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# A CASE OF JUDICIAL CHUTZPAH (The Judicial Adoption of Strict Tort Products Liability Theory)

MORRIS G. SHANKER\*

## I. THE HOLY GRAIL OF STRICT TORT

**A**NOTHER TITLE for my brief remarks might well be: "Finding the Holy Grail." Remember those exciting stories about King Arthur's Knights who were constantly searching for the Holy Grail? Few of the knights, of course, actually found it. For that great triumph was reserved only to those who were most worthy, those whose religious fervor and purity of mind and soul were beyond question. How fascinated I was when I read those stories as a boy. How I longed for the day that I might witness the discovery of a modern day Holy Grail.

Well, I think I have. Mine eyes have seen that glory; they actually have witnessed the sense of assuredness and the zeal that only the true believers possess when they make so magnificent a discovery. But, the Grail which has been discovered today is not the cup from which Christ drank at the Last Supper. Rather, the modern day Grail is the strict tort theory of products liability. And, the discoverers of this modern day Grail are not the knights of old. They are our American courts, led and urged on by the eminent Professor Prosser, and section 402A of the *Second Restatement of Torts*.

When one is about to discover a Holy Grail — which, after all, is something handed down from the Deity Himself — one is likely to act somewhat different than normal. And our courts in discovering strict tort have indeed acted in rather unusual ways: ways which, I believe, can be explained only by realizing that we are dealing with those who have just discovered the gospel, who have just heard a message from on High. Let me give you some specific examples.

## II. UNUSUAL JUDICIAL BEHAVIOR

From the first day of law school, lawyers have been told that legislative enactments are superior to judicial power. In other words, judges are supposed to apply statutes and not ignore them. Yet, despite the fact that

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there had been enacted the Uniform Commercial Code which comprehensively covers the entire field of the liability of sellers for selling defective products, the strict tort authorities have told us that this Commercial Code may be ignored. Comment M of the *Restatement (Second) of Torts*, section 402A, boldly tells us:

The strict [tort] rule stated in this section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code.

And court after court has accepted this statement.

Indeed, in one of the most recent decisions, an Illinois appellate court stated that a main purpose of strict tort was to "finess" the problems inherent in UCC sales warranties.<sup>1</sup> And, I might ask, since when are our courts supposed to "finess" statutes? I thought they were supposed to apply them. I put to you this question. How can our courts ignore a legislative enactment that covers the precise problem before it by the simple expedient of placing the label "strict tort" upon it? But, as I suggested, when one sees a symbol from the Almighty, strange things can happen.

For a more specific example, take a look at *Kirkland v. General Motors Corp.*<sup>2</sup> This was the case where the Oklahoma Supreme Court in 1974 adopted for that state the concept of strict tort liability (although they called it manufacturer's products liability). Normally, courts only decide cases and controversies; and those cases and controversies arise because the parties in their pleadings raise a specific issue, and then argue it at trial. That, however, did not happen in the Oklahoma situation. As the dissent pointed out:

I am unable to find reference to such an issue [of strict tort liability] *anywhere* in the pleadings, the trial proceedings or briefs on appeal . . . . In my view, a proper case in which to adopt the doctrine of strict liability in tort would be one in which plaintiff had at least *tried* to rely upon that doctrine at the trial court level . . . . In such a situation, no violence would be done to the basic principle of the separation of the powers of government.<sup>3</sup>

Notwithstanding, the majority of the Oklahoma Supreme Court, on its own and with no request ever having been made for it, adopted the strict tort theory.

And, if this were not enough, the Oklahoma Supreme Court did another thing that was most unusual. The court did not limit itself to adopting

<sup>1</sup> *Crowe v. Public Bldg. Comm'n of Chicago*, 54 Ill. App. 3d 699, 370 N.E.2d 32 (1977).

<sup>2</sup> 521 P.2d 1353 (Okla. 1974).

<sup>3</sup> *Id.* at 1369 (emphasis added).

just the limited rule that was necessary to dispose of the particular case before it. Rather, the court wrote a complete treatise on the law of strict tort liability and declared that this treatise would thereafter be the law of strict tort liability in Oklahoma. This was as startling as if some other court had, in a case involving a narrow point of negligence, declared that thereafter the total law of negligence for that state on every possible issue that might present itself would be that found in a textbook on torts which one of the judges had just written. And again the court did this, notwithstanding the dissent which pointed out how far beyond normal judicial practice it had gone. The dissent said:

In my opinion, decisional law concerning [strict tort] liability would be better developed by resolving issues presented in each particular case and we should not determine in this case issues neither presented nor necessary to decide . . . [T]he [fundamental] proposition [is] that this court on appeal will not determine abstract questions of law.<sup>4</sup>

The final irony is this. Although the court claimed that it was adopting strict tort as a means of giving better protection to consumers, guess what happened in this Oklahoma case? The consumer, even under the newly adopted strict tort theory, lost the case. That same decision could have been as easily reached under the UCC, without the necessity of adopting the strict tort doctrine.

### III. JUDICIAL CHUTZPAH IN NEW JERSEY

I could give you many other examples of the unusual and aberrant behavior of the courts when they are discovering the Holy Grail of strict tort. But, I will deal with only one more, the New Jersey decision of *Heavner v. Uniroyal, Inc.*<sup>5</sup> Indeed, I will spend considerable time on this case, since it is exhibit A to demonstrate the judicial chutzpah and questionable reasoning which the courts have been using in dealing with the relationship between strict tort and the Uniform Commercial Code.

