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Some Thoughts on Products Liability Law: A Reply to Professor Shanker

Neil O. Littlefield

In response to Professor Shanker's article urging the adoption of a unified system of products liability law within the Uniform Commercial Code in order to obviate the effects of the Code's eclipse by tort principles, Professor Littlefield argues that the eclipse is an expected and harmless one and analyzes the advantages of judge-made over statute-made law in this area. The author traces the development of products liability law and demonstrates that the sales law concepts of privity, disclaimer, and notice interfered with the desire for strict liability. Professor Shanker's hypothetical case is then re-evaluated to illustrate how tort law not only supplements the Code but also imposes outer limits on products liability.

PROFESSOR SHANKER has done it again! He has offered a very good analysis of a significant and tricky development in the law, which analysis is coupled with a commentary and some suggestions for change that are not supportable. In his latest article,

Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers,¹ he pretends to find in the present state of the law bogeymen which do not exist.

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This *Review* has given me the opportunity to set out briefly a contrasting view. My object is not so much to tear down what Professor Shanker has done, but to continue a meaningful dialogue which he has started. Much of the commentary on products liability law of the sixties has been simply a gloss on the cases.² Professor Shanker's article is more than that and is exceedingly welcome.

¹ 17 W. RES. L. REV. 5 (1965) [hereinafter referred to simply as Shanker]. It is hoped that the interested reader will read or reread Professor Shanker's excellent article in order to give him a fair shake. The reader might wish to know that the good Professor and I are warm, personal friends but that this dialogue did not come about by design. I say he has done it again, because when he wrote, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788 (1964), I had a like reaction to rebut his commentary and proposed solution.

² Examples can be found in the INDEX TO LEGAL PERIODICALS. Exceptions are, of course, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501 (1964).

There is no necessity in this reply to restate the rapid development of the law of strict liability for defective products. Professor Shanker has ably done so, and other articles have focused upon various phases of the development.³ The most significant development, of course, is the adoption of the latest version of section 402A of the *Restatement of Torts*.⁴ It is this latter development and its relationship to the law of implied and express warranties under article 2 of the Uniform Commercial Code (UCC) which has precipitated this dialogue.

It might be desirable at this juncture to set out a few assumptions which are part and parcel of this discussion and with which I believe Professor Shanker would concur. The basic assumption, of course, is that there is room in modern law for a doctrine which requires that an enterprise engaged in the production or the distribution or both of consumer goods be financially responsible for injuries resulting from defective products produced by that enterprise. An examination of the whys and wherefores of this assumption is not within the scope of this article. It is further assumed that this liability for defective products should not rest upon the classic law of negligence or fault. It has been felt that the law of *MacPherson v. Buick Motor Co.*⁵ and the extensions thereof⁶ have not adequately "spread the risk" of defective products.

However, the nub of the problem arises when it is decided that courts should recognize strict liability for defective products. There are at least two ways in which the law could develop to achieve this goal. The law could extend the area of tort liability without fault, or it could extend the law of warranties. As Professor Shanker points out in his article, the law of torts became the dominant theory of recovery. He argues that the law of strict liability in tort for defective products has eclipsed "at least some of the Commercial Code's statutory rules on products liability."⁷ Why the law of torts prevailed in this instance is part of the substance of this dialogue. The answer to this question is germane to this writer's disagreement with Professor Shanker.

³ See articles cited in Shanker 6 n.2.

⁴ RESTATEMENT (SECOND), TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶ See Prosser, *supra* note 2, at 1103-14.

⁷ Shanker 8.

I. HOW IT ALL CAME ABOUT

One should note at the start that the courts were going to breach the walls of the citadel in any event. It does not require much extensive investigation of the early cases to be impressed with the conclusion that it is the result which the courts actively sought. They were not necessarily required to predetermine the *theory* of recovery in the early cases.⁸ It seems evident from the history of the development of increased liability for defective products that the courts reached a result in favor of the injured consumer before they decided which of several rationales would govern the extent and limits of recovery. The development in two states, by way of example, illustrates that this was the pattern. The discussion here of that development should cast light upon some of the points intended to be made.

A. *Development of Case Law in New Jersey*

The development in New Jersey can be traced briefly through two supreme court cases. In *Henningsen v. Bloomfield Motors, Inc.*,⁹ the complaint sounded in both negligence and in express and implied warranties. Although the negligence count was dismissed, the plaintiffs recovered on the warranty count. Both parties appealed, the plaintiffs from the dismissal of the count in negligence and the defendants from the recovery in warranty. Judge Francis, in upholding the jury verdict for the plaintiffs, wrote an opinion which occupied twenty-nine pages in the *Atlantic Reporter*.¹⁰ In affirming the verdict, he discussed in a broad manner warranties, disclaimers, and recovery in negligence. While the holding must be analyzed as permitting recovery on warranty irrespective of privity, some of his language is noteworthy:

Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has con-

⁸ There is no obligation upon the courts to find a theory before they find a result. For example, the judges can make up their minds that facts A, B, and C warrant recovery for a plaintiff, while saving until later cases the choice of several competing theories to justify the result. (This does not mean that they can reach a result without reasons.) Courts have always proceeded from case to case in developing new areas of recovery, and this is the desirable way to proceed. They produce more harmonious rules when they label the pigeonhole after they have acquired some familiarity with the results of their new work.

⁹ 32 N.J. 358, 161 A.2d 69 (1960).

¹⁰ *Id.* at 364-416, 161 A.2d at 73-102.

trol of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend "upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.'"¹¹

There is little doubt but that the *Henningsen* decision stands for the proposition that modern sales law permits a recovery in warranty by the injured consumer-purchaser as against the manufacturer even though there is no direct privity. And the case has been so treated.¹² However, the policy reasons for the decision bear equally well on the matter of extending tort liability so as to permit the *same result* under a tort theory. The New Jersey Supreme Court in 1965 switched to the tort rationale as a basis for recovery in deciding *Santor v. A & M Karagheusian, Inc.*¹³ Therefore, *Henningsen*, a warranty case, begins to look (in retrospect) like the precursor of strict liability in tort.

