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at no dollar cost to himself. Also, limiting the ultimate union discipline to expulsion provides an internal restraint upon unions to impose only reasonable fines, while at the same time providing them with a real incentive to make themselves more desirable so that members will opt to pay the fines rather than be expelled.

WILLIAM J. DOCKERY

Sales—Products Liability—Sales Warranties of the Uniform Commercial Code

The Uniform Commercial Code sales warranties have caused several practical and theoretical problems in determining the appropriate basis of manufacturer liability in defective product cases. The growth of non-fault liability,¹ either in tort or on the sales contract, has been characterized by increasing permissiveness toward consumer recovery against remote manufacturers. This note is addressed to the relation between the Code scheme of recovery and common law non-fault remedies.

The basic Code money-damages remedy² for a purchaser of a defective product is an action on the sales contract for breach of the seller's warranty, express or implied. The Code sales warranties correspond roughly to those developed at common law.³ Section

¹ See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [Hereinafter cited as Prosser].

² See UNIFORM COMMERCIAL CODE § 2-711 for buyer's remedies in general. All citations are made to the 1962 official text of the Uniform Commercial Code. The Code has been adopted in forty-eight states and the District of Columbia.

³ Prosser termed the sales warranty "a freak hybrid born of illicit intercourse of tort and contract." The action for breach of warranty was originally on the case, a tort action, and resembled the action for deceit. Prosser states that it was not until 1778 that an action on a contract for breach of warranty was held to lie at all. However, once the action on the contract was permitted, the defenses to breach of contract, principally lack of privity and limitation of consequential damages, became entrenched in the law.

The warranty concept evolved, first through the food cases, to the point where implied warranties were imposed by operation of the law regardless of the seller's contractual undertaking. Liability was non-fault and in effect tort duties were imposed on sellers. Since *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), removed the privity barrier only with respect to negligence liability, courts invented a variety of devices, such as fictitious agency or warranties running with the product, to circumvent the privity rules. See Prosser at 1124. However, the defense of lack of privity to the breach of warranty action remains viable in many jurisdictions, and, further, the warranty has retained elements of both tort and

2-313 (the express warranty) holds a seller responsible for his representations to the buyer, section 2-314 (implied warranty of merchantability) requires that the product be fit for any ordinary use, and section 2-315 (implied warranty of fitness) requires fitness for any particular use of which the seller is apprised before the sale. The warranties arise only upon a sale of goods,⁴ can be disclaimed⁵ and are contractual in theory.⁶

The Code does not require an allegation of privity between plaintiff buyer and defendant seller/manufacturer in a breach of warranty action. The official comment states that the overall position of the Code is that of neutrality.⁷ However, section 2-318 extends the protection of the seller's warranties horizontally to members of the buyer's family and household, and to guests in his home: if the buyer can maintain an action, then these persons may also.

The Code's warranty liability is, inferentially, limited to sellers of goods.⁸ Further, section 2-715(2)(b) specifies that the buyer's consequential damages for breach of warranty include "injury to person or property proximately resulting from any breach of warranty," and section 2-719(3) states that any limitation of consequential damages "for injury to the person in the case of consumer goods is prima facie unconscionable." Sections 2-318, 2-715(2)(b), and 2-719(3) perpetuate the confusion of tort and contract remedies which existed in the common law breach of warranty action.⁹

A potentially troublesome jurisprudential problem is present in

contract liability. See Comment, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924). The argument is made that the privity requirement in warranty cases was an historical accident. See *Mull v. Colt Co.*, 31 F.R.D. 154, 173 (S.D.N.Y. 1962); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958). The evolution of the privity rule is discussed in detail in Prosser. See also 43 N.C.L. REV. 647 (1965).

⁴ See note 8 *infra*.

⁵ There is an exception: a limitation of liability for personal injury is prima facie unconscionable unless all warranties have first been disclaimed. See UNIFORM COMMERCIAL CODE § 2-719(3).

⁶ See Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 309 (1961).

⁷ UNIFORM COMMERCIAL CODE § 2-318, comment 3.

⁸ UNIFORM COMMERCIAL CODE § 2-103(1)(d); 2-106(1); 2-313(1)(a); 2-314(1); 2-315. But see UNIFORM COMMERCIAL CODE § 2-313, comment 2.

⁹ See Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers For "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539 (1966). See note 3, *supra*.

