The Citadel Stands: The Recovery of Economic Loss in American Products Liability

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Due mainly to the ill-founded conclusions of Dean Prosser, American products liability law has usually denied recovery of economic loss caused by defective products to parties not in contractual privity. Through an outline of the historical origins of implied warranty, the author argues that manufacturers and sellers of defective products should be liable for economic loss. Implied warranty provides the logical vehicle for such recovery, and representational theory provides the theoretical basis.

THE DISPATCH THREW EVERYONE into a state of confusion.

GREATER PART OF CITADEL UNHARMED STOP ENEMY MORALE HIGH STOP SECRET AGENTS SUSPECTED OF HAVING INFILTRATED OUR FORCES

Why the consternation? The last centuries of the dying planet had after all been so consistently violent and disturbed that news from one or another battlefront seldom produced surprise anymore.

If the truth be told, the dispatch caused a stir only because nobody knew whether to believe it or not: no less respected and prestigious a correspondent than William Prosser had chronicled the assault upon the citadel of

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privity and the citadel’s fall in great detail some years before. So intimate was Prosser’s acquaintance with the events in question that his word could scarcely be doubted. Like George Orwell in Spain, Prosser had been both historian of and soldier in the struggle.

Representatives of the media were accordingly ordered to the site to ascertain the truth. First reports indicated that the biggest part of the citadel—the economic loss section—did indeed remain in the hands of the enemy.

There is no question that part of the citadel has fallen. Presently, all states allow a buyer who lacks privity of contract with a manufacturer to recover for personal injuries caused by the manufacturer’s negligence. Virtually every state has on occasion imposed strict liability upon a manufacturer whose defective product has caused an out-of-privity buyer to sustain personal injuries. Many states have allowed nonprivity buyers recovery against manufacturers for property damage caused by a defective product.

Contrary to Prosser’s triumphant report, however, there is no question that the greater part of the citadel of privity in products liability cases remains intact. With some exceptions, litigants alleging economic loss, instead of personal injury or property damage, are still without any remedy when they lack privity of contract with the defendant.

A dreadful charge was made to explain the survival of the citadel: Prosser was a secret agent serving its defenders! In 1960, his accusers argued,
Prosser enthusiastically welcomed the appearance of what he called "seven spectacular decisions" which expanded the strict liability of the food and drink area to the manufacturers of other kinds of defective goods. But look at the seven decisions—no less than four of them were economic loss awards! They were part of a broad frontal attack on the whole citadel including its economic loss wing, but Prosser had chosen to report that the fighting had only involved "dangerous" products causing "injury." Later, emboldened by the success of this deception, he completed his undercover mission for the defenders of the citadel by openly advocating that there should be no liability to the out-of-privity plaintiff for products which only caused him economic loss.

So goes the scenario of the battle to date. In using overstatement against the late William Prosser, it is difficult to equal his own beautiful and imaginative use of that weapon. Nevertheless, the arguments favoring compensation of economic loss are persuasive even without overstatement.

This article presents a revisionist point of view of the extension of the concept of implied warranty of merchantability beyond the confines of privity of contract in the food and drink category, and thence to all defective products causing economic loss and other types of injury. The article begins with an attempt to define the concept of economic loss. Following this definition is a historical outline of the concept of implied warranty and its relationship to the economic loss problem. The final portion deals with the unresolved question of whether there should be any liability for economic loss between parties who are not in privity of contract. A representational theory suggests a resolution of this issue.

Implied warranty evolved as a mercantile remedy for the recovery of economic loss almost 100 years before the first case allowing economic loss recovery to an out-of-privity plaintiff was decided. Although the court in that first case was clearly making new law in accepting the invitation of the plain-


11. The Assault, supra note 2, at 1112.


13. See The Assault, supra note 2, at 1112.

14. See The Fall, supra note 2, at 820-23.

tiff's attorney to find liability in implied warranty in the absence of privity, it was able to do so by shifting the focus of an existing body of rules from sales law to an area that would today be called products liability. These rules impose strict liability for all categories of loss caused by the supply of defective products including physical damage to chattels and personal injury. In the latter respect they transcend the scope of the aedilitian sales remedies of the civil law, performing what civilians would probably think of as a delictual or tortious function while retaining the benefits of their contractual antecedents. In his desire to promote the "new" strict liability in tort, Prosser has obscured the historical importance of implied warranty and with it economic loss recovery in products liability cases.

Prosser's suggestion that the out-of-privity warranty cases be rationalized as a modified form of tort liability is not necessarily a bad one, but his own brainchild, section 402A of the Restatement (Second) of Torts, is no more than a truncated restatement of the effect of these cases since it excludes liability for economic loss and retreats from the strictness of warranty liability. The preference for implied warranty over tort as a doctrinal vehicle for products liability shown by a number of American courts need not be seen as an anomaly. Far from being "pernicious and unnecessary," this adaptation of implied warranty is in fact an apposite illustration of the readiness of the common law to subordinate the superficial demands of conceptual neatness to the deeper rationality of utility.

I. CLASSIFICATION OF DAMAGES

While the term "economic loss" evades simple definition, this discussion requires a basic understanding of its meaning. In privity of contract, the buyer of defective goods is permitted by the common law to claim the difference between the actual value of the goods when delivered to him and the value they would have had if they had answered to the warranty. For purposes of this discussion, this prima facie measure of damages will be referred to as "direct" damages.

Beyond direct damages, the buyer may also suffer various kinds of con-

17. Dickerson, Was Prosser's Folly Also Traynor's? or Should the Judge's Movement Be Moved to a Firmer Site?, 2 HOFSTRA L. REV. 469 (1974); see text accompanying notes 89-95 infra.
18. The Assault, supra note 2, at 1134.
sequential losses which may be classified as physical harm, including personal injury and property damage, and economic loss. Personal injury presents no special problems of classification, but the dividing line between property damage and economic loss is blurred. For example, does a defective floor preparation which transfers its powerful obnoxious odor to merchandise in a store where it has been applied cause property damage or economic loss?21

Property damage can be conceptualized as the physical injury sustained by an object, including a defective product itself, as a result of an accident caused by the product.22 Economic loss may be viewed as not merely the appendage of a risk or occurrence of personal or property damage,23 but as loss in product value (direct economic loss) and loss stemming indirectly from that loss of product value, such as loss of goodwill or anticipated profits (consequential economic loss).24 Damage to the defective chattel itself is often regarded as an exclusively economic loss,25 but American courts have long been prepared to award out-of-privity property damages to a buyer


Physical injury befalling a defective product itself has occasionally been regarded as economic loss. E.g., Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 STAN. L. REV. 974, 981 (1966). Less confusion seems to be engendered, however, when physical damage to any object, including a defective product, is thought of as property damage. Buyers lacking privity of contract with a product's manufacturer have found many American courts quite hospitable to claims of physical injury to a defective product itself. This has been true despite the generally recognized immunity from liability for economic loss. See, e.g., International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Spencer v. Madsen, 142 F.2d 820 (10th Cir. 1944); C.D. Herne, Inc. v. R.C. Tway Co., 294 S.W.2d 534 (Ky. 1956). Thus, economic loss and property damage appear to be suitably distinguished on the basis of physical damage—such damage to a defective product itself being classified as property damage and not economic loss.

23. Some commentators suggest that since the only kind of readily recoverable economic loss is the result of an unreasonable risk of harm to persons or tangible property, economic loss ought to be legally defined as economic injury stemming from this risk of harm to persons and property. See Products Liability Jurisprudence, supra note 22, at 929-31, 935-36, 950-51.
24. See id. at 918. See also Franklin, supra note 22, at 980-81. A helpful example which adequately displays the differences between "economic loss" and "property damage" appears in Zammit, supra note 22, at 82.

[A] truck's defective brakes may give rise to either economic loss or property damage, depending upon the facts. If the defect is discovered and the truck is thereby rendered temporarily unusable, its owner may suffer economic damage consisting of the costs of repairing the brakes, as well as consequential "economic loss" of profits resulting from his inability to use the truck in his business. On the other hand, if the defect is not discovered and an accident with another vehicle occurs, the damage both to the truck and the other vehicle resulting from the impact constitutes property damage.