The *Santor* case has been criticized as applying the tort rule to allow recovery of commercial damages (*i.e.*, loss of benefit of the bargain),¹⁴ but the point being made here is still valid. The plaintiff purchased from the defendant's retailer carpeting which proved unsatisfactory and, in suing the manufacturer, alleged that the carpet was defective. The trial court allowed recovery on a breach of an implied warranty.¹⁵ On appeal, Judge Francis affirmed and wrote a two-part opinion. First, the Judge pointed out that the *Henningsen* doctrine applied, stating that the rule was not limited to personal injury and property damages. He then asserted:

The trial court based its judgment for the plaintiff on the theory of breach of implied warranty of merchantability It seems important to observe, however, that the manufacturer's liability may be cast in simpler form.¹⁶

The court went on to gratuitously point out that recovery was permitted on strict liability principles, citing Prosser's 1960 article¹⁷ and observing that "Its character is hybrid, having its commence-

¹¹ *Id.* at 384, 161 A.2d at 83. (Citations omitted.)

¹² See Note, 109 U. PA. L. REV. 401 (1961).

¹³ 44 N.J. 52, 207 A.2d 305 (1965).

¹⁴ See Shanker 48.

¹⁵ 44 N.J. at 57, 207 A.2d at 307.

¹⁶ *Id.* at 63, 207 A.2d at 311.

¹⁷ Prosser, *supra* note 2.

ment in contract and its termination in tort."¹⁸ The opinion articulates what the New Jersey Supreme Court has done:

In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. The quest has found sound expression, we believe, in the doctrine of strict liability in tort. . . . The obligation of the manufacturer thus becomes what in justice it ought to be — an enterprise liability, and one which should not depend upon the intricacies of the law of sales.¹⁹

B. *Analogous Developments in Connecticut*

The development of case law in Connecticut varies slightly from New Jersey's in that Connecticut's Supreme Court is somewhat less explicit as to what it is attempting to do. However, when the two leading cases are read in the background of the lower court cases decided in the interregnum, the picture becomes quite clear. The first decision which sounded the tocsin was the 1961 case, *Hamon v. Digliani*.²⁰ In that case the plaintiff, according to the allegations, was seriously injured when some of the product Lestoil, an "all-purpose detergent," spilled on her.²¹ She sued Lestoil Corporation in warranty and in negligence. The manufacturer's demurrer alleging that there was no privity was sustained by the trial court. The Supreme Court of Errors²² reversed. The main thrust of the appellate decision was that privity was no longer a defense in an action of warranty against a manufacturer.

The manufacturer or producer who puts a commodity for personal use or consumption on the market in a sealed package or

¹⁸ 44 N.J. at 64, 207 A.2d at 311.

¹⁹ *Id.* at 64-65, 207 A.2d at 311-12, (citing *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)).

²⁰ 148 Conn. 710, 174 A.2d 294 (1961).

²¹ As an informal aside, readers may be interested in the subsequent history of the plaintiff. After winning on appeal from the demurrer, she lost in the subsequent trial when the facts indicated that she went to the grocery, purchased Lestoil, among other products, stopped for a visit in a cocktail lounge, arrived home sleepy, set the groceries down, breaking the bottle of Lestoil and spilling it on herself, then immediately went into the living room to nap for a while with her dress impregnated with strong detergent. This author does not know whether she lost by a jury verdict or whether her attorney settled after the depositions revealed basically the above facts.

²² Problems have arisen in referring to Connecticut's highest court of appeal. An amendment to the Connecticut Constitution changed its name from the romantic "Supreme Court of Errors" to the mundane "Supreme Court." The question arises whether one ought to refer to the "Supreme Court of Errors — As it then was," and similarly to the "Supreme Court — As it now is." Wags assert that the court itself initiated the change to silence those critics and law students who referred to the court as the "Court of Supreme Errors."

other closed container should be held to have impliedly warranted to the ultimate consumer that the product is reasonably fit for the purpose intended and that it does not contain any harmful and deleterious ingredient of which due and ample warning has not been given. . . . Where the manufacturer or producer makes representations in his advertisements or by the labels on his products as an inducement to the ultimate purchaser, the manufacturer or producer should be held to strict accountability to any person who buys the product in reliance on the representations and later suffers injury because the product fails to conform to them. . . . Lack of privity is not a bar to suit under these circumstances.²³

The *Digliani* case constituted, as did *Henningsen*,²⁴ simply a decision eliminating the privity defense in sales-warranty actions against the manufacturer, producer, or distributor of a nationally advertised product. However, the language in that opinion, focusing upon the duty owed by manufacturers to the public at large, was the clarion call to further extensions of the idea. And the lower courts in Connecticut in the short time between 1961 and late 1965 responded in a manner that tremendously eroded the "intricacies of the law of sales."

In a 1962 decision, *Ruderman v. Warner-Lambert Pharmaceutical Co.*,²⁵ the plaintiff, relying upon *Hamon v. Digliani*,²⁶ sued the manufacturer of a home permanent preparation, alleging misrepresentations made through advertising. The defendant demurred on the ground that no notice had been given as required by the statute.²⁷ Judge Lugg agreed that this would be fatal if the plaintiff had relied upon sales law but accepted the plaintiff's contention that "the warranties they sue on are common-law warranties and not warranties subject to the Sales Act."²⁸ The Judge relied heavily on language in the *Digliani* case. The benefits of the no-privity rule were extended to a non-purchaser, non-user by Judge Klau of the Superior Court in *Connolly v. Hagi*.²⁹ The plaintiff, a service station employee, suffered personal injuries while working on an automobile manufactured by the defendant Chrysler Corporation. The plaintiff

²³ 148 Conn. at 718, 174 A.2d at 297-98. (Citations omitted.)

