cmnd. 1749, para. 42(c).

to offer in purported fulfilment of the contract a performance which is substantially different from that which the promisee reasonably expected when he entered into the contract, or if it has the effect of enabling the promisor to refuse to render any performance.

SCOPE OF CONTROL TO BE LIMITED

147. The case for controlling clauses is evident in a situation where one party acts in the course of a business and the other party does not (we refer to such a transaction as a "consumer contract"). Injustice may arise because the consumer will frequently not understand the implication of the terms of the contract and, even if he does, he may not have sufficient bargaining strength to prevent their inclusion in the contract. But these factors are not limited to consumer contracts. In many cases a person acting in the course of a business is in a very similar position to a consumer. Take, for example, the case of a small shopkeeper who decides to advertise goods in a magazine; the standard terms on which the magazine agrees to print advertisements may include one which provides that the publishers "will not be responsible for any omission to insert any advertisement". The shopkeeper will probably have no greater bargaining strength than a private individual for the purpose of negotiating the exclusion of the clause. Furthermore, even a businessman tends to evaluate the contract on the assumption that it will be performed in the way he expects and not with reference to his rights in the case of breach. Should, therefore, the control over clauses preventing contractual liability arising, or excluding liability for breach of contract, apply to all contracts where one party enters into the contract in the course of a business regardless of whether the customer is acting in the course of a business? We have concluded that this would involve too high a degree of interference with freedom of contract; injustice is unlikely where the parties have been able to negotiate the provisions of the contract on equal terms. We believe that the situations where control is necessary (even though both parties to the contract are acting in the course of a business) arise where one party requires the other to accept terms which the former has decided upon in advance as being generally advantageous to him, and the customer must either accept those terms or not enter into the contract: that is, where there is a standard form contract. To summarise, we can identify the situations where control is needed as where the promisor has contracted in the course of a business, either where it is a consumer contract or where it is a standard form contract.

Consumer contracts

148. Statutory definitions of "consumer sale" and of "consumer agreement" have already been provided for the purposes of the control of provisions exempting from the terms implied by law in contracts of sale of goods¹⁷⁶ and in hire-purchase agreements¹⁷⁷. In Part II of this report we have identified the transactions in which a party is to be regarded as dealing as a consumer for the purposes of the control proposed over provisions exempting from the terms implied by law in the other contracts for the supply of goods dealt with in that Part¹⁷⁸.

¹⁷⁶ Sale of Goods Act 1893, s. 55(7).

¹⁷⁷ Supply of Goods (Implied Terms) Act 1973, s. 12(6).

¹⁷⁸ See para. 34, above.

149. Section 55(7) of the Sale of Goods Act 1893 contains the following definition of a “consumer sale”:

“a sale of goods (other than a sale by auction or by competitive tender) 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”.

This definition, the similar statutory definition in relation to hire-purchase of “consumer agreement”¹⁷⁹ and our proposed concept of consumer transaction in connection with other contracts for the supply of goods all require the same three conditions to be satisfied: (i) the supplier of the goods must be acting in the course of a business; (ii) the person to whom they are being supplied must not be acting, nor must he hold himself out as acting, in the course of a business; (iii) the goods concerned must be of a type ordinarily provided for private use. We also discussed in our joint document the feasibility of providing a definition of a “consumer services contract” for the purposes of the control there proposed over exemption clauses in, or in connection with, contracts for the supply of services¹⁸⁰. The definition there considered was an attempt to adapt to a contract of services the definition now contained in section 55(7) of the Sale of Goods Act 1893 (which was in fact one of the definitions of consumer sale proposed in our First Report); it was in the following terms:—

“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”.

The majority of our Working Party took the view that this definition would be difficult if not impossible to apply to some types of service and we provisionally endorsed that view in our joint document. The difficulty was said to arise from the fact that the supplier of some types of service would often have no means of knowing whether the person to whom the service was to be supplied was using it in the course of a business or not. The carriage of goods was given as one example and the carriage of persons is an even better one: the carrier could not know whether the consignor was sending the goods, still less whether the passenger was travelling, in the course of his business or not. If our proposals for controlling exemption clauses excluding liability for negligence are accepted the issue will to that extent become academic, since we recommend that such clauses should generally be subject to a reasonableness test, with a complete ban on contracting out of liability for death or personal injury in some special cases—including the carriage of persons—and that no distinction should be made between consumer and commercial contracts. In relation, however, to the kind of exemption clauses we are considering now the issue is still one of practical importance.

¹⁷⁹ Supply of Goods (Implied Terms) Act 1973, s. 12(6).

¹⁸⁰ Joint document, paras. 39–40.

150. Our provisional conclusion that it was not feasible to devise a workable definition of a consumer services contract was challenged by some of those who commented on our joint document and on reconsideration we think it was wrong. As we have indicated above, the reason for rejecting the proposed definition was that the supplier would in some cases have no means of knowing whether his customer was using the service in the course of his business or not. We believe that in the majority of cases the supplier of the service will know or have no difficulty in finding out if the customer is acting in the course of his business. In those cases where he cannot easily find out, we think the supplier should be encouraged to assume that his customer is a "consumer" and we therefore consider that, where a person who has entered in the course of a business into a contract seeks to rely on an exemption clause excluding liability for the breach of a contractual obligation, the onus of proving that the contract is not a consumer contract should fall on him. To that extent therefore we now reject the criticism which led us to think that the proposed definition of a consumer services contract would not work in practice. We now think, however, that it was unsatisfactory in another respect. The requirement that the service should be of a kind normally provided for private use is of course an adaptation of the third requirement in the definition of consumer sale in section 55(7) of the Sale of Goods Act 1893. We think this attempt was misconceived: whether goods are of a kind normally provided for private use is usually pretty clear; with services we think the position is different and that generally speaking it is not possible to identify a service as being of a kind normally provided for private (as distinct from business) use. We see no reason why the same concept of a consumer contract should not apply to all contracts to which our recommendations apply other than those for the supply of goods¹⁸¹. We therefore think that all these contracts (other than those for the supply of goods) should be treated as consumer contracts for the purpose of controlling the kind of exemption clause we are now considering where one party contracts in the course of his business and the other has neither done so nor held himself out as doing so.

Standard form contracts

151. The making of contracts in a standard form has been a familiar phenomenon for many years. By 1883 it could be said that "A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract¹⁸²". The expressions "standard form contracts" and "standard contracts" are in everyday use, but what was said in 1953 remains true today: "Neither the expression 'standard form contract' nor any variant of it has acquired the status of a term of art or, indeed, any recognised and distinctive meaning¹⁸³".

¹⁸¹ The concept of a consumer transaction for the purpose of contracts for the supply of goods is discussed in para. 33, above; see also para. 149, above.

¹⁸² *Watkins v. Rymill* (1883) 10 Q.B.D. 178, 188, *per* Stephen J.

¹⁸³ H. B. Sales, "Standard Form Contracts", (1953) 16 M.L.R. 318. The author supplied his own definition: "The words 'standard form contract' will be used to include every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form": p. 318.

152. Broadly speaking, standard form contracts are of two different types. One type is exemplified by forms which may be adopted in commercial transactions of a particular type or for dealings in a particular commodity, such as the different forms of sale contracts used by the Grain and Feed Trade Association or the forms for building and engineering contracts sponsored by the Royal Institute of British Architects, the Institution of Civil Engineers and the Federation of Associations of Specialists and Sub-contractors. Such forms may be drawn up by representative bodies with the intention of taking into account the conflicting interests of the different parties and producing a document acceptable to all. The other type is the form produced by, or on behalf of, one of the parties to an intended transaction for incorporation into a number of contracts of that type without negotiation. Examples include a multitude of printed documents setting out conditions of various kinds, terms found in catalogues and price lists, and terms set out or referred to in quotations, notices and tickets. Although it is the second type of standard form contract that has attracted most criticism, both types have in common the fact that they were not drafted with any particular transaction between particular parties in mind and are often entered into without much, if any, thought being given to the wisdom of the standard terms in the individual circumstances.

153. Although lawyers are familiar with the idea conveyed by the term "standard form contract" it is not easy to formulate a precise definition. A number of features can readily be described which contribute to the recognition of a standard form contract, but not all of them exist in every case and it would not be desirable to make it possible to avoid the application of a rigid definition by an artifice. It will be convenient to discuss some of these identifying features.

154. In practice standard terms are in writing. Indeed, they are normally printed, but a term would not be any less a standard term if salesmen were instructed to insert a standard form of words by hand in a blank space left in a printed contract every time they wrote in the customer's name and the price. Moreover, terms may be incorporated into a printed contract by reference to a handwritten document or a notice board. Of course the contract itself may not be wholly in writing, as contracts are frequently partly written and partly oral. In theory standard terms could no doubt be oral. One can envisage examples such as a standard patter memorised by a door-to-door salesman where each contract is entered into orally in an identical form of words. But consumer contracts are already within the scope of our proposals and we have therefore come to the conclusion that there is no need to attempt to regulate standard terms that are not in writing, even if there are any in actual use.

155. Legislation in Israel has defined a "standard contract" to mean—

"a contract . . . all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service . . . with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity . . ." ¹⁸⁴

¹⁸⁴ Standard Contracts Law, 5724-1964 (Israel), s. 1.

Although one normally has in mind a stock of printed forms or tickets, we do not think that the idea of terms "fixed in advance" would be a useful element for our purposes. In a sense every writing forming or incorporated into a contract necessarily comes into existence in advance of the making of the contract, and it is not clear what earlier stage than the making of a contract might be chosen as the time in advance of which the terms are fixed. Again, standard terms are often drafted for persons engaged in a particular trade by a trade association or professional body, but it is not clear that in this country they would be regarded as having been settled "on behalf of" either of the parties to a contract.

156. The essential element that has led us to the decision that there must be some measure of control over terms in standard form contracts between persons in business is the lack of negotiation that exists in most situations where they are used. Nevertheless it does not seem to us that the lack of negotiation, or of any opportunity for negotiation, can itself be regarded as the distinguishing feature of standard form contracts. In many contracts there may be negotiation as to some terms, such as the quantity or price, with no opportunity to negotiate the exempting terms with which we are concerned. Moreover, an expressed willingness to discuss terms may not in practice mean that the terms are any the less proffered on a "take it or leave it" basis. Accordingly our conclusion is that the lack of opportunity to vary or negotiate terms should not be made a feature of a statutory description of standard terms.

157. We think that the courts are well able to recognise standard terms used by persons in the course of their business, and that any attempt to lay down a precise definition of "standard form contract" would leave open the possibility that terms that were clearly contained in a standard form might fall outside the definition. In our view this would be unfortunate. We have not, therefore, attempted to formulate a statutory description of a standard form contract.

FORM OF CONTROL

158. The question that now arises is what form control over clauses of the type discussed in this Part of the report should take. Should all such clauses be made void or should they be subject to a reasonableness test? We feel that an absolute ban on clauses of this type is not justified; in some circumstances such clauses may be reasonable. A person who has entered into a standard form contract which includes a provision limiting the promisor's liability for breach may have read and understood fully the implications of the provision but as the other terms of the contract were so advantageous he may have decided to accept the risk of the other party breaking the contract; in that situation it may be thought reasonable that he should be bound by his bargain. Even where a contract term enables a party to render a performance substantially different from that which the other party expected it may in the circumstances be reasonable to uphold the clause, for example, where his expectation was totally unreasonable. Accordingly, we conclude that the most appropriate control is the test of reasonableness.

Recommendation

159. (a) *We recommend that, in contracts which fall within the scope of this report, terms—*

- (i) *which exclude or limit any liability of a party for breach of contract or exclude or limit rights or remedies available against him as a result of his breach, or*
- (ii) *which enable a party to render no performance or a performance substantially different from that which was reasonably expected of him under the contract,*

should be subject to control where that party was acting in the course of a business and the contract was either a consumer contract or a standard form contract.

(b) *The form of control should be the reasonableness test.*

(c) *Contracts for the sale of goods and hire-purchase agreements which are “consumer sales” or “consumer agreements” respectively for the purposes of the Supply of Goods (Implied Terms) Act 1973 should be treated as consumer contracts for the purpose of the control proposed in sub-paragraphs (a) and (b). The criteria for deciding whether other contracts for the supply of goods are consumer contracts should be the same as those proposed for the purpose of Part II. That is to say, all contracts for the supply of goods should be treated as consumer contracts where—*

- (i) *the supplier makes the contract in the course of a business;*
- (ii) *the person for whom the goods are supplied is not contracting and does not hold himself out as contracting in the course of a business; and*
- (iii) *the goods are of a type ordinarily supplied for private use or consumption.*

(d) *Other contracts should be treated as consumer contracts where—*

- (i) *one party was acting in the course of a business; and*
- (ii) *the other party neither made the contract in the course of a business nor held himself out as doing so.*

(e) *The onus of proving that a contract is not a consumer contract should lie on the party so contending.*

(Paragraphs 136–158.)

PART V—GENERAL

160. We think we have now, in our First Report, and in Parts II, III and IV of this report, identified and made recommendations for controlling each of the varieties of provision that can reasonably be labelled “an exemption clause”. In this Part we discuss a variety of problems which are common to all the situations which we have considered.

A. THE MEANING OF “EXEMPTION CLAUSE”

161. The expression “exemption clause” which we have used in this report needs some explanation at this stage. Some clauses are manifestly designed to exclude or restrict obligations or liability or rights and remedies. Others may be capable of producing the same result although they may appear to be intended for a different purpose.

162. The following provisions are clearly intended to operate or are clearly capable of operating as exemption clauses:—

- (i) terms imposing a liability in consequence of the exercise of a right or remedy;
- (ii) terms imposing a time-limit shorter than that fixed by the general law for the enforcement of a right or remedy;
- (iii) terms imposing a time-limit on action necessary before any right, remedy, duty or liability arises;
- (iv) terms altering the onus of proof or providing that one matter is conclusive evidence of another.

In view of the suggestion made to us that contracts of indemnity should have been and were not covered by the provisional proposals made in our joint document, perhaps we should say that, in our view, any provision whereby a person has to indemnify another from the consequences of the former person’s having exercised a right or remedy is a provision restricting the exercise of such a right or remedy and should accordingly be treated as an exemption clause.

163. There are, however, some provisions which, although they may not be designed to operate as exemption clauses, nevertheless resemble them in their effect, and it is not always clear how they should be treated. Thus a provision that any dispute is to be determined by one of the parties and that his decision is to be final clearly has the effect of restricting the remedies of the other party and should be controlled as an exemption clause. Arbitration clauses providing for the submission of disputes to an arbitrator or arbiter chosen by one of the parties could well have a similar effect. Indeed, section 15(9) of the Israeli Standard Contracts Law 1964 provides that a term which “refers a dispute between the parties to arbitration in such manner as to give the supplier more influence than the customer on the designation of the arbitrator or arbitrators or the place of the arbitration or entitles the supplier to choose, of his own accord, the court before which the dispute is to be brought” is a “restrictive term”, the definition of which includes exemption clauses and provisions having a similar effect. We have concluded, however, that it would not be appropriate to recommend that such arbitration clauses should be treated as though they

were exemption clauses. We clearly could not recommend that they should be avoided outright in any situation. The most we could recommend is that they should be subject to a reasonableness test. We do not think we should recommend even that degree of control since we consider that the possibility that an arbitration clause may operate to the detriment of a party to a contract is a matter which should be regulated by the law relating to arbitration.

164. A term restricting a remedy or a liability arising out of a breach of a contractual obligation is to be regarded as an exemption clause and thus within the scope of our proposals. So far as a contractual provision fixes the damages payable for breach at a figure below that which would otherwise be awarded it may be said to restrict the damages payable. Is then a liquidated damages clause to be regarded as an exemption clause in these circumstances? With any provision fixing the amount of damages there is the possibility that it may be held to be a penalty and so unenforceable¹⁸⁵. In this event the penalty clause is ignored and the normal damages are recoverable even if greater than the penal sum¹⁸⁶. Thus there is no need to worry whether a provision found to be a penalty is to be treated as an exemption clause since it is ineffective anyway. But a valid liquidated damages provision may in practice limit the liability which would have been imposed on a party in breach of contract had there been no such provision¹⁸⁷. In the normal way a provision for liquidated damages is not regarded as an exemption clause. In the case of *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*¹⁸⁸ it was argued that a demurrage clause, a familiar form of liquidated damages clause¹⁸⁹, should be treated as an exemption clause, but Lord Upjohn distinguished between "clauses which are truly clauses of exception or limitation, that is to say clauses essentially inserted for the purpose only of protecting one contracting party from the legal consequences of other express terms of the contract or from terms which would otherwise be implied by law or from the terms of the contract regarded as a whole" and clauses inserted for the benefit of both parties such as agreed damages clauses¹⁹⁰. A distinction was drawn in that case between a clause agreeing a figure of damages, where no proof of loss was needed (a liquidated damages clause), and a clause imposing a limit where proof of loss at least up to the limit would be necessary (an exemption clause)¹⁹¹.

165. Nevertheless it is clear that a clause may be drafted in the form of a liquidated damages clause so as to benefit one party very much more than the other. Thus a contract for the hire of a car might provide that, if any injury, damage or loss was caused by a defect, liquidated damages of £1 would be paid by the owner to the hirer. In a sense the provision benefits both parties—for even trifling damage £1 is payable, and the hirer need not prove his loss.

¹⁸⁵ *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79.

¹⁸⁶ *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66, approved in *Watts, Watts & Co. Ltd. v. Mitsui & Co. Ltd.* [1917] A.C. 227; but see *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry (1925) Ltd.* [1933] A.C. 20, 26, per Lord Atkin.

¹⁸⁷ *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry (1925) Ltd.* [1933] A.C. 20.

¹⁸⁸ [1967] 1 A.C. 361.

¹⁸⁹ "Demurrage, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading": *Scrutton on Charterparties and Bills of Lading* (18th ed., 1974), p. 303.

¹⁹⁰ [1967] 1 A.C. 361, 420.

¹⁹¹ See Viscount Dilhorne at p. 395, Lord Upjohn at pp. 420–421 and Lord Wilberforce at p. 436.

Yet in reality it is difficult to conceive of loss as low as £1 giving rise to any litigation, and the practical effect of the clause might be to limit the owner's liability. It might be said that £1 would not be a genuine pre-estimate of loss so that the provision would not be a true liquidated damages clause, but it is uncommon for an argument that a clause is penal to be based on the fact that the sum is too low¹⁹². Lord Wilberforce has, however, pointed out that the form of the clause is not decisive¹⁹³, and Viscount Dilhorne has said that "it may be that a demurrage clause in a particular case is so drawn that on its proper construction it is to be treated as imposing a limitation on liability"¹⁹⁴.

166. In our view this is a matter of construction for the courts. It is not our intention that the legislation we propose to deal with exemption clauses should upset all provisions for liquidated damages, with the result that whenever it was shown that the damages that would be awarded for a particular breach of contract were greater than the liquidated sum the provision for liquidated damages would have to be treated as an exemption clause. On the other hand, it must not be possible for an astute draftsman to evade the legislative control simply by producing a provision that looks like a liquidated damages clause. We therefore conclude that a provision drafted in the form of an agreement for liquidated damages may in fact fall to be dealt with as an exemption clause in a particular case.

167. Terms excluding any intention to create legal obligations are obviously not exemption clauses in the sense in which we have used that expression in this report. It is conceivable, however, that such clauses may be used as a device for avoiding the controls we are recommending. We would hope that, if the use of such terms becomes at all common, the Director General of Fair Trading would keep a watchful eye on them.

Recommendation

168. *We recommend that, although our proposed controls should generally apply to contract terms (and, in the case of the controls proposed in Part III, notices) which have the effect of excluding or restricting the relevant obligation or liability, arbitration clauses should not be regarded as exemption clauses for the purposes of this report. In England and Wales arbitration clauses should be excluded from the proposed controls if they are within the scope of the Arbitration Act 1950, that is to say, if they are written agreements to submit present or future differences to arbitration. In Scotland all agreements to refer to arbitration should be excluded from the proposed controls.*
(Paragraphs 161-167.)

B. THE REASONABLENESS TEST

169. The reasonableness test plays an important part in the control over exemption clauses proposed in this report. It is the method of control recommended for the clauses relating to contractual obligations discussed in Part IV.

¹⁹² Such an argument was rejected by Lord Upjohn in the *Suisse Atlantique* case with the words "It is quite clear on the authorities that the parties need not agree on a true estimate of damage. They are perfectly entitled to agree on a low rate". See [1967] 1 A.C. 361, 421. See, too, Viscount Dilhorne at p. 395.

¹⁹³ [1967] 1 A.C. 361, 436.

¹⁹⁴ *ibid.*, at p. 395.

It is the main method of control (supplemented in certain circumstances by a complete ban) over the exemptions from liability for negligence that we discussed in Part III. It is the method recommended in Part II for controlling exemption clauses in commercial contracts for the supply of goods. Both Commissions concur in recommending that a reasonableness test is the appropriate form of control in these cases and that it is for the party challenging the exemption clause to show that it is not fair or reasonable, but they have not reached agreement as to the form that that test should take¹⁹⁵. There are two issues on which they differ in relation to the reasonableness test. The first is as to the time at which the reasonableness of an exemption should be tested. The second is whether the statute should make any reference to what have come to be called "guidelines"—the matters to which regard should be had in determining the question of reasonableness.

AT WHAT TIME SHOULD THE TEST BE APPLIED?

The view of the Scottish Law Commission

170. The principal objection to the reasonableness test has already been mentioned¹⁹⁶: that it introduces a degree of uncertainty into the law. Although agreeing with this criticism, it was the view of both Law Commissions that the introduction of the reasonableness test would not create uncertainty where there is now certainty and that the advantages of such a test outweigh the disadvantages. At the same time the Scottish Law Commission do not think that further recommendations which would increase the element of uncertainty would be justified. They take the view that if, in applying the test, the courts are permitted to take account of any circumstances other than those which obtained or could reasonably have been anticipated at the date of the contract, the element of uncertainty will create difficulties for the business community and the consumer alike. It is not clear whether those who advocate the selection, for the purposes of the judicial test, of a time later than the date of the contract would select the date of the raising of the action, the date of the enquiry or the date of the hearing of the final appeal. But, whichever of these times were to be selected, it seems clear that any such approach might well result in an exemption clause being held void and ineffective at one time subsequent to the date of the contract and valid and effective at another, depending on the occurrence or non-occurrence of subsequent events, including events which could not reasonably, or even possibly, have been foreseen at the time when the parties entered into the contract. The Scottish Law Commission would, for that and other reasons, be opposed to a test which takes the form of a judicial dispensing power, exercised possibly in the light of unforeseeable events subsequent in date to the contract.

171. It must be clear or at least determinable from the outset what each contracting party has agreed to do or to give or to abstain from doing. This is not merely a matter of theory but one of great practical importance. It would be a considerable impediment to the undertaking of contracts involving plant of novel design or processes of a novel character if the party constructing the plant or developing the process were not in a position to ascertain in advance

¹⁹⁵ See para. 6, above.

¹⁹⁶ See paras. 65–68, above.

the range of the obligations he undertakes. It would be impossible for him to ascertain the range of his obligations against a legal background where unpredictable circumstances subsequent to the making of the contract could be taken into account. It is no answer to say that, in practice, reasonable exemption clauses will not be cut down. A contracting party must be in a position to assess his risks before he enters into the contract, not only to facilitate his decision whether or not to contract, but to enable him to decide whether or not to insure against the contingencies which the contract involves or to establish an appropriate contingency fund. For the same reasons a solution should be preferred which enables a lawyer to give sound advice to a client who is contemplating entering into a contract. If such advice is not available, there may be unnecessary litigation which would inevitably involve delay and expense.

172. To change *ex post facto* the effect of a contract would run counter to the general principles of the law. When contractual disputes arise, the court seeks to place itself in the position of the parties at the date of the contract and to ascertain their intentions at that time. In the words of Buckley L.J. the courts have to “attempt to discover what [the parties] did in fact intend”¹⁹⁷. Gloag observed “the Court is to endeavour to place itself in the position of a reasonable and disinterested third party, duly instructed, if necessary, as to the law.”¹⁹⁸ Further, it is clear law that the enforceability of liquidated damages provisions is to be ascertained by reference to the parties’ intention at the time of contracting¹⁹⁹. In the context of frustration—where the court seeks to do justice in the light of supervening events—it does not purport to exercise a dispensing power: it first ascertains the true meaning of the contract. Lord Radcliffe observed in *Davis Contractors Ltd. v. Fareham U.D.C.*: “So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”²⁰⁰

173. To admit such change in respect of one aspect of contract alone could create anomalies. For example, there are circumstances in which a clause agreed upon by parties to a contract can operate both as a liquidated damages clause and as an exemption clause. Thus if A and B agree that, in the event of a breach by B, a certain sum of money is to be paid to A by way of liquidated damages, the clause can operate as a restriction of B’s liability if the damage actually suffered by A is more than the agreed figure. It would be incongruous, to say the least, if the courts had to decide whether to enforce the clause as a liquidated damages provision or reject it as a penalty clause by reference to the time of contracting: and yet, in deciding whether to enforce it as an exemption clause, have regard to the time of enforcement.

174. The question whether an exemption clause should be upheld may affect not only parties to the litigation but other persons who may have entered into similar contracts, or whose rights depend on stipulations in favour of third

¹⁹⁷ *Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd.* [1973] Q.B. 400, 421.

¹⁹⁸ *Gloag on Contract* (2nd ed., 1929), pp. 398–9.

¹⁹⁹ *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79.

²⁰⁰ [1956] A.C. 696, 728–9.

parties, who may have no influence over or knowledge of events subsequent to the time of contract. If the courts were able to pronounce upon the reasonableness of an exemption clause in the light of subsequent events, businessmen could not have any reasonable assurance that the essential provisions of certain classes of contract entered into would be upheld in the future. Thus no reliable body of case law could be built up as a guide to contracting parties, both businessmen and consumers alike, which might indicate whether particular clauses would or would not be held to be reasonable.

175. Section 55(4) and (5) of the Sale of Goods Act 1893 provides that a clause exempting from any of the provisions of sections 13 to 15 of that Act should be unenforceable to the extent that it is shown that it would not be fair or reasonable to allow "reliance" on the term. The Scottish Law Commission agree that, *prima facie*, a test involving "reliance" should enable the court to look at all the circumstances up to the time of the dispute. On the other hand, of the guidelines in section 55(5), (d) specifically refers to the time of contracting and the other guidelines refer only to circumstances existing at the time of the contract. It is not, therefore, a matter for surprise that there was a difference of opinion during debates in the House of Lords about the relevant time²⁰¹. It is to be noted, however, that in the course of his speech the Lord Chancellor said:

"We continue to take the view that whether it is reasonable to allow reliance on a term of a contract should be decided in the light of the circumstances at the time of formation of the contract. To take account of later events for this purpose could be equivalent to changing the rules in the middle of the game."²⁰²

This view was shared by a majority of those whom the Law Commissions consulted before the publication of the First Report. It was stated in paragraph 105 of that Report, that "[t]he balance of opinion was clearly in favour of [the time when the contract was made], mainly on the ground that it would, to some extent, mitigate the uncertainty which was inherent in any kind of reasonableness test". The Scottish Law Commission consider it to be inappropriate to follow the pattern of legislation of which the effect is arguably unclear and they do not feel precluded from doing so because that legislation was recently enacted. They see no virtue in perpetuating ambiguities.

176. If the time of contracting is accepted as the appropriate time for testing the fairness of an exemption clause, the courts would still have to consider whether an exemption clause was intended to regulate the particular circumstances which gave rise to the dispute. If the court decided that the clause was not so intended, the exemption clause would be invalid in the context of that particular dispute. If they decided otherwise, the reasonableness test would then be applied, and the courts would then determine whether it was fair or reasonable to contract on those terms. To that extent there might be an element of judicial hindsight, because it is not suggested that the courts would be unaware of the circumstances which had led to the litigation. Nevertheless, in assessing the fairness of an exemption clause, there would be taken into account only those circumstances which were or which should reasonably

²⁰¹ *Hansard* (H.L.) 16 November 1972, Vol. 336, Col. 878; 12 December 1972, Vol. 337, Cols. 502, 504-5, 511-12; 1 February 1973, Vol. 338, Cols. 802-4.

²⁰² *Hansard* (H.L.) 1 February 1973, Vol. 338, Cols. 802-3.

have been foreseen by the parties when they entered into the contract. Such a test would reduce the degree of uncertainty as to the validity, not only of the particular clause in question, but of analogous clauses in other contracts.

