THE BUYER'S REMEDY IN DAMAGES FOR LATENT DEFECTS IN THE PROVINCE OF QUEBEC

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I. *Introduction: The Recourses Generally Available to the Purchaser for Latent Defects in the Object Sold.*

The warranty provisions in the Civil Code (C.C.) make potentially available four principal remedies to the purchaser who alleges and proves[1] latent[2] defects in the object sold. He may elect, at his

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[1] See the remarks of Hyde J. in *E. and M. Holdings (Inc.)* v. *Besmor Investment Corporation*, [1961] B.R. 376, at p. 379: "The burden of proof is on the purchaser not only to show that there is a defect but that the defect is latent."

[2] The question as to what constitutes a latent defect within the context of any given factual situation has received substantial doctrinal and judicial attention. See, in particular, in addition to the usual doctrinal sources within Quebec, J. W. Durnford, What is an Apparent Defect in the Contract of Sale? (1964), 10 McGill L.J. 60; J. J. Gow, Comment on the Warranty in Sale Against Latent Defects (1964), 10 McGill L.J. 243; J. W. Durnford, Apparent Defects in Sale Revisited (1964), 10 McGill L.J. 341. This intellectual exchange, referred to in the recent case of *Sport Togs Inc.* v. *Telio Trading Co. (Inc.)*, [1970] C.S. 261, at p. 267, illustrates the basic legal and policy options available to the courts when determining the appropriate degree of information which a purchaser should bring and apply to a sale transaction. The alternatives, essentially, are fourfold: a defect may be said to be latent where it was unknown to the buyer at the time of the sale, without regard to his ignorance or naïveté; the concept of latency may be restricted by abandoning this purely subjective test and applying the objective criterion of the knowledge, information, and ability to inspect ordinarily available to the reasonable man. According to this doctrine, the purchaser who negligently or naïvely fails to perceive defects in the object sold will be denied redress against the buyer. Alternatively, the concept of latency may be still further narrowed by applying the standard of knowledge ordinarily possessed by the expert only and hence by denying the buyer any recourse for defects which an expert in the relevant field would have perceived. This latter doctrine is now well-settled law in relation to transactions involving immovable property of substantial age: *Arpin* v. *Francoeur* (1930), 48 B.R. 231; *Dallaire* v. *Villeneuve*, [1956] B.R. 6; *Levine* v. *Horner*, [1961] B.R. 108, affirmed on appeal, [1962] S.C.R. 343; *E. and M. Holdings (Inc.)* v.

discretion,[3] provided that he has not alienated[4] the thing, or otherwise encumbered it with real rights,[5] and notwithstanding any deterioration as a result of normal usage before the institution of proceedings,[6] to take the redhibitory action to rescind the sale by

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Besmor Investment Corporation, supra, footnote 1. A fourth alternative of a different conceptual and philosophical nature would involve the application of the reasonable expectations of the parties as the principal criterion as to whether, in any given case, a defect is latent or apparent. It is my view that the cases can only, on a careful reading and with the exception of the decisions referred to in relation to immovable property, be substantially reconciled on the basis of this latter alternative. Time and again the courts, referring to factual elements such as the expertise of the seller, the inexperience of the buyer, the price paid, and the description of the object, have indicated what a purchaser is reasonably entitled to expect and to receive within the context of a particular transaction. See, by way of example only: *Churchill* v. *Parker,* [1953] R.L. 509, at p. 511: "... any person who purchases a second-hand automobile under such conditions can expect to effect at least some repairs...."; *Bourget* v. *Martel,* [1955] B.R. 659, at p. 664: "A tout événement, il est certain que lorsqu'on achète une automobile usagée, on s'attend et on a droit de s'attendre à recevoir une voiture qui fonctionne normalement et non pas une voiture sur laquelle il faudrait dépenser quelques centaines de dollars, pour la mettre en état de s'en servir"; *Tellier* v. *Proulx,* [1954] C.S. 180, at p. 182: "The buyer of a new house is entitled to assume it was built with reasonably good and adequate materials, and with due compliance with the building art...." For language to the same effect, see also, *Mallory* v. *Canadian Fairbanks Morse,* [1942] C.S. 142, at pp. 144-145; *Sport Togs (Inc.)* v. *Telio Trading Co. (Inc.), ibid.,* at p. 268; *Benoit* v. *Metivier,* [1948] C.S. 53, at p. 55; *Vermette* v. *Typewriter and Appliance Co. Ltd,* [1948] C.S. 139, at p. 141; *Cohen* v. *Nu-Style Clothing Co. Ltd,* [1948] C.S. 193, at p. 195.

[3] Art. 1526 C.C. provides that "The buyer has the option ...". See also P. B. Mignault, Droit civil canadien, t. 7 (1906), p. 110.

[4] L. Faribault, Traité du Droit civil de Québec, t. 11 (1961), p. 291; *Sport Togs (Inc.)* v. *Telio Trading Co. (Inc.), supra,* footnote 2, at p. 273; *Rondelet* v. *Legrand,* [1972] R.L. 285, at p. 288; *Independent Fruit Company* v. *Mallette* (1931), 50 B.R. 137, at p. 143; *Ménard* v. *Desloges,* [1949] R.L. 123, at p. 128; *Cedillot* v. *Lalonde,* [1951] C.S. 379, at p. 381. Although this requirement makes good sense where the purchaser elects to rescind the sale, it was wrongly applied to the action *quanti minoris* in the case of *Sport Togs, supra.* In these circumstances, art. 1526 C.C. provides that the buyer may keep the object of the sale, a right which clearly deprives the seller of any legitimate interest as to whether the purchaser actually retains possession or, as in *Sport Togs,* chooses, for reasons which the court itself indicated to be economically justifiable, to dispose of it at market value.

[5] *Rondelet v. Legrand, ibid.,* at pp. 288-289, citing L. Faribault, *op. cit., ibid.,* t. 11, p. 291; *Touchette* v. *Pizzagalli,* [1938] S.C.R. 433, at p. 440: "The essential obligation of the purchaser is the restoration of the thing with its legal status unimpaired. He must consequently procure the extinguishment of any droits réels to which he may have consented since the purchase; ..."

[6] *Touchette* v. *Pizzagalli, ibid.*

returning the thing to the seller and recovering the price of it.[7] Alternatively, he may rely upon the *quanti minoris* action, also known as the *action estimatoire*, and elect to keep the thing and recover a part of the price according to an estimation of its value.[8] Furthermore, he is entitled to the expenses caused by the sale in accordance with the terms of article 1528 C.C. In the case of immovable property, these would presumably include the legal fees associated with the contract and the costs resulting from the registration of the deed of sale, as well as any taxes paid or improvements made by the purchaser.[9] As regards movable property, it has been held that customs expenses and amounts paid for inspections are recoverable,[10] and one recent case[11] of great potential significance, relying upon French authority to justify an extended interpretation of article 1528 C.C., held that it includes the expenses incurred by the buyer who applies a manufacturing process to the merchandise while still unaware of the defect in question.

These recourses, it should be noted, are not affected by the nature of the object sold,[12] the status, professional or otherwise, of the vendor, or his state of knowledge, actual or presumed, of the defect in question.[13] In order to succeed, the plaintiff need only demonstrate that his claim is founded upon a valid contract of sale with the defendant,[14] that the defect was latent, that it

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[7] Art. 1526 C.C.

[8] Art. 1526 C.C.

[9] *Chodos* v. *Brault*, [1964] B.R. 846, at p. 847.

[10] *Smith* v. *Harris* (1939), 77 C.S. 137, at pp. 140-141.

[11] *Sport Togs Inc.* v. *Telio Trading Co. (Inc.)*, *supra*, footnote 2, at p. 272.

[12] Subject to the reservation that, as indicated in footnote 2, *supra*, the concept of latency has received a more generous interpretation when applied to movable property.

[13] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Co.*, [1925] S.C.R. 202, at p. 209.