²⁴ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

²⁵ 23 Conn. Supp. 416, 184 A.2d 63 (C.P. 1962).

²⁶ 148 Conn. 710, 174 A.2d 294 (1961).

²⁷ The case was decided when the Uniform Sales Act was still in force in Connecticut. Under the UNIFORM COMMERCIAL CODE § 2-607, such notice from the buyer is required. The comments to this section stipulate, however, that only the immediate buyer and not remote parties must comply with the notice provisions. See Shanker 27.

²⁸ 23 Conn. Supp. at 419, 184 A.2d at 65.

²⁹ 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963).

urged "a logical extension of the principle laid down in *Hamon v. Digliani*,"³⁰ which Judge Klau readily accepted with copious references to the *Digliani* and *Henningsen* cases and to *Harper & James*.³¹ At the same time, in the Common Pleas Court, Judge Lugg continued to act as midwife for the "*Digliani* progeny."³² Another case, *Simpson v. Powered Prods., Inc.*,³³ adhered to the developing theory by granting recovery to an injured plaintiff who had leased a golf cart from the golf pro who in turn had purchased it from the defendant manufacturer. The latter objected, but to no avail, that there had not been a "sale" to the plaintiff.³⁴

The superior court radically extended *Digliani* when it permitted recovery to a bystander in *Mitchell v. Miller*.³⁵ Plaintiff's decedent died as a result of being struck by the defective automobile manufactured by the defendant. The decedent had been playing golf when the car, parked on an incline, slipped from "park" into "neutral" gear and rolled onto him, inflicting fatal injuries. Relying on *Digliani* again, Judge Klau said:

Although the concept of warranty founded on contract is to be found in the Uniform Sales Act and the Uniform Commercial Code, the recent development of the law of product liability has re-established the common-law action of breach of warranty sounding in tort rather than in contract.³⁶

It was in this context of lower court extension of the *Digliani* decision that the Connecticut Supreme Court was presented with a typical beauty parlor case. In *Garthwait v. Burgio*,³⁷ the court aligned itself with jurisdictions adopting the rationale of section 402A of the *Restatement*. The manufacturer, Clairol, Inc., defended on the ground that the plaintiff, who had visited a beauty parlor for the application of the offending hair dye, was not a pur-

³⁰ *Id.* at 202, 188 A.2d at 886. (Citations omitted.)

³¹ 2 HARPER & JAMES, TORTS *passim* (1956).

³² I attribute this latter phrase to Professor C. J. Scanlon, who followed these cases carefully and excitedly, waiting to see when the Connecticut Supreme Court would either commit mass infanticide or acknowledge the paternity.

³³ 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963).

³⁴ For a further discussion of this case regarding this particular issue in comparison with *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963), see note 72 *infra*.

³⁵ 214 A.2d 694 (Conn. Super. Ct. 1965). *Contra*, *Kuschy v. Norris*, 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964). However, the *Kuschy* case concerned the sale of a used automobile.

³⁶ 214 A.2d at 696.

³⁷ 216 A.2d 189 (Conn. 1965).

chaser. The court discussed Prosser's article,³⁸ *Henningsen*, and *Digliani*. After quoting the language of *Digliani*,³⁹ it stated:

Where the liability is fundamentally founded on tort rather than contract there appears no sound reason why the manufacturer should escape liability simply because the injured user, a party in the normal chain of distribution, was not in contractual privity with it by purchase and sale.⁴⁰

The court then found itself "in accord with the rule recently adopted in § 402A."⁴¹

II. WHY TORTS BECAME THE DOMINANT THEORY

If it is accepted that the development of strict liability for defective products is a matter of the courts reaching the result they know is correct and then fishing for the best theory to support that result,⁴² then the question becomes why tort and not contract (sales)? Professor Shanker has stated that the result should be in sales — specifically, in accordance with the Uniform Commercial Code. Is there a good reason why it did not so develop? Professor Shanker puts forth a theory that it could have developed under the Code.⁴³ It is submitted that his suggested manner of reaching the result under the Code is a bit too strained to expect a substantial number of courts to adopt this method. His comments with respect to hurdling the barriers of notice and of disclaimers bear some weight and, as he indicates, are supported by some authority. His "run-around-the-end" to avoid the problem of privity poses difficulties and relies most heavily upon official comment 2 to section 2-318.⁴⁴ It should be remembered that section 2-318 benefits plaintiffs in the horizontal privity line and that the Code is silent as to vertical privity. All in all, the route to the desired recovery under article 2 of the Code

³⁸ Prosser, *supra* note 2.

³⁹ 216 A.2d at 191-92.

⁴⁰ *Id.* at 192.

⁴¹ *Ibid.* The Connecticut development of products liability law has been analyzed ably in Cella, Joseph, Sherwood, Tatoian & Tomeo, *Products Liability in Connecticut — A Survey*, 40 CONN. B.J. 155 (1966). I have borrowed from this article freely. I would also like to express appreciation for my discussions with Mr. Richard Tomeo with respect to the dialogue between Professor Shanker and me.

⁴² Not all jurisdictions show so dramatically the development discussed here. Apparently, California jumped in without testing the water. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). However, this does not blunt the usefulness of the message to be gleaned from the other jurisdictions' experiences.

⁴³ Shanker 23-30.

⁴⁴ *Id.* at 25.

would have been tortuous and full of pitfalls. A court selecting that route might find itself at an unknown destination if certain detour signs were ignored or misread.

