



Enhancing Sri Lankan consumer protection through consumer guarantees and strict liability for defective goods — Lessons from the Australian model of Consumer Law

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The introduction of the Consumer Affairs Authority Act No 09 of 2003 (Sri Lanka) marked a major advance in the protection of consumers in Sri Lanka. However, there are certain aspects of this legislation that can be further developed to enhance consumer protection. The focus of this article is on inadequacies of the existing statutory liability regime for (a) implied warranties and the need for, and desirability of introducing new provisions and/or replacing the existing provisions with a set of mandatory quality standards such as consumer guarantees; (b) the manufacturer's liability for physical injury or damage to property caused by goods that have safety defects and the need for an improved statutory provisions for the manufacturer's liability for defective goods. Drawing upon the equivalent provisions of the Australian Consumer Law (Cth) which is based on the Consumer Guarantees Act 1993 (NZ) this article proposes the manner in which these two areas of the Sri Lankan consumer law can be developed.

Introduction

With the development of sophisticated technologies and expanded markets that emerged as a result of post-World War II industrial development there have been far reaching developments of consumer protection laws in almost all parts of the world.¹ In the Sri Lankan context the introduction of the Consumer Affairs Authority Act No 09 of 2003 (CAAA) as the key consumer legislation marks a significant legislative development in the area of consumer protection.² Its significance can mainly be attributed to the establishment of the Consumer Affairs Authority and Consumer Affairs Council to investigate, inquire into and adjudicate consumer matters.³ For example, the consumer can make a complaint to the authority regarding a defect in goods which relates to the manufacturer's or trader's implied or express warranty or guaranty. The initial decision of the authority is final and the relief granted by it should be performed by the trader or manufacturer expeditiously. If the trader or

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1 See generally, the consumer protection directives of the European Union; Consumer Protection Act 1987 (UK); Consumer Product Safety Act (US); Australian Competition and Consumer Act 2010 which superseded the Trade Practices Act 1974 (Cth).

2 This legislation repealed the Consumer Protection Act No 01 of 1979, Fair Trading Commission Act No 01 of 1987 and Control of Prices Act (Cap 173).

3 See generally CAAA s 8 which sets out the investigative functions of the Consumer Affairs Authority (authority), and CAAA s 40 which sets out the adjudicative functions of the Consumer Affairs Council (council).

manufacturer fails or refuses to comply with an order made by the authority, the CAAA requires the authority to act on behalf of the consumer and initiate legal action in the appropriate Magistrate's Court.⁴ This system seems fair to both the consumer and trader or manufacturer involved in the distribution chain.

Another essential element of this system is that if the trader and the consumer fail to settle the dispute, the latter is entitled to an effective dispute resolution mechanism through the council which is low cost. This dispute resolution mechanism also provides relief within a reasonable time and can be used effectively by the consumer without a legal counsel. This remedial system is accessible to all non-commercial consumers irrespective of their economic status and language facility. However, from the perspective of manufacturers and traders, there is lack of procedural fairness in this adjudication system because it makes no provision for appeal to the judicial system against an order of the council.

While this legislative development reflects a response to the need for effective dispute resolution or remedial system, it is doubtful whether the legislation is a comprehensive treatment of the rights and obligations of consumers and persons involved in the distribution chain. This protection gap can be seen particularly in the areas of implied terms relating to consumer transactions and manufacturers' liability for goods that have safety defects. This article notes the lack of progress that has been made in these two areas of the Sri Lankan consumer law. It makes a comparative reference to the equivalent features of an advanced model — The Australian Consumer Law (ACL).

First, this article will examine the interaction between the Sri Lankan Sale of Goods Ordinance No 11 of 1896 (SGO) and the CAAA in relation to implied terms in commercial contracts. It will then examine the lack of progress that has been made in this area of the Sri Lankan consumer law, and the need for improvement of the position of the consumer through an advanced set of mandatory quality standards such as consumer guarantees which apply where goods or services are supplied to the consumer. It will be argued that the introduction of clearly defined statutory remedies which include not only a compensation determined by the authority, but also a right to reject the goods, a right to repairs and a right to spare parts will also be useful improvements to the consumer rights and protections.

The consumer guarantees provisions under the Australian Consumer Law which replaced the previous statutory implied terms along the lines of the Consumer Guarantees Act 1993 (New Zealand) provides an attractive model for improving the current implied warranties regime for consumer contracts under Sri Lankan law. The introduction of mandatory quality standards such as consumer guarantees can be justified on the basis of information asymmetry that typically exists between consumers and traders, and the common inability of consumers to bargain terms on which goods and services are supplied.⁵

Second, this article will examine the lack of statutory protection under the CAAA for the consumer to pursue an action against the manufacturer of

4 CAAA s 13(6).

5 See Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law)

defective goods for physical injury or damage to property. While the CAAA makes no express reference to defective goods or the nature of the liability that can be imposed on the manufacturer of defective goods, there is provision under s 13 for the aggrieved consumer to make a complaint to the authority if there is a non-conformity to the standards and specifications of goods and supply of services as determined by the authority or if the defect relates to the manufacturer's or trader's implied or express warranty or guaranty. While the consumer may be entitled to a compensation determined by the authority and/or replacement of such goods or refund of the amount paid for such goods, any action against the manufacturer for injury or loss/damage to property caused by a defective product is required to be initiated under the law of delict. This position essentially leaves the consumer with the burden of proving negligence on the part of the manufacturer. The trend of the development of the law in other jurisdictions has been in the direction of statutory recognition of strict liability — absence of fault on the part of the manufacturer is no defence.⁶ Drawing upon the statutory defective goods actions under Australian law which enables the consumer to pursue an action against the manufacturer for physical injury or loss/damage to property caused by a defective product, this article will examine the need and desirability of introducing similar statutory provisions for the manufacturers' liability for safety defects under the CAAA.

In essence, this article is intended to identify the protection gap in the two areas of the current consumer legislation in Sri Lanka and offer the Australian model of consumer law as a base to adopt and/or to adopt with modifications when they are inconsistent with Sri Lanka's economic and social policies.