[14] Although, as we shall see, there is an emerging judicial tendency in the context of consumer transactions, to ignore the traditional principle of privity of contract (for cases which demonstrate the privity rule, see *Gauvin* v. *Canada Foundries and Forgings Ltd*, [1964] C.S. 160, at p. 161; *Legault* v. *Chateau Paint Works Ltd*, [1960] C.S. 567, at p. 571; *Ferstenfeld* v. *Kik Company* (1939), 77 C.S. 165, at p. 166), and to apply arts 1522 C.C. and following to non-contractual relationships. See *Lazanik* v. *Ford Motor Company of Canada Limited*, unreported judgment of the Superior Court, SCM 623-564 (1965); *Gougeon* v. *Peugeot Canada Ltée*, [1973] C.A. 824; *Insurance Company of North America* v. *General Motors of Canada Limited*, unreported judgment of the Provincial Court, 02-066523-72 (1974).

existed at the time of the sale, [15] that the consequences were more than trivial,[16] that it interfered with an end use within the reasonable comprehension of the parties at the time of the transaction,[17] that he acted in good faith and without actual knowledge of the defect both at the time of the perfection of the contract and thereafter as well, where he is seeking to recover expenses subsequently incurred,[18] and that he instituted proceedings with reasonable diligence as required by article 1530 C.C.[19] Although not unimportant, particularly where the object purchased has significant value, these remedies are nevertheless primarily designed to meet the limited objective of permitting the purchaser to restore the object to the condition it should have been in at the time of the sale, or of placing him in an equivalent economic position. They are not geared to compensate him for the damages which he may have suffered as a result of the defect. For indemnification against this form of prejudice, frequently far more extensive than the value of the object sold, particularly in the context of consumer transactions, he must rely upon the fourth and last remedy enuring to his benefit as a result of the contract of sale *per se*, in

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[15] See, by way of example only, *Légaré Auto and Supply Company Ltée* v. *Choquette* (1926), 41 B.R. 69, at p. 81; *Longpré* v. *St. Jacques Automobile Ltée*, [1961] C.S. 265, at p. 266.

[16] *De minimis non curat lex.* See, for example, *Bouvier* v. *Thrift Stores Ltd* (1936), 74 C.S. 93, at p. 95; *Gosselin* v. *Beaulieu*, [1958] C.S. 23, at p. 30 (held that the cause of the humidity complained of must be serious). For an example of the variation in judicial attitudes towards the seriousness of the defect in the context of the action *quanti minoris*, compare the remarks of Collins J. in *Rothstein* v. *International Construction*, [1956] C.S. 109, at p. 110 with those of St. Jacques J. in *Levine* v. *Horner*, *supra*, footnote 2, at p. 113.

[17] What is reasonable will of course depend upon the specific facts of a particular transaction, but art. 1522 C.C. seems to imply that, in the case of doubt, it is the subjective intention of the buyer which must prevail: "... or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them." The decision of the Court of Appeal in *Levine* v. *Horner*, *ibid.*, however, suggests that defects otherwise immaterial are not actionable merely because they happen to interfere with modifications to the property subsequently effected by the purchaser. In the absence of a specific disclosure of the intended alterations, the subjective intent of the buyer will not justify the application of art. 1522 under these circumstances.

[18] *Sport Togs Inc.* v. *Telio Trading Co. (Inc.)*, *supra*, footnote 2, at p. 272.

[19] For a thorough and careful analysis of the manner and extent to which this article has been applied to delimit the redhibitory action, see J. W. Durnford, The Redhibitory Action and the Reasonable Diligence of Article 1530 (1963), 9 McGill L.J. 16. See in particular the cases and doctrine to which Durnford refers at p. 31.

accordance with the principles embodied in article 1527 of the Civil Code.

Before embarking upon a detailed discussion of these rules, however, it is important at the outset to distinguish between this source of liability and the responsibility for damages founded either in delict or upon a conventional guarantee which the vendor may have assumed expressly in accordance with article 1507 C.C., or impliedly in accordance with article 1024 C.C. or the relevant provisions of the Consumer Protection Act.[20] Non-contracting parties, it is clear, may rely upon the general delictual rules of civil responsibility for damages suffered, where the vendor has marketed a product which is not merely defective, but which is dangerously defective,[21] and there is significant, indeed, now overwhelming authority relying, perhaps, on less cogent reasoning, which suggests that the buyer himself may, at his discretion, invoke these principles of liability in addition to any other contractual responsibility with which they may co-exist.[22] It is crucial, of course, for the aggrieved litigant to identify the source of the alleged liability if he is effectively to assess the remedies at his disposal and determine the corresponding prescriptive delays and principles of quantification, where delictual damages are sought, to which they are subject.

Similar considerations apply to the buyer seeking to enforce a parallel conventional guarantee which may be annexed either expressly or impliedly to the principal contract of sale. In these circumstances, he need not demonstrate that the defect is latent

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[20] S.Q., 1971, c. 74, ss 60 and 62.

[21] See, generally, *Cohen* v. *Coca-Cola Limited*, [1967] S.C.R. 469; *Ross* v. *Dunstall* (1921), 62 S.C.R. 393; and, in particular, the remarks of Tremblay C.J. in *Monsanto Oakville Limited* v. *Dominion Textile Company Limited*, [1965] B.R. 449, at p. 451: "On peut fabriquer et vendre tant que l'on voudra des objets défectueux pourvu évidemment qu'ils ne soient pas dangereux."

[22] *Ross* v. *Dunstall*, *ibid.*, at pp. 396 (Duff J.), 400-401 (Anglin J.) and 415 (Mignault J.); *Belanger* v. *Coca-Cola Limited*, [1954] C.S. 158, at p. 162; *Lajoie* v. *Robert* (1916), 50 C.S. 395, at p. 401; *Ferstenfeld* v. *Kik Company*, *supra*, footnote 14, at p. 169; *Poudrette* v. *LaFrance* (1942), 48 R.L. 430, at p. 438; *Samson & Filion* v. *The Davie Shipbuilding & Repairing Co.*, *supra*, footnote 13, at p. 206; *St. Hyacinthe Express Inc.* v. *General Motors Products of Canada Limited*, [1972] C.S. 799. For a thorough analysis of the problem of "cumul" in general, see P.-A. Crépeau, Des régimes contractuel et délictuel de la responsabilité civile en droit civil canadien (1962), 22 R. du B. 501. For a cursory, but more direct treatment of the matter in the context of sale, see M. Tancelin, Responsabilité directe du fabricant vis-à-vis du consommateur (1974), 52 Can. Bar Rev. 90, at p. 94.

nor prove, in order to recover contractual damages, the actual or presumed knowledge required by article 1527 C.C. The mere context in which the conventional obligation may have been undertaken does not, of course, affect its status as such nor alter the applicability of the ordinary rules governing contractual relationships. Accordingly, the buyer should evaluate his recourses within the framework of article 1065 C.C. and the attendant restrictions and limitations of liability without regard to the particular rules defining and delimiting his remedies against the seller for any breach of the specific warranty against latent defects.[23]

The strategic implications of these distinctions are critical when evaluating the recourses available to the purchaser in any given factual situation. Thus it would be best to frame the buyer's action on the basis of the breach of a parallel conventional guarantee when the defect is arguably apparent or where, alternatively, he has failed to act within the reasonable diligence requirements of article 1530 C.C. The legal warranty provisions, on the other hand, might be more appropriately applied in circumstances in which these elements do not undermine the purchaser's case and where the breach has resulted in unforeseeable,[24] as well as foreseeable loss. Although there appears to be some debate on the recoverability of unforeseeable loss in this context, the better opinion, advocated by Mignault[25] and endorsed in at least three subsequent decisions,[26] holds that because the liability embodied

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[23] For examples of this reasoning in the cases, see *Côté* v. *Lanoche*, (1890), 16 Q.L.R. 15, at pp. 18-19; *Independent Fruit Company* v. *Mallette*, *supra*, footnote 4, at p. 144; *Monsanto Oakville Limited* v. *Dominion Textile Company Limited*, *supra*, footnote 20, at pp. 453-454. See also the cases to which J. W. Durnford, *op. cit.*, footnote 19, at p. 28 refers in note 66 and which he describes as "... a large body of jurisprudence to the effect that the delay of article 1530 C.C. does not apply where there is an express guarantee". Durnford continues, however, to make the dubious distinction between express guarantees which are operative for a specific period of time, and those which are not. The latter category, he suggests, should be subject to the reasonable diligence requirements of art. 1530 C.C. For significant judicial authority to the effect that arts 1526 and 1527 C.C. apply to conventional guarantees, see *Lamer* v. *Beaudoin*, [1923] S.C.R. 459, at p. 473, and *Samson & Filion* v. *Davie Shipbuilding & Repairing Co.*, *supra*, footnote 13, at p. 218.

