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Product Liability and Disclaimers in West Virginia: Reflections on Payne and Williams

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Reflections on *Payne* and *Williams*

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Two recent decisions by the West Virginia Supreme Court of Appeals have given unusual vitality to the contractual disclaimer of product liability. To some degree these decisions are now obsolete. To some degree they are not. The aim of this paper is to consider these rulings and reflect upon some of the many problems raised by them and the adoption of the Uniform Commercial Code.

In the first of the two cases, *Payne v. Valley Motor Sales*,[1] the purchaser of a new truck sued his seller to recover for the loss sustained when the truck ran off the road and was demolished. The plaintiff buyer's theory was that the truck was not merchantable, *i.e.* not fit for the ordinary purposes for which such a truck would be used. Recovery was denied in the Supreme Court of Appeals on the basis of a disclaimer in the sales contract. Noting "two distinct and conflicting lines of authority"[2] the court adopted the view which recognized the validity of the disclaimer. The court embraced this view because it deemed it to be in accord with the majority of jurisdictions in this country[3] and also because it was deemed consistent with the policy of freedom of contract.[4] Moreover, the court noted that the contrary view which refused to recognize the validity of such disclaimers grew from the famous *Henningsen*[5] case and was then to be found only in states which had enacted the Uniform Sales Act. The court suggested that the adoption of the Uniform Sales Act afforded public policy foundations upon which a rigorous investigation of the validity of a disclaimer could be based. Since West Virginia never adopted the Uniform Sales Act, the court reasoned it was additionally justified

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[1] 146 W. Va. 1063, 124 S.E.2d 622 (1962).

[2] *Id.* at 1070, 124 S.E.2d at 626.

[3] *Id.* at 1074, 124 S.E.2d at 628.

[4] See Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 325 n. 50 (1963).

[5] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

in refusing to consider the implied warranty as "a child of the law" and therefore deserving of special protection from disclaimers.[6]

The second decision, *Williams v. Chrysler Corp.*,[7] raised a broader range of issues. In that case the litigation originated as an action by a passenger against the buyer and manufacturer of a new automobile. The defendant buyer cross-claimed against manufacturer on the tort theory of *MacPherson v. Buick*[8] that a supplier of chattels owes a duty of reasonable care towards the ultimate user of such chattels. The *Williams* case clearly was premised upon a fault theory of liability—the manufacturer was liable because of negligence in the manufactuer of the automobile. The earlier *Payne* case had involved strictly a contract theory in which fault or negligence was immaterial. The claim of negligence against the remote manufacturer has been a means of avoiding the privity limitations of a contract based warranty action which, when narrowly confined, permits a buyer to sue only his immediate vendor.[9]

The interesting point of the *Williams* case is that the court again resolved the issue on the disclaimer provision. The opinion outlines the plaintiff's theory, notes its heavy reliance upon a recent article by the respected torts authority Dean Prosser,[10] acknowledges the adoption of a *MacPherson* type liability in West Virginia cases involving medicine[11] and chewing tobacco,[12] and notes the assumption by two federal Circuit Courts of Appeal that West Virginia would apply the *MacPherson* theory to automobile cases.[13] After this lengthy recitation, the opinion leaves the issue of the producer's liability suspended with the suggestion that the adoption of the Uniform Commercial Code may have affected the law significantly. The Williams appeal was then quickly dispatched in one brief paragraph by resort to the disclaimer provision. The language of the dispositive paragraph bears close consideration:

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[6] The court in Payne also ruled that the evidence did not support the jury's verdict. Thus the ruling on the validity of the disclaimer is an alternative holding.

[7] 137 S.E.2d 225 (W. Va. 1964).

[8] 217 N.Y. 387, 111 N.E. 1050 (1916).

[9] See Prosser, *The Assault Upon the Citidel*, 69 YALE L. J. 1099 (1960).

[10] *Ibid.*

[11] Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S.E. 190 (1901).

[12] Webb v. Brown & Williamson Tobacco Co., 121 W. Va. 115, 2 S.E.2d 898 (1939).

