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of punitive damages before the defendant's resources are depleted.[53] This encouragement to bring suit, however, is not an entirely undesirable goal because many violations causing small, individual financial losses to numerous plaintiffs might otherwise not be worth the expense of court proceedings to a single plaintiff. Moreover, if the primary purposes of punitive damages are to punish and to deter the wrongdoer, the fact that the first few plaintiffs might recover punitive damages while the others may not would not affect the accomplishment of that purpose. The additional compensation given to the initial plaintiff is merely a windfall.[54] The plaintiff's claim for punitive damages should be based upon the fact that potential wrongdoers should be deterred, and that the defendant's conduct warrants punishment rather than that the plaintiff is entitled to additional compensation.

It should be kept in mind that punitive damages would not be awarded merely on the finding that material information was omitted or misstated in a registration statement or prospectus. Juries would be instructed, after hearing evidence about the defendant's financial position and prior punitive damages, to award punitive damages only if the defendant's conduct was wilful and wanton, or, as the district court said in *Globus*, indicated "a high moral culpability."[55] This would be a stricter test than the "willfullness test"[56] of the 1933 Act on which simple actual damages may be based. Thus, the award of punitive damages for securities violations, if limited as suggested above, would increase the protection available to the buying public.

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Products Liability—Statute of Limitations—Application of the Contract Statute of Limitations to a Cause of Action for Strict Liability in Tort—*Mendel v. Pittsburgh Plate Glass Co.*[1]—In October, 1958 defendant Pittsburg Plate Glass Company installed a glass door at the front entrance to the Rochester, New York building of the Central Trust Company. The Plaintiff, Cecile Mendel, alleged that on October 29, 1965, while walking through the door, it struck her causing her to fall and suffer personal injuries. In 1967 the plaintiff and her husband initiated an action against the Pittsburgh Plate Glass Company in which they alleged that a fault in the door caused the injuries.[2] Recovery was sought both on the theories of tort and contract.

[53] Note, 82 Harv. L. Rev. 951, 957 (1969).

[54] Comment, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 525 (1957).

[55] 287 F. Supp. at 193.

[56] Securities Act of 1933, § 24, 15 U.S.C. § 77yyy (1964).

[1] 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

[2] The plaintiff and her husband also initiated an action against the owners of the building, the Central Trust Company.

Two causes of action in the complaint were based on a negligence theory and sought recovery for Mrs. Mendel's personal injuries and for the loss her husband suffered as a result of her injuries. Two additional causes of action were based on the theory of breach of implied warranty.[3]

In August of 1967, the Supreme Court of Munroe County, New York granted the company's motion to dismiss the third and fourth causes of action on the ground that the statute of limitations had run. That court rejected the plaintiff's contention that the concept of "strict *tort* liability" governed breaches of warranty, and that the three-year tort statute of limitation began running from the time of the injury. The supreme court held that the six-year contract statute of limitation applied to the case and the statute commenced running in 1958, the date of the sale.[4] The court felt that despite the abandonment of the concept of privity in breach of warranty situations, a third party user should be allowed the same right of relief as a party to the contract.[5] On October 30, 1969 the Court of Appeals of New York, in a four to three decision, affirmed the holdings of the supreme court.[6]

The issues on appeal were: (1) whether a non-party user's cause of action giving rise to liability for personal injuries allegedly caused by an unreasonably dangerous condition in a defective product lies in contract or tort, and (2) whether the applicable statute of limitation commences running from the date of sale of the defective product or the date of the plaintiff's injury. The court held that a cause of action for breach of warranty is governed by the six-year contract statute of limitation and that this statute runs from the time of the making of the contract. A majority of the justices felt that strict liability in tort and implied warranty in the absence of privity were actually the same cause of action,[7] and that the statute of limitation for actions in contract was applicable.[8]

This decision illustrates that the development of products liability law based upon tort theory and the parallel emergence of the Uniform Commercial Code treatment of breaches of warranty have led to confusion and inconsistency.[9] Two issues which remain unsettled are

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[3] The plaintiffs' cause of action founded on breach of implied warranty was dismissed. The plaintiffs took no appeal from this dismissal.

