DAMAGES IN A CONSUMER SALE CONTRACT: REVIEWING THE CONSUMER PROTECTION BILL, 2015

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ABSTRACT

Consumer protection law rests on the foundations of contract law and the law of sale of goods. A consumer law has to conceptually express this foundation and the modifications it is bringing about in these laws. Without this, the law would become unclear, conflicting and confusing. In this respect, the Consumer Protection Bill, 2015 is not secured in its foundation and needs revision. The paper reviews the rights of the consumer (buyer) to receive damages for breach by the seller. The bill recognises only repair and replacement as damages for the consumer. For claiming other damages, the consumer must establish negligence by the seller. The principle of contract law, to the contrary, is that for every breach, irrespective of the intention or diligence, the seller has to pay damages to the buyer. The bill has mixed up contractual damages with damages under the law of torts. In sale contracts, consequential damages arising from defective goods are readily recognised. The bill should recognise this. The paper, reviewing the law, develops draft provisions on the theme, which are mentioned in the last chapter of this paper.

INTRODUCTION

Consumer protection law rests on the foundations of contract law, law of sale of goods and law of torts. Taking the rights of the consumer as given in these laws, it creates further rights for the consumer. There cannot be a better testimony to this than the recently enacted Consumer Rights Act, 1985 of the UK. The Act systematically layers the rights of the consumer in contract law, law of sale of goods, law of torts and other laws. It then goes on to create further rights for the consumers. The rights coming from the different laws are well-networked and harmonised.

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In India, while enacting the Consumer Protection Act 1986, (*hereinafter* "CPA") this aspect of consumer law was ignored. The Act was drafted in itself, without using the standard lexicon or principles of contract law and the law of sale of goods. As a result, the CPA lacks conceptual clarity and is unhappily drafted. The Consumer Protection Bill 2015 has been introduced in the Parliament to replace the CPA. It provides amendments, among others, on unfair contract terms, unfair advertising and product liability. The bill, however, heavily borrows from the CPA in content, structure and style. As a result, it ends up being incomplete and unclear. In this paper, we review the provisions in the bill on award of damages to a consumer in a sale contract. As our laws share proximity with the British law, we will freely draw from the British court judgements.

DAMAGES IN CONTRACT LAW

There is no consumer without a contract. It is a contract which creates the rights and obligations for a consumer. Thus, the bill defines a consumer to be a person who enters in a contract to buy goods or avail services.[2] The rights of a consumer, as a contracting party, are well settled in contract law and the law of sale of goods. The consumer law must recognise these existing rights. In addition, it should create further rights by modifying contract law and the law of sale of goods. Let us then explore the rights of a consumer for award of damages in contract law. We will use the term consumer and buyer interchangeably.

The contract law has set the general principles for the award of damages. For every breach, the suffering party can claim damages. In addition, the suffering party may have the right to terminate the contract. In another paper, we have reviewed the right of a buyer to terminate a sale contract.[3]

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2 It also extends the rights of a consumer to others. This comes as an extension of the right of the party who enters in the contract.

3 Akhileshwar Pathak, *The Consumer Protection Bill, 2015: (Lack of) Rights of the Consumer to Terminate Sale Contract*, Working Paper No. 2015-09-01, Indian Institute of Management, Ahmedabad (2015), *available at* http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/7603570072015-09-01.pdf (last accessed 16 July 2016).

In this paper, we will focus on the right of the buyer to get damages for breach by the seller. The general principle for award of damages is to put the parties in a position they would be if the contract were performed. As a sale is a specific form of contract, the law of sale of goods has further adapted the principles for a sale contract. In a sale contract, a seller can be in breach of a contract term in the following ways. One, the seller may delay in delivering the goods. Two, the seller may not deliver the goods. Three, the delivered goods may not be of the contracted quality. We will consider each of the said aspects.