Implied terms

There is a notable difference between the implied terms regime in consumer contracts and in other commercial contracts under Sri Lankan law. The CAAA protect the consumer by implying certain warranties into all consumer contracts.⁷ Implied warranties under the CAAA in relation to the supply of services are provided for in s 32(1)(a) and (b), and therefore are distinct from the warranties attached to the supply of goods under subs (d). However, the implied warranties under subs (1)(c) and (2) do not differentiate between the treatment of goods and services.⁸

Similarly, the statutory implied terms in business sales are regulated by the

Bill (No 2) 2010, 607; see also J Paterson and K Tokeley, 'Consumer Guarantees' in J Malbon and L Nottage (Eds), *Consumer law & policy in Australia & New Zealand*, Federation Press, 2013, p 97.

⁶ Under strict liability, the manufacturer is liable if the product is defective. Strict liability focuses on the product itself rather than the behaviour of the manufacturer; See, eg, Consumer Protection Act 1987 (UK) s 2(1); American Restatement (second) of Torts s 402A; American Restatement (Third) of Torts: Liability for physical and emotional harm s 5; Competition and Consumer Act 2010 (Cth) ss 138, 139, 140.

⁷ See CAAA s 32: See also table below.

⁸ Note that under this section, the periodic Gazette Notifications published by the Consumer Affairs Authority set out the standards and specifications relating to sale of goods and the supply of services.

SGO which makes a distinction between implied conditions and warranties.⁹ It is apparent from the wording of these implied conditions and warranties that they are not generally intended to apply for consumer transactions. For example, the term 'merchantable quality' describes a sales transaction rather than a consumer transaction¹⁰ because the consumer does not intend to resell the goods.

The remedies available for breach of implied terms are another area of difference between the two regimes. The remedies available for breach of implied warranties under the CAAA are set out in s 32. A consumer aggrieved by the breach of a warranty under this section can make a complaint to the Consumer Affairs Authority. Compensation determined by the authority or the refund of the amount paid are the remedies available to the consumer.¹¹ On the other hand, the SGO provides remedies attaching to breach of a number of implied conditions and warranties. In relation to these remedies s 12(2) of the SGO states that:

Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract.

Thus remedies for breach of implied terms available to a commercial buyer under the SGO depend upon whether the implied term breached by the trader or manufacturer was a warranty or a condition. Breach of a condition entitles the consumer to repudiate the contract and return the goods or claim damages, whereas breach of a warranty only entitles him or her to a right to damages. To pursue these remedies under the SGO the aggrieved party is required to commence civil action for breach of contract.

Overall, the creation of consumer warranties under the CAAA while retaining the application of traditional warranties and conditions under the SGO for commercial contracts might create an unnecessary confusion. The confusion is compounded by;

- (a) The fact that warranties under the CAAA confer different rights and remedies than are accorded by conditions and warranties under the SGO;
- (b) The term warranty implies a contractual term that requires privity.

The consumer's entitlement to lodge a complaint to the authority under s 32(5) means that he or she is no longer required to establish privity of contract to pursue a remedy against 'the trader or other person'.¹² Therefore, it is confusing that the CAAA retains the warranty terminology. It is also unclear whether or not the term 'trader or other person' means trader or manufacturer, importer, retailer of goods and/or services for which the implied

9 See Sale of Goods Ordinance No 11 of 1896 ss 13, 14, 15 and 16.

10 Note that the case law suggests that it is undesirable to adopt the common law test of saleability equaling merchantability for the purpose of construing this term in consumer transactions; see generally *Rasell v Cavalier Marketing (Aust) Pty Ltd* (1991) ATPR 41-152; [1991] 2 Qd R 323; (1990) 96 ALR 375; (1991) ASC 56-036.

11 CAAA s 32(5).

12 See CAAA ss 32(3), (4), (5), (6).

warranty related. If the objective of the CAAA was to impose liability on everyone in the distribution chain without requiring the consumer to establish privity of contract, an interpretation of ‘trader or other person’ it refers to will be another useful inclusion to the current implied warranties regime. It is argued that the warranty label is not an indispensable terminology to affording appropriate protection to the consumer.

The recent legal developments in Australia that introduced a consumer guarantee regime provides a useful avenue for further discussion and reflection on the current implied warranties under the CAAA.

Consumer warranties or mandatory quality standards?

The Australian model of consumer law has abandoned the contractual language of conditions and warranties in favour of a single set of mandatory quality standards called consumer guarantees that operate independently of the law of contract.¹³ The term ‘guarantee’ is used in the sense of a promise by the supplier or manufacturer to meet a certain standard, rather than a promise to answer for the debt of another.¹⁴ The consumer guarantees under the ACL are similar to those contained in New Zealand’s Consumer Guarantees Act 1993.¹⁵

The table below provides an overview of the Australian consumer guarantee law. It notes the similarities and key differences between the consumer guarantees regime under the ACL and the statutory implied terms under the Sri Lankan consumer law. It identifies the equivalent provisions (if any) of the Sri Lankan sale of goods law. It also provides the foundation for the discussion that follows, and highlights the advantages of some of the significant features of the Australian consumer guarantee law.

13 See Australian Consumer Law ss 51–64 which replaced the former implied terms regime under the Trade Practices Act 1974 (Cth); The rationale for imposing liability on both the manufacture and supplier of goods without the need to establish a contract onto which the implied terms related, can be explained in terms of a ‘single enterprise theory’; D H Vernon, *An Outline for Post-Sale Consumer Legislation in New Zealand: A Report to the Minister of Justice*, 1987, p 17; see also D Harland, ‘Post-sale Consumer Legislation for New Zealand — A Discussion of the Report to the Minister of Justice by Professor David H Vernon’ (1988) 3 *Canterbury L Rev* 410; J Paterson, ‘The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions’ (2011) 35 *MULR* 252.

14 S G Corones, *The Australian Consumer Law*, Lawbook, 2011, p 303.

15 For an examination of the structure and content of the consumer guarantees under the ACL, see generally Department of Treasury (Cth), *The Australian Consumer Law: A Guide to Provisions*, 2010, pp 17–19, at <http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_guide_to_provisions_November_2010.pdf> (accessed 4 August 2012); Commonwealth Consumer Affairs Advisory Council, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties — Final Report*, 2009, at <http://archive.treasury.gov.au/documents/1682/PDF/Report_CCAAC_091029.pdf> (accessed 4 August 2012); Corones, above n 14, p 301.