Recommendation by the Scottish Law Commission

177. *The Scottish Law Commission recommend that the appropriate test is whether it was fair or reasonable to incorporate the term in the contract, or to give the notice, having regard only to matters which were or ought reasonably to have been known to or in the contemplation of the parties at the time when the contract was made or the notice was given. The onus of showing that it was not fair or reasonable should rest on the party challenging the exemption clause. (Paragraphs 169–176.)*

The view of the Law Commission

178. The Law Commission are not persuaded that any departure from, or amendment to, the existing legislation which provides for control over exemption clauses by a reasonableness test is necessary. In England and Wales the present form of reasonableness test was introduced into the law by section 3 of the Misrepresentation Act 1967. This spoke of “reliance” on an exemption clause; and it was the Law Reform Committee which recommended “that it should not be possible to rely on” an exemption clause in relation to misrepresentation²⁰³. When the Supply of Goods (Implied Terms) Act 1973 was going through Parliament there was a difference of opinion in the House of Lords about whether the relevant time should be the time of contracting or a later time²⁰⁴, but no one suggested that the reference to “reliance” on an exemption clause should be changed. The Law Commission would be reluctant to recommend a departure from legislation so recently enacted by Parliament unless there is a good reason for change.

179. In their view there is no good reason for change. The present formulations of the reasonableness test do not inhibit the court in any way. Section 55(4) of the Sale of Goods Act 1893 can be regarded as typical, and provides that an exempting term made subject to control—

“shall . . . not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term”.

The section continues—

“(5) In determining for the purposes of subsection (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case . . .”²⁰⁵.

There is no mention of the relevant time, but since the question is whether or not it is fair or reasonable to allow reliance on the term it seems to invite the court to consider all the circumstances so far as known to the court. This seems to the Law Commission to be right. Broadly speaking, the control of

²⁰³ Law Reform Committee, *Tenth Report (Innocent Misrepresentation)*; (1962) Cmnd. 1782, para. 24.

²⁰⁴ See para. 175 and n. 202, above.

²⁰⁵ The subsection goes on to set out, in five paragraphs, certain matters to which in particular regard shall be had. Section 12(3) and (4) of the Supply of Goods (Implied Terms) Act 1973 may for all practical purposes be regarded as identical. *cf.* Misrepresentation Act 1967, s. 3.

exemption clauses is concerned not with unreasonable contracts but with unreasonable defences. What may seem reasonable when a contract was made may turn out to be quite unreasonable in the light of the events that have occurred; conversely, a term that appears unreasonable when dealing with unknown consequences of unpredictable magnitude may turn out to operate reasonably in the event.

180. In most cases, of course, an exemption clause that was reasonably included in a contract will still be reasonable when it comes to be relied upon. This is recognised by the fact that the matters “in particular” to which regard is to be had, set out in section 55(5) of the Sale of Goods Act 1893 and section 12(4) of the Supply of Goods (Implied Terms) Act 1973, are all matters relating to the date of the contract. The Law Commission take the view that in many cases there will be no practical difference between the application of the formulation adopted in the Sale of Goods Act (and recommended in the draft clauses for England and Wales set out in Appendix A to this report) and that favoured by the Scottish Law Commission. But circumstances might arise which could not have been contemplated or even foreseen when the contract was made, and there could, in the opinion of the Law Commission, be cases in which these should be taken into account in applying the reasonableness test, whether to show that it is not reasonable to rely on the exemption clause or to show that it is reasonable to rely on it. They do not think that such circumstances will arise in many cases, but the possibility that they may arise is sufficient justification for not excluding them from consideration.

181. If the circumstances of the particular case could not be taken into account, the result might well be that exemption clauses capable of operating quite reasonably in some circumstances would be struck down as unreasonable in all cases. The Australian case *Commissioner for Railways (New South Wales) v. Quinn*²⁰⁶ affords a useful illustration. Part of a consignment of goods sent by rail was lost. The consignor, who had sent the goods at carrier’s risk, immediately complained. When sued the railway commissioner relied on a term requiring claims to be lodged within 14 days in writing. The term was contained in by-laws incorporated by reference into the consignment note and the consignor’s attention was not drawn to it when she complained orally. The term was subject to an Act of 1902 which required that a special condition should be “just and reasonable”. The term was held unreasonable by the High Court of Australia, Rich J. saying: “To my mind the unreasonableness of the clause before us is illustrated by the facts of the case. A lady consigning her luggage from the country loses it altogether . . . She knows nothing about the clause which is hidden away in a pamphlet. She makes prompt application and complaint, argues the matter out with station master and porter and presses her claim. Then she is refused because her expostulations have been oral and not in writing”²⁰⁷. The Law Commission have no doubt that on the facts of the case reliance on the term in question was not fair or reasonable; it is however possible that reliance on it might be reasonable in a case where the term was well-known to the other party and the circumstances were such that it might easily have been complied with, and where the railway authority was prejudiced by the failure to claim in time. They cannot see why such a clause should be

²⁰⁶ (1946) 72 C.L.R. 345.

²⁰⁷ At p. 358.

struck down *in limine* because it *could* operate unreasonably, and they believe that the proper test is whether or not it is reasonable to rely on a term, and that the court should not be prevented from taking into account all the material facts.

182. A court must already take account of matters that occurred after the date a contract was made. To determine damages the court must take into consideration all the facts that have occurred up to the date of the trial (and even possible future events). To determine whether there has been a breach of contract or negligence the court must take into account all the events up to and including what happened when the alleged breach or negligence took place. The nature of the breach and its consequences—including the seriousness or fundamental nature of the breach, and whether the breach of contract or breach of duty was deliberate or inadvertent—help to place the exemption clause in perspective, and may properly influence the court in deciding whether reliance on it is fair or reasonable. It must also be recognised that the reasonableness test proposed by the Law Commission is not simply a question of construction of a contract, so that the considerations relevant to construction are not, in their view, relevant in the present context.

Recommendation by the Law Commission

183. *The Law Commission recommend that the appropriate test is whether it is fair and reasonable to rely on the contract term or notice in question in all the circumstances of the case. The onus of proving that it is not fair or reasonable to rely on the term or notice should rest on the party challenging the exemption clause.*

(Paragraphs 169 and 178–182.)

SHOULD THERE BE GUIDELINES?

184. In our First Report we set out a list of matters to which we envisaged the court would have regard in applying the reasonableness test²⁰⁸. When we set out that list we contemplated that the court should be enabled to take account of our report and our recommendations²⁰⁹. We did not contemplate that the list, or anything like it, should be incorporated in an Act of Parliament, though in the event five paragraphs based on the matters which we listed were set out in the new section 55(5) of the Sale of Goods Act 1893 and section 12(4) of the Supply of Goods (Implied Terms) Act 1973.

The view of the Law Commission

185. The Law Commission recognise that there is a widespread view that legislation enacting a reasonableness test should give some guidance to the courts as to the sort of matters that should be taken into account. The only objection they see to a statutory list of matters to which regard shall be had in particular is that no such list can ever be complete. The omission of a matter which may well be relevant in a particular case may carry the implication that it should be disregarded, and the inclusion of particular matters may mean that they receive more importance than they merit. If, however, the matters

²⁰⁸ First Report, para. 113.

²⁰⁹ First Report, draft clause 8(4), p. 62.

listed are introduced by words indicating that regard is to be had to all the circumstances of the case²¹⁰ the Law Commission think the risk that other relevant matters will be disregarded is slight.

186. *Part II controls.* The contracts discussed in Part II of this report, such as contracts for the hire of goods and contracts for work and materials, are very similar to contracts for the sale of goods. The Law Commission therefore think that exemption clauses affecting the relevant terms implied in these contracts should be treated as far as possible in the same way as in contracts of sale, and that legislation applying the reasonableness test to these contracts should, with the necessary slight adaptations, follow the model of section 55(5) of the Sale of Goods Act 1893.

187. *Part III and IV controls.* There might well be a similar list of matters to be taken into account in any legislation implementing the proposals in Parts III and IV of this report. The Law Commission do not recommend this, however, for the situations discussed in Parts III and IV are very much more varied than those which arise in connection with the supply of goods alone. If the exemption clause which is subject to a reasonableness test under the proposals in Parts III or IV of the report is to be found in a contract of sale of goods then some or all of the matters listed in section 55(5) of the Sale of Goods Act 1893 may be relevant. But the exemption clause may be in a totally different type of contract, or may be found in a notice, and the application of the reasonableness test may involve reference to very different considerations.

188. This will become apparent if a list is given of the sort of matters that the Law Commission think the court could be expected to take into consideration when deciding if it would be fair or reasonable to permit reliance on provisions excluding or limiting liability for negligence or on one of the provisions discussed in Part IV. They would expect the court to regard the following circumstances as indicating that reliance on an exemption clause is likely to be fair and reasonable, while the converse circumstances might perhaps indicate that it is not:—

- (a) that the bargaining position of the person against whom the clause is invoked was stronger than that of the person invoking it;
- (b) that it was reasonable in the circumstances to expect the person against whom the clause is invoked rather than the person invoking it to have insured against the loss that has occurred;
- (c) that the person seeking to rely on the exemption clause had offered the other party an alternative contract without the exemption clause, at a fair, increased rate;
- (d) where the exemption clause operates in the event of breach of contract, that the breach was due to a cause over which the party relying on the clause had no control;
- (e) where the exemption clause operates in the event of negligence, that the party against whom it is invoked could be expected to be aware of the activities of the other which might give rise to a risk of negligence and of the possible consequences of such negligence;

²¹⁰ *cf.* Sale of Goods Act 1893, s. 55(5) (introduced by Supply of Goods (Implied Terms) Act 1973, s. 4); Supply of Goods (Implied Terms) Act 1973, s. 12(4).

- (f) where the exemption clause takes the form of requiring the party against whom it is invoked to comply with a time limit, that such a time limit is necessary to safeguard the position of the person seeking to rely on the clause;
- (g) that the clause did not exclude liability but only imposed an upper limit.

189. In assessing the relative strength of the bargaining position of the parties, the following circumstances might be regarded as strengthening the bargaining position of the party against whom the exemption clause is invoked:—

- (i) that he knew or should have known that he could enter into a similar contract with another party without having to agree to the exemption clause;
- (ii) that he was experienced in transactions of the type in question;
- (iii) that he had not relied on the advice of the other party.

Circumstances the converse of those indicated above might perhaps be treated as indicating that the position of the person relying on the exemption clause was stronger than that of the person against whom it is invoked.

190. The Law Commission are very conscious of the fact that these lists of matters that the court might take into account are not, and cannot be, comprehensive. The object of the reasonableness test is that the court should have regard not merely to the terms of the exemption clause or of the relevant contract but that it should take account of the commercial and social realities of the situation.

191. The conclusion of the Law Commission is that they should not recommend that matters of this sort be listed in legislation. In any event, one of the consequences of listing certain matters in section 55(5) of the Sale of Goods Act 1893 is that it is now clear that Parliament does not intend the courts to approach the question of reasonableness in a narrow way and to exclude evidence of matters that might arguably not be relevant to mere questions of construction. It is already apparent that the phrase “all the circumstances of the case” is to be interpreted widely, and they doubt if each new enactment of a reasonableness test needs to drive this point home.

Recommendation by the Law Commission

192. *The Law Commission recommend that if there is legislation for England and Wales implementing this report the court should be required, in deciding whether it would be fair or reasonable to allow reliance on an exemption clause in a contract for the supply of goods in accordance with the recommendations in Part II of this report, to have regard to all the circumstances of the case and in particular to the circumstances corresponding to those set out in paragraphs (a) to (e) of section 55(5) of the Sale of Goods Act 1893. But there should be no equivalent list of circumstances set out in the legislation implementing the control recommended in Parts III and IV of this report.*
(Paragraphs 185–191.)

The view of the Scottish Law Commission

193. As explained in paragraph 184, the two Law Commissions included in the First Report a list of matters to which, it was envisaged, a court would have regard in applying the reasonableness test²¹¹. But neither Commission contemplated that that list, or any similar list, would be incorporated into any Act of Parliament implementing that Report. The reasons which impelled the Scottish Law Commission to this conclusion were that no such list could ever be complete and that inclusion of particular matters might lead to excessive emphasis being placed upon the matters specified rather than upon other matters which it is relevant to consider in deciding what is reasonable in the whole circumstances of the case. The ultimate question is one of confidence in the courts and reference is made in this context to evidence submitted by the Lord President of the Court of Session, Lord Emslie, and the Lord Justice-Clerk, Lord Wheatley, to the Committee on the Preparation of Legislation²¹²:—

“It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This, with respect to them (the Parliamentarians), is wholly unfounded.”

The Scottish Law Commission have confidence in the ability of the judiciary to apply the reasonableness test appropriately in the absence of guidelines and regret their inclusion in section 55(5) of the Sale of Goods Act 1893. They return to consider this question in relation to the different areas of this report.

194. *Part II controls.* The Law Commission recommend that in relation to contracts involving the supply of goods the pattern of section 55(4) and (5) of the Sale of Goods Act should be followed. The Scottish Law Commission do not share this view, partly because, as they explained in paragraph 175 above, section 55(4) and (5) is arguably ambiguous in relation to the question whether circumstances emerging after the time of contracting are relevant to the assessment of the reasonableness of an exemption clause and partly because of their objection in principle to the qualification by statutory guidelines of the reasonableness test.

195. *Part III and IV controls.* For the reasons adduced in paragraph 193, the Scottish Law Commission would be opposed to the use of guidelines to illustrate the application of the reasonableness test in the situations discussed in Parts III and IV of this report. But they also agree with the Law Commission that the situations discussed in Parts III and IV are so varied that, even if in principle guidelines were thought to be appropriate, it would not be practicable to devise an adequate list.

Recommendation by the Scottish Law Commission

196. *The Scottish Law Commission recommend that any legislation for Scotland implementing this report should not set out particular matters to which regard is to be had, and that section 55(5) of the Sale of Goods Act 1893 and section 12(4) of the Supply of Goods (Implied Terms) Act 1973 should be reconsidered and amended.*

(Paragraphs 193–195.)

²¹¹ First Report, para. 113.

²¹² (1975) Cmnd. 6053, paras. 6.5 and 19.41.

C. ACTIVITIES TO BE REGARDED AS "BUSINESS"

197. As has been mentioned in Part I²¹³ our recommendations apply to exemption clauses which relate to things done or left undone in the course of a "business". We do not wish, however, to confine the control of exemption clauses to those used in the course of purely commercial activities; the control should apply to exemption clauses used in connection with the activities of the professions, government departments, local authorities and statutory undertakings²¹⁴.

198. It has been suggested that different considerations apply to the professions which justify their being treated differently from other suppliers of services. In relation to the professions generally it is argued that special treatment is necessary as the damage which may result from an act of negligence on the part of a professional man may be totally out of proportion to the contract price; for example, the contract price for the design by an engineer of a small component may be £500, but if the component is designed negligently the resulting damage might run into hundreds of thousands of pounds. It must be remembered, however, that in the case of many commercial services too, the damage caused by negligence may be considerably larger than the contract price, as was the case in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*²¹⁵ and this is also true of such services as those supplied by dry cleaners and car park operators.

199. It is true, however, that the damages awarded as a result of negligence on the part of a professional man may be very high in absolute terms. While the damage caused by negligence on the part of a dry cleaner may be totally out of proportion to the contract price it is not likely to cause bankruptcy, which it may do in the case of a professional man. Certain professions, moreover, do not allow members to operate as limited liability companies and as it is difficult to obtain adequate insurance to cover the vast sums which might be awarded the personal assets of the professional man are at risk. An added problem is that some professional men are prohibited by statute from excluding liability for negligence in relation to certain contracts²¹⁶. These controls over professional men are usually part of the general control and discipline of the professions and we feel it is not appropriate to make recommendations to amend the existing law in these areas.

200. Even though particular problems do exist for the professions, in our opinion there is no justification for treating the professions differently from commercial suppliers of services; it must be remembered that professional men are in the business of providing services for valuable consideration in the same way as, for example, travel agents, transport undertakings and laundries. The control over exclusions and limitations of liability that we are recommending is not a complete ban and we believe that the courts, in deciding whether

²¹³ See para. 9, above.

²¹⁴ This is based on the definition of "business" added to the Sale of Goods Act 1893 by the Supply of Goods (Implied Terms) Act 1973, s. 7(1).

²¹⁵ [1970] 1 Q.B. 447 (see para. 207, below).

²¹⁶ e.g., Solicitors Act 1974, s. 60(5), which applies to England and Wales, in the case of solicitors' agreements for contentious work; Companies Act 1948, s. 205, in the case of accountants acting as auditors of companies.

reliance on an exclusion or limitation of liability is reasonable, will take into account the particular insurance problems of the professions. This, in our view, will provide the professions with sufficient protection.

201. The control is to apply also to exemptions relating to things done or left undone in the course of the activities of government departments, local authorities and statutory undertakings. The considerations which led us to exclude purely private transactions from the scope of the control we are recommending²¹⁷—equality of bargaining power and the social relationship between parties which provides an incentive to protect the interests of the party receiving the service—are not present here. Indeed there are compelling reasons why we think the control should be applied to exclusions of liability introduced by government departments, local authorities and statutory undertakings. Nationalised industries render services in a way similar to purely commercial undertakings and we can see no justification for exemption clauses imposed by nationalised industries not being subject to the same control as those used by commercial undertakings. With regard to public authorities generally, these are set up in order to serve the public by carrying out particular functions. Not only does the law impose on them a duty to take reasonable care but it must have been intended that they should carry out properly their duties in serving the public. It does not seem appropriate that they should be permitted to exempt themselves from liability without any control.

202. In one area the liability of a statutory undertaking is limited not by contract but by statute. Section 29 of the Post Office Act 1969 excludes the liability of the Post Office, its servants or agents in tort or delict in respect of loss or damage suffered by reason of anything done or omitted to be done in connection with postal and telecommunication services. The liability of the Post Office is also limited by section 30 in connection with registered postal packets. Our consideration of exemptions has been concerned in the main with unilateral or consensual exemptions, not those deliberately conferred by Parliament. Although we find it hard to justify exemptions benefiting a nationalised industry to an extent not possible for ordinary suppliers of similar services we do not think it is for us to propose amendments to the Post Office Act 1969.

Recommendation

203. *We recommend that activities in the exercise of a profession and the activities of government departments, local authorities and statutory undertakers should be regarded as being “in the course of a business” for the purpose of our proposed control.*

(Paragraphs 197–202.)

D. THE FUTURE OF “FUNDAMENTAL BREACH”

204. We suggested in our joint document²¹⁸ that the introduction of a test of reasonableness would leave no place for the doctrine of fundamental breach as a means of preventing parties from relying unreasonably on exemption

²¹⁷ See para. 9, above.

²¹⁸ Joint document, para. 60.

clauses. This doctrine was specifically mentioned in the First Programme of the Law Commission as a matter to be examined²¹⁹. In Scotland, however, it seems that it has been considered by the courts only on rare occasions, and in Scottish appeals to the House of Lords it has apparently been taken to refer only to construction of the contract²²⁰. There are two aspects of the doctrine that call for discussion. First there is the relevance of fundamental breach in construing an exemption. Secondly, there is the proposition that where a breach has brought a contract to an end an exemption clause can no longer be relied upon. We are not of course concerned here with the effect of a fundamental breach of contract otherwise than in relation to exemption clauses.

205. We deal first with the “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 the contract. This . . . is a rule of construction based on the presumed intention of the contracting parties²²¹”. When we said that a reasonableness test would leave no place for the doctrine of fundamental breach we were not referring to this rule of construction. Clearly any attempt to rely on an exemption clause can only succeed if the exemption in question was intended to apply in the situation that has in fact arisen. If it does not apply it cannot be relied upon, and no control over the exemption clause is needed in that case. Only if the exemption clause is wide enough to apply to the breach that has taken place it is necessary to bring into play a control by a reasonable test. On the other hand, if the exemption clause is declared to be void by statute there will be no need to decide whether it was intended to apply.

206. We come now to the proposition that where a contract comes to an end as a result of a breach, exemption clauses, like other terms, cease to operate. This proposition was accepted in the *Suisse Atlantique* case by Lords Reid²²² and Upjohn²²³ and was applied by the Court of Appeal in *Harbutt's “Plasticine” Ltd. v. Wayne Tank and Pump Co. Ltd.*²²⁴ Whatever the true status of this proposition²²⁵ we do not think that it would be consistent with the imposition of a reasonableness test to leave this aspect of fundamental breach unchanged. The object of a reasonableness test is to do justice to both parties and its virtue is its flexibility. If the doctrine of fundamental breach were still to be applied as a rule of law where the contract comes to an end, a party might find that an exemption clause was ineffective even though he could show that the clause was reasonable. This would be a most unreasonable result.

²¹⁹ *First Programme* (1965), Law Com. No. 1, Item II, recommendation (c).

²²⁰ *Pollock v. Macrae* 1922 S.C. (H.L.) 192.

²²¹ *U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece S.A.* [1964] 1 Lloyd's Rep. 446, 453, per Pearson L.J., adopted in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, expressly by Viscount Dilhorne (p. 393) and Lords Hodson (p. 410) and Upjohn (p. 426) and implicitly by Lord Wilberforce (pp. 432–434); Lord Reid agreed that “exemption clauses should be construed strictly” (p. 406).

²²² [1967] 1 A.C. 361, 398.

²²³ At p. 425.

²²⁴ [1970] 1 Q.B. 447.

²²⁵ We refer to the uncertainty created by the *Harbutt's “Plasticine”* case in para. 43, above.

207. We can illustrate the problem by reference to the facts of the *Harbutt's "Plasticine"* case itself. The defendants agreed to install a pipeline in the plaintiff's factory. The pipeline was to be heated so that it would convey liquid wax. The defendants used a plastic pipe that was unsuitable for the purpose. The heating was left on unattended all night. The plastic pipe distorted, wax escaped, and a fire resulted. Damage to the amount of £146,581 was caused. The defendants sought to rely on an exemption clause which would limit their liability to the value of the contract, £2,330. On the assumption that the clause applied to the breach²²⁶ the Court of Appeal held unanimously that the breach of contract was fundamental, that the plaintiffs had no option but to treat the contract as at an end, and that consequently the exemption clause could no longer be relied upon.

208. In that case the judges were not, of course, applying any reasonableness test, so there was no discussion of the matters that might have been relevant had they been doing so. But we may, for the sake of argument, imagine possible facts that would have been relevant to a reasonableness test. Suppose that the parties had in negotiation considered the possibility of extensive damage caused by negligence. Suppose that as a result of discussions with their respective insurers they had arrived at the limitation of liability that was included in the contract as the fairest way of allocating the risk. Suppose that the agreed price reflected this conclusion. Suppose that the court, applying the reasonableness test, was satisfied that in all the circumstances the limitation was reasonable. It would nevertheless not be possible for the court to permit the defendants to rely on it, for it would have ceased to operate when the contract came to an end as a result of the breach. We do not think that this would be the right result in those hypothetical circumstances.

209. Before the *Suisse Atlantique* case it was thought by some that there was a general rule that, whether or not a contract came to an end, no exemption clause could protect a party who was guilty of a fundamental breach of the contract or guilty of the breach of a fundamental term. That doctrine, rejected by the House of Lords in the *Suisse Atlantique* case, was criticised because it was too rigid. Lord Reid said this in the *Suisse Atlantique* case²²⁷:

"But this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer. And 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 the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament."

It seems to us that the operation of the doctrine as it was applied in the *Harbutt's "Plasticine"* case²²⁸ is open to precisely the same criticism and that where a test of reasonableness has been introduced, whether under the proposals

²²⁶ *Widgery and Cross L.JJ.* held that as a matter of construction it did apply; Lord Denning M.R. thought it ambiguous, but was prepared to assume it applied.

²²⁷ [1967] 1 A.C. 361, 406.

²²⁸ [1970] 1 Q.B. 447.

contained in this report or under the Sale of Goods Act 1893 or the Supply of Goods (Implied Terms) Act 1973, this aspect of the doctrine of fundamental breach should be abolished so far as English law is concerned: and, in Scots law, it should be made clear that it has no application.

Recommendation

210. *We recommend that, in English law, where the reasonableness test applies, whether under the proposals of this report or under section 55(4) of the Sale of Goods Act 1893 or section 12(3) of the Supply of Goods (Implied Terms) Act 1973, neither the breach of the contract (fundamental or otherwise) nor the termination of the contract in consequence of breach should invalidate an exemption clause. We recommend that, for the avoidance of doubt in Scots law, where under the proposals of this report or under section 55(4) of the Sale of Goods Act 1893 or section 12(3) of the Supply of Goods (Implied Terms) Act 1973, it would be fair or reasonable to incorporate a term in a contract (or, as the case may be, to allow reliance on a term), the termination of the contract in consequence of a breach should not of itself invalidate that term. These recommendations are not intended to preclude the court from finding that, as a matter of construction, the term does not apply to the breach in question.*

(Paragraphs 204–209.)

E. CONFLICT OF LAWS—INTERNATIONAL TRANSACTIONS

RECOMMENDATIONS IN FIRST REPORT

Evasion of controls—choice of foreign law

211. In our First Report we pointed out the danger that the parties to a domestic sale might be tempted to circumvent the control of exemption clauses recommended in that report by choosing a foreign system of law under which there was no comparable control. There was, we thought, no settled principle in our law which would prevent them from so doing. Since the controls we recommended were, in their application to domestic sales, the equivalent of rules of public policy, it seemed desirable to disable parties to a domestic contract from avoiding these controls by a resort to foreign law. We therefore proposed the enactment of a provision which would ensure that the application of the proposed controls to domestic sales should not be circumvented in this way and recommended the introduction of the necessary safeguard into the Sale of Goods Act 1893²²⁹.

Evasion of controls—choice of Uniform Law on Sales

212. We also foresaw the possibility that, when the Uniform Laws on International Sales Act 1967 came into force²³⁰, the parties to a domestic contract for the sale of goods would be able to circumvent the controls we proposed by choosing the Uniform Law on the International Sale of Goods (“the Uniform Law on Sales”) as the law of their contract. Article 4 of the Uniform Law on Sales provides that when that Law has been chosen by the parties as the law of the contract, it shall apply “to the extent that it does not affect the application

²²⁹ First Report, para. 122.

²³⁰ The Uniform Law on Sales applies to contracts made on and after 18 August 1972 if the parties so elect: see the Uniform Laws on International Sales Order 1972, S.I. 1972 No. 973.

of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law". In order to prevent evasion of the controls recommended in our First Report by the choice of that Law as the law of a contract, we recommended²³¹ that section 1(4) of the Uniform Laws on International Sales Act 1967 should be so amended that sections 12 to 15 and 55 of the Sale of Goods Act 1893, together with the provision recommended as mentioned in the preceding paragraph, would be regarded as "mandatory" for the purposes of Article 4 of the Uniform Law.

International sales

213. We also expressed the view that the controls we recommended in that report over the right to contract out of the provisions of sections 12 to 15 of the Sale of Goods Act 1893 should not apply to "international sales"²³². Our reasons for making that recommendation were (a) that, where goods were exported from the United Kingdom to another country, it was for the legal system of that country rather than that of our own to specify how far contractual freedom should be limited or controlled in the interests of consumers or other purchasers; (b) that contracts of an international character ordinarily involved transactions of some size between parties who were engaged in commerce and who wished to be free to negotiate their own terms; and (c) that it would be undesirable to make proposals which would place United Kingdom exporters under restrictions which would not apply to some of their foreign competitors²³³.

214. We recognised that the problem of defining contracts for the international sale of goods would be a difficult one but for the existence of a definition in Article 1 of the Uniform Law on Sales, scheduled to the Uniform Laws on International Sales Act 1967, which, with a small modification, seemed to us to be an appropriate model.

215. We recommended accordingly that the parties to contracts for the international sale of goods should be free to negate or vary the conditions and warranties which would be implied by sections 12 to 15 of the Sale of Goods Act 1893²³⁴.

SUPPLY OF GOODS (IMPLIED TERMS) ACT 1973

Sale of goods

216. These recommendations were implemented by sections 5 and 6 of the Supply of Goods (Implied Terms) Act 1973 (with the modification necessary to take account of the fact that the Act applied to Northern Ireland). Section 5(1) was aimed against the possibility that parties to a domestic contract for the sale of goods might seek to circumvent the proposed controls by choosing a foreign system of law; it provided for the insertion in the Sale of Goods Act 1893 of the following section:—

"55A. Where the proper law of a contract for the sale of goods would, apart from a term that it should be the law of some other country or a

²³¹ First Report, para. 123.