[24] Provided, of course, that the buyer has taken effective action to mitigate the resulting damages. See *Cayer* v. *Drolet*, [1950] B.R. 790, at p. 795.

[25] P. B. Mignault, *op. cit.*, footnote 3, p. 111.

[26] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Company*, *supra*, footnote 13, at p. 208; *Touchette* v. *Pizzagalli*, *supra*, footnote 5, at p. 439; *Rioux* v. *General Motors of Canada*, [1971] C.S. 828, at p. 833. For an opinion to the opposite effect, see *Gauthier* v. *Comité de Réalisation de la Cité Jardin*, [1955] B.R. 100, at p. 110.

in article 1527 C.C. is based upon fraud actual or presumed, the victim's redress should not be subject to the limitation of article 1074 C.C., provided, of course, that the damage was suffered while the object was being used for the purpose for which it had been sold.[27]

II. *The Recourse for Damages Pursuant to Article 1527 C.C.*

A. *Where the seller had actual knowledge of the defect.*

Where, for these or other reasons of strategy of necessity the purchaser seeks, with or without concluding for the resiliation of the contract,[28] to recover damages resulting from a breach of the vendor's warranty against latent defects and proceeds with neither the potent remedy in delict nor a conventional guarantee, the principles embodied in article 1527 C.C. assume controlling significance. To both Domat[29] and Pothier,[30] the only authors to whom the codifiers referred, the policy basis underlying their application is *dol*, actual or presumed. Domat did not deal at length with the precise mental state required of the seller as a condition to his liability for damages, suggesting only, in essence, that it be engaged where he knew or was obliged to know of the defect in question. Pothier, however, elaborated substantially. According to his analysis, which has been adopted by the Supreme Court of Canada for interpretative purposes,[31] the seller owes a virtual fiduciary responsibility to the buyer which imposes upon him the duty of absolute disclosure. Thus he must inform the purchaser of defects which he only suspects as well as those whose existence he has actually determined. The reticent vendor who fails to make a disclosure in violation of the obligation placed upon him to act with the utmost good faith[32] thereby commits fraud in relation to the purchaser which justifies his being held

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[27] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Company*, *ibid.*, at p. 208.

[28] See *Beaver Oil Company* v. *Verronneau* (1923), 29 R.L. 106, at p. 108, holding that the plaintiff-purchaser may sue for damages without seeking the resiliation of the contract, notwithstanding the language of art. 1527 C.C., which seems to suggest the contrary.

[29] Domat, Loi civiles dans leur ordre naturel, t. 1, tit. II, s. XI, no. 7.

[30] Pothier, Traité du contrat de vente, ss. 212-213 in Bugnet, Oeuvres de Pothier, t. 3 (1861).

[31] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Company*, *supra*, footnote 13, at p. 209.

[32] Pothier, *op. cit.*, footnote 30, s. 212 gives the example of an individual who sells an animal knowing that it came from a district where a contagious disease prevailed, but not having actual knowledge that the particular animal in question is infected.

responsible for all consequential loss. So clear and unambiguous in Quebec is the position of the seller who has acted in bad faith that the relevant case-law is, without exception, uniform, predictable and easily comprehended.[33]

Although potentially powerful in scope and consequence, the remedy embodied in the first paragraph of article 1527 is predicated upon proof that the defendant vendor's state of mind was inconsistent with the rigorous standards which the law imposes. Canvassing subjective intent is always, however, a difficult procedure: the vendor is *prima facie* presumed to be in good faith,[34] and the buyer has little or no access to information which would enable him to prove, even if it were true, the fraudulent intent of the seller at the time of the transaction, which may have occurred months, or even years, before the institution of proceedings. Hence in the absence of suppletive rules mitigating this evidentiary burden, the buyer's claim for damages, while potent in theory, would prove to be illusory in the face of the stark realities of the fact-finding process. Nothing short of extensive judicial law-making, such as that which characterized the decisions of the French courts[35] for a period of time could overcome the fatal and pervasive effects which the presumption of good faith would have in this context.

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[33] *Yergeau* v. *Lavoie*, [1947] C.S. 407, at p. 413; *Mallory* v. *Canadian Fairbanks Morse, supra*, footnote 2; *Piché* v. *Bertrand*, [1946] C.S. 218, at p. 219; *Samson & Filion* v. *The Davie Shipbuilding & Repairing Company, supra*, footnote 13, at p. 205.

[34] Art. 2202 C.C.

[35] The Code Napoléon contains no provision corresponding to the presumption of knowledge which is embodied in the second paragraph of art. 1527 C.C. Certain French authors, it is true, such as L. Guillouard, Traité de la vente et de l'échange (2nd ed., 1890), t. 1, p. 477; Savatier, Cours de droit civil (2nd ed.), t. 2, p. 342; Aubry & Rau, Cours de droit civil français (4th ed., 1871), t. 4, p. 389; Baudry-Lacantinerie et Saignat, Traité de droit civil, de la vente et de l'échange (3rd ed., 1908), p. 455; and F. Laurent, Droit civil français (4th ed., 1887), t. 24, p. 289 contend that, because the relevant provisions of the Code Napoléon (Arts 1645 and 1646) are a reflection of Pothier's thinking, a presumption of knowledge (similar to that which exists in Quebec) can be reasonably inferred. Nevertheless the majority of thinkers opine, according to Laurent (see, for example, Planiol, Droit civil (9th ed., 1923), t. 2, p. 460; Zachariae, Droit civil français, t. 4, p. 303) that, absent actual knowledge, a liability in damages simply does not exist. As a result the French courts historically tended to give what might ordinarily be thought to be an excessively liberal interpretation to art. 1646 of the Code Napoléon, which provides that the buyer may recover from the innocent vendor not tainted with knowledge of the defect "...les frais occasionnés par la vente" in order, presumably, to achieve what they perceive to be an

B. *Where the seller had presumed knowledge of the defect.*

(1) *Introduction*

It is therefore upon the second paragraph of article 1527 C.C., embodying as it does the necessary presumptive principles, that the purchaser will ordinarily rely in seeking indemnification. Here again, Domat's[36] thinking is less developed than Pothier's.[37] Indeed, he does not even refer to a presumption of knowledge but merely indicates, without explanation or elaboration, that the seller, obliged to know of defects in the thing, will be held responsible for consequential damages notwithstanding his ignorance. He sets down no guidelines or criteria to determine the circumstances under which the obligation referred to should be imposed and gives only one example — that of the architect furnishing defective building materials — to illustrate the principle.

Pothier, on the other hand, took painful steps to justify the policy advocated and, in so doing, distinguished carefully between the different situations in which the various classes of sellers in a market economy may find themselves. The justification for the policy, it is clear, was fault — negligence or incompetence judged against the background of a particular factual situation — the same justification which permeated the law of civil responsibility as it existed at that time. The simplicity of the concept of fault did not, however, eliminate the complexity or subtlety of the distinctions which consequentially had to be made in order to make the policy work. Thus, while Domat gave only the one example, Pothier's writing embodies four different categories of sellers. He refers explicitly to the manufacturer, to the specialized merchant vendor, ("un marchand qui vend des marchandises du commerce dont il fait profession") and to the ordinary vendor, and, implicitly, to the non-specialized merchant vendor, and urges that the liability of each category of seller be determined independently with reference to the overriding principle of a civil responsibility

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acceptable public policy. According to Mazeaud, however, Leçons de droit civil (2nd ed., 1960), t. 3, pp. 810-811, a more restrictive interpretation of that provision presently prevails. For a decision of the Cour de Cassation taking up this latter position in unequivocal terms, see *Enterprise Moderne de Canalisations et de Travaux Publics* c. *Ravaille*, Sem. Jur. II, 13159 (1963). See also the comment by R. Savatier immediately following in which he criticizes the court for refusing to apply the principles urged by Domat and Pothier (see text, *infra*), and for conferring upon professional vendors, such as automobile dealers, all the advantages of good faith.

