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A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty

Morris G. Shanker

A REEXAMINATION OF PROSSER'S PRODUCTS LIABILITY CROSSWORD GAME:

THE STRICT OR STRICTER LIABILITY OF COMMERCIAL CODE SALES WARRANTY

by
*Morris G. Shanker**

*This is the third paper** in which Professor Shanker deals with the relationship between the judicially developed strict tort theory of products liability and sales warranty under the Uniform Commercial Code. In his first article, published in 1965 shortly after the courts first began accepting Professor Prosser's strict tort notions, Professor Shanker argued that strict tort was hardly the revolution that it was heralded to be and criticized the judicial eclipsing of the Uniform Commercial Code in products liability matters. In his second paper, Professor Shanker argued that the Uniform Commercial Code legislatively had preempted the field, thereby preventing the judiciary from properly adopting the strict tort theory, and that judicial decisions holding otherwise were poorly and superficially reasoned. In this paper, Professor Shanker argues that strict tort, as it has ultimately developed, is substantively the same as warranty liability under the Uniform Commercial Code. If anything, Professor Shanker points out, the Uniform Commercial Code may actually offer a higher level of product protection. Again, he urges a return to the Uniform Commercial Code as the governing law in products liability matters.*

A PERSONAL PROLOGUE

IN 1965, shortly after our courts began accepting Professor Prosser's strict tort theory of products liability, I argued that it was not the great step forward which its heralds had announced. To

* John Homer Kapp Professor of Law, Case Western Reserve University; B.S.E.E. (1948), Purdue University; M.B.A., J.D. (1952), University of Michigan. The author has been Visiting Professor of Law at the University of Michigan, the University of California (Berkeley), Wayne State University, and the University of London (England). Prior to entering the field of legal education, he practiced commercial law in Cleveland, Ohio, for ten years.

** The two papers referred to are Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Judicial Eclipses, Pigeonholes and Communication Barriers*, 17 WES. RES. L. REV. 5 (1965) and Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697 (1978).

the contrary, I pointed out that those strict tort cases would have been decided the same way using the warranty ideas found in the Uniform Commercial Code. Still, it then struck me that there might develop important substantive differences between these two competing products liability systems. I thought this would be regrettable, resulting in continued confusion and likely injustice.[1]

Over the years, my perceptions have changed. Contrary to the present conventional wisdom, I have concluded that no substantive differences, in fact, exist or ever existed between the two systems. The most recent judicial developments, I believe, confirm this. Stating it another way, all that is now substantively accomplished under strict tort is equally obtainable under UCC sales warranty law. If anything, UCC sales warranty may actually offer a higher level of product protection than that obtainable under strict tort theory. This paper will seek to demonstrate these points.[2]

If my perceptions are correct, one wonders why Professor Prosser was successful in persuading our courts first to accept and then to perpetuate his strict tort invention when the Uniform Commercial Code was always there to provide at least as much products protection, or likely more. Apparently Prosser succeeded by serenading our courts with a melody of words that captured and beguiled them.

I. THE MELODY OF WORDS

A. *Following the Pied Piper to Nowhere*

Indeed, Prosser made it sound so appealing: a products liability law which was "free of the intricacies of sales law" and all of that "undesirable luggage" found in the former Sales Act or the present Uniform Commercial Code.[3] And this much desired objective could be so easily accomplished. According to Prosser, all that need be done was to exchange certain words for others. Since the whole problem was due to the single word "warranty," get rid

1. 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 (1965).

2. The literature on the law of products liability is overwhelming. Thus, it is well nigh impossible to remember or to acknowledge all the sources which have contributed to my thinking. Accordingly, the specific authorities in this article typically are intended to be illustrative and not necessarily exhaustive.

3. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1133–34 (1960).

of it and replace it with the words "strict liability."[4] Stop saying that a products liability action was one in contract. Say, instead, that it was an action sounding in tort.[5]

Such was the beguiling melody of words that Professor Prosser began singing in 1960.[6] The American Law Institute soon joined him;[7] and it was not long before the American courts were following this pied piper of products liability *en masse* and virtually without question. Indeed, the courts have been marching to Prosser's melody for nearly twenty years.

Exactly where has this procession led? It seems nowhere. Recent developments confirm that the courts are engaged in a masquerade: they are doing today essentially what they would have been doing under the Uniform Commercial Code, although their actions have been masked with Prosser's new word labels.[8] But, even as Little Buttercup observed:

> Gild the farthing if you will
> Yet it is a farthing still.[9]

B. *The Nagging Preliminary Question*

Before elaborating this thesis, there is an obvious preliminary question that needs to be answered. As appealing and beguiling as Prosser's new words were, how could they create a new body of products liability law that is independent from and not controlled by the Uniform Commercial Code? Professor Prosser (and later, the courts) had complained bitterly that it was the Uniform Sales Act with its legislative permission to a seller to diminish or relieve

4. *Id.* at 1134; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 802 (1966).

5. Prosser, *supra* note 4, at 802–05.

6. Prosser, *supra* note 3; Prosser, *supra* note 4.

7. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Interestingly, Prosser was the "choir master" for the American Law Institute, or more precisely, chief reporter for the *Second Restatement of Torts*. As has been noted elsewhere, it was his persuasive leadership that was instrumental in persuading the American Law Institute to adopt § 402A. For a discussion of the reasoning set forth by the ALI, see RESTATEMENT (SECOND) OF TORTS § 402A, Comment b (1965).

8. *Cf.* Freeman and Dressel, *Warranty Law in Maryland, Product Liability Cases: Strict Liability Incognito?* 5 U. BALT. L. REV. 47, 75 (1975) (discussing the unique situation in Maryland brought about by a non-Uniform amendment to U.C.C. § 2-316, and concluding "that while the scope of recovery allowed under the [Commercial] Code in Maryland closely approaches that which might be available under strict liability in tort, it is nevertheless deficient in a few areas"). Maryland has since adopted strict tort. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).

9. *Things Are Seldom What They Seem*, in W. GILBERT & A. SULLIVAN, H.M.S. PINAFORE 79 (Oliver Ditson Co. ed. 1933).

himself of warranty liability that was the problem.[10] Yet, if the statute authorized these sellers' "rights," could the courts really avoid this legislative scheme simply by pinning a new label on the plaintiff's action?

The legislative preemption problem becomes even more acute in the context of the Uniform Commercial Code. Minimal research demonstrates that the Code specifically and directly dealt with the very Sales Act problems of which Prosser complained.[11] In most cases, the seller's "right" to avoid or diminish his liability for selling defective products was much cut back.[12] But, regardless of what the Commercial Code has done to a seller's substantive liability, the important point is that our legislatures recently and directly addressed themselves to the very problems which troubled Prosser and came up with statutory solutions to them.[13] Surely, these legislative enactments cannot be avoided simply by the judiciary pinning new word labels on the plaintiff's claim. As I stated previously,

> How may a court under our system of law ignore a valid statutory enactment covering a case which is before it? If the statute intends that a seller's liability for his defective products may entirely be excluded or partly limited, how can a court ignore these statutory limitations by developing some kind of superior case law?[14]

This problem of legislative preemption was raised shortly after Prosser began playing his new word game.[15] But, for nearly a decade, the courts in large measure simply ignored the issue or assumed that it did not exist.[16] Indeed, it was not until 1973 that

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10. Prosser, *supra* note 3, at 1131-33; Prosser, *supra* note 4, at 801; Prosser, *Spectacular Change: Products Liability in General*, 36 CLEV. B.A.J. 149, 167 (1965).

