Manufacturer's Strict Tort Liability to Consumers for Economic Loss

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evidence as a matter of right in order to correct any omissions or misstatements.

Another question which presents itself is whether the child should have a right to choose a public hearing. A statute could be drafted to admit members of the press, if the child so chooses, as long as his name is not reported.

These and other questions as to the validity of the Family Court Act must await the United States Supreme Court's determination concerning due process in the realm of juvenile law. It is recommended, during the interim, that the provisions of the Family Court Act be closely scrutinized by the courts to determine whether they provide not only for the rehabilitation of the juvenile offender, but also protect his rights in accordance with the basic requirements of due process of law.

MANUFACTURER'S STRICT TORT LIABILITY TO CONSUMERS FOR ECONOMIC LOSS

As American courts become increasingly aware of the need for protecting consumers from defective goods, the law of products liability correspondingly develops at a rapid and fascinating pace. Privity of contract, fault as the basis of liability, and other classical common-law concepts as prerequisites for liability are becoming antiquated or radically modified. Virtually every state holds the manufacturer liable to the consumer for negligence in the production of products when it ultimately results in physical injury. Indeed, a few courts have held manufacturers liable for property damage where no risk of personal injury was present, basing recovery on express representations made directly to the consumer by the manufacturer. However, absent the risk of personal injury or express representations, attempts to expand the law of products liability to encompass the economic loss of subpurchasers have met great resistance.

Plaintiffs seeking to recover in negligence actions by invoking traditional products liability theories have generally been denied recovery when the product has not threatened or caused physical injury.

1 Prosser, Torts § 96 (3d ed. 1964). Various theories, including warranty and strict liability in tort, have been used to hold manufacturers liable when a defect in a product causes personal injuries. See generally Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).
An extraordinary example is *TWA v. Curtiss-Wright Corp.* There, the court dismissed TWA's suit to recover the cost of repairing airplane engines which might have caused an accident if certain defects had not been discovered.

Courts have been more willing to allow recovery when the consumer's economic loss is a result of reliance upon the express representations of the manufacturer. Express warranty recovery is not necessarily based upon contractual principles, although such a rationale is tenable. Rather, it is held that since the manufacturer intentionally induced reliance and received benefits from the transaction, he should be held to the truth of the inducement. Nevertheless, various limitations are inherent in express warranty recovery. The user or consumer must establish reliance upon the manufacturer's representation, not that of the retailer or intermediary, and show that the product's defect comes within the scope of that representation. Moreover, the plaintiff must be a member of the class which can justify reliance on the terms of the representation. Significantly, these warranties, asserted to be in lieu of all others, express or implied, generally assure only that the product is free from defects in materials and workmanship, and limit the consumer's remedy to repair and replacement of defective parts. Potential recovery by a consumer is thereby greatly limited, especially when plaintiff has suffered severe consequential damages.

Implied warranty has been the basis of recovery in very few cases in which economic loss alone has been alleged. Courts

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3 See Prosser, *op. cit.* supra note 1. Contra, Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Fischer v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961). While these decisions may not portend generally accepted changes in the law of negligence, they indicate some judicial realization that the plaintiff who suffers economic loss is entitled to relief by some means.


6 Note, *Economic Loss In Products Liability Jurisprudence*, 66 Colum. L. Rev. 917, 932 (1966). That the express representation may be made by advertising or included in labels was established in Randy Knitwear, Inc. v. American Cyanamid Co., *supra* note 2.


8 Prosser, *op. cit.* supra note 1, § 98; Fleischman v. Hockett, 49 Wash. 2d 328, 301 P.2d 166 (1956).


have proceeded very cautiously in this area, initially limiting the manufacturer's liability to cases involving harmful food and drugs and then extending the rule to "inherently dangerous" products causing personal injuries. Eventually, injured members of the consumer's household were permitted recovery. Implied warranty thus evolved as a series of exceptions to the privity requirement. Formulation of a single, logical rule of recovery was impossible; different products and plaintiffs necessitated individual treatment. Finally, candid recognition of the fictional nature of the implied warranty doctrine was made by some courts. It was recognized that strict liability in tort is "surely a more accurate phrase."