A. Inadequacy of Warranty Law

Professor Shanker is eminently correct in his criticism of Dean Prosser's discussion of the inadequacies of warranty law in respect to products liability under modern merchandising practices.⁴⁵ Dean Prosser should have used the Commercial Code rather than the outdated Uniform Sales Act for his platform. Perhaps he deliberately chose the Uniform Sales Act for argumentative purposes. It certainly leads to more dramatic results when one is attempting to show that the warranty law of the twentieth century should be ignored in the area of products liability. However, there are considerations other than those highlighted by Dean Prosser which justify using tort rather than sales law. And this is true even admitting that it is eminently respectable to create warranty obligations which run with the goods.

The basic problem with using warranty law is that it is in the wrong milieu. This writer has always agreed with Professor Vold that there can be and is varying scope to warranty liability. Thus, the Professor points out that warranty may (1) arise from the seller's actual promises, express or implied, (2) arise from the seller's express or implied representations of "fact serving as inducements to the deal," or (3) "be imposed by law, by reasons of broader considerations of policy."⁴⁶ But in any event, it is difficult to formulate and impose warranty liability independently of a transaction which is contractual in nature. That is, a warranty obligation is imposed because the seller is selling. Warranties of various kinds attach to the transaction — one which is essentially consensual in nature.

In opposition to this "transaction context" contemplated by the Uniform Sales Act and article 2 of the Uniform Commercial Code stands the context of modern merchandising methods. The relationship between manufacturer or producer and the public at large, whether an individual therein be purchaser, consumer, user, or bystander, is not truly that of a consensual transaction. It is a status. Manufacturers and producers relate to the general public through non-consensual devices — advertising, pricing, product design, product distribution, etc. Therefore, it is not unexpected that tort law

⁴⁵ *Id.* at 71.

⁴⁶ VOLD, SALES 426-27 (2d ed. 1959).

would more realistically furnish the body of law to settle differences between the individual members of the public and the enterprises distributing consumer goods.

Professor Shanker, in his "Summary," states:

What is needed is a single unified system of products liability law. Probably, it can best be accomplished through a Code approach. It would be well if scholars in both the tort field and the commercial law field communicated with each other in preparing such a Code which hopefully would incorporate the best ideas from both.⁴⁷

It is not clear whether the word "Code" in this text refers to the Uniform Commercial Code or simply to a products liability code. However, the rest of the article and private correspondence with Professor Shanker indicate that he feels that article 2 of the Uniform Commercial Code should include this unified law of products liability. Thus, another area of disagreement between the Professor and this writer arises. It is submitted that the Uniform Commercial Code is a poor place for what is now in essence section 402A of the *Restatement of Torts*.⁴⁸

B. *Peculiarities of Strict Tort Principles*

First, it must be generally recognized that even before the promulgation of the latest draft of section 402A of the *Restatement of Torts*, there were well-recognized categories of recovery for strict liability in tort for certain defective products.⁴⁹ If the UCC were to extend warranty coverage as well as to eliminate privity and the requirement of notice and to neutralize disclaimers, would we have to at the same time backtrack on tort law? While it is true that section 402A renders much previous case law unnecessary, it is still an obvious development in tort law.

More significantly, it is submitted that the Code, particularly article 2, is not the place for liability law of the "strict" genre. The scope, purposes, and aims of article 2 are not conversant with strict liability concepts. Why work so hard to put freedom of contract, ideas of "basis of the bargain," and some feeling for mercantile practices into the Code and then turn around and write out reliance,

⁴⁷ Shanker 47.

⁴⁸ I am not advocating that the *Restatement* expresses the ultimate in products liability law. I am asserting that it is a better vehicle for the expression of the law about which Professor Shanker and I are concerned.

⁴⁹ Citations would be "window-dressing" here; however, see generally Prosser, *supra* note 2; *Symposium on Products Liability*, 1964 U. ILL. L.F. 693.

contractual disclaimers, and notice? It would not be a happy marriage. I would be the first to scream if the Code were so read as to play havoc with dealings between the merchant and the consumer,⁵⁰ but I am not willing to distort the commercial and mercantile features of the Code if other valid and effective methods can be found elsewhere.

III. AN INTERLUDE: STATUTE VS. CASE DEVELOPMENT

I might make one more comment on the problem of the jurisprudential eclipse outlined by Professor Shanker before I proceed to the equally interesting question of possible pigeonholes. There is still another factor, concerning the question of whether strict products liability should be tort or Code, which I feel should be discussed but mention of which is exceedingly slight in the already voluminous literature on this subject. Which forum is the better able to develop a meaningful and responsible doctrine for the problem of products liability? The choice is between either the courts via the *Restatement* or the legislatures via the Uniform Commercial Code. I may be charged with the rankest of heresy,⁵¹ but I submit that the task is better left to the courts. Development in breaching the walls of the citadel was probably possible only through the courts.

A. *Impracticality of Legislative Change*

While it is not always easier to change the law through the common law system, there are certain matters which seem to be resistant to legislative change. With respect to products liability, or with respect to consumer protection enactments generally, one cannot ignore the drafting history of the Uniform Commercial Code. It is well known that the drafters of the Code endeavored to include therein a reasonable amount of consumer protection legislation. Actually, there were attempts to broaden the approach to horizontal privity far beyond the present section 2-318. The drafters failed for the most part. Why? Simply because in the process of drafting a unified code which would encompass all commercial transactions and which they wished to have adopted in all jurisdictions, they were confronted with the wrong pressure groups. The distributive agencies in our economy have, and rightly so, well-paid,

⁵⁰ See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 SO. CAL. L. REV. 48, 74-77 (1966).