[4] Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (1967). The contract statute of limitations which the court applied is found in N.Y. Civil Pract. Law & Rules § 214(5) (McKinney 1963).

[5] 57 Misc. 2d at 46, 291 N.Y.S.2d at 96.

[6] 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

[7] Id. at 345 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

[8] Id. at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

[9] See generally Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipse, Pigeonholes and Communication Barriers, 17 W. Res. L. Rev. 5 (1965). The author applauds the justice and results of cases decided on an independent tort theory of strict liability but deplores the fact that strict liability in tort and the Uniform Commercial Code appear to be com-

whether the cause of action accruing to a plaintiff injured by a defective product is grounded in tort or contract, and whether the tort or contract statute of limitations applies.[10] The issues may be resolved either by recognizing a cause of action based upon strict liability in tort, by expanding the warranty concept of contract theory to give third parties not in privity the right to sue on a theory of breach of warranty, expressed or implied, or by recognizing the existence of both such causes of action and applying one to the facts of the case.

Section 2-318 of the U.C.C.[11] creates a right of action based upon the contract in favor of third party beneficiaries. It extends to the buyer's family, household, and guests the benefit of the same warranty which the buyer received in the contract of sale, and expressly discards technical concepts of privity. Beyond the inclusion of these classes of third party beneficiaries, this section of the Code is neutral and purports not to enlarge or restrict "developing case law on whether the seller's warranties" extend to other persons coming in contact with the product.[12] Section 2-725 of the Code sets a period of limitation for breach of any contract of sale. Subdivision (1) provides that no action may be brought after four years from the time the cause of action accrues. Subdivision (2) declares that a cause of action accrues when the breach occurs notwithstanding lack of knowledge of the breach on the part of the plaintiff. The purpose of section 2-725 appears to be the achievement of commercial uniformity among the states.[13]

The *Mendel* court was influenced by the fact that in 1964 the New York Legislature adopted the Uniform Commercial Code. Although the Code did not govern the case since the contract was entered into before the Code became law in New York, the court felt that the legislative intent with respect to actions based on breach of implied warranty was to apply the same statute of limitation to plaintiffs not in privity as is applied to those in privity. The court also felt that the legislative intent was that the Code warranty provisions

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peting bodies of law. Rather, it is urged, the tort scholars and commercial lawyers should get together and formulate an amalgamated body of products liability law.

[10] E.g., see Rapson, Products Liability Under Parallel Doctrine: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692, 704-07 (1965); Note, Manufacturer's Strict Tort Liability to Consumers for Economic Loss, 41 St. John's U.L. Rev. 401, 411 (1967).

[11] U.C.C. § 2-318 provides:

> A seller's warranty whether expressed or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not include or limit the operation of this section.

Unless otherwise specified, all references to the Uniform Commercial Code are to the 1962 Official Text.

[12] U.C.C. § 2-318, Comment 3.

[13] U.C.C. § 2-725, Comment.

were to manifestly pre-empt the field.[14] As a result the majority in *Mendel* refused to find that there was an independent cause of action founded in strict tort liability, and held that the only applicable theory, apart from that of traditional negligence, is the expanded warranty concept implicit in Section 2-318 of the Code. In fact, the majority stated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the same cause of action."[15]

The majority in *Mendel* refused to recognize the existence of an independent cause of action founded in strict tort liability partly because of the fear that many unfounded suits would be brought against manufacturers if the tort statute of limitations, which runs from the time of the injury, was held to apply.[16] The majority opinion was based upon the court's desire to avoid the possibility that "those plaintiffs not in privity . . . would be entitled to pick and choose between the Code's four-year-from-the-time-of-the-sale, and . . . (the) three-year-from-the-time-of-injury limitation period, depending upon which, under the facts of a given case, would grant them the largest period of time to sue."[17] The majority felt that it would be absurd to have two different limitation periods applicable to the "same cause of action with the same elements of proof complaining of the very same wrong."[18]