It was in this framework that two courts recently considered actions for economic loss based on strict tort liability. In the earlier case allowing recovery for economic loss, Santor v. A & M Karagheusian, Inc.,\(^\text{14}\) the plaintiff purchased an expensive—but defective—rug from a retailer. After attempts to secure satisfaction from the retailer failed, the plaintiff commenced an action against the manufacturer for the price of the rug. Although the product was nationally advertised, there was no evidence that the plaintiff had relied on these representations. In addition, while the rug was described as "No. 1 grade" by either the retailer or the manufacturer, the court did not attempt to base recovery on express warranty. Instead, the Supreme Court of New Jersey based recovery on the alternate theories of implied warranty and strict liability in tort, expressly rejecting the lower court's holding that actions in implied warranty without privity were limited to cases involving products dangerous to life or limb.\(^\text{15}\)

The Supreme Court of California considered but rejected the extension of strict liability made by the Santor court in Seeley v. White Motor Co.\(^\text{16}\) There, the plaintiff purchased a White Motor Company truck from an intermediary dealer, which was unsuitable for use in the plaintiff's business. While the contract of sale included the standard manufacturer's warranty assuring replacement of defective parts, the evidence was that the plaintiff

\footnotesize{\begin{itemize}
\item\textsuperscript{12} E.g., Hensel, Food, Beverages, And Their Containers, 1964 U. Ill. L.F. 705; Krause, Products Liability And The Independent Contractor, 1964 U. Ill. L.F. 748.
\item Supra note 7.
\end{itemize}}
believed this obligation was assumed by the dealer rather than the manufacturer. The manufacturer's attempts to repair the defect having failed, the plaintiff allowed the truck to be repossessed and sued the manufacturer in express warranty for recovery of that portion of the purchase price paid, and for losses resulting from inability to use the truck in his business. Alleging further that the defect had caused an accident in which the truck was damaged, he sought recovery either in strict tort liability or negligence. The court permitted rescission of the contract and recovery of lost profits based on express representations even though reliance on the representations had not been proven. Damages resulting from the accident were denied because there was no evidence that the defect caused the accident.

Thus, the case marked no departure from precedent. However, the decision is significant because of the court's lengthy dictum rejecting the Santor rationale. Strict tort liability, the court argued, replaced the fictional implied warranty theory only when a dangerous product caused the "overwhelming misfortune" of personal injury. Commercial law, namely the law of warranty with its contractual ramifications, governed in economic loss cases. Vigorously rejecting this conclusion, Justice Peters concurred in the result, insisting that no policy required this distinction between personal injuries and economic loss, and that the considerations which gave rise to the liability of the manufacturer to the consumer in the former were equally valid with respect to the latter.

This note attempts to grapple with the issue presented in Santor and Seely. It is submitted that a solution to the problem of recovery for economic loss will be the next critical step in the development of the law of products liability. To treat this problem adequately, the concepts of economic loss and strict liability in tort must be defined. The interrelationships between the manufacturer's liability under the Uniform Commercial Code and under the theory of strict tort liability must be considered. Finally, the conflicting rationales and policy bases of traditional products liability doctrines must be evaluated with an intent to resolve their real and apparent conflicts and to establish a viable doctrine to govern consumers' actions for economic loss.

37 See also Price v. Gatlin, 405 P.2d 502 (Ore. 1965) wherein the Supreme Court of Oregon considered both Seely and Santor. Plaintiff sued a wholesaler to rescind the sale of a defective tractor and to recover lost profits. In denying the applicability of strict tort doctrine, the court followed Seely, predicated liability on the nature of the damage caused by the defective product. A dissent maintained in part that the placing of goods on the market gives rise to an implied warranty which is a sufficient base for strict tort liability.
Definitions

Economic Loss

For purposes of analysis, economic loss may be divided into direct and consequential. Actions for direct economic loss may be defined as those alleging damages due either to a product injuring itself or to the product being unfit for its general purposes. They may be measured by the “out of pocket” or “loss of bargain” rules, or by the cost of replacement or repair. Consequential economic loss is injury extrinsic to the defective or damaged product, such as a loss of profits resulting from the inability to use the product. This does not include harm to other objects or persons since no physical damage to persons or property other than the defective product itself are here considered to be within the scope of economic loss actions. Such physical damages to objects exterior to the product are best described as personal injury or property damage. In addition, when the product itself is harmed in an accident, property damage results.