[13] Caprini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); General Motors Corp. v. Johnson, 137 F.2d 320 (4th Cir. 1943).

> "However, there can be no doubt that this language of the express warranty between the plaintiff and the defendant clearly and conclusively precludes the plaintiff from maintaining this action: '* * *this warranty being expressly in lieu of all other warranties *expressed or implied, and all other obligations or liability on its part.* * * *' (Italics supplied.) The rule seems to be well established in this jurisdiction that a party to a valid contract may in advance limit its liability so long as one of the parties thereto is not a common carrier or where the negligent act which was in futuro exempted did not amount to wilful, wanton or gross misconduct. Dunham v. Western Union Telegraph Co., 85 W. Va. 425, 102 S.E. 113; Zouch v. Chesapeake & O. Ry. Co. 36 W. Va. 524, 15 S.E. 185; and authorities cited in the opinions of those cases. This is the sixth syllabus point of the Dunham case: 'All just and reasonable conditions and regulations, prescribed in a contract * * * are binding on the addressee, whether his action to recover damages for breach of duty be in tort, or in assumpsit on the contract.' . . ."[14]

The court overstates the case by extracting a "well established" rule from *Dunham* and *Zouch* which supports the result in *Williams*. These two cases are quite distinguishable and their holdings could easily have survived an opposite result in *Williams*.[15] But even if *Zouch* and *Dunham* are to be taken to suggest a doctrine applicable in cases such as *Williams*, the rule suggested would be quite different than that applied in *Williams*. Note that the very language quoted from the Dunham syllabus starts with the admonition: "All *reasonable and just* conditions. . . ." A more recent utterance by the West Virginia court, not cited in the *Williams* case, is of like tenor: "[T]o relieve a party from liability for his own negligence by contract, the language to that effect must be

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[14] 137 S.E.2d at 321 (Italics in original.)

[15] Dunham and Zouch both involved contractual limitations of remedy by common carriers. Both involved cases where the person dealing with the carrier could have chosen a higher range of remedies by paying a moderately higher fee for the service involved. These cases did not rule, then, as a matter of law, on the conditions under which a person or business entity not a common carrier could totally disclaim liability for negligence. It should be noted additionally that the court in Dunham specifically acknowledged it was applying federal law, not state law. Because Congress had preempted control of interstate telegraph communications, the court recognized it was no more free to employ state law in Dunham than the West Virginia legislature would be free today to abolish the Interstate Commerce Commission.

clear and definite. . ."[16] But this caution which could moderate the harsh effects of the disclaimer appears now to have been abandoned. In *Williams,* the standard which is stated and applied is one that gives effect to a disclaimer so long as (1) the party disclaiming is not a common carrier; and (2) the conduct immunized does not involve wilful, wanton or gross misconduct. Simply restated, it would seem that *Williams* countenances disclaiming anything but liability for criminal conduct by anyone not a common carrier. This is not stretching *Williams* too far. The language of the paragraph quoted above supports this analysis. And more convincingly, what the court actually did in *Williams* lends even more poignant support. In the paragraph just preceding the one quoted above, the court remarked as follows about the warranty and disclaimer provisions of the contract involved: "A cursory examination of the warranty contained in the contract . . . is sufficient to reveal its restrictiveness and the necessity of giving the ultimate owner of the vehicle protection of either a judicial or legislative nature. . . ."[17] This concern for the necessity of giving ultimate relief to the purchaser was not linked with the moderating elements which were—prior to *Williams*—available under a still pliable, undeveloped and unsettled West Virginia law. By noting this deceptiveness in the disclaimer and failing to connect it with the available moderating elements which were so readily at hand, the court tacitly underlined the harshness of the *Williams* doctrine.

If support for such a callous doctrine is sought outside this state, little help is to be found. A survey of various materials indicates an absence of hard, fast rules. The omniscient encyclopedias speak with unusual ambivalence. The notion there abounds that plastic concepts of public policy or public interest may be employed to restrict the operation of disclaimers.[18] The presence of "superior bargaining power" may be enough to deny the advantaged party his license to injure with impunity.[19] "The law does not look with favor" is a favorite phrase introducing a statement of the pervasive animosity demonstrated towards such absolutions from fault.