Code related litigation. Hawkland argues that the Code was intended to operate as a code in the civil law sense, that is, in this context, as the *only* source of law governing commercial transactions.¹⁰ The principal distinction between a civil law code and ordinary legislation is that the former pre-empts its subject area.¹¹ From Hawkland's premise it can be argued that Article II of the Code precludes common law remedies where the basis of liability stems from a sale transaction.¹²

Hence in a typical products liability situation, where the consumer will normally have in addition to the Code remedy a parallel—and often overlapping—common law tort remedy, there will always be lurking in the background a serious jurisprudential question over the propriety of by-passing the Code remedy, even when the Code remedy as contrasted with the common law remedy does not afford full and fair relief. This did not constitute a critical problem at the time the Code was drafted,¹³ 1945—1952, since, at that time,

¹⁰ Hawkland argues that the failure of the earlier uniform commercial statutes can be attributed to their lack of pre-emption, system, and comprehension, and that this circumstance weighed heavily in the drafting of the Code. Hawkland cites the concern of the chief architect of the Code, Karl Llewellyn, over a (pre-Code) system of law which gave courts leeway in selecting from among two or more alternative principals of law a principle to settle a commercial dispute. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 ILL. L. F. 291, 299 (1962).

¹¹ "There is a wide difference between . . . a statute and a true code. A 'code' is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts." *Id.* at 292. UNIFORM COMMERCIAL CODE § 1-103 provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall *supplement* its provisions. (Emphasis added).

§ 1-104 provides:

This Act being a general act intended as a *unified coverage of its subject matter*, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided. (Emphasis added).

See generally Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

¹² Arguably, Article II should apply to commercial transactions analogous to sales, such as leases and bailments. See Comment, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

¹³ The history of the drafting of the Code is set out in Schnader, *The New Movement Toward Uniformity in Commercial Law—The Uniform*

the warranty action was with some exceptions¹⁴ the only non-fault remedy open to an injured consumer. However, six years subsequent to the drafting of the Code, the first of the strict tort liability cases was decided.¹⁵ This created an anomaly—at the time the Code was drafted, sections 2-318, 2-715(2)(b) and 2-719(3) were intended to be, and at the time represented, a liberalization of consumer remedies, yet subsequently the judicially created doctrine of strict tort liability went far beyond the liberalities of the Code.

The strict liability doctrine is based on breach of a tort duty running directly from the manufacturer to the consumer. The breach occurs when an unreasonably dangerous product is placed on the market. Liability is non-fault—it is no defense that the manufacturer exercised all possible care in the preparation or sale of his product.¹⁶ It is usually held that the plaintiff has met his

Commercial Code Marches On, 13 BUS. LAW. 646 (1958). A more liberal version of § 2-318 was originally drafted in 1950. However, in 1951 it was replaced by the present version of § 2-318. The wide divergence of state law privity rules is usually cited as the reason for the change. See Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 3 UCC REPORTING SERVICE 672, 678 (1967).

¹⁴ In some jurisdictions the exceptions to the principle of no non-fault liability without privity were extensive even before the Code was drafted. The development of exceptions to the general rule, for example, in the food and ultra-hazardous product cases, is set out in Prosser 1103—14.

¹⁵ Prosser states that *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 80 N.W.2d 873 (1958), was the first case to apply strict tort liability without limiting the principle to a given class of cases, such as those involving food products intended for human consumption. Prosser 1112.

¹⁶ RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides that:

(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 consumer, 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.

This section has been adopted in at least six jurisdictions by judicial decision. See *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965); *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 405 P.2d 624 (1965); *Ford*

burden by showing that (1) an unreasonably dangerous condition existed while the product was in the manufacturer's hands, that (2) that this defect caused the injury, while (3) the product was being used in a normal (or foreseeable) way by (4) an intended user of it.¹⁷

Assuming, for the sake of argument, that the Code is not preemptive, alternative remedies can in theory apply to many claims—relief can be granted either on the basis of breach of the Code warranties or in tort. If this is the case then ideally definite principles should govern the decision to give relief on the basis of one ground or the other. Indefiniteness of legal duties and remedies in commercial transactions existed before the Code, and was to have been corrected by the Code. This is a basic argument in favor of pre-emption. However, in the face of alternative remedies, a rational method of determining the appropriate basis of liability is to look to the traditional distinctions made between contract and tort liability: to the relation between the parties to the action, the functions of the two actions, the interests protected by each and the types of loss recoverable in each.