The reasoning of the majority in *Mendel* is based on the court's interpretation of two earlier New York decisions. In the 1953 case of *Blessington v. McCrory Stores Corp.*,[19] an administrator whose infant son died as a result of burns suffered from the ignition of an allegedly defective cowboy suit brought an implied warranty action against the retailer and a negligence action against both the retailer and the manufacturer. The tort statute of limitations clearly barred the negligence actions, since more than three years had elapsed between the occurrence of the accident and the commencement of the action. The New York Court of Appeals, however, held that the warranty action was independent of any negligence theory, was subject to the contract statute of limitations, and was not barred since it was commenced within the six-year contract statute of limitation.[20] The majority in *Mendel* interpreted *Blessington* as requiring the application of the contract statute of limitations to actions which are not founded on negligence and which seek recovery for injuries due to defective products.[21]

The reasoning of the majority in *Mendel* is further buttressed by

14 25 N.Y.2d at 344-45, 253 N.E.2d at 209-10, 305 N.Y.S.2d at 493-94.
15 Id at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.
16 Id. at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.
17 Id. at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.
18 Id.
19 305 N.Y. 140, 111 N.E.2d 421 (1953), 122 N.Y.S.2d 140.
20 Id. at 147, 111 N.E.2d at 422-23, 122 N.Y.S.2d at 147.
21 25 N.Y.2d at 343, 253 N.E.2d at 209, 305 N.Y.S.2d at 492.

its interpretation of *Goldberg v. Kollsman Instrument Corp.*[22] In *Goldberg* an administratrix sued the manufacturer of an aircraft and the supplier of the aircraft's altimeter for breach of warranty resulting in the death of her daughter caused from injuries suffered in an airplane crash. The New York Court of Appeals held that the airplane manufacturer could be held liable despite the lack of privity, but that the supplier of the altimeter could not be held liable since the plaintiff could be adequately compensated in a successful suit against the manufacturer.[23] The majority in *Mendel* interpreted *Goldberg* as extending the concept of implied warranty by rejecting the requirement of privity rather than as establishing a new cause of action of strict liability in tort. Thus, as seen by the *Mendel* majority, "*Goldberg* stands for the proposition that notwithstanding the absence of privity, the cause of of action which exists in favor of third-party strangers to the contract is an action for breach of implied warranty."[24]

The majority decision in *Mendel* finds support in several Pennsylvania decisions. In *Engelman v. Eastern Light Co.*,[25] where the plaintiff's injury was caused by an electrical defect in a washing machine which the plaintiff had purchased from the defendant, the Court of Common Pleas of Carbon County, Pennsylvania considered whether an action for personal injuries which was based solely on breach of warranty had to be brought within the two-year personal injury limitation period, or whether it could be brought within the four-year contract limitation under the Uniform Commercial Code. The court held that the Code's statute of limitations applied to actions for personal injury arising out of breach of warranty in the absence of a provision in the contract for a lesser time.[26] The court reasoned that the Code was the latest expression of legislative interest, that the general provisions of the Code plainly indicated an intention to occupy the field and achieve uniformity, and that since the Code deals with a narrow subject matter carved out of the broad field of personal injuries, the specific enactment is controlling over the general personal injury enactment.

The *Engelman* decision was considered by the Supreme Court of Pennsylvania in *Gardiner v. Philadelphia Gas Works*.[27] In that case the plaintiff brought an action to recover damages for personal injuries received allegedly as a result of defendant's breach of an implied warranty to transmit gas in a safe manner through an underground conduit into plaintiff's home. The plaintiffs alleged a defect in the conduit in an action brought after the two-year statute of

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22 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
23 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.
24 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.
25 30 Pa. D. & C.2d 38 (C.P. Carbon County 1962).
26 Id. at 44.
27 413 Pa. 415, 197 A.2d 612 (1964).