²³² First Report, para. 120.

²³³ First Report, para. 120.

²³⁴ First Report, para. 121.

term to the like effect, be the law of any part of the United Kingdom, or where any such contract contains a term which purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of sections 12 to 15 and 55 of this Act, those sections shall, notwithstanding that term but subject to section 61(6) of this Act, apply to the contract.”

217. Section 5(2) was aimed against the possibility that the parties to a domestic contract might seek to circumvent the controls by choosing the Uniform Law on Sales as the law of their contract²³⁵. It provided that section 1(4) of the Uniform Laws on International Sales Act 1967 should be so amended that sections 12 to 15, 55 and 55A of the Sale of Goods Act 1893 were excluded from the general rule that no provision of the law of any part of the United Kingdom was to be regarded as a mandatory provision for the purposes of Article 4 of the Uniform Law on Sales.

218. Section 6 was designed to ensure that the controls proposed in our First Report should not apply to “international” sales. It provided that the following subsection should be inserted in section 61 of the Sale of Goods Act 1893:

“(6) Nothing in section 55 or 55A of this Act shall prevent the parties to a contract for the international sale of goods from negating or varying any right, duty or liability which would otherwise arise by implication of law under sections 12 to 15 of this Act.”

Section 7 provided (*inter alia*) for the insertion in section 62(1) of the Sale of Goods Act 1893 of a definition of a “contract for the international sale of goods”. This followed the definition in Article 1 of the Uniform Law on Sales, as set out in Schedule 1 to the Uniform Laws on International Sales Act 1967, of the contracts of sale to which that Law applies, subject to certain modifications necessary for the purposes of section 61(6) of the Sale of Goods Act 1893.

Hire-purchase agreements

219. A provision similar to section 55A of the Sale of Goods Act 1893 was made in relation to hire-purchase agreements by section 13 of the Supply of Goods (Implied Terms) Act 1973. No provision was made for “international” hire-purchase agreements or for the possible abuse of Article 4 of the Uniform Law on Sales in relation to hire-purchase agreements²³⁶.

PROBLEMS INVOLVED IN PRESENT REPORT

General

220. We have set out in some detail the problems as we saw them in our First Report in relation to the conflict of laws and international sales because we think that similar problems arise in connection with the controls proposed in the present report.

²³⁵ See para. 212, above.

²³⁶ See Article 5(2) of the Uniform Law on Sales, which would apparently have the effect of preventing the evasion of the controls in question by the choice of that Law as the law of the contract.

221. We deal first with the provisions we think necessary to prevent the evasion of those controls and then with the provisions which we think necessary to ensure that the controls do not apply to international transactions where their application would be inappropriate.

Evasion of controls—choice of foreign law

222. *Part II controls.* The controls proposed in Part II of this report are very similar to those imposed by section 55(3) and (4) of the Sale of Goods Act 1893 in relation to the sale of goods and by section 12(2) and (3) of the Supply of Goods (Implied Terms) Act 1973 in relation to hire-purchase agreements. The contracts for the supply of goods to which they relate are similar to contracts of sale and hire-purchase agreements. The proposed controls would apply to clauses exempting from contractual obligations arising by implication of law and the obligations are similar to those imposed by the terms implied in a contract of sale of goods by sections 12 to 15 of the Sale of Goods Act 1893. The difference is that the contractual obligations to be protected by the controls proposed in Part II are implied by the common law and not by statute. The proposed controls could be evaded by the choice of a foreign law in contracts which are similar to those described in section 55A of the Sale of Goods Act. The foreign law might not imply the same obligations or it might allow the parties to contract out of them.

223. *Part III and IV controls.* The controls proposed in Parts III and IV might also, to a limited extent, be evaded by the choice of a foreign law.

224. In our view provision should be made on the general lines of section 55A of the Sale of Goods Act 1893 to ensure that the controls proposed in Parts III and IV of this report are not evaded by the choice of a foreign law.

Recommendation

225. *We recommend that provision should be made on the general lines of section 55A to ensure that the controls proposed in Parts II, III and IV of this report are not evaded by the choice of a foreign law.*
(Paragraphs 222–224.)

Evasion of controls—choice of Uniform Law on Sales

226. The controls proposed in this report could be evaded if the parties to a contract for the sale of goods exercised the right conferred by Article 4 of the Uniform Law on Sales to make that Law the law of their contract. Section 1(4) of the Uniform Laws on International Sales Act 1967 should therefore be further amended²³⁷ so as to prevent the evasion of the proposed controls in this way.

²³⁷ See para. 217, above, for the amendment made by the Supply of Goods (Implied Terms) Act 1973 to prevent a similar evasion of the controls imposed by s. 55(3) and (4) of the Sale of Goods Act 1893.

Recommendation

227. *We recommend that section 1(4) of the Uniform Laws on International Sales Act 1967 should be amended by adding the provisions of any legislation implementing the proposals made in this report to the list of provisions which are to be regarded as mandatory for the purposes of Article 4 of the Uniform Law on Sales, thus ensuring that the controls proposed in this report are not evaded by the choice of the Uniform Law on Sales as the law of a contract.*
(Paragraph 226.)

International transactions

228. *Contracts for the supply of goods including sale.* In our view the reasons which led us to propose in our First Report that the controls imposed by section 55(3) and (4) of the Sale of Goods Act 1893 should not apply to “international” sales²³⁸ apply with equal force to the controls proposed in this report, so far as they apply in relation to the contracts for the supply of goods described in Part II. We therefore consider that there should be a provision freeing the parties to a contract for the international supply of goods from the proposed controls. The definition of a contract for the international sale of goods now incorporated in section 62(1) of the Sale of Goods Act 1893 could be used, with minor modifications, to define a contract for the international supply of goods. The controls proposed in Parts III and IV would apply to a wide range of contracts, including contracts of sale of goods. It follows, in our view, that provision should be made freeing the parties from a contract for the international sale of goods from the controls proposed in Parts III and IV of this report.

229. *Other contracts.* As regards some of the cases in which we recommend in Part III that control should take the form of a ban on clauses exempting from liability for death or personal injury due to negligence, the problem of making special provision for “international” contracts does not seem to arise to any significant degree. It cannot arise in the case of car parks. It does not arise in connection with those contracts of international carriage which are the subject of statutory provisions implementing our international obligations. The remaining cases cover exemptions as between employer and employee and the various forms of international transport not yet covered by statutes implementing international conventions. It does not seem to us that any of the reasons advanced in paragraph 120 of the First Report²³⁹ for not applying the controls imposed by the Sale of Goods Act 1893 in relation to international sales have any application here. We see no reason why we should recommend that provisions should be made to deprive an employee or passenger of the benefit that the controls which we propose would give him. As to the proposal made in Part III that exemptions from liability for negligence contained in manufacturers’ guarantees should be made void, we see no reason why this should not apply to international transactions.

²³⁸ See para. 213, above.

²³⁹ Summarized in para. 213, above.

230. This leaves us with the general control over exemption from liability for negligence proposed in Part III in the form of a reasonableness test and the two controls proposed in Part IV, which also take the form of a reasonableness test. We do not think that the application of the reasonableness test to them, even if they are “international”, is open to objection, since the test is flexible enough to operate satisfactorily in any case where the international character of the contract provides a good argument for permitting the exemption clause.

Recommendation

231. We recommend that provision should be made to ensure that the parties to a contract for the supply of goods of the kind described in Part II of this report should be free, if the contract is one for the international supply of goods, from the controls proposed in this report and that parties to contracts for the international sale of goods should be free from the controls proposed in Parts III and IV of this report. No such provision should be made with regard to other types of international contracts.

(Paragraphs 228–230.)

Choice of English or Scots law

232. The parties to contracts of which the proper law would otherwise be the law of some country other than England and Wales or Scotland often choose English or Scots law as the proper law of their contracts. Sometimes there is an express provision to that effect, more often the choice is made by providing for disputes arising under such contracts to be settled by arbitration in England or Scotland, generally in the City of London. The effect of imposing our proposed controls in relation to those contracts might well be to discourage foreign businessmen from agreeing to arbitrate their disputes in England or Scotland. We see no reason why the controls proposed in this report should apply to such contracts and we therefore consider that it should be provided that the controls over exemption clauses proposed in this report should apply only where, apart from a term that the proper law of the contract should be the law of England and Wales or Scotland, the proper law of the contract would be the law of England and Wales or Scotland.

Recommendation

233. We recommend that provision should be made to ensure that the controls proposed in this report should not apply where, apart from a term that the proper law of the contract should be the law of England and Wales or Scotland, the proper law of the contract would be the law of some other country.

(Paragraph 232.)

CRITICISM OF FIRST REPORT

234. This is an appropriate place to mention and comment on criticisms that have been made of the definition of a “contract for the international sale of goods” now included in section 62(1) of the Sale of Goods Act 1893, and of section 55A of that Act.

International sales

235. The definition of “contract for the international sale of goods” now contained in section 62(1) of the Sale of Goods Act 1893 was introduced on our recommendation, being based, subject to certain modifications, not material for our present purposes, on the provisions of Article 1 of the Uniform Law on Sales. This definition has been severely criticised on the ground that it fails satisfactorily to identify the type of transaction which should not attract the controls proposed in our First Report²⁴⁰. We recognise that the definition is not wholly satisfactory, although we do not agree that it leads to all the absurd results which have been alleged. We do not, however, think that we should recommend any alteration of the definition now contained in section 62(1) of the Sale of Goods Act 1893. The Uniform Law on Sales has now become part of the law of this country. As a result the parties to a contract which is an international contract for the purposes of that Uniform Law are entitled to the full benefit of the provisions of the Uniform Law, which includes an absolute freedom to contract out of the terms in the Uniform Law which correspond to sections 12 to 15 of the Sale of Goods Act 1893. We are therefore under an international obligation not to deprive the parties to such a contract of that right. To adopt a different definition of an “international” or “non-domestic” sale, in deference to the criticism made of the existing definition of a contract for the international sale of goods, would in our view add immensely to the complication of the law without effecting any substantial improvement.

Section 55A

236. The provisions of section 55A of the Sale of Goods Act 1893²⁴¹ have been severely criticised by Dr. F. A. Mann in a recent article²⁴². We cannot hope to do justice to this detailed criticism in the compass of this report. We wish to stress, however, that, in their First Report, the Commissions sought to allow the principle of freedom of contract to apply not only where United Kingdom law was not the proper law of the contract but, even where it was the proper law, where the contract was one for the international sale of goods as defined in what has become section 7 of the Supply of Goods (Implied Terms) Act 1973. The risk, however, of the evasion of the amended sections 12 to 15 of the Sale of Goods Act 1893 in transactions essentially of a domestic character seemed to be a real one. While the courts might well have reached results similar to those envisaged by section 55A, it seemed wrong to leave businessmen for an indefinite time without legislative direction on matters which might be of crucial importance to them. In other words, we believe that the differences between ourselves and Dr. Mann reflect differences not on abstruse questions of private international law, but on matters of social and legal policy. Dr. Mann gives overriding weight to the principle of freedom of contract and in effect questions whether Parliament may appropriately control choice of law provisions in contracts even to support social policies which it has accepted. Our view is that, where these social policies require it, such control of choice of law provisions may be both appropriate and desirable.

²⁴⁰ See C. Hall, “International Sales and the Supply of Goods (Implied Terms) Act 1973”, (1973) 22 I.C.L.Q. 740.

²⁴¹ Which is set out in para. 216, above.

²⁴² “The Amended Sale of Goods Act 1893 and the Conflict of Laws”, (1974) 90 L.Q.R. 42.

F. SCOPE AND LIMITS OF PROPOSED LEGISLATION

INTRODUCTION

237. We have already argued the case for each of the recommendations made in this report for the control of exemption clauses. Here we think it necessary to discuss in more general terms the extent and limits of the regime we are proposing and the scope of the proposed control, to consider its impact on existing controls imposed on exemption clauses by statute and by the common law and to consider whether the scope of the controls we are proposing should not in some respects be extended.

SCOPE

General

238. Apart from the question to which types of contract the proposed controls in Parts III and IV should apply²⁴³, the Law Commissions are in agreement about the scope of control. All the controls proposed in the report would apply only to exemptions from obligations, duties or liabilities incurred by a person in the course of business or professional activities. The controls proposed in Part II would, of course, only apply in relation to certain contracts for the supply of goods and only in relation to certain terms implied by the common law in those contracts. The controls proposed in Part III are limited to exemptions from liability for "negligence" and "negligence" for this purpose is so defined that the controls would not apply to exemptions from liability for breach either of a strict duty imposed by the common law or (with the exception of the duty of care to visitors imposed by the Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960) of any statutory duty. The controls proposed in Part IV would apply only to exemption clauses or similar provisions affecting contractual terms and they would apply only in favour of a party entering into a contract either as a consumer or on the standard terms of another party.

239. As mentioned above²⁴⁴, however, the two Commissions have come to different conclusions as to the scope of the controls proposed in Parts III and IV of this report. The Commissions have considered their respective recommendations against the general background of the joint document. Although the joint document referred to all types of contract,²⁴⁵ nevertheless the examples canvassed related exclusively to contracts for the supply of goods and services.

England and Wales

240. The Law Commission are of the opinion that the controls proposed in Parts III and IV of this report should not be limited to specified types of contract. Although there may have been ambiguity as to the scope of the provisional conclusions contained in the joint document, in their view there is no justification for restricting the scope of the proposed controls.

²⁴³ See para. 5, above.

²⁴⁴ See para. 5, above.

²⁴⁵ Joint document, para. 17.

241. *Transactions relating to land.* The Law Commission have considered whether transactions relating to the transfer of ownership or possession of land or an interest in land should be excluded from the scope of the control over exemption clauses.

242. It might be argued that contracts relating to land should be excluded from the control proposed in Parts III and IV because of the need for finality and certainty. Such an argument commended itself to the Law Reform Committee when it considered innocent misrepresentation²⁴⁶ but the question to be decided then was whether rescission should be allowed after the completion of a sale of land. In this case the issue is whether there should be some control over terms excluding or limiting liability for negligence or breach of contract or over terms allowing a party to render a performance substantially different from that which the other party reasonably expected. In fact the Misrepresentation Act 1967 which followed the report of the Law Reform Committee did not exclude contracts relating to land and the Law Commission have received no complaints that this has caused difficulties in practice.

243. Where a party enters into a contract relating to land he is likely to take legal advice in which case he is unlikely to misunderstand the extent of the other party's obligations under the contract; thus the control over terms enabling a party to render a performance substantially different from that which the other party reasonably expected would have little impact on contracts where parties have been legally advised. On the other hand there are cases where people enter into contracts relating to land, particularly short leases and contracts for the purchase of small businesses, without taking professional advice, and it is precisely these people who need protection against unreasonable exemption clauses.

244. It may be argued that tenants are sufficiently protected by existing detailed legislation relating in particular to agricultural holdings and tenancies of dwelling-houses. These provisions, however, do not relate to all tenancies nor to all terms of the contract between the landlord and the tenant. The fact that there is already control over certain terms in limited areas does not mean that there are no cases where there may be unreasonable exemption clauses. For example, in cases outside the scope of section 4 of the Defective Premises Act 1972 and section 3(1) of the Occupiers' Liability Act 1957 there is no control at present over the exclusion of liability for negligence by a landlord. In *Canada Steamship Lines Ltd. v. The King*²⁴⁷ it was held as a matter of construction that a particular term was not effective to exclude liability for negligence; it was clearly envisaged, however, that an effective exemption clause could have been included in the lease. The Law Commission think that such a term should be subject to control even if it is contained in a lease. The recommendations dealing with the impact of the controls proposed in this report set out below²⁴⁸ would ensure that the imposition of a general control over exemption clauses would not prejudice the existing detailed controls over certain terms in leases and the Law Commission therefore see no reason why leases should be excluded from the scope of the proposed control.

²⁴⁶ Law Reform Committee, *Tenth Report (Innocent Misrepresentation)* (1962), Cmnd. 1782, para. 6.

²⁴⁷ [1952] A.C. 192.

²⁴⁸ See paras. 258–276, below.

245. *Other contracts.* The Law Commission have also considered the effect of applying our proposed control to other contracts, such as partnership agreements and contracts of guarantee or suretyship, which cannot be said to be contracts for the supply of goods or services. The Law Commission do not believe that clauses excluding liability for negligence are common in such agreements, but if they exist the control over them in the form of the reasonableness test would, they think, be appropriate. The controls proposed in Part IV would apply only to a contract where one party is not acting in the course of a business or where it is a standard form contract. Again the control would be the reasonableness test. They do not think that the introduction of control would have much impact over contracts such as partnership agreements and contracts of guarantee and they do not see any strong case for excluding any class of contracts from the scope of the control.

246. On the contrary there are good reasons for not excluding any class of contracts from the scope of control. One is that the doctrine of fundamental breach which has been used as a method of controlling the use of exemption clauses in England is not limited in its scope to contracts for the supply of goods or services; it applies to all contracts. Another more practical reason is that English law does not categorize contracts into types—there is no definition of a contract for services. Most important, however, is the view expressed above in connection with provisions excluding liability for negligence²⁴⁹ that exemption clauses are a source of actual or potential injustice over a wide area of activity and that the law should try to anticipate injustice by having a remedy available before it occurs and not simply provide one *ad hoc* when an injustice is shown to have occurred. The Law Commission consider that this applies with equal force to clauses excluding liability for breach of contractual obligations generally as well as to those excluding liability for negligence.

Recommendation by the Law Commission

247. *The Law Commission recommend that the controls proposed in Parts III and IV of this report should not be restricted to particular classes of contracts.* (Paragraphs 240–246.)

Scotland

248. Because the examples contained in the joint document related exclusively to contracts for the supply of goods or services the attention of those consulted was not, in the view of the Scottish Law Commission, specifically directed to the special problems which are or might be linked to other types of contract. It is far from clear from the comments received that many of those consulted appreciated that the joint document might be interpreted as referring to contracts of all kinds. The few who inferred that it might be intended to have a wider application were opposed to an “across the board” treatment of contracts of all kinds.

249. The Scottish Law Commission share the view expressed in paragraph 246 above, that exemption clauses are a source of actual or potential injustice and inefficiency over a wide area of activity, and share the belief that the law should

²⁴⁹ See para. 51, above.

try to anticipate injustice before it occurs. However, with the possible exception of some contracts relating to land²⁵⁰, there is little evidence of the use of exemption clauses in contracts other than those for the supply of goods or services, and this would seem to be an argument for limiting, rather than extending, control. In the view of the Scottish Law Commission, to recommend legislation beyond the limits of areas in which problems have been identified or to meet situations which have not arisen and which are not likely to arise, would be unjustifiable.

250. Although insurance contracts may not all relate to the actual rendering of services, they are often linked to contracts for services and to the liability of those who supply goods and offer services and use exemption clauses in their contracts. There was specific consultation with insurance interests, and in these circumstances the Scottish Law Commission consider the inclusion of insurance contracts within the scope of the proposed control to be justified.

251. The two specific reasons mentioned by the Law Commission for extending the control in England and Wales to all contracts have less force in the context of Scots law. First, the doctrine of fundamental breach has not so far created an urgent problem in the general Scots law of contract, and indeed the doctrine does not seem to have the same meaning in the two systems. Since the Misrepresentation Act 1967 does not apply to Scotland, reasoning in relation to exemption clauses by analogy with provisions in that statute is not of assistance in a Scottish context. Second, Scots law recognises a considerable number of contracts, onerous and gratuitous, relating to services, the implied terms of which are generally understood—such, for example, as carriage, care and custody, mandate, agency, loan, deposit and pledge.

252. The law relating to land in Scotland has been developed from different sources than the law relating to the transfer of moveables or the rendering of services. Transactions effecting the transfer of rights in land may take a variety of forms including sale, excambion, lease and the grant of rights in security, rights of liferent and rights of occupancy. There was no attempt in the joint document to discuss these contracts, since fundamental changes in land law had been introduced by statute shortly before the document was published and other changes were anticipated and have since been enacted, in particular, the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Land Tenure Reform (Scotland) Act 1974. There has also been legislation on various aspects of the law of landlord and tenant. The problem in Scotland is less whether it is desirable to control clauses exempting from implied conditions and stipulations in contracts relating to land than whether those conditions and stipulations which are implied are adequate. It would, in the view of the Scottish Law Commission, be undesirable to make important changes in this area without separate examination and consultation. The questions what contractual provisions are implied or imposed, and whether the parties should have the right to exclude them, ought in their opinion to be considered simultaneously. In relation to leases there has already been extensive legislative intervention and in some situations agreements to contract out of duties implied by law are already policed. Thus, section 6 of the Housing (Scotland) Act 1966 provides that in any contract

²⁵⁰ See para. 252, below.

to which the section applies, an undertaking will be implied that during the tenancy the subjects let will be kept in all respects reasonably fit for human habitation notwithstanding any stipulation to the contrary. By section 10 of the Act, the Sheriff may, subject to certain conditions, permit contracting out of the provisions of section 8 (which relate to the landlord's repairing obligations) "if it appears to him, having regard to . . . all the circumstances of the case, that it is reasonable to do so". The Agricultural Holdings (Scotland) Acts 1908 to 1949 also contain provisions regulating or prohibiting contracting out of the provisions of the Acts.

253. On the whole, it would seem that what might be regarded as "consumer leases" are already extensively controlled by express statutory provisions. As Parliament has already balanced the interests of landlord and tenant, it seems inappropriate to alter that balance by recommending general control over exemption clauses in this area, at least without first identifying situations which indicate the need for reform.

254. The non-commercial relationship of landlord and tenant regulated by common law is much less frequent than in the earlier decades of the century. So far as commercial leases are concerned, it seems that, as in sales of heritage generally in Scotland, parties rely more on professional legal advice than is customary in England. Thus the prospect of a tenant or buyer being unfairly prejudiced and left without redress is minimised.

255. Very different considerations may apply in commercial contracts such as partnership, cautionary and in company matters, than in contracts for the supply of goods or services. The dangers involved in the indiscriminate extension of the control over exemption clauses proposed in Parts III and IV to all types of contracts can be illustrated by reference to two types of contractual situations arising in the field of company law. If the scope of the control is not restricted it would apply to contracts made by private investors (*a*) for the purchase and subscription of shares on a public flotation and (*b*) for the sale of shares on a take-over or merger. This area of activity is, of course, already very fully regulated by the Companies Acts 1948 and 1967, which for example regulate the contents of prospectuses and impose criminal and civil liability for mis-statements therein; the Prevention of Fraud (Investments) Act 1958, which imposes *inter alia* criminal penalties for fraudulent inducements to purchase or sell securities; and also on a non-statutory basis by the requirements of the Stock Exchange and of the City Code on Take-overs and Mergers. The Jenkins Committee on Company Law²⁵¹ devoted a lengthy chapter to a consideration of how investors might be better protected, but did not include any recommendation to control contracts in the manner proposed in this report. At a time when the question of the better protection of investors is under active consideration it would seem premature to introduce a new system of control which has not been specifically designed to operate in this field.

256. In the circumstances the Scottish Law Commission would not feel justified in recommending legislative controls beyond the scope of the specific consultation unless they were satisfied that this was obviously necessary to avoid indefensible anomalies, or to cure recognised injustices. They are not so satisfied.

²⁵¹ *Report of the Company Law Committee (1962)*, Cmnd. 1749.

In the commercial field they consider that the interests concerned should have their attention drawn specifically to proposed changes in the law of contract which may affect them, and that this should be done in the context of the particular area of law under examination. Moreover, in the consumer sector, the Fair Trading Act 1973 made available remedies in a wider context than exemption clauses in contracts concerning services.

Recommendation by the Scottish Law Commission

257. The Scottish Law Commission recommend that the scope of the proposed legislation for Scotland should not extend beyond contracts for the transfer of goods, contracts of service or for the rendering of services, insurance contracts and notices in licences. In particular they make no recommendations in respect of exemption clauses in contracts concerned with the transfer of ownership or possession of land or interests in land, except that the appropriate control should extend to exemption clauses in contracts for services in so far as these relate to the use of land.

(Paragraphs 248–256.)

IMPACT OF OUR PROPOSED CONTROL ON EXISTING LEGISLATION

258. There already exists legislative control over exemption clauses in limited areas within the scope of our proposals. We now discuss the impact of our proposals on that and other legislation. It may be useful first to explain our general policy and then to indicate how it will apply to specific legislation.

259. First, it is not intended that our proposals should affect enactments implementing international conventions. Secondly, where a term or notice is made void or if it is effective only where it has been approved by a court or arbitrator our proposals should not affect the existing control. Thirdly, by contrast, where a statute allows variation of rights or obligations by agreement such agreement should be subject to the control proposed by this report; this, however, is subject to the first point mentioned above. Finally, our proposals should not affect a statutory limitation or exclusion of liability.

Legislation implementing international conventions

260. Our proposals are not intended to affect legislation implementing international agreements: to provide otherwise might involve the United Kingdom in breach of an international obligation. International conventions on international carriage of passengers and goods have been agreed and have been implemented by the following enactments: the Carriage of Goods by Sea Act 1924²⁵², the Carriage by Air Act 1961, the Carriage by Air (Supplementary Provisions) Act 1962, the Carriage by Air Acts (Application of Provisions) Order 1967²⁵³, the Carriage by Railway Act 1972, the Carriage of Goods by Road Act 1965 and the Carriage of Passengers by Road Act 1974²⁵⁴. The control over exemption clauses in some of these enactments is not always

²⁵² This Act was prospectively repealed by the Carriage of Goods by Sea Act 1971 which has not yet entered into force.

²⁵³ S.I. 1967 No. 480.

²⁵⁴ This Act has not yet entered into force.

as strict as that we have proposed but we do not propose that the statutory control should be affected. For example, the Carriage by Air Act 1961 permits a carrier to limit his liability to a passenger as long as the limitation is not less than a specified figure; the Carriage of Goods by Sea Act 1924 permits the parties to a contract of carriage of goods by sea to make any arrangements as to the liability of the carrier where special arrangements are reasonably justified by the character or condition of the goods or the circumstances of the carriage²⁵⁵.

261. In a few cases the scope of the control over contracts of carriage has been extended beyond the area required to be covered by our international obligations. The regulation of contracts of carriage by air agreed under the Warsaw Convention as amended by the Hague Protocol has been applied to domestic carriage by air and to international carriage from the United Kingdom to states which are not parties to either the amended or unamended Warsaw Convention, where the carriage is for reward or is performed by an air transport undertaking²⁵⁶. A similar regime has been applied to the carriage of passengers by hovercraft and the carriage of cargo by hovercraft is controlled on the lines of the Carriage of Goods by Sea Act 1924²⁵⁷. Again the control under these provisions should not be affected by our proposals even though it may not in all cases be as strict as our proposed control over exemption clauses.

262. We consider that if our proposed control is implemented the Government departments responsible for the relevant activity should consider what provision is necessary to ensure that the legislation implementing international conventions, and the legislation mentioned above applying similar controls to related fields, is not affected by our proposed control. We do not think, however, that it would be satisfactory to exclude all aspects of a contract to which any of these enactments applies from the scope of all of our proposed control. The existing controls are not intended to cover every aspect of the contract of carriage; the Carriage by Air Act 1961 does not make any provision for the liability of a carrier for complete failure to perform the contract and we would wish the controls proposed in Part IV to apply to a clause excluding a carrier's liability for failure to carry.

263. In this connection we should point out that our proposals would apply to carriage by air which is not regulated by or under the Carriage by Air Act 1961. In particular, we think the Department concerned will wish to consider the effect of our proposals on gratuitous carriage by air in the course of a business by a person or body other than an air transport undertaking; their effect would be that both the exclusion and the limitation of the carrier's liability for death or personal injury arising out of common law negligence, would be banned. Somewhat similar considerations arise over the position of certain flying and gliding clubs which enjoy the benefit of exemptions granted by the Secretary of State in respect of the carriage by such clubs of their members²⁵⁸. The effect of any such exemption is that the carriage to which it relates is exempt from Schedule 1 to the Carriage by Air Act 1961 and that the

²⁵⁵ Schedule, Article VI.

²⁵⁶ Carriage by Air Acts (Application of Provisions) Order 1967, S.I. 1967 No. 480, Article 4 and Schedule 1.

²⁵⁷ Hovercraft (Civil Liability) Order 1971, S.I. 1971 No. 720.