	Consumer Guarantees under Australian Consumer Law (ACL)	Statutory Implied Warranties under Sri Lankan Consumer Law (CAAA)	Statutory Implied Conditions and Warranties under Sri Lankan Sale of Goods Law (SGO)
(1)	Guarantee as to title (ACL s 51)	No similar provision under statutory implied warranties	Condition that the seller has a right to sell the goods (SGO s 13(a))
(2)	Guarantee as to undisturbed possession (ACL s 52)	No similar provision under statutory implied warranties	Warranty that the buyer will enjoy quiet possession of the goods (SGO s 13(b))
(3)	Guarantee as to undisclosed securities (ACL s 53)	No similar provision under statutory implied warranties	Warranty that the goods are free from any undeclared charge or encumbrance in favour of any third party (SGO s 13(c))
(4)	Guarantee as to acceptable quality (ACL s 54)	No similar provision under statutory implied warranties	Condition that the goods are of merchantable quality (SGO s 15(2))
(5)	Guarantee as to fitness for any disclosed purpose (ACL s 55)	Warranty that goods or services supplied are reasonably fit for the purpose disclosed by the trader (CAAA s 32(2))	Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose (SGO s 15(1))
(6)	Guarantee relating to supply of goods by description (ACL s 56)	No similar provision under statutory implied warranties	Condition that the goods corresponds with the description (SGO s 14)
(7)	Guarantees relating to the supply of goods by sample or demonstration model (ACL s 57)	No similar provision under statutory implied warranties	Condition that the goods corresponds with the sample (SGO s 14)
(8)	Guarantees as to repairs and spare parts (ACL s 58)	No similar provision under statutory implied warranties	
(9)	Guarantee relating to express warranties (ACL s 59)	No similar provision under statutory implied warranties. However, under CAAA s 13(1)(b), the Consumer Affairs Authority can inquire into complaints regarding the warranty or guarantee given by the manufacturer or trader.	

(10)	Guarantees as to due care and skill (ACL s 60)	Warranty as to due care and skill (CAAA s 32(1)(a))	
(11)	Guarantees as to fitness for a particular purpose (ACL s 61)	Warranty that the services and goods supplied are reasonably fit for the purpose for which they were supplied (CAAA s 32(b), (d))	
(12)	Guarantee as to reasonable time for supply (ACL s 62)	No similar provision under statutory implied warranties	
(13)	Guarantees not be excluded by contract (ACL s 64)	No similar provision under statutory implied warranties. However, Unfair Contract Terms Act No 26 of 1997, s 6 states that 'In the case of goods of a type ordinarily supplied, for private use or consumption, a contract term or notice contained in, or operating by reference to, a guarantee of the goods which purports to exclude or restrict or has the effect of excluding or restricting, liability for any loss or damage: (a) arising from the goods proving defective while in consumer use; and (b) resulting from the negligence of a person concerned in the manufacture or distribution of the goods, shall be of no effect.'	Unfair Contract Terms Act No 26 of 1997, s 7 states that any exemption clauses that restrict liability from implied terms under Sale of Goods Ordinance No 11 of 1896 is void.

Key features

(i) Title, undisturbed possession and undisclosed securities:

There are similarities in content between certain consumer guarantees under the ACL and the equivalent implied terms under the Sri Lankan sale of goods legislation. For example, the ACL recognises that in every consumer contract for the supply of goods there is a guarantee that the supplier will have a right to dispose of the property in the goods when that property is to pass to the consumer.¹⁶ This provision is similar to the wording of s 13(a) of the SGO which provides that 'unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass'.

While the wording of ss 13(b) and (c) of the SGO¹⁷ is similar to those of consumer guarantees under the ACL of undisturbed possession if the supply is not a supply of limited title¹⁸ and the guarantee that the goods are free from

¹⁶ ACL s 51 (1).

¹⁷ See items (2) and (3) above.

¹⁸ ACL s 53.

any security, charge or encumbrance¹⁹ no similar provisions have statutorily been recognised in the context of consumer transactions under the CAAA. In effect, the Sri Lankan consumer has no statutory protection against suppliers who do not have clear title to the goods they supply. Sometimes goods will have a mortgage or security placed on them by someone who is owed money. For example, a bank may have a mortgage over a car while the owner is paying it off. If the car is then sold, without having the debt paid out, it has been bought without clear title. If the repayments are not made, the bank may repossess the car to repay the debt, regardless of who owns it.

(ii) Acceptable quality:

The ACL provides for consumer guarantees as to acceptable quality; goods are fit for all the purposes for which the goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects and safe, and durable.²⁰ For example, an electric mixer should be able to mix and beat food ingredients, a new electric mixer should be free from scratches, the speed motor should function properly, sparks should not fly out of the mixer and it must function for a reasonable time after purchase, without breaking down. This guarantee as to acceptable quality under s 54 of the ACL replaced the statutory implied condition that the goods are of ‘merchantable quality’.²¹ The term ‘merchantable quality’ — goods are fit for any one of the purposes they are regarded as saleable — when applied to consumer contracts has been considered as ‘both general and vague, and likely to cause ongoing difficulty in its interpretation’.²² Therefore, the significance of this new provision lies in the clarity and flexibility it provides in the interpretation of the term ‘acceptable quality’.²³ Its adoption of the reasonable consumer test ‘ensures that the threshold of acceptable quality remains flexible across goods of many different kinds and supplied in many different circumstances’.²⁴

However, as the table above indicates, the implied condition that the goods are of ‘merchantable quality’ under the SGO applies to sales contracts only. In

19 ACL s 53 (i) imposes a guarantee that goods are free from any security, charge or encumbrance that was not disclosed to the consumer in writing before the consumer agreed to the supply; or that was not created by or with the express consent of the consumer; and that the goods will remain free from such a security, charge or encumbrance until the time when the property in the goods passes to the consumer.’

20 ACL s 54(1), (2) and (3); See also *Commissioner for Consumer Protection v Armstrong* [2012] WASC 206 (S); BC201208930; see generally, B Harris, ‘A critique of the CCAAC Report of 2009 and the statutory guarantee of acceptable quality in the Competition and Consumer Act 2010 (Cth)’ (2011) 19 *CCLJ* 152 at 162.