Let us first look at the facts of the case. They were quite simple. A resident of North Carolina had purchased a truck trailer equipped with Uniroyal tires from a North Carolina dealer.<sup>6</sup> The tire blew out in North Carolina and injured the buyer.<sup>7</sup> Thus, the case involved *only* North Carolina contacts. Unfortunately, the injured buyer failed to bring his suit in North Carolina within the three year period allowed by the North Carolina statute of limitations. So, the injured buyer did a little forum shopping and found

<sup>4</sup> *Id.* at 1370.

<sup>5</sup> 63 N.J. 130, 305 A.2d 412 (1973).

<sup>6</sup> *Id.* at 134, 305 A.2d at 414.

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<sup>7</sup> *Id.* at 133, 305 A.2d at 413.

that the Uniform Commercial Code's statute of limitations which was in force in New Jersey would give him a fourth year in which to bring the suit. So, the buyer brought his suit in New Jersey. And the New Jersey court, I think quite properly, decided it would have nothing to do with it. The court pointed out that New Jersey had no substantial interest in the matter since the entire transaction had taken place in North Carolina. Thus, it ruled that "the substantive law of [North Carolina] is to be applied, and its limitation period has expired at the time suit is commenced here, [so] New Jersey will hold the suit barred."<sup>8</sup>

That decision on the conflict of laws issue was sufficient to solve the entire problem. Indeed, the court admitted that "[t]his conclusion alone would dispose of the case at bar."<sup>9</sup> And, typical judicial behavior is to end an opinion once a clear ground for the decision has been set out. Normally courts do not go looking for additional grounds to reach the same conclusion, particularly when those additional grounds require the development of new and uncertain law. But the court saw the Holy Grail of strict tort. Even though it recognized that its decision on the conflicts point entirely resolved the matter, it then stated "[W]e prefer to decide this case on [another basis]."<sup>10</sup>

Interestingly, the next ground that the New Jersey court explored was not strict tort. Rather, it was an interpretation of the Commercial Code statute of limitations itself. Section 2-725 of the Commercial Code seems to set out four years for the action, exactly as the plaintiff had urged. However, in a rather questionable analysis, the court decided that section 2-725 of the UCC did not govern.<sup>11</sup> This was because the New Jersey Legislature had not repealed the torts statute of limitations when it enacted the Commercial Code. That convinced the New Jersey court that the torts statute continued to control what it conceived to be tort injuries, despite the enactment of the UCC.<sup>12</sup> It strikes me as a highly questionable interpretation. Notwithstanding, it gave the court yet another basis for ending its opinion, a basis which was grounded upon an interpretation on how to read the UCC itself.

But, even though the New Jersey court now had two traditional bases for ending the case, it could not stop. The court continued, "[t]here are

<sup>8</sup> *Id.* at 141, 305 A.2d at 418.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 142, 305 A.2d at 418.

<sup>11</sup> *Id.* at 146, 305 A.2d at 421.

<sup>12</sup> *Id.*

*deeper* considerations which dictate the same conclusion."<sup>13</sup> You might guess what those "*deeper* considerations" were. They were the principles of strict tort. The Holy Grail was in sight and the court had to take advantage of the moment by acting in a way completely contrary to our traditions; namely, that courts decide cases on the most narrow grounds possible.

Now let us look at the most interesting aspect of the *Heavner* case. As I pointed out, it is a good example of the unusual and curious behavior of our courts in rushing toward the adoption and implementation of the strict tort concept. But the case is far more than that. The *Heavner* case became the first judicial decision squarely to face up to the question of how strict tort, a judicial doctrine, could be imposed and somehow become superior to a statute, namely, the UCC. Being the first judicial decision on this issue, it seems to have set the precedent which since has been more or less slavishly followed by the other courts. Until the *Heavner* case in 1973, the courts which adopted strict tort apparently did not realize, or pretended they did not realize, that this critical problem even existed.<sup>14</sup> The courts simply adopted the strict tort doctrine and made it superior to the UCC. As I stated in my article, they simply eclipsed the UCC without any discussion of how this was possible.<sup>15</sup> Prosser and the *Restatement of Torts* had told the courts that strict tort was independent of the UCC, and it seems that no litigant had ever seriously challenged the courts on this point. However, this challenge was made in the *Heavner* case. Apparently, the court was asked to justify the unusual idea that a judicially developed scheme of law could become superior to and prevail over a legislative enactment which covered the same field. The *Heavner* court felt equal to the challenge. Let's explore its reasoning.

First of all, let's get one thing straight. The New Jersey court never stated that it had a right to ignore a valid statute. I submit that even though this is exactly what the court was about to do, it did not have the temerity to say this outright. Rather, the court presented a series of arguments which the court claimed proved that the statute, the UCC, was not intended to control the same arena being staked out for the judicially developed strict

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> Refreshing is the candor recently displayed by the South Dakota Court in recognizing that "in adopting the doctrine of strict liability in tort . . . , we did not pause to consider the potential conflict between the warranty provisions of the UCC and the concept of strict liability. In this we were not alone . . ." The court then decided to "reserve until another day the question whether the adoption of the UCC by the legislature has limited our authority to impose a broader concept of liability for damages resulting from defective products." *Pearson v. Franklin Labs.*, 254 N.W.2d 133 (S.D. 1977).

<sup>15</sup> Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 3, 8 n.13 (1965).

tort doctrine. Let us now carefully examine the arguments and reasoning which led the New Jersey court to this conclusion.

As a professor of law, I am then going to ask you practitioners how I should grade a student who came up with comparable reasoning.