²⁵⁸ The exemption is granted under Article 8 of the Carriage by Air Acts (Application of Provisions) Order 1967, S.I. 1967 No. 480.

liability of the club to the member/passenger is governed by the common law. The club can thus contract out of its liability for the death of or personal injury to a member/passenger, thereby reducing the burden of insurance it would otherwise have to carry. We are not concerned with the policy underlying the granting of this exemption, which we understand is intended to encourage private flying, but we think we should point out that, if such carriage is being performed in the course of the business of the club, the effect of the ban on exemption clauses which we recommend would be to deprive the club of its present common law right to contract out of liability for the death of or personal injury to a member/passenger.

Recommendation

264. We recommend that if the controls proposed by this report are introduced the provisions of statutes and statutory instruments implementing international conventions or applying similar controls to related fields should not be affected. The necessary provisions to implement this recommendation should be formulated by those Government Departments responsible for the relevant activity. (Paragraphs 260–263.)

Other statutory control over exemption clauses

265. There is other legislation which controls terms within the scope of our proposals. Under the control proposed in Part III terms excluding or limiting liability for negligence would in most situations be subject to the reasonableness test and in limited situations be made void. Section 60(5) of the Solicitors Act 1974, however, which applies to England and Wales, already avoids provisions in an agreement relating to contentious business that the solicitor shall not be liable for negligence. Section 205 of the Companies Act 1948 renders void clauses excluding the liability of a company's auditors for negligence. Section 4 of the Carriers Act 1830 provides that carriers are not able to exclude liability by public notice²⁵⁹. It is not intended that the general reasonableness test proposed for clauses excluding liability for negligence should supersede existing controls of this type. Where strict control already exists it is presumably because it has already been decided that in that particular area no exemption clauses are justified; if this assumption is correct it would be inappropriate to alter the law by introducing a test of reasonableness.

266. Contract terms other than those excluding liability for negligence may also be regulated by statute²⁶⁰. Some statutes render void terms which modify or vary statutory duties or liabilities—for example, section 25(4) of the Redundancy Payments Act 1965 prohibits contracting out of the statutory

²⁵⁹ Other examples are: Law Reform (Personal Injuries) Act 1948, s. 1(3), which provides that a provision in a contract shall be void in so far as it would have the effect of excluding or limiting liability of the employer in respect of personal injuries caused to an employee by the negligence of persons in common employment with him; Occupiers' Liability Act 1957, s. 3(1), which provides that an occupier of premises who is bound by contract to permit persons who are strangers to that contract to enter the premises may not by that contract exclude or restrict the duty of care owed to those persons; Defective Premises Act 1972, s. 6(3), which provides that the duty of care imposed on landlords by s. 4 of that Act may not be excluded by agreement; Transport Act 1962, s. 43(7); Road Traffic Act 1960, s. 151; and Road Traffic Act 1972, s. 148(3); see paras. 75–85 and 94, above, and para. 269, below.

²⁶⁰ See para. 276, below, for the avoidance of exemption clauses at common law in one exceptional case.

obligation to make redundancy payments; section 6(3) of the Defective Premises Act 1972 prohibits the exclusion of duties imposed by that Act on persons doing work on premises; section 47(5) of the Health and Safety at Work, etc. Act 1974 makes void terms excluding the civil liability imposed by that Act for breach of regulations made under the Act (except where the regulations provide otherwise)²⁶¹. Other statutes regulate contractual relations between, for example, vendor and purchaser of land and landlord and tenant; some terms are made void and some are regulated in some other way²⁶². For example, section 42(1) of the Law of Property Act 1925 renders void in certain circumstances a stipulation that a purchaser of a legal estate in land shall accept a title made with the concurrence of any person entitled to an equitable interest. Section 6 of the Housing Act 1957 implies in lettings of certain houses an undertaking that the house is at the commencement of the tenancy fit for human habitation; except in very limited circumstances the implied undertaking may not be excluded by contract. Our respective proposals, in so far as they extend to the subject matter of such statutes, are not intended to affect any such statutory avoidance of contract terms.

267. In England and Wales the legislation controlling the relationship of landlord and tenant sometimes provides control over certain terms of leases different from both outright avoidance and the reasonableness test²⁶³. The following are some examples. Section 6(1) of the Agricultural Holdings Act 1948 empowers the Minister to make regulations prescribing terms as to maintenance, repair and insurance of fixed equipment, which are deemed to be incorporated into certain contracts but which can sometimes be varied by an agreement in writing²⁶⁴. Section 6(2) and (3) permits an arbitrator to uphold or disallow an attempt to modify the prescribed terms, applying what is in effect a reasonableness test. Section 32 of the Housing Act 1961 implies repairing covenants into certain leases and the county court is given power to authorize terms excluding or modifying the provisions of that section²⁶⁵. Our proposed control should not apply to terms approved by a court or arbitrator under any enactment of this type.

268. There already exists a considerable amount of legislation in the fields of carriage and employment. After reviewing this legislation in detail we concluded that there should be a general ban on the exclusion or limitation of liability for death and personal injury caused by negligence by carriers and employers²⁶⁶. The gaps in the existing legislation such as the lack of control over clauses excluding liability to passengers on light railways and over clauses excluding liability to passengers carried by air gratuitously not by an air transport undertaking will be filled by the general ban.

²⁶¹ Other examples are: Companies Act 1948, ss. 38(2) and 51(4), which render void terms allowing a company not to comply with statutory duties in connection with the issue of prospectuses and the allotment of shares respectively.

²⁶² See para. 267, below.

²⁶³ Similar provisions apply in Scotland but the Scottish Law Commission recommend (in para. 257, above) that the proposals contained in this report should not apply to contracts concerned with the transfer of ownership or possession of land or interests in land.

²⁶⁴ The regulations at present in force are the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, S.I. 1973 No. 1473.

²⁶⁵ Housing Act 1961, s. 33(6) and (7).

²⁶⁶ See para. 94, above.

269. Two of the statutes, however, would become misleading if our proposals were implemented. Section 151 of the Road Traffic Act 1960 prohibits exclusion of liability only in a contract of carriage and section 43(7) of the Transport Act 1962 excludes (from the scope of the ban on terms exempting from liability for death or personal injury) persons travelling on a free pass. Both these enactments should be amended to indicate that the ban on terms excluding or limiting liability for death or personal injury resulting from negligence will apply to all passengers and not merely those who travel under a contract of carriage. We do not think, however, that any amendment of section 148(3) of the Road Traffic Act 1972 will be necessary. So far as it bans exclusion of liability incurred in the course of a business, for death or personal injury, the section and our proposed general ban will overlap but we do not think the existence of overlapping controls will be misleading. The section also applies, however, to exclusion of liability incurred in a purely private capacity and we do not intend to affect this control.

Recommendation

270. (a) *We recommend that the controls proposed in this report should not affect any term or notice which is rendered void or ineffective by any enactment.* (Paragraphs 265 and 266.)

(b) *We recommend that the controls proposed in this report should not apply to any term which has been approved or authorised by a court or arbitrator under any enactment.* (Paragraph 267.)

(c) *If our proposals are implemented we recommend that section 151 of the Road Traffic Act 1960 and section 43(7) of the Transport Act 1962 should be amended to indicate that the avoidance of terms excluding or limiting liability for death or personal injury to passengers caused by negligence would apply to passengers travelling under a free pass.* (Paragraph 269.)

Statutes permitting exemption clauses

271. Some statutes expressly permit the use of terms which would fall within the scope of our controls. Some may be permitted by statutes implementing international conventions; we have already recommended²⁶⁷ that our proposals should not affect exemption clauses regulated by enactments implementing international conventions. An enactment may permit the use of a term authorised by a court or arbitrator; we have already recommended²⁶⁸ that our proposed control should not apply to such a term. In other cases, however, we consider that the freedom of contract permitted by statute is no more than common law freedom of contract and, if such a term would fall within the scope of our proposed control, there is no reason why the control should not apply.

272. Under section 4 of the Carriage of Goods by Sea Act 1924 a carrier in the coasting trade is permitted to carry goods under any conditions as to his liability for loss of or damage to the goods, free from the terms laid down under

²⁶⁷ See para. 264, above.

²⁶⁸ See para. 270, above.

the Act. In English law section 46 of the Law of Property Act 1925 permits parties to a contract for the sale of land by correspondence to vary the conditions of sale laid down by regulations made under that section. We see no reason for excluding terms permitted by those statutes from the scope of the control proposed in this report.

273. Section 55(1) of the Sale of Goods Act 1893 (as amended by the Supply of Goods (Implied Terms) Act 1973) permits the parties to a contract of sale of goods to negative or vary (subject to certain exceptions) rights, duties and liabilities arising under the contract by implication of law. The controls proposed in Parts III and IV of this report should apply to terms excluding or restricting rights, duties and liabilities arising under a contract of sale of goods and we consider that section 55(1) of the Sale of Goods Act 1893 should be amended to indicate that the freedom granted by the section is subject to control.

Recommendation

274. We recommend that, if the proposals in this report are implemented, section 55(1) of the Sale of Goods Act 1893 should be amended to indicate that the freedom of contract permitted by that Act is to be subject to the implementing legislation.

(Paragraph 273.)

Statutory exclusion or limitation of liability

275. Statutes themselves may have an effect similar to exemption clauses. They may limit the liability of a person to a fixed sum; for example, section 1 of the Carriers Act 1830 limits the liability of a common carrier to a fixed sum for loss of or damage to certain types of article if their value has not been declared; section 503 of the Merchant Shipping Act 1894 limits the liability of a shipowner for all claims relating to one incident to a fixed sum. Statutes may also exclude all liability; for example, section 29 of the Post Office Act 1969 excludes the liability of the Post Office, its servants or agents in tort or delict in respect of loss or damage suffered by reason of anything done or omitted to be done in connection with postal and telecommunication services. A time limit within which complaints must be lodged may be imposed by statute; for example, Article 26 of Schedule 1 to the Carriage by Air Act 1961 provides that a complaint about damage to luggage must be brought within seven days of receipt of the luggage. Although the same effect may result from a statutory provision as from an exemption clause our proposals will not affect such statutory provisions. Our recommendations control the exclusion or restriction of obligations or liability by means of contract terms or notices only.

276. In one case the common law itself makes void clauses excluding liability and legislation has been introduced to allow limitation of liability in restricted circumstances. The common law liability of an innkeeper in relation to the property of his guests extends beyond liability for negligence and it may be limited only by displaying the notice set out in the Hotel Proprietors Act 1956²⁶⁹. The Act, however, does not permit the limitation of liability where the

²⁶⁹ The liability of a hotel keeper displaying such a notice does not exceed £50 in respect of any one article or £100 in the aggregate: s. 2(3) of the Hotel Proprietors Act 1956 (which replaces the Innkeepers' Liability Act 1863).

loss is caused by the fault of the proprietor or his servant, where the property was deposited for safe-keeping with the proprietor or where the guest was unable to deposit the property owing to the fault of the proprietor or his servant. This common law control, even as modified by statute, is stricter than the general control over exemption clauses proposed in this report. Our proposals will not affect the control.

ARE THERE OTHER EXEMPTION CLAUSES WHICH SHOULD BE CONTROLLED?

277. It might be suggested that our proposed control is too limited. We have considered whether there should be control over exclusion of two other types of liability—liability for breach of strict common law duties and liability for breach of statutory duty. We have also considered whether clauses excluding liability for wilful default or gross negligence should be made void. We now explain our reasons for rejecting these additional controls.

Breach of “strict” duty imposed by common law

278. Breach of a duty in tort or delict that is stricter than the duty to take reasonable care or exercise reasonable skill is not “negligence” for the purposes of this report and there is no control over exemptions from such a duty. Of course, if facts which give rise to strict liability (for example under *Rylands v. Fletcher*²⁷⁰ in English law) also give rise to liability in negligence, the exemption clause will be controlled to the extent that it is relied upon to exclude or restrict liability for negligence. It could be said that in this respect our recommendations do not go far enough and that the exclusion of strict liability needs to be controlled as much as the exclusion of liability for negligence. The law may have imposed strict liability because the person to whom it is owed is in need of a special degree of protection or because the activity out of which the strict liability arises is particularly hazardous. If the intended beneficiary of a legal duty to take reasonable care needs to be protected against the unfair or unreasonable operation of exemption clauses, why not the intended beneficiary of a strict liability?

279. The consultations we conducted for the purposes of this and our First Report gave us no ground for believing that the practice of contracting out of this type of strict liability was a serious problem. We made no proposals in our joint document for controlling the practice and none of those who commented on our joint document criticised this omission. We should feel justified, therefore, in proposing that the practice should be controlled only if we were satisfied that this was obviously necessary to avoid indefensible anomalies or to cure a real mischief.

280. We are not aware of any such anomalies or any real mischief caused by the exclusion of liability for breach of a strict duty. Furthermore our control over exclusion of liability for negligence would apply where a person in breach of a strict duty is also in breach of a duty to take reasonable care. We therefore make no recommendation for further control over clauses excluding liability for breach of a strict duty.

²⁷⁰ (1868) L.R. 3 H.L. 330.

Breach of statutory duty

281. A duty to take care to avoid causing harm to another is imposed by a large number of provisions in statutes; such a duty may also be imposed by instruments made under statutory powers; for simplicity we will refer to both as “statutory” duties or duties imposed by “statute”. Provisions having this effect take various forms. The commonest is a provision prohibiting or requiring certain action, the purpose of the prohibition or requirement being to protect individuals of a particular class; a penal sanction is imposed for breach of the provision; no express provision is made that the person subjected to the prohibition or requirement shall be liable in damages for harm caused by breach but the courts may hold that an intention that there shall be such liability is to be inferred. More rarely, a statute will provide expressly that the breach of a specified provision shall be treated as the breach of a statutory duty²⁷¹. In some cases, indeed, the statute confers a right to compensation for certain kinds of harm without prohibiting any action likely to cause that harm²⁷².

282. The facts on which an action to enforce a civil liability imposed by statute is based often bear a close resemblance to those giving rise to an action for common law negligence, but it now seems to be settled, in English law at any rate, that, to use the words of Lord Wright in the case of *London Passenger Transport Board v. Upson*²⁷³, “a claim for damages for breach of a statutory duty . . . is a specific common law right which is not to be confused in essence with a claim for negligence”. A provision in a statute which has the effect of imposing a duty, the breach of which is actionable, appears to have no direct effect on the law of negligence; the breach of such a duty is not treated, as it is in some jurisdictions in the United States, as “statutory negligence” or “negligence *per se*” nor is it treated as evidence of negligence²⁷⁴.

283. It might, therefore, be argued that there is a case for controlling clauses which purport to contract out of statutory duties which are imposed for the protection either of individuals of a particular class or of the general public as individuals; and that, if there is such a case, some provision for it must be made over and above that recommended in Part III of this report. We do not believe the practice of contracting out is widespread but our attention has been drawn to a form of contract used by the operators of a car park in which the operator expressly excludes liability for breach of statutory duty.

284. Over a considerable part of the field, and that the most important, the question has already been answered. The great bulk of actions for breach of statutory duty is brought in respect of injuries suffered by workmen and caused by the alleged breach of some provision imposed by statute in order to protect their health and safety. The most important examples are the provisions of the Factories Act 1961, the Mines and Quarries Act 1954 and the Offices, Shops and

²⁷¹ See s. 4(2) of the Resale Prices Act 1964 and s. 3(1) of the Consumer Protection Act 1961.

²⁷² See s. 2(1) of the Animals Act 1971 and s. 40(2) of the Civil Aviation Act 1949.

²⁷³ [1949] A.C. 155, 168.

²⁷⁴ See, e.g., *Barna v. Hudes Merchandising Corpn.* (1962) 106 S.J. 194, where a motorist who exceeded the statutory speed limit was held not to be driving negligently.

Railway Premises Act 1963²⁷⁵. In this class of case, it is clearly settled, in the words of Lord Donovan in the case of *Imperial Chemical Industries Ltd. v. Shatwell*²⁷⁶, that “it would be contrary to public policy to allow an employer to contract out of duties which Parliament had specifically imposed upon him in the interest of the safety of his workmen”. Professor Street²⁷⁷, indeed, suggests that “It may well be contrary to public policy for anybody, and not merely employers, to contract out of a duty imposed by Act of Parliament”, a view that appears to derive some support from the following passage from the judgment of Wills J. in the case of *Baddeley v. Earl Granville*²⁷⁸:—

“An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so.”

There appears, however, to be no authority on the matter and in view of the wide and varied range of “statutory duties” we cannot dismiss the possibility that it may be permissible for the person upon whom some of them are imposed to contract out of liability for the breach of them.

285. The width and variety of these statutory duties is, of course, compounded by the fact that it is often not until a case has been litigated that it is possible to say that a particular statute is to be interpreted as imposing civil liability. The field is not only wide, it is, at any given time, indefinable. We do not therefore think we should be justified in recommending any attempt to impose control over the whole field.

286. The conclusion we have reached applies, of course, whatever the standard of duty imposed by the statute—whether it be the strict duty imposed by section 133(2) of the London Building Acts (Amendment) Act 1939 to maintain fire escapes in good repair or the statutory duty to take all reasonable steps to maintain embankments and a drainage system in order to protect land from flooding imposed on the defendant authority in the case of *Sephton v. Lancashire River Board*²⁷⁹.

Liability for “wilful” or “reckless” misconduct

287. It may be said that the proposals made in Parts III and IV of this report are defective because they do not include any special provision for clauses exempting from liability for a breach of a duty or obligation where the breach constitutes misconduct so culpable that it would be wrong to allow reliance on

²⁷⁵ Rights under these Acts have not yet been affected by the Health and Safety at Work, etc. Act 1974 which imposes general duties on employers and others. Health and safety regulations and agricultural health and safety regulations may be made (ss. 15 and 30) and s. 47(2) provides for civil liability for breach of those regulations unless the regulation provides otherwise; any agreement purporting to exclude or restrict liability for breach of those regulations is to be void unless the regulation provides otherwise: s. 47(5).

²⁷⁶ [1965] A.C. 656, 693.

²⁷⁷ H. Street, *The Law of Torts* (5th ed., 1972), p. 272.

²⁷⁸ (1887) 19 Q.B.D. 423, 426.

²⁷⁹ [1962] 1 W.L.R. 623.

the exempting clause. In our joint document²⁸⁰ we invited views on the question “whether clauses which purport to exclude or limit liability for wilful, or for reckless, misconduct should be void”. There was much support for the view that they should, although it was suggested that the difficulty of proving the state of mind of the person whose conduct was in question would render a provision to that effect somewhat ineffective and it was thought that it would be difficult to define “wilful” and “reckless”. Some of those who commented, while accepting the case for making void clauses which exempted a person from liability for his own wilful or reckless misconduct, felt that it would be wrong to provide that a clause excluding an employer’s liability for the wilful or reckless misconduct of his servants or agents should be void in all circumstances.

288. We have some sympathy with the view that a person should not be permitted to contract out of liability for his own “wilful” or “reckless” misconduct and, indeed, we think it arguable that in some circumstances clauses purporting to exclude a person’s liability for acts done by him with the intention of injuring another would be void under the existing law as being contrary to public policy. The reason why we have decided not to recommend that there should be a special provision avoiding such clauses is that we do not think it would be possible to provide a satisfactory definition of the sort of misconduct conveniently but vaguely labelled “wilful” or “reckless”. To be satisfactory for the purpose of identifying the exemption clauses which are to be avoided, the definition would need to be precise enough to cover all the kinds of misconduct in question but no more. We are aware, of course, that a number of provisions such as that now proposed have been introduced into the laws of the United Kingdom in implementation of a number of international conventions on the carriage of goods and persons. The “misconduct” at which those provisions are aimed is described in a variety of ways; thus, Article 25 of Schedule 1 to the Carriage by Air Act 1961 provides that the limits of liability specified in Article 22 of that Schedule shall not apply if it is proved that the damage resulted from “an act or omission . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result”. A similar formula appears in Article IV, Rule (5)(e) of the Schedule to the Carriage of Goods by Sea Act 1971. In Article 8 of the Schedule to the Carriage by Railway Act 1972 and in Article 18.2 of the Schedule to the Carriage of Passengers by Road Act 1974, various provisions limiting the liability of the carrier are made inapplicable if the damage results from “wilful misconduct or gross negligence”. A similar provision in Article 29 of the Schedule to the Carriage of Goods by Road Act 1965 applies “if the damage was caused by his [the carrier’s] wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct”. We appreciate that these provisions had to be imported into our law as the price of international agreement on the matters to which the conventions in question relate but we cannot regard any of them as satisfactory for our present purposes. Indeed, it is only the provisions cited from the Schedules to the Carriage by Air Act 1961 and the Carriage of Goods by Sea Act 1971 that even attempt to provide a precise definition of the misconduct which is to deprive the carrier of the benefit of the relevant provision limiting

²⁸⁰ Joint document, para. 71.

his liability. Even that definition seems to us to be unsatisfactory for our present purposes; the expression "intent to cause damage" seems to us to be uncertain in its effect, while the complete formula ("act or omission . . . done with intent to cause damage or recklessly with knowledge that damage would probably result") might cover cases which we should regard as falling short of "misconduct", but fail to cover cases which we should regard as justifying a refusal to allow reliance on an exemption clause which purported to cover them.

289. We have considered the possibility of making void a clause which exempts from liability for "intentional acts". The objection to this is that it would be wide enough to cover cases in which the breach of duty or obligation would be innocent or even praiseworthy. Take, for example, the case of a coal merchant who has undertaken to supply three customers each with 1,000 tons of coal. Owing to an unforeseen shortage, he only has 1,500 tons in hand when delivery is due. To be fair he supplies each customer with 500 tons. He has "deliberately" or "intentionally" broken his contract with each one, when in fact he could have performed his contract in full with any one (but no more) of them. This is not "misconduct" either "wilful" or "reckless"; in a case like this an outright ban on exemption clauses might well lead to injustice.

G. PRIOR VALIDATION OF CONTRACTUAL STANDARD FORMS

290. Any control over exemption clauses which falls short of an outright avoidance is capable of leading to uncertainty in particular cases. There would be a great advantage to businessmen if it were possible, before entering into contracts in a standard form incorporating an exemption clause—indeed, before having the standard form printed—to have the individual form scrutinised on behalf of a public authority and approved so that it was not thereafter possible to argue that it was unreasonable to rely on the clause.

291. The Working Party considered the possibility of a procedure of this kind utilising the Restrictive Practices Court or some similar body both in its study of exemption clauses in the sale of goods and in relation to other contracts. The working paper containing provisional proposals relating to the Sale of Goods Act 1893²⁸¹ invited comment on the practicability of such a procedure in relation to commercial sales without arriving at any provisional conclusions, and our joint document raised the question afresh with a provisional conclusion that it should not be supported²⁸². Our First Report rejected the idea of bringing the Restrictive Practices Court into the control of exemption clauses in business sales²⁸³.

292. In our proposals in this report the reasonableness test would have a much larger part to play than it does under section 55(4) of the Sale of Goods Act 1893, where it is limited to contracts of sale which are not consumer sales, and where the obligations which are the subject of the exemption clause are prescribed by law, or (in England and Wales) under section 3 of the Misrepresentation Act 1967, where it is limited to liability for misrepresentation. We have therefore thought it necessary to reconsider whether some system of prior

²⁸¹ Law Commission, Working Paper No. 18; Scottish Law Commission, Memorandum No. 7 (May 1968), paras. 67–71.

²⁸² Joint document, paras. 43–45.

²⁸³ First Report, para. 106.

validation of exemption clauses might be desirable. Although the majority of the comments we received on our joint document did not dissent from our provisional unfavourable conclusion, some expressed a contrary view. Moreover, the appointment of the Director General of Fair Trading and the new powers of the Restrictive Practices Court under the Fair Trading Act 1973 have introduced new factors.

293. In order to discuss whether such a system might be adopted we think that a clear idea of how it might operate is essential. We have therefore given some thought to the machinery that might be introduced and, before coming to our review of the merits and disadvantages of the proposal, we will attempt to describe how it might work.

POSSIBLE MACHINERY

Nature of tribunal

294. In our joint document²⁸⁴ we referred to “control through the Restrictive Practices Court or some similar tribunal”. We do not now think it would be appropriate to create a new tribunal especially to deal with terms in standard form contracts, and accordingly for the purpose of this discussion we assume that the powers we canvass are to be conferred on the existing Restrictive Practices Court.

Standard form contracts only

295. Our First Report²⁸⁵ pointed out that the Restrictive Practices Court would be an inappropriate tribunal for the scrutiny of any contracts other than standard contracts, and nothing in our consultations in connection with the present report has led us to change this view. We are quite clear that no machinery need be considered for the prior scrutiny of individually negotiated contracts. The present discussion must therefore relate only to provisions in standard form contracts.

Method and effect of referring contracts to the Court

296. Various possibilities present themselves. Reference to the Court might be voluntary, at the option of the business using the standard form or a trade association. It might be compulsory, either under a general provision (comparable to section 9 of the Restrictive Trade Practices Act 1956, under which all agreements to which Part I of that Act applies are subject to registration) or under a power of selection given to the Director General of Fair Trading, whether exercised on his own initiative or after complaint. Provisions in the relevant contracts might be void unless approved or valid unless disapproved. Decisions of the Restrictive Practices Court might or might not be binding on the ordinary courts.

297. To take the last point first, we believe that an important justification for the introduction of the Restrictive Practices Court into our consideration of this problem would be to remove the uncertainty that might otherwise result from the application of a test of reasonableness. An adverse decision of the

²⁸⁴ Joint document, para. 42.

²⁸⁵ First Report, para. 106.

Restrictive Practices Court would no doubt be conducive to certainty whether or not the decision was formally binding on the ordinary courts in subsequent litigation, for it is unlikely that any business would continue to use in an unamended form a contract that had been disapproved. On the other hand, if provisions in a standard form contract had met with the approval of the Restrictive Practices Court there would be little or no advantage of certainty if a later court could, notwithstanding that approval, find that the term in question was unreasonable in the individual circumstances of the case. We believe that if reference to the Restrictive Practices Court were to be voluntary few businesses or trade associations would bother to apply unless it could be guaranteed that approval of the exemption clause would make it proof against the reasonableness test in subsequent disputes. If reference to the Court were mandatory this incentive would not be needed; but businesses or trade associations might understandably object to the expense and trouble of a court hearing if it did not lead to a clause the reasonableness of which could not be impugned.

298. Practical considerations lead to the conclusion that if some form of scrutiny by the Restrictive Practices Court were introduced, approval by the Court should establish the reasonableness of the clause in any future litigation. This is the solution arrived at by the legislation in Israel, the Standard Contracts Law 1964²⁸⁶. This provides that if a restrictive term in a standard contract is approved by the Israeli equivalent of the Restrictive Practices Court, it is to be "of full effect"²⁸⁷ in every contract made in accordance with the standard contract; the ordinary courts then no longer have the power conferred by other provisions of the law to regard the term as void if it is prejudicial to customers.

299. Although we think that a decision by the Restrictive Practices Court itself would have to be binding on the ordinary courts, it might be that provision could be made for a decision other than by the Court—for example, by the Director General of Fair Trading. We consider below²⁸⁸ whether such a decision should bind the courts.

300. We have said that a major justification for using the Restrictive Practices Court would be the removal of uncertainty²⁸⁹. A further advantage might well be that standard form contracts containing exemption clauses could be vetted in advance so that unreasonable exemption clauses would disappear, a development which might be of greater value to consumers than the test of reasonableness we have recommended. We think that this would be an important result of a system of approval and that, if such a system were introduced, it should be made a feature of it. In order to achieve this end it is clear that reference to the Court would have to be mandatory.

301. We therefore envisage the possibility of a system of prior validation working in this way. Standard form contracts containing exemption clauses

²⁸⁶ A copy of the Law was set out in Appendix D to our working paper containing provisional proposals relating to the Sale of Goods Act 1893, Law Commission, Working Paper No. 18; Scottish Law Commission, Memorandum No. 7 (May 1968). See also paras. 67–71 of that working paper.

²⁸⁷ Standard Contracts Law 1964 (Israel), s. 10.

²⁸⁸ See para. 303, below.

²⁸⁹ See para. 297, above.

would be subject to registration. Registration would take the form of supplying particulars, including a complete print in proof form of the proposed standard form, to the Director General of Fair Trading²⁹⁰. It would be for the Director General to refer registered forms of contract to the Court for adjudication.

302. If registration is compulsory it would be appropriate to provide that exemption clauses in unregistered standard form contracts should be void. This would be a valuable sanction to enforce the registration requirement. Registration would then permit the use of the exemption clause, subject to the reasonableness test in the ordinary courts, until approved or disapproved by the Restrictive Practices Court. The Court would, of course, consider the exemption clause in the context of the whole of the standard form and approval would have effect in relation to contracts adopting the whole of the approved form in such circumstances, and subject to such conditions, as the Restrictive Practices Court might prescribe in its decision.