Manufacturers today extend a standard “warranty” to consumers which is actually a disclaimer of virtually all the implied warranties imposed by the Uniform Commercial Code. The liability a manufacturer is willing to accept under such a warranty is equivalent to that which results from direct economic loss, i.e., restoring the consumer's loss of bargain. What the manufacturer is quite unwilling to accept by contract, or otherwise, is liability for any consequential economic losses. It is this liability which the strict tort liability approach of Santor and the unconscionability approach of the Uniform Commercial Code threaten to force upon the manufacturer.

Economic loss may also be the result of a product being unfit for a particular purpose although it is reasonably able to perform its usual functions. Since it is clear that recovery for this kind of loss is dependent upon express representations, for purposes of analysis, such loss will be excluded from the definition of economic loss as used in this note.

Strict Liability in Tort

Strict liability in tort is utilized to hold manufacturers or other sellers of goods liable to ultimate consumers for certain injuries caused by defective products. Strict liability in tort eliminates the principal requirement of a negligence action—the violation of a

\[19 \text{ Note, Economic Loss In Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966).} \]
duty of care owed to the particular plaintiff. Under this doctrine, the manufacturer is not absolutely liable to all his consumers; rather, the prerequisite of negligence is replaced by the require-
ment that the plaintiff prove that the product was defective when it left the manufacturer's control and that this defect caused injury. The focal point of a consumer-plaintiff's cause of action is thereby transferred from the degree of care employed by the defendant manufacturer to the quality of the product itself. Pre-
sumably, his cause of action can be established much more readily here than in negligence even when the latter is coupled with the doctrine of res ipsa loquitur. A defendant may overcome the inference of negligence raised by res ipsa loquitur by establishing that he exercised reasonable care and that injuries similar to plaintiff's occur despite reasonable precautions, while reasonable care is irrelevant with respect to strict liability in tort.

Strict tort liability had previously been limited in application to cases where the "overwhelming misfortune" of personal injury was caused or threatened by defective products. Indeed, according to the Restatement, it is only when the product is "unreasonably dangerous" that the manufacturer or other seller is liable for the resulting property damage or physical harm. Recovery for economic loss was previously considered to be governed solely by the Uniform Sales Act and Uniform Commercial Code. The Santor decision extends strict tort liability to all defective products actions even where there is no danger of personal injury and whether or not the damages are significant.

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21 RESTATEMENT (SECOND), TORTS § 402A (1965) provides:
Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or con-
sumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
While no distinction is made between types of property damage, the "unrea-
sonably dangerous" limitation would seem to preclude most economic loss recovery.
The Uniform Commercial Code and Strict Liability in Tort

In rejecting the applicability of the law of sales to determine the manufacturer's liability, the Santor court seemed to imply that its decision was not influenced by the Uniform Commercial Code [hereinafter referred to as UCC]. Perhaps this reflects the court's belief that, since the UCC was developed to codify and standardize commercial law, it is an inappropriate device to protect consumers. This view, however, seems to ignore the clear intent of the Commentators that the UCC is to apply to consumer sales. It is necessary to compare Santor and other recent New Jersey decisions to understand it in context and to determine how strict liability departs from statutory liability. The comparison will also serve to distinguish the Santor and Seely approaches, for, presumably, the UCC will henceforth be the guide for recovery of economic loss in California.

Implied Warranty of Merchantability

The most fundamental principle of Santor is that when a manufacturer places a product in the stream of commerce it is impliedly warranted to be "reasonably fit for the ordinary purposes for which such articles are sold and used. . . ." This language is virtually identical to that of UCC Section 2-314(2) which describes the implied warranty of merchantability. It thus appears that both the concept of implied warranty and the criteria for commodities were used.

22 Although the UCC was in effect at the time the decision was rendered, it was not in effect at the time the facts of this case took place. The then applicable Uniform Sales Act was cited once but summarily rejected. Santor v. A & M Karaghuesian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).


25 UCC § 2-314(2) provides:

Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.
determining if a product is defective are the same under the UCC and in strict tort liability. It seems that the detailed definition of merchantability provided by section 2-314(2) may be utilized to determine defectiveness.  

Nevertheless, nowhere in the Santor decision is there reference to the fact that implied warranty of merchantability is a rule of the UCC. Indeed, it was stated that the concept of defectiveness is “a broad one” which must be developed “by courts mindful that the public interest demands consumer protection.” It may be assumed that the New Jersey courts will not be restricted by the UCC definition in this area. However, this position is not inconsistent with the UCC. In the UCC, the definition used is not meant to be circumscriptive of the warranty, for the draftsmen have made it clear that the words of section 2-314 do not exhaust the meaning of merchantable and “the intention is to leave open other possible attributes of merchantability.”

