MANUFACTURERS' LIABILITY TO REMOTE PURCHASERS FOR "ECONOMIC LOSS" DAMAGES—TORT OR CONTRACT?

The products liability field is one of the fastest changing in our law today and the changes have steadily extended liability.[1] The first cases holding a manufacturer liable for injuries caused by his product in the absence of privity of contract used a negligence theory.[2] Their theory was liability based on fault. Once liability was firmly established for negligence,[3] theories other than fault began to receive recognition as justification for holding the manufacturer liable even though he had exercised all reasonable care.[4]

One rationale of strict liability without fault or privity is that the manufacturer is better able to distribute the risk of injury than is the injured consumer.[5] Underlying this thought is the assumption that the cost of insuring against such losses will be distributed by the manufacturer to the consuming public by way of higher prices.[6] A second justification is that the manufacturer by placing the goods on the market makes an express or implied representation to the public that they are suitable and safe for use.[7]

Coupled with these justifications for liability is the argument which has traditionally been employed against the privity requirement in the products liability field[8]—that regardless of the privity requirement the

[1] Jaeger, *How Strict Is the Manufacturer's Liability? Recent Developments*, 48 MARQ. L. REV. 293 (1965); Prosser, *Products Liability in General*, 1965 CLEV. B.A.J. 149; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

[2] The landmark decision in this area was MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.).

[3] *MacPherson* has been accepted by all jurisdictions in the United States, PROSSER, TORTS § 96, at 661 (3d ed. 1964), with the possible exception of Mississippi. See Cox v. Laws, 244 Miss. 696, 145 So. 2d 703 (1962). *But see* Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962), purporting to apply Mississippi law and accepting *MacPherson*.

[4] See, *e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

[5] This rationale is well stated by Justice Traynor in his concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944).

[6] The assumption has been criticized by legal authorities. See, *e.g.*, Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957). See the dissenting opinion of Justice Burke in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963). For the actuarial problems involved see, Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

[7] See, *e.g.*, State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

[8] See 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44 (1964); PROSSER, TORTS § 97, at 674 (3d ed. 1964).

purchaser can, in most cases, maintain an action against his seller based on an implied warranty and the seller can then sue the manufacturer for indemnity.[9] Recovery through this circuitous route, however, may be frustrated by form disclaimers, insolvency, statutes of limitation, or lack of jurisdiction. Therefore the law should allow a direct action by the purchaser against the manufacturer.

While these arguments were first used to justify manufacturers' liability where defective food or drink caused physical injury,[10] strict liability has now been extended beyond food to cases involving a wide variety of products.[11] Although the doctrine was originally restricted to products which were "inherently dangerous," an examination of the kinds of products involved in recent cases shows that this early requirement has generally been abandoned.[12] While most of the decisions in the strict liability area involved personal injuries, damage to property has recently become recoverable in some courts.[13]

The most recent extension of liability has been to recovery by a purchaser against a manufacturer when the only injury was "economic loss." [14]

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[9] *Ibid.*

[10] Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

[11] Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (hula skirt); Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Munic. Ct. App. 1962) (automobile); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (power tool); Simpson v. Powered Prods. of Mich., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963) (power golf cart); McBurnette v. Playground Equip. Corp., 137 So. 2d 563 (Fla. 1962) (children's playground equipment); Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. Ct. App. 1965) (tractor unit); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961) (automobile); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder blocks); Midwest Game Co. v. M. F. A. Milling Co., 320 S.W.2d 547 (Mo. 1959) (fish food); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (automobile); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965) (truck tractor); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959) (truck); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (automobile).

[12] Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (hula skirt); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953) (dictum) (seeds); Continental Copper & Steel Indus., Inc. v. E. C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. Ct. App. 1958) (underground cable). For cases collected in the nonprivity negligence area, see 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.03[1][a] (1964).