First, the court observed that, to their knowledge, no one had ever contended anywhere that adoption of the Commercial Code did away with strict liability in tort.<sup>16</sup> How very interesting. On April 26, 1973, about six weeks before the *Heavner* decision was entered (June 5, 1973) in New Jersey, the Oregon Supreme Court decided *Markle v. Mulholland's, Inc.*<sup>17</sup> In the concurring opinion, Chief Justice O'Connell noted:

A careful reading of the Uniform Commercial Code reveals that it prescribes a legal framework for the recovery of damages for personal injury resulting from defective products. After careful study of the question I have reluctantly concluded that the Code is controlling in this area of the Law . . . . A fair reading of the Code and its official comments indicate its attention to the question of sales to consumers . . . . Moreover, personal injury problems are dealt with explicitly.<sup>18</sup>

The Chief Justice then pointed out that the courts had no "license to create a separate body of common law which . . . displaces the Code's explicit provisions."<sup>19</sup> He also noted that "the Code is controlling in this area of law, [and] I would hold that the statute should govern all future products liability cases, [notwithstanding Section 402A]."<sup>20</sup>

Well, contrary to what the New Jersey court stated, apparently judges *were* already questioning how judicial strict tort could eclipse the UCC. But perhaps the New Jersey court in stating to the contrary; namely, that no one had ever suggested this possibility, can be excused since Judge O'Connell's opinion in Oregon at the time was only six or seven weeks old.

Well, let us go back to 1972, a full year before *Heavner*. In 1972, the Maryland court, when asked to adopt strict tort principles stated that to do so "would take us beyond the limits of judicial restraint and into the area of judicial legislation, a journey which we refuse [sic] to make."<sup>21</sup> And in 1971, two years before *Heavner*, the federal district court for Dela-

<sup>16</sup> 63 N.J. 130, 305 A.2d 412 (1973).

<sup>17</sup> 265 Or. 259, 509 P.2d 529 (1973).

<sup>18</sup> *Id.* at 275, 509 P.2d at 536-37.

<sup>19</sup> *Id.* at 277, 509 P.2d at 537.

<sup>20</sup> *Id.*

<sup>21</sup> *Bona v. Graefe*, 264 Md. 69, 285 A.2d 607, 609 (1972). The Maryland Court of Appeals has reversed this position and adopted strict tort liability. *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

ware equally refused the suggestion to adopt strict tort.<sup>22</sup> It did so because the Delaware Supreme Court "was committed to the common law rule governing actions for breach of warranties, and [had held] that any change would have to be made by the Legislature rather than the Judicial Branch."<sup>23</sup> Interestingly, the Delaware Supreme Court decision on which the federal district court had relied was made way back in 1961.<sup>24</sup> What is more, the Delaware Court reached this 1961 decision even though the strict tort doctrine had been expressly urged upon it.<sup>25</sup> The Delaware court in 1961 stated:

It may well be desirable as a matter of public policy to impose absolute liability upon a manufacturer for injuries caused by defects in his product but, if such is to be the public policy of this state, it must be made so by the Legislative rather than the Judicial Branch of the Government, the function of which is not to change established law but to apply it.<sup>26</sup>

Similarly, in 1969, the New York Court of Appeals refused to create a different statute of limitations for strict tort stating that: "this cannot be done for the Legislature by adopting the applicable provisions of the [UCC], has already clearly manifested a [legislative] intention to the contrary."<sup>27</sup>

And yet another judge, writing in 1965, 8 years before *Heavner*, specifically stated: "[T]hat the courts were not free to ignore the valid legislative enactments found in the Uniform Commercial Code by developing a superior case law theory of strict tort liability."<sup>28</sup> A commentator writing in the same year, 1965, asked this question:

How may a court under our system of law ignore a valid statutory enactment covering a case which is before it? If a statute intends that a seller's liability for his defective products may be entirely excluded or partly limited, how can a court ignore the statutory limitations by developing some kind of superior case law?<sup>29</sup>

The commentator was myself, writing my Western Reserve strict tort-UCC

<sup>22</sup> *Handy v. Uniroyal, Inc.*, 327 F. Supp. 596 (D. Del. 1971).

<sup>23</sup> *Id.* at 607, quoting DEL. CODE tit. 6, 2-318 (Study Comments) (1975).

<sup>24</sup> *Ciociola v. Delaware Coca-Cola Bottling Co.*, 53 Del. 477, 172 A.2d 252 (1961).

<sup>25</sup> *Id.* at 486, 172 A.2d at 257, referring to Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

<sup>26</sup> *Id.* at 486-87, 172 A.2d at 257.

<sup>27</sup> *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

<sup>28</sup> Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 33 (1965).



article. The judge was my hypothetical Judge Zede, dealing with an equally hypothetical case which I discussed in my article.<sup>30</sup>

Do you want more? Take a look at Mark Franklin's article published in May 1966, 7 years before *Heavner*. He pointed out that "[j]udges appear . . . unwilling to consider the possible limitations legislation may impose on judicial primacy in tort law . . . . The unwillingness of particular judges who see the relevance of sales law to ponder seriously this possible limit of judicial freedom is even more remarkable."<sup>31</sup> In his conclusion, Mark Franklin stated:

The conclusion, then, is that the [Commercial] Code does not permit courts to decide products cases on tort theories entirely independent of [UCC] warranty . . . . [T]he [Commercial] Code comes along with its comprehensive scheme that requires courts to utilize the warranty principle as the sole basis for recovery. Thus, Justice Traynor's treatment . . . would be impermissible today in a state that has adopted the [Commercial] Code.<sup>32</sup>

Franklin, of course, was referring to Justice Traynor's opinion in *Greenman v. Yuba Power Products*,<sup>33</sup> the very first case to adopt strict tort. And if all this is not enough, it is worth noting that Professor Dickerson was beginning to raise this very same preemption point in articles written way back in 1961.<sup>34</sup>

How would you grade a student who was asked to research this question: "Is there any authority suggesting that the UCC had prohibited the use of a judicially developed strict tort theory?" And he then came back with the answer that no authority had ever suggested that it even was a problem. Would you grade that student an "A" for his effort, or would you grade him something less? The grade you give that student is exactly the grade which the New Jersey court deserves. In their quest for the Holy Grail of strict tort, they either refused to research the subject, or they deliberately blinded themselves to what others had said. Instead, they bald-faced told

<sup>30</sup> *Id.* at 28, 33.

