1 Consumer protection rationales

Introduction

Laws have been used to protect consumers for centuries. These laws have drawn on a variety of legal forms, including criminal law, tort, and contract, to achieve their objectives. In addition to those laws that specify consumer protection as their primary concern, numerous other provisions have the effect of protecting the consumer, for example by streamlining the prosecution of fraud, protecting property, or facilitating litigation.[1] As a result, the boundaries of consumer protection law are not easily drawn. This book is concerned primarily with those laws that have consumer protection as their main objective, and which use the criminal law to achieve this objective.[2]

This chapter examines the role of law in consumer protection, focusing upon the objectives of consumer protection. In order to achieve this, we need to consider a number of matters. First, we need to identify 'the consumer' whom we are concerned to protect. Secondly, we need to consider the relationship between consumer protection and the market economy. It is sometimes argued that the state, through the law, should play only a restricted role in protecting consumers, because consumer protection is most effectively achieved by the operation of free and open markets. Law should be used to ensure that the markets function as freely as possible. Where markets do not work perfectly, the law should intervene to address this failure, provided this can be done cost effectively. Thirdly, this chapter will consider the extent to which consumer protection should concern itself with social, non-market-based goals. While accepting the importance of market and social goals, it is argued that the distinction between the two is not clearly drawn, and that some approaches could be viewed under either heading. Using the language of efficiency and equity

[1] See for example, the Misrepresentation Act 1967, the Theft Act 1968, and the Civil Procedure Rules 1998 (as amended).
[2] It is recognised that many of these statutes will have additional aims, in particular, the protection of honest traders and the encouraging of fair competition.

rather than market and social goals, Ramsay observes that '[a]n efficient policy is ultimately justified by equity since consumers are able to obtain goods and services of a quality, on terms, and at the price that they are willing to pay'.[3] Although helpful for the purposes of structure, the market/social distinction is imperfect in practice. The chapter concludes that the market, underpinned by private law, is an important technique for ensuring that consumers are able to purchase the goods and services that they want, and that intervention which helps the market to function is valuable. However, social goals are being recognised as increasingly important and it is important for any effective consumer protection policy to address both.

Who is a consumer?

Describing something as a consumer protection statute implies that there is someone who can be identified clearly as a 'consumer'. Although the private buyer of goods is perhaps our paradigmatic consumer, she has been joined by a wealth of other economic actors who can lay claim to forming part of that diverse group. As a result, there is the initial difficulty of identifying our subject matter. The first point to note is that there is no universally agreed definition of the term 'consumer', although a number of statutes, both criminal and civil, attempt to define it for their own purposes. One example of such a definition is found in s.20(6) of the Consumer Protection Act 1987, which states:

'consumer'
(a) in relation to any goods, means any person who might wish to be supplied with the goods for his own private use or consumption;
(b) in relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and
(c) in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his.

Another example is contained in s.12 of the Unfair Contract Terms Act 1977. This states that a party to a contract deals as a consumer if '(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in

[3] Iain Ramsay, *Rationales for Intervention in the Consumer Marketplace* (London, Office of Fair Trading, 1984), p. 12.

the course of a business'. Regulation 2 of the Unfair Terms in Consumer Contracts Regulations 1999 provides a further approach, describing a consumer as 'a natural person who, in making a contract to which these Regulations apply, is acting for purposes which are outside his business'. These definitions suggest that the consumer is a private individual acting in a private capacity. A further paradigm of consumer protection statutes is that the defendant must act in the course of a trade or business.[4] However, some UK statutes which would undoubtedly be regarded as examples of 'consumer protection' legislation fall outside this description. For example, the Trade Descriptions Act 1968 prohibits the supply of false and misleading information in business to business transactions.[5] There is also a suggestion that the Act might prohibit misdescriptions applied by private individuals, albeit in limited circumstances.[6]