11. Markle v. Mullholland's, Inc., 265 Or. 259, 273-82, 509 P.2d 529, 537-39 (1973) (O'Connell, C.J., concurring); Shanker, *supra* note 1, at 21.

12. Shanker, *supra* note 1, at 21-22.

13. Even Professor Prosser seemed to have grudgingly conceded that "given enough time—say another decade—the sales law of warranties [in the UCC] might have worked out a method of dealing effectively with these problems." But he was in a hurry to implement his theory of strict tort and "in the desperate hours of the fall of the citadel, there was no such time." Prosser, *supra* note 4, at 801.

14. Shanker, *supra* note 1, at 11 n.20.

15. Franklin, *When Worlds Collide*, 18 STAN. L. REV. 975, 1016 (1966); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *supra* note 1, at 11 n.20; Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 751–59 (1970). Indeed, the preemption problem was being raised as early as 1961 by Professor Dickerson. Dickerson, *The Basis of Strict Products Liability*, 17 BUS. LAW. 157 (1961).

16. *But see* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305

the New Jersey Supreme Court first squarely met the problem and declared that the Uniform Commercial Code had not preempted the judicially developed strict tort doctrine.[17] Since then, nearly every court which has faced the preemption question has followed suit.[18] Despite this near judicial unanimity, the preemption question will not go away. During the past several years, commentators have been again demanding that the courts explain how they accomplished their *tour de force* under our system of law.[19]

The preemption problem has been adequately covered elsewhere in the literature,[20] and thus will not be discussed again here. As stated, this article takes quite a different tack. Its major thesis is that strict tort substantively has accomplished little, if anything, which would not have been obtained under the Uniform Commercial Code. Thus, as it has turned out, strict tort essentially has been an exercise in futility—perhaps an interesting, albeit confusing, word game, but one which has had minimal substantive impact. For this further reason, our courts in products liability matters ought to stop singing Prosser's beguiling melody of words. They ought to abandon this pied piper's procession and return instead to the place which they never should have left, namely, the Uniform Commercial Code. Indeed, like it or not, this essentially is the very place where the courts, without realizing it, have always been.[21]

N.Y.S.2d 490 (1969) (accepting the supremacy of the UCC). For a discussion of the total rejection by Massachusetts state courts of the strict products liability theory in favor of UCC warranties, see note 38 *infra*.

17. Heavner v. Uniroyal, Inc., 63 N.J. 130, 157, 305 A.2d 412, 427 (1973). A criticism of this and other judicial decisions reaching this result is found in Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697 (1978).

18. *E.g.*, Phipps v. General Motors Corp., 278 Md. 337, 352-53, 363 A.2d 955, 963 (1976) (holding that Maryland's adoption of the UCC did not preempt the judicially created strict tort action since there were "significant differences between the two theories"). This decision is criticized in Shanker, *supra* note 17, at 715–16.

19. Brickley, *Products Liability in Kentucky: The Doctrinal Dilemma*, 65 KY. L.J. 593, 621 (1977); Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. REV. 205 (1977); Dickerson, *Was Prosser's Folly Also Traynor's?*, 2 HOFSTRA L. REV. 469 (1974); Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 666 (1977); Shanker, *supra* note 17. Professor Walkowiak apparently finds these commentators' arguments to be persuasive, but feels that the preemption problem today "is of only mild historical interest." Walkowiak, *Product Liability Litigation and the Concept of Defective Goods: "Reasonableness" Revisited?*, 44 J. AIR LAW & COMM. 705, 707 (1979).

20. *See* notes 15–19 *supra*.

21. The judicial development of strict tort is now bringing about legislative reactions. *See Draft Uniform Product Liability Law*, 44 FED. REG. 2996 (1979); Bivins, *The Products*

II. WORD EXCHANGE NUMBER ONE: "STRICT LIABILITY" FOR "WARRANTY"

What exactly was accomplished when the courts accepted Professor Prosser's suggestion to exchange the words "strict liability" for the word "warranty"? The impression left on the unschooled is that the words "strict liability" have enhanced the quality of the goods which a seller must deliver. Witness such judicial pronouncements as strict liability is "imposed [as a matter of] law"[22] or to protect the "public interest";[23] that it does not depend on the seller's "will" or "intention" as set out in the underlying sales agreement;[24] and indeed, that it was developed to prevent the seller from "defin[ing] the scope of its own responsibility for defective products. . . ."[25]

A. *Warranty: An Equal or Higher Quality Standard*

Leaving this impression may give a warm glow to those judges who believe that in developing strict tort they are marching in the mainstream of consumer justice. But, if they seriously believe that strict liability has given or ever was intended to give a higher level of quality protection to a consumer than that always available through warranty, then they have reasoned superficially and erroneously. It would be a poor Commercial Code lawyer who could not draft a sales agreement containing express warranties or a warranty of fitness for a particular purpose which required product quality far in excess of that which anyone has ever obtained through strict tort liability concepts. And indeed, Professor Pros-

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Liability Crisis, 11 AKRON L. REV. 595 (1978). If the Uniform Commercial Code, as I submit, already controls the field legislatively, one wonders whether this new separate legislation is needed or desirable. Would it not make better sense to design any new legislation—if any is needed—by amending the Uniform Commercial Code rather than by developing still another legislative scheme to deal with these same problems? *See* Shanker, *supra* note 1, at 17, 47.

22. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

23. Kirkland v. General Motors Corp., 521 P.2d 1353, 1360-62 (Okla. 1974) (losses should be borne by those who can control defective products because it is in the "public interest to discourage the marketing of products having defects that are a menace to the public. . ."); *see also*, Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) ("The purpose of such liability is to insure that the costs of injuries resulting from the defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.").

24. *E.g.*, Kirkland v. General Motors Corp., 521 P.2d at 1362.

25. *E.g.*, Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

ser himself recognized this. As he stated: "But the seller's strict liability may be *enlarged* by his express representations [*i.e.*, express warranties]."[26] What so often is overlooked is that the Uniform Commercial Code recognizes three quite different warranties: (1) the express warranty,[27] (2) the implied warranty of fitness for a particular purpose,[28] and (3) the warranty of merchantability.[29] No one has ever seriously contended that strict tort liability competes with the first two warranties. Its battle has always been only with the merchantability warranty, a warranty which arises whenever a merchant sells his regular merchandise.[30] Of course, a sale by a merchant of his regular merchandise involves *precisely* the *same* set of conditions which is required to trigger strict tort liability.[31]

What then is the difference between the two; in particular, is there a difference between the product quality level required by strict tort liability and that required by the merchantability warranty? Almost every commentator who has seriously studied the problem has concluded that there is no difference; that strict tort liability requires the seller to deliver the same quality of goods as that required under the merchantability warranty.[32] Several courts have expressly agreed with this proposition.[33] And, even

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26. Prosser, *supra* note 4, at 834 (emphasis added). For a recent application of this principle, see Drayton v. Jiffee Chemical Corp., 591 F.2d 352 (6th Cir. 1978). The court in a personal injury case questioned whether liability could properly be imposed under strict tort concepts. However, it had no difficulty finding liability for breach of an express warranty.

27. U.C.C. § 2-313.

28. *Id.* § 2-315.

29. *Id.* § 2-314.

30. *Id.* § 2-314(1).

31. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965); St. Luke's Hospital v. Schmaltz, 188 Colo. 353, 359, 534 P.2d 781, 784 (1975) ("The threshold question to the liability of such a [strict tort] claim is a sale in fact of the marketed product."). Courts have extended by analogy the strict liability ideas found in strict tort and the merchantability warranty to nonsales situations. *See, e.g.*, All-States Leasing Co. v. Bass, 96 Idaho 873, 877-78, 538 P.2d 1177, 1181-82 (1975) (discussing authorities that extend implied Code warranties to nonsales situations); Annot., 52 A.L.R.3d 121 (1973).