<sup>31</sup> Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 989-90 (1966).

<sup>32</sup> *Id.* at 1016.

<sup>33</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

<sup>34</sup> Dickerson, *The Basis of Strict Products Liability*, 17 The Business Lawyer 157 (1961). There have been many discussions since *Heavner* questioning the judicial power to develop strict tort in face of the U.C.C. See Brickley, *Products Liability in Kentucky: The Doctrinal Dilemma*, 65 KY. L.J. 594, 621 (1977); Dickerson, *Was Prosser's Folly Also Traynor's? or Should The Judge's Monument Be Moved to a Firmer Site?* 2 HOFSTRA L.R. 469 (1974); Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L.R. 205 (1977). See also authorities cited by Edmeades, 27 CASE W. RES. L. REV. 647, 666 (1977).

the state of New Jersey that no one had ever even doubted the premises which they just adopted.

Let us now look on to the other reasons which the New Jersey court in *Heavner* advanced to justify its decision. One was that the Commercial Code simply did not give enough protection to consumers, something which the court claimed strict tort did.<sup>35</sup> Thus, even if the Commercial Code was intended to cover the consumer transaction, nevertheless, the court agreed with Prosser's statement that the Commercial Code still imposes "far too much luggage in the way of undesirable complications" to be tolerated.<sup>36</sup> Among the UCC's undesirable luggage is the possibility that the warranty liability might be limited or disclaimed entirely. And since this "undesirable luggage" flew in the face of the New Jersey court's previous decisions in *Henningsen* and *Santor*, the UCC would therefore be ignored.<sup>37</sup>

What judicial chutzpah! Who says that a legislature has to write its statutes to please its judges. And since when does a court get the power to ignore a validly enacted statute, just because the court does not like what the statute says and wishes that it had said something else?

Shall we continue with the New Jersey court's "reasoning"? Remember, the court had pointed out that the Commercial Code flew in the face of its prior decision in *Henningsen*.<sup>38</sup> *Henningsen*, the court noted, was already on the books before New Jersey adopted the Uniform Commercial Code.<sup>39</sup> So the court stated:

*Henningsen* [already] had been decided and this new [strict tort] concept [already] born [in New Jersey when the UCC was adopted in New Jersey]. It has to be assumed that the *Legislature was cognizant of this and the [Commercial] Code must be interpreted accordingly in this state.*<sup>40</sup>

How very interesting. Assuming the court's premise is correct; namely, that the *Henningsen* case is at odds with the later adopted Commercial Code, then would this not show a clear legislative intention to *overrule the Henningsen* decision, rather than to affirm it as this court suggests? Is it not the rule that a statute which is contrary to a prior case overrules that case rather than affirms it?

<sup>35</sup> 63 N.J. at 151, 305 A.2d at 424.

<sup>36</sup> *Id.* at 154, 305 A.2d at 425, quoting W. PROSSER, LAW OF TORTS § 98 (4th ed. 1971).

<sup>37</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Santor v. A&M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

<sup>38</sup> 63 N.J. at 151-56, 305 A.2d at 424-26.

<sup>39</sup> *Id.* at 146, 305 A.2d at 421.

<sup>40</sup> *Id.* at 156-57, 305 A.2d at 427.

It is more amazing that the *Heavner* court in 1973 even suggested that *Henningsen* was the beginning of strict tort in New Jersey. The fact of the matter is that *Henningsen* was argued in December, 1959 and decided on May 9, 1960. At that time, the words "strict tort" were not even known. How could they have been, since the idea was invented and first given its name "strict tort" in an article published by Prosser in the June, 1960 edition of the Yale Law Journal.<sup>41</sup>

Thus, a legislature reading *Henningsen* would have never guessed that it had anything to do with something called strict tort. Indeed, if you actually read the *Henningsen* decision, not only would you find that it never mentions the word "strict tort;" quite to the contrary, it often relies heavily on the Uniform Commercial Code, particularly its unconscionability section, section 2-302. In other words, the *Henningsen* decision in early 1960 actually seemed to give a hearty approval to the UCC, even though it was not at the time adopted or effective in New Jersey.<sup>42</sup> Thus, if a legislature had read *Henningsen*, it would have found judicial approval of the UCC they were about to enact. There would be no hint whatsoever of the strict tort concept, an idea which was not yet born or christened.

How would you grade a student whose research was so deficient and whose analysis was so poor? The grade you would give the student is the grade which the New Jersey court deserves.

Let me now share with you what I consider the most shocking part of the New Jersey court's decision in *Heavner*. The *Heavner* decision was by a unanimous court.<sup>43</sup> Not one of the seven judges had the insight, the intellectual capacity, or the guts to blow the whistle on this shoddy piece of analysis. And, when our judges no longer are capable or willing to accept the discipline imposed by the most elementary principles of logic and reasoning, then we are, indeed, in a sorry state.

The New Jersey court was perhaps the first, but far from the only court whose reasoning on this issue is highly questionable. A discussion of some of the more recent decisions in which the courts sought to justify the notion that the Commercial Code had not preempted strict tort liability is found in the Addendum to this article.

What explains this kind of judicial behavior? What is it about strict tort that has made it so powerful a driving force for our courts, a driving force

<sup>41</sup> Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

<sup>42</sup> The UCC was enacted in New Jersey in 1961, effective Jan. 1, 1963. 12A N.J. STAT. ANN. § 1-101 (Historical Note, West, 1962).

that makes our courts do things that are so completely antithetical to our common law traditions, and, quite likely, to the constitutional limitations imposed upon the judiciary. I frankly don't know. I can only explain it by the Holy Grail phenomenon. The courts seem absolutely convinced that strict tort is the Holy Grail, something which will produce more justice than the UCC. And, our courts obviously will do a great deal in the name of justice.