[13] Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138 (5th Cir. 1959); Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962); Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Munic. Ct. App. 1962); Hoskins v. Jackson Grain Co., *supra* note 12; Continental Copper & Steel Indus., Inc. v. E. C. "Red" Cornelius, Inc., *supra* note 12; Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. Ct. App. 1965); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963); Pabon v. Hackensack Auto. Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (App. Div. 1960); 50 New Walden, Inc. v. Federal Ins. Co., 39 Misc. 2d 460, 241 N.Y.S.2d 128 (Sup. Ct. 1963); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

[14] Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (express warranty); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d

"Economic loss" is defined as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. In recent decisions two leading state courts[15] allowed recovery for economic loss damages by purchasers against manufacturers with whom they were not in privity on two different legal theories.[16]

The plaintiff in the New Jersey case of *Santor v. A. & M. Karagheusian, Inc.*,[17] had purchased advertised carpeting from a retailer. Later he noticed an unusual line in it; but the dealer reassured him. The carpet got worse, and after eight months the plaintiff went back to the dealer, only to find that the dealer had gone out of business. At the trial the manufacturer admitted that the carpeting had been defectively manufactured. The plaintiff recovered in the trial court on an implied warranty of merchantability without privity even though the damage was limited to loss of the value of the carpeting. On appeal, however, the Supreme Court of New Jersey said that the manufacturer's liability could be cast in simpler form:

> Ordinarily there is no contract in a real sense between a manufacturer and an expected ultimate consumer of his product. The fact is that as a matter of public policy the law has imposed on manufacturers a duty to such persons irrespective of contract or a privity relationship between them. Such a concept expressed in terms of implied warranty of fitness or merchantability bespeaks a *sui generis* cause of action. Its character is hybrid, having its commencement in contract and its termination in tort.[18]

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305 (1965) (strict liability in tort); Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (express warranty); Lang v. General Motors Corp., *supra* note 13 (implied warranty); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965) (express warranty and dictum that in the absence of an express warranty a warranty might be implied). *But see* Henry v. John W. Eshelman & Sons, 209 A.2d 46 (R.I. 1965) (strict liability in tort will not be extended to economic loss damages and privity was necessary for an implied warranty action by a poultry farmer against the remote manufacturer of defective chicken feed); Dimoff v. Ernie Majer, Inc., 55 Wash. 2d 385, 347 P.2d 1056 (1960) (no recovery for economic loss when the express warranty limited the seller's obligation to replacing defective parts and where the defect did not result in a dangerous or noxious instrumentality); Price v. Gatlin, 405 P.2d 502 (Ore. 1965) (economic loss suffered as a result of a tractor's defective manufacture was not recoverable by a purchaser against a *wholesaler* with whom he was not in privity (dictum as to manufacturer)).

[15] The California Supreme Court previously decided Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), which expressly stated that strict liability in nonprivity personal injury cases lay in tort. The New Jersey Supreme Court decided Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), which was the landmark case establishing a manufacturer's liability to a remote purchaser without proof of negligence.

[16] Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[17] 44 N.J. 52, 207 A.2d 305 (1965).

[18] *Id.* at 64, 207 A.2d at 311.

The court held the manufacturer strictly liable in tort for the economic loss damages.

While the New Jersey court was extending strict liability in tort by refusing to recognize any significant difference between the case of the defective rug and the earlier personal injury and property damage cases, the California Supreme Court was making just such a distinction. The plaintiff in *Seely v. White Motor Co.*[19] entered into a conditional sales contract with a dealer for the purchase of a truck manufactured by the defendant. Plaintiff purchased the truck for use in his business of heavy duty hauling. Upon taking possession of the truck, plaintiff found that it bounced violently. For eleven months after the purchase the dealer, with guidance from the manufacturer, made unsuccessful attempts to correct the bouncing. Finally the plaintiff stopped making payments and the truck was repossessed. In the trial court the plaintiff recovered the money paid on the purchase price and business profits lost because he was unable to make normal use of the truck. In an opinion by Chief Justice Traynor, the supreme court held that the manufacturer's express warranties, even though they excluded all others and limited liability to repair and replacement of defective parts,[20] allowed recovery for economic loss damages. The court said:

> The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries. . . . Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting. . . . These rules determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver.[21]

Both California and New Jersey are among the majority of jurisdictions which have adopted the Uniform Commercial Code.[22] Both are also, however, in the growing minority of jurisdictions which have declared that in products liability cases where physical injury has occurred, liability of the manufacturer to the remote purchaser must rest in tort

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[19] 403 P.2d 145, 45 Cal. Rptr. 17 (Cal. 1965).