25. Franklin, supra note 22, at 978-79.
whose chattel self-destructs in a suitably dramatic manner. An automobile which catches fire because of an electrical fault has sustained "physical" damage, while another which oxidizes at a more sedate pace by rusting causes "mere" economic loss to its buyer.\textsuperscript{26}

Because all the categories of loss are recoverable in implied warranty, these distinctions do not have controlling importance either in cases where the plaintiff and defendant are in privity of contract with each other, or in one of the American jurisdictions where liability in implied warranty is not dependent upon privity of contract. They make all the difference, however, in jurisdictions where the only out-of-privity remedy is a tortious one, since many courts are still opposed to tort liability for economic loss caused by defective products.\textsuperscript{27} Physical damage caused by defective chattels has been actionable in tort for some time, but economic loss claims have been denied in some cases even where the defect in question threatens physical harm or personal injury in addition to rendering the chattel unusable.\textsuperscript{28}

II. A Brief Historical Outline of Implied Warranty: From Common Law Origins to Modern Statutory Codification

Breach of warranty of the soundness of goods was actionable at common law by the end of the 14th century. The form of action was trespass "in the manner of deceit."\textsuperscript{29} Although the writs commonly stated that the plaintiff had been "craftilly and subtilly" deceived by the defendant, the plaintiff was not required to prove that the defendant knew of the defect.\textsuperscript{30} It is often said that liability for breach of warranty was tortious at this stage, but "[t]he affinity between the obligation incurred by the making of a false representation (the most important form of deceit) and the obligation which arises out of the making of a promise is so marked that some scholars refuse to take any account whatever of false representation as a species of tort."\textsuperscript{31}

By the end of the 18th century, considerations of procedural convenience moved lawyers to use assumpsit as the form of action for breach of warranty.\textsuperscript{32} Soon afterward a growing number of judges began to find warranties of quality implicit in the circumstances of a sale in the absence of any express undertaking by the seller. At an early stage of this development it became apparent that some of these judges were more concerned with the

\textsuperscript{26. Id. at 981.}
\textsuperscript{27. See cases cited in note 7 supra.}
\textsuperscript{29. Garrok v. Heytesbery, Y.B. Trin. 11 Rich. 2, pl. 2 (1387).}
\textsuperscript{30. Chandelor v. Lopus, 79 Eng. Rep. 3 (Ex. 1791).}
\textsuperscript{31. T. STREET, FOUNDATIONS OF LEGAL LIABILITY 374 (1906).}
implementation of certain policy interests than with the parties' express intentions. "[I]n every contract to furnish manufactured goods, however low the price," wrote Chief Justice Best in 1825, "it is an implied term, that the goods must be merchantable. . . . [I]t will teach manufacturers that they should not aim at underselling each other by producing goods of inferior quality." The implied warranty of merchantability began, therefore, to assume the quality of an ex lege obligation after it had migrated from the writ of deceit to assumpsit.

A number of 19th century judges refused to accept these departures from the caveat emptor rule, and a host of qualifications and distinctions sprang up around the implied warranty cases. In Jones v. Just all these judicial maneuvers were woven into a long and essentially meaningless explanation of the circumstances in which implied warranty arose. Sir McKenzie Chalmers drew upon this formulation in drafting sections 14 (1) and (2) of the English Sale of Goods Act in 1893—an ambiguous statutory statement of the implied warranties of quality—which was reproduced almost verbatim in sections 15 (1) and (2) of the Uniform Sales Act that was recommended for enactment to the several states by the Commissioners on Uniform State Laws in 1906.

The statutory formulation of the warranties left a number of questions of considerable legal and social significance unanswered. Were the warranties applicable, for instance, to the typical over-the-counter retail sale? Soon after the turn of the 20th century, British courts had, answered this question in the affirmative, while a large number of American courts, until fairly

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34. [1868] L.R. 3 Q.B. 197.
35. 1 S. WILLISTON, SALES 1-2 (rev. ed. 1948). The relevant text of the Uniform Sales Act is as follows:

Sec. 15. IMPLIED WARRANTIES OF QUALITY. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

UNIFORM SALES ACT § 15 (act withdrawn 1951).

36. P. ATTYAH, THE SALE OF GOODS 55–83 (3d ed. 1966). These English decisions gave a restrictive interpretation to the statutory language which could well have been construed to
recently, interpreted the same language as preserving the immunity of retail sellers. The adaptation of this mercantile remedy to the needs of consumers meant that the British courts soon found themselves using implied warranty as a remedy for personal injury. One of the first personal injury cases concerned poisonous food and drink. An ancient warranty of wholesomeness long antedating the modern chain of mercantile cases arising from *Gardiner v. Gray* 37 in 1815 was invoked to justify this development. 38 American courts resurrected this warranty of wholesomeness early in the 19th century. It enjoyed an independent existence as an exceptional form of retail liability for a considerable period of time before being amalgamated into the general rule of retail responsibility for defective goods now contained in section 2-314 of the Uniform Commercial Code.

## III. The Reception and Adaptation of Implied Warranties in the United States

To describe the development of the warranties of quality in particular states of the Union or to isolate specific lines of cases would inflate and fragment this study to an impossible degree. 39 There are, however, nationwide trends discernable with sufficient clarity in the cases and literature to permit meaningful discussion of warranties of quality in the United States at a generalized level.

### A. Manufacturing vs. Nonmanufacturing Seller

Where the seller was the manufacturer or grower of the goods, the laws of the great majority of the states implied a condition into the contract that the goods were to be of merchantable quality. 40 This remained true until the nationwide acceptance of retail responsibility for defective merchandise
during the 1940's and 1950's swamped this exceptional form of liability. The frequently repeated rationale for this rule was that a buyer would necessarily rely on the manufacturing seller. No one doubted the fairness of imputing knowledge of any defects in the goods to one so intimately acquainted with them as their maker. This attitude, moreover, had respectable origins in Great Britain. *Laing v. Fidgeon,* decided at Nisi Prius four weeks after *Gardiner v. Gray* (the wellspring of the merchantability decisions), held that every contract for manufactured goods included an implied term that the goods were merchantable. When counsel for the seller confronted Chief Justice Best in *Jones v. Bright* with *Chandelor v. Lopus* and *Parkinson v. Lee*—the mainstays of *caveat emptor*—the learned Chief Justice responded with this distinction:

"There is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen."

True, this was liability for manufactured articles (whoever sold them) rather than the narrower manufacturing seller's liability which evolved in the United States. But the idea that manufacturer's responsibility for defective merchandise was greater than that of a mere dealer was a recurrent theme

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41. This presumption [that the seller knows of the defect] is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purpose for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he brought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.


46. 79 Eng. Rep. 3 (Ex. 1791).
in English case law until Chalmers drafted the emphatic phrase “whether he be the manufacturer or not” into both section 14 (1) and (2) of the Sale of Goods Act.

While a manufacturing seller therefore received much the same treatment under English and American law, the position of the “mere dealer” was much more favorable in the United States. “A manufacturer knows, or ought to know, the design, materials, and workmanship of the machines he produces, while a trader in them, who has no connection with their manufacture, is chargeable with no such knowledge.”

In 1906 the Commissioners on Uniform State Laws recommended the Uniform Sales Act for enactment by the states. Sections 15 (1) and (2) of the Act were almost exact replicas of sections 14 (1) and (2) of the English Sale of Goods Act. Although its gradual adoption by the states over the next fifty years coincided with the decline of dealer immunity in the United States, the immediate effect of the Uniform Sales Act was not decisive. American courts showed little desire to participate in the radical surgery which was performed on these sections by the British courts to excise the various provisos that rendered dealer responsibility so illusive and uncertain. Instead, a number of states preserved their notions of retail immunity by utilizing one or more of the conditions which characterized these guarded provisions. There was also considerable debate about how much real reliance a buyer could place on the skill and judgment of a retailer. As recently as the 1950’s a diminishing, but articulate and determined, number of courts con-

49. The buyer’s reliance on the manufacturing seller’s skill and the likelihood that he who made a barge knew of its defects were the dominant considerations in Shepherd v. Pybus, 133 Eng. Rep. 1390 (C.P. 1842), even though the goods had been in existence and open to inspection at the time of sale. See also James Drummond & Sons v. E.H. Van Ingen & Co., 12 App. Cas. 284 (1887); Jones v. Padgett, 24 Q.B.D. 650 (1890).