303. Whether or not the scheme as described so far would be significantly slower or more expensive than proceedings in the ordinary courts²⁹¹, it might be possible to reduce time and expense by utilising the expertise of the Director General of Fair Trading. The Registrar of Restrictive Trading Agreements had wide experience of standard form contracts and had been able to influence their terms where they fell within his jurisdiction under the Restrictive Trade Practices Acts—that is, where they were the subject of agreements to which Part I of the Restrictive Trade Practices Act 1956 applied. Under section 9(2) of the Restrictive Trade Practices Act 1968 the Registrar—now the Director General—may ask the Department to give directions the effect of which is to exempt the agreement in question from being brought before the Court on the ground that the restrictions accepted under the agreement are not of such significance as to call for investigation by the Court. In using his powers under this provision (and under its predecessor, section 12 of the 1956 Act) the Registrar has been able to negotiate with the parties to registrable agreements so as to remove terms in standard conditions which he regards as unsatisfactory from the point of view of, *inter alia*, prospective customers²⁹². If a scheme such as that we are now discussing were introduced the Director General could be given power to approve standard form contracts without the need to refer them to the Restrictive Practices Court. It might well be appropriate for decisions of the Director General in pursuance of this power to be referred to the Consumer Protection Advisory Committee for a report on the lines of that envisaged by section 14(3) of the Fair Trading Act 1973. Approval by the Director General in accordance with this power would dispense with the need for a hearing by the Court. It would, we think, nevertheless be necessary that his decision should be binding on the ordinary courts. Although investigation by the Director General would no doubt be less expensive than a full hearing before the Court, any expense involved, however small, might be regarded as too much if decisions of the Director General did not remove exemption clauses from the ambit of the reasonableness test before the ordinary courts. We

²⁹⁰ *cf.* Restrictive Trade Practices Act 1956, s. 10, as amended.

²⁹¹ See para. 309, below.

²⁹² See the Reports of the Registrar of Restrictive Trading Agreements: (1956–59) Cmnd. 1273, App. B; (1960–61) Cmnd. 1603, App. B; (1961–63) Cmnd. 2246, para. 24 and App. B; (1963–66) Cmnd. 3188, App. C; (1966–69) Cmnd. 4303, pp. 5–6 and App. C; (1969–72) Cmnd. 5195, p. 7 and App. C.

recognise that it might be regarded as constitutionally undesirable to confer such powers on the Director General, but the only alternative would, we think, be that all standard form contracts would have to go before the Restrictive Practices Court, which would involve very considerable delays.

304. Having described how a system of prior validation by the Restrictive Practices Court, or by the Director General of Fair Trading on its behalf, might operate, we now proceed to consider the advantages and disadvantages of such a system before coming to our conclusions.

ADVANTAGES OF PRIOR VALIDATION

305. As we have already indicated, an outstanding advantage of a system of prior validation of exemption clauses in standard form contracts would be that it would create certainty. From the point of view of the party contemplating incorporating the exemption clause in a standard form contract there would be no risk that a court might subsequently hold that it was unreasonable, so he could make his arrangements with other traders or with insurers on that basis. This would be especially important with a clause that did not seek to exclude liability altogether, but merely limited liability to a specified amount.

306. A system such as we have described would also support the functions to be carried out by the Director General of Fair Trading. Under section 17(2) of the Fair Trading Act 1973 the Director General may include in a reference to the Consumer Protection Advisory Committee proposals for a Ministerial order with respect to certain consumer trade practices. These include consumer trade practices that have or are likely to have the effect of misleading consumers as to their rights and obligations or other matters²⁹³ or of causing the terms of transactions to be so adverse as to be inequitable²⁹⁴. If the Restrictive Practices Court were to disapprove of an exemption clause in a standard form contract it is unlikely that the provisions in question would continue to be used. The Court would, therefore, exercise a preventive function which would reduce the need for the Director General to propose Ministerial orders.

307. It is possible that a system of validation by the Director General of Fair Trading and the Restrictive Practices Court would lend itself to a more thorough investigation of the background and consequences of the exemption clause than proceedings in litigation relating to particular disputes.

DISADVANTAGES OF PRIOR VALIDATION

308. We now come to consider the drawbacks of a system of prior validation such as we have outlined, before reaching our conclusions.

309. In our First Report²⁹⁵ we mentioned the widely held view that to invoke the jurisdiction of the Restrictive Practices Court would be cumbersome, slow and expensive. It is of course a matter of balancing merits and demerits whether the thoroughness of the investigation of a problem which had been a feature

²⁹³ Fair Trading Act 1973, s. 17(2)(a) and (b).

²⁹⁴ *ibid.*, s. 17(2)(d).

²⁹⁵ First Report, para. 106.

of the work of the Restrictive Practices Court and which has been said to be a possible advantage that would flow from the use of the Court in the present context outweighs the time and expense involved in the preparation of a case for the Court. It is only to be expected that trade associations in particular would take as a very serious matter indeed the scrutiny of their standard forms of contract by the Court and they would rightly not wish to take unnecessary risks in the interests of speed and economy. Moreover, although trade associations might have the resources to prepare adequately for a hearing by the Restrictive Practices Court, it must not be forgotten that many individual traders use standard form contracts: they would regard the prospect of being brought before the Court with even less favour than a trade association.

310. There is, too, a major difficulty of procedure involved in the whole concept of prior validation. We have suggested that registration would involve the supply to the Director General of Fair Trading of a complete print in proof form of the proposed standard form contract²⁹⁶. But contracts do not consist only of forms, and many contracts involving standard terms are partly oral and partly in writing. Moreover, even where a contract is wholly in writing, not all of the writing is necessarily to be found in the printed form: not only do printed forms contain blank spaces for the insertion of matters relevant to the particular transaction, but it is not uncommon for contracts comprised in correspondence to incorporate standard terms by reference. How could the Restrictive Practices Court consider the effect of printed terms without knowing what the individually prepared written or oral terms of the particular contracts are going to be? Terms which appear unobjectionable in one context might become wholly unreasonable in another. The addition of fresh clauses might radically change the effect of the standard terms. Another problem is the effect of amendments to a standard form. In commerce conditions of trade change rapidly, and terms in a standard form may call for equally rapid change. It might well be necessary to provide that any variation in the terms of a standard form, or any addition to them, would take the resulting contract outside the scope of the original approval.

311. Over and above these difficulties, there is a further matter of great concern. If the approval of an exemption clause by the Restrictive Practices Court were to exclude any control by the ordinary courts by way of the reasonableness test, as we think would be necessary²⁹⁷, that approval must afford an adequate substitute for the reasonableness test. A court applying the reasonableness test in a dispute between the parties to litigation would be in a position to consider the surrounding circumstances of the case that might bear on the question of reasonableness. These would include the strength of the bargaining positions of the contracting parties relative to each other, the amount of the consideration or price, whether the party adversely affected by the term had received any inducement to agree to the term, whether he had an opportunity of entering into a similar contract without the term, whether he had had his attention drawn to the term and been advised as to the need for adequate insurance, and whether there were any unusual circumstances present at the time of contracting that might affect the court's view of what was reasonable.

²⁹⁶ See para. 301, above. Standard terms comprised in notices might have to be represented by a full-size photograph.

²⁹⁷ See para. 298, above.

Yet none of these matters could be taken into consideration, except perhaps in abstract terms, by the Restrictive Practices Court. They arise from the particular circumstances of a particular contract between particular parties, whereas the Restrictive Practices Court would have to consider the terms of the standard form more or less in a vacuum.

CONCLUSIONS ON PRIOR VALIDATION

312. Having reviewed the advantages and disadvantages set out above, and having considered how the reasonableness test to be applied by the ordinary courts might operate in practice, our conclusion is that it would be unwise to introduce a new scheme for the prior validation of standard form contracts at this stage. There was indeed little enthusiasm for such a scheme on the part of either traders or consumers. We believe that the reasonableness test as we envisage it would work well without any material increase in the uncertainty always inherent in the application of principles of law to the actual facts as they emerge in litigation. And for the reasons that emerge from paragraphs 310 and 311 above we do not think that approval by the Restrictive Practices Court can afford an adequate substitute for control by the ordinary courts.

313. Nevertheless, we must draw attention to one problem that may emerge in the future if our proposals are implemented. Our study of this matter has arisen out of the need to deal with exemption clauses. The exemption clause is a particular type of contractual provision that has become familiar to lawyers over the years. It has been said that many effects produced by exemption clauses might equally well be produced by drafting other provisions in the contract differently²⁹⁸. The result of applying the test of reasonableness to exemption clauses in accordance with our recommendations might be that the draftsman of a standard form contract will seek to produce the result he wishes by provisions that are not exemption clauses. We say "might" rather than "will" because the incentive to do this already exists in consequence of the attitude of the courts to exemption clauses, including the doctrine of fundamental breach, but there is no evidence that draftsmen have given up the use of exemption clauses in favour of other types of provision. Despite this, we recognise that attempts to avoid legislative control over exemption clauses may occur and that the courts might not find it easy to influence the consequences of different drafting techniques.

314. If this were to happen, we think that consideration might then be given to a more general control over standard form contracts than is needed at the present time. There are some clauses that might appear in a standard form contract that might not be caught by our proposals to deal with exemption clauses but might be just as undesirable. We have in mind in particular clauses imposing positive obligations, possibly certain arbitration clauses, and clauses denying an intention to create legal relations which may rob apparent contracts of legal effect. It would be possible for the Restrictive Practices Court to be given power to exercise control over the whole of the terms of a standard form contract. The scheme we have outlined above whereby the Restrictive Practices Court and the Director General of Fair Trading might exercise functions in

²⁹⁸ See paras. 50, 138 and 142, above.

relation to standard form contracts could, we think, form a basis for new functions to be conferred by appropriate legislation. It may not prove necessary to do this, but we imagine that if the recommendations in this report are implemented by Parliament the Director General of Fair Trading would keep a watchful eye on developments, whether arising out of the particular circumstances envisaged in paragraph 313 above or more generally, so as to draw the attention of Ministers to the need to consider legislation of the type which we have discussed in this section of our report.

PART VI—SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

315. Exemption clauses operate against the public interest in many cases and there is a need for new statutory regulation of exemption clauses (paragraph 11).

SUPPLY OF GOODS (PART II)

316. Exemption clauses which operate on implied terms in certain contracts for the supply of goods should be controlled (paragraph 27).

317. Our recommendations as to these exemption clauses apply to contracts which involve the transfer of ownership or possession of goods from one person to another or the use or expenditure of goods in the performance of any services. These contracts include contracts of hire and exchange and contracts for work and materials, but do not include contracts of sale of goods or hire-purchase agreements, nor the redemption of trading stamps, all of which were the subject of the Supply of Goods (Implied Terms) Act 1973 (paragraph 32(a), (d)). Draft clauses: England and Wales, Appendix A, clause 2(1), (7); Scotland, Appendix B, clauses 1(a) and 3(2).

318. In a contract for the supply of goods there should be control over exemption clauses where the supplier entered into the contract in the course of a business (paragraph 32(a)). Draft clauses: England and Wales, Appendix A, clause 2(2); Scotland, Appendix B, clause 3(3).

319. The control should regulate provisions which exclude or restrict obligations under terms implied by the common law relating to title, correspondence with description or sample, quality and fitness for purpose (paragraph 32).

320. Provisions excluding or restricting obligations relating to the right to supply the goods or the enjoyment of quiet possession should be subject to a test of reasonableness, whether or not the contract is a consumer transaction (paragraph 32(b)). Draft clauses: England and Wales, Appendix A, clause 2(4); Scotland, Appendix B, clause 3(1)(b), (3)(b).

321. Provisions excluding or restricting obligations relating to the correspondence of the goods with description or sample or their quality or fitness for any particular purpose should be void in a consumer transaction and subject to a test of reasonableness in any other transaction where the supplier entered into the contract in the course of a business (paragraph 32(c)). Draft clauses: England and Wales, Appendix A, clause 2(3); Scotland, Appendix B, clause 3(1)(a), (3)(a).

322. A contract for the supply of goods is to be regarded as a consumer transaction if—

- (i) the person supplying the goods contracts in the course of a business;
- (ii) the person for whom the goods are supplied is not contracting in the course of a business and does not hold himself out as doing so; and
- (iii) the goods are of a type ordinarily supplied for private use or consumption (paragraph 34(a)).

Draft clauses: England and Wales, Appendix A, clause 4; Scotland, Appendix B, clause 10.

323. The onus of proving that a contract is not a consumer transaction should be on the party so contending (paragraph 34(b)). Draft clauses: England and Wales, Appendix A, clause 6; Scotland, Appendix B, clause 10.

324. The nature of the test of reasonableness is described in paragraph 340, below.

“NEGLIGENCE” (PART III)

325. Provisions excluding or restricting liability for “negligence” incurred in the course of a business should, within the scope of the respective proposals of the two Commissions, be subject to a general control in the form of a reasonableness test (paragraph 69(a), (d)); in limited circumstances they should be made void (paragraphs 329–331, below). Draft clauses: England and Wales, Appendix A, clause 7(2), (3), (4); Scotland, Appendix B, clause 4(1), (2).

326. “Negligence” is used in these recommendations to mean the breach of a duty or obligation imposed by the common law or by contract to take reasonable care or to exercise reasonable skill (but not any stricter duty), or the breach of the duty of care imposed upon occupiers of premises by the Occupiers’ Liability Act 1957 (the “common duty of care”) and the Occupiers’ Liability (Scotland) Act 1960 (paragraph 69(b)). Draft clauses: England and Wales, Appendix A, clause 7(1); Scotland, Appendix B, clause 10.

327. The Law Commission and the Scottish Law Commission differ as to the scope of the proposed control over provisions excluding or restricting liability for negligence.

England and Wales. The Law Commission recommend that the control should apply to the provisions of contracts of all types and to contract terms and notices which apply conditions to licences or the conferring of other benefits (paragraphs 69(c), 247). Draft clauses: Appendix A, clause 7(1), (2), (3), (4).

Scotland. The Scottish Law Commission recommend that the control should apply only to:—

- (a) contracts for the supply of goods (including contracts of sale of goods, hire-purchase agreements and the redemption of trading stamps);
- (b) contracts of service and apprenticeship;
- (c) contracts for services of all types;
- (d) contracts of insurance;
- (e) licences to enter upon or use land.

In particular, the control should not apply to exemption clauses in contracts concerned with the transfer of ownership or possession of land or interests in land, except that it should extend to exemption clauses in contracts for services in so far as these relate to the use of land (paragraphs 69(c), 257). Draft clauses: Appendix B, clause 1.

328. The nature of the reasonableness test is described in paragraph 340, below.

329. Provisions excluding or restricting liability, incurred in the course of a business, for death or personal injury due to negligence should be made void in the following circumstances:—

- (a) Where a person is killed or injured in an accident arising out of and in the course of his employment and the liability is that of his employer (paragraph 94(a)). Draft clauses: England and Wales, Appendix A, clauses 7(3) and 9(1), (2); Scotland, Appendix B, clause 4(2)(b)(i).
- (b) Where a person is killed or injured while being carried as a passenger by land or water or in the air and the liability is that of the carrier (paragraph 94(b)). Draft clauses: England and Wales, Appendix A, clauses 7(3) and 8; Scotland, Appendix B, clause 4(2)(b)(ii).
- (c) Where a person is killed or injured in consequence of a defect or malfunction or the mismanagement of a device for the movement of persons (including lifts, escalators and fairground contrivances) (paragraph 94(c)). Draft clauses: England and Wales, Appendix A, clauses 7(3) and 9(1), (3); Scotland, Appendix B, clause 4(2)(b)(iii).
- (d) Where a person is killed or injured while making use of a car park (by which we mean any facilities for parking motor vehicles) and the liability is that of the occupier or manager of the car park (paragraph 94(d)). Draft clauses: England and Wales, Appendix A, clauses 7(3) and 9(1), (4); Scotland, Appendix B, clause 4(2)(b)(iv).

330. There should be power to designate additional circumstances where exemption clauses would be void in relation to liability for death or personal injury due to negligence:—

- (a) The Secretary of State (acting on a recommendation made by the Director General of Fair Trading) should have power to direct by order that, in circumstances described in the Director General's recommendation, provisions excluding or restricting liability incurred in the course of a business should be void as regards liability for death or personal injury resulting from negligence. The Secretary of State should be free to give partial or modified effect to the Director General's recommendation.
- (b) The Director General should be empowered to make a recommendation only where he is satisfied that in the cases described in his recommendation persons need protection because, in his opinion,
 - (i) they specially depend for their personal safety on the skill and care of others;
 - (ii) either they are not in a position to negotiate or, if they are, their bargaining position in relation to exemption clauses is weak; and
 - (iii) they are exposed to the unfair or unreasonable use against them of exemption clauses.
- (c) The power to make an order should be exercisable only after a draft of the order has been approved by an affirmative resolution of each House of Parliament.

- (d) The Secretary of State should be required to lay a copy of recommendations of the Director General before each House of Parliament and to publish them.

(Paragraph 97.) Draft clauses: England and Wales, Appendix A, clauses 7(3) and 11; Scotland, Appendix B, clauses 4(2)(c) and 5.

331. There should be special control over exemption clauses in manufacturers' "guarantees". Provisions excluding or restricting liability for loss or damage arising while goods are in consumer use, due to the negligence of a person concerned in the manufacture or distribution of goods, should be made void if they are contained in a guarantee of the goods. This recommendation does not apply when the guarantee relates to goods supplied by the person giving the guarantee to the person accepting it in pursuance of a contract between them (paragraph 105). Draft clauses: England and Wales, Appendix A, clauses 7(3) and 10; Scotland, Appendix B, clause 4(2)(a), (4), (5)(a).

332. The control of provisions excluding a person's liability for negligence incurred in the course of a business should apply even where that person was acting voluntarily (paragraph 131). Draft clauses: voluntary activities are not excluded from the ambit of the draft Bills.

333. Where, under the proposals in this report, a provision is void or ineffective the fact that a person agreed to or was aware of the provision should not of itself be regarded as sufficient evidence that he knowingly and voluntarily assumed the risk (paragraph 135). Draft clauses: England and Wales, Appendix A, clause 7(6); Scotland, Appendix B, clause 4(6).

CONTRACTUAL OBLIGATIONS (PART IV)

334. In contracts within the scope of the respective proposals of the two Commissions there should be control over contract terms which—

- (a) exclude or restrict the liability of a party for breach of contract, or
- (b) enable a party to render no performance or a performance substantially different from that which was reasonably expected of him under the contract,

where that party entered into the contract in the course of a business and the contract was either a consumer contract or a contract on written standard terms (paragraph 159(a)). Draft clauses: England and Wales, Appendix A, clause 1; Scotland, Appendix B, clause 2.

335. This control should take the form of a test of reasonableness (paragraph 159(b)). The nature of the reasonableness test is described in paragraph 340, below.

336. For the purpose of this control the expression "consumer contract" should mean—

- (a) for contracts of sale of goods, a "consumer sale" as defined in section 55(7) of the Sale of Goods Act 1893;
- (b) for hire-purchase agreements, a "consumer agreement" as defined in section 12(6) of the Supply of Goods (Implied Terms) Act 1973;

- (c) for other contracts for the supply of goods, a contract which is to be regarded as a consumer transaction for the purpose of the control recommended in Part II of this report (see paragraph 322, above);
- (d) for other contracts, a contract where one party (the party referred to in paragraph 334, above) entered into the contract in the course of a business and the other party did not contract in the course of a business and did not hold himself out as doing so.

(Paragraph 159(c), (d).) Draft clauses: England and Wales, Appendix A, clauses 1(1)(a), 3, 4 and 5; Scotland, Appendix B, clause 10.

337. The onus of proving that a contract is not a consumer contract should be on the party so contending (paragraph 159(e)). Draft clauses: England and Wales, Appendix A, clause 6; Scotland, Appendix B, clause 10.

338. The Law Commission and the Scottish Law Commission differ as to the scope of the proposed control over the contract terms described in paragraph 334, above.

England and Wales. The Law Commission recommend that the control should apply to contracts of all types (paragraph 247). Draft clauses: Appendix A, clause 1.

Scotland. The Scottish Law Commission recommend that the control should apply only to the following types of contracts:—

- (a) contracts for the supply of goods (including contracts of sale of goods, hire-purchase agreements and the redemption of trading stamps);
- (b) contracts of service and apprenticeship;
- (c) contracts for services of all types;
- (d) contracts of insurance.

In particular, the control should not apply to terms in contracts concerned with the transfer of ownership or possession of land or interests in land, except that it should extend to terms in contracts for services in so far as these relate to the use of land (paragraph 257). Draft clauses: Appendix B, clause 1.

GENERAL (PART V)

Provisions to be treated as exemption clauses

339. Although the controls proposed in this report should generally apply to contractual provisions (and, in the case of provisions excluding liability for negligence, notices) which have the effect of excluding or restricting the relevant obligation or liability, arbitration clauses should not be subject to the proposed controls. In England and Wales written agreements to submit present or future differences to arbitration should be excluded from the proposed controls; in Scotland all agreements to refer to arbitration should be excluded (paragraph 168). Draft clauses: England and Wales, Appendix A, clause 12(3); Scotland, Appendix B, clause 1 (cc).

The reasonableness test

340. The Law Commission and the Scottish Law Commission differ about what the test of reasonableness should be and how it should operate.

England and Wales. The Law Commission recommend that the test should be whether it is fair and reasonable to rely on the contract term or notice having regard to all the circumstances of the case. The onus of showing that it is not fair or reasonable to rely on it should rest on the party challenging the exemption clause (paragraph 183). In relation to contracts for the supply of goods, legislation implementing Part II of this report should include a list of matters to which, in particular, regard should be had. There should be no such list of matters in legislation implementing Parts III and IV of this report (paragraph 192). Draft clauses: Appendix A, clauses 1(2), (3), 2(3), (4), (5) and 7(4), (5).

Scotland. The Scottish Law Commission recommend that the test should be whether it was fair or reasonable to incorporate the term in the contract or to give the notice having regard only to matters which were or ought reasonably to have been known to or in the contemplation of the parties at the time of the contract or of the giving of the notice. The onus of showing that it was not fair or reasonable should rest on the party challenging the exemption clause (paragraph 177). Legislation implementing this report should not set out particular matters to which regard is to be had, and section 55(5) of the Sale of Goods Act 1893 and section 12(4) of the Supply of Goods (Implied Terms) Act 1973 should be reconsidered and amended (paragraph 196). Draft clauses: Appendix B, clauses 2(1), (2), 3(1)(b), (4), and 4(1)(b), (3).

Activities to be regarded as “business”

341. Activities in the exercise of a profession and the activities of government departments, local authorities and statutory undertakers should be regarded as being a “business” for the purpose of the proposed control (paragraph 203). Draft clauses: England and Wales, Appendix A, clause 18; Scotland, Appendix B, clause 10.

Fundamental breach

342. *England and Wales.* Where the reasonableness test applies to an exemption clause (whether under the proposals in this report or under section 55(4) of the Sale of Goods Act 1893 or under section 12(3) of the Supply of Goods (Implied Terms) Act 1973), neither the breach of the contract (fundamental or otherwise) nor the termination of the contract in consequence of breach should invalidate the clause.

Scotland. For the avoidance of doubt in Scots law, where (under the proposals in this report or under section 55(4) of the Sale of Goods Act 1893 or section 12(3) of the Supply of Goods (Implied Terms) Act 1973) it would be fair or reasonable to incorporate a term in a contract (or, as the case may be, to allow reliance on a term), the termination of the contract in consequence of a breach shall not of itself invalidate that term.

General. These recommendations are not intended to preclude the court from finding that, as a matter of construction, the term does not apply to the breach in question (paragraph 210). Draft clauses: England and Wales, Appendix A, clauses 15 and 17 and Schedule 1; Scotland, Appendix B, clause 8.

Conflict of laws and international matters

343. The controls proposed in this report should not apply where, apart from a term that the proper law of the contract should be the law of England and Wales or Scotland, the proper law of the contract would be the law of some other country (paragraph 233). Draft clauses: England and Wales, Appendix A, clause 13(1); Scotland, Appendix B, clause 6(1).

344. The provisions of a contract for the international sale of goods or a contract for the international supply of goods should be free from the controls proposed in this report but, subject to paragraph 343, above, the controls should apply to other types of international contracts (paragraph 231). Draft clauses: England and Wales, Appendix A, clause 14; Scotland, Appendix B, clause 7.

345. Provision should be made to ensure that the controls proposed in this report are not evaded by the choice of either a foreign law or the Uniform Law on Sales to govern the contract (paragraphs 225, 227). Draft clauses: England and Wales, Appendix A, clauses 13(2), (3) and 17 and Schedules 1 and 2; Scotland, Appendix B, clauses 6(2), (3) and 9 and Schedules 1 and 2.

Impact of proposed controls on existing legislation

346. If the controls proposed in this report are introduced, the provisions of statutes and statutory instruments implementing international conventions or extending their application to related fields should not be affected (paragraph 264). Draft clauses: England and Wales, Appendix A, notes to clauses 7 and 8; Scotland, Appendix B, notes to clause 1(*bb*).

347. The controls proposed in this report should not affect any term or notice which is rendered void or ineffective by any enactment (paragraph 270(*a*)). Draft clauses: England and Wales, Appendix A; the draft Bill does not affect terms or notices rendered void or ineffective by other legislation; Scotland, Appendix B, clause 1(*bb*).

348. The controls proposed in this report should not apply to any term which has been approved or authorised by a court or arbitrator under any enactment (paragraph 270(*b*)). Draft clauses: England and Wales, Appendix A, clause 16.

APPENDIX A

**Draft Exemption Clauses
(England and Wales) Bill**

ARRANGEMENT OF CLAUSES

Exemption clauses in contracts

Clause

1. Control of unreasonable exemptions.
2. Miscellaneous supply contracts not within 1973 c. 13.

“Dealing as consumer”

3. “Consumer” in sale and hire-purchase.
4. “Consumer” in other supply contracts.
5. “Consumer” in other cases.
6. Onus of proof.

*Exemption from liability for failure to take
reasonable care*

7. Restrictive contract terms and notices.
8. Passenger and carrier.
9. Other exemptions void under s. 7.
10. “Guarantee” of consumer goods.
11. Additional cases controlled by order of Secretary of State.

Miscellaneous and general

12. Meaning of “exclude or restrict liability”.
13. Conflict of laws.
14. International contracts.
15. Effect of breach of contract.
16. Saving for court-approved terms.
17. Amendments of enactments; repeals.
18. Interpretation.
19. Commencement.
20. Citation and extent.

SCHEDULES:

- Schedule 1—Amendments of enactments.
- Schedule 2—Repeals.

Exemption Clauses (England and Wales) Bill

DRAFT
OF A
BILL

TO

IMPOSE further limits on the extent to which civil liability for breach of contract, or for negligence, can under the law of England and Wales be avoided by means of contract terms and otherwise.

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

Exemption clauses in contracts

Control of
unreason-
able
exemptions.

1.—(1) As between the parties to a contract, this section applies in favour of one who—

- (a) deals as consumer (within the meaning of sections 3 to 5 of this Act); or
- (b) deals on the other's written standard terms, the contract being made by the other in the course of a business.

(2) A term of that or any other contract is ineffective, to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term, for the purpose of enabling the other party—

- (a) when himself in breach of contract, to exclude or restrict any liability of his in respect of the breach;
- (b) to render a performance substantially different from that which was reasonably expected of him under the contract; or
- (c) in respect of the whole or any part of the contract, to render no performance at all.

(3) In determining for the purposes of this section whether it would be fair or reasonable to allow reliance on a contract term, regard shall be had to all the circumstances of the case.

EXPLANATORY NOTES

Clause 1

This clause implements the main recommendations in Part IV of the report.

Definitions

“Business”: see clause 18.

“Deals as consumer”: see clauses 3, 4 and 5.

“Excluding or restricting liability”: see clause 12(1).

Clause 1(1)

1. Not all contracts are subject to the controls over contract terms contained in this clause. The clause applies only (i) in favour of a contracting party who deals “as consumer”, an expression explained for different types of contract in clauses 3 to 5,

or (ii) in favour of a contracting party who deals on the other’s written standard terms, an expression not defined in the Bill. (Paragraphs 334 and 338.)