[20] The warranty said: "The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof." 403 P.2d at 148, 45 Cal. Rptr. at 20.

[21] 403 P.2d at 149-50, 45 Cal. Rptr. at 21-22.

[22] More than forty jurisdictions had adopted the Uniform Commercial Code by July 1, 1965. The facts of both cases preceded the adoption of the Code in California and New Jersey, but the Code had been adopted when the cases were decided. See UNIFORM LAWS ANN. 5 (Supp. 1965), for a list of states which have adopted the Uniform Commercial Code and the effective dates.

rather than on the law of sales.[23] The tort approach had been advocated earlier by Dean Prosser in his classic article[24] in order to overcome the privity of contract problem, especially in cases where the injured person was not the purchaser of the product. According to Dean Prosser the "intricacies of the law of sales" were ill suited to personal injury cases.[25] The Supreme Court of California followed this analysis in the 1963 case of *Greenman v. Yuba Power Prods., Inc.*[26] where the plaintiff, who was injured by a power tool purchased by his wife, maintained an action against the manufacturer. There was no negligence and the manufacturer argued that recovery should be denied since the plaintiff failed to comply with the notice provisions of the sales law.[27] Justice Traynor employed the risk distribution rationale[28] to say that in nonprivity personal injury cases the liability lay in tort and therefore the notice requirement was inappropriate.

Both the *Santor* and *Seely* courts discussed the *Greenman* decision. The New Jersey court approved the *Greenman* analysis and stated that no distinction should be drawn based on the kind of injury that has occurred. The *Seely* court distinguished its *Greenman* holding as limited to the "distinct" problem of physical injury, saying that when the injury is "economic loss" the appropriate source of standards is the Uniform Commercial Code. The California court in moving away from the tort approach concluded that when the injury is economic loss rather than personal injury the reason for holding the manufacturer liable is not that he is necessarily better able to insure against the risk but that he has breached an implied or express representation of quality. The manufacturer's ability to forecast the extent of potential liability and plan for it, when it is limited to the purchase price of the product, is no greater than the purchaser's. In a personal injury case, however, an injured purchaser might suffer damage many times greater than the value of the product. Therefore when the injury is economic loss the manufacturer is held liable for inducing reasonable consumer expectations, rather than as a better risk bearer, and the warranty provisions of the sales law would seem to afford appropriate standards.

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[23] Delaney v. Townmotor Corp., 339 F.2d 4 (2d Cir. 1964) (New York law); Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (Texas law); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965) (Indiana law); Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. Ct. App. 1965); Dealers Transp. Co. v. Battery Distrib. Co., 33 U.S.L. WEEK 2651 (Ky. Ct. App. June 4, 1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); see RESTATEMENT (SECOND), TORTS § 402 A (1964).

[24] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[25] *Id.* at 1134.

[26] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[27] The plaintiff notified the manufacturer of the injury ten and one-half months after it occurred. See UNIFORM COMMERCIAL CODE § 2-607.

[28] 59 Cal. 2d at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.

The New Jersey court while emphasizing the representation rationale,[29] saw no reason to shift the doctrine and held that liability of manufacturers of defective products to purchasers rested in tort and was not governed by sales law notions. The *Santor* court, however, was not without judicial precedent for classifying liability based on a breach of representation as tort. The 1932 case of *Baxter v. Ford Motor Co.*[30] held that an *express statement* in the manufacturer's literature that the glass of his windshield was "shatterproof" made it liable, without knowledge that the representation was untrue, to one who bought the car from a dealer, and suffered personal injury when a pebble struck the glass and shattered it. The *Santor* decision, however, goes beyond *Baxter* not only in allowing recovery for economic loss damages but in basing the manufacturer's liability on an implied rather than an express representation of quality.