50. Sale of Goods Act, 1853, 56 & 57 Vict., c. 71, §§ 14 (1), 14 (2). The phrase was almost certainly aimed at scuttling Justice Mellor’s formulation of the obligation to deliver merchantable articles as a manufacturer’s obligation: “[W]here a manufacturer undertakes to supply goods manufactured by himself, or in which he deals .... it is an implied term in the contract that he shall supply a merchantable article.” Jones v. Just, L.R. 3 Q.B. 197, 203 (1868) (emphasis added). See also U.C.C. § 2-314.


A number of American cases adopted this position. See, e.g., Harrington v. Montgomery Drug Co., 111 Mont. 564, 111 P.2d 508 (1941) (seller of product intended for intimate bodily use not liable where buyer had equal opportunity of discovering defects); State ex rel. Jones Store Co. v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944) (buyer must bear risk of defects in product quality); Barton v. Dowis, 315 Mo. 226, 285 S.W. 988 (1926) (seller of animals not liable where knowledge of contracted disease was lacking); S. WILLISTON, SALES § 233, at 597 n.1 (rev. ed. 1948). See also Kirkland v. Great Atl. & Pac. Tea Co., 233 Ala. 404, 171 So. 735 (1937); Pelletier v. Dupont, 124 Me. 269, 128 A. 186 (1925).

52. See Brown, The Liability of Retail Dealers for Defective Food Products, 23 MINN. L. REV. 585 (1939); Waite, supra note 40; Waite, Retail Responsibility: A Reply, 23 MINN. L. REV. 612 (1939).
continued to hold the warranty sections inapplicable to retail sales on one or another of these available pretexts. Typically, it was found that the offending article had not been sold by description;\(^5\) sometimes relief was denied because the container, rather than the contents, was defective.\(^5\) Not until the 1950's did it become generally acknowledged that the sale of an article under a trade name did not render section 15 (1) inoperative, as the Act seemed to suggest.\(^5\)

Not all American courts insulated nonmanufacturing sellers from liability, but in the early part of this century a clear majority did so,\(^5\) and a number continued to do so until quite recently, despite a growing belief that the Sales Act rendered a retail seller liable for latent defects regardless of the limitations of fair inference from the particular fact situation. That is to say, it imposes a liability as matter of law, regardless of reasonable inference. This interpretation is difficult to reconcile with judicial statements that the section merely codifies the (American) common law. Nevertheless, worded as it is, without any reference to the fact situation, it probably does purport to impose an arbitrary liability quite regardless of any fairly inferential intent of the seller, or reasonable expectation of the buyer.\(^5\)

Thus, even as the tide of caveat emptor was running out for the non-manufacturing seller, there remained a large pool of dealer immunity where the defendant could prove that the defective merchandise had passed through his hands in a sealed container.\(^5\) The helplessness of a retailer who was obviously prevented from assuring himself of the quality of the merchandise he was selling was strongly contrasted with the manifest opportunities of a manufacturing seller to know and control the quality of the

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54. Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955) (doubt expressed concerning extension of an implied warranty to a defective glass jar containing food).


56. See note 51 supra. See also J. Honnold, Cases and Materials on the Law of Sales and Sales Financing 76 (2d ed. 1962).

57. This rather inimical but perceptive analysis of the effect of the warranty provisions of the Sales Act was made by Waite, supra note 40, at 507-08 (footnotes omitted; emphasis original), who argued convincingly in favor of retaining retail immunity.

goods he himself produced. While no one would try to revive this attitude today, it played an important role in shaping subsequent legal developments. Although the logic of this position acted as a brake on the development of dealer responsibility in America, it served to concentrate judicial attention on manufacturer's responsibility much more strongly in America than in England. To this extent the sealed-container rule contributed to the unique and remarkable developments in this field which were to generate a flood of analysis, controversy, legislation, and litigation in the 1960's.

B. Sellers of Impure Food and Drink

Beginning in 1815, a series of dicta by the New York courts suggested that there was an implied warranty of wholesomeness in the sale of provisions for immediate consumption. The first of these, Van Bracklin v. Fonda, rested upon the authority of Blackstone who had written that "[i]n contracts for provisions, it is always implied that they are wholesome." While there has been some debate about whether Blackstone's statement correctly reflected the English law, it is sufficient to note that certain enactments making the supply of unwholesome food and drink a criminal offense were extant when the learned jurist wrote, and that some early judicial pronouncements support his opinion.

In the majority of American jurisdictions, the food warranty did not purport to reflect the presumed intention of the parties, but rested from the outset on grounds of public policy. Some courts preferred, however, to say that a dealer was not in a position to tell whether the food was fit for

59. This is the basis of the argument in Waite, supra note 40.
60. 12 Johns. 468 (N.Y. 1815). This dictum was echoed in Hoe v. Sanborn, 21 N.Y. 552 (1860), Moses v. Mead, 1 Denio 378, aff'd, 5 Denio 617 (N.Y. 1846), and Wright v. Hart, 17 Wend. 267, aff'd, 18 Wend. 449 (N.Y. Ct. Err. 1837).
61. 3 W. BLACKSTONE, COMMENTARIES* 166.
62. See J. MELICK, THE SALE OF FOOD AND DRINK 10 (1936). But see Perkins, Unwholesome Food as a Source of Liability, 5 IOWA L. BULL. 6 (1919). Perkins concludes that the cases do not justify the conclusion that this tendency resulted in the actual adoption of such a rule, but he relies on a 19th century decision, Emmerton v. Mathews, 158 Eng. Rep. 604 (Ex. 1862), which accurately reflects only the law of its own time. For a fuller historical discussion, see Burnby v. Bollett, 153 Eng. Rep. 1348 (Ex. 1847), where it was concluded that the obligation to supply wholesome food attached to "common trades" such as vintners, brewers, butchers, taverners, and cooks rather than being an incident of sale of food per se. Melick's view that there was an implied warranty of wholesomeness in contracts for the sale of food and drink is generally preferred. See The Assault, supra note 2, at 1104; Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 STAN. L. REV. 713, 735-36 (1970).
65. "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle, not only salutary, but necessary to the
consumption. In accordance with the logic of this rationale, these courts refused to hold the seller of unwholesome food in sealed containers liable. The majority of courts nevertheless upheld the liability of the retail seller of food and drink intended for immediate consumption no matter how it was packaged. Where, however, a dealer sold provisions to another dealer for purposes of resale rather than consumption, this majority was much less inclined to protect the buyer. The general rule in this situation was *caveat emptor*. If the seller also happened to be the packer or processor of the food, he would always be liable, even though he had only sold to a dealer for resale and not for immediate consumption.

In sum, sellers of food have long been subject to exceptional liability based on implied warranty. This liability was concentrated in a single figure—the packer and processor of food—who was widely held accountable for any unwholesome food which he might sell. When canners, packers, or processors were subjected to this kind of liability, however, it often involved the award of damages for economic loss to middlemen rather than damages for personal injury to consumers. This is not surprising when one considers that only people who were in privity of contract with a manufacturer were permitted to sue him during the early years of the 20th century.

### IV. THE SUPERIORITY OF IMPLIED WARRANTY OVER STRICT TORT LIABILITY AS A TOOL FOR LITIGATION

#### A. The Extension of Implied Warranty to Actions Between Parties Lacking Privity of Contract

While the application of implied warranty in products liability cases was not without support, some commentators were bitterly opposed to its exten-
sion beyond privity of contract. These critics characterized implied warranty as an awkward device that obscured the "true" nature of a manufacturer's liability for the injury caused by a defective product to an out-of-privity buyer.

William Prosser in particular advocated the abandonment of the warranty rationale in favor of strict liability in tort:

All this is pernicious and entirely unnecessary. No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.

Prosser's ideas and methods of analysis permeate products liability law. His influence as official reporter for the Restatement (Second) of Torts was immense. Nevertheless, academic credentials and recognition do not warrant blind adherence to those arguments opposed to the application of implied warranty in products liability cases. The extension of implied warranty to products liability was a logical and appropriate outcome of the case-by-case development which had molded the characteristics of implied warranty.