⁵¹ See Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

able legal staffs to watchdog the activities of Code drafters. The drafters, in order to retain certain vital changes in sales law, had to concede in other places. In contrast, consumers, particularly that class of consumers suffering financial hardship from defective products, do not constitute a well-recognized and well-represented pressure group. Consequently, the drafters of the Uniform Commercial Code had to give in on most of the consumer protection legislation.⁵²

While it is true that certain types of legislation protecting the "little man" have varying degrees of success in uniform legislation, the Code drafters' problems with banking legislation are typical. Prior to the promulgation of the Uniform Commercial Code, the only legislation on bank-depositor law was found in the Bank Collection Code⁵³ which was sponsored and drafted by banking interests. The Code drafters attempted to write article 4 of the Code with the depositors' interests in mind but ran into trouble with the banking lobby at the New York Revision Commission hearings in New York in 1954.⁵⁴ Consequently, those parts of the Code have been termed by Professor Beutel a "sell-out" to the bankers.⁵⁵ It is submitted that the record will show that the so-called "sell-out" in this respect was necessary to ensure substantial enactment of the rest of the Code. The practical problems of gaining acceptance of the Code would have been much more difficult had opposition developed from manufacturers and producers generally because of the drastic changes in products liability law.

B. *Success of the Common Law Method*

The problems of changing the *Restatement of the Law of Torts* are quite different. It is true that in this particular area of the law there exists the problem of criticism from those who felt that the *Restatement* view was not substantiated by the cases.⁵⁶ However, I

⁵² Part of the argument for ignoring consumer protection legislation was that such legislation was highly policy oriented and should be treated differently. Part of this work is now being done by the Uniform Commissioners who are working on a Uniform Consumer Credit Act.

⁵³ "The Bank Collection Code was drafted in 1928 under the auspices of the American Bankers Association, and was recommended for adoption by that Association." FARNSWORTH & HONNOLD, *CASES ON COMMERCIAL LAW* 41 (Statutory Supp. 1965). The BCC has been superseded by article 4 of the Uniform Commercial Code in most jurisdictions. See UNIFORM COMMERCIAL CODE § 10-102(1).

⁵⁴ N.Y. LAW REVISION COMMISSION REPORT (1954).

⁵⁵ Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 362-63 (1952). See generally Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 802 (1958).

⁵⁶ See Smyser, *supra* note 51.

think it is fair to say that Professor Prosser correctly judged developing law and was not far off the mark when he said that strict liability in tort was the law of the immediate future.⁵⁷

At this point, a plea for the value of common law development as opposed to statutory development may be inserted. Statutes have a number of characteristics which make them poor vehicles for changes in the law. In common law development, it is no longer necessary to make a classification of the law in terms of the archaic classification of the common law writ system. It is not necessary to pigeonhole the cause of action as trespass, trespass on the case, or special assumpsit. It is sufficient to hammer out step by step the substantive rules to govern the circumstances under which recovery will be allowed and the situations in which limitations will be imposed. The archaic forms of action have been buried and should not be allowed to rule from their grave.⁵⁸

The law of responsibility for injuries generally has developed case by case. The courts have felt their way slowly because they have had to decide only one case at a time. They can "back and fill" where social conditions seem to be adversely affected by particular rules or variations. They create exceptions where the major rule creates anomaly. They very seldom move so fast that the economic result of a particular rule is chaos, even though the scare-mongers are always prone to make such predictions.⁵⁹

One example of the workability of court development of lia-

⁵⁷ No one has to be any seer or soothsayer to foresee that this is becoming the law of the immediate future. There are some sixteen jurisdictions now in which there are indications that this law of strict liability to the ultimate user or consumer goes beyond food or products for intimate bodily use. Therefore it becomes apparent that if our Section . . . is to be published this summer . . . it will be on the edge of becoming dated before it is published. ALI PROCEEDINGS 350 (1964) (remarks of Dean Prosser).

⁵⁸ Apparently, the thirteenth-century courts were less concerned with the idea of pigeonholing recovery. Professor Edward L. Stephenson has called to my attention two cases in 1325, decided in the Court of the Bishop of Ely at Littleport. The first case is found in 4 Seldon Society 138 (1891), wherein it is said that "John Fox the younger delivered to John Mountfort 1,000 of sedge of worse quality than he bought of him, to his damage 18 d., which etc.; and for the trespass be he in mercy (2 d.)." *Id.* at 138-39. The second case stated that "William Hewen and Margery his wife were attached to answer Robert Carter of a *plea of covenant*, whereof he complains that whereas he delivered to the said Margery ten quarters of barley to be made into malt for his use, the said malt was found to be not sufficiently good, to his damage and against the covenant, etc." *Id.* at 140. (Emphasis added.)

In answer to those who argue that the original recovery in warranty was in tort, it might be replied that these cases show that originally there was no desire to limit recovery to any prior pigeonhole.

⁵⁹ For a diatribe against strict liability for defective products, see Freedman, *Products Compensation: Who's Pushing Whom?*, 20 BUS. LAW. 167 (1964).

bility involves a recent situation. Some time ago, Professor Borchard began a campaign to have the courts abrogate municipal immunity as a defense to negligence actions brought against a municipality.⁶⁰ For a considerable period of time, the courts heeded the advice of many that it was a task for the legislature. However, the legislatures apparently took the attitude that it was a job for the courts.⁶¹ Finally, the courts began to chip away at the rule, bit by bit. Then they indicated that they would seek a complete reversal of the rule, in spite of the warnings that chaos would result. And when they did finally discard the remnants of the doctrine that "The King could do no wrong," the predicted municipal bankruptcies simply did not occur.⁶²