(a) Damages for delayed delivery

A sale contract may have provided the time for delivery of the goods. The seller should supply according to the delivery schedule. Alternately, a sale contract may be silent on the time for delivery of the goods. In this case, the seller has to deliver the goods within a reasonable period. The seller can delay in delivering the goods and yet, the buyer may accept the late delivery. This can happen where the buyer does not have the right to terminate the contract for delay in delivery or opts not to exercise the right. The end result is the buyer gets delayed delivery. The buyer can be put in the situation he would be in if the goods were delivered on time, by hiring goods of the same description. The adequate award of damages for the buyer then is the seller paying the hiring charges. An alternative is the seller paying additional costs which may have been incurred by the buyer as a result of having to make do without the goods during the delay. For example, a buyer of a washing machine, following a delayed delivery, may hire a washing machine or get his clothes washed from a laundry. In the first he incurred the hiring charges and in the second, he has incurred costs in making do without the goods.

(b) Damages on termination of contract

The buyer may have the right to terminate a contract for a breach by the seller and exercise this right. The buyer can put himself in a situation he

would be in if the contract were performed, by buying goods of the same description from another. If the buyer gets it cheaper, there is no loss to him. If he has to pay more, the difference is the loss. The seller should pay this in damages. The damages can be readily worked out. For consumer goods, there is always a market. The market price becomes the reference for working out the damages. The key question is for which date should the market price be referred to?

We would explore this for the different breaches for which the buyer can terminate the contract. One, there is no fixed time for delivery of the goods and the seller refuses to deliver the goods. In this case, the market price on the date of refusal will be the reference point. The difference between the contract price and the market price on the date of refusal to deliver will be the damages.[4] Two, the contract gives the right to the buyer to terminate the contract for delay in delivery. The contract has a delivery date and the seller delays in delivery. The buyer, exercising the right, terminates the contract. In this case, the reference point for award of damages is the market price at the time the goods ought to have been delivered. The buyer does not have to mitigate his losses by going to the market and getting the goods from another source. He can simply get the difference between the contract price and market price on the date the goods were to be delivered.[5]

Other grounds for termination of contract are in relation to the quality of goods. A buyer in a sale contract has the right to terminate the contract if the delivered goods are not in conformity with the description, the goods are not of merchantable quality or the goods are not suitable for the purpose stated in the contract. These are known as implied conditions. In addition to the implied conditions, the contract may set further quality standards for whose breach, the buyer may have a right to terminate the contract. These are known as express conditions. The buyer may terminate the contract

4 Melachrino v. Nickoll and Knight, 1 K.B. 693 (1920).

5 *See*, Melachrino v. Nickoll and Knight, 1 K.B. 693 (1920); Williams Brothers v. ET Agius Limited, [1914] A.C. 510 (HL).

if the supplied goods breach an implied or express condition. In this case again, the buyer will get the difference in the contract price and the market price. What should be the reference date for the market price? The way the law is structured, it requires the buyer to examine the goods and accept or reject them. If the goods are rejected, it is taken that the seller never delivered the requisite goods. Thus, the date of delivery becomes the date of breach and reference point for the market price.

It is significant to note that the buyer does not have to buy substitute goods. Once the seller is in breach, the damages are payable with respect to the market price. In *Union of India* v. *M/s. Commercial Metal Corpn.*,[6] the buyer terminated the contract but did not buy goods from another source. On this ground, the seller contended that the buyer could not claim damages. The Delhi High Court rejected the contention. It noted:

> I cannot accept the broad contention that unless the purchaser repurchases the equivalent goods in the market after the date of the breach, he cannot claim damages against the seller. In case of non-delivery by the seller, the measure of damages is the difference between the market price and the contract price. The market price on the date following the breach is the yardstick by which the buyer's claim for damages is evaluated and quantified… This 'breach-date rule' does not require him actually to go into the market and buy the substitute goods before he can succeed in his action for damages…No one has said that the buyer in a case of non-delivery by the seller must go into the market and buy like goods in order to claim damages. This has never been the law. The decisive element is the date of breach and the market price prevailing on that date.

The above are the general principles of law, drawn mainly from commercial contracts. In a consumer contract, there is almost always a

6 Union of India v. M/s. Commercial Metal Corpn., AIR 1982 Del 267.

market for goods. Further, unlike a commercial contract, where the buyer may have bought the goods for sale, in a consumer contract, the goods are for use. The market price becomes even more relevant. Consumer law should retain and express these rights of the buyer.