Pure tort liability was not the readily available, doctrinally obvious device for extending products liability beyond the confines of contractual privity that it may appear to modern eyes. Indeed, the first decision to break the privity barrier and award an out-of-privity plaintiff recovery for injury caused by a defective product was a case where liability was held to rest upon the breach of an implied warranty. This case, Mazetti v. Armour & Co., was decided three years before MacPherson v. Buick Motor Co.

73. The Assault, supra note 2, at 1134.
74. Both courts and commentators alike were influenced by Prosser's two major articles in the products liability field and the methods of analysis therein (What Seller? What Plaintiffs? What Damages? What Defenses?). The Fall, supra note 2; The Assault, supra note 2.
75. At least fifteen jurisdictions have now embraced the Restatement rule. Titus, supra note 62, at 714 n.8.
78. "[I]n the absence of an express warranty of quality, a manufacturer of food products under modern conditions implies warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade." Id. at 630, 135 P. at 636.
broke through the defenses of the citadel of privity via liability for negligence.

In *Mazetti*, Armour & Co. prepared and sealed a carton of cooked tongue and sold it to the Seattle Grocery Company. Seattle sold it to Mazetti, a restauranteur, who served it to one of his patrons. The carton contained a "foul, filthy, nauseating, and poisonous substance" and the unfortunate patron "then and there became sick and nauseated, and did then and there in the presence of other persons publicly expose and denounce the service to him of such foul and poisonous food." Mazetti sued the packer for loss of reputation, loss of business, and loss of profits for the remainder of his lease of the restaurant. The Supreme Court of Washington awarded damages to the restaurant owner despite the fact that he bought the packaged food from a wholesaler who was the defendant's immediate purchaser.

*Mazetti* demonstrates that the extension of liability for defective products beyond privity of contract was consistent with the common law development of implied warranty. Prior to *Mazetti* there had been a long line of decisions holding sellers of impure food and drink liable to their immediate purchasers, but never before had a purchaser of defective goods been permitted to sue the maker of the goods in implied warranty over the head of a middleman. The adaptation of the warranties to this extracontractual role rapidly found favor with the courts in the majority of states. The wholesaler of the packaged food in *Mazetti* was very much akin to the nonmanufacturing seller of goods sold in a sealed container. For this reason the *Mazetti* court may have thought it improper to hold the wholesaler liable, and turned to the defendant as the only other person available to compensate the plaintiff.

Like the rules of tort law, liability in implied warranty was widely believed to be imposed by law for reasons of policy rather than being the product of an agreement by the parties. If it was illogical to restrict tort liability for defective chattels to parties who had actually contracted with each other (as the legal community came to believe in the second decade of this century), then it was equally indefensible to confine the operation of the warranties to these limits.

But this explanation merely indicates that neither negligence nor warranty was clothed with any self-evident suitability as a vehicle for liability in the *Mazetti* case. The special feature of the case which might explain the choice of implied warranty by the plaintiff's attorney was the nature of the damages sought: economic loss consequential upon the purchase of a defective chattel.

80. Id. at 622, 135 P. at 633-34.
81. Id. at 630, 135 A. at 636.
82. See text accompanying notes 65-71 supra.
83. See text accompanying notes 40-59 supra.
B. Implied Warranty and Economic Loss

Warranty theory in general, including implied warranty, has been characterized as "a freak hybrid born of the illicit intercourse of tort and contract."84 It is true that implied warranty has a number of different, if not conflicting, characteristics. On some occasions, for example, an implied warranty might display contractual qualities, being promissory in nature and part of a bargained-for agreement. At other times, an implied warranty could be interpreted as tortious in nature, exhibiting qualities of an obligation to refrain from misrepresentation or a duty imposed for public policy reasons. But behind the characterization of implied warranty as a freak hybrid there is a view that legal analysis and decisions employing implied warranty will lead to unneeded controversy, confusion, and error.85

The question specifically raised is this: Is implied warranty a concept which "carries far too much luggage in the way of undesirable complications"86 to be of value for resolving issues of compensation for injury sustained from defective or unmerchantable products? This article's response to the question is clearly negative. The varied character of implied warranty is not legally undesirable. Its contractual and representational characteristics afforded courts precisely those tools needed in such cases as Mazetti v. Armour & Co.87 and others,88 where issues of economic loss recovery were confronted and ultimately resolved in favor of such recovery.

The law of tort has shown persistent aversion to this kind of claim. When Mazetti was decided, damages for personal injury caused by defective chattels could only be claimed in exceptional circumstances from an out-of-privity manufacturer. Far from allowing a claim for economic loss in negligence, it was to be many years before the liability for personal injury would be extended even to property damage. If an action in negligence to recover economic loss is an uncertain prospect today, it could not have commended itself to the plaintiff's attorney as a particularly promising doctrinal vehicle for that kind of claim in 1913. Implied warranty, on the other hand, had originally evolved as a remedy for economic loss, although it was available for all kinds of losses caused by defective products by that time. The extracontractual use of warranty was restricted to items of food and drink for some 40 years after Mazetti, and the post-Mazetti cases all involved personal

84. The Assault, supra note 2, at 1126.
85. See id. at 1126, 1127–34.
86. Id. at 1133.
87. 75 Wash. 622, 135 P. 633 (1913).
injury (the most common consequence of bad food and drink) until the new extracontractual warranty liability was broadened to cover other defective goods in the 1950's.

Still, opponents, led by William Prosser,89 have been successful in stifling judicial use of implied warranty, and, in so doing, discouraging recovery of economic loss. Their success has primarily resulted from the acceptance of section 402A of the Restatement (Second) of Torts by a large number of state courts.90 Section 402A was the Restatement provision, drafted by Prosser, which sought to establish strict tort liability as the sole rationale for products liability. The section made it possible for out-of-privity buyers to hold manufacturers strictly liable in tort for injuries caused by a defective product, but only for personal injuries and property damage.91 Implied warranty was scuttled and economic loss ignored.

This widespread judicial approval of section 402A of the Restatement (Second) of Torts is not justified or defensible. Section 402A has often been regarded as a bold innovation. In reality, the section was a rejection of implied warranty and economic loss recovery founded upon faulty analysis and questionable case authority. With respect to the adoption of strict tort liability, the decisions cited in support of section 402A were in large part implied warranty cases.92 It was not until after the section's initial draft, yet prior to its acceptance, that such cases as Greenman v. Yuba Power Products, Inc.93 and Goldberg v. Kollsman Instrument Corp.94 provided support for the section. But these decisions also curiously relied upon implied warranty precedents.95

A similar problem plagued the absence of economic loss recovery in section 402A—Prosser intimates that recovery could only be based on an extension of the "dangerous products" rule, but the cases indicate recovery based on warranty. According to Prosser, "the real break to other products came in 1958 with Spence v. Three Rivers Builders & Masonry Supply, Inc.96

89. The Assault, supra note 2, at 1127.
90. For a breakdown of the various jurisdictions, see F. HARPER & F. JAMES, THE LAW OF TORTS § 28.33, at 1606 (1956).
91. See Restatement (Second) of Torts § 402A (1965).
92. Id. § 402A app., at 4 (1966).
93. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). After Prosser had drafted the tentative version of section 402A in 1964, but before the American Law Institute had accepted it, Justice Traynor (who served as one of the advisers to the Restatement (Second) of Torts) provided support for the section in the majority opinion he wrote in Greenman.
95. Herbert Titus conducted an extremely thorough examination of both the broad historical arguments as well as all judicial decisions and legislative pronouncements that might conceivably have provided support for Greenman. He found that overall the case law was "inconclusive and unhelpful" and that warranty cases had been cited. Titus, supra note 62, at 775, 780.
96. 353 Mich. 120, 90 N.W.2d 873 (1958).
where the Michigan court found a warranty, without privity and without negligence, of cinder building blocks when the user’s home collapsed.”