[16] Bowlby-Harman Lumber Co. v. Commodore Service, Inc., 144 W. Va. 239, 248, 107 S.E.2d 602, 607 (1959).

[17] 137 S.E.2d at 231.

[18] See, e.g. 17 AM. JUR. 2d *Contracts* § 188 (1964); 17 C.J.S. *Contracts* § 262 (1962).

[19] See Tyler v. Dowell, Inc. 274 F.2d 890 (10th Cir. 1960); Tunkl v. Regents of Univ. of Calif., 60 Cal. 2d 182, 383 P.2d 441 (1963).

Treatises in the area offer little in the way of a dogmatic rule, but rather encourage a flexible, policy oriented approach.[20] Though a nose count of recent case decisions regarding the efficacy of a disclaimer shows a sizeable margin in favor of its validity, the vast majority of these cases involve litigation between business concerns—not between the relatively naive consumer and a giant national corporation.[21] Risk allocations between business men could rationally be viewed differently than those arrangements found in mass production contracts which the untutored citizen accepts on faith.[22] The unsettled nature of the legal doctrine in this area is demonstrated in the contrary results reached recently in California and New York. In California it was held that a disclaimer executed at the time of admission to a hospital did not bind the patient.[23] The New York court held a member of a health club was bound by her waiver when she claimed for injuries suffered while using a swimming facility provided under contract with the club.[24] A careful analysis of only the recent case law in this area would run far beyond the limited undertaking of this paper. This superficial survey has been tendered to demonstrate that there is no settled, automatic rule which provides a simple solution to the disclaimer issues as it was posed in the *Williams* case. On the contrary, most authorities point to a judicial responsibility to weigh carefully the possibility of overreaching.

The immediate product of the *Williams* decision is a very harsh doctrine but the callousness of this unconcern appears tempered somewhat by the court's treating the case as a very transitory affair. An obvious forecast of change emanates from a reference to the impending effect of the Uniform Commercial Code. Noting this, the court combined some language of the *Payne* case with a sophisticated principle of statutory interpretation and tendered an

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[20] See 6A CORBIN, CONTRACTS § 1472 (1962); PROSSER, TORTS 456 (3d ed. 1964).

[21] A general survey of head notes indexed under the West Key Number, Contracts 114, indicated about sixty decisions involving the validity of an exculpatory clause in the period since 1956. About two-thirds of these notes indicated the clause was upheld.

[22] This type of contract is becoming commonly known as the "contract of adhesion." Credit for originating this phrase is given to Edwin W. Patterson in his article, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919). See, Kessler, *Contracts of Adhesion, Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

[23] Tunkl v. Regents of Univ. of Calif., 60 Cal. 2d 182, 383 P.2d 441 (1963).

[24] Ciafolo v. Tic Tanney Gyms, Inc., 10 N.Y.2d 294, 177 N.E.2d 925 (1961).

intriguing prophecy that better times lay ahead for the consumer: "*Even if the provisions of the* [Uniform Commercial Code]. . . were not directly applicable, we would be among those states 'wherein the doctrine of public policy was used in connection with allowing implied warranties to be considered' as stated in the Payne case. . . ."[25] Two important points emerge from this sentence. First, the court indicates that policy implications arise from the adoption of the Uniform Commercial Code which radiate beyond its express terms. Second, the court suggests that these policy implications bode well for the consumer. These points are not mere loose conjecture. They deserve serious attention. They are pivotal remarks furnishing the most rational link between the court's expressed concern for giving a buyer "ultimate relief" and its cursory and uncritical acceptance of the efficacy of the disclaimer. The sentence gives a "things are darkest before the dawn" tone to the opinion which tends both to apologize for the result in *Williams* and suggest better times ahead.