[36] *Op. cit.*, footnote 29.

[37] *Op. cit.*, footnote 30.

based on fault, expressed, in these circumstances, by the maxim *spondet peritiam artis.*

It is thus clear that the apparent simplicity of the second paragraph of article 1527 C.C. is merely a brief excerpt distilled from a highly complex doctrine embodying carefully-drawn distinctions which were thought inappropriate to codify. Whether it was the intention of the codifiers, through omission, to abandon the distinctions which Pothier had meticulously developed, is an open question. Their reliance upon that author in drafting the article, however, and the pervasive influence which his writing has always had upon the law of Quebec renders that inference improbable. It remains true, nevertheless, that they refer to no guidelines nor policy considerations in their commentary but rather, like Domat, give only one isolated example — that of mechanics who, according to the principle, are "... presumed to know the defective quality of materials used by them in their trades".[38]

It is not surprising to find, therefore, that the general statement of the principle embodied in the second paragraph of article 1527 C.C. that the vendor "... is obliged in like manner in all cases in which he is legally presumed to know the defects" has left many consequential questions unanswered, has proved to be a statement insufficiently precise to deal effectively with the wide variety of situations to which it has been applied, and, in the last analysis, has forced the courts to refer back to, revive, and refine the distinctions which Pothier articulated. In so doing they have, whether out of necessity or choice, developed a number of sub-rules and exceptional principles designed, presumably, to achieve justice and to implement the public policy perceptions of the individual judge on a case by case basis. Unfortunately, numerous statements of law embodied in cases reported during the present century are frequently beyond reconciliation, and the hard reality must inevitably be faced that the law is still unsettled in relation to a number of very important questions. Our goals are therefore modest: to note observable judicial tendencies where possible and, where impossible, to identify the issues on which debate has centered.

The general framework of the existing rules first conceived by Pothier, were re-articulated with some modification by Anglin C.J. in the *Davie Shipbuilding* decision.[39] So extensive was the

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[38] Report of the Commissioners for Codification of Laws Relating to Civil Code (1865-66), Vol. 4, p. 14.

[39] *Supra,* footnote 13.

Chief Justice's analysis, so thorough his review of the relevant precedent and doctrine, and so lofty his authority, that the strength and weaknesses of the law today can only be effectively understood and evaluated in the context of his reasoning in that judgment, and hence it is from this perspective that the following analysis will proceed. Although the judgment itself has been widely praised by both academic[40] and judge[41] alike, it is nevertheless not without its ambiguities, and it is in relation to these unresolved difficulties that inconsistencies have tended to emerge in subsequent cases.

In that case, the Supreme Court of Canada was called upon to determine whether the plaintiff corporation was entitled to recover the damages it suffered as a result of an explosion of gun powder lodged in used iron pipe which it had purchased from the vendor, a second-hand dealer in scrap pipes. In proceeding to resolve the dispute, Anglin C.J., speaking for the majority of the court, assumed that the existence of an explosive substance was, in the circumstances, a latent defect,[42] and found as a matter of fact that the vendor was ignorant of the defect at the time of the sale,[43] thereby rendering inapplicable the liability envisaged by the first paragraph of article 1527 C.C. The narrow issue of responsibility thus reduced itself to a determination of the applicability of the second paragraph of that article.[44] In proceeding to evaluate the extent and character of the presumption of knowledge, the Chief Justice, relying substantially upon the writing of Pothier, made a series of statements having, or appearing to have, general application. He emphasized that the presumption is one of knowledge and not of fault,[45] although it only applies to those "... to whom lack of knowledge would be imputable as fault ...".[46] It is rebuttable, and, apparently always so,[47] not by proof, however cogent, of actual ignorance of the defect,[48] but rather by

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[40] See J. W. Durnford, *op. cit.*, footnote 2, p. 73.

[41] See the remarks of Gagné, J. in *Cayer* v. *Drolet*, *supra*, footnote 24, at p. 793.

[42] *Samson & Filion* v. *Davie Shipbuilding & Repairing Co.*, *supra*, footnote 13, at p. 209.

[43] *Ibid.*, at p. 204.

[44] *Ibid.*, at p. 209.

[45] *Ibid.*, at p. 210.

[46] *Ibid.*, at p. 212.

[47] *Ibid.*, at p. 207: "Hence it is rebuttable but by what proof is again a question for careful consideration", and again at p. 213: "By what proof is the presumption of knowledge under art. 1527 (2) C.C. rebuttable?"

[48] *Ibid.*, at p. 213.

a demonstration that "... the nature of the defect was such that its existence could not have been suspected by the vendor and that he could not, by any precaution which he might reasonably be expected to take, have discovered it ...".[49]

These ground rules, however, only represent one aspect of the judgment, for the Chief Justice superimposed upon them carefully-developed distinctions between the four categories of vendors envisaged by Pothier, evaluating in relation to each the applicability and character of the presumption of knowledge. So significant are these distinctions to the present state of the law and so material, if occasional, the inconsistencies between this part of the judgment and the earlier, more general statements to which reference has been made that I shall deal separately with each category of seller to whom Anglin C.J. refers, incorporating into the analysis, where appropriate, subsequent judicial decisions.

(2) *The ordinary vendor*

It is implicit in Pothier's analysis, which Quebec doctrinal sources[50] endorse without qualification, and clear from the terms of article 1527 C.C. that the presumption of knowledge is not a rule of general application. On the contrary, it is an exceptional principle designed to impose a liability under circumstances in which innocence or naïveté, however reprehensible, would otherwise serve as a complete defence; nor has there ever been any doubt whether the exception extends to the vendor "... who is neither the maker of the goods sold nor a merchant ..."[51] such as the consumer selling his used television set, the homeowner selling his dwelling,[52] or any person, for that matter, who did not actually build an immovable sold.[53] For this category of individual, to whom Anglin C.J. refers as the "ordinary vendor",[54] characterized by neither technical expertise nor commercial experience, honesty and pureness of purpose will mitigate liability. This is a hard and fast rule in an area of the law beset with ambiguity; a rare foothold, as it were, upon which a vendor can confidently rely.

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[49] *Ibid.*, at p. 214.

[50] See P. B. Mignault, *op. cit.*, footnote 3, p. 112; L. Faribault, *op. cit.*, footnote 4, p. 295.

[51] *Samson & Filion* v. *Davie Shipbuilding & Repairing Company*, *supra*, footnote 13, at p. 209.

[52] *Joncas* v. *Blouin*, [1952] R.L. 554, at p. 557.

[53] *Gauthier* v. *Comité de Réalisation de la Cité Jardin*, *supra*, footnote 26, at p. 107.

[54] *Samson & Filion* v. *Davie Shipbuilding & Repairing Company*, *supra*, footnote 13, at p. 209.

(3) *The manufacturer*

(a) *Delimiting the category*

Traditional and elementary legal principle dictates that the availability of article 1527 C.C. to the purchaser seeking direct redress against the manufacturer is limited to situations in which there is a direct contractual relationship between the parties. We shall see in the analysis which follows, however, that there is an emerging judicial tendency[55] to ignore the principle of privity of contract, particularly in the context of consumer transactions and to extend and to apply the presumption of knowledge to non-contractual situations as well.

It is appropriate to note, before assessing these recent decisions, that the very concept of the manufacturer is elusive, and defies exact delimitation. Although the cases have not tended to cluster around this particular ambiguity,[56] there are a few decisions which suggest that the mere assemblage of a particular product will not, in the absence of a corresponding expertise in relation to the component parts, necessarily activate the presumption. One decision, for example, reasons that it would be unfair to apply the presumption to the general building contractor who cannot possibly be expected to have detailed personal knowledge of the complicated gadgets which he purchases from his suppliers,[57] while other judgments, without giving reasons, are to the same effect.[58] On another occasion, however, a vendor was held to have the status of a manufacturer where the product being assembled was less complex, and hence where there was a correspondingly greater degree of control over the various components being assembled.[59] That particular decision involved a refrigeration system in relation to which it was not unreasonable to expect and to demand a degree of expertise, thus justifying the imposition of the presumption of knowledge. These few cases justify the necessarily tentative inference that the nature of the

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[55] See the cases cited, *supra,* footnote 14.