Prosser misread the Spence case. The structure in issue was not the user’s home; it did not collapse. What really happened in Spence was that the defendant had sold to one C, who resold to the plaintiff, certain cinder blocks which were used to construct a cottage in a lakeside resort area. The blocks “started to crack, chip and, also, to pit and explode into a popping series of minute craters, followed by numerous flakings and powdery deposits and exuding unsightly travelling red and yellow stains known as ’bleeding’.” There was expert testimony that these cracks were internal and progressive and would “at some undefined future time probably endanger the structure.” Defendant denied that such a risk existed, but this was of no avail:

[Even granting the correctness of defendant’s position (and disregarding the fact that the widowed plaintiff here appears to make at least part of her living in that great American competitive sweepstakes: the care and housing of migrant tourists) we do not hesitate to hold . . . that in these circumstances and in this day and age appearance as well as structural safety and durability is an important factor in determining the merchantable quality and fitness of these particular products as used in this case.]"^{100}

Prosser’s misconception of the new developments was not restricted to the facts of the Spence case: in the Assault on the Citadel he wrote that “[t]he last two years have brought no less than seven spectacular decisions, 97. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 654 (4th ed. 1971). Did Prosser see Spence as a personal injury case? I do not know. In The Assault, supra note 2, at 1112, he wrote: “The first of these [non-food cases], Spence v. Three Rivers Builders & Masonry Supply, Inc., came, appropriately enough from the point of view of the defendant, from the pen of Justice Voelker of Michigan, the author of Anatomy of a Murder . . . .” (footnote omitted).


88. Id. at 126, 90 N.W.2d at 876.

89. Id.

90. Id.

Prosser’s misconception of the facts in Spence is worth noting because his judgment that the court’s remand was for property damages, “supported only in principle” by cases of economic loss, might have been supported by his erroneous belief that the cottage had collapsed. The Assault, supra note 2, at 1143 & n.284.

From the face of the opinion, it is easy to understand how Prosser may have taken the position he did. Although the Spence court explicitly stated that the plaintiff’s loss was primarily due to the despoiled appearance of the cinder blocks rather than to property damage or to personal injury, the court obscured and complicated the importance of this distinction by an equivocal statement that the plaintiff’s remedy under warranty might be grounded in negligence.

The Michigan Court of Appeals subsequently acknowledged this confusing conclusion by the Spence court, but after accurately reconstructing the facts in Spence, the appeals court commanded an interpretation of the remand contrary to Prosser’s. Where a golf course owner
which appear to have thrown the limitation to food into the ash pile, and to hold that the seller of any product who sells it in a condition dangerous for use is strictly liable to its ultimate user for injuries resulting from such use.”

One needs only a cursory glance at the seven decisions which Prosser quotes in support of his formulation of the new rule to satisfy oneself that only three of them were concerned with personal injury. Of the others, three, and possibly four, were awards for economic loss. This early formulation of strict liability for injury caused by defective products in a dangerous condition is, moreover, clearly the precursor of the current version of section 402A of the Restatement which Prosser laid before the American Law Institute in 1964.

Section 402A was drafted to reflect what its creator called “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.” It was to preserve and reinforce the gains made in the warranty cases by removing them from the “intricacies of the law of sales.” But section 402A is not what it seems. It unblushingly cites Spence and Continental Copper & Steel Industries v. E.C. “Red” Cornelius, Inc. as illustrations of a rule under which these cases could never have reached court, since neither involved personal injury or physical damage to chattels.

After Prosser had drafted the 1964 version, but before the ALI had accepted it, Justice Traynor, who served as one of the advisors to the Restatement (Second) of Torts, provided support for the new strict liability in tort in Greenman v. Yuba Power Products, Inc. which was approved shortly afterwards in New York.

sought to recover economic loss under implied warranty without privity from the manufacturer of defective golf carts, the appeals court placed great emphasis on the fact that the loss in Spence was “entirely economic” and that the Michigan Supreme Court, in Spence, had therefore “allowed recovery for economic loss.” Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 605, 618, 182 N.W.2d 800, 802, 809 (1970) (emphasis added).

101. The Assault, supra note 2, at 1112.


104. The fourth case is Jarnot v. Ford Motor Co., 191 Pa. Super. Ct. 422, 156 A.2d 568 (1959), in which accidental damage to the product itself, which is sometimes held to be economic loss, was recoverable.

105. W. Prosser, supra note 97, § 97, at 654.


On the assumption that "Greenman is likely to be not only authoritative, but also the most articulate and persuasive argument in the literature in favor of section 402A," Herbert Titus conducted an extremely thorough examination of both the broad historical arguments and all decisions and legislation which might conceivably have provided support for the case (and so, less directly, for section 402A). He found that the case law was "inconclusive and unhelpful," and that "the legislative history of warranty liability argues that Greenman overrides the legislative will." His objection to Greenman did not, however, involve a denial of the court's creative function:

Although the court might possibly have developed a strict tort liability rule outside the Sales Act without case support, the California court did not do so and instead incorrectly cited warranty cases. This misuse of case authority represents an overextension of judicial policymaking power that conflicts with the guidelines for judicial law reform stated by Justice Traynor himself.

A number of commentators have pointed out that section 402A is inconsistent with the warranty provisions of the UCC, and that the almost universal legislative adoption of the UCC has ended any freedom which a particular court may have had to adopt the rule expressed in section 402A. Little can be added to the excellent studies which have been made of the conflict between the UCC and the Restatement. The judicial development of implied warranty took place independently of the UCC (and of the Uniform Sales Act) for the most part. The attack on vertical privity of implied warranty which began in 1913 and intensified in the late 1950's received no more than a tenuous sanction from the UCC in the 1960's to the extent that the UCC bestowed a belated and indirect recognition upon judicial lawmaking beyond its own privity provisions. Also, there is a conflict between the implied warranty cases and the UCC on the subject of dis-

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110. Titus, supra note 62, at 713.
111. Id. at 775.
112. Id. at 781.
113. Id. at 780.
115. Louisiana is the only state that has not adopted all articles of the UCC.
116. Franklin, supra note 22, at 1016; Titus, supra note 62, at 751.
117. Rapson, supra note 114; Shanker, supra note 114; Speidel, Products Liability, Economic Loss and the UCC, 40 Tenn. L. Rev. 309 (1973); Titus, supra note 62.
claimers which illustrates a divergence between contemporary legislative and judicial attitudes toward implied warranty.

However well-founded the various objections to the Restatement formulation may be, the courts of a large number of the states have approved it.\(^1\) Not unexpectedly, this appears to have had a negative effect on the development of liability for economic loss between parties not in privity.\(^2\) This statement must be qualified by mentioning that Justice Francis allowed a claim for pure economic loss in Santor v. A & M Karagheusian, Inc.\(^3\) on the theory of strict liability in tort. However, it is significant that he based this characterization entirely on Greenman. Quite understandably there is no mention in Santor of section 402A with its unambiguous reference to “liability for physical harm . . . to the ultimate user or consumer, or to his property.”\(^4\) Following the New Jersey Supreme Court’s own unique formulation in Santor, one court has now equated strict liability in tort with breach of implied warranty in a more recent award of economic loss.\(^5\) Other courts which have permitted the recovery of economic loss continue to say that the liability arises out of breach of implied warranty.\(^6\)

V. SHOULD ECONOMIC LOSS BE RECOVERABLE OUTSIDE OF CONTRACTUAL PRIVITY?

Up to this point this article has been concerned with “is” rather than “ought” questions. Economic loss awards have played a more important role in the development of strict products liability than is generally acknowl-
edged, but are these awards in fact justified? In considering the theoretical and policy arguments for and against liability for economic loss it may be well to remind oneself that this kind of liability has been firmly established between parties in privity of contract in all common law jurisdictions for some time, and that the present debate concerns only the unresolved question of liability for economic loss outside privity of contract.

A. Theoretical Support for Economic Loss Recovery

Analysis aimed at answering the question whether economic loss ought to be recoverable in products liability cases outside privity of contract has usually begun with the premise that tort law has traditionally disregarded the infringement of economic interests by others unless the interference was intentional. The familiar analysis next notes that contract law has long afforded extensive protection to economic interests. In the same breath, notice is taken of the fact that a buyer lacking privity of contract with the manufacturer of a defective product could not possibly bring a suit in contract against that manufacturer for injuries sustained from the product. On the contrary, such a buyer’s effort to obtain compensation from the manufacturer, it is said, must be classified as fundamentally an action in tort. The conclusion drawn is that the tortious nature of the buyer’s cause of action makes it necessary for the court to disallow recovery of the buyer’s economic loss because of the traditional judicial reluctance to protect economic interests in tort cases.