In both actions the effect of plaintiff's recovery is to shift a loss of some kind from him to the defendant. However, the relation between the plaintiff and the defendant which existed prior to the tort or breach of contract is very different. Parties to a contract have consented to deal with each other, while a tortfeasor and his victim normally have not. Tort duties have no consensual basis but are imposed by law.¹⁸ If the action is on the contract the rights and duties *inter se* have previously been consented to by

Motor Co. v. Lonam. 398 S.W.2d 240 (Tenn. 1966). Comment *m* to § 402A states:

The rule stated in this Section is not governed by the provisions . . . of the Uniform Commercial Code; and it is not affected by limitations on the scope and content of warranties, or by any limitation to 'buyer' and 'seller' in [the Code]. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by [the Code]. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement"

¹⁷ See note 16 and cases there cited. Prosser states that 22 jurisdictions have adopted strict liability as to all products on one theory or another. Prosser, *Strict Liability to the Consumer*, 18 HASTINGS L.J. 9, 15 (1966).

¹⁸ See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

the contracting parties, or, as a minimum, consent to deal has been given.¹⁹

The function of the two actions is also different. The breach of contract action is treated as a device for satisfying the performance expectation bargained for in the contract. The tort action, however, is intended to restore the plaintiff to the position he occupied before the tort was committed—to make him whole.²⁰ Both actions embody a device—the contemplation-of-the-parties rule in contract and proximate cause in tort—which effectively reduces the defendant's liability beneath what his misfeasance has caused in fact. While the standard is roughly the same, reasonable foreseeability, the function of recovery in the two actions is entirely different notwithstanding the similarity of the liability limiting rules.

A more basic distinction is in the interests protected by the two actions. The interest traditionally protected in the contract action is the performance of promises, on which, supposedly, the fabric of commercial transactions rests. The interest protected by a tort action, however, is the personal security of the plaintiff and his property—freedom from unprivileged interference.²¹ To this it is frequently added that the tort action protects a social interest in risk (loss) distribution over as wide a range as possible.²²

The consensual-non-consensual distinctions between the two actions require that if the basis of the plaintiff's claim is that the defendant did not perform his promise, then privity of contract or some other consensual relation should exist between the plaintiff and the defendant. Similarly, if the interest being protected is promise performing, and/or if the perceived function of the action is satisfaction of the bargain, then there should be either plaintiff—defendant privity or some other consensual relation. The qualification of "some other consensual relation" is added because it is possible to conceive of situations where there is no privity of contract yet where each of the contract action distinctions can be made

¹⁹ The distinction made here is not inconsistent with the concept of duties imposed by law on the contracting parties. The question asked is whether the plaintiff and the defendant have, or have not, agreed to deal with each other before the wrong complained of was committed. See L. SIMPSON, *CONTRACTS* § 3 (2d ed. 1965).

²⁰ R. McCORMICK, *DAMAGES* § 137 (1935). The remedy of rescission an exception to this distinction.

²¹ L. GREEN, *RATIONALE OF PROXIMATE CAUSE* 51 (1927).

²² *E.g.*, *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944).

in favor of enforcing contract liability, for example, in a third party beneficiary situation, or where an express warranty has been made directly to a plaintiff not in privity.

To make a final distinction, there are different types of losses upon which the two actions operate in a products liability context. One of these is injury to the person of the plaintiff and to his property; tort law has traditionally focused here. The other is economic loss unrelated to personal injury or to injury to the property other than the product.²³ This loss lies in the destruction of the value of the product—loss of the bargain—and traditionally

²³ The Supreme Courts of California and New Jersey decided oppositely the question of recovery of pure economic loss in an action to enforce strict tort liability. In *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), the plaintiff was permitted to recover the value of the defective product from the non-privity manufacturer of the product. There had been no personal injury or injury to property other than the product. The New Jersey Court stated that in mass marketing transactions the retailer is a mere conduit, while the manufacturer is the "father of the product," and his responsibility should be no different where only economic loss is involved. In *Seely v. White Motor Co.*, 63 Cal.2d 1, 403 P.2d 145, 5 Cal. Rptr. 17 (1965), the California court, in dicta, stated its view that strict tort liability should govern the distinct problem of physical injuries. The court felt that the breach of warranty action functioned better to compensate plaintiffs for loss of the commercial bargain, and that to impose strict tort liability for all loss caused by defective products might subject the manufacturer to liability unknown in scope. Justice Peters, in a carefully reasoned dissent, pointed out that the majority rationale for imposing strict tort liability in any circumstance was the theory of loss (or risk) spreading rather than deterrence to the manufacturer, and that therefore on this rationale there was no basis to distinguish between physical and non-physical loss. *Id.* at 158.