21 Trade Practices Act 1974 (Cth) s 71.

22 S Corones, ‘Consumer Guarantees in Australia: Putting an End to the Blame Game’ (2009) 9(2) *QUTLJ* 137 at 141.

23 Corones notes that it is necessary to adopt a standard that provides for flexibility, so that it can be applied to a myriad of different consumer transactions. The flexibility comes at the loss of some certainty; above n 14, at 342; Cf L Nottage and J Kellam, ‘Product Liability and Safety Regulation’ in J Malbon and L Nottage (Eds), *Consumer law & policy in Australia & New Zealand*, Federation Press, 2013, p 204 wherein the authors argue that the concept of acceptable quality is not necessarily clearer in its application than the previous concept of merchantable quality which was at least well tested by the courts; Cf G Pearson, ‘Suitable for an Individual or Acceptable for All? A Response to Nottage and Kozuka’ (2012) 22 *Aust Product Liability Reporter* 266.

24 A Bruce, *Consumer Protection Law in Australia*, LexisNexis, 2011, p 210.

regard to consumer contracts there is an implied warranty under the CAAA which states that ‘the goods supplied or services provided will be in conformity with the standards and specifications determined under section 12 of this Act’.²⁵ In order to fully understand the ‘standards and specifications’ referred to in s 12, the consumer, trader and manufacturer are required to be familiar with ‘Notifications published in the Gazette’ which adopt ‘standards and specifications prescribed by the Sri Lanka Standards Institution established by the Sri Lanka Standards Institution Act No 6 of 1984, relating to the production, manufacture, supply, storage, transportation and sale of goods and supply of services’.²⁶ Thus, ss 12 and 32(3) of the CAAA are intended to provide reasonable assurance of quality of the goods sold or the services provided to the consumer. However, it is argued that from the perspective of the trader, manufacturer and importer, identification of the general characteristics of the product’s minimum quality standards required for the purpose of consumer warranty under s 32(3) would provide not only a clear criterion of liability but also would facilitate compliance with the implied warranty regime.

In order to strike a fair balance between the interests of the consumer, and the trader and manufacturer, and to promote clarity and certainty of the legal position, it is proposed that any future development of the relevant provisions of the CAAA, consider an inclusion of the main characteristics of the minimum standards that would satisfy the warranty requirement in s 32(3) or a substitution of the warranty under that sub section with a guarantee as to ‘acceptable quality’ along the lines of Australian law.

(iii) Availability of repairs and spare parts:

The ACL provides the consumer with guarantees as to the availability of repairs and spare parts. For example under s 58 of the ACL the consumer who purchases a vacuum cleaner is entitled to a guarantee that a repair facility or spare parts would be available to him if a vital component of the vacuum fails to function.

It is to be noted that the statutory implied terms regime under the CAAA does not offer a similar protection to the consumer. Unless the CAAA provides a deterrent, the irresponsible trader would have no motivation to repair or make available spare parts until ordered to do so. The inclusion of a statutory protection under the CAAA would be particularly useful in relation to goods imported into Sri Lanka, because the consumer will have the security that spare parts will be available for a certain period of time.

However, it would be a reasonable to limit the guarantee as to availability of spare parts to essential spare parts or spare parts imperative to the continued functioning of the item. In order to strike a reasonable balance between

²⁵ CAAA s 32(3).

²⁶ CAAA s 12(1), (2); Note that Sri Lanka Standards Institution issues a permit known as ‘Product Certification or SLS Mark Scheme’ which gives a third party guarantee on the quality of a product. In this context it should also be noted that the implied *warranty* for products under s 32(3) of the CAAA is essentially the *guarantee* of the quality of products under SLS Marks Scheme; see Sri Lanka Standards Institution, at <http://www.slsi.lk/web/index.php?option=com_content&view=article&id=87&Itemid=118&lang=en> (accessed 7 August 2012).

protecting the consumer and recognising the trader's needs, it seems appropriate to require the trader to inform the consumer of the availability of essential spare parts and the time it will take to obtain such spare parts. The consumer then can make an informed decision about purchasing the item.

(iv) Reasonable time for supply:

The table above also indicates the ACL's recognition of the importance of providing statutory protection to the consumer where a contract for the supply of services does not stipulate when those services are to be provided. The importance of the guarantee as to reasonable time for supply of services under s 62 of the ACL is in its ability to provide the consumer with a 'right to approach a court or tribunal to seek appropriate orders when services are not provided within a reasonable time'.²⁷ Notably, no such protection has been recognised thus far under the provisions of the CAAA.

(v) Remedies:

The significance of the consumer guarantees regime under the ACL also lies in the nature of the remedies it provides for failure to comply with consumer guarantees. These remedies come under two categories – remedies in the event of a major failure,²⁸ and remedies in the event of a minor failure to comply with consumer guarantees provisions.²⁹

Section 259(3) states that:

If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

- (a) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection; or
- (b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

In the event of a minor failure — a failure that can be remedied — to comply with consumer guarantees, the consumer is entitled to require the supplier to remedy the failure within a reasonable time; or by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.³⁰

While the CAAA does not make a distinction between implied warranties and conditions, it does provide limited remedies for breach of implied warranties recognised under s 32. This section states that an aggrieved consumer may make a complaint to the authority in writing within 1 month of the alleged breach of the implied warranty under s 32.³¹ The expression that a complaint can be made against 'the trader or other person' is vague because

²⁷ Ibid, at [7.63].

²⁸ ACL s 260; Note that NZ's equivalent provisions in the Consumer Guarantees Act 1993 s 18(3) refers to the concept of failure of a 'substantial character'; See also the NZ cases of *Stephens v Chevron Motor Court Ltd* [1996] DCR 1; *Cooper v Ashley & Johnson Motors Ltd* (1997) 6 NZBLC 102.

²⁹ ACL s 259.

³⁰ ACL s 259(2).

³¹ ACL s 32(3).

it does not specifically explain the type of persons, who come under ‘the other person’, ie, whether it includes agents or manufacturers against whom such a complaint can be lodged. The remedies available are a compensation determined by the authority or a refund.³²

Overall, the discussion above points out that there is scope for improvement of the position of the Sri Lankan consumer through an advanced set of implied terms, and rights and obligations which apply where goods or services are supplied to the consumer. The consumer guarantees provisions under the ACL which replaced the previous statutory implied terms under Australian law, provides an attractive model for improving the current implied warranties regime for consumer contracts under Sri Lankan law. Particularly, replacing the implied warranties under the CAAA with a single set of consumer guarantees, and incorporating clearly defined statutory remedies which include not only a compensation determined by the authority, but also the right to reject the goods and repair will also be useful improvements to the consumer rights and protections under this legislation.