The suggestion that the adoption of the Commercial Code may affect issues which do not fall expressly within its terms intimates that the court is ready to embrace a most sophisticated position in regard to the use of legislative materials. Perceptive commentators have long criticized courts for being too much of an opposite mind.[26] There can be no doubt that case oriented law teaching and legal research have deeply imbedded the idea that cases are read for broad principles while statutes state only narrow rules. Cases are to be reasoned from. Statutes are to be reasoned around. But this attitude should not obtain, the court has now indicated, so far as the Commercial Code is concerned. There may be a case for treating the Code specially in this regard,[27] but the concept of employing statutes generally as sources of principle and policy is a healthy one deserving wide application. But it should be recognized that the challenge of this approach is a rigorous one. It demands a thorough study of statutory materials and a careful

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[25] 137 S.E.2d at 231.

[26] E.g. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 213 (Pound ed. 1934).

[27] Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 88 (1965).

articulation of the principles which they support.[28] Judicious use of this method of policy determination eschews loose and haphazard generalizations. It is in this vein that difficult problems arise from the second point made in the court's prophecy in *Williams*.

Broadly speaking, the relevant general policy which will flow from the adoption of the Commercial Code is one of enhanced protection for the buyer of goods. So goes the obvious forecast of *Williams*. And this policy in turn involves two broad issues: (1) Does any obligation of quality extend from the manufacturer to the ultimate buyer and (2) may this obligation be abolished or limited by disclaimer. Whether the court's intimation of change applies to both of these issues is conjectural. The positioning of the statement in the case tends to indicate that the question of whether liability exists falls within the forecast. The language seems a part of the general conclusion of the discussion of the MacPherson issue. It seems to be advanced as a justification for leaving that issue unresolved. It appears, therefore, to bear upon the threshold question of whether any liability exists at all. But it is language from the *Payne* case that is called upon to flesh out the court's statement and this would seem to draw the disclaimer issue also within the range of the prophecy. The *Payne* case involved only the efficacy of the disclaimer and this inverting of the argument advanced in *Payne* suggests a different doctrine may now be in store for the disclaimer. At this point, it seems fair to assume that both issues are open for fresh consideration.

We start with the issue of whether any liability extends from a manufacturer to the ultimate purchaser. The forecast of the *Williams* case refers to the "doctrine of public policy" and links this with the peculiar status of the implied warranty as a "child of the law" under the Uniform Sales Act. Since the Uniform Sales Act provisions regarding implied warranties have been carried forward to the Uniform Commercial Code and that act has been adopted in West Virginia, an indiscriminate projection of *Williams* might suggest the law's concern with protecting the consumer has come to occupy that ephemeral state which, in terms of the metaphor, makes the implied warranty a "child of the law." In deed, we might assume that in response to a new legislative policy

[28] For a beautiful example of mixing statute and case rules to construct a general policy which is employed to dispose of a difficult question see Webb v. County Court, 113 W. Va. 474, 168 S.E. 760 (1933).

manifested by the adoption of the Uniform Commercial Code, West Virginia is now poised, ready to plunge headlong into a doctrine of absolute liability for manufacturers, suppliers and sellers. Shere silliness of course.

To disentangle sense from silliness, we must return to the *Payne* decision. The court there employed the legislative policy argument as a convenient means of distinguishing the *Henningsen* decision. Admittedly, the New Jersey court, in there holding the disclaimer invalid, did point to the adoption of the Uniform Sales Act as a manifestation of a legislative policy of consumer concern. But in the totallity of that opinion, this point was hardly a telling argument. It was a tolerable bit of fluff in an energetic opinion that dealt head on with a difficult problem. To turn this point into the distinguishing feature is to circumvent the vigorous and wide ranging arguments base on policy considerations. If we are to take the *Payne* distinction of *Henningsen* seriously, we should scurry about to study the more than sixty other uniform acts which have not been adopted in West Virginia and distill from those heady spirits a telling reservoir of legislative unpolicy.[29] This would require only a total disdain for the realities of the legislative process. Clearly the failure of West Virginia to enact the Uniform Sales Act was not a legitimate reason for ignoring the elaborate arguments in *Henningsen* which condemned the unfairness and deceptiveness of the new car warranty disclaimer. Those arguments stand on their own. They are not servient to the euphamistic lable hung on the implied warranty. And now to do a judicial about face upon the adoption of the Uniform Commercial Code does not correct the default of the *Payne* case. Rather, it compounds it.