limitations for personal injuries had expired but before the four-year period of limitation on actions for breach of contract of sale established by the Uniform Commercial Code had run. The court held that the legislature intended the Code limitation to apply to breaches of contracts of sale regardless of whether personal injuries were involved or not.[28] The court in so holding cited the legislative intent "that there be a four-year period of limitation on all actions for breach of contracts for sale, irrespective of whether the damages sought are for personal injuries or otherwise."[29]

Although the Pennsylvania decisions appear to support the majority in *Mendel*, a closer examination shows that it is quite unclear how the Pennsylvania Supreme Court would have decided the *Mendel* case. The Pennsylvania cases all involved parties who were either in privity or who were both in the distributive chain of the product, for example, a manufacturer and an ultimate purchaser. Thus, in such cases it was less difficult to apply a contract theory to parties who had bound themselves, either directly or through distributors, by a purchase and sale contract. Also, in the Pennsylvania decisions all of the plaintiffs had clearly sued on a contract theory.

The Pennsylvania Supreme Court has not considered whether the contract statute of limitation applies when that statute would bar an otherwise valid claim if, under the tort statute of limitations, which would run from the date of the injury, the claim would not be barred. Unless a court felt bound by authority to so hold, it would be reluctant to bar an otherwise valid claim. Thus, when faced with a situation where application of the contract statute of limitations would bar a claim, especially where the claim is for personal injuries by one not party to a contractual relationship, the court would be at least reluctant to apply such a statute.[30]

The dissenting opinion in *Mendel* disagreed with the majority's interpretation of the effect of the Uniform Commercial Code and the *Blessington* and *Kollsman* cases. The views of the dissenting justices were considerably influenced by the recent authorities who support the existence of a cause of action based on strict liability in tort, independent of both contract law and the Code. Foremost among these authorities is Section 402A of the Restatement of Torts (Second). That section provides that one who sells any defective product "unreasonably dangerous to the user or consumer or to his property" is liable for harm befalling the "ultimate user or consumer." The liability is

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[28] Id. at 420, 197 A.2d at 614.

[29] Id.

[30] There is some limited authority that Pennsylvania does accept the tort of strict liability, see Hoeflich v. William S. Merrel Co., 288 F. Supp. 659, 661 (E.D. Pa. 1968).

The majority in *Mendel* did not consider this line of Pennsylvania decisions, but other courts, in considering whether the Code or tort statute of limitations should apply in an action for damages caused by a breach of implied warranty, have relied on the Pennsylvania cases. See, e.g., Val Decker Packing Co. v. Corn Prods. Sales Co., 411 F.2d 850 (6th Cir. 1969).

limited to the seller who is engaged in the business of selling the product and with the proviso that the product reaches the customer without material change.[31] The Restatement clearly indicates that the consumer need not have bought the product nor entered into a contractual relationship with the seller, and that the cause of action is founded in tort rather than contract or the Uniform Commercial Code.[32] Thus, the Restatement indicates that there exists an independent cause of action based neither on negligence nor contract law but rather on strict liability in tort.

A growing number of commentators also argue that there exists such an independent cause of action. Dean Prosser contends that confusion has resulted from the use of the term "warranty" in respect to products liability law. In spite of this confusion he indicates that under strict liability in tort the word "warranty" does not imply the traditional concept whereby a warranty is extended from the seller to the buyer, but refers to "something separate and distinct which sounds in tort exclusively, and . . . which exists apart from any contract between the parties."[33]

The gradual acceptance of this independent tort is also found in developing case law. The dissenters in *Mendel* take the position that *Goldberg v. Kollsman Instrument Corp.*[34] represents a recognition by the New York Court of Appeals of this developing theory, and the acceptance by the court of this new tort rather than, as the majority held, a rejection of the requirement of privity in certain contractual-products liability actions.[35] Several other jurisdictions, most notably New Jersey and California, have also held that there exists a course of action based on strict liability in tort not governed by contract law, the Uniform Sales Act or the Uniform Commercial Code.[36] The New Jersey Supreme Court, in a case similar to *Mendel*, allowed a plaintiff to bring an action fourteen years after the product was purchased. That court held that the cause of action accrued when the injury occurred, and that the applicable statute of limitations was that governing tort actions rather than Section 2-725 of the Uniform Commercial Code.[37]

The decisions of these courts were generally prompted by a

[31] Restatement (Second) of Torts § 402A (1965).