32. *E.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-7, at 295 (1972) ("[W]e would find the terms nearly synonymous . . . ."). *See also* Kessler, *Products Liability*, 76 YALE L.J. 887, 903 n.91, 928-29 (1967); Shanker, *supra* note 17, at 698-99, 701.

33. *E.g.*, Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) *quoted in* Kessler, *supra* note 32, at 903 n.91 ("[I]t may fairly be said that the liability which [§402A of the *Restatement*] would impose is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer," etc.); Wolfe v. Ford Motor Co., — Mass. App. Ct. —, 376 N.E.2d 143, 150 (1978) (noting 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 3-1 to 3-7 (1978)) ("the two bases of liability are

when courts do not articulate such express agreement, they seem to assign to strict tort the very same attributes that are found in the merchantability warranty. Thus, in *Dunham v. Vaughan & Bushnell Manufacturing Co.*,[34] the court, after studying the many definitions for product quality proposed by the leading authorities on strict tort, concluded:

> Although the definitions of the term "defect" in the context of products liability law use varying language, all of them rest upon the common purpose that those products are defective which are dangerous because they fail to perform *in the manner reasonably to be expected in light of their nature and intended function.*[35]

This sounds strikingly similar to the merchantability test set out in U.C.C. section 2–314(2)(c) that requires a merchantable product to be "fit for the ordinary purpose for which such goods are used." In a more recent example, the California Supreme Court, the judicial leader in developing strict tort, has now conceded that its originally developed strict tort standard was "somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability [U.C.C. sections 2–315 and 2–314 and] . . . reflects the warranty heritage upon which California products liability in part rests."[36] In this same decision, the California Supreme Court then went on to "invent" an alternative standard to be used in determining when design errors (as opposed to production defects) would cause the goods to fall below the required strict tort quality standard.[37] But, within a year, the Massachusetts

identical . . ."); Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345, 253 N.E.2d 207, 210, 305 N.Y.S. 490, 494 (1969) ("We would merely add that both parties appear to agree, and we believe correctly, that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action."); Reid v. Eckerds Drugs, Inc. 40 N.C. App. 476, 253 S.E.2d 344, 348 (1979) ("We likewise find any distinctions between tort and contract in this warranty action to be artificial and unnecessary to our consideration of merchantability."); Fisher v. Sibley Memorial Hospital, 26 U.C.C.R.S. 1128, 1133 (D.C. App. 1979) (" '[T]he current doctrines of implied warranty and strict liability in tort are but two labels for the same legal right and remedy, as the governing principles are identical.' ") (quoting Cottom v. McGuire Funeral Service, Inc., 262 A.2d 807, 808 (D.C. App. 1970)).

34. 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

35. *Id.* at 342, 247 N.E.2d at 403–04 (emphasis added). This definition recently was reexamined and again approved by the Illinois Supreme Court in Hunt v. Blasius, 74 Ill.2d 203, 384 N.E.2d 368 (1978), *rehearing denied*, Jan. 25, 1979.

36. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978).

37. According to the test propounded by the court, the trier of fact would be required to weigh the risk of danger inherent in the design against the benefits it offered. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. In so doing, consideration should be given to "the gravity of the danger posed by the challenged design, the likelihood that such danger

Supreme Judicial Court adopted the very same approach—indeed, the very same language—to state the law which governed design defects under the UCC merchantability warranty standard.[38]

To summarize, it seems amply clear that the level of product quality required by strict tort is no more than that required by the merchantability warranty. Indeed, some commentators have suggested that, if anything, merchantability actually will benefit the consumer in more cases than would be true under strict tort liability.[39]

Comparing strict liability with only the merchantability warranty much oversimplifies the problem. The fact of the matter is that a seller's warranty liability is the *totality* of the three warranties that can arise under the Commercial Code.[40] More precisely, one, two, or all three of these warranties can arise in a particular

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would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

38. Back v. Wickes Corp., — Mass. —, 378 N.E.2d 964, 970 (1978). Massachusettes has never accepted strict tort but instead has decided all of its products liability cases under UCC warranty. In Swartz v. General Motors Corp., — Mass. —, 378 N.E.2d 61, 63 (1978), the Massachusetts court has reaffirmed that it will continue with this approach. Part of the court's rationale was based on preemption, particularly by reason of non-Uniform amendments added to the Massachusetts Commercial Code dealing with (1) removal of privity as a defense, (2) prohibition of any disclaimer of merchantability warranty, (3) allowing duty to give notice of defects as a defense only to the extent that the defendant was prejudiced, and (4) running the statute of limitations from date of injury or damage. Except for the statute of limitations, it seems likely that the Massachusetts court could have achieved the same results on all of these points under the Uniform version of the Commercial Code. For a discussion of these points, see notes 55–62 & 106–25 *infra* and accompanying text. The critical point here is that the non-Uniform Massachusetts amendments in no way affected or varied the content or substance of the UCC sales warranties, including the implied warranty of merchantability.

Differences between the Massachusetts (UCC) and California (strict tort) approaches might develop in the area of evidence. Compare U.C.C. § 2-607(4) ("The burden is on the buyer to establish any breach [of warranty] with respect to the goods accepted.") with Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978) (the burden of proof will be upon the manufacturer to demonstrate that an injury producing product is not defective in design).

39. J. WHITE & R. SUMMERS, *supra* note 32, at 295 (strict tort standard "does not purport to reach all defective goods . . ."). *See also* Schenk v. Pelkey, 25 U.C.C.R.S. 416 (Conn. 1978). There the injured plaintiff lost his strict tort case through an adverse jury verdict. Nevertheless, the Connecticut Supreme Court directed that the plaintiff be given an additional opportunity to prevail under an implied warranty of merchantability theory. The court stated that it was a controversial question whether the products liability standard required by strict tort and merchantability warranty were the same. The court did not, however, find it necessary in the case to resolve the question. *Id.* at 420.

40. *See* notes 27–29 *supra* and accompanying text.

sale. And when more than one warranty does arise, the seller's responsibility typically will be measured by the one requiring the highest level of quality.[41] Further, as will be discussed later, any attempt by agreement to reduce all warranty protection below that of merchantability standards would likely be declared unconscionable, particularly where consumer goods are involved.[42]

B. *Strict Liability: Old Words for an Old Idea*

What, then, explains these unthinking judicial suggestions that strict liability gives better quality protection than would be available under UCC warranties? Judge Levin, in *Cova v. Harley Davidson Motor Co.*, has suggested that the courts may have confused strict liability with the quite different concept of absolute liability which arises in cases involving dangerous activities.[43] Because of this potential confusion, Judge Levin condemned the label "strict liability" as being either "oversimplification, exaggeration, or simply misleading."[44]

I am inclined, however, to believe that the error arises because so many of our authorities just have not read their legal history. They apparently believe that the words "strict liability" are a new set of words which Prosser invented to represent a new legal concept. But in fact the words "strict liability" are the very same words used to describe a seller's liability arising from breach of warranty! They are the words which bring home the startling idea in our legal system that the seller's liability does not depend upon fault.[45] Rather, so long as *any* warranty arises from a sales agreement, then the seller is responsible for its breach, even though the breach was not caused by his wrongdoing. Indeed, the liability exists even though the seller had been extraordinarily careful in the manufacture, sale, and distribution of the goods. It is in this sense that the words "strict liability" have long been used, namely, to describe the no-fault nature of warranty liability.[46]

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41. U.C.C. § 2-317(c). For a discussion of estoppel defenses available to the consumer, see U.C.C. § 2-317, Official Comment 2.