Defective goods actions

The CAAA makes no express provision for liability on the part of the manufacturer of defective goods.³³ However, it is implicit in the remedial system provided under the CAAA that it allows the aggrieved consumer to make a complaint against the manufacturer of defective goods, if the defect relates to breach of an implied or express warranty given by him or her, or breach of standards and specifications relating to goods and supply of services.³⁴ In these circumstances the consumer will be entitled to a compensation ordered by the authority.

In this context, it is important to note the wide scope of the concept of manufacturer adopted in the CAAA is wide in scope. The manufacturer is defined as ‘any person who — makes any article or any goods; assembles or joins any article or any goods whether by chemical process or otherwise; or adapts for sale any article or any goods’.³⁵ Thus included within the statutory definition of manufacturer would be a person who produces, assembles, extracts or processes goods. This provision along with the provisions of s 68 answer an important question whether or not a deemed manufacturer (such as an importer of goods) can be identified as a manufacturer for the purposes of

³² CAAA 32(5).

³³ Note that CAAA makes no provision for defining defective goods. Typically, defective goods or goods that have safety defects are goods that are actually unsafe, not just of poor quality or inoperative; J Kellam and L Nottage, ‘Happy 15th Birthday, Part VA TPA: Australia’s Product Liability Morass’ (2007) 15 *CCLJ*26 at 28; Note that ACL provides a definition of this term: ‘goods have a safety defect if their safety is not such as persons generally are entitled to expect’; s 9(1) of the ACL; see also s 9(2) of the ACL which sets out a list of factors that are relevant to determine the extent of the safety of goods: see, eg, *Gliderol International Pty Ltd v Skerbic* (2009) 170 ACTR 1; [2009] ACTCA 16; BC200909580, where the court held that the instructions for installing a garage door were deficient and not safe as persons were entitled to expect.

³⁴ See CAAA s 13.

³⁵ CAAA s 75.

recovering damages for physical injury or loss of property.³⁶ The CAAA states that where an offence under this Act is committed by an agent or servant of the manufacturer, it is deemed that that offence has been committed by the manufacturer.³⁷

From a practical point of view, recognition of the liability of agents and servants of the manufacturer such as the liability of an importer is of importance because the consumer may not always be successful in recovering compensation from a manufacturer who has no place of business in Sri Lanka. As Sri Lanka relies on imports in certain categories of consumer items (such as pharmaceuticals, petroleum, milk powder, textiles and motor vehicles),³⁸ this provision is likely to be in the interests of the consumer because the consumer could buy products manufactured overseas, yet seek remedies locally against as wide as possible a range of potential defendants in defective goods actions.

However, a review of the CAAA indicates the lack of express provisions governing the liability of manufacturers of defective goods, and in particular, highlights the need to recognise the nature and types of liability that can be imposed under the current regime.

Types of liability

The CAAA makes no provision for situations where the consumer³⁹ suffers physical injury or damage to property because goods turn out to be defective. In those circumstances the technicalities of the law of contract will also effectively prevent the consumer and/or a third party initiating action against the manufacturer — as the manufacturer is not privy to the contract under which the product was sold to the consumer.⁴⁰ In other words, unless a direct contract or a collateral contract exists between the manufacturer and consumer, the latter party may not pursue an action in contract against the former because of the lack of privity of contract between them.

Consequently, if the consumer purchases from a retailer a faulty kitchen appliance which injures him, his wife or a relative for whom he bought it as a gift, the privity of contract will not allow those injured persons to have a claim for damages against the manufacturer. Therefore, an action against the manufacturer for injury to persons or damage to property caused by defective products will have to be pursued separately under the law of tort.⁴¹ Lack of privity of contract is not relevant to an action in tort. In pursuing an action in tort the consumer (as the plaintiff) bears the burden of establishing a breach of

36 See, eg, *Leeks v FXC Corporation* (2002) 118 FCR 299; 189 ALR 288; [2002] FCA 72; BC200200176; Also consider the definition of manufacturer under the ACL — s 7 which includes not only the actual manufacturer but also a person who imports goods into Australia; see also *Ryan v Great Lakes Council* (1999) 102 LGERA 123; (1999) ATPR 46-191; [1999] FCA 177; BC9900565; ACL goes further to provide for situations where a person is injured by a defective product does not know the identity of the manufacturer; See ACL s 147.

37 CAAA s 68: Principal liable for offences of agents and servants.

38 See, generally, Central Bank of Sri Lanka, Annual Report 2011.

39 Note that the consumer is defined under s 75 of the CAAA as 'an actual or potential user of any goods or services made available for a consideration by any trader or manufacturer'.

40 See, eg, *Chinta Devi v Glacio Ltd* (1985) 1 SLR 265.

41 *Ibid.*

duty of care on the part of the manufacturer or that the manufacturer was at fault.⁴² Arguably the problem with this delictual remedy is that it may be difficult to establish that the manufacturer was at fault for manufacturing or distributing a product that is defective, particularly in technology driven industries such as the manufacture of pharmaceuticals, electrical equipment or motor vehicles. Thus in an action in tort, the consumer under the current Sri Lankan law may establish that the product which caused the physical injury to him or her, violated the standards and specifications contained in the Gazette notifications issued by the authority in compliance with those prescribed by the Sri Lanka Standards Institution, and hence the product was defective. The consumer may also rely on the doctrine of *res ipsa loquitur* to establish the product's defectiveness.⁴³ On the other hand, the manufacturer may rely on its compliance with such standards and specifications as evidence of the product's non-defectiveness. In short, the proof of manufacturer's fault is fundamental to a product liability action in tort. The requirement to establish the manufacturer's fault, particularly in relation to the production process, can be considered as the principal and obvious short coming of a product liability action in tort.⁴⁴

Therefore, it is proposed that a future response to the difficult burden of proof on the consumer, would be to incorporate a strict liability regime into the CAAA — liability on the part of the manufacturer is strict in that absence of fault on his or her part is no defence — which would enable the consumer to seek statutory remedies for physical injury and damage to property caused by defective goods. The consumer would then be able to seek enforcement of the statutory remedies through the authority which would be much more expedient than costly civil litigation.