[56] Perhaps for the reason that virtually all reported decisions involve producers whose status is unequivocal, such as car manufacturers and beverage companies.

[57] *Azeff and Meilman* v. *Century Construction Limited,* [1958] C.S. 80, at p. 83.

[58] *Arsenault* v. *Maurice Turcot Construction Ltée,* [1973] R.L. 155, at p. 156; *Kwiat* v. *Beauchemin,* [1958] C.S. 322, at p. 325. See *contra, Michaud* v. *Letourneux,* [1957] C.S. 150, at p. 151.

[59] *Karpman-Yaphe Ltd* v. *Poly Refrigeration Inc.,* [1970] C.S. 468, at p. 471.

producing seller's expertise and the extent of his control over the manufacturing process are appropriate criteria to determine the applicability of the presumption pursuant to article 1527 C.C.

(b) *The application of the presumption to non-contractual relationships*

Certain recent Quebec decisions,[60] reflecting the growing judicial concern for consumer protection, appear to have imposed the presumption of knowledge upon the manufacturer *per se*, without attaching significance to the existence and character of the contractual relationship which it may or may not have had with the plaintiff consumer. Nor is this the first occasion on which the privity rule has been abandoned in this context, there being other, less recent reported decisions in which article 1527 C.C. was held to enure to the benefit of non-contracting parties.[61] In both of these latter cases, however, the courts seemed unaware that they were applying a rule of presumed contractual intent to non-contractual situations, and the corresponding failure of these opinions even to consider the legal implications of so grave a departure from traditional legal principle justifies their rejection as serious authority.

A more substantial challenge to the once inviolable rule of privity of contract began with the decision of Challies J. in the unreported judgment of *Lazanek*,[62] an opinion subsequently relied upon by the Court of Appeal in *Peugeot*[63] and more recently still by the Provincial Court.[64] So broad is the effect of these judgments, rendering applicable as they do the remedies of articles 1526 and 1527 C.C. to the manufacturer *per se*, so great the momentum which they have contributed to a rapidly developing area of the law, and so fragile and tenuous their basis, I think it appropriate, while the question is still an open one, and before the Supreme Court has considered the matter, to evaluate carefully the manner in which this emerging line of jurisprudence has developed.

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[60] See cases cited *supra*, footnote 14.

[61] See *Parent* v. *Rutishauser* (1937), 63 B.R. 226, where art. 1527 C.C. was invoked by the purchaser's wife, and *Bouvier* v. *Thrift Stores Ltd.*, *supra*, footnote 16, where it was relied upon by the buyer's employer.

[62] *Supra*, footnote 14.

[63] *Supra*, footnote 14, at p. 830.

[64] *Insurance Company of North America* v. *General Motors of Canada Limited*, *supra*, footnote 14.

The holding in *Lazanek*, which constituted a significant foothold for the Court of Appeal in *Peugeot*, itself rests upon irrelevant authority. The frontal attack upon the privity rule is embodied in the following critical statement:[65]

> The action must be maintained also against Ford Motor Company because it is bound as the manufacturer of the defective automobile to legal warranty just as is the vendor, and the two are bound jointly and severally. This may be seen in the judgment of the Supreme Court of Canada in *Ross* v. *Dunstall* (1921), 62 S.C.R. 393, at p. 419.

A careful analysis of that particular page of the *Ross* decision, however, convincingly reveals that it stands for quite the opposite proposition. Indeed, the entire framework of Mignault J.'s reasoning in that opinion is carefully based upon and developed around the distinction between contractual and delictual responsibility:[66]

> The principles governing civil responsibility are very familiar. *In the absence of any contractual relationship between two persons,* the one is liable towards the other if, being *doli capax,* he has caused him damage by his fault, whether by positive act, imprudence, neglect or want of skill (art. 1053 C.C.) . . .: *in the case of the sale* of a thing with a latent defect, the usual remedy is the rescission of the sale or a diminution of the price.

It is true that elsewhere in this decision both Mignault[67] and Duff JJ.[68] opine that a recourse founded on article 1053 C.C. is available to situations in which there is, as well, an independent conventional liability. These statements, however, merely stand for the (debatable)[69] proposition that delictual and contractual recourses were not under the circumstances necessarily nor inherently inconsistent; and that assertion, however meritorious, does not necessarily give rise to the converse conclusion that the recourse of article 1527 C.C. is available to non-contracting parties. On the contrary, it is clear from the judgment of Duff J. and implied in that of Mignault J. that the only effect intended was to render article 1053 C.C. applicable to contractual situations in which article 1527 C.C. was available as well.

Hence the proposition in *Lazanek*, although innovative, was not based upon relevant authority, and it is surprising that Kaufman J. chose to invoke the same tenuous reasoning in *Peugeot*

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[65] *Lazanik* v. *Ford Motor Company of Canada Limited, supra,* footnote 14, at p. 12.

[66] *Ross* v. *Dunstall, supra,* footnote 21, at p. 419. Emphasis mine.

[67] *Ibid.*, at p. 422.

[68] *Ibid.*, at p. 396.

[69] See P.-A. Crépeau, *op. cit.*, footnote 22.

to justify such a radical departure from conventional legal principle. It is equally curious that the opinion, followed in a subsequent Provincial Court decision,[70] which added nothing, either by way of reason or authority to support the central contention, did not even refer to the judgment of Anglin J. in *Ross*.[71] Of the six judges in the *Ross* case, he alone held that the remedy of article 1527 C.C. is available to non-contracting parties. Although the statement was merely a dictum, and although Anglin J. cited no doctrine upon which the Quebec codifiers relied when drafting the article, it is surprising that neither Kaufman, Challies, nor Lande JJ. even mentioned this sole, although weak and isolated, source of support to lend credibility to an otherwise novel assertion.

The legal basis underlying this incipient doctrine thus remains vague and undefined, a weakness which, as one commentator has already pointed out,[72] undermines the authority of these opinions. If the courts in question intended to impose the warranty provisions upon the manufacturer because it had in each case undertaken an independent conventional guarantee,[73] they were effectively, in so doing, stripping a simple guarantor of his status as such and clothing him with the various trappings and responsibilities of the vendor. They were putting forth the novel and legally untenable proposition that a third party undertaking certain obligations in respect of the purchaser will be treated as a vendor if he happens to be the manufacturer of the object sold.

These cases might, on the other hand, stand for the still broader and more objectionable proposition that articles 1522-1530 C.C. apply to the manufacturer *qua* manufacturer without regard to the kind of contractual relationship, if any, which he may or may not have with the ultimate consumer. If this consequence was the effect intended, as it indeed appears to be, then, as a matter of law they should be rejected as constituting a crude and analytically unsupportable departure from a basic tenet of contractual responsibility. It may well be that these decisions were motivated by a desire to implement what the courts perceive to be overriding public policy objectives. However laudable this goal, and however legitimate judicial law-making may be in

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[70] *Insurance Company of North America* v. *General Motors of Canada Limited, supra,* footnote 14.

[71] *Ross* v. *Dunstall, supra,* footnote 21, at p. 400.

[72] M. Tancelin, *op. cit.,* footnote 21, at p. 92.

[73] See the judgment of Deschenes, J. in *Gougeon* v. *Peugeot Canada Ltée, supra,* footnote 14.

other contexts to achieve such objectives, the unabashed abandonment of fundamental legal concepts in this manner oversteps the proper limits of the judicial function. If these concepts are inconsistent with contemporary societal needs, it is surely the legislative, rather than the judicial branch of government which must provide the appropriate response.

(c) *The application of the presumption to contractual relationships*

Although the presumption of knowledge is undeniably applicable to the manufacturer who sells his product to the public, either directly, or through and authorized mandatary, the precise character of the presumption remains, surprisingly, an unsettled question of law. As we have seen, Pothier perceived both the manufacturer and the specialized merchant vendor as craftsmen upon whom the law placed a very special and onerous responsibility. Having induced the consuming public to rely on their expertise, he thought it appropriate to hold them accountable for incompetent workmanship, and he chose the presumption of knowledge as the mechanism with which to shape a moral and professional accountability into the mold of legal responsibility.