It seems that the main characteristics of consumer protection statutes are that the supplier acts in the course of a trade or business, the recipient is a private individual, and the recipient acts in a private capacity. It should be remembered that it is important not to limit the term 'consumer' to contracting parties, as that might exclude the ultimate user of goods and services, such as the plaintiff in *Donoghue* v. *Stevenson* whom Jolowicz describes as 'the law's best known consumer'.[7] Indeed, it is possible to develop a much wider concept of the consumer than has traditionally been envisaged.[8] A private individual who receives services from a non-commercial state authority, such as the user of National Health Service facilities or even the recipient of state benefit, might be aptly described as a consumer. As Kennedy has stated, 'consumerism is just as concerned with the supply of services as with goods. The consumer merely becomes the client, or patient, or whatever rather than the shopper.'[9] We could even go as far as Ralph Nader, the American consumer rights activist, and equate the word 'consumer' with 'citizen'. Scott and Black point out that the consumer interest is involved whenever citizens enter relationships with bodies such as hospitals and

[4] For discussion of the meaning of this see Richard J. Bragg, *Trade Descriptions* (Oxford, Clarendon Press, 1991), ch. 2.
[5] See *Shropshire County Council* v. *Simon Dudley Ltd* (1997) 16 Trading Law 69.
[6] See *Olgeirsson* v. *Kitching* [1986] 1 WLR 304, although it is submitted that this case is wrongly decided.
[7] J. A. Jolowicz, 'The Protection of the Consumer and Purchaser of Goods Under English Law' (1969) 32 MLR 1, 1.
[8] For discussion see I. Ramsay, *Consumer Protection: Text and Materials* (London, Weidenfeld and Nicolson, 1989), ch. 1 and C. Scott and J. Black, *Cranston's Consumers and the Law* (3rd edn London, Butterworths, 2000), pp. 8–11.
[9] I. Kennedy, *The Unmasking of Medicine* (The 1980 Reith Lectures) (London, Allen and Unwin, 1981), p. 117. Cited in Ramsay, *Consumer Protection*, pp. 11–12.

libraries.[10] The Molony Committee, which was set up in 1959 to consider and report on changes to consumer law, opined that the consumer is 'everybody all of the time'. However, the committee did not suggest this as a working definition of the term, limiting their ambit to the purchase of or obtaining on hire purchase goods for private use and consumption.[11] This illustrates the numerous contexts in which an individual could be regarded as a consumer. It is interesting to note that when the idea of the Citizen's Charter was taking shape, there was some discussion about whether it should be referred to as the 'Consumer's Charter'. The former title was agreed upon, as the term 'consumer' was seen as 'narrow [and] econocratic'.[12] Equating 'consumer' with 'citizen' has the benefit of enabling us to look beyond the narrow economic function of the consumer, and to consider the individual's wider role in society. This is important in areas such as financial services where a strict economic definition of consumer might exclude private investors.[13] It thus becomes easier to see rights against the state as consumer issues. However, there is the danger that the term 'consumer' could become almost meaningless. Indeed, it could be argued that the legacy of the Citizen's Charter is that citizens have increasing been treated as consumers, rather than consumers as citizens.[14]

This book does not propose to offer a prescriptive definition of the consumer. It is concerned to examine the way in which criminal law is used in the context of consumer protection in the UK, but the UK has no agreed definition of the consumer. Few could deny that the Trade Descriptions Act 1968 and the Consumer Protection Act 1987 are properly described as consumer protection statutes, even though they take different approaches to whom they protect. It is therefore suggested that we should eschew a narrow definitional approach to the concept of the consumer, recognising that statutes may legitimately take different approaches to this issue. Nevertheless, we should recognise that this book is primarily concerned with those statutes which aim to protect the buyers of goods and services from the misbehaviour of traders and which use the criminal law to do so.

[10] See Scott and Black, *Cranston's Consumers and the Law*, pp. 8–11.
[11] Board of Trade Final Report of the Committee on Consumer Protection (the Molony Committee) Cmnd 1781/1962, para. 16.
[12] S. Hogg and J. Hill, *Too Close to Call: Power and Politics – John Major in No. 10* (London, Warner, 1995), p. 94.
[13] See P. Cartwright, 'Consumer Protection in Financial Services: Putting the Law in Context' in P. Cartwright (ed.), *Consumer Protection in Financial Services* (Deventer, Kluwer, 1999) and C. J. Miller, B. W. Harvey, and D. L. Parry, *Consumer and Trading Law: Text Cases and Materials* (Oxford, Oxford University Press, 1998), pp. 5–6.
[14] A. Barron and C. Scott, 'The Citizen's Charter Programme' (1992) 55 MLR 526.