C. *Jurisprudential Eclipse as a Natural Development*

The foregoing discussion has been an attempt to reply to Professor Shanker insofar as he has bemoaned the jurisprudential eclipse of Commercial Code products liability law and insofar as he has made a case for statutory changes to reflect a unified body of products liability law. I agree that the eclipse has taken place, but it seems to have been only an expected, natural eclipse which has not necessitated a wholesale refiguring of the paths of the heavenly bodies involved. After all, an eclipse takes place when heavenly bodies, proceeding in their naturally prescribed orbits, interact with each other. To continue the analogy, it must be remembered that eclipses appear as dramatic and unusual phenomena only to observers peculiarly located on one of the astronomical bodies involved. The analogy breaks down very quickly, of course, inasmuch as natural eclipses are merely transient in their effect. Professor Shanker and I would agree that the eclipse which we are discussing is more than temporary. Perhaps Professor Shanker originally used the analogy because of his desire that the eclipse be only transitory.⁶³

⁶⁰ See Professor Borchard's leading articles on *Governmental Liability and Sovereign Immunity* (pts. 1-8), 34 YALE L.J. 1, 129, 229 (1924-1925); 36 YALE L.J. 1, 757, 1039 (1926-1927); 28 COLUM. L. REV. 577, 734 (1928).

⁶¹ Judge Black of the Michigan Supreme Court described the process as a "game of quasi-legal basketball, with legislators and judges tossing the sphere back and forth." *Williams v. City of Detroit*, 364 Mich. 231, 241, 111 N.W.2d 1, 11-12 (1961).

⁶² I have described in some detail the process outlined here in *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity*, 9 ST. LOUIS U.L.J. 56 (1964).

⁶³ See Shanker 8 n.13.

IV. HEREIN OF PIGEONHOLES

One of the effects of the eclipse which troubles Professor Shanker is the "pigeonhole" effect. He feels that the eclipse places part of products liability law on the planet Tort, thus placing in shadow the products liability law of the planet Code. He fears that the consequences of maintaining two bodies of such law will be detrimental. Thus, he asks:

Why must the legal mind look so desperately for an exclusive pigeonhole? Has not the time come to recognize that the business of law is to determine liability between people and not to place their claims in pigeonholes? In determining liability, is it too much to ask of the courts that they consider all relevant legal theories rather than playing a game of logic with only one?⁶⁴

A. *Problems of Decision-making*

In reply to Professor Shanker's last question, I would be the first to say, "Quite so! Hear! Hear!" However, I fail to see that the jurisprudential eclipse will lead to pigeonhole decision-making. Legal principles do not make pigeonholes.

Let us examine for a moment the problem of pigeonhole decision-making. Then we need only to examine what potentialities for pigeonholes there are in the jurisprudential eclipse effectuated by section 420A of the *Restatement of Torts*. It must be admitted that Professor Shanker does not say that the eclipse will necessarily lead to unfortunate pigeonhole decision-making. Quite to the contrary, he makes a plea that such tactics be avoided if the courts are to accept the eclipse.⁶⁵ However, I would like to pick up the thread which he has introduced and elaborate upon it. It is important that the courts be aware that they can use the pigeonhole technique in combination with consideration of the facts of a case in framing a decision, or they can be sidetracked by the pigeonhole techniques so that the real problem is never reached. This discussion is to emphasize that pigeonhole cases are the result of the courts' work and not the result of legal theory.

Probably the classic example of pigeonholing in sales law is evident in those cases which denied recovery when a customer was injured by defective food served in a restaurant.⁶⁶ The typical judicial decision, rather than focusing on whether it made sense for the

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* at 36-37.

⁶⁶ VOLD, *op. cit. supra* note 46, at 453.

customer to recover, indulged in logic chopping which proceeded in this manner. A warranty would allow recovery. The Uniform Sales Act provides for statutory warranties. The act applies to sales. Therefore, the real issue is whether or not the transaction was a sale. It cannot be called a sale; therefore, there is no warranty. Therefore, there is no recovery. What happened, of course, is that the court has pigeonholed warranty in sales. That is, the court is deciding without discussion that recovery based upon implied promises of fitness is a characteristic of a sales contract. They are not questioning whether other types of contractual transactions ought to be accompanied by warranties.⁶⁷

But there is an excellent example of pigeonholing in a recent products liability case. *Epstein v. Giannattasio*⁶⁸ is a Connecticut common pleas case which postdates *Hamon v. Digliani*⁶⁹ but predates *Garthwait v. Burgio*.⁷⁰ *Epstein* is factually identical to *Garthwait* except that there is a different plaintiff. Clairol, Inc., is again the manufacturer-defendant. The plaintiff went to a beauty parlor to have her hair bleached. Naturally, as is the wont in these cases which law professors discuss, the result of the treatment was that "she suffered acute dermatitis, disfigurement resulting from loss of hair, and other injuries and damages."⁷¹ The complaint set forth counts in negligence and in breach of warranty against co-defendants Clairol, Inc., and the operator of the beauty parlor. Each demurred on the ground that there was no sale to the plaintiff. In sustaining the demurrers, Judge Lugg of the court of common pleas pigeonholed the complaint. Pertinent portions of his opinion, when abstracted, read thusly:

The issue reduces itself to the simple one of whether or not the use of the products involved in the course of the beauty treatment amounts to a sale or a contract for sale of goods under the pertinent sections of the code. . . .

As the complaint alleges, the plaintiff asked Giannattasio for a beauty treatment, and not for the purchase of goods. . . . There is another line of cases which involves blood transfusions

Building and construction transactions which include materials to be incorporated into the structure are not agreements of sale. . . . [The complaint] amounts to a claim of implied warranty

⁶⁷ *Contra*, the much-cited New York case permitting recovery on a warranty theory where the contract was a bailment for hire and not a sale, *Hoisting Engine Sales Co. v. Hart*, 237 N.Y. 30, 142 N.E. 342 (1923).

⁶⁸ 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963).

⁶⁹ 148 Conn. 710, 174 A.2d 294 (1961).