A statutory strict liability

Having considered the legal position under the CAAA above as not being able to expressly and adequately provide for the manufacturer's liability for goods that have safety defects, attention may now be directed at the Australian legal position under the ACL which is in essence a strict liability regime. Under this regime the consumer is required to establish only causation — the defect in the product in fact caused the injury or damage. The major arguments

42 Ibid; see also *Donoghue v Stevenson* [1932] AC 562 at 599 per Lord Atkin; [1932] SC (HL) 31; [1932] All ER Rep 1; (1932) 101 LJPC 119:

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

43 See cases that inferred negligence on the part of the manufacturer and required him to disprove the inference, eg, *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 101 per Lord Wright; (1935) 9 ALJR 351; [1935] All ER Rep 209: 'Negligence is found as a matter of inference from the existence of the defect taken in conjunction with all the known circumstances.'

44 M Jones and A Dugdale (Eds), *Clerk & Lindell on Torts*, 20th ed, Sweet & Maxwell, p 776.

customarily put forward in support of imposing strict liability on the manufacturers of defective products can be summarised as follows:⁴⁵

- (a) Modern methods of production and distribution may impose an unfair burden in requiring an injured person to prove negligence against a producer who may be situated far away and to whose manufacturing processes the injured person will normally not have direct access.
- (b) Manufacturers may be regarded as having a moral responsibility for the safety of their products, especially when one considers the profits likely to be made by the distribution of such products and the public confidence often generated by the manufacturer's advertising.
- (c) It is felt to be unreasonable that individual persons should stand to bear the risk of loss caused by the defective products which will inevitably occur in any system of mass production. Especially where personal injury results, the individual affected will not normally have insured against the risk. Such insurance coverage can more easily and efficiently be procured by the manufacturer, with the result that the cost of such inevitable losses is ultimately borne by the consuming public as a whole as the cost of insurance is built into the manufacturer's price structure.
- (d) It is said that strict liability will serve as an incentive to more effective quality control.
- (e) Although liability may ultimately be brought home to the manufacturer by a series of contractual actions (in which liability will often, but by no means always, be strict), allowing the injured person a direct action against the manufacturer avoids the costs involved in such a series of actions, and overcomes the danger that the chain of liability may be broken at any stage by an exclusion clause or by insolvency. This argument is also sometimes allied with the assumption that the manufacturer is likely to be the person in the chain of distribution best able to bear the cost of liability.

Thus, the above arguments in support of a strict liability regime appear to be based on the assumption that the manufacturer as the person who is in control of production is also the person who is in the best position to avoid the injury or damage. The ACL's adoption of strict liability on manufacturers of defective products indicates the predominant tendency in other developed legal systems in the arena of product liability.⁴⁶ The ACL's scope of strict liability comes under the following four headings.⁴⁷

(a) Liability for loss or damage suffered by an injured individual⁴⁸

The ACL imposes a statutory liability on the manufacturers of goods that have safety defects if the defect causes injury to the consumer. Thus, if the consumer suffered injuries or was disabled due to an explosion caused by a mechanical defect in the refrigerator the consumer bought for household use, the manufacturer of the defective refrigerator will be liable to pay

45 D J Harland, 'Products Liability and International Trade Law' (1977) 8 *SydLRev* 358 at 380.

46 See, eg, The Consumer Protection Act 1987 (UK) which has introduced a measure of liability without fault into the product liability; see also *EU Product Liability Directive* (85/374/EEC).

47 With a view to enhance the benefits granted to the consumer under these provisions, ACL provides that any term of a contract that purports to exclude, restrict or modify the liability of a manufacturer is void; see ACL s 150.

48 ACL s 138.

compensation to the injured consumer if the causal link between the mechanical defect and the physical injuries can be established.

However, if the consumer dies as a result of the injuries suffered, 'a law of a State or Territory about liability in respect of the death of individuals applies as if (a) the action were an action under the law of the State or Territory for damages in respect of the injuries; and (b) the safety defect were the manufacturer's wrongful act, neglect or default.'⁴⁹

(b) Liability for loss or damage suffered by a person other than an injured individual⁵⁰

This provision imposes liability on the manufacturers of goods with safety defects if a person other than the injured consumer suffers loss or damage.

Thus, this provision will enable a dependant person of the consumer to seek compensation for the injuries suffered by the consumer due to a safety defect. However, the relationship between the dependant person and the consumer who suffered the injury should not be of a business or professional relationship.⁵¹

(c) Liability for loss or damage suffered by a person if other goods are destroyed or damaged⁵²

The ACL imposes liability on the manufacturer of goods that have safety defects if the defect results in destruction or damage of other goods of a kind ordinarily acquired for personal, domestic or household use or consumption, and results in loss or damage to the person who used the product or the person who intended to use the product.

For example, this provision will enable the consumer who bought foam insulation which was described by the manufacturer as 'self-extinguishing' but failed to extinguish the fire started by a spark from the fire place in his living room and destroyed the furniture in the living room, to seek compensation for the loss or damage to the items that were destroyed by the fire.

(d) Liability for loss or damage suffered by a person if land, buildings or fixtures are destroyed or damaged⁵³

The ACL imposes liability on the manufacturers of defective goods if the defect results in destruction or damage of land, buildings or fixtures acquired for private use, and results in loss or damage to the person who used the product or the person who intended to use the product for private use.⁵⁴

49 ACL s 138(3).

50 ACL s 139.

51 ACL s 139(1), (e).

52 ACL s 140.

53 ACL s 141.

54 Note that the application of this provision is subjected to the limitation in ACL s 141(1)(d) — the liability of the manufacturer under s 141 is limited to land, buildings or fixtures which have been acquired for private use; cf *Fulcher v Knott Investments Pty Ltd* [2012] QSC 232; BC201206609.