In order to evaluate the *Seely* and *Santor* approaches it is necessary to compare their solutions to various problems in the economic loss area. Under the New Jersey tort approach the purchaser must first prove that the product contained a defect which arose either out of the design or manufacture, or while the article was in the control of the manufacturer. The court defines "defective" as "not reasonably fit for the ordinary purposes for which such articles are sold and used." [31] Thus the standards for minimum quality are the same as those imposed by the implied warranty of merchantability section of the Uniform Commercial Code.[32] For the New Jersey court this minimum standard of merchantability is "implicit in the presence of the product on the market." [33] Thus if the manufacturer makes express representations in his advertising, New Jersey would no doubt hold him to the reasonable expectations of purchasers relying on the representations. This is consistent with the Code provision on express warranties.[34]

The plaintiff under the *Santor* tort approach must also prove that the defect proximately caused the injury or damage to the ultimate purchaser

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[29] Although it emphasized the representation rationale, the New Jersey court also said: "The purpose of such liability is to insure that the cost of injuries or damage . . . resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves." 44 N.J. at 65, 207 A.2d at 312.

[30] 168 Wash. 456, 12 P.2d 409, *aff'd on rehearing*, 15 P.2d 1118 (1932).

[31] 44 N.J. at 67, 207 A.2d at 313; see Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

[32] UNIFORM COMMERCIAL CODE § 2-314. *Compare* comment 7: "In case of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section," *with Santor*: "[O]ne measure of the manufacturer's obligation necessarily must be the price at which the manufacturer reasonably contemplated that the article might be sold," 44 N.J. at 67, 207 A.2d at 313.

[33] *Ibid.*

[34] UNIFORM COMMERCIAL CODE § 2-313(1). Comment 2 to § 2-313 says that the Code was "not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." See *Advertised-Product Liability (A Symposium)*, 8 CLEV.-MAR. L. REV. 521 (1959); 42 MARQ. L. REV. 521 (1959).

or reasonably expected consumer. The proximate cause standard, while usually associated with tort law, is also not unfamiliar to the law of contractual warranty, and the Code speaks of recovery of damages "proximately resulting from any breach of warranty." [35]

The most troublesome problem leading courts to resort to tort law in suits by purchasers against manufacturers was the requirement of privity of contract under the sales law.[36] Avoiding the privity requirement permits any consumer to recover directly from a manufacturer who was not his immediate seller.[37] The comment to the privity section of the Uniform Commercial Code states that the section is "not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." [38] Thus the *Santor* approach was merely making law where the Code is silent. When the injury is economic loss the case law in this area should be no different than it would be under the Code.

In personal injury cases after *Santor* the New Jersey court has indicated that a form of contributory negligence or assumption of risk would be a defense to tort actions like *Santor*.[39] Speaking about this defense the court said that "a manufacturer or seller is entitled to expect a normal use of his product" and that the doctrine of strict liability in tort "should not be extended so as to negate this expectation." [40] It would seem that this defense would also be applicable in an economic loss case where the

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[35] UNIFORM COMMERCIAL CODE § 2-715(2)(b). In an economic loss case, once it is proved that the product left the control of the manufacturer in a defective condition the purchaser has shown the requisite causal connection. The proximate cause standard would be used where the defect causes further tangible property damage, see note 54 *infra*, or where the purchaser suffers business losses in the form of lost profits, see note 55 *infra*.

[36] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[37] There are two types of privity problems, horizontal and vertical. Horizontal privity involves the question of who besides the purchaser should have a right of action against the manufacturer or seller for injury caused by a defective product. This is usually associated with personal injury cases where a member of the purchaser's family or even an unrelated bystander is injured by a defective product. See Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964). Section 2-318 of the Code extends the seller's warranty for personal injuries to "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods. . . ." But the problem of horizontal privity does not affect the case where the injury is only economic loss or where the damage is limited to the purchased product itself.