Although Anglin C.J. in *Davie Shipbuilding* relied heavily upon Pothier's thinking, he introduced certain elements of ambiguity, an inevitable consequence, perhaps, of any attempt to refine a raw and undeveloped area of the law. Thus, at one point he reasoned that the manufacturer is not merely subject to the presumption, but furthermore, in addition, ". . . is invariably presumed to know of defects in it and to be liable for damages caused by them . . .",[74] he is subject, the analysis continues, to ". . . a *fin de non reçevoir* which precludes his alleging a belief that the article sold was free from defects . . .".[75] Yet the judgment also contains other, apparently irreconcilable language which strongly suggests that the presumption is always rebuttable. Thus, although it is said at one point that the presumption is *ex facie . . . juris tantum*[76] thereby leaving open the limited possibility of its being irrebuttable in certain cases, the Chief Justice in the very next sentence makes the general statement that ". . . it is rebuttable but by what proof is again a question for careful consideration".[77] Hence, although

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[74] *Supra*, footnote 13, at p. 209.

[75] *Ibid.*, at p. 210.

[76] *Ibid.*, at p. 207.

[77] *Ibid.*

the Chief Justice apparently intended to rely upon Pothier who made it quite clear that the manufacturer was not free to contest the presumption, there are unresolved ambiguities inherent in the judgment and occasional statements which suggest that the manufacturer can bring forth the appropriate exculpatory proof.[78]

Subsequent cases reflect these ambiguities. Authority as profound as the Supreme Court[79] and as recent as 1971[80] have expressly held that the presumption is rebuttable if the manufacturer can establish "... that the defect was such that it could not have been discovered by the most competent and diligent person in his position ...".[81] From the perspective of these courts, the presumption, although framed in terms of the manufacturing vendor's knowledge, is nevertheless geared to engage the liability of those who fail to demonstrate compliance with a dictated standard of prudence and care. Drawing upon the reasoning of the Chief Justice in *Davie Shipbuilding*[82] and applying it to what is arguably a context not contemplated by that authority, these cases assert that ignorance, where understandable, is a good defence. Other decisions, emanating from both the Supreme Court[83] and the Quebec Court of Appeal,[84] (among others)[85] hold, either expressly or by necessary implication,[86] that exoneration founded upon a reasonably based ignorance is not available to the manufacturer, and there is at least one case in which a court, seemingly unable or unwilling to resolve this question, has left it unanswered.[87]

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[78] *Ibid.*, at p. 213: "By what proof is the presumption of knowledge under art. 1527(2) C.C. rebuttable?"

[79] *Touchette* v. *Pizzagalli, supra,* footnote 5, at p. 439.

[80] *Rioux* v. *General Motors of Canada, supra,* footnote 26, at p. 832. See also *Cayer* v. *Drolet, supra,* footnote 24, at pp. 794-795; *Poudrette* v. *LaFrance, supra,* footnote 22, at p. 445.

[81] *Touchette* v. *Pizzagalli, supra,* footnote 5, at p. 439; cited with approval in *Rioux* v. *General Motors of Canada, ibid.*, at p. 832.

[82] *Supra,* footnote 13, at p. 214.

[83] *Ross* v. *Dunstall, supra,* footnote 21, at p. 419, per Mignault J.: "... the manufacturer is not listened to when he pleads ignorance of the defect ... his ignorance of the defect in the thing manufactured by him is itself a fault".

[84] *Gougeon* v. *Peugeot Canada Ltée, supra,* footnote 14, at p. 831.

[85] *Lazanik* v. *Ford Motor Company of Canada Limited, supra,* footnote 14.

[86] *Belanger* v. *Coca-Cola Limited, supra,* footnote 22, at p. 162.

[87] *Karpman-Yaphe Ltd* v. *Poly Refrigeration Inc., supra,* footnote 59, at pp. 471-472.

It would be artificial, in the face of such overt and pervasive contradiction, to attempt to select as controlling either of these two streams of thinking. It remains nevertheless true however, that none of the cases cited actually held that the manufacturer had successfully rebutted the presumption, and hence this particular question, although analytically significant, may be of theoretical interest only, particularly where it is framed against the pro-consumer background, to which reference has already been made, which prevails in Quebec today. Although the position of the non-consuming purchaser is ambiguous, existing judicial predispositions suggest that where a consumer happens to be the purchaser, and where he succeeds, as he must, in demonstrating the existence of both a latent defect and consequential loss, the presumption applicable to the manufacturer, although arguably rebuttable, will more often than not be held not to have been rebutted. This tendency is particularly well entrenched where the character of the defect touches upon highly visible and sensitive areas of public policy. Judicial sanctioning is a virtual certainty, for example, where the health or safety of the consumer is threatened, as the beverage and automobile decisions so clearly demonstrate.

(4) *The specialized merchant-vendor*

Ambiguities still more serious cloud the legal status of the third category of vendor to whom the Chief Justice refers, namely, the ". . . merchant-vendor who deals in a definitive class of goods in regard to which he may reasonably be supposed to possess skill and special knowledge".[88] The analytical difficulties which have arisen in the cases in relation to this category of vendor are twofold. They extend beyond the question as to the nature of the presumption applicable, on the one hand, to the delimitation of the category itself and to the determination of which vendors may be properly subsumed within it, on the other. These two questions, although intellectually severable, inevitably, and understandably, are closely linked in any case involving a merchant-vendor. We shall nevertheless attempt to deal with each in turn.

(a) *Delimiting the category: the distinction between the specialized and the unspecialized merchant-vendor.*

So closely intertwined were these questions in the judgment of Chief Justice Anglin that he virtually established, if he did not

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[88] *Samson & Filion* v. *Davie Shipbuilding & Repairing Co., supra,* footnote 13, at p. 210.

actually establish, identical criteria for determining both the applicability of the presumption in any given case and the manner in which it is to be rebutted. Such a proposition, if that was the intent, is clearly untenable, for if the presumption only applies to those merchants "... to whom lack of knowledge would be imputable as fault...",[89] it will not be rebuttable, when it does apply, "... by proof that the nature of the defect was such that ... the vendor ... could not, by any precaution which he might reasonably be expected to take, have discovered it".[90] The very imposition of the presumption on the basis of the criterion indicated renders its rebuttal rationally impossible, and in this sense the ground rules set out by the Chief Justice are seriously inconsistent: when strictly read they impose a presumption which is said to be rebuttable but which is in fact irrebuttable when applicable, the only effective criterion of liability being fault.

The reasoning in most of the cases subsequently decided has managed to avoid or ignore this particular difficulty by drawing upon and emphasizing the notion which Pothier first expressed and to which Anglin C.J. referred, that it is not any merchant who could properly be called a specialized vendor, but only "un marchand qui vend des marchandises du commerce dont il fait profession".[91] The Chief Justice incorporated into his analysis the general standard of professionalism which Pothier deemed so significant and elaborated upon it by requiring, first, that the seller deal in a definite class of goods, and secondly, that he exhibit special skill and knowledge upon which a purchaser would be entitled in placing, and might be expected to place, reliance.

Although subsequent cases have elaborated upon the first[92] of these two elements, they have adopted with perhaps more substantial uniformity the principle that a merchant will not be subject to the presumption unless he exhibits some degree of expertise in relation to the product with which he is dealing, the merchant

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[89] *Ibid.*, at p. 212.

[90] *Ibid.*, at p. 214.

[91] *Ibid.*, at p. 211.