125. There are several references in the legal literature on this subject to the general tort principle that nonintentional interference with economic interests is not actionable. E.g., Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231, 232 (1966); Note, Negligent Interference With Economic Expectancy: The Case for Recovery, 16 Stan. L. Rev. 664, 664, 667 (1964). But see Carpenter, Interference With Contract Relations, 41 Harv. L. Rev. 723, 739–41 (1926).
This approach to the question falls victim to the very evil it strives to avoid: it reasons by means of “outcome-affective” terms \(^{126}\) instead of underlying realities. The effort to abandon such terms as “warranty” and “privity” necessitates the use of even more loosely defined terms like “tort” and “contract,” which carry the analysis further from the underlying realities of fact and policy.\(^{127}\)

There exists, however, a long and continued history of judicial recognition of recovery for economic loss\(^ {128}\) in both actions for deceit in tort and actions for breach of contract.\(^ {129}\) In each of these situations the plaintiff's reliance upon a misrepresentation serves as the theoretical basis of judicial relief for economic loss.\(^ {130}\) This same representational theory of recovery for economic loss may be applied in products liability cases.

1. Deceit

Deceit, or fraud as it is sometimes called, is the typical tort action for intentional misrepresentation.\(^ {131}\) In order for a plaintiff claiming deceit to meet his burden of proof, specific facts showing either actual knowledge of the representation’s falsity, a conscious lack of belief in its truth, or a reckless disregard for its truth or falsity—the common “scienter” formula—must

\(^{126}\) This phrase is explained in Products Liability Jurisprudence, supra note 22, at 943.

\(^{127}\) Fuller & Perdue, The Reliance Interest in Contract Damages (pt. 2), 46 YALE L.J. 373, 419 (1937). Terms such as “tort” and “contract” may be outcome-affective. See Products Liability Jurisprudence, supra note 22, at 917. It has been argued, for example, that protection of economic interests is justified in contract law, unlike in tort law, because the defendant in a contract case has voluntarily undertaken a duty by choosing to contract with the plaintiff. Id. at 947. Such a statement passes superficial scrutiny because “contract” is a loosely defined word that may be taken to mean a number of things. Upon closer examination, however, it is doubtful that economic interests are protected in contract and not in tort because contractual duties are primarily consensual in nature. On the contrary, the underlying reason for contract law’s protection of economic interests appears to be the commercial and economic contexts within which contractual obligations so often arise. Contractual obligations drawn on noncommercial backgrounds illustrate that not every plaintiff bringing an action on a contract is necessarily entitled to recovery of economic loss. See 46 YALE L.J., supra, at 396–98.


\(^{129}\) It is conceded that courts are frequently justified in refusing recovery for economic loss in many tort cases. See, e.g., Stevenson v. East Ohio Gas Co., 47 Ohio L. Abs. 586, 73 N.E.2d 200 (Ct. App. 1946). But cases like Stevenson and tort cases involving misrepresentation are distinguishable. Professor Carpenter noted the distinction between these types of cases which may help to explain why economic loss is readily recoverable in the latter and not the former. Carpenter, Responsibility for Intentional, Negligent and Innocent Misrepresentation, 24 ILL. L. REV. 749, 756–59 (1930).


\(^{131}\) W. PROSSER, supra note 97, § 105, at 686; Prosser, supra note 125, at 233.
be established.\textsuperscript{132} A number of courts also premise liability on negligent and innocent misrepresentation.\textsuperscript{133}

There are two ways to measure relief for deceit claims. The majority of American jurisdictions measure damages according to the "benefit-of-the-bargain" rule,\textsuperscript{134} which provides that a deserving plaintiff receive the difference between the value actually accruing to him in a particular situation and the value which would have accrued to him had the defendant's representation been true.\textsuperscript{135} For example, a buyer of realty who justifiably relies upon a broker's intentional misrepresentation concerning the dimensions of a parcel of land would be entitled to recover from the broker the difference between the land's value based on its actual size, and its value had the parcel's dimensions been as the broker stated.

A minority of American courts measure deceit damages by the "out-of-pocket-loss" rule.\textsuperscript{136} This rule provides that a plaintiff injured by deceit is entitled only to the difference between the value he parted with due to a defendant's misrepresentation and the value he actually received.\textsuperscript{137} Applying this out-of-pocket-loss rule to the above example of the real estate purchase, the defrauded buyer could only recover from the broker the difference between the purchase price of the land and the actual value of the land determined according to its true size.

\begin{itemize}
  \item \textsuperscript{132} The "scienter" formula was initially laid down in the case of Derry v. Peek, 14 App. Cas. 337 (1889), and has been adopted by the majority of courts and the Restatement (Second) of Torts. Shapo, \textit{supra} note 130, at 1157.
  \item \textsuperscript{133} The negligent misrepresentation cases include: Gediman v. Anheuser Busch, Inc., 299 F.2d 537 (2d Cir. 1962); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Suit v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947); Weston v. Brown, 52 N.H. 157, 131 A. 141 (1925); International Prod. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927); Brown v. Underwriters at Lloyd's, 53 Wash. 2d 142, 333 P.2d 228 (1958).
  \item \textsuperscript{134} The "scienter" formula was initially laid down in the case of Derry v. Peek, 14 App. Cas. 337 (1889), and has been adopted by the majority of courts and the Restatement (Second) of Torts. Shapo, \textit{supra} note 130, at 1157.
  \item \textsuperscript{135} The negligent misrepresentation cases include: Gediman v. Anheuser Busch, Inc., 299 F.2d 537 (2d Cir. 1962); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Suit v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947); Weston v. Brown, 52 N.H. 157, 131 A. 141 (1925); International Prod. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927); Brown v. Underwriters at Lloyd's, 53 Wash. 2d 142, 333 P.2d 228 (1958).
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  \item \textsuperscript{137} The "scienter" formula was initially laid down in the case of Derry v. Peek, 14 App. Cas. 337 (1889), and has been adopted by the majority of courts and the Restatement (Second) of Torts. Shapo, \textit{supra} note 130, at 1157.
\end{itemize}
In addition to out-of-pocket-loss damages and benefit-of-the-bargain damages—which are in reality alternative measures for direct harm—many courts have allowed compensation for consequential injury stemming from a misrepresentation.138 Within the context of the real estate purchase described above, consequential injury would include a loss of profits caused by the buyer's inability to construct commercial facilities on the parcel or expenditures incurred in drafting new architectural plans in accordance with the actual size of the parcel.

Commentators have disagreed as to whether the benefit-of-the-bargain rule or the out-of-pocket-loss rule is the proper measure of damages for a cause of action in deceit. Tort law calls for an out-of-pocket-loss measure,139 while contract principles are said to dictate a benefit-of-the-bargain remedy for a plaintiff alleging a cause of action in deceit.140 However, these approaches to understanding the nature of deceit ignore important underlying considerations of fact and policy.

Court-awarded relief for deceit is essentially compensation for some commercial, financial, or other economic loss caused by a misrepresentation.141 A person relying upon a false representation may have bestowed some benefit upon the misrepresenting party, or a third party, or may have otherwise detrimentally changed position as a result of reliance upon the false representation.142 The policy of compensating economic losses resulting from a detrimental change of position in reliance upon a misrepresentation is the underlying justification for out-of-pocket-loss damages.143 A purchaser of realty who is deceived so as to believe that there have been recent oil discoveries on an otherwise worthless tract of land has suffered a reliance loss amounting to the entire purchase price of the tract, an amount equal to the seller's unjust enrichment. Aside from the purchase price, the purchaser in this instance has suffered other reliance losses, one being his title search expenses. These additional losses coming out of the purchaser's pocket, but not necessarily benefiting the seller, should be recoverable since they flow from the seller's deceit. Courts and commentators have also noted that the satisfaction of reasonable expectations is important for encouraging commercial activity.144 Benefit-of-the-bargain damages could be founded upon this

138. Id. at 1059-61.
139. See, e.g., id. at 1051.
140. See, e.g., Note, Measure of Damages for Fraud and Deceit, 47 VA. L. REV. 1209, 1210-11 (1961).
141. Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 HARV. L. REV. 733, 733-34 (1929).
142. Compare Fuller & Perdue, supra note 127, at 409-10 with 53-54.
143. See McCormick, supra note 134, at 1051-53.
policy of allowing recovery for the expected fruits of an unrealized representation. Consider for example, the real estate purchaser described above who justifiably relies upon the seller’s false remarks about rich oil reserves. This purchaser might be able to show that the benefit of his bargain was the value he reasonably expected the land to possess had there actually been oil below its surface. Consequential injury in the form of lost profits might also be within the range of benefit-of-the-bargain damages.