Consumer protection and the market system

The perfect market

When examining why we intervene in the market to protect consumers, it is possible to take the so-called 'perfect market' as a starting point. This is helpful even if we doubt that such a system is attainable in reality. Free market economic theory suggests that if the characteristics of a perfect market could be created, there would be no need for regulation. In one of the leading studies, *Rationales for Intervention in the Consumer Market Place*, Ramsay identifies the characteristics of the perfect market as follows:

(i) there are numerous buyers and sellers in the market, such that the activities of any one economic actor will have only a minimal impact on the output or price of the market;
(ii) there is free entry into and exit from the market;
(iii) the commodity sold in the market is homogeneous; that is, essentially the same product is sold by each seller in the particular market;
(iv) all economic actors in the market have perfect information about the nature and value of the commodities traded;
(v) all the costs of producing the commodity are borne by the producer and all the benefits of a commodity accrue to the consumer – that is, there are no externalities.[15]

Those who champion the idea of the perfect market see markets as efficient and effective tools for maximising consumer welfare. The expressions 'free market economics' and 'free market economists' are used in this context for want of a better term. It is recognised that this is not a perfectly homogeneous group. This approach, which is associated primarily with the Chicago School, makes assumptions about the ways in which markets operate.[16] First, it assumes that individuals are rational maximisers of their own satisfaction. In other words, they know what they want, and will make logical, consistent choices in accordance with their wishes. Secondly, it assumes that by their choices, consumers influence producers and so dictate the way that the market operates. By making choices in accordance with their wishes, consumers send signals to traders. If traders do not respond to these wishes they will lose custom and, ultimately, be forced to exit the market. The consumer is therefore sovereign.

[15] Ramsay, *Rationales*, pp. 15–16.
[16] For a useful discussion see Scott and Black, *Cranston's Consumers and the Law*, pp. 26–9.

The market system can be viewed as desirable for two main reasons. First, it is economically desirable because it is efficient. Traders compete with each other to win custom, thereby raising standards and lowering prices. Secondly, it is seen as ideologically desirable that individuals' choices should be respected, rather than a choice made on their behalf by the state. Indeed, many supporters of the free market seem as much influenced by ideological matters as by efficiency arguments.[17] The free market recognises that different consumers are likely to be prepared to endure different levels of product safety and quality for different amounts of money. Where this is the case, a variety of products will be supplied with different levels of quality and safety for different prices. It is for consumers to act rationally in accordance with their own preferences and decide upon the level of safety or quality that they are prepared to purchase.

The perfect market only exists where the requirements set out in Ramsay's list are met, although we may still have competitive markets where not all are present. If we have numerous buyers and sellers competing with each other, no individual trader should be able to influence price appreciably by varying output.[18] By ensuring that there is free entry into and exit from the market, we ensure that anyone who wishes to enter a particular market may do so, and that anyone who does not respond to consumer demand will be forced to exit the market. By having perfect information, we ensure that the choices that consumers make are fully informed, and so likely to give effect to their true wishes. Where externalities do not occur we can be sure that only the parties to a transaction are affected by that transaction, and so the price of the transaction reflects its value to the parties. Free market economics tells us that where these factors are present there is no need for the state to intervene. However, that does not mean that the state has no role in the free market, as we will now see.

The market, the state, and the law

Although free market economics is frequently associated with rolling back the frontiers of the state, this does not mean that the free market requires the state to lose its role in all areas.[19] On the contrary, for the market

[17] See C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass., Harvard University Press, 1981) and P. S. Atiyah, 'The Liberal Theory of Contract' in P. S. Atiyah, *Essays on Contract* (Oxford, Clarendon Press, 1990), p. 121.

[18] F. M. Scherer, *Industrial Market Structure and Economic Performance* (2nd edn, Boston, 1980), p. 10.