42. *See* notes 81-103 *infra* and accompanying text.

43. 26 Mich. App. 602, 614-15, 182 N.W.2d 800, 806 (1970).

44. *Id. See also* Kirkland v. General Motors Corp., 521 P.2d 1353, 1361 (Okla. 1974), where the Oklahoma Supreme Court discarded the strict tort liability label in an "attempt to avoid the semantic confusion of and relationship of tort to common law negligence."

45. BLACK'S LAW DICTIONARY 1591 (rev. 4th ed. 1968) ("[N]either care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save defendant.").

46. Hanson v. Firestone Tire & Rubber Co., 276 F.2d 254, 257 (6th Cir. 1960) ("The seller has bound himself unqualifiedly as to the existence of the characteristics or qualities

Professor Prosser himself recognized this. In his two major articles developing the strict tort liability doctrine, nearly every case which he used to describe the quality level which strict tort would require were merchantability warranty cases under the Sales Act or the Commercial Code. Prosser himself made clear that his suggesting the words "strict liability" in place of "warranty" was *not* for the purpose of developing a different standard of quality which sellers of goods would have to meet.[47] Rather, it was to assure that the quality standard already imposed, particularly by the merchantability warranty, was not denied a consumer, particularly a remote consumer, by what Prosser considered the "intricacies of contract law"[48] which also were incorporated into the sales statutes. He explained that

> [i]t would be easy . . . to overestimate the significance of the change [brought about by section 402 A of the *Restatement* and *Greenman v. Yuba Power Products, Inc.*], which is more one of theory than of substance. It is only the rules of contract which have been jettisoned, where there is no contract. The substance of the seller's undertaking remains unaffected; and as Chief Justice Traynor himself has agreed, the precedents of the "warranty" cases will still determine what he must deliver. They will also determine the extent of his liability, except insofar as limitations derived from the law of contracts have been applied. No case has been overthrown unless it has applied such a contract limitation.[49]

The contractual limitations, those intricacies found in sales statutes which Prosser wanted to kill off, will be discussed later.[50] At this point, it is important only to emphasize that, so far as Prosser was concerned, strict liability in tort was simply a new analytical tool by which contractual limitations and the other intricacies of

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warranted; and absolute liability against the warrantor is available to the buyer who is injured by the non-existence of such characteristics or qualities. (quoting Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 249, 147 N.E.2d 612, 615 (1958)) . . . [M]anufacturer[s] ought to be held to strict accountability. . . ."); Rivera v. Berkeley Super Wash Inc., 44 App. Div. 2d 316, 328, 354 N.Y.S.2d 654, 665 (1974) (Benjamin J., dissenting) ("[T]he principle [is] that liability for a breach of warranty is 'strict' only in the sense that no element of fault is involved."); J. WHITE & R. SUMMERS, *supra* note 32, at 286 ("Section 2–314 [of the UCC] offers a form of strict liability. . . ."); Kessler, *Products Liability*, 76 YALE L.J. 887, 898 n.56, 899 (1967) ("warranty liability is strict liability. . . ."; "sellers of defective goods are, on principle, strictly accountable for injuries to remote parties. . . .").

47. "No one disputed that the 'warranty' [under a sales statute] was a matter of strict liability." Prosser, *supra* note 4, at 802.

48. *Id.*

49. *Id.* at 804-05.

50. *See* notes 104–25 *infra* and accompanying text.

sales law might be eliminated.[51] *Nothing more.* But, Prosser surely would have been surprised if told that his new strict tort theory placed upon a professional seller the duty to deliver a higher quality or safer product than that already imposed by the warranty of merchantability.

This is not to say that that definition of what constitutes merchantable goods under the Commercial Code is an easy problem. Nor is it to suggest that the Commercial Code has frozen the judicial role in continuing to develop that definition. What I have said is that the very same problems that have existed and will exist in defining the quality level required and defenses permitted by strict tort would have been similarly resolved if, instead, the courts had been proceeding under the Commercial Code's merchantability warranty.[52]

To summarize, strict liability is not a new set of words, nor was it an attempt to increase the quality or safety level of products which a seller manufactures or distributes. Thus, when the courts infer otherwise, they are simply mistaken. The words "strict liability" are nothing more than a shorthand way of indicating what professional sellers knew long before Professor Prosser, strict tort, and Restatement Section 402A appeared on the scene: namely, they are liable for breach of the merchantability (or any other) warranty, even though that breach was not due to their negligence or other fault.

III. WORD EXCHANGE NUMBER TWO: "TORT" FOR "CONTRACT"

A. *Tort: A New Analytical Tool*

The major analytical tool which Prosser thought would accomplish his objective was to change the basic theory of a strict liability action from one sounding in contract to one sounding in tort. Since tort was imposed as a matter of public policy, then, as Prosser saw it, it could not be disclaimed by contractual agreement; nor could it be limited by the contractually associated ideas of privity, disclaimer, notice, and election of remedy, *i.e.*, those "annoying intricacies" of sales law. In Prosser's view, "[T]he [new] rule stated is purely one of strict liability in tort . . . [and] is not subject to the various contract rules which have grown up to

51. Prosser, *supra* note 4, at 801; Prosser, *supra* note 3, at 1128-33; Prosser, *supra* note 10, at 167. *Compare* Shanker, *supra* note 1, at 19.

52. *See* text accompanying notes 44-51 *supra.*

surround such sales."[53] Indeed, making this change in legal theory would, Prosser thought, kill entirely the notion that a seller's strict liability even depended upon a contractual agreement between the parties or the concomitant notion that anyone had "relied" upon the seller's contractual representations regarding his product. As he stated:

> [W]arranty had become so closely identified to the legal profession with the contract between the plaintiff and the defendant, that it was attended by contract rules. Traditionally it has always required some reliance by the plaintiff upon an express or implied assertion; and this was often lacking on the part of the user.[54]

B. *Merchantability: A Matter of Law*

It is here that Prosser made his fundamental error. He was quite wrong in suggesting that the merchantability warranty which gave rise to the seller's strict liability regarding his products needed either agreement or reliance by the buyer to bring it about. To the contrary and certainly under the Uniform Commercial Code, the merchantibility warranty does not arise because the parties have bargained for it. Rather, it arises as a matter of law, simply because a merchant has sold an item from his regular stock of goods.[55] Thus, when the courts almost universally declare that the merchantability warranty liability under the Commercial Code "is a contractual remedy created solely by the provisions of the Uniform Commercial Code and the terms of the contract between the buyer and the seller,"[56] they display a regrettable naivete about the Uniform Commercial Code. Under the Code's terminology, a rule of law which binds the parties who have entered into a sales agreement automatically becomes a part of the "contract" between them.[57] This is so not because the parties voluntarily agreed to that rule of law, or bargained for it; rather, it is

53. Prosser, *supra* note 4, at 802-03.

54. Prosser, *supra* note 4, at 801. *See also*, Prosser, *supra* note 10, at 167.

55. "The warranty arises independently of the sales contract and is imposed by law." Annot., 83 A.L.R.3d 694, 699 (1978). *See also* Thompson Farms, Inc. v. Corno Feed Prods., — Ind. App. —, 366 N.E.2d 3, 18 (1977); Collela v. Beranger Volkswagen, Inc., — N.H. —, 386 A.2d 1283, 1285 (1978); L. VOLD, LAW OF SALES 426 n.10 (2d ed. 1959).

56. Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 595, 403 N.Y.S.2d 185, 192, 374 N.E.2d 97, 103 (1978) (Gabrielli, J., dissenting in part). A comparable statement was made by the majority. *Id.* at 589, 403 N.Y.S.2d at 187-88, 374 N.E.2d at 99.

57. U.C.C. § 1-201(11).

an *additional consequence imposed by the law* and automatically made a part of the "contract."

To elaborate, the Commercial Code carefully distinguishes between the statutory words "agreement" and "contract." The word agreement is what the parties have actually agreed to—their bargain, in fact. The "contract," however, is "the total legal obligation"[58] which exists between the parties; and this obligation can go beyond the terms agreed upon by the parties, by reason of "applicable rules of law" found in the Commercial Code.[59] This Code approach is hardly a new idea. In 1927, the Minnesota Supreme Court stated it this way:

> An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in the contract, nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law. It, because of the acts of the parties, is imposed by the law. It arises independently and outside of the contract. The law annexes it to the contract. It writes it, by implication, into the contract which the parties have made.[60]

To repeat, the merchantability warranty arises under U.C.C. section 2–314 simply because a professional seller (*i.e.*, a merchant) has sold from his regular stock of goods. No further agreement, beyond the underlying agreement to sell his regular goods, is needed. This, of course, is a carbon copy of the approach followed by strict tort. It, too, is triggered when a professional seller of goods enters into an underlying sales agreement.[61] Once he has done so, then as a matter of law the seller becomes bound to the strict liability imposed by strict tort. Thus, both under the Commercial Code and strict tort, the seller's strict liability is involuntary: it is added to the sales agreement by rule of law.

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58. *Id.*

59. *Id.*

60. Bekkevold v. Potts, 173 Minn. 87, 89, 216 N.W. 790, 791 (1927). *See also* authorities cited in L. VOLD, *supra* note 55, at 451. Curiously, Professor Prosser acknowledged this approach. Citing *Bekkevold* as well as cases dating back to 1898, he noted that warranty could arise "without any intent to make it a matter of contract . . . and exist between parties who have not dealt with one another." Prosser, *supra* note 3, at 1127. Nonetheless, as stated in the text, Prosser insisted that the new tort theory was needed for these actions because "the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish." *Id.*

61. RESTATEMENT (SECOND) OF TORTS § 402A (1965). The courts have extended by analogy the strict liability concepts found in both theories to nonsales situations. See note 31 *supra.*

Under the Commercial Code this involuntary liability is automatically incorporated into the parties' contract as part of their total legal obligation. The failure of the courts to recognize the involuntary nature of the merchantability warranty liability and their erroneous suggestion that it arises by reason of the parties' "agreement" calls to mind Professor Dickerson's statement that, "Most American lawyers and judges simply have never learned how to deal with statutes."[62]

C. *Disclaimer of Merchantability Warranty*

Granting that the merchantability warranty arises as a matter of law, can it be disclaimed or limited by agreement between the parties? There is no doubt that the Uniform Commercial Code envisions the *possibility* that even the merchantability warranty can be disclaimed under very limited and controlled circumstances.[63] In particular, it is required that there be a *conscionable* agreement voluntarily and knowingly entered into between the parties.[64] Nevertheless, one court after another has seized upon the Commercial Code's mere *possibility* of disclaimer as a major reason for stating that strict tort, which the courts state will not tolerate disclaimers, gives to consumers better protection than that afforded under the Commercial Code.[65]

D. *But Strict Tort Disclaimers are Permitted*

These judicial statements need to be examined carefully. Almost all of them were dicta. Typically, these judicial statements were made as an additional reason to justify the court's initial adoption of the strict tort theory, even though the validity of a disclaimer was not in issue, or necessary for the decision of the case. In those strict tort cases in which an actual *decison* had to be made on the validity of a disclaimer, they usually have been allowed. Further, they have been allowed under the same circumstances which would move a court to hold that the disclaimer was conscionable under the Code. Thus, the first strict tort court which had to *decide* (and not just talk about) a disclaimer noted that "parties to a contract may agree to limit their liability as long

62. Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402(A) and the Code*, 36 TENN. L.REV. 439, 453 (1969).

63. U.C.C. § 2-316; *see* notes 81-102 *infra* and accompanying text.

64. U.C.C. § 2-316.

65. *E.g.*, Phipps v. General Motors Corp., 278 Md. 337, 349-50, 363 A.2d 955, 961-62 (1976).

as the limitation is not violative of public policy."[66] The court upheld the disclaimer because commercial parties were involved who had the power to write the contract as best suited themselves and there was "no showing that plaintiff was precluded from negotiating a contract on more favorable terms."[67] These very same factors, no doubt, would have moved a court operating under the Commercial Code to recognize that the disclaimer was permissible because it was a conscionable one.

Perhaps the best judicial statement recognizing the right of the parties to disclaim strict tort liability comes from the Third Circuit Court of Appeals. In *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*,[68] the court made these pertinent comments:

> A social policy aimed at protecting the average consumer by prohibiting blanket immunization of a manufacturer or seller through the use of standardized disclaimers engenders little resistance. But when the setting is changed and the buyer and seller are both business entities, in a position where there may be effective and fair bargaining, the social policy loses its *raison d'etre.* The transaction then tends to be more influenced by gravitational pull of the Uniform Commercial Code than by the consumer oriented § 402A.
>
> *Since the Code is tolerant of disclaimers and limitation clauses within certain defined limits, that same philosophy would be equally approving of a negotiated waiver of § 402A.* Such a limitation on comment m would avoid the not unfamiliar result of "overkill" when a legal principle completely valid in its original context is extended so far that the mischief caused may be equal to the original disorder sought to be remedied.
>
> . . . .
>
> We conclude therefore that Pennsylvania law does permit a freely negotiated and clearly expressed waiver of § 402A between business entities of relatively equal bargaining strength.[69]

Only one court, the Tenth Circuit in *Sterner Aero AB v. Paige Air-*

66. Moreira Constr. Co. v. Moretrench Corp., 97 N.J. Super. 391, 394, 235 A.2d 211, 213 (1967).

67. *Id.* at 395, 235 A.2d at 213.

68. 499 F.2d 146, 148 (3d Cir. 1974) (plaintiff corporation brought suit to recover damages for helicopter purchased from defendant under contract stating: "Customer takes 'as is' without warranty of any kind. . . .").

69. *Id.* at 149 (emphasis added and citations omitted). *See also* Idaho Power Co. v. Westinghouse Elec. Corp., 26 U.C.C.R.S. 638 (Idaho 1979) (contractual limitation of liability effective between commercial corporations notwithstanding adoption of strict tort liability in Idaho); S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1376 (9th Cir. 1978) (in discussing the validity of a contractual limitation of liability in a commercial case, the court stated that the plaintiff's rights should be limited to those provided by the Code "whether the complaint is cast in terms of strict liability in tort or negligence").

motive, Inc.,[70] seems expressly to have held that a disclaimer simply is not possible under strict tort. That court, a federal court deciding a diversity case, apparently concluded that it was bound by an earlier statement of the Oklahoma Supreme Court in *Kirkland v. General Motors Corp.*[71] that contractual disclaimers would not serve as a valid defense to strict tort liability. It should be noted, however, that the Oklahoma Court's statement was not necessary to the decision of the case, but rather part of the original judicial merchandising of strict tort to the state of Oklahoma.[72] Yet, the statement, albeit dicta, was there and the federal court in this diversity case apparently felt *Erie*-bound to follow it.[73]

The Oklahoma decision deserves further comment, for it is among the most curious in our recent legal jurisprudence. First, the court adopted strict tort despite the absence of a "case" or "controversy" on the subject. Moreover, the court decided not only the narrow issue before it, but also wrote a treatise—all dicta—on what strict tort would thereafter be in Oklahoma. It was this dicta that contained the no-disclaimer statement which the federal court in *Sterner Aero* felt bound to follow. Not surprisingly, this Oklahoma decision has been the subject of criticism.[74]

It is difficult to understand why Prosser asserted that strict tort liability could not be disclaimed or limited by contract. Our law has long recognized that most tort liabilities can under conscionable conditions be disclaimed. (Indeed, Prosser's own treatise on torts discusses the principle.)[75] As a result, it appears that a better case can be made for permitting disclaimers and limitations of

70. 499 F.2d 709, 713 (10th Cir. 1974) (corporate purchaser of rebuilt aircraft engine brought suit for damages to plane downed by engine failure on takeoff; parties had negotiated express, written, limited warranty in lieu of any implied warranty).