Chief Justice Traynor, speaking for the California Supreme Court, seems to be the lone dissenter in the use of the term “defect” as equivalent to “unmerchantable.” In Seely, he seemed to equate defectiveness with lack of fitness for a particular purpose. As Justice Peters indicated in his dissent, to establish liability for unfitness for a particular purpose an express representation must be proven.

Disclaimers

The power to disclaim conscionably is an incident of the freedom of contract preserved by the UCC. The remedies provided therein may be altered or modified by contract as long as a “fair quantum” of remedy remains. While limitation or exclusion of damages for personal injury is prima facie unconscionable, limitation of damages for economic loss is not.

The main limitation upon a seller’s ability to disclaim is UCC Section 2-302 which provides that if a contract or any clause thereof is found to be unconscionable at the time it was made, the court may refuse to enforce it. The Official Comment states

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28 UCC § 2-314, comment 6.
29 Seely v. White Motor Co., supra note 7, at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22.
30 Id. at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28.
31 UCC § 1-102, comment 2.
32 UCC § 2-719, comment 1.
33 UCC § 2-719(3)(c).
the principle as "the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." This limited definition has caused some authors to believe the section gives courts too much authority to change private agreements, thus subverting freedom of contract. Because of the few decisions interpreting the section, general principles of application cannot be formulated. Nevertheless, analysis of the Comment indicates that the section may be reasonably applied to abuses which are the result of disparate bargaining power.

Freedom of contract is realistic only when the contract represents meaningful negotiation between the parties. If one of the parties is oppressed or unfairly surprised as a result of unfair advantages attributable to the other party's superior bargaining position, the assumption that the contract is a result of free negotiation is untenable. It has been argued that this conclusion contradicts the Commentators' statement that the purpose of section 2-302 is not to disturb "allocation of risks because of superior bargaining power." However, the objectives of preventing oppression and unfair surprise may not be reached unless contracts which result from unfair bargaining power are unenforceable under this section. Oppression can only result from terms being imposed upon the weaker party who, although aware of the consequences, is forced to do business on the stronger party's terms or not at all. Unfair surprise may also be the result of disparity in bargaining power. Unfair surprise may be caused either by sharp practices such as misleading statements as to the terms of a writing, or by including terms in a contract which are unlikely to be read or understood. Also, the Comment may be reasonably understood as cautionary, for not all contracts in which one party obtains advantages because of superior bargaining power are necessarily unconscionable.

Means other than the unconscionability provision are available to restrict the manufacturer's disclaimer power. The disclaimer

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34 UCC § 2-302, comment 1.
38 79 Harv. L. Rev. 1299, 1301 (1966).
39 See also Hawkland, Major Changes Under the Uniform Commercial Code in the Formation and Terms of Sales Contracts, 10 Pract. Law. 73, 89 (1964).
will be interpreted strictly against its maker; 40 it may be shown that the disclaimer did not come to the buyer's attention; 41 and the disclaimer must be in accordance with the UCC requirement that it be conspicuous. 42

When liability is founded in tort, contract concepts may be ostensibly rejected, liability being imposed by law rather than being voluntarily assumed by contracting parties. Since consumer protection and redress is the basic purpose, courts need not permit this social policy to be hampered by the disclaimers of a party with vast bargaining power. 43 Thus, it may be concluded that disclaimers and limitations of liability are unenforceable and irrelevant in tort actions. 44 However, the fact remains that assumption of risk 45 and, perhaps, contributory negligence 46 are recognized defenses to strict liability. To establish these defenses, it must be proven that the plaintiff was aware of the danger he is said to have assumed or had proper knowledge of the conduct required of him. A conspicuous, commercially reasonable, and commonly understandable disclaimer may be sufficient to establish plaintiff's awareness. 47 This may be roughly equivalent to a finding that the plaintiff was neither oppressed nor unfairly surprised, thereby making the disclaimer conscionable. For example, if a product is sold at a reduced price and is marked "as is" or "with defects," the disclaimer may not be enforced as a matter of contract but is nevertheless relevant evidence of the plaintiff's willingness to assume the risk. Other factors, such as a limitation of liability in the contract of sale and the retail price which the manufacturer contemplated, would also be relevant in determining the extent of the manufacturer's liability. 48

42 UCC § 2-316(2).
44 E.g., Rapson, supra note 26, at 711.
48 See Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 68, 207 A.2d 305,
Statute of Limitations