If the rationale of strict liability is loss spreading then there is no legitimate basis for the *Seeley* distinction. It is often suggested that this problem does not lend itself to legal analysis but is properly the concern of an economist. As between an ordinary plaintiff and an ordinary defendant, the defendant's capacity to spread his loss will depend upon two factors: whether the risk involved has sufficiently frequency of occurrence to warrant insurance and if so whether the defendant has had the foresight to insure against it. If the defendant has no insurance the loss will remain on him if he is found liable. From an economist's viewpoint this is neither desirable nor undesirable since it would accomplish no gain in total utility provided plaintiff and defendant have roughly the same incomes—the marginal utility of the dollar amount lost is the same to both. However, if the plaintiff is insured against the loss and the defendant not, then it is economically preferable for the loss to remain on the plaintiff for now he can spread it. This reasoning suggests that liability should turn on which party is insured. The Code partially adopts this position in § 2-510 where it is provided that a non-defaulting party in certain circumstances may, to the extent of his effective insurance coverage, treat the risk of loss as remaining on the defaulting party. Prosser, among others, objects to liability turning on insurance coverage. However, if loss spreading is the only relevant question, the

is compensable in an action on a contract. The distinction can be illustrated by comparing the case of a machine which does not work

economic sense of the proposition is unassailable—less total utility is lost if the party who is insured is found liable.

In the case of the manufacturer defendant, the minimum loss of total utility is accomplished through his ability to spread the loss by raising prices to his customers, assuming for now that this is possible. In both the case of the ordinary defendant who is insured and the manufacturer defendant, the result is the same, provided that the manufacturer is able to spread his loss. In the former case the spreading is accomplished through a raise in the insurer's premiums to all his customers. What makes loss spreading economically preferable is the concept of diminishing marginal utility. This posits that each additional unit of consumption has less utility than the one which preceded it—the second Cadillac does not have as much utility as the first. By inference, then, each previous unit of consumption has more utility than the next one. Therefore if one unit of consumption is taken away from ten people the loss in total utility is less than if ten units of consumption are taken away from one person. This is because each of the first nine units, counting back nine through one, has increasing marginal utility, while the tenth has the least utility of all. See P. SAMUELSON, *ECONOMICS* 427-30 (1964); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 527 (1961). However, an economist would quarrel with the facile assumption that the manufacturer defendant will as a matter of course be able to distribute his losses through price rises. See Prosser at 1120. This assumption is implicit in identifying loss spreading as a justification for strict liability, or, as Justice Peters did in *Seeley*, setting up the function of loss spreading as a barrier to distinctions between physical and economic injury. This is not to say that Justice Peter's argument is invalid—because there is no indication that it is more difficult for a manufacturer to distribute one type of loss than another—but rather to say that judicial decisions to date have not taken account of relevant economic theory.

The case of the perfect competitor: the perfect competitor is defined as one who is a mere price taker and can sell as little or as much quantity as he desires without affecting market price or without shifting his demand curve either to the left or to the right. *The perfect competitor has no power to raise prices.* However, strict liability may result in output reduction. According to the marginal cost theory of output, the perfect—or any other—competitor in determining how much quantity to produce is, during the short run, not concerned with fixed costs but rather will always push quantity to the point that price equals marginal cost. Where price equals marginal cost of the last unit of output no more quantity will be produced until price or marginal cost changes. Therefore, whether strict liability will have any effect on quantity during the short run depends upon whether the cost of the liability are fixed—constant with quantity increments—or variable. If the former is the case strict liability will have no effect on quantity during the short run, and it has already been noted that the perfect competitor has no power to raise price. However, if the cost is variable, the effect of strict liability will be to reduce output during the short run as marginal costs will reflect this cost. During the long run, if the cost of strict liability is variable it will have already been included in marginal cost and is removed from the picture, except that since less quantity is now being produced there will probably be a slight price rise in the market. However, if the cost is fixed, during the long run it will cause the perfect competitor to reach a new equilibrium at a slightly lower quantity and a slightly higher price.

This brief analysis is intended as a model to illustrate that strict liability

and thereby causes loss of profits, with the case of a machine which blows up and kills everybody.

Applying the principles outlined here to the Code, section 2-318 can be rationalized in contract terms as each of the enumerated classes of persons can be considered third party beneficiaries of the buyer's contract. The section does not codify the common law test of intent to benefit, but it is close enough to the typical third party beneficiary situation to permit the rationalization. Consent to deal with members of the buyer's household and guests can fairly be attributed to the seller. The Code's real reparture from contract theory is in sections 2-715(2)(b) and 2-719(3). The former section specifically makes damages for personal injuries recoverable in a breach of warranty action and the latter deprives the seller of the power to limit or exclude liability for personal injury if he has first not disclaimed away all warranties.