(c) Damages for breach not leading to termination

The seller may be in breach but the buyer may not have the right to terminate the contract. It can happen in different situations. For example, if the outer shell of a washing machine is scratched, the goods meet the implied conditions but there is still a problem with the goods. The seller is in breach of contract but it is not serious enough for the buyer to terminate the contract. The buyer may discover the goods are not of merchantable quality but after months of being delivered the goods. By this time, he would have lost the right to terminate the contract. In the situations where there is a breach of contract in relation to the quality of goods but no termination of contract, the consumer can be put in a situation he would have been in if the contract were performed, by the seller replacing or repairing the goods. Further, the customer is deprived of the use of the goods while these are being repaired or replaced. The customer is entitled to receive damages equivalent to hiring the goods of the same description for the days he could not use the goods or costs incurred in making do without the goods. In *Bernstein* v. *Pamson Motors (Golder Green) Ltd.*,[7] the court awarded damages for the days the car was not available to the buyer due to defect in it.

Is the appropriate remedy in replacing the goods or repairing the goods? This will depend on the nature of goods, and convenience and benefit to the parties. A consumer should not be denied of his valuable rights. At the same time, a trader need not unnecessarily be loaded with expenses. If a washing machine is delivered and installed and turns out to be defective, a better option may be in repairing it. The same may be the case in the sale of a car, a television or a music system. If a mobile phone turns out to be defective,

7 Bernstein v. Pamsons Motors (Golders Green) Ltd., [1987] 2 All ER 220.

there is no gain in the consumer being made to take it to a service centre, surrender it and collect later. He is better off being given a replacement and the seller can, in association with the manufacturer, attend to the piece. In some cases, it may be a short step for the retailer/manufacturer to repair and repack the goods as new. In other cases, the defective goods may just have to go as second hand goods. In some cases, replacement may be the normal or only choice, for example, where a shirt delivered to a consumer loses significant colour in the first wash. In other situations, repair may be the only option. Repair and replacement should be left as appropriate remedies, than specifying one over the other. The consumer courts may work out the appropriate remedy on a case to case basis.

Monetary damages can also be awarded instead of repair and replacement. Section 59 of the Sale of Goods Act 1930 provides the basis for this as "diminution or extinction of the price." The market price of the defective goods on the date of delivery is determined. The market price of the goods, if these were without defect, on the date of delivery is determined. The difference between the two becomes the loss to the buyer. The amount is awarded in damages to the buyer.[8] An implication is if the goods are seriously defective, even if the buyer does not have the right to terminate the contract, he may recover full value. This happened in *Argos Distributors* v. *Advertising Advice Bureau*.[9] In consumer contracts, the seller ordinarily repairs or replaces the goods. However, in some contracts, the remedy of repair or replacement may not be adequate. Or the buyer may prefer a difference in the price than a repair or replacement. In such cases, the consumer forums should have the option of awarding monetary damages. Thus, in addition to repair and replacement, there should be a provision for award of monetary damages.

8 *See*, Muthukrishna v. Madhavji Devichand and Co., AIR 1953 Madras 817; Bengal Corporation v. Commrs. for the Port of Calcutta, AIR 1971 Calcutta 357.

9 Argos Distributors v. Advertising Advice Bureau, [1996] CLY 5285.

CONSEQUENTIAL LOSSES: INJURY TO CONSUMER

We now come to another kind of a loss which arises to a buyer. The goods supplied are in breach of an express or implied condition or warranty and end up injuring the consumer or causing damage to property. For example, an electric iron sparks injuring the user. The losses we were considering so far were the direct losses, losses in the seller not giving the contracted goods. These losses are consequential losses, arising as a consequence of the goods being defective. Every breach has a consequence. A general question before the courts was how far does one go from a breach in working out the losses? The answer to this was as far as the parties contemplated to go.[10] However, most contracts were silent on consequences of a breach. It proved an intractable problem for the courts to infer contemplation when the parties were silent.[11] In a sale of goods, however, the question of contemplation of the parties has not been a problem. The courts have readily taken that it is in the contemplation of the parties that defective goods would lead to injury to persons and property. The principle for the award of the damages is the same, that is, to put the parties in a position they would be in if the contract were performed. Thus, if a person is injured, the damages are doctor's charges, hospitalisation, cost of medical care and loss of earning capacity and amenities arising from the injury. The damages for injury can be several times the value of the goods.