⁷⁰ 216 A.2d 189 (Conn. 1965).

⁷¹ 25 Conn. Supp. at 109, 197 A.2d at 343.

Obviously, the subject of the contract was not a sale of goods
All three demurrers are therefore sustained⁷²

B. *Re-evaluation of the Hypothetical Scooter Case*

Not to belabor the point but only to give a further illustration, let us examine Professor Shanker's case, *Hypothetical Scooter Co. v. Nosuch Mfg. Co.*⁷³ In that case Nosuch sold grinding wheels to Scooter. They both knew that the wheels were experimental, but Scooter wanted to use them to gain a competitive position in manufacturing scooters. The contract of sale properly excluded all warranties. The wheels, of course, proved totally unsatisfactory and their subsequent failure caused damage to scooters being manufactured, loss of profits, and personal injuries to one employee. In the Fiction Supreme Court, Judge Alpha and Judge Zede wrote conflicting opinions. Before the third judge spoke, the parties settled. Professor Shanker uses the conflicting opinions to indicate that a choice between tort law and contract law may make a difference. I will use the opinions to illustrate pigeonholing.

Judge Alpha found for the Scooter Company. He conceded that the warranties had been effectively excluded but said that recovery here was sought on a strict tort theory. Disclaimers of warranty are, therefore, irrelevant.⁷⁴ Judge Zede, on the other hand, found for the defendant. He doubted the applicability of strict liability where new and experimental products were concerned, citing comment *k* of the *Restatement*. Judge Zede, relying on the disclaimer as being not unconscionable and sanctioned by statute, pointed out that the courts were not free to ignore statutory law by

⁷² *Id.* at 109-13, 197 A.2d at 343-45. (Citations omitted.) In all fairness to the late Judge Harry Lugg, long an honored member of the Connecticut bar and bench, it should be pointed out that he refused to pigeonhole the result in *Simpson v. Powered Prods., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963). That case, decided just nine months prior to the *Epstein* case and discussed in text accompanying notes 33-34 *supra*, involved a plaintiff who was injured using a golf cart which he had leased. It is extremely puzzling why Judge Lugg was able to see any distinction between the *Simpson* case and the *Epstein* case. In *Simpson* he did say that the lease "is still a contractual relationship, as is a sale," but this is also true of the plaintiff's contract for services in the *Epstein* case. *Id.* at 413, 192 A.2d at 557.

One of my colleagues here at the Law School has suggested that perhaps Judge Lugg was really making a distinction in terms of "user." That is, in *Simpson* the plaintiff leased a golf cart which he used, whereas in *Epstein* the use was by the beauty parlor on the plaintiff. Or to put it another way, the contractual relationship in *Simpson* involving the plaintiff dealt with the defective chattel as a chattel, which was not true in the *Epstein* transaction. There is no indication of Judge Lugg's opinions, however, as to why liability for the defective product should stop at this particular point.

⁷³ Shanker 31.

⁷⁴ Cella, Joseph, Sherwood, Tatoian & Tomeo, *supra* note 41, at 220-21.

developing superior tort law. The exclusion of warranties under the Code was effective, and, therefore, the plaintiff could not recover. Thus, Judge Alpha pigeonholed the case as a tort problem and Judge Zede pigeonholed it as a contract one. They both gave reasons why the result should be the way they determined, which means that the pigeonholing itself was not the evil which created the conflict.

Professor Shanker's analysis of these two opinions is along the same lines as mine — with one important difference. He accuses only Judge Alpha of pigeonholing. Specifically, the wily Professor says that Judge Alpha reached his result because he believed that the *Restatement* had eclipsed the Code.⁷⁵ And it seems that herein is the nub of Professor Shanker's battle. He is afraid that courts will decide cases only on tort principles in those cases where the *Restatement* rule applies. I agree that there is that possibility. But pigeonholes were found in applying the Uniform Sales Act. They will be found in applying the Code. The law does not make bad logic, judges do. Let me at this point set out my analysis of the effect of the eclipse.

The *Restatement* rule, it is submitted, does not supplant the warranty rules of the Code; it supplements them. It is not so much that there are two competing bodies of products liability law as that there are two complementary bodies of law. Let me elaborate. The law of sales has and always will need to set out the rules stating the duties of performance which attach to a contract of sale. Part of the duty of a seller is to provide goods which the contract calls for. In the course of construing this duty, it is inevitable that the question of what kind and quality of goods will satisfy the contract must be resolved. Obviously, therefore, implied warranties of quality will and must continue to be part of the obligation of the seller of goods. But, as has been indicated in an earlier portion of this polemic, the law of sales is not geared to, nor appropriate for, the determination of those liabilities which manufacturers and producers must respond to as far as the public at large is concerned.⁷⁶ Considerations of tort law, that is, risk-shifting theories, costs-of-doing business logic, and problems-of-economic-effects of strict liability, are needed. Thus, tort law provides a rule so that John Q. Public may live happily in this modern world of ours. This

⁷⁵ My discussion of the *Scooter* case is continued in the text accompanying note 78 *infra*.

⁷⁶ See text accompanying notes 43-50 *supra*.

is not to say that sales and tort law do not share responsibilities. This is not to say that they do not overlap. But it is submitted that the eclipse is an overlap pure and simple. It is not a situation in which the jurisdiction of sales law is pre-empted.

Professor Shanker, and others, have spilled ink on the question of what transactions will be subject to the *Restatement* rule and what transactions will be left for the Code. This is an interesting question, but the implication that tort law displaces Code law is unnecessary. As Professor Shanker points out, it is pure pigeonholing.⁷⁷ In most problem cases, there is no need to answer the question, How far does the *Restatement* rule go? Assume an action is brought for injuries resulting from defective products. The first question is, Will there be recovery? This can be answered by matching the facts up against either the *Restatement* or the Code. If either or both allows recovery, then there is no problem. And it makes no difference whether the tort or the sales theory is used. Under modern fact pleading, there is no requirement that the complaint "sound" in the right theory.