While it is settled law that personal injuries are within the contemplation of the parties rule and recoverable in breach of warranty,²⁴ this doctrine is the result of using the warranty action as a vehicle for imposing tort duties on the seller.²⁵ Consequently, with respect to personal injuries, the contemplation rule in warranty cases has become indistinguishable from the tort standard of proximate cause. The original scope of the rule, in pure contract, was quite different: it was intended to limit liability in the situation where unforeseeable consequences *in a commercial context* result from the non-performance of a contract term, as where, for example, breach of a time term causes loss of profits.²⁶ It is a conceptual

will not always result in immediate loss spreading through price rises. The effect of strict liability will vary in the case of the imperfect competitor and the monopolist from what has been outlined here. See Calabresi, *Some Thought on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961). See generally *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966); *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965); ANNOT., 13 A.L.R.3d 1057, 1090 (1967).

²⁴ *E.g.*, *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931). "[T]he law is clear that such damages for personal injury are recoverable under an ordinary warranty." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

²⁵ See note 3 *supra* and materials there cited. See also Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539 (1966).

²⁶ See L. SIMPSON, *CONTRACTS* 396 (2d Ed. 1965); McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract*,

misapplication of the rule to hold that personal injuries are, per se, within it. The inquiry is misdirected—if a purchaser buys a cigarette containing a cancer causing agent this does not necessarily mean that the seller has breached his contract.²⁷ If the cigarette is otherwise of good quality and meets commercial standards the buyer, arguably, got what he bargained for—a smoke—and an action on the contract for breach would satisfy neither the bargain satisfying (purpose of recovery) nor the promise performing (interest protected) rationales of the action. Whether the eventuality of the buyer contracting cancer was within the contemplation of the parties is irrelevant.²⁸ Suppose, however, that the buyer was on the verge of a nervous breakdown and needed a quick smoke and the seller tendered delivery past the time due. If this failure of performance causes a nervous breakdown, there is a contemplation of the parties question, that is, whether the buyer's condition was previously brought home to the seller. Whether a tort duty, running from manufacturer to consumer, should be imposed on the cigarette manufacturer, and then whether this duty has been breached, are distinct and unrelated matters. The conceptual difficulty that this analysis leads to is in saying that a personal injury-causing product can be merchantable. However, this is the result of treating the breach of warranty as a tort.

19 MINN. L. REV. 497 (1935). Amram and Goodman, *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 268 (1952), are critical of cases which "while talking in terms of contract liability for breach of warranty have in fact imposed a tort standard of 'proximate damage.'" Pointing to *Naumann v. Wehle Brewing Co.*, 127 Conn. 44, 5 A.2d 181 (1940), where a store owner recovered for personal injuries when a bottle of ale exploded, they say, "Her action based on an alleged breach of warranty that the ale was of merchantable quality, though it could hardly be argued that personal injuries to a retail merchant were a foreseeable consequence of a breach of this warranty which is designed to protect commercial interests." *Id.* at 270. See generally L. FRUMER and M. FRIEDMAN, PRODUCTS LIABILITY § 16.01(2) (1967).

²⁷ See Note, 26 ALBANY L. REV. 354, 359 (1962). *But see* Green v. American Tobacco Co., 154 So.2d 169 (Fla. 1963).

²⁸ It is irrelevant where the buyer is enforcing a contract against the seller. If, for example, the buyer purchases weed killer which works—it kills weeds—the seller has fully performed his contract. If the weed killer also causes the buyer to develop a rash the question is whether the seller ought to be held liable for marketing a dangerous product, not whether the injury was within the contemplation of the parties. The contemplation rule remains viable, however, in contract actions, as where, for example, the contemplation of the parties must be examined to determine whether the seller has given a warranty of fitness for a particular purpose. See UNIFORM COMMERCIAL CODE § 2-315.

Similarly, depriving the seller of the power to limit or exclude liability for personal injuries without first disclaiming all warranties is a departure from contract theory. While it is true that the Code permits disclaimer of warranties, it is highly unlikely that a seller interested in the good will or trade name value of his product will do so in the conspicuous manner which the Code requires. Since only non-fault liability—common law tort and Code warranty—is being considered the public policy against limitations of negligence liability is not present. In this context unconscionability has traditionally been limited to two situations: where one party because of superior bargaining power is able to impose remedy depriving limitations of liability on the other (adhesion contracts), and where fine print, or ambiguous or otherwise “shady” disclaimers have been used. Both of these elements are illustrated in *Henningsen v. Bloomfield Motors, Inc.*,²⁹ where an industry wide standard form contract disclaimed all implied warranties and limited the seller’s liability to cost of repair of the automobiles sold. The contract was held unconscionable. However, limitations of non-fault liability and disclaimers of warranties have not traditionally been treated as unconscionable *per se*.³⁰

Apart from the theoretical problems under discussion, the perpetuation in the Code of the hybrid nature of the sales warranty can have the effect of retarding the judicial development of other consumer remedies. In *Hochgertel v. Canada Dry Corp.*,³¹ the first major case construing section 2-318, the Pennsylvania Supreme Court gave restrictive effect to the section on the principle *enumeratio unius est exclusio alterius*. The court reasoned that since the plaintiff, an employee of a purchaser, was not a purchaser nor one of the classes of persons enumerated in section 2-318, “it is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include.”³² On the ground

²⁹ 32 N.J. 358, 161 A.2d 69 (1960).