[19] Andrew Gamble, *The Free Economy and the Strong State: The Politics of Thatcherism* (2nd edn, Basingstoke, Macmillan, 1994), ch. 2.

to function effectively it is vital that the state retains its strength. Frank Knight observed that 'the [market] system as a whole is dependent upon an outside organisation, an authoritarian state . . . to provide a setting in which it can operate at all'.[20] The state should, therefore, not be seen as an alternative to the market, but as an essential part of the market system. Hutchinson similarly comments that '[w]ithout a state willing or able to define and protect property rights, enforce contracts and prevent involuntary transactions, maintain a circulating medium, and curtail monopoly and anti-competitive behaviour, there is no market in any real or meaningful sense'.[21] The state is therefore vital to set up and enforce the structure in which the market operates. This is done through the mechanism of law. Law determines the 'rules of the game' in the first place, and acts as an umpire to interpret and enforce those rules.[22] For example, competition/anti-trust law ensures that markets are open and that competition exists. Property law sets out the rules of property and so determines rights of ownership, and explains how title can pass. Criminal law ensures that such rights are protected. As the market is premised upon the importance of exchange, the rules of contract law have to be set out. There is no inherent conflict between a strong state, strong laws, and the free market.

Although the state has to be strong for the market system to function effectively, the state only imposes its views on citizens in order to ensure that parties are held to their agreements. It is individuals' choices that count, rather than those of the state. As a consequence, laws prohibiting fraud and force are seen as protecting the private rights of citizens rather than enforcing the state's aims on those citizens.[23] The prime method by which choices can be demonstrated and effected is through the private law of contract. The next section considers the use of the private law to protect consumers within the context of the market. It focuses on the role and limitations of the law of contract, but also considers the place of the law of tort. Although contract law could be viewed as a technique of regulation, and so might be thought of as more appropriately placed in our discussion of techniques of regulation, its almost symbiotic relationship with the market has led it to be considered here.[24]

[20] F. Knight, 'Some Fallacies in the Interpretation of Social Cost' (1924) 38 QJEcon 582 at 606.
[21] A. Hutchinson, 'Life After Shopping: From Consumers to Citizens' in I. Ramsay (ed.), *Consumer Law in the Global Economy* (Aldershot, Dartmouth and Ashgale, 1997), p. 25 at p. 31.
[22] See M. Friedman, *Capitalism and Freedom* (Chicago, Chicago University Press, 1962).
[23] See J. Raz, 'Promises in Morality and Law' (1982) 95 Harvard LR 916.
[24] For an excellent examination of contract law as a form of regulation see H. Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999).

The use and limitations of private law

The role of contract

The law of contract is central to the effective working of the market. Contracts provide a mechanism through which individuals can express their preferences, create agreements with others, and ensure that those agreements are fulfilled. Contract law provides a framework through which the market can function. The classical theory of freedom of contract has been central to the development of contract law and its relationship with the market. As Sir George Jessel famously argued: '[i]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice'.[25] Although championed by the 'New Right' in the 1980s, classical theory was originally associated with left-wing movements in the nineteenth century, concerned that the people should be allowed control over their destinies.[26]

Classical theory's emphasis on freedom of contract is a natural consequence of putting faith in the market. Consumer sovereignty demands the means by which the consumer can exercise choice. If we accept that consumers are rational maximisers of their own satisfaction, then it is logical that they should decide the transactions into which they wish to enter, and the terms upon which those transactions will be entered. Intervention by the state beyond that agreed by the parties is therefore anathema to the traditional idea of contractual freedom. Classical theory was characterised by free dealing and non-intervention in substantive matters. It was concerned with fairness, but primarily in relation to procedure rather than substance, acting as an 'umpire' to be appealed to when a foul is alleged.[27] However, it is a moot point whether the law of contract ever championed the kind of freedom to which Sir George Jessel alluded. Despite the significant extent to which classical theory has been emphasised in writing, some commentators question how influential it was in practice. Reiter refers to Jessel's view as 'simply wrong',[28] and Atiyah notes several ways in which contractual freedom was limited,

[25] *Printing and Numerical Registering Co.* v. *Sampson* (1875) LR 19 Eq 462 at 465.
[26] See P. S. Atiyah, 'Freedom of Contract and the New Right' in Atiyah, *Essays on Contract*, p. 355 at p. 357.
[27] P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979), p. 404. For an even stronger defence of individual autonomy see R. Nozick, *Anarchy, State and Utopia* (Oxford, Blackwell, 1974).
[28] B. Reiter, 'The Control of Contract Power' (1981) 1 OJLS 347.

even in the so-called heyday of classical theory.[29] Nevertheless, the philosophy of classical theory was influential, and can be used to explain many of the characteristics of twentieth-century contract law.