Loose generalizations about the legislative policy implications of the Sales Act become the more misleading when the narrower issue here concerned is posed in terms of the successor Commercial Code. The crux of the immediate issue involves not the general problem of the *quality* of the implied warranty, or *what* it involves. The issue is *who* it involves. And here, the tribunal that intends to rest on some portentious implication of legislative policy lurking in the Uniform Commercial Code is in for a very injudicious prat fall.

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[29] See NAT'L CONF. COMM'RS ON UNIFORM STATE LAWS, HANDBOOK, chart at 302 (1964).

On the very point at issue here—the manufacturer's liability to the ultimate consumer—the Commercial Code is consciously neutral.

Admittedly, the Code does make one slight enlargement of the usual range of warranty protection. In section 2-318, warranties are extended to members of the family and household of the immediate purchaser and to guests in his home.[30] The sponsors of the Code recognized that this section approaches a very volatile area and in a comment stated:

> "This section expressly includes as beneficiaries within its provisions the family, household and guests of the purchasor. *Beyond this, the section is neutral* and is not intended to enlarge or restrict the developing case law on whether the sellor's warranties given to his buyer who resells, extends to other persons in the distributive chain." (Emphasis added.)[31]

In contrast to this consciously neutral position, the Virginia legislature abandoned the uniform provision at this point and substituted the following:

> "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; . . ."[32]

The glaring contrast between this provision and the uniform section adopted in West Virginia and other Code states[33] demonstrates beyond question the distinction between the neutral position of the Commercial Code and the consumer-prone attitude of the Virginia law.

The manufacturer's liability to his ultimate consumer poses a legal issue buffeted by very turbulent and unsettled doctrines at the present.[34] The food cases have given West Virginia law a start

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[30] W. VA. CODE, ch. 46, art. 2, § 318 (Michie Supp. 1964).
[31] UNIFORM COMMERCIAL CODE § 2-318, comment 3 (1962 official ed.)
[32] CODE OF VA. § 8.2-318 (1965 added vol.)
[33] See UNIFORM COMMERCIAL CODE PERMANENT EDITORIAL BD. REP. No. 2, 39 (1965).
[34] See, e.g. RESTATEMENT (SECOND) TORTS § 402A (Tent. Draft No. 10 1964); Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

in this area,[35] the exploding bottle cases have added an interesting supplement.[36] But, contrary to the implications of the *Williams* case, there is no nascent legislative policy to be devined from the Uniform Commercial Code that will provide the easy answer to this problem.

While the Code is in fact silent on the issue of the manufacturer's liability, it does provide guides in regard to disclaimers.[37] Note that the Code would expressly apply to the issues raised in the *Payne* case—a suit between the immediate buyer and the seller. In such situations, section 2-316 demands that the disclaimer mention "merchantability" and be "conspicuous" in the written contract.[38] From this section it is possible to draw a general principle applicable to other cases which do not fall within the express provisions of the Code. Such a principle would demand that one seeking to disclaim a responsibility which the law would ordinarily imply is obligated to employ prominently and conspicuously language which is well suited to call attention to the disclaimer provision. One who seeks to avoid fair obligations should assume a special burden of calling this modification to the attention of the other party in understandable terms. Under such a principle, it would be appropriate in cases such as *Williams* to demand that the language mention negligence or fault and refer specifically to injury to the person and to property—including the vehicle being sold before the disclaimer language should be given effect. Of course, the prominence or conspicuousness of the provision in the terms of written contract in general must be relevant. Burying such disclaimers in language well calculated to escape attention in a mass of form provisions written in incomprehensible jargon makes a farce of freedom of contract. Such practices smack of deception. The broad doctrines of unconscionability[39] and good faith[40] which permeate the Code are certainly apt. The specific provisions relating to disclaimers in the Sales Article of the Code

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[35] See notes 10 and 11 *supra.*

[36] See Ferrell v. Royal Crown Bottling Co., 144 W. Va. 465, 109 S.E.2d 489 (1959).