Statutory defences

The ACL makes provision for the following statutory defences to an action against a manufacturer of goods that have safety defects:

- (a) The defect in the goods did not exist at the time at which the electricity was generated⁵⁵ or goods were supplied by their actual manufacturer.⁵⁶

As held in *Effem Foods Ltd v Nichols* the manufacturer has to establish on the balance of probabilities that the defect in the goods existed at the time of supply and speculation and proof of mere possibilities are not enough.⁵⁷ This was a case where the claimant (the manufacturer) manufactured a chocolate-coated confectionary item sold under the name of Snickers bar. The opponent (Nichols) purchased one of these bars in a shop but when she attempted to eat it she bit into a concealed safety pin and was injured. Since the opponent's tongue had been penetrated she was given a tetanus injection which unfortunately produced an allergic reaction. Subsequently she was tested for the presence of the HIV and Hepatitis B and C viruses. She developed an obsessive condition which manifested itself in poor appetite and disturbed sleep. She brought an action in the District Court against the claimant as the manufacturer for breach of ss 74D and 75AD of the Trade Practices Act 1974 (Cth). The trial Judge held that the plaintiff had proved a prima facie breach of s 74D(1) because the bar was not of merchantable quality, and a prima facie breach of s 75AD because the defendant, in trade and commerce, had supplied defective goods manufactured by it which had injured the plaintiff. The case on liability turned on statutory defences. The defence under s 74AK(1)(a) of the Trade Practices Act required it to establish that 'the defect . . . did not exist' when the goods were delivered by the manufacturer into the supply chain. The court held that:

'There remains the possibility of malevolent interference by an employee of the retailer. During a quiet period, when the boss was away, an employee in charge of the cash register could have undertaken the exercise described by Mr Schulze. However there is no apparent motivation for an isolated act of this kind calculated to injure an unknown member of the public on a completely random basis. Such an act was not likely to damage the employer's business. There was no evidence that this manufacturer was the target of deliberate sabotage at this time. There was no evidence of threats or blackmail or of product recalls. On the evidence the presence of the pin in this bar was the result of an isolated occurrence either in the factory

⁵⁵ ACL s 142 (a)(i).

⁵⁶ ACL s 142(a)(ii).

⁵⁷ *Effem Foods Ltd v Nichols* (2005) ASAL 55-137; (2004) ATPR 42-034; [2004] NSWCA 332; BC200406088 (17 September 2004).

or in the shop. There was also no evidence that the retailer had a disgruntled employee who might have been motivated to commit such an act.⁵⁸

Thus, the court held that a manufacturer is not required to lead direct evidence to support these defences and a case based on circumstantial evidence is capable of discharging the onus. It was held that the defendant's evidence did not rise above the level of a speculative possibility, and that the trial Judge was correct in finding that the defences had not been established.

- (b) The safety defect was due to compliance with a mandatory standard for them under the law of the Commonwealth, a State or Territory.⁵⁹ A manufacturer who intends to rely on this defence must comply with s 148 of the ACL which requires him or her to give appropriate notice to, and make the Commonwealth a defendant in the defective goods action. The manufacturer must as soon as practicable after raising that defence, give the Commonwealth:⁶⁰

- (i) A prescribed notice of the action and of that defence; and
- (ii) A copy of the defence in the action.

If, in the action, the court finds that the plaintiff-consumer by whom the action is brought would, but for the defence referred to in subs (1) have succeeded against the manufacturer against which the action is brought, then the Commonwealth, and not the manufacturer is liable to pay the amount of the loss or damage caused by the safety defect and the court is to enter judgment against the Commonwealth for that amount.⁶¹

- (c) The state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered.⁶² The following case illustrates the application of this defence.⁶³

In *Graham Barclay Oysters Pty Ltd v Ryan*,⁶⁴ Graham Barclay Oysters Pty Ltd (Barclay Oysters) and other oyster growers grew oysters at Wallis Lake, located within the Shire of Great Lakes in New South Wales. A group of consumers, including Ryan, contracted the hepatitis A virus as a consequence of eating oysters grown at Wallis Lake which were contaminated with the virus. There was evidence that the source of the contamination was pollution of the lake by infected human faeces which came primarily from land-based locations surrounding the lake.

The question arose as to whether the courts below were entitled to find that Barclay Oysters had discharged the onus of establishing that

58 Ibid, per Handley JA.

59 ACL s 142(b). See also the definition of mandatory standard in ACL s 2.

60 ACL s 148 (1).

61 ACL s 148(3).

62 ACL s 142(c).

63 See also *Merck Sharpe & Dohme (Aust) Pty Ltd v Peterson* (2011) 196 FCR 145; 284 ALR 1; [2011] FCAFC 128; BC201107861; *Drake v Mylar Pty Ltd* [2011] NSWSC 1578; BC201110376 where the manufacturer's defence based on state of the art succeeded.

64 (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54; BC200207277.

when it supplied the oysters, the state of scientific or technical knowledge was not such as to enable the presence of contamination to be discovered. The High Court held that:

‘The law so far as the liability of Barclay is concerned is well settled. It was obliged to take reasonable care for the safety of persons who consumed its oysters. So much was conceded by Barclay. Bearing upon that matter are these facts: of most importance that Barclay was carrying on a commercial activity in the cultivation and sale of oysters, that Barclay was not only obliged to have, but also had a great deal of knowledge about the cultivation and harvesting of oysters, and in particular of the potential for infection after heavy rain; that oysters were susceptible to faecal contamination; and that there were numerous potential sources of such contamination in the catchment of the lake. Useful measures were available and had been adopted by Barclay but they could provide no complete defence against hepatitis A infection. The trial judge made a finding that Barclay could have made a significant contribution to the reduction of risk by causing an inspection to be made of the foreshores of the lake. Barclay was armed with the knowledge of outbreaks of hepatitis A on other occasions in other places. Hepatitis A is a particularly unpleasant and dangerous illness. By a combination of inspections (as held by the primary judge) and a suspension of harvesting for longer than a few days, the risk might have significantly been reduced. As grower and supplier for profit, Barclay could and should be expected to provide safe oysters. These matters led the trial judge to make what was essentially a finding of fact that in failing to adopt those measures Barclay was in breach of its duty of care to Mr Ryan.’⁶⁵

- (d) While a component manufacturer will be liable to compensate for physical injury or damage to property where the defective component is included in the finished item he or she will not be liable if that safety defect is attributable only to: (i) the design of the finished goods; or (ii) the markings on or accompanying the finished goods; or (iii) the instructions or warnings given by the manufacturer of the finished goods.⁶⁶

Overall, it is argued that the adoption of a statutory strict liability regime under Sri Lankan law, similar to that of the ACL would be useful to ensure that the legislation itself will address situations where the consumer suffers physical injuries and damage to property caused by defective goods. Such a

⁶⁵ Ibid, at [328].