Under the UCC, an action for breach of warranty normally must be commenced within four years from the date the seller tenders delivery. On the other hand, under New Jersey statutes, and the statutes in many states, the period of limitation is two years from the date of the personal injury, or six years from the date that the consumer suffers property damages. Which statute would be applicable in Santor, remains unresolved. It would seem, however, that the court’s insistence that the consumer not be limited by the intricacies of the law of sales would tend to favor a decision in favor of the use of the strict liability in tort theory. Although this might allow actions for economic loss many years after the original sale, possibly imposing a heavy burden upon manufacturers, the plaintiff would be equally burdened to prove that the defect was in existence while the product was in the control of the manufacturer and that he had no cause to know of the defect earlier. In any event, the issue remains unresolved.

Notice

In order to “defeat commercial bad faith,” UCC Section 2-607(3)(a) provides that a buyer must notify the seller within a reasonable time after he discovers a breach. In Santor, the plaintiff notified the dealer immediately, but did not bring the defect to the attention of the manufacturer of the rug until almost three years after the defect had been discovered. The defense that notice had not been given in accordance with the then applicable provisions of the Uniform Sales Act was rejected, the court stating that “the sections have no application in actions such as this one. . . .” While, at first, it might seem that this holding and the UCC provisions are contradictory, analysis of the Comment indicates that it may be interpreted as supporting the court’s holding. First, only “reasonable” time for notification is required. Reasonable may be defined differently in a commercial setting than in an ordinary consumer’s situation. Furthermore, it is explicitly stated

313 (1965). There, the court noted that the contemplated retail price would be one measure of the manufacturer’s liability.
49 UCC § 2-725. Where it is expressly stated, the statute of limitations may be reduced to not less than one year or extended where the warranty specifically refers to a future event.
that notification is merely "designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."54 This may be interpreted as meaning that the notice provision, while applicable to the consumer, has little significance. Mere service of the complaint before the running of the statute of limitations may constitute timely notice.55 There is thus no great conflict between strict liability in tort and the UCC in this area.

Privity; Warranty of Services

The UCC extends the seller's liability on an express or implied warranty to any person in the family or household, or to a guest of the buyer, where it is reasonable to expect that this person would be affected by a breach of warranty.56 The intent of this section, as expressed in the Comment, was neither to enlarge nor to restrict the developing case law.57 While the defense of privity is still recognized in some jurisdictions,58 New Jersey's position in virtually abolishing all remnants of privity in products liability actions is not inconsistent with the UCC.

The official comment to Section 2-313 of the UCC proclaims that "warranties need not be confined . . . to sales contracts. . . ."59 This provision was quoted by the New Jersey Supreme Court in Cintrone v. Hertz Truck Leasing & Rental Serv.,60 wherein strict tort liability was extended to the leasing of motor vehicles. This is an example of the New Jersey court's liberal interpretation of a UCC provision to justify an extension of strict products liability.

Policy Considerations

A comparison of the provisions of the UCC with the rationale of the Santor court reveals that the approach outlined in either may yield strikingly similar results. Indeed, the strict liability rule might differ from the UCC only in the areas of disclaimers and the statute of limitations. Other results of the application of strict liability in tort, such as restrictions on the notice and privity requirements, can be justified under the UCC. Thus, it has been said that, since the conclusion reached in either case

54 UCC § 2-607, comment 4.
56 UCC § 2-318.
57 UCC § 2-318, comment 3.
59 UCC § 2-313, comment 2.
60 45 N.J. 434, 212 A.2d 769 (1965).
would be the same, the statutory approach is to be preferred. Nevertheless, policy considerations may justify the Santor decision. These policy arguments are now to be considered.

**Damages of Plaintiff as Operative Factor**

There are several possible explanations for Chief Justice Traynor's reluctance to use strict tort theory in the *Seely* case. It has been suggested that he may have desired to show more conservative courts that the strict tort liability theory introduced in his opinion in *Greenman v. Yuba Power Prods., Inc.*, was not an opening of Pandora's box. By limiting the strict liability theory to physical injury cases, wider recognition by other courts seems likely. Thereafter, expansion to economic loss cases is merely a matter of time. Also, in citing *TWA v. Curtiss-Wright Corp.*, Chief Justice Traynor indicated he was aware of the anomaly of permitting recovery for economic loss based on strict liability and denying recovery when negligence can be proven. He may have felt that, since the negligence theory would be expanded to include economic loss, economic interests would eventually be sufficiently protected.