[32] Id., Comment *m*.

[33] Prosser, Spectacular Change: Products Liability in General, 36 Cleve. B. Ass'n J. 149, 167-68 (1965). See also W. Prosser, Law of Torts § 97, at 681 (3d ed. 1964), where the author advocates the abandonment of "the elusory contract" that is confusing the concept of strict liability in tort.

[34] 12 N.Y.2d 432, N.E.2d 81, 240 N.Y.S.2d 592 (1963).

[35] 25 N.Y.2d at 348, 253 N.E.2d at 213, 305 N.Y.S.2d at 497.

[36] See Schipper v. Builders Supply Corp., 44 N.J. 70, 207 A.2d 314 (1965); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 304 (1965); Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897 (1963), 27 Cal. Rptr 697, Operating Engineers Local 57 v. Chrysler Motors Corp. — R.I. —, 258 A.2d 271 (1969); Holifield v. Setco Industries, Inc. 42 Wisc. 2d 750, 168 N.W.2d 177 (1969).

[37] Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

desire to avoid applying complex contractual or commercial requirements to essentially tortious actions. They felt that the public would be best served and protected if the laws governing commercial relationships, such as those relating to the disclaimer of warranties and notice of defect requirements, were not made applicable to product liability cases.[38] They recognized, as did the dissenters in *Mendel,* that such a holding would not be unduly prejudicial to manufacturers since, though a plaintiff need not prove that the manufacturer was negligent, he still must prove that the defect existed while the product was under the control of the manufacturer, and that the harm was the proximate result of the defect.[39] The passage of time makes it difficult to prove that the defect was attributable to the manufacturer rather than to users or repairers. Thus, the plaintiff's case as well as the defendant's is weakened by a considerable passage of time. Also, contributory negligence or assumption of the risk are defenses available to the manufacturer in an action of strict liability in tort.[40]

Once the concept of strict liability in tort is accepted, the courts are faced with the difficult question of whether the Uniform Commercial Code or the new tort theory is applicable.[41] In jurisdictions which recognize the existence of this new tort, the Code is still law, and although the elements of proof in an action based on strict liability are very similar to those of an action for breach of implied warranty, certain elements of proof and defenses differ.[42] Inconsistencies between the two theories occur in relationship to (1) disclaimers of the warranties,[43] (2) the requirements that the defendant be given timely notice of the defect,[44] (3) express warranties greater than the standard imposed by tort law,[45] (4) the time of accrual of a cause of

[38] See Santor v. A & M Karagheusian Inc., 44 N.J. 52, 207 A.2d 304 (1965); Restatement (Second) Torts § 402A, Comment *m* (1965); W. Prosser, supra note 33, § 97, at 681 (3d ed. 1964).

[39] 25 N.Y.2d at 351, 253 N.E.2d at 213, 305 N.Y.S.2d at 499. Santor v. A & M Karagheusian Inc., 44 N.J. 52, 67, 207 A.2d 304, 313 (1965).

[40] This is not entirely clear since there is some authority for the proposition that contributory negligence is not a defense, Restatement (Second) Torts § 402A, Comment *n* (1965), although assumption of the risk is more generally accepted as a defense. Id. Wisconsin accepts contributory negligence as a defense. Holifield v. Setco Indus. Inc., 42 Wisc. 2d 750, 756, 168 N.W.2d 177, 180 (1969). See also W. Prosser, supra note 33, § 95, at 656.

[41] The Code has been adopted in all jurisdictions except Louisiana.

[42] The majority in the *Mendel* case were wrong in holding that strict tort and implied warranty are the same cause of action. 25 N.Y. 2d at 345, 253 N.E.2d at 210, 305 N.Y.S. 2d at 494. For an article enumerating the inconsistencies see Rapson, supra note 10.