#### IV. STRICT TORT AND THE UCC COMPARED

But, let us pause for a moment and ask the crucial question, "Does strict tort really give us more justice?" Many obviously seem to think so. Indeed, a great deal of the motivation for strict tort seems based on the assumption that strict tort gives consumers a better break, *i.e.*, better justice than would be true under the UCC. However, I submit that this assumption does not stand up under analysis. As I stated earlier, the consumer in the Oklahoma case, *Kirkland v. General Motors*, lost both under the UCC and under strict tort. In the New Jersey *Heavner* case, the consumer lost under strict tort. He *actually would have won* under the UCC. Thus, there is little hard evidence and a great deal of contrary evidence that the consumer is not going to get more from strict tort than from the UCC. Indeed, the UCC, through its express warranty, [UCC 2-313] and fitness for particular purpose warranty, [UCC 2-315] will often give the buyer a better deal, *i.e.*, more product protection than could be obtained through strict tort.

The likelihood is that on *substantive* liabilities, strict tort brings about the same results as those obtained by the UCC's implied warranty of merchantability. In fact, a major thesis of my various articles has been that strict tort has brought substantively little new. However, it has produced a great deal of complexity, confusion and uncertainty that was hardly worth the effort.

I will not here set out in detail the distinctions which may exist between strict tort theories of products liability under the UCC. I have already done that in my various other articles. My basic thesis remains that there are no significant differences between the two areas of law, despite all the sounds and fury that suggest that there might be. Indeed, a number of other scholars and judges have pointed out strict tort accomplishes essentially that which is accomplished by section 2-314 of the Commercial Code; namely, the implied warranty of merchantability which goes with the sale of goods by a professional merchant.<sup>44</sup>

<sup>44</sup> See, e.g., *Green v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Pearson v. Franklin Laboratories, Inc.*, 78 254 N.W.2d 133 (S.D. 1977); See also Prosser, *The Fall of*

It has often been suggested that disclaimers and limitations of liability authorized by the Commercial Code would not be tolerable under strict tort. I highly doubt this. Rather, my guess is that the *conscionable* disclaimers authorized by the Uniform Commercial Code typically would be allowed under strict tort.<sup>45</sup> Quite true, the cases suggest that the language needed to bring about a disclaimer under strict tort may be different from that authorized by the Commercial Code.<sup>46</sup> But, I submit that the substantive results which permits disclaimers typically will be the same.

Differences between the UCC and strict tort approach could arise with respect to statutes of limitations. Further, the duty of a buyer to give notice of a defect which typically is required by the UCC may not be required under strict tort. But, other than these two procedural areas, I doubt that the substantive liabilities will be different. In other words, my thesis remains that strict tort has brought little, if anything new which was not already available under the UCC. However, it has brought about a complexity and a confusion which is most unfortunate. Thus, I doubt that one can say that the strict tort doctrine produces more "justice" or more "consumer protection" than would be true under the Uniform Commercial Code.

#### V. THE LESSON OF THIS PAPER

What does this mean to all of us? From a practical point of view to you general lawyers, it means that if you are going to understand the total law of products liability, you cannot rely upon strict tort alone. You are going to have to interrelate it with the warranty sections of the Uniform Commercial Code. As I stated, you may often get better protection from the Code than from strict tort.

But the most important lesson of this article is this. After all, while I am a professor of commercial matters and you are general practitioners, both of us, nonetheless, are disciples of the law. Thus, I owe it to my students to deal constantly and critically with how law is made. Similarly, you owe it to the law profession to do the same. It strikes me that the development of strict tort is a classic example of how law should *not* be made. Or, to put it more correctly, I become very critical of courts who ignore the constitutional limitations imposed upon them; namely, their duty to give supremacy

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*the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 805 (1966), who concedes "the precedents of the warranty cases will still determine what he [the seller] must deliver."

<sup>45</sup> Cf. *Moreira Construction Co. v. Moretrench Corp.*, 97 N.J. Super. 391, 235 A.2d 211 (1967).

<sup>46</sup> See *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir. 1974); *Stearns Aero AB v. Page Airotive, Inc.*, 499 F.2d 709 (10th Cir. 1974).

to the enactments of our legislatures. One may not like a particular statute. However, so long as it is constitutionally enacted, there is no license for a court to ignore it. There is even less for the court to eclipse it by replacing it with what the court considers to be a superior brand of judicial justice. This, I submit, is not the function of the courts. Rather, it is a misuse of the judicial function, an imposing by the judiciary of its personal views of what is good social policy rather than deferring to those social policies which have been validly enacted by the legislature.

I believe that our legal system is far poorer when judges begin to take this tack. I, as a law professor and you as a member of the law profession, ought to be the first ones to blow the whistle on our judges when they do so.<sup>47</sup> Because if we don't blow that whistle, who will?

## ADDENDUM

## JUDICIAL "REASONING" BEYOND NEW JERSEY

**A**FTER *Heavner*, the New York Court of Appeals apparently was the next court to decide that the Commercial Code had not preempted the judicially developed strict tort action.<sup>1</sup> Specifically, the court ruled that the provisions of the Uniform Commercial Code, including its statute of limitations found at section 2-725 "are not pertinent when liability is based on the [judicially developed] tort doctrine of strict products liability."<sup>2</sup> Perhaps it is worth noting that the court's cavalier dismissal of the Commercial Code was not even dignified by being placed in the text of the opinion. Instead, this dismissal was relegated to a footnote—a footnote which the judge inserted simply to note his "passing" observations of the role of the UCC in products liability cases. Let us now examine the reasoning which led the New York court to its conclusion. It strikes me as being as superficial and unpersuasive as that used by the New Jersey court in the *Heavner* case.