The facts in *Seely* were not the strongest upon which to predicate expanded strict liability. Even Justice Peters, advocating the tort approach, recognized that it was a "close case" as to whether the plaintiff was a commercial buyer or an ordinary consumer. While Mr. Seely's business used only one truck, it was nevertheless used for commercial profit. He was, therefore, arguably in a better bargaining position than most consumers. It is doubtful, however, that Chief Justice Traynor was correct in believing that the plaintiff's bargaining position was on a par with the manufacturer's, so that he could "shop around" for a better warranty.

Conjecture aside, the clear holding of the *Seely* case is that UCC provisions, and not strict liability, are applicable to the recovery of economic loss. The type of plaintiff, whether ordinary consumer or commercial buyer, is immaterial; it is the type of damage which determines the means of recovery. The plaintiff is left to face the obstacles which the strict liability in tort doctrine was developed to obviate.

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65 63 Cal. 2d at 22-23, 403 P.2d at 150-51, 45 Cal. Rptr. at 19-20.
66 Movement in this direction was indicated in Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).
Justice Peters noted some of the problems apparent in the majority's decision. His argument that Seely did not rely on the manufacturer's representations may be dismissed as based on a mere technicality, since such reliance may be considered implicit. Not so easily disregarded is his criticism of the holding that the type of damage, whether to person or property, determines the method of recovery:

How can the nature of the damages which occur later, long after the transaction has been completed, determine the character of the transaction? Any line which determines whether damages should be covered by warranty law or the strict liability doctrine should be drawn at the time the sale is made.\textsuperscript{67}

Drawing the line on the basis of the type of damages results in divergent conclusions. For example, it seems likely that the California court would now permit strict liability recovery when a defect causes personal injuries, no matter how slight, but not when the same defect causes only economic loss, no matter how great. In addition, when one defect causes personal injuries, property damages, and economic loss, the question arises as to what theory should be applied. The strict tort doctrine might be allowed for all of plaintiff's injuries, or the losses might be separated and economic loss left to be governed by the UCC. Where economic loss is the major item of recovery, this might be considered the controlling factor, making the UCC applicable to the entire suit.\textsuperscript{68} Either solution has practical and logical defects.

Another difficulty, recognized by Justice Peters, was present in the Santor approach, wherein recovery turned on the nature of the plaintiff. The difficulty is in distinguishing between commercial buyers who are governed by the UCC and ordinary consumers who may use a tort doctrine. While the distinction must necessarily be clarified by case law, relevant factors are apparent. The initial criterion will probably be the purpose of the plaintiff in purchasing the goods. If the product is for a business use, the purchaser may nevertheless stand in the same position as an ordinary consumer, where the value of the purchase or the size of his business is not large enough to enable him to bargain as an equal with the manufacturer. Relative bargaining position seems to be a key factor. Since strict tort liability was developed with the consumer in mind, it seems that the Santor plaintiff-oriented approach is more logical and practical than the damage emphasis of Seely.

\textsuperscript{67} 63 Cal. 2d at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28.
\textsuperscript{68} Franklin, \textit{supra} note 63, at 982.
However, logic alone is not sufficient to warrant the adoption of strict tort liability for economic loss in the face of the UCC, since such injury to the consumer is usually minor. The Santor decision, therefore, necessitates rethinking of the policy considerations which were advanced in favor of strict tort liability. These include the deterrence of unreasonable conduct of producers, the facilitation of remedy by removal of circuitous actions, and the producer's greater risk-spreading ability.

**Deterrence of Unreasonable Conduct**

One factor to be considered in expanding tort liability is its effect as a deterrent to the undesirable conduct sought to be controlled. Chief Justice Traynor recognized this factor in *Escola v. Coca Cola Bottling Co.*, wherein he first argued for the adoption of strict liability. He stressed society's interest in discouraging "the marketing of products having defects that are a menace to the public." Strict liability is thus intended to induce the manufacturer to improve methods of quality control, so as to avoid liability for defective products.

Since the economic loss of ordinary consumers is likely to be less than the loss resulting from personal injury, it is arguable that the slight increase in liability caused by strict liability is not likely to deter shoddy products. As has been seen, the manufacturer is already liable for his express representations and he may also be held on the basis of the implied warranty imposed by the UCC upon each buyer and seller in the marketing chain. Moreover, another avenue of recovery may be provided if consumers are permitted recovery of economic loss on the basis of negligence. Finally, direct economic loss is generally compensated for by the producer as a matter of good business practice.