[92] For authority to the effect that "... a merchant who deals in a general class of goods... is held to a general warranty against latent defects...", see *Legaré Auto and Supply Company Ltd* v. *Choquette*, *supra*, footnote 15, at pp. 77-78. See also the remarks of Galipeault J. in *Blais* v. *United Auto Parts Ltd*, [1944] B.R. 139, at p. 146 to the effect that a dealer whose stock in trade is comprised of several hundred articles is merely a casual seller, and hence is not subject to the presumption. See also in this context, *Les Constructions Salaberry* v. *Dumouchel*, [1968] C.S. 547, at p. 549.

lacking the required degree of actual or apparent professionalism being consistently freed from the presumption and its effects. Thus it has been judged not to apply to a second hand dealer in scrap pipes,[93] a general contractor supplying plumbing fixtures,[94] an auto parts supplier,[95] a wholesale plumbing and heating dealer,[96] a grocery store,[97] a wholesaler selling large quantities of plastic fabrics,[98] a wholesaler dealing in refrigerators,[99] and a speculative owner-builder.[100]

There are, it is true, a number of cases which appear to stand for the bald proposition, explicitly rejected by Chief Justice Anglin,[101] that the presumption affects any dealer in similar articles.[102] Abandoning the criterion of professionalism as a precondition to liability, these cases suggest that the commercial character of the activity, in itself and without more, justifies the imposition of the presumption. The majority of these decisions, however, involve automobile dealers where there might reasonably be said to be the holding out of professional competence to which the Chief Justice referred, and while some opinions overlook this element and substitute in its place the simple but crude rule that automobile dealers *per se* stand in the shoes of the manufacturer,[103] other, more discriminating judgments have man-

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[93] *Samson & Filion* v. *Davie Shipbuilding & Repairing Co., supra,* footnote 13.

[94] *Azeff & Meilman* v. *Century Construction Limited, supra,* footnote 57.

[95] *Blais* v. *United Auto Parts Ltd, supra,* footnote 92.

[96] *Les Constructions Salaberry* v. *Dumouchel, supra,* footnote 92.

[97] *Bouvier* v. *Thrift Stores Ltd, supra,* footnote 16.

[98] *Sport Togs Inc.* v. *Telio Trading Co. (Inc.), supra,* footnote 2, at p. 271.

[99] *Méthot* v. *Gaspé Gaz Utilities Inc.,* [1964] C.S. 439.

[100] *Arsenault* v. *Maurice Turcot Construction Ltée, supra,* footnote 58; *Kwiat* v. *Beauchemin, supra,* footnote 57. See, *contra, Michaud* v. *Létourneux, supra,* footnote 58.

[101] *Samson & Filion* v. *Davie Shipbuilding & Repairing Co., supra,* footnote 13, at p. 211.

[102] *Ross* v. *Dunstall, supra,* footnote 21, at p. 419; *Modern Motor Sales Limited* v. *Masoud,* [1953] 1 S.C.R. 149, at p. 156; *Touchette* v. *Pizzagalli, supra,* footnote 5, at p. 439; *Rioux* v. *General Motors of Canada, supra,* footnote 26; *Joyal* v. *Vanasse,* [1967] R.L. 467, at p. 473; *Gougeon* v. *Peugeot Canada Ltée, supra,* footnote 14; *Insurance Company of North America* v. *General Motors of Canada Limited, supra,* footnote 14; *G. A. Gruninger et Fils Ltée* v. *Construction Equipment Company Limited,* [1962] C.S. 444, at p. 445; *Roy* v. *Ostiguy,* [1956] R.L. 527, at p. 528; *Parent* v. *Rutishauser, supra,* footnote 61, at p. 231.

[103] *Modern Motor Sales Limited* v. *Masoud, ibid.,* at p. 156; *Touchette* v. *Pizzagalli, supra,* footnote 5, at p. 439.

aged to retain the policy objectives which Pothier envisaged by searching for and identifying elements in the fact pattern suggestive of the necessary expertise. Thus, on one occasion, a dealer who also operated a garage on the premises was held subject to the presumption[104] whilst, on another, Mr. Justice Hyde took pains to point out that the dealer in question not only sold automobiles, but repaired and serviced them as well.[105] On still another, the Court of Revision, after an exhaustive review of the relevant French authorities, held that the demonstrations which the defendant dealer gave to his clientele to prove the superiority of his product constituted a special circumstance rendering the presumption applicable.[106]

There are, it is true, other cases,[107] not involving automobiles, which are more difficult to reconcile. They all, however, with but one exception,[108] involved consumer transactions, a sensitive area, as we have seen, in which the courts tend to sympathize with the plaintiff. Although these judgments are of varying quality (one court, for instance, held the presumption applicable for the bizarre reason that the seller had failed to implead the manufacturer as a defendant in warranty),[109] they cannot, as a whole, be curtly dismissed or ignored as merely constituting bad law. Rather, they are symptomatic of the difficulties which the courts have experienced in reconciling their concept of fairness with the governing rules of the Civil Code as traditionally interpreted. Here again, a clearly defined legislative response is both institutionally and functionally the appropriate medium through which clarity should be achieved. In the interim, and pending that response, the following considerations emerge from the cases and remain controlling when determining whether any particular *commerçant* is a specialized merchant-vendor and hence subject to the presumption:

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[104] *Longpré* v. *St. Jacques Automobile Ltée, supra,* footnote 15, at p. 266.

[105] *Masoud* v. *Modern Motor Sales Limited,* [1951] R.L. 193, at p. 212. Unfortunately this reasoning was not relied upon by the Supreme Court, *supra,* footnote 102.

[106] *Lajoie* v. *Robert, supra,* footnote 22, at p. 400.

[107] *Ross* v. *Dunstall, supra,* footnote 21; *Roy* v. *Ostiguy, supra,* footnote 102; *Parent* v. *Rutishauser, supra,* footnote 61; *G. A. Gruninger et Fils Ltée* v. *Construction Equipment Company Limited, supra,* footnote 102.

[108] *G. A. Gruninger et Fils Ltée* v. *Construction Equipment Company Limited, ibid.*

[109] *Parent* v. *Rutishauser, supra,* footnote 61, at p. 231.

(1) Does the vendor describe or hold himself out as an expert in relation to his stock in trade?
(2) Does he customarily comment upon the relative quality of the various brand products with which he deals?
(3) Does a salesman deal individually with the buyer, or is the purchaser left alone and unattended, as in a large department or grocery store?
(4) Does he deal in one class of goods, or many?
(5) Does he have the facilities necessary to effect repairs and maintenance on the premises?
(6) Is the object of the sale complex or relatively simple?
(7) Did it arrive at the merchant's place of business well packaged and difficult to inspect, or did the merchant have a reasonable opportunity and the necessary technical expertise to effect a detailed examination?
(8) On how many prior occasions had the merchant dealt with the product in question?[110]
(9) Was the sale a consumer transaction?

Although no hard and fast lines can be drawn, I think it fair to generalize that, apart from any other considerations, the presumption will apply to the vendor in situations in which the first and last of the foregoing questions can be answered affirmatively. Conversely, he will generally escape the liability of article 1527 C.C. where a negative response to both questions is appropriate. The vendor's position in the more ambiguous situations will depend, as we have seen, upon the peculiar factual pattern of a given case and the policy perspectives and preferences of the particular court hearing the case.

(b) *The application of the presumption to the specialized merchant-vendor.*

It is difficult to make even modest generalizations of this nature when evaluating the character of the presumption applicable to the specialized merchant-vendor. Pothier took the position that the presumption, where applicable, was in all cases irrebuttable, and, as we have seen, certain portions of Chief Justice Anglin's judgment appear to adhere to this reasoning. Embodied in other portions of the judgment, however, are clear and unam-

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[110] For authority to the effect that the presumption does not apply to the dealer who has dealt only once with the product in question, see *Sport Togs Inc.* v. *Telio Trading Co. (Inc.)*, *supra*, footnote 22, at p. 146, and *Blais* v. *United Auto Parts Ltd*, *supra*, footnote 92, at p. 146.

biguous statements that the specialized merchant-vendor can exonerate himself by bringing forth the appropriate exculpatory proof. In a significant departure from the authority then prevailing, the Chief Justice opined that the seller can liberate himself from responsibility not by proving, as Mignault had advocated,[111] that it was absolutely impossible to discover the defect, but rather by invoking the more lenient justification "... that he could not, by any precaution which he might reasonably be expected to take, have discovered it".[112] The mere absence of knowledge *per se* will not suffice, but understandable ignorance is a permissible defence. Lurking behind the convoluted reasoning and the eloquent prose there is imposed again, therefore, a criterion of liability embodying the traditional concept of fault.