Clause 1(2)

2. The “reasonableness test” is applied by this subsection to contract terms in so far as they are relied upon for any one or more of three possible purposes, described in paragraphs (a), (b) and (c). It is for the party who objects to the contract term to show that it would not be fair or reasonable to allow reliance on it. (Paragraphs 335 and 340.)

3. The first purpose is described in paragraph (a). A term is subject to the reasonableness test if it is relied upon for the purpose of excluding or restricting any liability for breach of contract and in particular, by clause 12(1)(b), if it excludes or restricts any right or remedy in respect of the liability. This paragraph does not impose any control over terms which lay down when or whether a breach of contract occurs. Thus terms which are drafted as defining the contractual obligations themselves, whether or not drafted as “exemptions” or “exceptions”, are not caught by this paragraph.

4. The second purpose is described in paragraph (b). A term, however drafted, is subject to the reasonableness test if it is relied upon for the purpose of enabling a party to render a performance substantially different from that which the other party reasonably expected of him under the contract. In deciding what was reasonably expected under the contract the terms of the contract will not be decisive; regard will be had to all the circumstances.

5. The third purpose is described in paragraph (c). A term, however drafted, is subject to the reasonableness test if it is relied upon for the purpose of enabling a party to render no performance at all of the whole or any part of the contract. This would apply to various terms excusing non-performance or entitling a party to cancel a contract.

Clause 1(3)

6. In applying the reasonableness test the court is directed to have regard to all the circumstances of the case. (Paragraph 340.)

Exemption Clauses (England and Wales) Bill

Miscellaneous supply contracts not within 1973 c. 13.

2.—(1) The contracts within this section do not include contracts of sale of goods, or hire-purchase agreements; but subject to this the following provisions apply to any contract whose performance involves—

- (a) the ownership of goods passing from one person to another (with or without work having been done on them) or the possession of goods passing by way of hire or otherwise; or
- (b) goods being applied or expended in the doing of any work, or in the performance of any services, provided for by the particular contract.

(2) In the case of a contract within this section, subsections (3) and (4) below apply as regards the effect (if any) to be given to a term of that or any other contract excluding or restricting a party's liability for breach of obligations arising under the contract; but the obligations here referred to are only those which are incurred in the course of a business and arise by implication of law from the nature of the contract.

(3) In favour of a person dealing as consumer (within the meaning of section 4 below) such a term is void for the purpose of excluding or restricting liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose; and otherwise the term is ineffective for that purpose to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.

(4) Such a term is ineffective, to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term, for the purpose of excluding or restricting liability in respect of—

- (a) a person's right to transfer ownership of the goods, or give possession; or
- (b) the assurance of quiet possession to a person taking the goods under the contract.

EXPLANATORY NOTES

Clause 2

This clause implements the main recommendations in Part II of the report. Under section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973 the exclusion or restriction of the terms implied by those Acts into contracts of sale of goods and hire-purchase agreements is regulated. This clause deals with the exclusion or restriction of the terms implied at common law in contracts for the supply of goods such as contracts of hire and exchange and for work and materials. It applies to these contracts for the supply of goods a regime over exemption clauses which is broadly similar to that in section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973.

Definitions

“Business”, “court”, “goods” and “hire-purchase agreement”: see clause 18.

“Deals as consumer”: see clause 4.

“Excluding or restricting liability”: see clause 12(1) and (2).

Clause 2(1)

1. This subsection describes the contracts to which the clause applies. This is a wide description intended to include such contracts as contracts of hire, contracts of exchange (whether of goods for goods or of goods for services or other benefit) and contracts for the provision of services where goods are used or supplied. Since the common expression “contracts for work and materials” is not a term of art it is not used. Contracts of sale of goods and hire-purchase agreements are already controlled by section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973 and so are excluded from the application of this clause. (Paragraph 317.)

2. Paragraph (a) includes contracts of hire and exchange and many contracts for work and materials. There are however some contracts for work and materials where neither ownership nor possession of materials applied or expended passes from one person to another, such as contracts for the dyeing of hair or fabric where the materials applied operate by chemical reaction without their substance attaching to the hair or article dyed. These are covered by paragraph (b).

Clause 2(2)

3. This subsection makes it clear that contracts between two private individuals are not within this clause, which applies only where at least one of the parties enters into the contract in the course of a business and where that party is relying on a term excluding or restricting implied obligations. (Paragraph 318.)

Clause 2(3)

4. The exclusions and restrictions which are controlled by this clause are those affecting the implied obligations which are described in subsections (3) and (4). Subsection (3) deals with liability in respect of those obligations, if any, which are implied relating to the goods’ correspondence with description or sample or their quality or fitness for a particular purpose. A distinction is drawn between a person dealing as consumer—in whose favour exempting terms are void—and other persons, where the exempting terms are subject to the reasonableness test. The expression “dealing as consumer” is explained in clause 4. The reference to excluding or restricting liability includes the exclusion or restriction of the relevant implied terms themselves: see clause 12(2). (Paragraph 321.)

Clause 2(4)

5. Subsection (4) deals with liability in respect of those obligations, if any, which are implied in respect of title or quiet possession and related matters. No distinction is drawn between consumer and other transactions, and all exempting terms are in this respect subject to the reasonableness test. (Paragraph 320.)

Exemption Clauses (England and Wales) Bill

(5) In determining for the purposes of this section whether it would be fair or reasonable to allow reliance on a term excluding or restricting liability, regard shall be had to all the circumstances of the case and in particular to any of the following matters which appear to be relevant—

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

(6) Subsection (5) above does not prevent the court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(7) Nothing in this section applies to the supply of goods on a redemption of trading stamps within the Trading Stamps Act 1964.

1964 c. 71.

EXPLANATORY NOTES

Clause 2 (continued)

Clause 2(5)

6. In applying the reasonableness test (where, under subsections (3) and (4), it is for the party who objects to the contract term in question to show that it would not be fair or reasonable to allow reliance on it) the court must have regard to all the circumstances of the case. Subsection (5) follows the pattern of section 55(5) of the Sale of Goods Act 1893 and section 12(4) of the Supply of Goods (Implied Terms) Act 1973 by setting out a number of matters to which in particular the court should, so far as they are relevant, have regard. (Paragraph 340.)

Clause 2(6)

7. Although subsection 5(c) instructs the court to have regard to whether the customer knew or ought reasonably to have known of the existence of the term, this is not intended to prevent the court from holding that where the customer did not know of the term, and adequate steps had not been taken by the other party to draw his attention to it, the term does not form part of the contract; *cf. Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163. Of course, where the contract containing the term has been signed by the customer it will usually be binding on him whether he knows of it or not; but the court will be able to consider under subsection (5)(c) whether the customer did know of it and whether a person in his position ought reasonably to have known of it, so that the fact that (for example) the contract was in small print or unlikely to be read in full by a customer can be taken into account.

Clause 2(7)

8. Terms are implied into the redemption of trading stamps for goods by section 4 of the Trading Stamps Act 1964, as amended by the Supply of Goods (Implied Terms) Act 1973, section 16, and these terms take effect notwithstanding any terms to the contrary. Exemption clauses are therefore already made ineffective under the 1964 Act.

Exemption Clauses (England and Wales) Bill

“Dealing as consumer”

“Consumer”
in sale and
hire-
purchase.

3.—(1) This section applies to a contract of sale of goods or a hire-purchase agreement.

(2) In the case of a contract to which this section applies (if it is not a sale by auction or by competitive tender), the buyer or hirer “deals as consumer” if—

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the seller or owner (as the case may be) makes the contract in the course of a business; and
- (c) the goods are of a type ordinarily supplied for private use or consumption.

EXPLANATORY NOTES

Clause 3

This clause provides a definition of the phrase “deals as consumer” in clause 1(1)(a) of the Bill for the purpose of applying clause 1 to contracts of sale of goods and hire-purchase agreements. It adopts for these contracts the definition of “consumer sale” and “consumer agreement” found in section 55(7) of the Sale of Goods Act 1893 and section 12(6) of the Supply of Goods (Implied Terms) Act 1973. (Paragraph 336(a) and (b).) The definitions of the phrase for other types of contract will be found in clauses 4 and 5.

Definitions

“Business”, “goods” and “hire-purchase agreement”: see clause 18.

Exemption Clauses (England and Wales) Bill

“Consumer”
in other
supply
contracts.

4. A party to a contract within section 2 of this Act “deals as consumer” in relation to another party if—

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party makes the contract in the course of a business; and
- (c) the goods are of a type ordinarily supplied for private use or consumption.

EXPLANATORY NOTES

Clause 4

(i) This clause provides a definition of the phrase “deals as consumer” in clause 1(1)(a) of the Bill for the purpose of applying clause 1 to contracts for the supply of goods (and other contracts in which goods are used or expended) other than contracts of sale of goods and hire-purchase agreements. The definitions for other types of contracts will be found in clauses 3 and 5.

(ii) The clause also provides a definition of the phrase “dealing as consumer” in clause 2(3) of the Bill.

Definitions

“Business” and “goods”: see clause 18.

Clause 4: detail

1. The contracts within clause 2 of the Bill include such contracts as contracts of hire, contracts of exchange and contracts for work and materials (see clause 2(1)).

2. This clause adapts, in relation to the contracts defined in clause 2(1), the definition of “consumer sale” to be found in section 55(7) of the Sale of Goods Act 1893. It will be seen that the terms of this clause are substantially the same as those of clause 3 (which applies to contracts of sale of goods and hire-purchase agreements). (Paragraphs 322 and 336(c).)

Exemption Clauses (England and Wales) Bill

“Consumer”
in other
cases.

5. In the case of a contract to which neither section 3 nor section 4 applies, a party “deals as consumer” in relation to another party if—

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party makes the contract in the course of a business.

EXPLANATORY NOTES

Clause 5

This clause provides a definition of the phrase “deals as consumer” in clause 1(1)(a) of the Bill for the purpose of applying clause 1 to contracts other than contracts for the supply of goods. The definitions for other types of contracts will be found in clause 3 (in relation to contracts of sale of goods and hire-purchase agreements) and clause 4 (in relation to other contracts for the supply of goods). (Paragraph 336(d).)

Definition

“Business”: see clause 18.

Exemption Clauses (England and Wales) Bill

Onus of
proof.

6. Where under this Act the question arises whether a party to a contract deals as consumer, the onus of proving that he is not dealing as such lies on the party so contending.

EXPLANATORY NOTES

Clause 6

1. The question whether a party to a contract “deals as consumer” may arise under clause 1(1)(a) or under clause 2(3). The relevant definitions are to be found in clauses 3, 4 and 5.

2. This clause follows the provision in section 55(8) of the Sale of Goods Act 1893 and section 12(7) of the Supply of Goods (Implied Terms) Act 1973. (Paragraphs 323 and 337.)

Exemption Clauses (England and Wales) Bill

Exemption from liability for failure to take reasonable care

Restrictive
contract
terms and
notices.

- 7.—(1) In this Act “negligence” means the breach—
- (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
 - (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
 - (c) of the common duty of care imposed by the Occupiers’ Liability Act 1957.

1957 c. 31.

(2) This section applies only to negligence which consists in the breach of obligations or duties arising from anything done or to be done by a person in the course of a business (whether his own business or another person’s) or from the occupation of premises used for business purposes; but subject to this it applies to any breach, whether inadvertent or intentional.

(3) In the cases specified in sections 8 to 10 below, and also in other cases (but only cases of death or personal injury) to which the Secretary of State extends this subsection by order in a statutory instrument, contract terms and notices given either to persons generally or to particular persons are void for the purpose of excluding or restricting liability for negligence whether directly or vicariously incurred.

EXPLANATORY NOTES

Clause 7

This clause, with clauses 8, 9, 10 and 11, implements the main recommendations in Part III of the report for the control of terms and notices excluding or restricting liability for negligence.

Definitions

“Business”, “notice” and “personal injury”: see clause 18.

“Excluding or restricting liability”: see clause 12(1) and (2).

Clause 7(1)

1. This subsection explains that the word “negligence” in this Bill means (a) breach of a contractual obligation to take reasonable care or exercise reasonable skill, (b) breach of common law duty to take reasonable care or exercise reasonable skill (tort) and (c) breach of the common duty of care imposed by the Occupiers’ Liability Act 1957. (Paragraph 326.)

2. Breach of a tort duty that is stricter than the duty to take reasonable care or exercise reasonable skill is not included in the meaning of “negligence” and there is no control over exemptions from liability for breach of such duties in this clause. Thus an exemption clause is not subject to control under this clause in so far as it excludes or restricts liability under *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. Of course, if the facts which give rise to liability under *Rylands v. Fletcher* also give rise to liability in negligence the exemption clause will be controlled under this clause to the extent that it is relied upon to exclude or restrict liability for negligence.

Clause 7(2)

3. The recommendations in this report deal only with exemptions from liability incurred in the course of a business (see paragraphs 9 and 36 of the report). This subsection therefore provides that the control over exemptions from liability for negligence introduced by this clause applies only to obligations or duties arising in the course of a business or from the occupation of premises used for business purposes. It also makes it plain that the word “negligence” includes any breach of a relevant duty of care even if the breach is intentional. (Paragraph 36.)

Clause 7(3)

4. The report recommends that in some circumstances exemptions from liability for negligence should be made void. This subsection accordingly provides for exemptions to be made void: the circumstances to which this provision applies are described in detail in other clauses. In relation to liability for death or personal injury, see clauses 8 (passenger and carrier), 9 (employment, mechanical devices for the movement of persons, and car parks) and 11 (order made by the Secretary of State). In relation to any kind of loss or damage, see clause 10 (“guarantees” of consumer goods). (Paragraphs 329–331.)

5. The provision operates on contract terms and notices in so far as they exclude or restrict liability for negligence as defined in subsection (1). The expression “contract terms” is not defined, for it bears its natural meaning of any terms in any contract (and is not limited to terms in a contract between the instant parties). The expression “notice” is defined in clause 18 as including an announcement, whether or not in writing, and any other communication or pretended communication. See also clause 12(2).

6. The contract terms or notices in question are not made void for all purposes, but only for the purpose of excluding or restricting liability for negligence. They are void for this purpose whether the liability is directly incurred (*i.e.*, liability for one’s own negligence) or vicariously incurred (*i.e.*, liability for another’s negligence). If an employee is in breach of duties arising from anything done in the course of his employer’s business this clause applies: see subsection (2).

Exemption Clauses (England and Wales) Bill

(4) A contract term or a notice so given, so far as it is not void under subsection (3) for the purpose there mentioned, is ineffective for that purpose to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term or notice.

(5) In determining for the purposes of this section whether it would be fair or reasonable to allow reliance on a contract term or notice, regard shall be had to all the circumstances of the case.

(6) Where under this section a contract term or notice is void or ineffective for any purpose, neither a person's agreement to, nor his awareness of, the exempting or restricting effect of the term or notice is of itself to be taken as conclusive that he voluntarily assumed any risk.

EXPLANATORY NOTES

Clause 7 (continued)

Clause 7(4)

7. Apart from the cases where exemptions from liability for negligence are to be made void the report recommends that such exemptions should be subject to a judicial test of reasonableness. (Paragraph 325.)

8. This subsection provides for the reasonableness test to apply to contract terms and notices (as to which see paragraph 5, above) in all cases other than those specified in clauses 8, 9 or 10 or in an order made in accordance with clause 11. It applies, as does subsection (3), to contract terms, and to notices given either to persons generally or to particular persons, and renders them ineffective for the purpose of excluding or restricting liability for negligence, whether directly or vicariously incurred, to the extent that it is shown that it would not be fair or reasonable to allow reliance on the terms or notice. It is therefore for the person who objects to the term or notice to show that it would not be fair or reasonable to allow reliance on it. See also clause 12(2).

9. It is not intended that this subsection should make contract terms subject to the reasonableness test if they are permitted by an international convention to which the United Kingdom is a party or by a statutory enactment or instrument which extends provisions based on a convention to domestic contracts. Accordingly it will be necessary to add to this Bill, if it is introduced into Parliament, a provision preserving any contractual limitation on liability which is expressly permitted by the following:—

Carriage of Goods by Sea Act 1924;
Carriage by Air Act 1961;
Carriage by Air (Supplementary Provisions) Act 1962;
Carriage of Goods by Road Act 1965;
Carriage by Air Acts (Application of Provisions) Order 1967, S.I. 1967 No. 480;
Carriage of Goods by Sea Act 1971;
Hovercraft (Civil Liability) Order 1971, S.I. 1971 No. 720;
Carriage by Railway Act 1972;
Carriage of Passengers by Road Act 1974.

In relation to the Carriage of Goods by Sea Act 1924, it will probably be necessary to amend section 4 of that Act so as to subject contracts of carriage of goods by sea in the coasting trade to the reasonableness test under this subsection. (Paragraphs 272 and 346.)

Clause 7(5)

10. In applying the reasonableness test the court is directed to have regard to all the circumstances of the case. (Paragraph 340.)

Clause 7(6)

11. Mention is made in the report of the possibility that the maxim *volenti non fit injuria* may be called in aid in situations where a party has agreed to, or become aware of, a term even though the contract in which it was sought to incorporate it never became effective. This subsection ensures that there is no room for the argument that a term or notice which is struck down under the earlier provisions of this clause is nevertheless effective by virtue of the doctrine of assumption of risk. Of course, the term or notice may be a factor to take into account in deciding whether a person has voluntarily assumed the risk. (Paragraph 333.)

Exemption Clauses (England and Wales) Bill

Passenger
and carrier.

8.—(1) In the case of a person killed or injured while being carried as a passenger by any means of transport, such a contract term or notice as is mentioned in section 7 above is void under that section for the purpose of excluding or restricting the carrier's liability for death or personal injury resulting from negligence.

(2) Subsection (1) above applies to any means of transport, whether by land or water, or in the air; and a passenger is "carried" from when he boards to when he alights, and also while boarding or alighting.

1962 c. 46.

(3) In section 43(7) of the Transport Act 1962 (which prohibits the Boards established under that Act from carrying passengers on terms excluding liability for death or personal injury), the words "other than a passenger travelling on a free pass" shall be omitted.

EXPLANATORY NOTES

Clause 8

Clause 7(3) of the Bill provides that contract terms, and notices, are to be void for the purpose of excluding or restricting liability for negligence to the extent specified in this clause, in clauses 9 and 10 and in statutory instruments (dealt with in the explanatory notes to clause 11).

Definitions

“Notice” and “personal injury”: see clause 18.

“Negligence”: see clause 7(1).

“Excluding or restricting liability”: see clause 12(1) and (2).

Clause 8(1)

1. The effect of this subsection, read together with clause 7(3), is that exemptions are void for the purpose of excluding or restricting a carrier's liability for death or personal injury due to negligence, where the victim is a passenger. As a result of clause 7(2), this provision applies only where the carriage is in the course of a business (as defined in clause 18). For the meaning given to “carried” see subsection (2). (Paragraph 329(b).)

Clause 8(2)

2. This clause applies to every means of transport.

3. Nevertheless, it is not intended that this Bill should make void contractual limitations on liability which are permitted by an international convention to which the United Kingdom is a party or by a statutory enactment or instrument which extends provisions based on a convention to domestic carriage. Accordingly it will be necessary to add to this Bill, if it is introduced into Parliament, a provision preserving any contractual limitation on liability which is expressly permitted by the following:—

Carriage by Air Act 1961;

Carriage by Air (Supplementary Provisions) Act 1962;

Carriage by Air Acts (Application of Provisions) Order 1967, S.I. 1967 No. 480;

Hovercraft (Civil Liability) Order 1971, S.I. 1971 No. 720;

Carriage by Railway Act 1972;

Carriage of Passengers by Road Act 1974.

(Paragraphs 272 and 346.)

Clause 8(3)

4. There are two amendments to existing legislation which are thought advisable in consequence of clause 8(1). (Paragraph 270(c).)

5. The first amendment is to section 151 of the Road Traffic Act 1960. This will be found in Schedule 1.

6. The second amendment is to section 43(7) of the Transport Act 1962. The report recommends (paragraph 270(c)) that section 43(7) should no longer exclude from its effect passengers travelling on a free pass. This subsection accordingly proposes for repeal the relevant words in section 43(7). The present form of section 43(7) of the Transport Act 1962 is set out below, the words now proposed for repeal being printed in italics:—

43.—(7) The Boards shall not carry passengers by rail on conditions which—

(a) purport, whether directly or indirectly, to exclude or limit their liability in respect of the death of, or bodily injury to, any passenger *other than a passenger travelling on a free pass*, or

(b) purport, whether directly or indirectly, to prescribe the time within which or the manner in which any such liability may be enforced,

and any such terms or conditions shall be void and of no effect.

Exemption Clauses (England and Wales) Bill

Other
exemptions
void under
s. 7.

9.—(1) In any of the cases specified below in this section, such a contract term or notice as is mentioned in section 7 above is void under that section for the purpose of excluding or restricting liability for death or personal injury resulting from negligence.

(2) The first case is that of a person killed or injured by an accident arising out of and in the course of his employment, where the liability is that of his employer.

(3) The second case is that of a person killed or injured in consequence of a defect or malfunction, or the mismanagement, of a device installed on premises (including any land) for the movement of persons on or about those premises.

(4) The third case is that of a person killed or injured while making use of a car park, where the liability is that of the occupier of the car park, or of some person concerned with its conduct or management; and “car park” means a place for parking motor vehicles.

EXPLANATORY NOTES

Clause 9

Clause 7(3) of the Bill provides that contract terms, and notices, are to be void for the purpose of excluding or restricting liability for negligence to the extent specified in this clause, in clauses 8 and 10, and in statutory instruments (dealt with in the explanatory notes to clause 11). As a result of clause 7(2), this clause applies only to liability for negligence incurred in the course of a business. "Business" is defined in clause 18.

Definitions

"Notice" and "personal injury": see clause 18.

Clause 9(1)

1. This clause makes void under clause 7(3) exemptions in so far as they are relied upon to exclude or restrict liability for death or personal injury resulting from negligence. It specifies three cases, described in subsections (2), (3) and (4).

Clause 9(2)

2. This subsection describes the first case where exemptions are void in relation to death or personal injury. It fills the gap in the present law identified in paragraph 75 of the report, so that an employer will no longer be able to exclude or restrict liability for his own negligence to an employee killed or injured in an accident arising out of and in the course of his employment. (Paragraph 329(a).)

Clause 9(3)

3. This subsection describes the second case where exemptions are void in relation to death or personal injury. It deals with situations which cannot strictly speaking be described as the carriage of passengers (dealt with in clause 8) but where similar considerations apply in that someone is killed or injured as a result of a mishap involving a mechanical device for the movement of persons on or about premises, such as an escalator or a fairground device. (Paragraph 329(c).)

Clause 9(4)

4. This subsection describes the third case where exemptions are void in relation to death or personal injury. It deals with the death of or personal injury to a person making use of a car park where the liability for negligence is that of the occupier of the car park or of some person concerned with its conduct or management. Although "car park" is widely defined as a place for parking motor vehicles (and hence includes "lorry parks" and "motor-cycle parks"), the application of this subsection is limited in that some person must be liable for negligence, and that person must be the occupier of the place for parking motor vehicles or some person concerned with the conduct or management of that place. (Paragraph 329(d).)

Exemption Clauses (England and Wales) Bill

“Guarantee”
of consumer
goods.

10.—(1) This section applies in the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage (including, but not limited to, death or personal injury)—

- (a) arises from the goods proving defective while in consumer use; and
- (b) results from the negligence of a person concerned in the manufacture or distribution of the goods.

EXPLANATORY NOTES

Clause 10

Clause 7(3) of the Bill provides that contract terms, and notices, are to be void for the purpose of excluding or restricting liability for negligence to the extent specified in this clause, in clauses 8 and 9, and in statutory instruments (dealt with in the explanatory notes to clause 11). As a result of clause 7(2), this clause applies only to liability for negligence incurred in the course of a business.

Definitions

“Business”, “goods”, “hire-purchase agreement”, “notice” and “personal injury”: see clause 18.

“Negligence”: see clause 7(1).

“Excluding or restricting liability”: see clause 12(1) and (2).

Clause 10(1)

1. Manufacturers of goods (and distributors) are potentially liable under *Donoghue v. Stevenson* [1932] A.C. 562 for loss or damage caused by their negligence. Sometimes “guarantees” or “warranties” are issued, particularly by manufacturers, which attempt to exclude or restrict this liability. The effect of this clause is to make void such exemptions under clause 7(3). (Paragraph 331.)

2. This subsection in effect makes three points as to the operation of this clause.

3. First, the clause applies to every kind of loss or damage, and is not limited to death or personal injury.

4. Second, the clause applies where the loss or damage results from the negligence of a person concerned in the manufacture or distribution of the goods (see paragraph (b) of this subsection). “Negligence” is defined in clause 7(1)(b) of this Bill as including the breach of a common law duty to take reasonable care; in other words, it includes the tort of negligence.

5. Third, the clause applies only to the consumer situation. It will be seen that it applies only where the goods are consumer goods that is to say, goods “of a type ordinarily supplied for private use or consumption” (*cf.* Sale of Goods Act 1893, section 55(7)(a), and clauses 3(2)(c) and 4(c) of this Bill). Although guarantees may be issued in respect of all types of goods (for example, “warranties” issued by the manufacturers of heavy goods vehicles), this clause will not apply unless the goods are consumer goods. Moreover, it applies only where the loss or damage arises from the goods proving defective while “in consumer use” (see paragraph (a) of this subsection). This phrase is explained in subsection (3) of this clause.

6. Where this clause does not apply, exemptions from liability for negligence will still be subject to control under this Bill. They will be subject to the reasonableness test under clause 7(4).

Exemption Clauses (England and Wales) Bill

(2) Such a contract term or notice as is mentioned in section 7 above is void under that section for the purpose of excluding or restricting liability for the loss or damage, where the term or notice is contained in, or operates by reference to, a guarantee of the goods.

(3) For the purposes of this section—

(a) goods are to be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and

(b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.

(4) This section does not apply as between parties to a contract of sale of goods, a hire-purchase agreement or a contract within section 2 of this Act; nor does it apply, in the case of goods supplied on a redemption of trading stamps within the Trading Stamps Act 1964, as between the promoter of the trading stamp scheme and the person obtaining the goods.

1964 c. 71.

EXPLANATORY NOTES

Clause 10 (continued)

Clause 10(2)

7. This is the main operative provision of the clause. It makes void under clause 7(3) contract terms or notices (nothing therefore turns on the question whether the guarantee has contractual effect or not) contained in, or operating by reference to, a guarantee of the goods. The expression "guarantee" is explained in subsection (3).

Clause 10(3)

8. This subsection defines the expressions "in consumer use" used in subsection (1) and "guarantee" used in subsection (2).

9. Not all documents that look like guarantees do on analysis contain any firm promise or assurance that defects will be made good. They may nevertheless contain an exemption clause. To avoid any doubt, the definition of a guarantee in paragraph (b) of this subsection includes not only documents which actually contain such a promise or assurance but also those that purport to do so: documents flamboyantly headed "Guarantee" in gothic script which contain only empty words besides the exemption clause, such as a promise that the goods are made to the manufacturer's high standards, should therefore be caught by this clause.

Clause 10(4)

10. Where there is a contract of (for example) sale of goods, the seller may agree in a document to make good defects in the goods. But for this subsection such a document would be a guarantee and this clause would apply. In that situation, however, the buyer has contractual rights against the seller quite apart from obligations in the document, and if the seller attempts to exclude his liability for negligence this can be treated in the same way as exemptions from such liability are treated where there is no express promise (or purported promise) to make good defects. Such exemptions will be subject to the reasonableness test under clause 7(4).

11. This subsection therefore excludes from the operation of this clause the direct relationship of the parties to a contract of sale of goods, a hire-purchase agreement, or a contract for the supply of goods within clause 2 of this Bill. It also excludes the redemption of trading stamps.

Exemption Clauses (England and Wales) Bill

Additional cases controlled by order of Secretary of State.

11.—(1) An order of the Secretary of State under section 7(3) of this Act shall be made only with a view to giving effect (or such partial or modified effect as the Secretary of State thinks expedient) to a recommendation by the Director General of Fair Trading identifying any case or cases in which (in his opinion) such contract terms and notices as are mentioned in that subsection should be made void for the purpose of excluding or restricting liability for death or personal injury resulting from negligence.

(2) Before making such a recommendation the Director General must be satisfied that the case is one in which persons need protection in any kind of relationship with others because (as it appears to him) in that relationship—

- (a) they specially depend for their personal safety on the others' skill and care;
- (b) they are in practice limited in their ability to protect themselves by negotiation against the effect of a contract term or notice excluding or restricting liability for negligence; and
- (c) they are exposed to the unfair or unreasonable use against them of such terms or notices.