[43] See, W. Prosser, supra note 33, § 97 at 680. The Code, of course, allows a seller to disclaim warranties, U.C.C. § 2-316, but limits their application, especially where the disclaimer concerns personal injuries. U.C.C. § 2-719(3); see also Boshkoff, Some Thoughts about Physical Harm, Disclaimers and Warranties, 4 B.C. Ind. & Com. L. Rev. 304 (1962).

[44] U.C.C. § 2-607(3)(a) provides that the buyer must notify the seller within a reasonable time after a breach is discovered. Under strict tort liability there is no notice requirement. Rapson, supra note 10, at 707.

[45] It is possible to give an express warranty under the Code which gives a buyer

action, and (5) the length of the limitation period running from such accrual. Where one of these elements is present in a case, and that element alone can determine the court's decision, (a situation which will arise most often when the defendant moves to dismiss on the grounds that one of the prerequisites is lacking), the court will have to decide whether the prerequisite is required by law, and therefore decide which theory is applicable to the case.

This decision may be difficult since there is a great area where both the Uniform Commercial Code and tort law apply. Generally, whenever a merchant sells his regular product in the normal course of business both the Code and tort law apply.[46] In a factual situation where it is obvious that recovery will be granted under either theory, there will be no dispute; but where under one theory, generally the Code, rceovery would be denied, while under the other it would be granted, there will be a dispute.

Thus, courts generally decide that only one theory may apply.[47] That is, they decide that there is a cause of action on tort theory which is free of the requirements of the Uniform Commercial Code and is applicable to the facts before the court, or that such a cause of action is not applicable and the Code governs, or that the Code has preempted the field so that there is no cause of action under tort law. It is doubtful that a court would rule that strict liability in tort had pre-empted the legislatively enacted Uniform Commercial Code. Thus, unless the court decides, as did the majority in *Mendel*, that the Code pre-empts all non-negligent products liability law, it will have to decide which conflicting theory is most applicable to the facts of the case before it. In doing so courts will attempt to arrive at some standard by which the applicability of the conflicting theories can be gauged in light of the facts of the case.

The dissenting justices in *Mendel* as well as the other courts which have accepted the concept of strict liability in tort, have neither

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greater rights than those imposed by strict tort law. In a recent article Professor Donovan gives the example of the car manufacturer who advertised that his brakes were twice as good as those of his competition. If a person bought a car and was injured because he relied on the warranty but the brakes were only as good as the competitors, the injured party has a cause of action based on express warranty but under the law of strict tort liability, and the measure of reasonableness of the defect, he could not recover. Donovan, Recent Developments in Products Liability in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code, 19 U. Me. L. Rev. 181, 250 (1967).

[46] Donovan, supra note 45, at 252.

[47] This may be the result of the plaintiff's choice of pleadings but more generally it is an example of the "eclipse" theory. Both the Code and the new tort attempt to occupy the entire field. The Code attempts to establish uniform rules while the tort law is purportedly free of all contract requirements. As a result it is difficult for a court to hold that both causes of action are equally applicable to a particular factual situation.

[48] But see Operating Engineers Local 57 v. Chrysler Motors Corp., — R.I. —, 258 A.2d 271, 273 (1969), where the court held that the Code did not apply since there was no buyer-seller relationship.

considered the problem nor attempted to evolve such a standard.[48] Commentators have, however, suggested that the applicability of a cause of action can best be determined by examining the policy underlying that theory.[49]

Such an examination indicates that the theories are not really competing since they should apply to different situations. Generally, parties to a tort action are legal strangers whose relationship and respective rights and liabilities are imposed by law. Their relationship is determined by standards which apply to the public at large, and although liability may hinge somewhat on their respective circumstances and their relationship to each other, their rights are not determined by an agreement between the parties.[50] The parties do not acquire unique rights, that is rights which any other person similarly situated, would not acquire.