[38] UNIFORM COMMERCIAL CODE § 2-318, comment 3. There is some doubt as to what weight should be given to the comments to the Uniform Commercial Code. While only the text of the Code was enacted by the legislature, the comments may be persuasive in areas where the statutory provisions are silent. See HONNOLD, LAW OF SALES AND SALES FINANCING 17-19 (1962).

[39] Maiorino v. Weco Prods. Co., 214 A.2d 18 (N.J. 1965) (per curiam); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769 (N.J. 1965); see 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16A[3][a] (1964); PROSSER, TORTS § 95, at 656-57 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 402 A, comment *n* (1965); Keeton, *Assumption of Products Risks*, 19 SW. L.J. 61 (1965).

[40] Maiorino v. Weco Prods. Co., *supra* note 39, at 20.

consumer misused the product or could not reasonably have expected it to perform for some particular purpose. A court handling such a situation under the Code would say that the implied warranty of merchantability was not breached if the consumer misused the product[41] or used it for some unusual purpose not communicated to the seller.[42]

Another problem both under the Code approach and under the tort approach is the effect to be given the manufacturer's disclaimer of liability. Under the Code warranties can be disclaimed if the disclaimer is in writing that is "conspicuous" and fairly apprises the buyer of the risk he is running.[43] But under section 2-302 "unconscionable" contract provisions will not be enforced by the courts and under section 2-719(3) "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable" but "limitation of damages where the loss is commercial is not."[44] It is difficult to say whether a manufacturer's disclaimer as to the quality of the product which clearly brings the point home to the purchaser will be upheld under the *Santor* tort theory. A buyer purchasing a product in the face of such a disclaimer may be denied recovery under the assumption of risk defense put forth in the post-*Santor* cases.[45] In other words, the buyer might be held to have deliberately and unreasonably proceeded to encounter a known danger.[46] If the rationale of liability in these cases is that of implied or express representation and not enterprise liability based on risk distribution, the manufacturer should not be held liable when no reasonable buyer expectations are upset. While the application of the disclaimer provisions of the Uniform Commercial Code to consumer sales is a complex problem,[47] the

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[41] UNIFORM COMMERCIAL CODE § 2-314(2): "Goods to be merchantable must at least be such as . . . (c) are fit for the ordinary purposes for which such goods are used. . . ."

[42] Section 2-315 of the Code says an implied warranty of fitness for a particular purpose arises if the seller at the time of contracting had reason to know the particular purpose for which the goods were required and if the buyer was relying on the seller's skill and judgment to furnish suitable goods. The Code distinguishes the implied warranty of fitness from the implied warranty of merchantability, § 2-314. Thus if the purchaser never deals with the manufacturer, the manufacturer should not be liable in tort when the use of the product is not within the reasonable expectation of the purchaser and the manufacturer.

[43] UNIFORM COMMERCIAL CODE §§ 2-316(2), (3)(a).

[44] The warranty in *Seely* was said to be "expressly in lieu of all other warranties, expressed or implied." 403 P.2d at 148, 45 Cal. Rptr. at 20. This was probably an attempt by the manufacturer to limit liability to replacement of defective parts and to exclude liability for consequential damages. An argument can be made that the *Seely* court's action failed to give effect to this limitation. The court did not discuss § 2-719(3) of the Code which seems to allow limitation of consequential damages in consumer goods cases where the loss is commercial.

[45] See note 39 *supra*.

[46] See Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d at 782-83 (N.J. 1965).