(3) The Secretary of State may (with or without a recommendation by the Director General) by order in a statutory instrument vary or revoke any previous order made under section 7(3) or this subsection; and an order (made under either subsection) may contain such incidental and supplementary provisions as the Secretary of State thinks necessary or expedient.

(4) An order under section 7(3), or under subsection (3) above, shall not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

(5) Where the Director General makes to the Secretary of State a recommendation for the purposes of this section, the Secretary of State shall lay a copy of the recommendation before each House of Parliament, and shall arrange for it to be published in such manner as appears to him to be appropriate.

EXPLANATORY NOTES

Clause 11

Clause 7(3) of the Bill provides that contract terms, and notices, are to be void for the purpose of excluding or restricting liability for death or personal injury due to negligence to such extent as the Secretary of State may direct by order made by statutory instrument. This clause imposes limitations on the power of the Secretary of State to make orders under clause 7(3). As a result of clause 7(2), an order made under clause 7(3) applies only to negligence incurred in the course of a business. "Business" is defined in clause 18. With clause 7(3), this clause implements the recommendation in paragraph 330.

Definitions

"Notice" and "personal injury": see clause 18.

"Negligence": see clause 7(1).

"Excluding or restricting liability": see clause 12(1) and (2).

Clause 11(1)

1. This subsection provides that the Secretary of State may not make an order under clause 7(3) unless—

- (a) a recommendation that such an order be made has been received from the Director General of Fair Trading (an officer appointed by the Secretary of State under section 1 of the Fair Trading Act 1973), and
- (b) the order is made with a view to giving effect (or partial or modified effect) to the recommendation.

2. Clauses 8 and 9 of the Bill specify certain cases where exemptions are to be void in so far as they exclude or restrict liability for death or personal injury caused by negligence. A recommendation by the Director General of Fair Trading must identify any additional case or cases which in the opinion of the Director General should be treated similarly.

Clause 11(2)

3. This subsection specifies the criteria which the Director General of Fair Trading must apply in deciding whether to recommend the making of an order.

Exemption Clauses (England and Wales) Bill

Miscellaneous and general

Meaning of
"exclude or
restrict
liability".

12.—(1) Subject to subsection (3) below, a reference in this Act to excluding or restricting any liability includes—

- (a) making the liability or its enforcement subject to any restrictive or onerous condition;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding or restricting any rule of evidence or procedure.

(2) Contract terms are within the application of section 2(3) and (4), and contract terms and notices are within that of section 7(3) and (4), in so far as they exclude or restrict liability by excluding or restricting the relevant obligation or duty.

(3) An agreement in writing to submit present or future differences to arbitration is not to be treated under this Act as excluding or restricting any liability.

EXPLANATORY NOTES

Clause 12

This clause explains the meaning of the phrase “exclude or restrict liability” which is used throughout this Bill.

Definition

“Notice”: see clause 18.

Clause 12(1)

1. This subsection does not supply an exhaustive definition of an exemption clause, but explains that a reference to excluding or restricting liability includes—

- (a) the imposition of restrictive or onerous conditions on the creation or enforcement of liability (such as an obligation to give notice of loss within a specified period);
- (b) the exclusion or restriction of remedies (such as a limitation of liability to a specified amount) or the imposition of any prejudice (such as an obligation to indemnify a third party);
- (c) the exclusion or restriction of rules of evidence or procedure (such as a provision that a fact is to be conclusive evidence of another fact).

Clause 12(2)

2. Clause 2(3) and (4) make void or ineffective terms which exclude or restrict liability in respect of certain implied obligations. A common form of exemption clause is one which purports to exclude “all conditions and warranties, express or implied”. This subsection provides that terms which exclude or restrict the conditions or warranties themselves are within the controls in this Bill which are expressed to apply to exclusion or restriction of liability.

3. Similarly, clause 7(3) and (4) apply to terms which exclude or restrict liability for negligence. This subsection provides that terms or notices which exclude or restrict the duty of care itself, or the contractual obligation to take care, are within the controls in this Bill which are expressed to apply to exclusion or restriction of liability.

4. This subsection does not, however, apply to clause 1 of this Bill. In particular, clause 1(2)(a) makes terms ineffective in certain circumstances if they exclude or restrict liability for breach of contract (for example, by limiting liability to a specified amount or by imposing conditions on the exercise of remedies); but clause 1(2)(a) only comes into effect when there is a breach of contract, and terms which define the contractual obligation or in some other way prevent the breach of a contract are not controlled by clause 1(2)(a). They may however be subject to clause 1(2)(b) and (c).

Clause 12(3)

5. This subsection implements the recommendation in paragraph 339 of the report. Arbitration clauses governed by the Arbitration Act 1950 are not treated as exemption clauses even though they would otherwise fall within clause 12(1)(a) or (b).

Exemption Clauses (England and Wales) Bill

Conflict
of laws.

13.—(1) Subject to the following subsections, nothing in this Act applies to a contract whose proper law—

(a) is that of England and Wales only by the choice of the parties; and

(b) would apart from that choice be the law of some other country.

(2) Where a contract is one of which the proper law is the law of England and Wales, or the law of Scotland, or would be so apart from a term that it should be the law of some other country or a term to the like effect, then the following subsection operates in relation to the contract.

(3) The controlling provisions of this Act or the Scottish Act (as the case may be) and the obligations, duties and liabilities there mentioned shall (subject to section 14 below) apply notwithstanding that the parties—

(a) have chosen the law of another country as the proper law of the contract; or

(b) have substituted, or purported to substitute, provisions of such a law for any of the controlling provisions referred to above in this subsection, or for the enactments or rules of law imposing the obligations, duties or liabilities there mentioned.

(4) For the purposes of subsection (3) above, the controlling provisions of this Act are sections 1, 2 and 7; and those of the Scottish Act are sections 2, 3 and 4 of the Exemption Clauses (Scotland) Act 1975.

EXPLANATORY NOTES

Clause 13(1)

1. This subsection implements the recommendation in paragraph 343 of the report.

Clause 13(2), (3) and (4)

2. These subsections implement the recommendation in paragraph 345 of the report. *Cf.* section 55A of the Sale of Goods Act 1893 and section 13 of the Supply of Goods (Implied Terms) Act 1973.

Exemption Clauses (England and Wales) Bill

International
contracts.
56 & 57
Vict. c. 71.

14.—(1) Nothing in this Act applies to any term of—

- (a) a contract for the international sale of goods (within the meaning of the Sale of Goods Act 1893); or
- (b) such a contract as is described in subsection (2) below.

(2) Subject to subsection (3), that description of contract is one whose characteristics are the following—

- (a) it is not a contract of sale of goods or a hire-purchase agreement;
- (b) subject to that, it is one whose performance involves—
 - (i) the ownership of goods passing from one person to another (with or without work having been done on them) or the possession of goods passing by way of hire or otherwise; or
 - (ii) goods being applied or expended in the doing of any work, or in the performance of any services, provided for by the particular contract; and
- (c) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (Northern Ireland, the Channel Islands and the Isle of Man being treated for this purpose as different States from Great Britain).

(3) A contract falls within subsection (2) above only if either—

- (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or
- (b) the acts constituting the offer and acceptance have been effected in the territories of different States; or
- (c) the contract provides for the goods to be delivered to, or to be delivered, applied or expended in the course of some service to be performed in, the territory of a State other than that within whose territory the acts constituting the offer and acceptance have been effected.

EXPLANATORY NOTES

Clause 14

This clause implements the recommendation in paragraph 344 of this report. *Cf.* section 61(6) of the Sale of Goods Act 1893 and the definition of “contract for the international sale of goods” in section 62(1) of that Act.

Definitions

“Goods” and “hire-purchase agreement”: see clause 18.

Clause 14(1), (2) and (3)

1. These subsections exclude from the operation of this Bill—
 - (a) a contract for the international sale of goods as defined in section 62(1) of the Sale of Goods Act 1893; and
 - (b) a contract of an international nature that would otherwise fall within clause 2 of this Bill, such as an international contract (as defined in subsections (2) and (3) of this clause) of hire of goods or for work and materials.
2. This clause does not exclude other international contracts from the operation of this Bill: see paragraph 231 of the report.

Exemption Clauses (England and Wales) Bill

Effect of
breach of
contract.

15.—(1) No breach of contract, whether fundamental or not, and no termination of a contract in consequence of a breach thereof, is to be regarded of itself as invalidating a contract term excluding or restricting liability to which this section applies.

(2) Nothing in this section is to be taken as affecting—

- (a) the matters relevant for determining the extent to which it is fair or reasonable to allow reliance on a contract term; or
- (b) any rule of construction which applies to a term excluding or restricting liability.

(3) This section applies only to a contract term excluding or restricting liability which would, by section 1(2), 2(3) or (4) or 7(4) of this Act, be ineffective to any extent if it were shown that it would not be fair or reasonable to allow reliance on it.

EXPLANATORY NOTES

Clause 15

This clause implements the recommendation in paragraph 342 of the report.

Clause 15(1)

1. There may be some situations where an exemption clause cannot be relied upon because there has been a fundamental breach of contract or the breach of a fundamental term. If this is because it is found as a matter of construction that it was not intended to apply to such a breach (*Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 61) that is an end of the matter, and nothing in this Bill is concerned to make effective an exemption clause which is not intended to apply to the breach in question. But the situation may result from the argument that the exemption clause ceases to operate where the contract is terminated as a result of a breach (*Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447), even though the court might otherwise take the view that in all the circumstances of the case it was reasonable to rely on the exemption clause.

2. This subsection provides that neither the termination of a contract in consequence of breach, nor the breach itself, automatically invalidates an exemption clause which is subject to the reasonableness test under this Bill (see subsection (3) of this clause).

Clause 15(2)

3. This subsection makes it plain that subsection (1) does not—

- (a) preclude a court which is applying the reasonableness test from taking into account the nature of the breach of contract, or
- (b) validate an exemption clause which does not apply to the breach because it is found, as a matter of construction, that it was not intended to apply to it.

Clause 15(3)

4. This confines the operation of subsection (1) to contract terms which are subject to the reasonableness test under this Bill. Terms which are made void by this Bill are outside the scope of this clause. On the other hand, the common law principles that apply when there has been a fundamental breach will continue to apply to exemption clauses which are not controlled by this Bill or by the Sale of Goods Act 1893 or the Supply of Goods (Implied Terms) Act 1973 (see Schedule 1 to this Bill).

Exemption Clauses (England and Wales) Bill

Saving for
court-
approved
terms.

16. Nothing in this Act precludes reliance on a contract term incorporated or approved by any court in the exercise of a jurisdiction conferred by statute.

EXPLANATORY NOTES

Clause 16

This clause implements the recommendation in paragraph 348 of the report.

Definition

“Court”: see clause 18.

Clause 16

1. Certain statutes provide for the approval of a court or arbitrator to contract terms before they are incorporated into a contract; see the Agricultural Holdings Act 1948, section 6 and the Housing Act 1961, section 33.

2. It would be inconvenient if terms already approved under a form of reasonableness test under such statutes were made subject to this Bill. They are accordingly excluded from the operation of the Bill by this clause.

Exemption Clauses (England and Wales) Bill

Amend-
ments of
enactments;
repeals.

17.—(1) The enactments specified in Schedule 1 to this Act are amended as there specified.

(2) The enactments specified in Schedule 2 to this Act are repealed to the extent specified in the third column of that Schedule.

Exemption Clauses (England and Wales) Bill

Interpreta-
tion.

18. In this Act—

“business” includes a profession and the activities of any government department, local authority or statutory undertaker;

“court” includes an arbitrator;

56 & 57
Vict. c. 71.

“goods” has the same meaning as in the Sale of Goods Act 1893;

1974 c. 39.

“hire-purchase agreement” has the same meaning as in the Consumer Credit Act 1974;

“notice” includes an announcement, whether or not in writing, and any other communication or pretended communication; and

“personal injury” includes any disease and any impairment of physical or mental condition.

EXPLANATORY NOTES

Clause 18

The definition of “business” follows the definitions in section 62(1) of the Sale of Goods Act 1893 and section 15(1) of the Supply of Goods (Implied Terms) Act 1973. (Paragraph 341.)

Exemption Clauses (England and Wales) Bill

Commence-
ment. **19.**—(1) This Act comes into force at the expiration of three months beginning with the day on which it is passed.

(2) As between the parties to a contract made before the date on which this Act comes into force, this Act does not apply so as to make void or ineffective any term of the contract; but subject to this it applies to liability for any loss or damage which is suffered on or after that date.

Citation and
extent. **20.**—(1) This Act may be cited as the Exemption Clauses (England and Wales) Act 1975.

(2) This Act extends to England and Wales only.

Exemption Clauses (England and Wales) Bill

SCHEDULES

Section 17(1)

SCHEDULE 1

AMENDMENTS OF ENACTMENTS

Sale of Goods Act 1893 (56 & 57 Vict. c. 71)

In section 55 of the Sale of Goods Act 1893, the following is substituted for subsection (1)—

“(1) Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties or by usage if the usage is such as to bind both parties to the contract; but the foregoing provision shall have effect subject to the following provisions of this section and to the provisions of the Exemption Clauses (England and Wales) Act 1975”.

In that Act, the following is inserted after section 55A—

“Effect of breach of contract.

55B.—(1) No breach of a contract of sale of goods, whether fundamental or not, and no termination of such a contract in consequence of a breach thereof, is to be regarded of itself as invalidating a term of a contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act to which this section applies.

(2) Nothing in this section is to be taken as affecting—

(a) the matters relevant for determining whether or not reliance on any such term would be fair or reasonable; or

(b) any rule of construction which applies to a term exempting from the provisions of this Act.

(3) This section applies only to a term of a contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act which would, by section 55(4) of this Act, not be enforceable to any extent if it were shown that it would not be fair or reasonable to allow reliance on it”.

Road Traffic Act 1960 (c. 16)

In the Road Traffic Act 1960, the following is substituted for section 151—

“Civil liability to passengers in public service vehicles.

151.—(1) In the case of a person carried as a passenger in or on a public service vehicle, a contract term, or a notice given either to persons generally or to particular persons, is void so far as it purports—

(a) to negative or restrict any person’s liability in respect of the death of, or personal injury to, the passenger while being so carried; or

EXPLANATORY NOTES

Schedule 1

This Schedule provides for the amendment of certain other statutes in implementation of the report.

1. *Sale of Goods Act 1893*

(a) A new section 55(1) of the Sale of Goods Act 1893 is supplied to ensure that the freedom of contract conferred by the first part of the subsection is subject to the provisions of the present Bill. This implements the recommendation in paragraph 274 of the report. Clauses 1 and 7 of the present Bill are capable of applying to contracts of sale of goods.

The new section 55(1) follows the present text of the subsection but adds the words "and to the provisions of the Exemption Clauses (England and Wales) Act 1975." at the end.

(b) A new section 55B is proposed for addition to the Sale of Goods Act 1893 in implementation of the recommendation in paragraph 342 of the report. The text follows clause 15 of the present Bill with the necessary adaptations.

2. *Road Traffic Act 1960*

The report recommends (paragraph 270(c)) that section 151 of the Road Traffic Act 1960, which at present relates to a contract for the conveyance of a passenger in a public service vehicle (defined in section 117 of the Road Traffic Act 1960), should no longer be confined to contracts. A new version of section 151 is accordingly supplied in order to do this. For the purpose of comparison, section 151 of the Road Traffic Act 1960 in its present form reads as follows:—

"151. A contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void."

Exemption Clauses (England and Wales) Bill

SCH. 1

- (b) to impose any conditions with respect to the enforcement of any such liability.
- (2) For the purposes of subsection (1) above—
 - (a) a passenger is 'carried' from when he boards to when he alights, and also while boarding or alighting; and
 - (b) 'notice' includes an announcement, whether or not in writing, and any other communication or pretended communication".

Uniform Laws on International Sales Act 1967 (c. 45)

In section 1 of the Uniform Laws on International Sales Act 1967, the following is substituted for subsection (4)—

"(4) In determining the extent of the application of the Uniform Law on Sales by virtue of Article 4 thereof (choice of parties), no provision of the law of any part of the United Kingdom shall be regarded as a mandatory provision within the meaning of that Article, except—

- (a) sections 12 to 15, 55 and 55A of the Sale of Goods Act 1893;
- (b) sections 1, 2, 7 and 13 of the Exemption Clauses (England and Wales) Act 1975".

Supply of Goods (Implied Terms) Act 1973 (c. 13)

In the Supply of Goods (Implied Terms) Act 1973, the following is inserted after section 12—

"Effect of breach of contract.

12A.—(1) No breach of a hire-purchase agreement, whether fundamental or not, and no termination of such an agreement in consequence of a breach thereof, is to be regarded of itself as invalidating a term of an agreement exempting from all or any of the provisions of sections 9, 10 or 11 above to which this section applies.

- (2) Nothing in this section is to be taken as affecting—
 - (a) the matters relevant for determining whether or not reliance on any such term would be fair or reasonable; or
 - (b) any rule of construction which applies to a term exempting from the provisions of this Act.

(3) This section applies only to a term of an agreement exempting from all or any of the provisions of sections 9, 10 or 11 above which would, by section 12(3) of this Act, not be enforceable to any extent if it were shown that it would not be fair or reasonable to allow reliance on it".

EXPLANATORY NOTES

Schedule 1 (continued)

3. *Uniform Laws on International Sales Act 1967*

The report recommends (paragraphs 227 and 345) that provision should be made to ensure that the controls proposed in the report are not evaded by the choice of the Uniform Law on Sales to govern the contract.

Section 1(4) of the Uniform Laws on International Sales Act 1967 was amended by section 5(2) of the Supply of Goods (Implied Terms) Act 1973 so as to make certain sections of the Sale of Goods Act 1893 "mandatory provisions" for the purpose of Article 4 of the Uniform Law on Sales. That amendment is represented by paragraph (a) in the new subsection. The effect of paragraph (b) in the new subsection is to make the relevant provisions of this Bill "mandatory provisions" as well. If this Bill is introduced into Parliament consideration must be given to the question whether the relevant provisions of the Exemption Clauses (Scotland) Bill should also be made "mandatory provisions" for the purposes of English law.

4. *Supply of Goods (Implied Terms) Act 1973*

Sections 8 to 11 of the Supply of Goods (Implied Terms) Act 1973 enact certain conditions and warranties which are implied in hire-purchase agreements, and section 12 of that Act regulates the exclusion of implied terms and conditions in hire-purchase agreements. This schedule proposes a new section 12A for addition to the Supply of Goods (Implied Terms) Act 1973 in implementation of the recommendation in paragraph 342 of the report in relation to hire-purchase agreements. The text follows clause 15 of the present Bill with the necessary adaptations.

Exemption Clauses (England and Wales) Bill

Section
17(2).

SCHEDULE 2

REPEALS

Chapter	Short Title	Extent of Repeal
1962 c. 46.	Transport Act 1962.	In section 43(7) the words "other than a passenger travelling on a free pass".
1973 c. 13.	Supply of Goods (Implied Terms) Act 1973.	Section 5(2).

EXPLANATORY NOTES

Schedule 2

1. See clause 8(3) of this Bill for the proposed amendment to section 43(7) of the Transport Act 1962.

2. Section 5(2) of the Supply of Goods (Implied Terms) Act 1973 amended section 1(4) of the Uniform Laws on International Sales Act 1967. The present Bill proposes a new version of section 1(4) of the Uniform Laws on International Sales Act 1967 (see Schedule 1 to this Bill), and accordingly section 5(2) of the Supply of Goods (Implied Terms) Act 1973 is proposed for repeal.

APPENDIX B

Draft Exemption Clauses (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Application of Act.
2. Control of unreasonable exemptions.
3. Obligations implied by law.
4. Liability for breach of duty.
5. Additional cases controlled by order of Secretary of State.
6. Conflict of laws.
7. International contracts.
8. Consequence of breach.
9. Amendments of enactments and repeals.
10. Interpretation.
11. Citation, commencement and extent.

SCHEDULES:

- Schedule 1—Amendments of Enactments.
- Schedule 2—Repeals.

Exemption Clauses (Scotland) Bill

DRAFT
OF A
BILL
TO

IMPOSE further limits on the extent to which civil liability under the law of Scotland can be avoided by means of contract or otherwise.

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

Application
of Act.

1. This Act applies to—

- (a) any contract the performance of which involves or may involve—
 - (i) the transfer of the ownership or possession of goods from one person to another (with or without work having been done on them); or
 - (ii) the use, application or expending of goods in the doing of any work or the performance of any services;
- (b) any contract of service or apprenticeship;
- (c) any contract for services of whatever kind, including (without prejudice to the generality of the provisions of this paragraph) carriage, deposit and pledge, care and custody, mandate, agency, loan, and a contract for services relating to the use of land;
- (d) any contract of insurance;

EXPLANATORY NOTES

Clause 1

This clause identifies the types of contract to which the Bill applies. (Paragraphs 316, 327 and 338.)

Definitions

“Goods”, “hire-purchase agreement” and “licence”: see clause 10.

1. Paragraph (a) includes contracts of sale, hire-purchase, hire and exchange. There are also some contracts for services where neither ownership nor possession of materials used, applied or expended passes from one person to another, such as contracts for the dyeing of hair or fabric where the materials applied operate by chemical reaction without their substance attaching to the hair or article dyed. These are covered by sub-paragraph (ii). (Paragraph 317.)

2. Paragraphs (b) and (c) include those type contracts which, under the law of Scotland, may be classified as contracts of service or for services.

Exemption Clauses (Scotland) Bill

(e) any licence to enter upon or use land;

but, notwithstanding any provision in this Act contained, this Act does not apply to—

(aa) any contract (other than a contract for services relating to the use of land) in so far as it provides for the transfer of the ownership or possession of land or any interest in land;

(bb) any term of any contract (other than a contract of sale of goods or a hire-purchase agreement) which is a term regulated by any enactment or rule of law affecting the right of a person to exclude or restrict any obligation or liability of his under the contract;

(cc) any agreement to refer any matter to arbitration;

(dd) any contract made or licence granted before the coming into operation of this Act.

EXPLANATORY NOTES

Clause 1 (continued)

3. Paragraph (*e*) includes licences to enter upon or use land, in relation to which notices may be used as a method of excluding or restricting liability for failure to take reasonable care. (See clause 4.)

4. Paragraphs (*aa*) to (*dd*) enumerate a series of specific exclusions from the application of the Bill.

5. Paragraph (*aa*) makes clear that contracts providing for the transfer of the ownership or possession of land or any interest in land are excluded. Contracts for services relating to the use of land, however, are covered by the Bill.

6. Paragraph (*bb*) excludes from the Bill's application exemption clauses in contracts which are already regulated by an enactment or rule of law. Thus the Bill does not interfere where a particular term has been declared void by statute. (Paragraph 347.) The effect of the expression "regulated" is that all statutory provisions which leave the common law in operation are subject to the Bill because such provisions cannot be said to "regulate" the term. This paragraph is, however, subject to the recommendation that the provisions of statutes and statutory instruments implementing international conventions or extending their application to related fields should not be affected by the Bill. (Paragraph 346 of the report and paragraph 2 of the Explanatory Note to clause 4.)

7. Paragraph (*cc*) implements the recommendation in paragraph 339 of the report whereby arbitration clauses are not treated as exemption clauses.

8. Paragraph (*dd*) is similar in effect to section 18(5) of the Supply of Goods (Implied Terms) Act 1973. A licence to enter upon or use land is a bilateral relationship involving acceptance of or acting in conformity with the grantor's permission by the licensee. The giving of a notice is unilateral, and is of no legal effect except within the context of a recognised legal relationship, such as contract or licence. Its efficacy therefore depends on whether the legal relationship in which it is incorporated is included in or excluded from the application of the Bill.

Exemption Clauses (Scotland) Bill

Control of
unreason-
able
exemptions.

2.—(1) Any term of a contract to which this Act applies which is a consumer transaction or a standard form transaction shall be of no effect for the purpose of enabling a party to the contract—

- (a) who is in breach of a contractual obligation, to exclude or restrict any liability of his to the consumer or customer in respect of the breach, or any rights or remedies available to the consumer or customer,
- (b) in respect of a contractual obligation, to render no performance or to render a performance substantially different from that which the consumer or customer reasonably expected from the contract,

if it was not fair or reasonable to incorporate such term in the contract.

EXPLANATORY NOTES

Clause 2

This clause implements the main recommendations in Part IV of the report.

Definition

“Consumer”, “consumer transaction” and “customer”: see clause 10.

Clause 2(1)

1. Not all contracts are subject to the controls over terms in contracts specified in this clause. The controls apply only to consumer transactions and standard form transactions. Standard form transactions are not defined in the Bill (paragraph 157), but the expression “customer”, in relation to such transactions, is defined in clause 10. (Paragraphs 334 and 338.)

2. The “reasonableness test” is applied by this subsection to terms incorporated into contracts for any one or more of the purposes described in paragraphs (a) and (b). It is for the party who objects to the term in the contract to show that it was not fair or reasonable to incorporate the term in the contract. (Paragraphs 335 and 340.)

3. The first purpose is described in paragraph (a). A term is subject to the reasonableness test if it enables a party to the contract to exclude or restrict any liability for breach of contract, and in particular, if it excludes or restricts any right or remedy in respect of the liability. This paragraph does not impose any control over terms which lay down when or whether a breach of contract occurs. Thus terms which are drafted as defining the contractual obligations themselves, whether or not they are drafted as “exemptions” or “exceptions”, are not regulated by this paragraph.

4. The other purposes are described in paragraph (b). A term, however drafted, is subject to the reasonableness test if (i) it purports to enable a party to the contract to render no performance at all of the whole or any part of the contract—this would apply to various terms excusing non-performance or entitling a party to cancel a contract—or (ii) to render a performance substantially different from that which the other party reasonably expected from the contract. In the latter case the terms of the contract will not be decisive—regard will be had to all the circumstances.

Exemption Clauses (Scotland) Bill

(2) In determining for the purposes of subsection (1) above whether it was fair or reasonable to incorporate the term in the contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made.

(3) In this section, any reference to a term of a contract shall include a reference to a term which, although not contained in the contract, is incorporated into or affects the contract.

EXPLANATORY NOTES

Clause 2 (continued)

Clause 2(2)

5. This subsection implements the recommendation in paragraph 340 of the report.

Clause 2(3)

6. This subsection is similar in effect to section 55(10) of the Sale of Goods Act 1893.

Exemption Clauses (Scotland) Bill

Obligations
implied by
law.

3.—(1) Any term of a contract to which this section applies excluding or restricting an obligation—

(a) such as is referred to in subsection (3)(a) below—

(i) in the case of a consumer transaction, shall be void against the consumer, and

(ii) in any other case, shall be of no effect if it was not fair or reasonable to incorporate such term in the contract;

(b) such as is referred to in subsection (3)(b) below shall be of no effect if it was not fair or reasonable to incorporate such term in the contract.

EXPLANATORY NOTES

Clause 3

This clause implements the main recommendations in Part II of the report. Under section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973, the exclusion or restriction of the terms implied by those Acts into contracts of sale of goods and hire-purchase agreements is regulated. This clause deals with the exclusion or restriction of the terms implied at common law in contracts for the supply of goods such as contracts of hire and exchange. It applies to these contracts for the supply of goods a regime over exemption clauses which is broadly similar to that in section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973.

Definitions

“Business”, “consumer”, “consumer transaction”, “goods”, and “hire-purchase agreement”: see clause 10.

Clause 3(1) and (3)

1. The exclusions and restrictions which are controlled by these subsections are those affecting the implied obligations which are described in subsection (3). Subsection (3)(a) deals with liability in respect of those obligations, if any, which are implied relating to the goods' correspondence with description or sample or their quality or fitness for a particular purpose. A distinction is drawn between consumers—where the exempting terms are void—and other persons, where the exempting terms are subject to the reasonableness test. Subsection (3)(b) deals with liability in respect of those obligations, if any, which are implied in respect of title or quiet possession and related matters. No distinction is drawn between consumer and other transactions, and all exempting terms are in this respect subject to the reasonableness test. (Paragraphs 320 and 321.)

Exemption Clauses (Scotland) Bill

(2) This section applies to any contract (not being a contract of sale of goods or a hire-purchase agreement) such as is referred to in section 1(a) of this Act.

(3) An obligation referred to in this subsection is an obligation incurred under a contract in the course of a business and arising by implication of law from the nature of the contract which relates—

- (a) to the correspondence of goods with description or sample, or to the quality or fitness of goods for any particular purpose; or
- (b) to any right to transfer ownership or possession of goods, or to the enjoyment of quiet possession of goods.