The law of sales, on the other hand, elaborates the duties of performance which attach to a contract for sale.[51] The parties' rights and liabilities are founded on the existence and terms of a particular contract to which they have agreed. The law of sales is merely designed to aid in the interpretation and enforcement of that contract. Thus, where a contract does not exist, or if it is particularly remote, the law of sales should not govern. This situation arises when there is a contract for sale between a manufacturer and a distributor, who later sells products to the retailer who in turn sells to a consumer. In such a situation the original contract and the law of sales is no more appropriate for determining the relationship of the manufacturer to the consuming public than it should be in determining the liabilities of the manufacturer in respect to the use of his automobile. This is similar to the situation involving an automobile insurance contract, which does not effect the liability of the insured to third parties. Thus, the test would be whether a plaintiff user of a product has been differentiated from the general public by a contract with the manufacturer; if so, the law of sales should govern, if not then tort law controls.

If the choice of legal theory were made in light of the policy underlying each theory, a problem which was raised by the *Mendel* court would easily be resolved. The majority in *Mendel* was troubled by the possibility that because of the law of strict liability in tort, immediate parties to a sale could have lesser rights than remote parties.[52] This could occur if there is, for example, the requirement that the injured party give timely notice of a defect to the defendant. If the Code applied to immediate parties to a contract of sale, and tort theory applied to remote consumers or non-purchasing users, the more

[49] Littlefield, Some Thoughts on Products Liability Law: A Reply to Professor Shanker, 18 W. Res. L. Rev. 10, 27-28 (1966).

[50] Id.

[51] Id.

[52] 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

remote consumers would be more likely to recover, since they need not comply with the notice requirements. Such a possibility influenced the majority in *Mendel* to reject the concept of strict liability.

Nevertheless, this result is completely acceptable if viewed in relation to the policies of the two bodies of law. The remote user is essentially a member of the general public. He is undifferentiated and has neither increased nor decreased his rights by an agreement. As such it would be inappropriate to apply a notice provision to him since that provision is intended to enable parties to a contract to rectify defects. It would also be appropriate to apply any warranty or disclaimer provisions to the remote user since that user has not agreed to limit or expand his rights by means of the contract. His rights are therefore that of the general public, and as such tort law should apply even if this would enable him to recover where an immediate party to the contract would be barred.

This approach is particularly applicable to situations necessitating a choice between statutes of limitation. If a person is a party to a contract, it is relatively easy for him to discover the defect within the period of time from when the contract was made. The time of the making of the contract of sale usually represents the first instance the party came into contact with the product and the first instance that the party would have the right to sue for alleged defects. If the user or consumer was not related to the contract, it is irrelevant to compute the limitation period from the time the contract was made. The user may not have come into contact with the product at this time. The remote user certainly did not have a cause of action at the time of the making of the contract, since he could not recover until he was injured. Nor does the fact that the goods did not conform to the original contract give a remote user a cause of action. This is illustrated by the facts of the *Mendel* case where the plaintiff was a complete stranger to the contract involving the sale of the door. She was not at all aware of the time of the making of the contract, she had no period of time dating from that time to inspect for defects, nor had she contracted as to her rights and liabilities with respect to the door. Just as the terms of the contract should not bind the plaintiff in *Mendel,* neither should the contract statute of limitations.

Although the result advocated by the dissenters in *Mendel* is correct, they did not consider the problem which arises after the court accepts the doctrine of strict tort liability. That problem is to determine the circumstances under which the new tort applies as opposed to those under which the Uniform Commercial Code applies. Because the majority rejected the assistance of the new tort they were not faced with this problem. Since the majority position appears to be in error and contrary to the trend of American law, it is necessary to develop a standard to determine the applicability of the respective theories. The most rational source of such a standard is the policies underlying tort and contract law. Such a standard will enable the

courts when faced with a dispute in which a cause of action is brought in tort, but where the court feels that the theory is inappropriate, to avoid a complete rejection of the existence of the independent tort of strict product liability.

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