71. 521 P.2d 1353, 1362 (Okla. 1974). The *Kirkland* court quoted with approval Comment m of § 402A of the *Restatement (Second) of Torts.*

72. *See* text accompanying note 74 *infra.*

73. 499 F.2d at 713.

74. McNichols, *Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA L. REV. 494, 516–23 (1975); Shanker, *supra* note 17, at 698. Products liability law in Oklahoma recently took another interesting twist. In Barker v. Allied Supermarket, 26 U.C.C.R.S. 597 (Okla. 1979), the Oklahoma Supreme Court declared that notwithstanding the *Kirkland* decision, it "still recognizes the Commercial Code as an independent basis for an implied warranty cause of action." *Id.* at 607. Thus, plaintiffs in Oklahoma seem to have the delightful choice of proceeding under the strict tort doctrines laid down in *Kirkland*, or under UCC warranties, whichever suits their purposes better. For an apparent criticism of this approach, see Markle v. Mulholland's Inc., 265 Or. 259, 273–80, 509 P.2d 529, 537–38 (1973).

75. W. PROSSER, THE LAW OF TORTS 442–45 (4th ed. 1971).

products liability than for other torts. Strict tort, after all, is a no-fault liability; traditional tort liability is based on some fault or wrongdoing. If the parties can in a conscionable fashion bargain away fault liability, then, a fortiori, they should be able to bargain away no-fault liability.

It is generally recognized that the language needed to disclaim or limit tort liability must be express and fairly specific. Ironically, that standard has been used to invalidate disclaimers of strict tort liability, because the disclaiming language was only that authorized by the Uniform Commercial Code as sufficient to disclaim warranty liability. Such was the decision of the Third Circuit in *Keystone Aeronautics*.[76] Having recognized that disclaimers were possible under strict tort because conscionable disclaimers which have been fairly bargained for were "more influenced by gravitational pull of the Uniform Commercial Code,"[77] the court curiously then held that the very words authorized by the Code for obtaining the disclaimer did not meet the specificity requirements for a tort case. How wrong, how futile, and how ironic is this decision! It is wrong because it ignores a legislative authorization to use those particular words to bring about disclaimer. As such, those who drafted that disclaimer understood and knew full well the consequences of those words. The decision is futile because it represents the state of the law for only a short period of time; thereafter, ironically, only the unwary will be trapped. Once a decision invalidating a strict tort disclaimer on this basis has been published, it is not long before counsel realize that the disclaimer objective can be readily accomplished simply by adding a new set of magic words to the underlying sales agreement.[78] And, indeed, counsel have already acted on this reality. Thus, the disclaimer clauses found in today's sales agreements often contain not only the disclaiming language authorized by the Code, but also the specific, magic words necessary to disclaim tort liabilities. And when these additional "tort" words have been added to the agreement, the disclaimer of tort liability has been upheld.[79]

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76. 499 F.2d at 150, discussed at text accompanying note 68 *supra*.

77. *Id.* at 149.

78. *E.g.*, JIG The Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171, 179 (5th Cir. 1975) (Gee, J., dissenting).

79. Marr Enterprises Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 956 (9th Cir. 1977). *See also* Atlas Mut. Ins. Co. v. Moore Dry Kiln Co., 30 Or. App. 111, 589 P.2d 1134 (1979) (contract limiting remedies for any liability arising "from any cause" is enforceable, even though suit is based on strict tort or negligence).

E. *The Special Problem of Personal Injury: Maintaining the Merchantability Standard*

The strict tort cases discussed in the previous section which authorized disclaimers each involved situations between commercial parties who had suffered only property loss. Even Professor Prosser seems to have recognized that limitations and disclaimers in this context were permissible.[80] His major concern (and apparently the major concern of most strict tort authorities) was that the disclaimers might be upheld under a sales statute, even though a personal injury to a consumer was involved.[81] Because most cases involving consumer personal injury since the enactment of the Uniform Commercial Code have been decided under a strict tort theory, we have few current UCC decisions on this exact point. Nevertheless, it appears that the various unconscionability and good faith doctrines written into the Commercial Code would prevent disclaimers which take away the rights of a consumer who has suffered personal injury.

This is perfectly clear when the seller has made any one of the three Commercial Code warranties.[82] In such a case, the attempt to limit or disclaim personal injury recovery for breach of that warranty is expressly declared *prima facie* unconscionable.[83] Even consumers not in privity are assured of this protection since the Code prohibits a seller from denying them the benefit of any sales warranty.[84] These specific Code rules will protect almost all of the injured consumers since very few consumer articles are sold without one of the three Code warranties. Indeed, competitive factors almost make this a necessity.

Also worth noting is that the mere description of goods gives rise to an express warranty that the goods will meet the minimum

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80. Prosser, *supra* note 3, at 1133 ("Commercial buyers are usually quite able to protect themselves.").

81. *Id.*

82. *See* notes 27–29 *supra* and accompanying text.

83. U.C.C. § 2–719(3). There seems to have been little, if any, judicial discussion of the "prima facie" language. Presumably, it is intended to permit disclaimers or limited remedies when dealing with unavoidably unsafe products—for example, certain drugs. The strict tort authorities apparently would not object to limitations of liability under these conditions. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965); Prosser, *supra* note 10, at 169; Shanker, *supra* note 1, at 40 n.124. The "prima facie" language may also permit conscionable disclaimers where used goods are being sold. *See* Chamberlain v. Bob Matick Chevrolet, Inc., 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967).

84. U.C.C. § 2–318, particularly Alternatives B and C. For a discussion of the privity doctrine under the Code, see text accompanying notes 106 & 107 *infra*.

features of an article carrying that description.[85] Thus, the sale of an automobile requires that the article delivered meet the minimum features of an automobile. Presumably, this includes a combination of machinery which will operate on the roads with some degree of safety. The failure of the automobile to meet these minimum safety features would result in a breach of the express warranty of description. Thus, under the rule in U.C.C. section 2–316(1), injuries resulting from that breach would be recoverable, despite any contrary language in the contract.[86]

It is difficult to imagine cases in which the express warranty of description did not exist, or would not protect an injured consumer who has suffered personal injury. Assuming arguendo that such a case might exist, one must face the question whether the Commercial Code would ever permit a professional seller to get away with a contractual clause which disclaimed entirely his warranty of merchantability. As has been previously suggested,[87] posing the question this way is a bit misleading. The real issue is whether all three of the Commercial Code warranties successfully could be disclaimed in a case involving consumer goods which caused personal injury. No court is likely to object to a total disclaimer of the merchantability warranty if the sales agreement provided superior protection by an express or implied warranty of fitness. The crucial question will arise when a contractual clause seeks to eliminate *all* warranty protection or, more precisely, to reduce it to less than that normally available under the merchantability warranty.[88] The consensus of those who have addressed the question seems to be that such contractual disclaimers would not be tolerated by the Commercial Code.[89]

The Commercial Code has a series of rules which seems deliberately written to invalidate any such gross attempt. Briefly, these rules include the following:

1. Any description of the goods gives rise to an express warranty (which cannot be negated) that the goods will meet that

85. U.C.C. § 2–313(1)(b) and Official Comment 4.

86. For further discussion on this point, see Shanker, *supra* note 1, at 40 n.124.

87. *See* text accompanying notes 40–41 *supra*.