The policies of granting restitution, of compensating reliance losses, and of satisfying reasonable expectations arising from a misrepresentation justify deceit as a claim for relief, and apparently some courts have begun analyzing claims of deceit to promote these specific policies instead of applying an inflexible rule of damages. Analysis revolving about these policy interests also indicates when and if there ought to be recovery for negligent and innocent misrepresentations.

A number of factors have been used to limit liability for misrepresentation. One limit is that a plaintiff’s reliance upon a misrepresentation must be justifiable. Courts have also fashioned a second, less flexible limit to misrepresentational liability: liability is imposed only when the misrepresentation’s reliance-inducing qualities were intended, known, or specially foreseeable by a defendant. Courts have been more reluctant to impose liability when the reliance-inducing tendency of a false representation was only generally foreseeable to a defendant or not foreseeable at all.

At one end of this liability spectrum is Glanzer v. Shepard. In Glanzer, the plaintiff had relied upon a weighing certificate, issued by the defendant to determine the price of certain goods purchased by the plaintiff from a third-party seller, which was negligently prepared, causing the plaintiff to overpay for the goods. The tendency of the weighing certificate to induce reliance upon a particular monetary amount as the proper purchase price was probably intended by the defendant and certainly known to him.

Jaillet v. Cashman exemplifies a situation at the other end of the spectrum in which a court refused to impose liability when the reliance-inducing tendency of the misrepresentation was only generally foreseeable to the defendant. In this case the defendant had negligently misrepresented a certain event over a stock-ticker newstape that was influential to investor opinion. After receiving the report, the plaintiff sold stock on the basis of this report by the defendant. Although the plaintiff had clearly been negligent,

147. See cases cited note 133 supra.
149. 235 N.Y. 511, 139 N.E. 714 (1923).
the court did not impose liability for misrepresentation. It was crucial to the
court's decision that the reliance-inducing tendency of the false news report
was only generally foreseeable to the defendant.

2. Breach of Contract

Tort actions for misrepresentation are not the only occasions for recovery
of economic loss. Courts deciding contract actions have long allowed such
recovery,\textsuperscript{150} also under a representational theory. An offer to enter a contract
with another person might be thought of as a representation—a representa-
tion of an undertaking. Offers that embody promises of future performance
carry a reliance-inducing tendency. Should an offeree exercise his power of
acceptance and believe that he has entered a contract, actual reliance upon
the offeror's representation will have been displayed. Saying that an offeree
gave consideration for a promise he relied upon simply recognizes the off-
eree's reliance as justifiable.

That representational theory is the theoretical basis of contractual liability
seems to be a plausible proposition. Such a suggestion is hardly legal heresy.
After all, deceit and assumpsit, the forerunners of modern contract and tor-
tious misrepresentation claims, shared company within the action on the
case for a considerable period of time.\textsuperscript{151} Admittedly, there are differences
between actions for breach of contract and actions for tortious misrepresen-
tations. A misrepresentation of fact, for example, is false when it is made,
while a misrepresentation of an undertaking is false only after performance
has been breached; justifiable reliance in breach of contract actions is con-
sensually oriented while this is not true for tortious misrepresentations.
Nevertheless, the visible similarities between these actions for economic loss
cannot be easily ignored.

In addition to the common thread of representational theory, a further
similarity exits between actions for breach of contract and actions for misrep-
resentation. In the analysis of tortious misrepresentation, economic loss re-
covery was observed to rest upon three different but related policies: restitu-
tion of conveyed benefits, compensation for reliance losses, and satisfaction
of expected gains.\textsuperscript{152} A judicial concern for these same three policies jus-
tifies recovery of economic loss in contract actions.

First, a promisee confers a benefit upon his promisor in the belief that
the promisor will perform as originally agreed. If it should happen that the
promisor fails to perform and thus breaches the agreement, the promisee
will have forfeited the value of those benefits conveyed under the contract.

\textsuperscript{150} Products Liability Jurisprudence, supra note 22, at 946-47.
\textsuperscript{151} See Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888); Carpenter, supra note
129, at 760-61; Products Liability Jurisprudence, supra note 22, at 948.
\textsuperscript{152} See text accompanying notes 141-45 supra.
In such a case, contract law affords the promisee an opportunity to obtain restitution of those benefits conferred upon the promisor. Second, the promisee in such a situation may have incurred various expenses in preparing to perform his side of the bargain. Such costs of preparation would not necessarily involve corresponding benefits conveyed to the promisor for which the promisee could receive restitution. In contract actions courts have frequently awarded compensation for these reliance losses of the promisee. Finally, a promise may have led the promisee to expect some gains for himself when the promisor ultimately performs his part of the bargain. The relief granted upon a successful contract claim has usually sought to satisfy reasonable expectation gains, thus enforcing the contract as if it had been actually performed.

3. Products Liability Cases

Carrying the analysis one step further, commentators have suggested that representational theory may be used to prove a claim of economic loss caused by a defective or unmerchantable product. For some courts and commentators, representations relating to a product are thought to be made only when express words are spoken or written statements made. Others have held that the making of a representation does not require express oral or written communication, and they would recognize implied or implicit representations in many products liability cases.

For example, product representations may be inherent in a manufacturer's marketing of a product. "By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use . . . ." In addition, it is said that the product itself triggers an impression within a buyer's mind of the general social consensus of its character and function. An automobile, for example, triggers impressions

154. See A. Corbin, Contracts § 1 (1953); Fuller & Perdue, supra note 127, at 53-54, 60-63.
158. Shapo, supra note 130, at 1243-45.
159. The Fall, supra note 2, at 799; accord, The Assault, supra note 2, at 1122-23; Comment, The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy, 4 Seton Hall L. Rev. 145, 153 (1972).
160. Shapo, supra note 130, at 1234.
161. Id. at 1240, 1370.
of a motor vehicle with properly functioning brakes and transmission. Likewise, a refrigerator raises presumptions of an appliance that will keep food cold. The product itself, in short, is the message to the buyer.

As noted above, a certain degree of culpability on the part of the defendant was required in tort actions for misrepresentation—intent, knowledge, or special foreseeability—mere general foreseeability being the point at which most courts refuse to impose liability. Assuming the presence of product representations, the requisite degree of culpability could also be successfully proven in a products liability case. A manufacturer induces buyers to purchase his product by fostering an image through advertising. Often, a manufacturer knows facts making it specially foreseeable to him that the representations emanating from his product will have a reliance-inducing tendency. Thus, proof of culpability relating to a representation's reliance-inducing tendency is not likely to be an insurmountable barrier for buyers seeking relief in products liability actions.

Another important element of either a tort or contract claim for misrepresentation is actual and justifiable reliance. A buyer displays actual reliance upon a product representation when that representation influences his decision to purchase. A buyer who relies upon a representation implied by the product itself is in the same position as a person who relies to his detriment upon an ordinary misrepresentation or breached promise. On the one hand, the difference between the product's purchase price and its actual or market value is the buyer's out-of-pocket loss (a reliance loss). On the other hand, the difference between the product's represented value and its actual value is the buyer's loss of the benefit of his bargain (an unrealized expectation gain). A buyer faces only normal difficulties of proof in satisfying this element of a successful misrepresentation action in a products liability case.

Proving that one's reliance as a buyer upon a product representation was justifiable so as to warrant recovery of economic loss, however, might be more difficult in a products liability case. The element of justifiable reliance in actions for tortious misrepresentation and breach of contract involves a process of weighing and balancing various interests. By analogy, justifiable

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162. See text accompanying notes 147–50 supra. See also Prosser, supra note 125.
163. See Shapo, supra note 130, at 1180 (objectively expectable impression made on the consumer); id. at 1181 (reasonably understandable impression); id. at 1370 (the result objectively determinable). As Dean Prosser noted:

The supplier, by placing the goods upon the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything that he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety; and it is in fact so purchased and used.