[47] See, *e.g.*, Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

problem will be no less complex under the tort approach. The flexibility afforded courts under the tort approach is thus probably not significantly greater than that afforded by a court's power to strike down disclaimers as "unconscionable" under section 2-302 of the Code.[48]

Section 2-607(3)(a) of the Uniform Commercial Code states that where tender has been accepted "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." This was one of the problems which led the California Supreme Court in *Greenman* to hold that the liability lay in tort. The comment to this section of the Code says that "a reasonable time" may be extended in the case of a consumer as the notification requirement "is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."[49] It is difficult, in light of the flexibility allowed by the term "a reasonable time," to see why this requirement should force a court to abandon the Code's standards. Certainly when the injury is only the loss of his bargain the consumer should also be held to at least a good faith effort to notify either his seller or the manufacturer of his claim that the product is defective.[50]

There is also a question whether the *Santor* court will apply the Code's statute of limitations which provides that "an action for breach of any contract for sale must be commenced within four years after the cause of action accrues."[51] Under the Code a "cause of action has accrued when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."[52] While in personal injury cases the court may wish to have the statute run from the injury rather than the sale, there should be no substantial objection to applying the Code statute of limitations when the injury is economic loss. In such implied warranty cases a lapse of time longer than four years might create a serious question whether the product

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[48] See Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961). The *Seely* court distinguished the case where the entire industry disclaims liability through a form disclaimer thus forcing the purchaser to either go without the product or take it with the disclaimer:

> Unlike the defendant in Henningsen v. Bloomfield Motors, Inc. . . . White is not seeking to enforce an industry-wide disclaimer of liability for personal injuries. Here, plaintiff, whose business is trucking, could have shopped around until he found the truck that would fulfill his business needs. He could be fairly charged with the risk that the product would not match his economic expectations, unless the manufacturer agreed that it would.

403 P.2d at 151-52, 45 Cal. Rptr. 23-24. The implication is that a disclaimer like the one in *Henningsen* might not be upheld.

[49] UNIFORM COMMERCIAL CODE § 2-607(3)(a), comment 4.

[50] Comment 5 to § 2-607 says that "in regard to discovery of defects and the giving of notice within a reasonable time after acceptance," the notice requirement is not intended to apply to injured guests or relatives under § 2-318 since they have "nothing to do with acceptance." But the comment goes on to say that: "However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. . . . [E]ven a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation."

[51] UNIFORM COMMERCIAL CODE § 2-725(1).

[52] UNIFORM COMMERCIAL CODE § 2-725(2).

was really defective and would impose a heavy burden on the manufacturer. Finally, differences in the length of tort and contract statutes of limitation in some jurisdictions might present problems in decision of some cases especially where the period in which tort actions may be brought is significantly shorter.

Overall, however, it seems that in economic loss cases the *Santor* tort approach should not reach results significantly different from the results that will be reached by the *Seely* court under the Code. While in personal injury cases the problem of allowing injured persons other than the purchaser to recover may afford some reason to work outside the Code,[53] no such problem is presented where the damage is only the value of the buyer's bargain or is limited to damage to the purchased product itself. In personal injury cases the rationale of risk distribution is one which is usually associated with the policy of tort law. When the rationale is based on the manufacturer's implied or express representation of quality, however, the standards from the law of sales would seem to be more appropriate.[54]

The *Santor* court's reason for not applying the Uniform Commercial Code's standards must be that these standards were meant to cover transactions between commercial parties and are not applicable to nonprivity transactions involving an ordinary consumer. Yet the standards of the Code would seem more appropriate when the damage is loss of the

[53] The Pennsylvania Supreme Court in the case of Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963), held that a bartender in a club who was injured when a bottle of soda water exploded as it was standing on the bar could not sue the defendant bottler who had sold and delivered the soda to the bartender's employer. The court in an unduly restrictive use of the Code standards said that § 2-318 of the Code "gives no basis for the extension of the existing warranty to an *employee* of the purchaser." *Id.* at 612, 187 A.2d at 577 (emphasis in original).

[54] The *Seely* court said that the doctrine of strict liability in tort employed in personal injury cases should be extended to tangible property damages. Thus the court said that if, on the *Seely* facts, the plaintiff could have proved that the automobile accident was caused by the defect then he could recover the damage to the car on a tort theory. 403 P.2d at 152, 45 Cal. Rptr. at 24. It is questionable whether the court is drawing the appropriate line. With the growing availability of insurance today it is uncertain whether the purchaser or the manufacturer is better able to distribute the risk of property damage. The line might be drawn between personal injury and all property damage including economic loss.