This does not deny that the eclipse poses problems. But these are always present. Professor Shanker has pointed out in his article the problems of disclaimer and notice and has shown that there is really no problem of privity under the Code.⁷⁸ There are also these problems: Which rule of damages applies? Which statute of limitations applies? It is submitted that these unanswered questions will have to be analyzed and solved in terms of the factors which are involved. What is the policy of the *Restatement* rule? What is the policy behind the warranty sections of the Code? Based upon the competing interests in any particular case, which policies predominate?

The much-cited case of *Perlmutter v. Beth David Hosp.*⁷⁹ illustrates very well the problems of determining the outer limits of products liability. This, one of the "bad blood" cases, will still create problems under present law. The plaintiff, while in the hospital, suffered injuries as a result of a transfusion of "bad blood" supplied by the hospital. In determining whether the plaintiff could recover as a matter of law from the hospital, absent negligence, the court spoke in terms of whether or not there was a sale. However, much of Judge Fuld's opinion concerned itself with the problem of

⁷⁷ Shanker 14-17, 39-47.

⁷⁸ *Id.* at 39-47.

⁷⁹ 308 N.Y. 100, 123 N.E.2d 792 (1954).

the consequences of imposing strict liability upon a hospital. He stated that "The art of healing frequently calls for a balancing of risks and dangers to the patient."⁸⁰

The problem of the "bad blood" cases, as well as many analogous problem cases, would have to be resolved if product liability law developed (1) through additional instances of strict recovery, (2) through the elimination of both privity and notice and the neutralization of disclaimers in the law of sales warranty, (3) because of a "bald, unsupportable" assertion of the *Restatement*, or (4) through fictional extension of the law of bailments. I cannot feel that there is great merit to Professor Shanker's thesis that the eclipse of sales law by the law of torts is going to invite difficulties in solving these problems. I have tried to indicate some considerations in support of a thesis that the eclipse is a natural way to handle some of the expected problems.

Let us return now to the hypothetical case of the *Scooter Co.* The logical problem therein is similar to the problem of the *Perlmutter* case. Inasmuch as the *Restatement* has rendered disclaimers irrelevant, the question is, What are the limits on this move?⁸¹ Courts will have to wrestle with the problem of what types of cases come within the strict language of the rule but which evidence factors inconsistent with the policy of the rule.

If I were the third judge in the *Scooter* case, I would write my opinion along these lines. I would point out that the tort policies leading to the adoption of the *Restatement* rule have no application in this case. There is no advertising program upon which the buyer relied. There was no placing of the goods upon the market constituting a representation that they were suitable for any use. The "risk-shifting" argument has no application between enterprises of

⁸⁰ *Id.* at 107, 123 N.E.2d at 795. For an analysis of the *Perlmutter* case, see 103 U. PA. L. REV. 833 (1955). For an analysis of the problems of extending warranties past the sales cases, see Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957). A recent Minnesota case, *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965), commented upon in 26 MD. L. REV. 182 (1966), illustrates very well the problem of deciding a case of this type and reviews the authorities. In rejecting the plaintiff's claim that strict liability should apply, the Minnesota Supreme Court, per Murphy, J., said: "We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose." *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, *supra* at 159, 132 N.W.2d at 811.

⁸¹ After the eclipse, this is the natural question in these cases. If recovery were allowed in these cases via warranty under the Code, à la Shanker, then we would have to determine when a disclaimer of warranty was "unconscionable." I submit that it is no easier to solve this problem than it would be to refrain from pigeonholing the complaint.

potentially equal economic status and with equal possibilities of "spreading the cost" over a number of products or of charging the cost of insurance to the expenses of operating the enterprise. The discussion is buttressed by comment *n* to section 402A of the *Restatement*.⁸² The conclusion would be that since the tort rule had no application, then sales principles should. The disclaimer, not being unconscionable, is effective. Judgment for the defendant.⁸³

In the concluding paragraph of Professor Shanker's article, he states:

The divergent views expressed by the judges in the *Seely* case would seem to support a major thesis propounded in this article, namely, that a consistent products liability law can be better developed by the legislative process rather than through the judicial process.⁸⁴

I submit that Professor Shanker has more faith in the products of legislatures than I do and, moreover, that he ignores the problems of getting *any* products liability law out of the state legislatures.

V. CONCLUSION

It bears repeating. Professor Shanker's article is a valuable addition to the products liability literature. His desire to discuss in depth the meaning and possible effects of this new development with suggestions for future development is a commendable one. It is in this spirit that I have attempted to continue the dialogue in the hopes that courts, legislatures, the American Law Institute, and the Uniform Commissioners will be aided by our discussions. Professor Shanker has performed a function which, to my mind, is a function and responsibility peculiar to those who purport to teach law in our universities.

It is my belief that the courts have reached a desirable state of law with respect to products liability. In this endeavor they had a choice between expanding the concept of warranty in sales or devel-

⁸² "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense . . ." RESTATEMENT, comment *n*.

⁸³ See the dissenting portion of Judge Peters' concurring and dissenting opinion in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965), discussed in Shanker 48.

⁸⁴ Shanker 49. (Footnote omitted.)

oping tort liability along natural lines. I see much reason for choosing the latter route. I do not believe that the problems which the courts will encounter in applying two bodies of products liability law will be any greater than if they had chosen the other route. Actually, Professor Shanker's suggestion that we amend the Code to include a unified body of products liability law would have worked an eclipse of its own. The law of negligence and the law of strict liability for imminently or inherently dangerous products would have been eclipsed.