First, the court noted that the injured party in this case had no "contractual relationship" with the seller,<sup>3</sup> or to use old fashioned language, the parties were not in privity of contract with each other. Thus, to the court, it was "obvious" that the liability could not be based on the UCC which depended upon "agreement, express or implied," *i.e.*, a contract between the parties.<sup>4</sup> Rather, the liability had to be based on "considerations of sound social policy," *i.e.*, on tort.<sup>5</sup> Still, the court commendably cautioned against "jumping, kneejerk-like, to the conclusion that if liability is grounded in [strict] tort, tort Statute of Limitations must automatically be applied."<sup>6</sup> Further, the court noted that the words "tort" and "contract" were merely labels; and that "analysis and enlightenment are not always advanced when heavy reliance is placed on labels; indeed understanding may even be obscured."<sup>7</sup>

How can anyone dispute such wise and self-evident statements? But, note, if you will, *the well has already been poisoned!* Why does the court even label the UCC action as one sounding in "contract"? Is it not the fact

<sup>1</sup> *Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

<sup>2</sup> 37 N.Y.2d at 404 n.3, 335 N.E.2d at 279 n.3, 373 N.Y.S.2d at 45 n.3.

<sup>3</sup> 37 N.Y.2d at 400, 335 N.E.2d at 277, 373 N.Y.S.2d at 41.

<sup>4</sup> 37 N.Y.2d at 401, 335 N.E.2d at 277, 373 N.Y.S.2d at 42.

<sup>5</sup> *Id.*

<sup>6</sup> 37 N.Y.2d at 403, 335 N.E.2d at 278, 373 N.Y.S.2d at 43.

<sup>7</sup> 37 N.Y.2d at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 42-43.

that the UCC is a statute? Thus, is it not more precise to describe the actions which the UCC authorizes as "statutory" actions? And, does anyone doubt that a statute can control actions once labeled as "tort" actions as much as those once labeled as "contract" actions? Indeed, is this not exactly what the UCC has done?<sup>8</sup>

Be that as it may, the court, having concluded its platitudes, finally set out to grapple with the specific statute of limitation issue which was before it. It conceded that "periods of limitations must be fixed . . . [by] . . . a nice balancing of policy considerations" of the defendant's right after a period of time "not [to] be harried" versus the plaintiff's right to assert his claim.<sup>9</sup> Having stated this truism, the court then promptly rejected the policy balance determined by the legislature as set out in UCC section 2-725.<sup>10</sup> Instead, the court decided *judicially* to balance the competing policy considerations. Having done so, it concluded that that policy choice in this case should be the same as that found in a negligence, *i.e.*, another "tort" action.<sup>11</sup>

How curious! First, I thought the fundamental theory of our country's legal system was that the legislature and not the judiciary made the social policy decisions. Not only is this required as a matter of constitutional law, this is also based on the reality that a legislature is far better equipped than are the courts to obtain the necessary social and economic data which are required for making sound social policy decision. Secondly, didn't the court err in suggesting that the competing policies underlying statutes of limitations applicable to negligence are the same as those based on strict tort. After all, negligence actions are based on the "fault" of the defendant. On the other hand, strict liability imposed on a seller (whether by reason of a strict tort theory or under the Commercial Code) is not. Indeed, the seller is entirely innocent of any "fault" or legal wrongdoing. While one, if he wishes, can call this liability a "tort", it ought be recognized that it differs considerably from the historical torts which were based on wrongdoing. As a result, the "faultless" seller being stuck with "strict liability" would seem more deserving of solicitude in striking the appropriate statute of limitation balance, *i.e.*, in determining how long he should remain liable — than would be true of a seller who had committed some legal wrong.

One wonders why the New York court was so ready to ignore the

<sup>8</sup> See generally *Markle v. Mulholland's Inc.*, 265 Or. 259, 273, 509 P.2d 529, 536 (1973) (O'Connell, C.J., concurring); *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471, 191 S.E.2d 110 (1972); *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 613, 182 N.W.2d 800, 807 (1970); Shanker, *Pigeonholes, Privity, & Strict Products Liability*, 21 CASE W. RES. L. REV. 772, 782-83 (text & authorities found in n.36-39) (1978).

<sup>9</sup> 37 N.Y.2d at 403, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

<sup>10</sup> *Id.*

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<sup>11</sup> 37 N.Y.2d at 403-4, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.



legislative policy decision set out in UCC section 2-725. Rather clearly, it was because the court did not much like the way UCC section 2-725 worked. In particular, it did not like the notion that UCC section 2-725 might start counting the limitation period from the date of the delivery of the defective goods rather than from the date that they injured the consumer. As the court viewed it, this "would defy both logic and experience" because a consumer injured by the defective product after the statutory period would have no claim at all.<sup>12</sup> As the court put it: "it is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one."<sup>13</sup> It seems not to have troubled the court that the legislature had, indeed, thought about this problem, and having done so, deliberately enacted UCC section 2-725.<sup>14</sup> Further, the evidence is strong that the legislature acted, knowing that UCC section 2-725 could well prevent the prosecution of a claim before a party even knew that he had one. This seems clear from the statutory language itself which recognizes that the statute of limitations usually starts running only from the time that the "cause of action has accrued," *i.e.*, the injury took place. However, a deliberate exception is made for a breach of warranty action. There the limitation period starts running "when tender of delivery is made . . . regardless of the aggrieved party's lack of knowledge of the breach," unless future performance of the product had been "explicitly" guaranteed.<sup>15</sup>