Moreover, by allowing recovery for damage to the purchased product itself the *Seely* court distinguished between recovery for the loss of value from a defect in a product and damage to the product caused by the defect. The court seems to be borrowing from the nonprivity negligence area where some cases have held that to recover property damage it must have resulted from an accident "involving some violence or collision with external objects, not a mere marked deterioration, or even a complete ruin brought about by internal defect." Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 866, 323 P.2d 227, 229 (Super. Ct. 1958); Trans-World Airlines v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), *aff'd mem.*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546, *appeal denied*, 2 App. Div. 2d 745, 153 N.Y.S.2d 550 (1956). The "accident requirement" in the negligence area has been criticized for overlooking that it is the injury and the causal connection to the defect in the product which makes the negligence actionable rather than the exact manner in which the injury occurred. See 32 N.Y.U.L. REV. 197 (1957). The rationale of the "accident requirement" must be based on the greater risk of personal injury in such cases. Another problem is that with many products an "accident" cannot clearly be distinguished from internal deterioration. For this reason a better line might be between damage to the purchased product and damage caused to other property.

buyer's bargain in a sale than would the body of products liability law built up in the personal injury area. Moreover, it is questionable what the *Santor* court will do when the plaintiff is a commercial purchaser. While the opinion contains no indication of any such limitation, such a commercial transaction would appear within the intended penumbra of the Code.

When both manufacturer and ultimate consumer are commercial enterprises the manufacturer should be able to shift liability for economic loss onto the purchaser. In such a case the New Jersey court might uphold the disclaimer by saying that the commercial purchaser "assumed the risk." The invocation of these terms between commercial parties would be as inappropriate as the invocation of the privity requirement had been previously in the personal injury cases. On the other hand, the New Jersey court could decide that the nonprivity tort doctrine applies only to "consumers" and not to purchasers who are buying for business use or for resale. New Jersey would then be saying that "commercial buyers" are governed by the Code's standards while "ordinary consumers" are governed by the tort doctrine.[55] The *Seely* court is in essence saying that the Code standards should be used in cases involving "commercial transactions" and defining them as cases where the damage is only economic loss.

Under both *Seely* and *Santor* the purchaser is not barred by lack of privity from suing the manufacturer of the defective product when the injury is economic loss. This alone puts New Jersey and California well ahead of the great majority of jurisdictions where the "assault on privity" has not come so far.[56] The two courts differ only on the question whether the doctrine in this area should grow from the tort concept or whether the Uniform Commercial Code should be the starting premise for judicial reasoning. While the results under the two doctrines may not turn out to be significantly different, there would seem to be a certain judicial impropriety in ignoring a statute dealing with substantially the same area as the case before the court.[57] Moreover, the tort rationale of risk distribution and the doctrine of assumption of risk, while appropriate in personal injury cases, seem wholly inappropriate when the injury is only the loss of the value of the purchaser's bargain. It would indeed be ironic if the tort doctrine which was evolved to rescue the personal injury area from the "intricacies of the law of sales" were to imprison the economic loss area with inapposite tort concepts.

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[55] Justice Peters in his separate opinion in *Seely* said that strict liability in tort should be extended to economic loss whenever an "ordinary consumer" was involved. He felt that the plaintiff in the *Seely* case who bought the truck for use in his business of heavy duty hauling and was suing for the purchase price and lost profits was an "ordinary consumer." 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30. By not classifying a suit for lost business profits as "commercial" Justice Peters appears to leave no alternative for courts in drawing the line between commercial and noncommercial cases other than to examine the size and bargaining power of the plaintiff's business in each case.

[56] For jurisdictions which have allowed recovery by a purchaser against the remote manufacturer of a defective product for economic loss damages, see note 14 *supra*.

[57] See generally MISHKIN & MORRIS, ON LAW IN COURTS 514-23 (1965).