³⁰ See generally Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 BOSTON COL. IND. and COM. L. REV. 285 (1963).

³¹ 409 Pa. 610, 187 A.2d 575 (1963).

³² 409 Pa. 614, 187 A.2d 577 (1963). Three years later the Pennsylvania court adopted § 402A of the Restatement of Torts verbatim. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). See, for cases following *Hochgertel*, *Atlas Aluminum Corp. v. Borden Chemical Corp.*, 233 F. Supp. 53 (E.D. Pa. 1964); *Driver v. F. A. Mitchell Co.*, 35 F.R.D. 226 (E.D. Pa. 1964); *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963). Cf. *Phares v. Dandia Lumber Co.*, 62 N.M. 90, 305 P.2d 367, 370 (1957). Note that a judicial hat hanging peg—to avoid the *Hochgertel* result—exists in section 1-103 of the Code. See note 11 *supra*.

that the section was too restrictive it was not enacted in California and Utah.⁸³ To the argument that the official comments state the overall neutrality of the Code on the issue of privity, the Pennsylvania court answered that the legislature did not enact the comments. While in fairness it should be said that courts construing the Code tend to refer to the comments, the doubtful status of the comments—they are not law nor are they legislative history⁸⁴—presents a problem in jurisdictions where legislative histories may shed no light on the legislative purpose behind section 2-318.⁸⁵ The pre-emption argument, if it is relevant to *Hochgertel*, is probably neutral as to the *Hochgertel* result—the fact that the Code pre-empts sales remedies does not indicate one way or another whether a court should religiously restrict the *scope* of the Code remedies. What the pre-emption argument militates against is the total by-passing of the Code remedies in favor of a common law remedy.⁸⁶ This argument,

⁸³ See CALIFORNIA SENATE FACT-FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART I, THE UNIFORM COMMERCIAL CODE 457-58 (1959-61): Comment, *Implied Warranty, Strict Tort Liability for Personal Injuries, And the Uniform Commercial Code § 2-318*, 13 KAN. L. REV. 411 (1965). In addition, non-uniform versions of section 2-318 have been enacted in ten states. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 13 (1967). This report proposes two alternative amendments for states dissatisfied with section 2-318. Alternative B states that "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Alternative C states that "A seller's warranty whether express or implied extends to any person who may be reasonably be expected to use, consume or be affected by the goods and is injured by breach of warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends." The accompanying proposed amendments to the official comments to section 2-318 state generally that the purpose of the proposals is to extend the protection of the Code warranties consistent with case law liberalization of the privity rules. *Id.* at 14.

⁸⁴ See E. FARNSWORTH, *NEGOTIABLE INSTRUMENTS* 7-8 (2d ed. 1965). In *Henry v. John W. Eshelman & Sons*, 209 A.2d 46 (R.I. 1965), the Rhode Island Supreme Court interpreted the official comment to section 2-318 to mean that the legislature had left it to the courts to determine whether the privity rules ought to be abrogated in warranty actions. This approach seems to equate the comments with legislative history, which they are not.

⁸⁵ However, just as it can be asked whether the comments reflect legislative intent, it can also be asked whether the intention to pre-empt which Hawkland attributes to the drafters was adopted by the legislature in enacting the Code. The difference, however, is that there is statutory authority for the pre-emption argument. See UNIFORM COMMERCIAL CODE §§ 1-103, 1-104. See note 11 *supra*.

⁸⁶ *But see* Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966), and

however, did not trouble the Pennsylvania court—three years after *Hochgertel*, in *Webb v. Zern*,³⁷ it adopted section 402A of the Restatement of Torts as a rule of law in products liability cases.

Beyond the problems so far discussed, there are other “intricacies of sales law” relevant to warranty relief which have (necessarily) been included in the Code. Principally these are the sale of goods requirement and the notice giving requirement.