(4) In determining for the purposes of subsection (1) above whether it was fair or reasonable to incorporate the term in the contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made.

(5) In this section, any reference to a term of a contract shall include a reference to a term which, although not contained in the contract, is incorporated into or affects the contract.

(6) Nothing in this section applies to the supply of goods on a redemption of trading stamps within the Trading Stamps Act 1964.

EXPLANATORY NOTES

Clause 3 (continued)

Clause 3(2)

2. This subsection refers to the contracts to which the clause applies: these are described in detail in clause 1(a). It includes such contracts as hire and exchange and contracts for services where goods are used or supplied. Contracts of sale of goods and hire-purchase agreements are already controlled by section 55 of the Sale of Goods Act 1893 and section 12 of the Supply of Goods (Implied Terms) Act 1973 and so are excluded from the application of this clause. (Paragraph 317.)

Clause 3(3)

3. This subsection describes the implied terms which are controlled by the clause. The subsection makes it clear that contracts between two private individuals are not within this clause. It applies only where at least one of the parties enters into the contract in the course of a business. (Paragraph 318.)

Clause 3(4)

4. This subsection implements the recommendation in paragraph 340 of the report.

Clause 3(5)

5. This subsection is similar in effect to section 55(10) of the Sale of Goods Act 1893.

Clause 3(6)

6. Terms are implied into the redemption of trading stamps for goods by section 4 of the Trading Stamps Act 1964 as amended by the Supply of Goods (Implied Terms) Act 1973, section 16, and these terms take effect notwithstanding any terms to the contrary. Exemption clauses are therefore already made ineffective under the 1964 Act.

Exemption Clauses (Scotland) Bill

Liability for
breach of
duty.

4.—(1) Any term of a contract to which this Act applies, or any notice given either to persons generally or to particular persons, which excludes or restricts liability for breach of duty arising in the course of any business or from the occupation of any premises used for business purposes—

- (a) shall be void in a case to which subsection (2) below applies, and
- (b) shall, in any other case, be of no effect if it was not fair or reasonable to incorporate such term in the contract or to give such notice.

EXPLANATORY NOTES

Clause 4

This clause, with clause 5, implements the main recommendations in Part III of the report for the control of terms and notices excluding or restricting liability for failure to take reasonable care.

Definitions

“Breach of duty”, “business”, “notice” and “personal injury”: see clause 10.

“In consumer use”: see subsection (4)(a).

“Guarantee”: see subsection (4)(b).

Clause 4(1)

1. The recommendations in this report deal only with exemptions from liability incurred in the course of a business (see paragraphs 9 and 36 of the report). This subsection therefore provides that the control of exemptions from liability introduced by this clause applies only to obligations or duties arising in the course of a business or from the occupation of premises used for business purposes. It provides that terms in a contract, and notices, are void in the circumstances set out in subsection (2), and subject to the reasonableness test in other cases. (Paragraphs 325 and 329–331.)

2. It is not intended that statutory enactments which implement international conventions to which the United Kingdom is a party, or statutory enactments or instruments which extend provisions based on a convention to domestic contracts, should be affected by this clause. Accordingly it will be necessary to add to this Bill, if it is introduced into Parliament, a provision preserving any contractual limitation on liability which is expressly permitted by the following:—

Carriage of Goods by Sea Act 1924;

Carriage by Air Act 1961;

Carriage by Air (Supplementary Provisions) Act 1962;

Carriage of Goods by Road Act 1965;

Carriage by Air Acts (Application of Provisions) Order 1967, S.I. 1967 No. 480;

Carriage of Goods by Sea Act 1971;

Hovercraft (Civil Liability) Order 1971, S.I. 1971 No. 720;

Carriage by Railway Act 1972;

Carriage of Passengers by Road Act 1974.

In relation to the Carriage of Goods by Sea Act 1924, it will probably be necessary to amend section 4 of that Act so as to subject contracts of carriage of goods by sea in the coasting trade to the reasonableness test under this subsection. (Paragraphs 272 and 346.)

Exemption Clauses (Scotland) Bill

- (2) This subsection applies to a term or notice such as is mentioned in subsection (1) above excluding or restricting liability—
- (a) for loss or damage (including death or personal injury) which—
 - (i) arises from goods of a type ordinarily supplied for private use or consumption proving defective while in consumer use and
 - (ii) results from the breach of duty of a person concerned in the manufacture or distribution of the goods, insofar as the term or notice is contained in, or operates by reference to, a guarantee of the goods;
 - (b) for death or personal injury resulting from breach of duty where a person is killed or injured—
 - (i) in an accident arising out of and in the course of his employment and the liability is that of his employer; or
 - (ii) while being carried in, entering or alighting from any means of transport by land or water, or in the air, and the liability is that of the carrier; or
 - (iii) in consequence of a defect or malfunction, or the mismanagement, of a device for the movement of persons; or
 - (iv) while making lawful use of a vehicle park and the liability is that of the occupier of the vehicle park, or of some person concerned with its conduct or management;
 - (c) in a case or class of case to which the Secretary of State by order made under section 5 of this Act has directed that this subsection shall apply.

EXPLANATORY NOTES

Clause 4 (continued)

Clause 4(2)

3. Manufacturers and distributors of goods are potentially liable in delict for loss or damage. Sometimes "guarantees" or "warranties" are issued, particularly by manufacturers, which attempt to exclude or restrict this liability. The effect of this subsection is to make such exemptions void. (Paragraph 331.)

4. This subsection in effect makes three points as to the operation of this clause.

5. First, the clause applies to every kind of loss or damage, and is not limited to death or personal injury.

6. Second, the clause applies where the loss or damage results from the failure of a person concerned in the manufacture or distribution of the goods to take reasonable care (see sub-paragraph (ii)).

7. Third, the clause applies only to guarantees to consumers. It applies only where the goods are consumer goods, that is to say, goods "of a type ordinarily supplied for private use or consumption" (*cf.* Sale of Goods Act 1893, section 55(7)(a), and the definition of "consumer transaction" in clause 10 of this Bill). Although guarantees may be issued in respect of all types of goods (for example "warranties" issued by the manufacturers of heavy goods vehicles), this clause will not apply unless the goods are consumer goods. Moreover, it applies only where the loss or damage arises from the goods proving defective while "in consumer use" (see sub-paragraph (i)). This phrase is explained in subsection (4)(a) of this clause.

8. Where this clause does not apply, exemptions from liability to take reasonable care will still be subject to control under this Bill. They will be subject to the reasonableness test under subsection (1)(b) of this clause. (Paragraph 325.)

9. Paragraph (b) sets out four situations in which exemptions from liability for death and personal injury resulting from failure to take reasonable care should be made void.

10. Sub-paragraph (i) describes the first case where exemptions are void in relation to death or personal injury. It fills the gap in the present law identified in paragraph 75 of the report so that the employer will no longer be able to exclude or restrict liability, for his own failure to take reasonable care, to an employee killed or injured in an accident arising out of and in the course of his employment. (Paragraph 329(a).)

11. Sub-paragraph (ii) describes the second case where exemptions are void in relation to death or personal injury. It deals with carriage of passengers by every means of transport. (Paragraph 329(b).) An amendment to section 43(7) of the Transport Act 1962 is thought to be advisable in consequence of this subsection, and is contained in Schedule 2.

12. Sub-paragraph (iii) describes the third case where exemptions are void in relation to death or personal injury. It deals with situations which cannot strictly speaking be described as the carriage of passengers, dealt with in sub-paragraph (ii), but where similar considerations apply in that someone is killed or injured as a result of a mishap involving a mechanical device for the movement of persons such as an escalator or a fairground device. (Paragraph 329(c).)

13. Sub-paragraph (iv) describes the fourth case where exemptions are void in relation to death or personal injury. It deals with the death of or personal injury to a person making lawful use of a vehicle park where the liability is that of the occupier of the vehicle park, or of some person concerned with its conduct or management. (Paragraph 329(d).) Clauses excluding or restricting liability for other forms of damage sustained by persons making lawful use of a vehicle park are subject to the reasonableness test by virtue of subsection (1)(b). (Paragraph 325.)

Exemption Clauses (Scotland) Bill

(3) In determining for the purposes of subsection (1)(b) above whether it was fair or reasonable to incorporate the term in the contract or to give the notice, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of—

- (a) the parties to the contract at the time the contract was made; or
- (b) the person giving the notice at the time the licence was granted or at the time the notice was given, whichever was the later.

(4) In subsection (2)(a) above—

- (a) goods are to be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business;
- (b) any document is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.

EXPLANATORY NOTES

Clause 4 (continued)

Clause 4(3)

14. This subsection implements the recommendation in paragraph 340 of the report. In the case of a licence, the giving of the notice may either precede or succeed the granting of the licence, and regard is therefore to be had to the circumstances prevailing at the later of these dates.

Clause 4(4)

15. Paragraph (a) defines the expression “in consumer use” used in subsection (2)(a).

16. Paragraph (b) defines the expression “guarantee” used in subsection (2)(a).

Exemption Clauses (Scotland) Bill

(5) Nothing in subsection (2)(a) above applies—

(a) as between the parties to a contract such as is referred to in section 1(a) of this Act;

(b) in the case of goods supplied on a redemption of trading stamps within the Trading Stamps Act 1964, as between the promoter of the trading stamp scheme and the person obtaining the goods.

(6) Where under this section a term or notice is void or is of no effect, the fact that a person agreed to, or was aware of, the term or notice shall not of itself be sufficient evidence that he knowingly and voluntarily assumed any risk.

EXPLANATORY NOTES

Clause 4 (continued)

Clause 4(5)

17. Where there is a contract of, for example, sale of goods, the seller may agree in a document to make good defects in the goods. But for this subsection such a document would be a guarantee and this clause would apply. In that situation, however, the buyer has contractual rights against the seller quite apart from obligations in the document, and if the seller attempts to exclude his liability for failure to take reasonable care this can be treated in the same way as exemptions from such liability are treated where there is no express promise (or purported promise) to make good defects. Such exemptions will be subject to the reasonableness test under subsection (1)(b) of this clause.

18. This subsection therefore excludes from the operation of this clause the direct relationship of the parties to a contract of sale of goods, a hire-purchase agreement, or a contract for the supply of goods within clause 3 of this Bill. It also excludes the redemption of trading stamps.

Clause 4(6)

19. Mention is made in the report of the possibility that the defence of *volenti non fit injuria* may be called in aid in situations where a party has agreed to, or become aware of, a term in a contract or a notice, even where the term or notice is struck down. This subsection ensures that where a term in a contract or a notice is void or is of no effect, the fact that a person has agreed to, or been aware of, the term or notice is not of itself to be regarded as sufficient evidence that he knowingly and voluntarily assumed any risk. (Paragraph 333.)

Exemption Clauses (Scotland) Bill

Additional cases controlled by order of Secretary of State.

5.—(1) An order to which section 4(2)(c) of this Act relates may be made by the Secretary of State by statutory instrument to give effect (or such partial or modified effect as the Secretary of State thinks expedient) to a recommendation by the Director General of Fair Trading.

(2) A recommendation by the Director General of Fair Trading under this section shall identify the type of circumstances of death or personal injury which are not, but which in his opinion ought to be, included in section 4(2)(b) of this Act.

(3) The Director General of Fair Trading shall make a recommendation under this section only if he is satisfied that an order under subsection (1) above should be made having regard to the fact that persons need protection in any kind of relationship with others because in that relationship—

- (a) they specially depend for their personal safety on the others' skill and care;
- (b) they are in practice limited in their ability to protect themselves by negotiation against the effect of any term of a contract or any notice excluding or restricting liability for breach of duty; and
- (c) they are exposed to the unfair or unreasonable use against them of such terms or notices.

(4) The Secretary of State may (with or without a recommendation by the Director General of Fair Trading) by order in a statutory instrument vary or revoke any previous order made under this section; and an order made under this section may contain such incidental and supplementary provisions as the Secretary of State thinks necessary or expedient.

(5) An order under this section shall not be made unless a draft of the order has been laid before each House of Parliament and approved by a resolution of each House.

(6) Where the Director General of Fair Trading makes to the Secretary of State a recommendation for the purposes of this section, the Secretary of State shall lay a copy of the recommendation before each House of Parliament, and shall arrange for it to be published in such manner as appears to him to be appropriate.

EXPLANATORY NOTES

Clause 5

Clause 4(2)(c) of the Bill provides that terms in a contract, and notices, are to be void for the purpose of excluding or restricting liability for death or personal injury resulting from failure to take reasonable care to such extent as the Secretary of State may direct by order made by statutory instrument. This clause imposes limitations on the power of the Secretary of State to make orders under clause 4(2)(c). As a result of clause 4(1), an order made under clause 4(2)(c) applies only where liability is incurred in the course of a business. With clause 4(2)(c), this clause implements the recommendation in paragraph 330.

Definitions

“Breach of duty”, “notice”, and “personal injury”: see clause 10.

Clause 5(1)

1. This subsection provides that the Secretary of State may not make an order under clause 4(2)(c) unless—

- (a) a recommendation that such an order be made has been received from the Director General of Fair Trading (an officer appointed by the Secretary of State under section 1 of the Fair Trading Act 1973), and
- (b) the order is made with a view to giving effect (or partial or modified effect) to the recommendation.

Clause 5(2)

2. Clause 4(2)(a) and (b) specifies certain cases where exemptions are to be void in so far as they exclude or restrict liability for death or personal injury. A recommendation by the Director General of Fair Trading must identify any additional case or cases which in the opinion of the Director General should be treated similarly.

Clause 5(3)

3. This subsection specifies the criteria which the Director General of Fair Trading must apply in deciding whether to recommend the making of an order.

Exemption Clauses (Scotland) Bill

Conflict of laws.

6.—(1) Nothing in this Act applies to a contract whose proper law—

(a) is that of Scotland only by the choice of the parties; and

(b) would apart from that choice be the law of some other country.

(2) Where a contract is one of which the proper law is the law of Scotland, or the law of England and Wales, or would be so apart from a term that it should be the law of some other country or a term to the like effect, then (subject to section 7 of this Act) the following subsection operates in relation to the contract.

(3) The controlling provisions and the obligations, duties and liabilities therein mentioned shall (subject to section 7 of this Act) apply notwithstanding that the parties—

(a) have chosen the law of another country as the proper law of the contract; or

(b) have substituted, or purported to substitute, provisions of such a law for any of the controlling provisions or for the enactments or rules of law imposing the obligations, duties or liabilities therein mentioned.

(4) For the purposes of subsection (3) above, “the controlling provisions” means any of the following provisions as the case may require, that is to say—

(a) in relation to Scotland, the provisions of sections 2, 3 and 4 of this Act;

(b) in relation to England and Wales, any provisions in any enactment which relate to England and Wales corresponding to the provisions of sections 2, 3 and 4 of this Act.

EXPLANATORY NOTES

Clause 6(1)

1. This subsection implements the recommendation in paragraph 343 of the report.

Clause 6(2), (3) and (4)

2. These subsections implement the recommendation in paragraph 345 of the report. *Cf.* section 55A of the Sale of Goods Act 1893 and section 13 of the Supply of Goods (Implied Terms) Act 1973.

Exemption Clauses (Scotland) Bill

International
contracts.

7.—(1) Nothing in this Act applies to any term of an international contract to which this section applies.

(2) In this section, “an international contract to which this section applies” is a contract (other than a hire-purchase agreement) such as is referred to in section 1(a) of this Act being a contract—

(a) made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (Northern Ireland, the Channel Islands and the Isle of Man being treated for this purpose as different States from Great Britain), and

(b) in the case of which, one of the following conditions is satisfied, that is to say—

(i) the goods involved in the contract are at the time of making the contract in the course of carriage, or will be carried, from the territory of one State to the territory of another; or

(ii) the acts constituting the offer and acceptance have been effected in the territories of different States; or

(iii) the goods are to be delivered, or to be used, applied or expended in the doing of any work or the performance of any services, in the territory of a State other than that within whose territory the acts constituting the offer and acceptance have been effected.

EXPLANATORY NOTES

Clause 7

This clause implements the recommendation in paragraph 344 of the report. *Cf.* section 61(6) of the Sale of Goods Act 1893 and the definition of “contract for the international sale of goods” in section 62(1) of that Act.

Definitions

“Goods” and “hire-purchase agreement”: see clause 10.

Clause 7(1) and (2)

1. These subsections exclude from the operation of this Bill—
 - (a) a contract for the international sale of goods as defined in section 62(1) of the Sale of Goods Act 1893; and
 - (b) a contract of an international nature that would otherwise fall within clause 3 of this Bill, such as an international contract (as defined in subsection (2) of this clause) of hire.
2. This clause does not exclude other international contracts from the operation of this Bill. (Paragraph 231.)

Exemption Clauses (Scotland) Bill

Conse-
quence of
breach.

8.—(1) For the avoidance of doubt, where it was fair or reasonable to allow reliance on a term in a contract or to incorporate a term in a contract, the termination of the contract in consequence of a breach of contract shall not of itself invalidate the term.

(2) Nothing in this section shall prevent a term of a contract from being held not to apply to the breach in question.

Amend-
ments of
enactments
and repeals.

9.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments therein specified.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Clause 8

This clause implements the recommendation in paragraph 342 of the report.

Clause 8(1)

1. This subsection provides, for the avoidance of doubt, that the termination of a contract in consequence of a breach of contract does not automatically invalidate an exemption clause which is subject to the reasonableness test under this Bill.

Clause 8(2)

2. This subsection preserves the ordinary rules of construction whereby a particular term may be held not to apply to the breach in question.

Exemption Clauses (Scotland) Bill

**Interpre-
tation.**

10. In this Act, unless the context otherwise requires, the following expressions have the following meanings hereby assigned to them—

“breach of duty” means the breach (whether intentional or not)—

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill;

(c) of the duty of reasonable care referred to in section 2(1) of the Occupiers’ Liability (Scotland) Act 1960;

“business” includes a profession and the activities of any government department, local authority or statutory undertaker;

“consumer” has the meaning assigned to that expression in the definition in this section of “consumer transaction”;

“consumer transaction” means a contract (not being a contract of sale by auction or competitive tender) in which—

(a) one party to the contract deals, and the other party to the contract (“the consumer”) does not deal or hold himself out as dealing, in the course of a business, and

(b) in the case of a contract such as is referred to in section 1(a) of this Act, the goods are of a type ordinarily supplied for private use or consumption;

and for the purposes of this Act the onus of proving that a contract is not to be regarded as a consumer transaction shall lie on the party so contending;

“customer”, in relation to a standard form transaction, means a party to a contract who deals on the basis of written standard terms of business of the other party to the contract who himself deals in the course of a business;

“goods” has the same meaning as in the Sale of Goods Act 1893;

“hire-purchase agreement” has the same meaning as in section 189(1) of the Consumer Credit Act 1974;

“licence” means a licence such as is referred to in section 1(e) of this Act;

“notice” means a notice in or relating to a licence and includes an announcement, whether or not in writing, and any other communication or pretended communication;

“personal injury” includes any disease and any impairment of physical or mental condition.

EXPLANATORY NOTES

Clause 10

“Breach of duty”

This expression in the Bill means (a) breach of a contractual obligation to take reasonable care or exercise reasonable skill, (b) breach of a common law duty to take reasonable care or exercise reasonable skill, and (c) breach of the duty of reasonable care referred to in section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

Breach of a duty that is stricter than the duty to take reasonable care or exercise reasonable skill is not included in the definition, and there is no control over exemptions from liability for breach of such duties. However, an exemption clause will be controlled to the extent that it excludes or restricts liability for breach of a duty to take reasonable care, even if it excludes or restricts a stricter duty. (Paragraph 326.)

“Business”

This expression in the Bill follows the definition in section 62(1) of the Sale of Goods Act 1893 and section 15(1) of the Supply of Goods (Implied Terms) Act 1973. (Paragraph 341.)

“Consumer”

Except for the expression “in consumer use” which is separately defined in clause 4(4)(a), the term “consumer” is used only in the context of a “consumer transaction”.

“Consumer transaction”

In the case of contracts which involve the transfer of the ownership or possession of goods or the use, application or expending of goods in the doing of any work or the performance of any services (see clause 1(a))—that is, all contracts referred to in Part II of the report—this definition incorporates the same three factors as the definitions of “consumer sale” contained in section 55(7) of the Sale of Goods Act 1893 (which was introduced by section 4 of the Supply of Goods (Implied Terms) Act 1973) and “consumer agreement” (that is a consumer hire-purchase agreement) contained in section 12(6) of the Supply of Goods (Implied Terms) Act 1973. (Paragraphs 322 and 336.)

In other contracts to which the Bill applies, only two factors are relevant in determining whether the contract is a consumer transaction, *viz.* those referred to in paragraph (a). (Paragraph 336(d).)

The provision as to onus of proof follows section 55(8) of the Sale of Goods Act 1893 and section 12(7) of the Supply of Goods (Implied Terms) Act 1973. (Paragraphs 323 and 337.)

“Customer”

This term identifies one of the parties to a standard form contract. The expression “standard form contract” is not, however, defined in the Bill. (Paragraph 157.)

Exemption Clauses (Scotland) Bill

Citation,
commence-
ment and
extent.

11.—(1) This Act may be cited as the Exemption Clauses (Scotland) Act 1975.

(2) This Act shall come into operation at the expiration of three months beginning with the day on which it is passed.

(3) This Act shall extend to Scotland only.

Exemption Clauses (Scotland) Bill

SCHEDULES

Section 9.

SCHEDULE 1

AMENDMENTS OF ENACTMENTS

The Sale of Goods Act 1893 (56 & 57 Vict. c. 71)

In section 55 of the Sale of Goods Act 1893, the following is substituted for subsection (1)—

“(1) Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negated or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract; but the foregoing provision shall have effect subject to the following provisions of this section and to the provisions of the Exemption Clauses (Scotland) Act 1975”.

The Uniform Laws on International Sales Act 1967 (c. 45)

For section 1(4) there shall be substituted the following subsection:—

“(4) In determining the extent of the application of the Uniform Law on Sales by virtue of Article 4 thereof (choice of parties), no provision of the law of any part of the United Kingdom shall be regarded as a mandatory provision within the meaning of that Article, except—

- (a) sections 12 to 15, 55 and 55A of the Sale of Goods Act 1893;
- (b) sections 2, 3, 4 and 6 of the Exemption Clauses (Scotland) Act 1975”.

EXPLANATORY NOTES

Schedule 1

This Schedule provides for the amendment of two other statutes in implementation of the report.

1. Sale of Goods Act 1893

(a) A new section 55(1) of the Sale of Goods Act 1893 is supplied to ensure that the freedom of contract conferred by the first part of the subsection is subject to the provisions of the present Bill. This implements the recommendation in paragraph 274 of the report. Clauses 2 and 4 of the present Bill are capable of applying to contracts of sale of goods.

The new section 55(1) follows the present text of the subsection but adds the words "and to the provisions of the Exemption Clauses (Scotland) Act 1975." at the end.

2. Uniform Laws on International Sales Act 1967

The report recommends (paragraphs 227 and 345) that provision should be made to ensure that the controls proposed in the report are not evaded by the choice of the Uniform Law on Sales to govern the contract. Section 1(4) of the Uniform Laws on International Sales Act 1967 was amended by section 5(2) of the Supply of Goods (Implied Terms) Act 1973 so as to make certain sections of the Sale of Goods Act 1893 "mandatory provisions" for the purpose of Article 4 of the Uniform Law on Sales. That amendment is represented by paragraph (a) in the new subsection. The effect of paragraph (b) in the new subsection is to make the relevant provisions of this Bill "mandatory provisions" as well.

Exemption Clauses (Scotland) Bill

Section 9.

SCHEDULE 2

REPEALS

Chapter	Short Title	Extent of Repeal
1962 c. 46.	The Transport Act 1962.	In section 43(7), the words "other than a passenger travelling on a free pass".
1973 c. 13.	The Supply of Goods (Implied Terms) Act 1973.	Section 5(2).

EXPLANATORY NOTES

Schedule 2

1. See paragraph 11 of the Explanatory Note to clause 4 of this Bill in connection with the proposed amendment to section 43(7) of the Transport Act 1962.

2. Section 5(2) of the Supply of Goods (Implied Terms) Act 1973 amended section 1(4) of the Uniform Laws on International Sales Act 1967. The present Bill proposes a new version of section 1(4) of the Uniform Laws on International Sales Act 1967 (see Schedule 1 to this Bill), and accordingly section 5(2) of the Supply of Goods (Implied Terms) Act 1973 is proposed for repeal.

APPENDIX C

**Joint Working Party on Exemption Clauses in Contracts
(June 1966–February 1970)**

Joint Chairmen	The Hon. Lord Kilbrandon	(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)	
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 D

Organisations and individuals who gave evidence to the Joint Working Party or who commented on Law Commission Working Paper No. 39, Scottish Law Commission Memorandum No. 15

Accepting Houses Committee
Squadron Leader M. J. Allisstone
Association of British Chambers of Commerce
Association of British Launderers and Cleaners Ltd.
Association of British Travel Agents
Association of Consulting Engineers
Association of Municipal Corporations
Professor P. S. Atiyah
Mr. R. P. Bates
Board of Trade
Professor G. J. Borrie
Mr. J. W. Bourne, C.B.
British Airports Authority
British Antique Dealers Association Ltd.
British Association of Overseas Furniture Removers
British Association of Removers
British Chiropractors' Association
British Compressed Air Society
British Electrical and Allied Manufacturers' Association Ltd.
British European Airways
British Independent Air Transport Association
British Insurance Association
British Insurance Law Association
British Petroleum Co. Ltd.
British Railways Board
British Security Industry Association
British Shippers Council
British Transport Docks Board
British Waterways Board
Bromley and District Consumers' Group
Mr. M. A. Brown
Building Societies Association
Cattle Food Trade Association
Chamber of Shipping of the United Kingdom
Chartered Land Societies Committee
The Honourable Norman A. Citrine
Confederation of British Industry
Consumers' Association
Consumer Council
Co-operative Union Ltd.
Counties of Cities Association
County Councils Association
Mr. P. J. Craven
Cruising Association
Lt.-Commander D. A. Davies, R.N.R.

Mr. J. Dempsey
 Dock and Harbour Authorities' Association
 Professor C. D. Drake
 Mr. A. Eden Green
 Electricity Council
 English Electric Valve Co. Ltd.
 Faculty of Advocates
 Faculty of Law, University of Sheffield
 Federation of Associations of Specialists and Sub-contractors
 Sir Henry Fisher
 Ms. Brenda Francis
 Freight Transport Association Ltd.
 Mr. F. R. Furber
 Mr. G. E. Garrett
 General Council of the Bar of England and Wales
 Glasgow Bar Association
 Professor R. M. Goode
 Mr. T. V. S. Gordon
 Heating and Ventilating Contractors' Association
 Mr. A. Hotter
 Messrs D. A. Howarth, R. C. Evans and F. C. Dike
 International Computers and Tabulators Ltd.
 Institute of Chartered Accountants in England and Wales
 Institute of Chartered Accountants of Scotland
 Institute of Legal Executives
 Institute of Weights and Measures Administration
 Institute of Electrical Engineers
 Messrs Joynson-Hicks and Co.
 Mr. S. Kalman
 Mr. A. W. G. Kean
 Law Reform Sub-Committee, Faculty of Laws, University College London.
 Law Society
 Law Society of Scotland
 Mr. J. D. Liddell-King
 Life Offices' Association
 Lloyd's
 London Transport Board
 Mr. J. MacDonald
 Dr. J. K. Macleod
 Mr. P. Martin
 Mr. J. McKee, J.P.
 The Right Honourable Lord Justice Megaw, T.D.
 Milk Marketing Board
 Ministry of Agriculture, Fisheries and Food
 Motor Agents' Association
 Motoring Organisations*
 Multiple Shops Federation
 Municipal Passenger Transport Association
 Mr. C. E. J. Murphy

* Automobile Association, Royal Automobile Club and Royal Scottish Automobile Club.

National Association of Inland Waterway Carriers
National Chamber of Trade
National Citizens' Advice Bureaux Council
National Coal Board
National Conference of Road Transport Clearing Houses
National Farmers' Union
National Federation of Consumer Groups
National Federation of Fruit and Potato Trades Ltd.
National Union of Small Shopkeepers
Mr. E. M. Ogden, Q.C.
Mr. W. Parker
Passenger Vehicle Operators Association
Port of London Authority
Post Office
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