On the theme of consequential losses, we first review the classic case, *Grant* v. *Australian Knitting Mills Limited*.[12] Grant bought two woollen underwear garments from John Marlin and Co. He put on one suit on the morning of June 28, 1931. By the evening, he started to feel itchy. The next day, redness appeared on the front of each of his ankles. Soon, the rash became generalised and very acute. For weeks, he remained confined to bed and the doctor feared that he might die. The cause of the dermatitis was

10 The founding case on this is Hadley v. Baxendale, All ER Rep. 461 (1843-1860).
11 *See*, Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., 2 K.B. 528 (1949); Czarnikow Ltd v. Koufos (The Heron II), [1969] 1 AC 350.
12 Grant v. Australian Knitting Mills Ltd., All ER Rep. 209 (1935).

sulphides in the garments. The manufacturing process and the treating of the garments with chemicals had left a content of sulphites in the garments. These should have been washed off the cloth but were not. The court held the retailer "liable in contract" for selling underwear which caused injury to Grant. The court awarded a judgement of 2,450 pounds in damages, a large amount for the 1930s.

The second case we review is *Godley* v. *Perry*.[13] A store sold a plastic toy catapult. While a six-year old child was correctly using the catapult, it broke and led to serious injuries. The child completely lost his left eye. The catapult was made of cheap quality brittle plastic, something not suitable for children's toys. The toy was not of merchantable quality. The court noted:

> I have no hesitation in concluding that this catapult was a most dangerous toy to be released on the market. As a result, the plaintiff, a child of six, was grievously injured, and his left eye completely destroyed. The injuries are the subject of agreed medical reports, and the general damages to which, subject to liability, the plaintiff is entitled in respect of pain and suffering, the loss of his eye, and the discomfort of daily removal of the artificial eye, are, in my judgment, the sum of £ 2,500.

Thus, it was taken that it was in the contemplation of the seller that a fabric can lead to skin rashes and a catapult, to bodily injury. In consumer contracts, a frequent allegation of the seller will be that the consumer suffered injury as he did not make proper use of the goods. This is a factual question. If it is established that the buyer did not take normal or reasonable precautions, the seller will become free from being responsible for the breach. In *Lambert* v. *Lewis*,[14] the seller supplied a machine whose coupling was defective. The seller was in breach of implied conditions. A reasonable person would have known that the machine was defective. The buyer, however, continued to use the machine. The coupling gave way

13 Godley v. Perry, 1 All ER 36 (1960).
14 Lambart v. Lewis, A.C. 225 (1982).

leading to an injury to the buyer. The buyer could not claim damages from the seller. To conclude, consequential damages in sale of goods are more readily awarded.

MENTAL AGONY AND HARASSMENT

It is a settled principle of contract law that a contract-breaker is not liable for any distress, harassment, frustration, anxiety, displeasure, vexation, tension or aggravation which may arise from a breach of contract. However, there is an exception to this principle. Where the very object of a contract is to provide pleasure, relaxation or peace of mind, damages are awarded if it is not attained.[15] These contracts are for holiday, fun and entertainment, protection and safety. In other cases, physical inconvenience and discomfort caused by the breach would be considered and awarded damages. Attempting to make a distinction between "physical inconvenience" with anxiety, frustration and agony is nebulous. The courts are elaborating it. Applying the principle to the sale of goods, damages cannot be awarded for frustration, distress or mental agony arising from the conduct of the seller, for example, in delaying and deferring delivery of the goods or not satisfactorily removing defect in goods. Further, harassment, mental agony, frustration or anxiety arising from the goods cannot be claimed as damages. The exception is where the goods themselves are meant to give pleasure, mental peace or relaxation. The Supreme Court, in judgment after judgment, has reversed awards made for agony and mental harassment by the consumer forums. In *Ghaziabad Development Authority* v. *Union of India*,[16] the Supreme Court noted:

> Normally, no damages in contract will be awarded for injury to the plaintiff's feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the

15 Watts v. Morrow, 1 W.L.R. 1421 (1991); Farley v. Skinner, House of Lords, 2 A.C. 732. (2002).

16 Ghaziabad Development Authority v. Union of India, AIR 2000 SC 2003.

> breach of contract…The exception is limited to contracts whose purpose is 'to provide peace of mind or freedom from distress,'