The Code requires that all defendants in breach of warranty actions shall be sellers of goods.³⁸ Section 2-108 defines a sale as the “passing of title from the seller to the buyer for a price.” A literal application of the Code terms precludes the possibility of successful warranty actions against the sellers of services, bailors and lessors. While the word “seller” sometimes creeps into strict tort liability formulations,³⁹ the tort liability principle is not burdened with a background of sales case law interpretation of the words, “sale,” “seller” and “goods.” Further, the judicial doctrine of strict tort liability is not circumscribed by the jurisprudential arguments which may influence the construction of the Code.

In *Cintrone v. Hertz Leasing & Rental Service*,⁴⁰ the New Jersey Supreme Court extended strict tort liability to the leasing of motor vehicles. In doing so, the court made passing reference⁴¹ to the official comment to section 2-313 which states the intention of the drafters that the Code provisions were not intended to restrict case law application of the warranties to non-sale transactions. The case illustrates that it is conceptually a simple matter to extend tort liability to non-sale transactions. The word “seller” in the Code does not have to be tortured into meaning “lessor,” and the imposition of liability can be frankly made on the basis of policy.

Section 2-314 specifically provides that the serving for value of food or drink for consumption either on the premises or elsewhere is a sale. Beyond this provision, the Code leaves unresolved the problems arising from the distinction between the sale of goods

Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965). In both of these cases the court felt that section 2-318 was inapplicable because strict liability in tort was the basis for relief. These cases also ignored the preemption argument.

³⁷ 422 Pa. 424, 220 A.2d 853 (1966).

³⁸ See note 8 *supra*.

³⁹ It is used in SECTION 402A OF THE RESTATEMENT OF TORTS. See note 16 *supra*.

⁴⁰ 45 N.J. 434, 212 A.2d 769 (1965).

⁴¹ The adoption of the Code post-dated the facts of the case.

and the sale of services. In *Epstein v. Giannattasio*,⁴² a Connecticut court held that a beauty parlor treatment was a sale of services and there could be no breach of the Code warranties.

The notice giving requirement of the Code should not prove to be burdensome to consumer recovery for breach of the Code warranties. While the requirement of giving notice of breach within a reasonable time is usually pointed out as one of the principle differences between tort and warranty liability, the notice giving requirement is not that much more exacting than the requirement common to both actions of bringing suit within the time provided by the statute of limitations. In *Pritchard v. Liggett & Myers Tobacco Co.*,⁴³ a cigarette smoker gave notice to the manufacturer ten months after the smoker's lung was removed that he was electing to treat the purchase of cigarettes allegedly containing cancer causing agents as a breach of warranty. After having been persuaded that the delayed notice did not prejudice the manufacturer, the court held that this notice was not insufficient as a matter of law. In a non-Code case, *Greenman v. Yuba Power Products, Inc.*,⁴⁴ the California court dispensed with the notice requirement altogether in an action for breach of warranty where personal injury damages had been alleged. The court held that the seller's liability was properly in tort and therefore the sales law concept of notice had no application. The distinction is logical. The function of giving notice in a commercial context is to permit the seller to repair whatever the breach has caused. In a personal injury context this is impossible. However, the Code does require notice of breach⁴⁵ and where the Code warranty remedies are used to recover personal injury damages the *Greenman* result cannot follow.

Section 2-725(1) provides that an action for breach of warranty must be brought within four years after the action has accrued. Further, section 2-725(2) indicates that an action accrues when the breach occurs, upon tender of delivery of the defective product, "regardless of the aggrieved party's lack of knowledge of the breach." The import of this section is that if an injury occurs more than four years after tender of delivery the buyer cannot

⁴² 25 Conn. Supp. 109, 197 A.2d 342 (1963). See generally Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957), and cases there cited; 43 N.C.L. REV. 1019 (1965).

⁴³ 295 F.2d 292 (3d Cir. 1961).

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

⁴⁵ Uniform Commercial Code § 2-607(3)(a).

commence an action. The problem raised by this section is that most states have tort statutes shorter than four years, which, in view of the hybrid nature of the warranty,⁴⁶ may result in interesting categorizations of the liability which a plaintiff is seeking to enforce. There has been no pattern of repeal or modification of existing statutes of limitations upon adoption of the Code.⁴⁷

Conclusion

No matter how liberally the Code warranties are construed they remain circumscribed by the "intricacies of the law of sales."⁴⁸ Notice, disclaimers, etc., are the children of sales law and their parentage is a judicial bias in favor of protecting struggling nineteenth century industry vis-a-vis consumer plaintiffs. Serious jurisprudential problems arise, furthermore, when the Code sales law is by-passed in favor of parallel common law tort remedies. If *Hotchgertel*⁴⁹ proves to be a prototype of judicial reasoning under the Code, the ultimate effect of the sections under discussion may be to retard the growth of non-fault tort remedies. Further, the hybrid mixture of contract and tort law in the sales warranty results in hazy, poorly reasoned conceptualizations of the basis of liability in products liability cases.⁵⁰

⁴⁶ See Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 FOOD DRUG COSM. L.J. 262 (1956); Comment, *Manufacturer's Liability to Remote Purchasers For "Economic Loss" Damages—Tort or Contract?* 114 U. PA. L. REV. 539 (1966).