Classical theory's aversion to intervention on the grounds of substantive fairness can be justified on a number of different grounds. Collins identifies four main propositions which underlie this, none of which convinces him.[30] It is worth saying a few words about these, as they provide both an authoritative summary of the key characteristics of classical theory and a useful critique of its principal arguments.

First, classical theory's adherents argue that most instances of apparent unfairness turn out to be illusory. For example, most terms which appear to be unfair will be balanced by corresponding benefits, such as a reduction in price. As a result, it is difficult to determine that a voluntary exchange is unfair.[31] Collins accepts that we should not jump to conclusions concerning the unfairness of transactions, and that unfair contracts are more difficult to detect than might first be thought. However, he recognises that unfair contracts do exist, and that the important point is to engage in a detailed examination of the particular circumstances of the transaction, and to take the whole picture into account.[32]

Secondly, it has been argued that approaches which allow contracts to be challenged on the basis of fairness will make it more difficult to construct markets, a prime aim of contract law. Several statutes allow contracts to be challenged on the basis of substantive unfairness, although different terms are used in different contexts. For example, the Unfair Terms in Consumer Contracts Regulations 1999 allow the courts to strike down a term in a consumer contract which 'contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. Also s.137(1) of the Consumer Credit Act 1974 allows a consumer to challenge a credit bargain on the grounds of its being extortionate. Although these provisions look appealing from the point of view of equity, there is an argument that they create uncertainty for the contracting parties, which makes it difficult for those parties to predict how their transactions will be judged. Collins questions this. First, he argues that business people do not regard planning documents as central to transactions and that as a result of this, uncertainty about legal

[29] Atiyah, *The Rise and Fall of Freedom of Contract*.
[30] Collins, *Regulating Contracts*, ch. 11.
[31] See M. J. Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post Benthamite Economics in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359.
[32] *Regulating Contracts*, pp. 258–9.

enforceability will seldom affect entry into transactions.[33] Secondly, he suggests that business people place great emphasis on their expectations, represented by such factors as the long-term business relation and the customs of the trade. As a result, general clauses such as good faith may be helpful in allowing decisions to be made in accordance with expectations. He concludes that most commercial parties 'would expect the legal system to decline to enforce terms in the planning documents that impose extremely harsh bargains'.[34]

The third argument that could be used to criticise intervention is that where the law attempts to regulate fairness, this tends to backfire. Epstein puts forward this view in the context of intervention on the grounds of unconscionability: '[w]hen the doctrine of unconscionability is used in its substantive dimension, be it in a commercial or consumer context, it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good'.[35] One example that has been given is that the setting of interest-rate ceilings may exclude poor consumers from the market altogether.[36] Another is that minimum-wage laws may lead to employers employing fewer people. Collins suggests that this will depend on the market in question, and points out that there is some empirical evidence that measures such as minimum-wage laws have led to a decrease in unemployment.[37] The evidence of the effects of minimum standards of this sort is ambivalent.[38]

Finally, it is sometimes argued that where genuine unfairness does occur, the most effective remedy will be to tackle the market failure that caused it. The issue of market failure is examined in some detail below and so is not considered in detail here. Suffice it to say that steps which correct market failure are desirable in helping the market to function, for example by generating competition and correcting information deficits. However, they cannot create perfect markets and will be limited in the extent that they protect consumers, particularly the most vulnerable. Collins concludes that regulation of unfair contracts can be desirable, and that such measures comprise an important ingredient of the legal system. He favours both 'open textured rules' rooted in private law, and

[33] Ibid. p. 269.
[34] Ibid. p. 271.
[35] R. Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 *Journal of Law and Economics* 293 at 315.
[36] See D. Cayne and M. J. Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 *University of Toronto Law Journal* 396.
[37] D. Card and A. B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton, N. J., Princeton University Press, 1995).
[38] See A. Leff, 'Unconscionability and the Crowd: Consumers and the Common Law Tradition' (1970) 31 *University of Pittsburgh Law Review* 349.