⁶⁶ ACL s 142(d); Additionally, s 137A of CCA provides statutory recognition of contributory acts or omissions to reduce compensation payable by a manufacturer of defective goods if the liability falls under ss 138, 139, 140 and 141 of the ACL; see also *ACCC v Glendale Chemical Products Pty Ltd* (1998) 90 FCR 40; (1998) ASAL 55-021; (1999) ATPR 41-672; BC9806620; *Mayes v Australian Cedar Pty Ltd* (2006) ASAL 55-159; (2006) ATPR 42-119; [2006] NSWSC 597; BC200604479.

statutory liability regime would also significantly improve and facilitate the enforcement of consumer rights. Specifically, it would ensure that the consumer as well as third parties such as family, friends, relatives and guests who suffered physical injury or loss of property as a result of defective goods is entitled to claim compensation from the manufacturer. The inclusion of statutory defences available to the manufacturer will also be useful to allay the fears of the manufacturers that an inclusion of statutory strict liability for defective goods may cause.

In light of the suggested inclusion of strict liability in the CAAA, it would be necessary for the CAAA to clarify the concept of defect. The adoption of a definition similar to the ACL's definition seems appropriate.⁶⁷

It would also be preferable if the CAAA could follow the approach adopted in the ACL (with appropriate modifications) requiring that an aggrieved consumer may make a complaint to the authority regarding defective goods 'at any time within 3 years after the time he became aware, or ought reasonably to have become aware, of the alleged loss or damage, the safety defect of the goods',⁶⁸ and that in any event a complaint regarding physical injury or damage to property caused by defective products must be made within at least 10 years of the supply by the manufacturer of the goods to which the complaint relates.⁶⁹ This time period will enable the manufacturers to have a more secure basis on which to estimate the likely future liabilities and on which to base their insurance.⁷⁰

Conclusion

It has been argued in this article that there are inadequacies relating to the liability on traders and manufacturers for implied warranties of goods and services, and the liability for defective goods under Sri Lankan law — the Sri Lankan Consumer Affairs Authority Act No 9 of 2003 (CAAA) — which may hinder its primary objective of consumer protection.

The problem with the current implied warranties regime under the CAAA

67 See s 9(1) of the ACL 'goods have a safety defect if their safety is not such as persons generally are entitled to expect'; see also s 9(2) of the ACL which sets out a list of factors that are relevant to determine the extent of the safety of goods. Note that the ACL's definition of 'defective goods' reflects the definition of the term used in the EC Directive for defective products; see EEC Product Liability Directive 85/374, Art 6 which states that 'a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product (b) the use to which it could reasonably be expected that the product would be put (c) the time when the product was put into circulation; Note that 1985 EC Directive has come to be regarded far outside of Europe as setting an international standard for reform of the law; see D Harland, 'Recent Developments in product and service liability in the Asia-Pacific region' (1997) 8 *Australian Product Liability Reporter* 53.

68 ACL s 143(1).

69 ACL s 143(2).

70 Harland, above n 45, at 391. Note that this time period for initiating action against the manufacturer has received criticism in the past, particularly, in relation to goods that can be expected to be in use for a longer period than 10 years, eg, in the case of pharmaceutical products the harm to the consumer may not occur until a very long time after exposure and in such cases the 10 year period could cause hardship: D J Harland, 'The Liability to Consumers by Manufacturers of Defective Goods — An Australian Perspective' (1981) 3 *Journal of Consumer Policy* 212 at 223.

is mainly its lack of certain protections such as the availability of repair and spare parts and reasonable time for supply. As the key consumer legislation it is important that the CAAA itself create these substantive rights of the consumer. The current use of warranty terminology in the CAAA seems to conflict with the goals of the statutory remedial system that the consumer may first resort to alternative dispute resolution through the authority without having to face difficulties in using the normal judicial process to vindicate their contractual rights. The elimination of warranty terminology in the CAAA will therefore clarify the current legal position that the term warranty has not been used in the traditional sense, that is, as a contractual term the breach of which requires the consumer to establish privity. Hence, it has been argued in this article that the recent legislative developments in Australia that replaced the previous implied conditions and warranties under the Trade Practices Act with consumer guarantee provisions under The Australian Consumer Law can usefully be adopted as a model for law reform in Sri Lanka.

In addition to the suggested inclusions or modifications for manufacturer's liability arising from consumer guarantee provisions which also bind the trader, another important aspect that has been proposed in this article is the inclusion of statutory provisions for the manufacturer's liability for goods that have safety defects. The manufacturer's liability for defective goods supplied under an express or implied warranty or guarantee comes under s 13 of the CAAA.⁷¹ However, the legislation does not specify the nature of liability of the manufacturer in circumstances where the consumer or another person suffers injury or loss of property caused by the goods that subsequently turned out to be defective. Therefore, an injured consumer or another injured person may pursue a claim for compensation from the manufacturer of a faulty product if under the law of delict the consumer proves that the defect was caused by the manufacturer's negligence. However, the proof of negligence in the manufacturing process, in the distribution, in the advertising of goods, and so forth casts a burden on the consumer.

On the other hand, the Australian Consumer Law has a number of desirable provisions intended to improve the position of the consumer. First, it imposes a measure of strict liability on the manufacturers for physical injury to the consumer and loss or damage of goods or property caused by defective goods. These provisions have largely overcome the anomalies caused by the privity of contract doctrine — where the express or implied warranty does not cover third parties. Second, it provides statutory defences available to the manufacturer.

Drawing upon this model of strict liability under the ACL, it has been argued that a statutory strict liability regime would significantly improve the ability of the consumer to obtain compensation in the event of physical injury or damage to property. It has also been argued that the CAAA should spell out clearly on the face of the legislation for each consumer right in relation to the manufacturer's liability for goods that have safety defects rather than leaving the consumer to consult the law of negligence to determine whether he or she is entitled to compensation.

⁷¹ Note that CAAA does not clarify whether the manufacturer's or trader's warranty or guarantee relates to the quality, performance and characteristics of goods.

There is also a need to clarify the position under s 13 of the CAAA whether or not the liability for implied warranty or guarantee referred to in that section covers any physical injury to the consumer and also whether or not the warranty or guarantee can be extended to protect the third parties injured or who suffered damage to property, and thereby allow persons other than the original consumer to make a complaint to the authority regarding defective goods provided under such a warranty or guarantee.

The anomalies highlighted in this article lead to there being a need for a review of the key consumer legislation in Sri Lanka. The arguments presented in this article are intended to provide a starting point for further development of the CAAA to afford consumers the protection they currently lack. It is hoped that the statutory liability regimes for consumer guarantees and defective goods actions proposed in this article would serve as a model for improvement and the way forward for Sri Lanka.