⁴⁷ See Freedman, *Products Liability Under the Uniform Commercial Code*, 10 PRAC. LAW., April 1964, at 49, 64.

⁴⁸ More differences flow from affixing the label "breach of contract" to the plaintiff's action than the ones under discussion. The contract action will not normally permit recovery for wrongful death. The contract action may fail for uncertainty, illegality, want of consideration, or because of the statute of frauds or the parole evidence rule, or because of infancy or discharge in bankruptcy. Different conflicts and joinder rules may apply, and the plaintiff may only be able to bring a single action for multiple breaches. See W. PROSSER, *TORTS* 641-2 (3d ed. 1964) and cases there cited. See, e.g., *Williams v. Connolly*, 227 F. Supp. 539, 542 (D. Minn. 1964); *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936).

⁴⁹ 409 Pa. 610, 187 A.2d 575 (1963). Frumer and Friedman have analyzed the possible consequences of section 2-318 and conclude that it should not prove to be restrictive. L. FRUMER and M. FRIEDMAN, *PRODUCTS LIABILITY* § 16.04(3) (1967). But see Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961); 13 KAN. L. REV. 411 (1965); 31 BROOKLYN L. REV. 367 (1965).

⁵⁰ [W]e hold the bottler, of a Pepsi-Cola which the non-privy plaintiff purchased, by advertising and sales promotion addressed to the consumer, induced her to 'Come Alive' and that she was 'in

It has been pointed out that it is perfectly consistent to insist on privity in contract cases and at the same time impose non-fault tort liability in the absence of privity on the basis of other policies.⁵¹ Further, the existence of contractual remedies, where there is manufacturer—consumer privity, does not bar tort remedies in the case of tortious conduct. Prosser makes the distinction that when the defendant's misfeasance goes beyond breaching the terms of his contract, then the proper basis of liability is in tort.⁵²

It has already been noted that the inclusion of personal injuries within the contemplation rule is the consequence of imposing seller tort duties through the sales warranty.⁵³ Sections 2-715(2)(b) and 2-719(3) perpetuate this. The inclusion of damages for personal injury as a normal element of recovery in a contract action and the prohibition against limitations of (non-fault) liability for personal injury commingle two distinct legal relationships—that between two parties to a contract and that between a tortfeasor and his victim. If there is something to be said for conceptual clarity in the law, these two sections do not say it.⁵⁴

The repeal of sections 2-318, 2-715(2)(b) and 2-719(3) is suggested. Repeal of these sections would leave the privity doctrine viable in warranty actions, would limit recovery to the loss of the commercial bargain and would permit the seller to limit or exclude non-fault personal injury liability. The Code warranty protection would then be limited to implementing the traditional promise performing and bargain satisfying rationales of the breach of contract action. As Prosser argues and as several courts have

the Pepsi Generation.' . . . The evidence in this case was sufficient to go to the jury on the theory implied warranty resulting from the manner in which the Pepsi-Cola was advertised and traveled from the bottler to the plaintiff.

Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967).

"Then you should say what you mean," the March Hare went on. "I do," Alice hastily replied; "at least I mean what I say—that's the same thing you know." "Not the same thing a bit!" said the Hatter. "Why you might just as well say that 'I see what I eat' is the same as 'I eat what I see!'"

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⁵¹ See Byrd and Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 937 (1965).

⁵² W. PROSSER, *TORTS* 641 (3d ed. 1964).

⁵³ See note 3 and materials there cited.

⁵⁴ UNIFORM COMMERCIAL CODE §§ 1-102(2) and 1-102(2)(a) state: "Underlying purposes and policies of this Act are (a) to *simplify, clarify* and *modernize* the law governing commercial transactions." (Emphasis added).

concluded, the breach of warranty action is an unsuitable vehicle for tort recovery.⁵⁵ Yet at the same time it remains a viable instrument for protecting the integrity of the commercial bargain and affording relief in the case of breach.

The suggestions made presuppose the continuing rapid development of the remedy of strict tort liability and are not intended to affect the problem of unconscionable contracts.⁵⁶

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⁵⁵ See Prosser 1127. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Ca. Rptr. 697 (1963).

⁵⁶ See *Kessler, Contracts of Adhesion, Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