The following are the illustrations of the cases where it was taken that the goods themselves were to give pleasure and joy. In *Jackson* v. *Chrysler Acceptances Ltd*.[17] a person bought a new car informing the seller specifically that he wanted to take it to France for his holiday. The car was defective and the holiday was ruined. The court awarded damages for the ruined holiday. In *Bernstein* v. *Pamson Motors (Golder Green) Ltd.*,[18] the buyer bought a luxury car for £8000. The car broke down on a motor way soon after purchase. The court noted that it was a luxury car. The sales brochure for the car had described it as: "A luxury car for the economy conscious 80s, at the forefront of automotive progress that's one reason why the Laurel does everything so well; it has been developed, refined and improved to a level which cannot fail to impress." The court, thus, awarded the damages: "What then is the proper measure of his damages? Clearly, in my judgment, he is entitled to the cost of making his way back home on the day of the breakdown, plus the loss of his full tank of petrol, as pleaded, in the sum of £32.90 between them."

Additionally, I think he is entitled to be compensated for a totally spoilt day, comprising nothing but vexation, and for this I would award the sum of £150. He was without his car for a lengthy period, but in my judgment only five days' loss of use can properly be awarded, taking us to 8 January when he declined the defendants' offer of a substitute and for those five days I would award £50.

The court thus awarded damages for vexation. It is also significant to note that the court awarded damages for the number of days the consumer could not use the car while it was taken away for repair. The National Commission in *Vinoo Bhagat, General Motors (India) Limited* v. *Regent*

17 Jackson v. Chrysler Acceptances Ltd., RTR 474 (1978).
18 Bernstein v. Pamsons Motors (Golders Green) Ltd., RTR 384 (1987).

Automobiles Limited,[19] awarded damages for mental agony and harassment as a high end car turned out to be defective. It noted:

> Keeping in view the aspect of 'consumer factor' or 'consumer component' or 'consumer surplus' as aforementioned we are of the opinion that [the buyer] is certainly entitled to compensation for the mental tension, harassment and inconvenience caused to him. [The buyer] has claimed Rs.25,000/- but in our view award of Rs.10,000/- will meet the ends of justice. There cannot be any standard for measuring damages in such a situation.

Thus, damages for mental agony and harassment are awarded only in the cases where the contract itself is for peace of mind, pleasure and joy.

REMEDY IN THE BILL

We can now explore the remedy provided in the bill. The bill borrows the provisions on remedies from the CPA. Section 35 in the bill provides that the consumer court will have the power to issue one or more of the following directions to the trader:

> (*a*) to remove the defect pointed out by the appropriate laboratory from the goods in question;
>
> (*b*) to replace the goods with new goods of similar description which shall be free from any defect…
>
> (*d*) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:
>
> Provided that the District Commission shall have the power to grant punitive damages in such circumstances as it deems fit;

19 Vinoo Bhagat, General Motors (India) Limited v. Regent Automobiles Limited, 3 CCC 79 (2005).

The only remedy the bill contemplates for breach of contract by the seller is repair and replacement. As we have seen, this is a remedy only in the cases where the buyer cannot terminate the contract. The bill has ignored to contemplate the right of the consumer to terminate the contract. The buyer may have the right to terminate the contract if the seller fails to deliver the goods or delivers goods violating an implied or express condition of the contract. As we have explored, for every breach, damages are to be paid for the loss. In the case of delayed delivery, it is the hiring charges of similar goods for the period of delay. In the case of termination, it is the difference between the contract value and market value of the goods. In the cases the buyer cannot terminate the contract, the remedy is repair and replacement. In addition, hiring charges are to be paid for the days the buyer is deprived of the use of goods while these are taken for repair or replacement.

Once there is a breach, the party has to pay damages. These are contractual damages. Award of contractual damages do not depend on the intention or diligence of the parties. The bill, however, provides for award of damages only "for any loss or injury suffered by the consumer due to the negligence" of the other party. For example, if a consumer has to pay Rs.2000 more in buying goods as the seller has failed to supply, the consumer cannot claim it as a right. He can claim it only by establishing that the breach by the seller happened due to his negligence. In fact, no remedy other than repair or replacement can come without the consumer establishing negligence by the other party. The provision, instead of creating further rights for the consumer, takes away rights already available to a consumer under the contract law.