Having an absolute bar date beyond which even unknown claims are cut off is a pattern which has often been followed in other places of the Commercial Code. Thus, Comment 2 of UCC section 2-312 makes clear that actions for breach of a title warranty in the sale of personal property is governed by the statute of limitations set out at UCC section 2-725; and that the time starts running from the point of delivery of the goods, whether or not the buyer knew of or could have known of the title breach.<sup>16</sup> Similarly, in Article 4 of the Commercial Code, claims against a bank for honoring a check containing a forged endorsement also are absolutely barred after three years, whether or not the bank customer has or could have learned about the forgery within that time.<sup>17</sup> The explanation for this approach is certainly pertinent to our discussion:

The three year absolute time limit on the discovery of forged endorsements should be ample, because in the great preponderance of cases

<sup>12</sup> 37 N.Y.2d at 403, 335 N.E.2d at 278, 373 N.Y.S.2d at 43.

<sup>13</sup> *Id.*, quoting *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 346, 253 N.E.2d 207, 211, 305 N.Y.S.2d 490, 495 (1969) (Breitel, J., dissenting).

<sup>14</sup> N.Y. U.C.C. LAW § 2-725 (McKinney 1964) (Statute of Limitations in Contracts for Sale).

<sup>15</sup> N.Y. U.C.C. LAW § 2-725 (2) (McKinney 1964).

<sup>16</sup> N.Y. U.C.C. LAW § 2-312 Comment 2 (McKinney 1964).

<sup>17</sup> N.Y. U.C.C. LAW § 4-406 (4) (McKinney 1964).

the customer will learn of the forged endorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have.<sup>18</sup>

Nevertheless, let us suppose for a moment that the court has raised a valid criticism of the operation of UCC section 2-725. As I stated earlier, who says that a legislature has to enact a statute to please the judges of its courts? And, since when can a court ignore a statute, simply because it finds some valid criticism which might be leveled against it?

But, let us move on. Let us test out the court's bold statement that a statute like UCC section 2-725 is contrary to "experience," "logic," and, indeed, is totally "unthinkable." Consider the following items.

First, *as to experience*, the fact is that New York, and other states, long before the Commercial Code, were living with the statutes of limitations governing personal injuries caused by defective goods which followed the UCC section 2-725 pattern. That is, they started the time period running from the date of delivery of the defective goods and not from the time that they injured the consumer.<sup>19</sup>

Second, *as to lack of logic*, cogent arguments have been presented as to why starting the time period from the date of delivery makes sense and is sound policy. For example, four judges recently put it this way:

[Even] if the case presented merely an open policy question . . . [w]e are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after a product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limitations applicable . . .<sup>20</sup>

Third, *as to being unthinkable*, other legislative bodies, faced with the problem of personal injuries arising from defective products have also concluded that the limitation period for such liability, *i.e.*, *no-fault* as opposed to *fault* situations, ought to contain some outer limit which cuts

<sup>18</sup> N.Y. U.C.C. LAW § 4-406 Comment 5 (McKinney 1964).

<sup>19</sup> See *Blessington v. McCrory Stores Corp.*, 305 N.Y. 104, 111 N.E.2d 421 (1953); Annot., 37 A.L.R.2d 703 (1954).

<sup>20</sup> *Mendel v. Pittsburg Plate Glass Co.*, 25 N.Y.2d 340, 346, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 495 (1969).

off claims, even though the injury had not yet occurred, or the claim was not yet known. Perhaps the most recent example is found in Article 7 of the European Economic Community (Common Market) Treaty On Products Liability For Personal Injury And Death executed on January 27, 1977. Here in the United States, the Commissioners on Uniform State Laws, just in 1975, also enacted the statute of limitations for sale of defective houses which cause injury, and damage starts running from the time the buyer takes possession of the real estate "regardless of the buyer's lack of knowledge of the breach . . ." <sup>21</sup> Furthermore, "[e]ven inability to discover the breach does not delay the running of the statute of limitations." <sup>22</sup> Worth noting is that while the ULTA was redrafted in 1978 to meet objections raised to its 1975 text, no change was made in this section, or in this comment. Instead, they were reconfirmed by the Commissioners. <sup>23</sup>

After considering the above items, are you persuaded by the court's statement that UCC's section 2-725 approach is totally without basis in "experience;" or that it is so devoid of any "logic" as to be "unthinkable?"

The most amazing part of this New York decision is yet to come. Not only did the court refuse to follow UCC section 2-725, the court went so far as to overrule its previous *Mendel v. Pittsburgh Plate Glass* decision <sup>24</sup> which only a few years earlier had declared that the Commercial Code's statute of limitations, being the mandate from the legislature, had to be obeyed. In fact, the four judges which constituted the majority in *Mendel* are the ones who presented the cogent arguments stated earlier as to why UCC section 2-725 was not only "logical" and "thinkable," but, made good sense as a policy choice. Notwithstanding, the New York court in *Victorson* decided to adopt *Mendel's* dissenting opinion, a dissenting opinion which had stated that "[a]s for the Uniform Commercial Code, it is all but irrelevant to the problem at hand . . . [because] the [judicial] cases had already gone beyond . . ." <sup>25</sup> Get that! Judicial case law can suffice to make "irrelevant" a validly enacted statute. What chutzpah!

I should tell you that there was a concurring opinion in *Victorson*. <sup>26</sup> The concurring judge did not find any fault with what the majority had

<sup>21</sup> UNIFORM LAND TRANSACTIONS ACT 2-521 (b).

<sup>22</sup> UNIFORM LAND TRANSACTIONS ACT 2-521 (b) Comment 2.