88. Some states have amended their version of the Code to prohibit the disclaimer of the merchantability warranty. *E.g.*, MD. COMM. LAW CODE ANN. § 2–316.1(2) (1975); MASS. ANN. LAWS ch. 106, § 2–316A (Michie/Law Co-op. 1976).

89. *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 286 n.12 (Alaska 1976) and authorities cited therein; R. NORDSTROM, THE LAW OF SALES § 88, at 274 (1970); I. WHITE & R. SUMMERS, *supra* note 32, § 12–11, at 392; Shanker, *supra* note 1, at 43 n.135.

description.[90]

2. Contractual disclaimer and limitation clauses which deny a buyer a fair minimum quantity of remedy when the goods are defective are prohibited.[91]

3. A merchant seller must act in good faith and in accordance with the reasonable commercial standards of fair dealing in his trade.[92]

4. U.C.C. § 2-302 generally prohibits unconscionable contract clauses. Indeed, the Code's Official Comments expressly invite any disclaimer of the merchantability warranty to be carefully scrutinized for any unconscionable effect. Pointing out that unconscionability principles are, among other things, intended to "prevent oppression and unfair surprise,"[93] the Comments also state: "The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution."[94] It is also worth noting that the New Jersey court in the famous *Henningsen* case[95]—said by Prosser[96] and others to mark the inception of strict tort—actually relied upon the Code's unconscionability section to invalidate a limitation of remedy to a consumer.[97]

Indeed, the reasons given by the courts as justification for strict tort—public policy, the inequality of bargaining power between consumers and commercial sellers, the social necessity of assuring that consumers have remedies for physical injuries—are the same kinds of reasons which would move a Commercial Code court to declare a total disclaimer or limitation of the merchantability warranty liability to be invalid under one or more of the above rules.[98] And, in fact, the Official Comment to the Code's uncon-

90. U.C.C. § 2-313(1)(b). *See* notes 85-86 *supra* and accompanying text.

91. U.C.C. § 2-719, Official Comment 1.

92. *Id.* §§ 1-203, 2-103(1)(b).

93. *Id.* § 2-302, Official Comment 1.

94. *Id.* § 2-314, Official Comment 11.

95. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1959).

96. Prosser, *supra* note 4, at 791.

97. 32 N.J. at 390-91, 161 A.2d at 86-87.

98. In *Henningsen*, the relevant factors establishing unconscionability were the adhesive nature of the disclaimer, *id.* at 390, 161 A.2d at 87, and the "gross inequality of bargaining position occupied by the consumer in the automobile industry." *Id.* at 391, 161 A. 2d at 87. In Morrow v. New Moon Homes, Inc., 548 P.2d 279, 285 (Alaska 1976), the court noted that Code-authorized "disclaimers and limitations cannot be so oppressive as to be unconscionable and thus violate [U.C.C. § 2-302]." "Particularly close judicial scrutiny is warranted when a manufacturer exacts a liability disclaimer or remedy limitation from a

scionability section states that its very purpose is "to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable" and to permit such policing directly without the necessity of turning to "public policy" arguments.[99]

As stated, almost all of the cases involving consumer personal injury since the enactment of the Commercial Code have been decided under the strict tort theories.[100] Thus, few Code decisions exist which directly test this thesis. But the Fourth Circuit Court of Appeals, at least by way of dictum, seems to have approved it.[101] In addition, there are commercial loss cases where various kinds of disclaimers and limitations, even those agreed upon between highly sophisticated and knowledgeable parties, have been invalidated because the commercial loss was due to latent defects not readily observable to the buyer or because the limitation failed to give the "fair quantum of remedy" which the Commercial Code requires.[102] If such disclaimers are invalidated when commercial losses are involved, then invalidation should follow with more force when a contractual clause has denied at least the merchantability level of protection to a consumer personally injured by an unknown or unobservable defect.

Lastly, it is worth noting that the recently enacted Federal Warranty Act[103] as a matter of federal law maintains merchantability protection with respect to consumer items when any kind of written warranty regarding the useful life or duty to repair is

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consumer who enjoys little or no bargaining power in the marketplace." *Id.* at 292, n.43. Also, see the list of cases specifically approved as illustrating the unconscionability principle in U.C.C. § 2-302, Official Comment 1. *See also* Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enterprises, Inc., 58 App. Div. 2d 482, 396 N.Y.S.2d 427 (1977); L. FRUMER & M. FRIEDMAN, *supra* note 33, § 19.07(6), at 5-214 to 5-217; Kessler, *supra* note 32, at 906-07; Shanker, *supra* note 1, at 43 n. 135.

99. U.C.C. § 2-302, Official Comment 1.

100. *See* page 568 *supra.*

101. Matthews v. Ford Motor Co., 479 F.2d 399, 403 n.8 (4th Cir. 1973) (citing with apparent approval L. FRUMER & M. FRIEDMAN, *supra* note 33, § 19.07(6)).

102. Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd in part and rev'd in part*, 422 F.2d 1205 (3d Cir. 1970) (involving latent chemical defects not discoverable by ordinary inspection and testing until after the product had been manufactured and sold); Desert Seed Co. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (involving seed with defect which could not be discovered until after the crops began to grow).

103. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 108, 15 U.S.C. § 2308 (1976). Some states have also amended their version of the Code to prohibit the disclaiming of the merchantability warranty. *See* note 88 *supra.*

given. As stated, this seems to cover most of the consumer goods that are sold in today's marketplace.

F. The Other Intricacies of Sales Law

It has been argued above that strict tort does not produce a higher level of product protection for a consumer than does the Commercial Code. In particular, no agreement is necessary to give rise to the merchantability warranty.[104] Further, any attempt to disclaim that warranty or limit the remedies for a breach thereof is likely to be given the same effect as that produced under strict tort.[105]

So what is left of strict tort? In what ways would it ever bring about a result different than that obtainable under the Uniform Commercial Code? In other words, beyond contractual disclaimers, how do strict tort and the Commercial Code compare with respect to those other "intricacies of sales law" which were used to justify the strict tort development? To analyze this question, the issues of privity, notice, miscellaneous defenses, and the statute of limitations will be addressed.

1. *Privity*: Professor Prosser viewed privity as an unacceptable "intricacy of sales law."[106] Indeed, this probably was the prime driving force which motivated Prosser's efforts to develop strict tort. This question need not be discussed at length, however, since previous studies make clear that the elimination of the privity defense was as easily obtained under the Commercial Code as under strict tort.[107] And, when a particular state has adopted either Alternative B or C of U.C.C. section 2–318, then the legislative scheme itself goes as far in eliminating privity as does strict tort.[108]

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104. *See* notes 55–62 *supra* and accompanying text.

105. *See* notes 66–102 *supra* and accompanying text.