A forceful argument nevertheless remains in support of the deterrent effects of strict liability. While, admittedly, damages in the category of economic loss to consumers are not usually substantial, where, as in the case of a small grocer who loses business because of a defective heater, the consequential damages can amount to a great deal more money than the value of the product itself. The potential for numerous suits, individually not very significant but cumulatively quite expensive, will definitely tend to

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69 Mr. Santor recovered $1,512. In *Seely*, the plaintiff's damages were the cost of a truck and some loss of profits.
72 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion).
73 UCC § 2-314.
force the manufacturer to improve methods of quality control. Thus, the policy of deterrence of unreasonable conduct is as applicable to economic loss as it is to personal injury liability. Otherwise, there would remain the anomaly of permitting strict liability recovery where a defect causes only slight personal injury, while denying recovery for substantial economic loss caused by the same defect.

Circuity of Actions

In Santor, the court noted that because of the implied warranty now imposed by the UCC upon each buyer and seller in the marketing chain, the manufacturer would ultimately be responsible for the plaintiff's injuries. Hence, in removing the requirement of privity, the rights of the parties are more economically settled and the possibility that recovery will be defeated by lack of jurisdiction, insolvency, or the running of the statute of limitations is diminished. This position has been attacked on the basis that as procedural inconveniences are solved, new ones are created.

Each party in the marketing chain may have personal defenses, such as conscionable disclaimers or contracts limiting liability, which might ultimately insulate the manufacturer. The privity requirement is considered justifiable because of the difficulty of establishing these defenses against third parties. For example, if the manufacturer in Santor had sold the rug to the retailer "as is" at a discount and the retailer represented to the consumer that the rug was "Grade No. 1," facts concerning the relationships between the consumer and the retailer and between the retailer and the manufacturer would be necessary for the manufacturer's defense. Evidence from the retailer would also be required in order to determine whether the plaintiff is a commercial buyer rather than a consumer, and whether the plaintiff assumed the risk of loss, e.g., by accepting a conscionable disclaimer. Moreover, if the plaintiff claims loss of bargain damages, the retailer may be needed to corroborate the terms of the sale.

Many of these problems may be eliminated by allowing the manufacturer to make the retailer a third party. This is permitted in most states which have adopted liberalized impleader provisions. There, the retailer should be joined when jurisdiction has been obtained and it can be shown that he is a necessary party. Aside from this procedural difficulty, elimination of the privity

74 79 Harv. L. Rev. 1315, 1317 (1966).
requirement will, in the majority of cases, provide the plaintiff with a solvent defendant while multiple suits are avoided. There is, thus, little reason for demanding privity in economic loss actions while the requirement is eliminated in other products liability actions.

Risk Spreading

Viewing the problem solely in the context of tort, the question is simply whether the manufacturer, retailer, or consumer should be burdened with the economic loss. The frequently advanced risk spreading argument has been used to hold manufacturers liable for personal injury because of their greater ability to maintain a reserve for anticipated losses by distributing the expenses to purchasers through increased prices. It has been successfully maintained in most jurisdictions that the extreme hardship of personal injuries justifies this result, but no similar well-settled cause of action has been developed to compensate consumers for economic losses.

The argument is made in the area of economic loss that both the retailer and the consumer have sufficient resources to bear the risk of this relatively slight loss. A second argument advanced is that strict tort liability for economic loss may result in economic dislocation and the destruction of marginal enterprises, unless the risk is insurable. Consequential economic loss is less ascertainable than is the loss for personal injuries. Present provisions in product liability insurance policies generally do not provide for indemnification for economic loss. It is further maintained that, since such loss is generally sustained in the consumer's business, the consumer is in a better position to estimate the extent of the loss and insure accordingly. The argument suggests that the solution would be to allow contractual limitations on liability between each intermediary in the distribution chain, thereby establishing a readily insurable risk for each to assume.