<sup>23</sup> Note also the recently enacted Ohio Medical Malpractice statute, which has an absolute four year bar period, though the injury caused by the malpractice may not yet be known. OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1977). This seems particularly significant since the statute cuts off a liability based on *fault*, something which appears to be far less justifiable than an absolute cut-off of liability based on strict (*i.e.*, no-fault) liability ideas.

<sup>24</sup> 37 N.Y.2d at 400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40.

<sup>25</sup> 37 N.Y.2d at 351, 253 N.E.2d at 214, 305 N.Y.S.2d at 500.

<sup>26</sup> 37 N.Y.2d at 404, 335 N.E.2d at 280, 373 N.Y.S.2d at 45 (Fuchsberg, J., concurring).

said.<sup>27</sup> Rather, he felt that the majority's reasoning processes had not gone far enough. Thus, he wanted to nail down even more tightly the conclusion that in consumer injury cases there was "no reasonable remaining doubt that neither the provision of the [Commercial] Code nor the intent behind it result[s] in their preemption of any [judicially determined] tort cause of action."<sup>28</sup>

Let us see how the concurring judge reached his "without doubt" conclusion. Essentially he reached it from a study of how those provisions of the Commercial Code concerned with the three crucial areas of notice of defect, disclaimer and privity in consumer injury cases.<sup>29</sup> As you probably know, the Commercial Code, indeed, has specific sections which deal with these problems; and those sections clearly and expressly give better rights to a consumer injured by defective products compared to those available in a commercial damage case. Because this is expressly set out in the Code, the concurring judge concluded that this was the "clearest confirmation" that the Commercial Code, including its statute of limitations was never meant to apply to consumer injury claims!<sup>30</sup> What kind of reasoning is this? Because the Code expressly gives better rights to a consumer, somehow this proves that the Code, therefore, was never intended to be applied to consumer cases *at all*. If ever there was a non-sequitur, this surely is it.

Do you want to see more of this same kind of non-sequitur reasoning from our judiciary? Then take a look at the decision of the Maryland Court of Appeals when in 1976 it decided that strict tort had not been preempted by the Commercial Code.<sup>31</sup> That court undertook to compare the cause of action under the Commercial Code with that of strict tort. It noted that there were "significant differences between the two theories" in several areas.<sup>32</sup> In particular, strict tort (the judicially developed doctrine) prevented a seller from excluding his liability,<sup>33</sup> whereas the Commercial Code did not; strict tort did away with notice of defect requirements which the Commercial Code retained; strict tort was governed by a different statute of limitations than that found in the Commercial Code. Because of these differences, the Maryland Court concluded that the UCC had not preempted the judicially created strict tort.<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> 37 N.Y.2d at 408, 335 N.E.2d at 282, 373 N.Y.S.2d at 48.

<sup>29</sup> 37 N.Y.2d at 407, 335 N.E.2d at 281, 373 N.Y.S.2d at 47.

<sup>30</sup> *Id.*

<sup>31</sup> *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

<sup>32</sup> 278 Md. at 349, 363 A.2d at 961.

<sup>33</sup> This really may not be true. See discussion accompanying note 45-46.

<sup>34</sup> 278 Md. at 350, 363 A.2d at 962.

Now, take a good look at what the court just said. Because the judiciary refused to follow the constraints and rules mandated by the Commercial Code and, instead, judicially developed new and different rules for the very same matters, this established that strict tort is a different cause of action which is not controlled by the Code. If ever there was a bootstrap operation, this is it. Look at the implications. Whenever a court does not like a rule or constraint found in a statute, just ignore the rule, or write a different one. Then announce that the statute no longer controls because there now exists a "different" (judicially created) action. But, I always thought that where a statute clearly provides for constraints and limitations, then it is for the court to apply those constraints and limitations, and *not* to ignore them by developing a contrary or different set of judge-made rules.

Lastly, examine the Alaska case of *Morrow v. New Moon Homes, Inc.*<sup>35</sup> The court conceded that a judicial attempt to extend strict tort liability to remote, *i.e.*, not in privity, consumers suffering economic loss "would be contrary to the legislature's intent . . . [and] would in effect be an assumption of legislative prerogative on our part [which] would vitiate clearly articulated statutory rights" in favor of sellers under Article 2 of the Commercial Code.<sup>36</sup> If this is so with respect to economic loss, why is it not equally true with respect to personal injury cases which equally are covered and controlled by Article 2 of the Commercial Code? Yet, the Alaska Court waffled in admitting this. Rather, in a footnote, the court simply stated that its adoption of strict tort liability in 1969 "was not in derogation of these [Code] rights, for the reason that a manufacturer has no right to disclaim or limit the liability for personal injury [because] [t]he Code provides that such restrictions are *prima facie* unconscionable [UCC 2-719(3)] . . ."<sup>37</sup> But, why waffle? How refreshing it would have been if the Alaska court had admitted out-right, as did Judge O'Connell in *Markle v. Mulholland*,<sup>38</sup> that the Uniform Commercial Code has, in fact, preempted the entire field of a seller's liability for defective products, regardless of whether they cause economic loss or personal injury. Perhaps, that is what the Alaska court one day will do. But, if it does not, the court will be left in the strange and questionable position of suggesting that the Commercial Code has preempted judicial action in the economic damage area, but not in the personal injury field — notwithstanding the fact that both types of losses are expressly authorized and controlled in the very same sections of the Code.<sup>39</sup>

<sup>35</sup> 548 P.2d 279 (Alaska 1976).

<sup>36</sup> *Id.* at 286.

<sup>37</sup> *Id.* at 286 n.12.

<sup>38</sup> 265 Or. at 275, 509 P.2d at 536.

<sup>39</sup> *See, e.g.*, U.C.C. §§ 2-714, 2-715, 2-719.