106. *See* Prosser, *supra* note 3, at 1099–103. Indeed, the citadel referred to in the title of that article and his later article, Prosser, *supra* note 4, is the "citadel of privity." The term was coined by Justice Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

107. Shanker, *supra* note 1, at 24–27.

108. U.C.C. § 2–318, Alternative B states:

> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C in the same section provides:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the opera-

2. *Notice*: The duty of an injured party to give notice of defective goods was another one of those intricacies of sales law which troubled Prosser.[109] Strict tort dispenses with a notice requirement;[110] the Code requires notice of defect or injury within reasonable time.[111] This area has also been explored previously and these studies make clear that consumers, particularly consumers not in privity, have either no or, at best, a minimal duty of notice.[112] Between whatever minimal notice duty exists under the Commercial Code and the no-notice approach under strict tort, it really seems that the Commercial Code has struck the fairer balance.[113] Surely it offends one's sense of fairness to permit an aggrieved party to say nothing about his claim to the defendant until the lawsuit is filed, which could well be the day before the statute of limitations runs.[114]

3. *Miscellaneous defenses*: Are there defenses unique to warranty which might not be allowed under strict tort? It seems not. Rather, almost every defense permissible in the one area has been recognized as available under approximately the same conditions in the other. For example, both strict tort and merchantability recognize that while a misuse of the products is a defense, a reasonably foreseeable misuse is not.[115] Similarly, both agree that proper warnings or instructions about the use of the product must be given or else the seller will be responsible.[116] And, recent developments indicate that both theories recognize that comparative negligence, sometimes referred to as equitable apportionment of fault, is available to divide or apportion the plaintiff's loss.[117] In-

tion of this section with respect to injury to the person of an individual to whom the warranty extends.

109. Prosser, *supra* note 4, at 829.

110. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

111. U.C.C. § 2-607(3). It should be noted, however, that UCC notification requirements are minimal, requiring merely that the buyer inform the seller that the transaction is claimed to involve a breach. *Id.* § 2-607, Official Comment 4. As might be expected, the reasonableness of the time for notification is judged by stricter standards where a merchant buyer is involved than where the purchaser is a retail consumer. *Id.*

112. Shanker, *supra* note 1, at 45.

113. Kessler, *supra* note 32, at 905.

114. *See id. But see* Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 350, 378 N.E.2d 1083, 1089 (1978), where the filing of the suit nearly four years after the injury was held to be timely notice. The case involved a consumer who had suffered a stroke after ingesting an oral contraceptive.

115. Back v. Wickes Corp. — Mass. —, 378 N.E.2d 964 (1978); Prosser, *supra* note 4, at 824 n. 173.

116. Wolfe v. Ford Motor Co., — Mass. App. Ct. —, 376 N.E.2d 143 (1978).

117. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).

deed, the Fifth Circuit Court of Appeals noted that this result was commendable because it achieved "the sensible posture that similar actions are subject to the same defense."[118]

4. *Statute of Limitations*: The overwhelming amount of litigation involving the relationship between strict tort and UCC warranties has involved the statute of limitations. The battle has been fought vigorously whether strict liability, be it under the warranty approach or strict tort approach, should be governed by the UCC statute of limitations or a tort statute of limitations.[119] Yet, curiously, this is the one matter which Prosser hardly mentioned in his two classic articles which developed the strict tort theory.[120]

Ironically, while its supporters have sought to justify strict tort on the basis that it would give more consumer justice, in most cases the UCC statute of limitations would give the injured consumer a longer period within which to sue. Thus, if justice is measured by the length of time which a consumer has to bring his strict liability action, the UCC warranty approach ought to be declared the winner. Tort statutes of limitations tend to be short, the usual period being two years.[121] In the typical case, the Code would allow a minimum of four years from delivery.[122] In fact, when a warranty explicitly extends a guarantee of performance into the future, which is so often the case with consumer goods, then the consumer injured by the product typically will be allowed four more years beyond the date of his injury to bring the action.[123]

It seems that there is only one kind of case where the tort statute of limitations can give a greater length of time for bringing a suit. That is the case where the sales warranty does not explicitly

118. West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977).

119. For the competing arguments, see the majority and dissenting opinions in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). The majority opted for the UCC statute of limitations; the dissent argued that the torts statute of limitations should have been used. Subsequently, the dissent's view was adopted in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975). *Victorson* probably represents the majority view today, although some strict tort jurisdictions still embrace the UCC statute of limitations. *E.g.*, Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425 (E.D. Pa. 1978). Oklahoma apparently permits the injured plaintiff to take advantage of the statute of limitations that will do him the most good. Barker v. Allied Supermarket, 26 U.C.C.R.S. 597 (Okla. 1979). For further discussion of *Barker*, see note 74 *supra*.

120. Professor Prosser mentions the statute of limitations only casually. Prosser, *supra* note 3, at 1126.

121. *E.g.*, OHIO REV. CODE ANN. § 2305.11 (1978 Supp.)

122. U.C.C. § 2-725(1) to -725(2).

123. *Id.*

extend to future performance, and the injury occurs more than four years after delivery of the goods. In that case, the consumer's rights under the Code would be cut off. Under a tort statute of limitations, the consumer would still have available his tort limitation period, measured from the date of injury.

Of course, simply having the right to bring an action more than four years after delivery does not mean that the consumer will win it. He will still have to prove the defect as of the date of delivery, and the practical likelihood that he can succeed in this effort certainly is not high.[124] In any case, whether some outside limit should be set for cutting off strict liability (*i.e.*, no-fault) claims against a seller, even though the injury has not yet occurred, is the subject of debate. Almost every legislature which has considered the problem has found that this is a wise social policy; and it seems that it is primarily the judiciary which disagrees with that choice.[125]

IV. CONCLUDING REMARKS

The basic theme of this paper has been expressed many times before. In Shakespeare's words, "a rose by any other name would smell as sweet."[126] Even Little Buttercup noted:

> Things are seldom what they seem
> Skimmed milk masquerades as cream. . .
> . . . .
> Gild the farthing if you will
> Yet it is a farthing still.[127]

So it is with strict tort. It masquerades as something different—indeed, something better than sales warranties. Yet it seems to be the old farthing which has been gilded but yet remains a farthing. Or, to put it more precisely, strict tort seems simply to be new words inscribed on essentially the same warranty package. Strict tort has brought about substantively little, if anything, which was not already available under the Uniform Commercial

124. Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 404, 335 N.E.2d 275, 279, 373 N.Y.S.2d 39, 44 (noting the dissent in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 351, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 499 (1969)).

125. Shanker, *supra* note 17, at 710 and addendum. For a summary of recent legislative activity on this subject, see Bivins, *The Products Liability Crisis*, 11 AKRON L. REV. 595, 611 n.68 (1978) and the other authorities in note 21 *supra*. *Contra*, MASS. ANN. LAWS ch. 106, § 2-318 (Michie/Law Co-op 1976) (beginning a breach of warranty action at "the date the injury and damage occurs"). For a discussion of the development of this section, see Swartz v. General Motors Corp., — Mass. —, 378 N.E.2d 61, 63 (1978).

126. W. SHAKESPEARE, TRAGEDY OF ROMEO AND JULIET 29 (Folger Library ed. 1959).

127. W. GILBERT & A. SULLIVAN, *supra* note 9, at 79.

Code. It has given legal scholars the opportunity to discuss the interrelationship between the Commercial Code and strict tort "with all the zeal, fury, and abstruseness of medieval theologians";[128] and legal scholars have no doubt enjoyed the exercise. But, for those who must live with these competing products liability systems and their different labels, it seems only to have brought about an enervating, costly, and confusing word game which hardly was worth the effort. Ironically, in this crossword game of products liability, the words describing strict tort and those describing commercial warranty liability mean essentially the same thing.

128. Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 38, 260 A.2d 111, 112 (1969).