It can be seen, however, that the two arguments are inconsistent. The first is based upon the belief that economic loss will be minimal, the second that it will be significant. In addition, the arguments may be attacked individually. Since the damages resulting from economic loss can range from minimal to significant,

79 Id. at 965.
the consumer who suffers such loss is in no better position to anticipate his chances of suffering economic loss than he is to anticipate personal injuries. Therefore, he cannot properly be expected to insure against the remote possibility of a defect. As compared to the manufacturer, who can easily spread the cost of the risk, the consumer is not the one upon whom the law should impose the burden of insuring. Finally, a contractual system of risk spreading, developed by the intermediaries in the distribution chain, has failed to materialize. If such a system is to be developed, it probably would first appear in jurisdictions which adopted the strict tort liability approach of Santor and thereby placed the initial liability on the manufacturer, thus forcing him to protect himself by contract in conscionable agreements with the intermediaries of the marketing chain. At present, barefaced disclaimers of consequential damages are much more common than mere limitations of liability.

Moreover, both arguments fail to give sufficient weight to the helpless position in which the consumer finds himself when faced with the manufacturer’s overwhelming power. At the same time, risk spreading is as practical and equitable in the area of economic loss as it is in the area of personal injury. The implementation of this risk spreading can be accomplished most directly by holding the manufacturer liable to the consumer for economic loss. Once this liability is well established, the manufacturer will be able to contract with the other members of the product distribution system, the wholesalers and retailers, so that they absorb some proportionate part of the risk of liability. Of course, these contractual provisions will be subject to the UCC’s requirement of conscionability which will, like the manufacturer-consumer relationship, be based to an important extent on the relative bargaining strength of the manufacturer-wholesaler or manufacturer-retailer relationships. The result will be a division of the risk among all the elements of the production and distribution chain. Furthermore, the cost of this insurance against consequential economic loss, so spread over the chain, will be reflected in the price; the ultimate consumer will bear his proportionate share of the risk.

Although the rationale underlying such risk spreading is that of using the manufacturer as a mere conduit through which the economically injured consumer is compensated, the result is a burden on the manufacturer which must be further justified. In an ideal economic system, the manufacturer would be able to adjust to this new liability merely by adding the cost of insurance against economic loss to his price. His cost of goods would increase, but he would be able to maintain the identical profit margin. The effect on the consumers of the product would be a proportionate increase in price. However, in the imperfect
economic system of the business world, the manufacturer cannot afford to add insurance costs while refusing to change his margin of profit. If he did, he would place himself in danger of pricing his product out of the competitive market. Therefore, the result of holding the manufacturer liable to consumers would be to force him to reduce his profit margin since it will bear in part the cost of this new insurance. In such a situation, the manufacturer who produces the most defect-free product will have the greatest profit margin. The cumulative effect on the community of holding manufacturers liable to consumers can only be to promote defect-free products.

Hence, the capacity of the manufacturer to spread the risk is not the sole factor upon which liability is based. Whether the harm is great or small, the manufacturer is responsible for the initial act of creating the defect which causes the harm. This is the so-called "conditional fault," the primary basis of liability, which justifies reducing the manufacturer's profit margin.

The fault basis of liability is emphasized by the need to prove that a defect existed while the product was in the control of the manufacturer. Although not identical to the concept of due care, the fault involved in the production of defective merchandise is within the manufacturer's control. The manufacturer is not held to a standard of perfection; all that is required is commercially reasonable merchantability—a standard which can be met by the scientific application of quality controls.81

Conclusion

The chief virtue of the Santor holding is that it is candidly unrestricted by statute and traditional tort or contract concepts, while it does not radically depart from precedent. It shifted the risk of economic loss from the consumer to the producer in conformity with the ancient practice of tort law of making those who cause loss to others compensate them for the damage done. The stability provided by statute is not lost, for the statute is not totally rejected; but its substance is adapted to conform to modern marketing conditions. Yet, flexibility permitting the continued development of tort law is maintained.

Those who charge judicial usurpation of the legislative function or judicial disregard of the legislative mandate may be answered by the fact that all judicial law-making is also legislative. The very conception of the decision as a precedent makes it legislative in nature,

i.e., prospective and general. . . [S]ince the courts have made up almost the whole body of tort law without benefit of legislative aid, it is quite anomalous to charge them with legislative usurpation when they refashion their own creation.\textsuperscript{82}

Strict liability in tort was developed solely for the protection of consumers. Although originally used only where personal injuries resulted from defective products, there is no reason why it must be so limited. Similar results may be achieved under the UCC, with perhaps a lesser degree of flexibility, if the courts refuse to enforce disclaimers of liability for consequential economic loss on grounds of unconscionability.

\textsuperscript{82} Id. at 1085.