Here again, however, the diversity of judicial opinion requires us to await legislation to achieve uniformity and predictability. There are cases which hold expressly[113] or by necessary implication[114] that the presumption is in this context rebuttable. Other decisions are equivocal, and avoid the issue in its entirety[115] while still others[116] restate Pothier's thesis that the presumption is, when applicable, irrebuttable, and hence refuse to allow the specialized merchant-vendor to exonerate himself. There is even one decision,[117] not subsequently followed and based upon neither principle nor authority, which predicates liability upon the specificity or generality of the purchaser's description of the product at the time of the transaction. Where the buyer has asked for and received a brand name, the reasoning proceeds, the vendor is subject to an irrebuttable presumption, a presumption otherwise rebuttable, however, where the purchaser has merely requested

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111 P. B. Mignault, *op. cit.*, footnote 3, p. 113.

112 *Samson & Filion* v. *Davie Shipbuilding & Repairing Co.*, *supra*, footnote 13, at p. 214.

113 *Masoud* v. *Modern Motor Sales Limited*, *supra*, footnote 105, at p. 213; *Touchette* v. *Pizzagalli*, *supra*, footnote 5, at p. 439; *Ross* v. *Dunstall*, *supra*, footnote 21, at p. 419; *Rioux* v. *General Motors of Canada*, *supra*, footnote 26, at p. 832.

114 *Roy* v. *Ostiguy*, *supra*, footnote 102, at p. 531.

115 *Karpman-Yaphe Ltd* v. *Poly Refrigeration Inc.*, *supra*, footnote 59, at pp. 471-472.

116 *Modern Motor Sales* v. *Masoud*, *supra*, footnote 102, at p. 156 (Surprisingly, Taschereau J. cited the decision of *Touchette* v. *Pizzagalli*, *supra*, footnote 5, which stands for the proposition that the presumption is rebuttable); *Gougeon* v. *Peugeot Canada Ltée*, *supra*, footnote 14, at p. 831.

117 *Légaré Auto and Supply Company Ltée* v. *Choquette*, *supra*, footnote 15, at p. 78.

the article in general terms without reference to the manufacturer.[118]

Given the existing configuration of the jurisprudence, it would be hopelessly artificial to contend that any one stream of thinking is authoritative and constitutes the law in Quebec today. Notwithstanding these ambiguities, however, it is probable that a Quebec court would allow a rebuttal to prevail if genuinely satisfied that a defendant dealer was not tainted with fraud or fault. The realities of the judicial process dictate, in this context at least, that the controlling elements of liability will be found in the specific behaviour of a defendant in a particular factual situation rather than in the various abstract and often contradictory statements of principle which may be found in the cases reported during the present century.

C. *Conclusions and recommendations.*

Two controlling principles emerge from a jurisprudence otherwise characterized by ambiguity and equivocation. The first of these dictates that the private, or non-commercial vendor, as well as the commercial seller not substantially characterized by the features previously enumerated, are both free from the presumption and its effects; for them, ignorance, however naïve or reprehensible, carries with it immunity from the potent recourse embodied in article 1527 C.C. The second ground rule is equally clear, rendering the presumption applicable to both the manufacturing vendor, and the specialized merchant-vendor, a category of seller more difficult to define.

These fundamentals exhaust whatever uniformity of judicial and doctrinal opinion exists in this area of the law and constitute the parameters or outer limits within which controversy has developed. Within these boundaries, substantial debate and uncertainty affects virtually every meaningful legal and policy question that has arisen. Ineed, the courts have even had difficulty in

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[118] This reasoning subverts the policy of art. 1527 C.C. which, as we have seen, is to impose a burden of special responsibility upon the vendor where the purchaser has reasonably relied upon his expertise and skill. The buyer who asks for a product by its brand name, however, thereby demonstrates a competence in the subject matter of the transaction which, in the absence of other proof, justifies the inference that he was not relying upon the particular skill and knowledge of the merchant, whose responsibility under the circumstances should be diminished accordingly. The policy of the common law in this context would appear to be in accord. See the Ontario Sale of Goods Act, R.S.O., 1970, c. 421, s. 15(1). See also *Baldry* v. *Marshall*, [1925] 1 K.B. 260.

establishing and applying on a consistent basis workable criteria to distinguish the ordinary commercial seller, who is not subject to the presumption, from the specialized merchant-vendor, who is. Although, as we have seen, a number of criteria have haltingly emerged from the cases to begin to settle this particular difficulty, judicial opinion is hopelessly divided in relation to the nature of the presumption applicable to the various classes of sellers; and the legal basis, contractual or delictual, which underlies its application is, or appears to be, in virtue of three recent decisions, an open question.

Some courts have held that the presumption is invariably rebuttable while others have opined that, where it applies, excuses will not be listened to. Still other judges have been careful to distinguish between the manufacturing vendor who, it is said, cannot rebut, and the specialized seller, who can, it being possible to rely upon lofty and extensive authority to support either proposition. There exists in addition the further complicating element that significant judicial statements subsequently followed have been made in contexts bearing no substantial policy relationship to the question under consideration. The decision of *Touchette*,[119] for example, concerned the validity of an exemption clause[120] but has nevertheless been applied in cases in which the central question concerned the liability of the defendant for damages in accordance with article 1527 C.C.; and the holding in *Ross*,[121] which was intended to circumscribe the liability of article 1053 C.C., has been invoked by the Quebec Court of Appeal[122] to justify an extended interpretation and applicability of articles 1522 and the following of the Civil Code.

It remains generally true, however, that, in spite of these analytical and jurisprudential difficulties, the one thread which weaves its way throughout the disparate cases, the one criterion of liability which remains primarily controlling, the one paramount principle which emerges, is a standard of responsibility based upon the traditional concept of fault. The legal consequence of

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[119] *Touchette* v. *Pizzagalli, supra,* footnote 5.

[120] It is now well-settled law in Quebec that an exemption clause will be struck down where it is being relied upon by a vendor to whom the presumption of knowledge applies. See, by way of example only, *Touchette* v. *Pizzagalli, supra,* footnote 5, at pp. 438-439; *Longpré* v. *St. Jacques Automobile Ltée, supra,* footnote 15, at p. 266; *Joyal* v. *Vanasse, supra,* footnote 102, at p. 473; *Roy* v. *Ostiguy, supra,* footnote 102, at p. 531; *Michaud* v. *Letourneux, supra,* footnote 58, at p. 151.

[121] *Ross* v. *Dunstall, supra,* footnote 21, at p. 419.

[122] *Gougeon* v. *Peugeot Canada Ltée, supra,* footnote 14, at p. 829.

the presumption, it is true, is knowledge, and the legal consequence of knowledge is liability. The policy basis which underlies both the presumption and the consequential liability, however, is fault, the state of the vendor's knowledge being merely a device, one might almost say a fiction, designed to implement a public policy operative during the past century.

Whether this policy makes sense in the context of contemporary social norms is an open question, which merits detailed attention. Fault, on the one hand, seems to have grown threadbare with usage and should here, as elsewhere, be discarded as a principal criterion for the allocation of responsibility. Commercial expediency, on the other, must largely dictate the parameters of legal liability and to impose strict responsibility upon certain classes of sellers without carefully evaluating the various markets within which they participate,[123] might be to step outside the limits of viable economic policy.

To conceive and to formulate policy which is both commercially and socially acceptable is a task well beyond both the scope and purpose of this analysis. We may nevertheless address ourselves to the question as to how policy, once determined, can be implemented with codified rules without falling into the intellectual pitfalls which presently characterize Quebec law. In this respect, and on the assumption that blanket rules of strict responsibility will not be the policy decided upon (in which case no serious drafting problems arise in any event) two central conclusions emerge from the array of contradictory judicial dicta. It is clear, on the one hand, that the presumption of knowledge serves no significant purpose and should be abandoned in its entirety as an analytical instrument. It is equally certain, on the other, that unnecessary debate has arisen in relation to the classes of vendors subject to the presumption. If there is to be a presumption of any kind, then it should be a presumption of *liability*, and should be applied to all categories of sellers excepting those subject to any rule of strict responsibility, leaving to the courts to develop on a case by case basis the criteria and guidelines pursuant to which the presumption will be held to be rebuttable.

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[123] For an economic analysis of a variety of consumer protection rules and a proposed model for their evaluation, see D. Cayne and M. J. Trebilcock, Market Considerations in the Formulation of Consumer Protection Policy (1973), 23 U. of T. L.J. 396.