[37] Unfortunately, the provisions relating to disclaimers are not among the most clearly drawn in the Code. See, Lorenson, *The Uniform Commercial Code Sales Article Compared With West Virginia Law—II,* 64 W. VA. L. REV. 142, 168-73 (1962).

[38] W. VA. CODE, ch. 46, art. 2, § 316 (Michie Supp. 1964).

[39] W. VA. CODE, ch. 46, art. 2, § 302 (Michie Supp. 1964).

[40] W. VA. CODE, ch. 46, art. 2, § 203 (Michie Supp. 1964).

illustrate the development of explicit working rules stemming from these general principles. The Code can provide legislative material for the formulation of a major premise of public policy which would condemn the deceptive disclaimer.

This leaves what must be considered the most surprising twist that might be drawn from the *Williams* case. Implicit in that decision—and unmolested by the adoption of the Commercial Code—is the recognition of a contractual relationship between the ultimate purchaser and the manufacturer where the manufacturer voluntarily grants an express warranty. The consequences that flow from this under the Commercial Code are something to behold. It was the existence of this contract that prevented *Williams* from pressing his tort claim. The extension of the express warranty under such circumstances is a contract made in connection with the sale of goods. It should now be subject to the Code provisions relating to express warranties[41] and limitations of remedy.[42] Particularly, section 2-719 would be pertinent. This section provides that an agreement limiting the remedy under a sales contract to the acceptance of repair or replacement of defective parts or goods is generally valid. But this is subject to two very important exceptions. The first of these exceptions, found in subsection (2), makes the limitation ineffective if the "exclusive or limited remedy" fails of "its essential purpose." The comments to this section indicate that what it intended by the phrase "essential purpose" is the "substantial value of the bargain" to either party.[43] To the buyer who loses substantially the entire value of a new automobile because of the defect of some part of inconsequential cost, the "essential purpose" of the remedy has rather obviously failed. Under such circumstances, the broad, general relief of the Code would become available.[44] The second exception, found in subsection (3), focuses expressly on consequential damages, thus venturing expressly into the potentially costly realm of personal injuries. The second exception condemns any limitation on consequential damages which is "unconscionable." Excluding personal injury damages in connection with the sale of consumer goods—such as family automobiles—is declared prima facia unconscionable. The general approach of the second exception is aimed at providing

[41] W. VA. CODE, ch. 46, art. 2, § 313 (Michie Supp. 1964).
[42] W. VA. CODE, ch. 46, art. 2, §§ 718, 719 (Michie Supp. 1964).
[43] UNIFORM COMMERCIAL CODE § 2-719, comment 1 (official ed. 1962).
[44] W. VA. CODE, ch. 46, art. 2, §§ 711, 714, 715 (Michie Supp. 1964).

the court with some leeway in dealing with unusually harsh limitations of remedies. The special concern for personal injury in consumer goods is demonstrated by obligating the party seeking the benefit of the limitation to demonstrate a special justification. Just how this might be done is left to future consideration. At this point, it should be noted that the balance of advantage has shifted clearly and emphatically to the buyer.

The *Payne* and *Williams* decisions fail to establish a pattern upon which an articulate and well reasoned body of product liability law may be constructed. As a combination, they seem to compound their own weaknesses more than they buttress their points of strength. The "child of the law" meaphor was in *Payne* an innocuous afterthought, an almost facitious make-weight argument. Resurrected in *Williams,* this phrase now appears destined to serve as a foundation for future developments in the field of products liability law. It is hoped that this estimate may prove wrong. It would be better that *Williams* be quickly forgotten as a humorless joke, dimly considered in the shadow of portentious--but misunderstood--legislative change.