The reason for this is a conceptual error in the drafting of the CPA. Damages are awarded under the law of torts also. These are different from contractual damages. Under torts, if a person owes a duty to another and is negligent in meeting the duty causing injury, the injured person can claim damages for the injury. Law of tort applies where there is no contract between the parties. Damages in contract and tort are parallel to

each other, in one there is a contract and in the other, there is no contract. The founding case on law of torts held a manufacturer owing a duty to the consumers. Thus, very early in the development of the law of torts, a consumer could claim damages in torts from a manufacturer for defective goods. In *Grant* v. *Australian Knitting Mills Limited*,[20] a case reviewed earlier, Grant got damages under torts from the manufacturer for the injury caused to him by wearing the garments which were not washed-off sulphides in the manufacturing process. The CPA has mixed the two streams, which were never meant to meet. As a result, the consumer has lost the right of contractual damages. The only right available to him is in establishing negligence by the other party.

To conclude, there are several remedies available to a consumer under the contract law and the law of sale of goods. In the case of delayed delivery, the buyer is entitled to receiving the hiring charges for similar goods for the period of delay. The buyer may, exercising his right, terminate the contract. In this case, the buyer will receive the difference between the market price and the contract price as the damages. In the cases the buyer cannot terminate the contract, repair or replacement of the goods is the remedy for the buyer. The bill mentions only the remedy of repair or replacement of goods. As a result, all other significant rights of the consumer, available to him under the contract law and the law of sale of goods are lost. The bill, instead of creating rights, takes them away. Under the bill, the right of the buyer to receive contractual damages are completely lost. A consumer can claim damages only by establishing negligence by the other party. This has happened because the damages under contracts and torts, which are parallel to each other, have been mixed up. Hence, draft proposals are being recommended, with which this paper shall end.

20 Grant v. Australian Knitting Mills Ltd., All ER Rep 209 (1935).

DRAFT PROVISIONS

The following is a draft provision on the rights of a consumer to be awarded damages in a sale contract. It is followed by damages under torts.

1. Damages under contract:

The consumer is entitled to award of the following contractual damages for breach by the seller:

(1) If the seller fails to deliver the goods, leading to a termination of the contract, the buyer will receive the difference between the prevailing market price on the day goods ought to have been delivered and the contracted price for the goods as damages.

(2) The seller delivers the goods but the goods are rejected for a breach of an express or implied condition. In this case, the buyer will receive the difference between the prevailing market price on the day the buyer terminated the contract and the contracted price for the goods as damages.

(3) The seller is in breach in relation to the quality of goods but the buyer does not have a right to terminate the contract, or, has the right, but elects not to terminate it. In both the cases, the seller will repair or replace the goods without any cost to the consumer. As an alternative, the contract price minus the market value of the delivered goods on the day goods were delivered can be awarded. In addition, the seller will pay the hiring charges for the same or similar goods for the number of days the consumer could not use the goods due to the defect and its repair or replacement. The hiring charges can be worked out as a rough estimate on the basis on the value of the goods and its longevity.

(4) In the case of a breach, where the goods are first repaired or replaced, followed by termination of the contract, the damages would be for both, as provided above.

(5) An injury to a consumer or death of a consumer, arising from a breach of an express or implied condition or warranty is a consequential loss.

The losses will be payable in damages in the following situations:

a. The contract has contemplated that the loss could arise from the breach, or

b. The contract is silent on the consequences of the breach but from the vantage of an ordinary person, with reference to the nature of goods, it is in contemplation that losses could arise from the breach.

The damages would include expenses of medical care, hospitalisation, doctor's charges; and loss of earning capacity and amenities arising from the injury.

(6) Damages will be paid for mental agony, harassment, anxiety or vexation only if the very purpose of the sale of goods was to provide peace of mind, calm and joy.

2. Damages under torts.

A consumer can claim damages for personal injury or death from a seller arising from the negligence of the seller. The claim under tort is an alternative to damages under the contract for personal injury or death. Damages can be claimed in the alternative. However, damages cannot be awarded under both for the same person injury or death.