The Assault, supra note 2, at 1123 (emphasis added).
164. See text accompanying notes 136–37, 142–43 supra.
165. See text accompanying notes 134–35, 144 supra.
reliance in products liability cases should entail the same balancing and weighing process.166 A buyer who purchases a product whose actual value is far less than was its represented value is interested in obtaining restitution for any discrepancy in value and for those gains he may have reasonably expected in light of the product's representations. Aside from strictly economic interests, the buyer also has an interest in his own health and safety, which would be threatened by defective products. Refusal to compensate a buyer for the costs of repairing such products could discourage preventive repairs and thus increase the risk of harmful future accidents.167 Society may also have an interest in seeing buyers recover the economic loss caused by a defective or unmerchantable product. Buyers often find it difficult168 and costly169 to ascertain the truth about certain representations of a product. Compensating them for economic losses that could not be reasonably avoided would promote society's interest in a healthy exchange and consumption of goods and services.170

Manufacturers, on the other hand, want the freedom to represent their products as they wish to promote sales,171 which complements the societal interest in a healthy level of production and distribution of goods and services.172 Liability rules, if not properly shaped, will dampen business incentive and harmfully affect the production of goods and services.173

A familiar form of legal action for presenting theories in favor of economic loss recovery is needed, however. Implied warranty appears to be one such form of action. Because warranties have traditionally been looked upon as express or implied representations, representational theory may easily underlie a products liability complaint that is structured in the form of an implied warranty action. But whatever form of action is chosen on whatever

166. See Shapo, supra note 130, at 1363–64; cf. Carpenter, Interference With Contract Relations, 41 Harv. L. Rev. 728, 745 (1928) (determining liability for an alleged incident of contractual interference involves a weighing of the conflicting interests between plaintiff and defendant).


168 Weisiger, Basis of Liability for Misrepresentation, 24 Ill. L. Rev. 866, 875 (1930); Zammit, supra note 22, at 84.

169. See Shapo, supra note 130, at 1372–73.

170. See id. at 1372–73, 1380–81.


172. See Shapo, supra note 130, at 1371–73.

173. See id. at 1371–73, 1380–81. Concern for society's infant productive capacity may well have been the underlying rationale for the privity of contract requirement in products liability cases that was set forth in Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), and applied in such later cases as Lebourdois v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (1907). See W. Prosser, supra note 97, § 96, at 641–42. Of course, with the more advanced technology and increased productive capacity of the present day, manufacturers are less vulnerable to the imposition of products liability.
theoretical basis, the important consideration is that injured buyers be afforded some means of recovery for economic loss.

B. Common Arguments Against Economic Loss Recovery

Representational theory constitutes a theoretical basis for allowing recovery of economic loss. Even without this theoretical underpinning, however, sound policy considerations justify recovery of economic loss. These justifications will be addressed by analyzing the common arguments against such recovery.

1. Direct Economic Loss

As defined previously, direct economic loss consists of the difference between the actual value of the defective goods and the value they would have had if they had not been defective. This hypothetical defect-free value is often calculated by referring to the price which the plaintiff-buyer paid for the goods. The use of this yardstick enabled Prosser to argue that out-of-privity manufacturer's liability was dangerous, as the dealer could trigger it by simply selling a product to the ultimate consumer at an unreasonably high price:

Such pecuniary loss is a matter, not only of what the plaintiff has received, but also of what he has paid for it. Loss on the bargain must depend upon what the bargain is; and when the purchaser of a new car trades in his old one to the dealer, whether he suffers any pecuniary loss, and if so what is its extent, must necessarily depend upon the allowance made by the dealer on the trade. It must also be affected by the dealer's undertaking to the plaintiff, and whatever representation or warranties he has made. If the dealer overprices the goods, or if he sells grade 2 as grade 1, there will be a loss on the bargain even if they are in no way defective, and of course all the more if they are; but how much of the loss is to be attributed to the manufacturer? This appears to be clearly, in the first instance, a matter properly between the purchaser and the dealer; and if the manufacturer is to be liable, it should be to the dealer, and for damages which may be quite a different sum from the dealer's own liability.

There are several rejoinders to this argument. First, while a product's retail price will often be an appropriate indicator of its represented value to a buyer, a manufacturer could reduce or avoid his liability by proving that the retailer charged an inflated price bearing no relation to the product's

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174. See note 20 supra and accompanying text.
175. The Fall, supra note 2, at 823.
represented value. The same reasoning would apply to any additional or expanded representations which a retailer might have made about a product. Second, inflated prices and additional representations made by a retailer are quantitatively insignificant. Manufacturers often exercise significant control over retail prices and sales transactions, and even where they do not, prices and the terms of written retail sales contracts\textsuperscript{176} are likely to be standardized. Finally, no products liability attaches to anyone if the goods are not defective, and price is only one of a number of factors that determine the issue.\textsuperscript{177}

2. \textit{Consequential Economic Loss}\textsuperscript{178}

Some courts\textsuperscript{179} and commentators\textsuperscript{180} have argued that economic loss, especially consequential economic injury, is too speculative and excessive to be a calculable or insurable\textsuperscript{181} cost of the supplier’s business. The contention is that even if a buyer proffers evidence of his consequential injury, such evidence is at most conjectural, and a court would experience great difficulty in measuring and apportioning any sort of damage award.\textsuperscript{182}

Unquestionably, consequential economic losses are potentially much larger, and in this sense less predictable, than direct economic losses, but this is hardly a sufficient reason for a denial of liability. The losses which may be caused by personal injury and property damage are also unpredictable or “large” in relation to direct economic loss—they too can vastly exceed the value of the product which caused the trouble. The real question is whether consequential economic losses can be said to be “larger” or in any sense less predictable than personal injury or property damage. The issue of manufacturer’s liability is a justiciable one in sales law (between parties in privity) and it has been for some considerable time.\textsuperscript{183} Except where the seller’s liability has been the subject of agreement by the parties, it has been the task of the courts to determine its scope, and it is doubtful that the judicial limitations upon consequential economic loss evolved in these cases...

\textsuperscript{176} It will be recalled, for instance, that the dealer in Henningsen v. Bloomfield Motors, 32 N.J. 358, 16 A.2d 69 (1960), had no authority to vary a standard form sales contract supplied to him by the manufacturer.

\textsuperscript{177} B.S. Brown & Sons v. Craiks Ltd., 1 All E.R. 823 (1970).

\textsuperscript{178} See notes 21-26 supra and accompanying text.

\textsuperscript{179} E.g., Seely v. White Motor Co., 63 Cal. 2d 9, 17, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965).


\textsuperscript{181} \textit{Products Liability Jurisprudence}, supra note 22, at 954–57.


\textsuperscript{183} See Zammit, \textit{supra} note 22, at 87.
are likely to undergo great change if the litigation is between parties who are not in privity.

What are the limitations on consequential economic loss claims? A blunt characterization of the attitude of the courts toward this problem would be that they are stingy to those whose only complaint is economic loss and generous to those who suffer personal injury or property damage. To the extent that the law of contract concerns itself with economic interests, leaving personal injury and physical damage to the law of tort, it will use the "stingy" measure, limiting its reach "to the amount of injury that would arise generally, and in the great multitude of cases." 184 Where there is personal injury or property damage, courts will adopt the generous measure more characteristic of tort law, regardless of the fact that the parties might well be in privity of contract.185 Conversely, they will continue to apply the "stingy" rule to economic loss even where the parties are not in privity.186 There is nothing mysterious about this distinction; it simply reflects the fact that we regard dangerous products in a more serious light than worthless ones.

Generally speaking, all the sales legislation has directed that the loss to be expected "in the great multitude of cases" is the difference between actual and warranted value—direct loss.187 Recovery of consequential economic loss thus requires "special circumstances," although the UCC does not go as far as Hadley v. Baxendale188 in requiring that the buyer actually tell the seller of these; it is sufficient that he had reason to know of them.189 In practice this means that courts are not averse to compensating the small expenses that are typically incurred in the insurance, inspection, transportation, or storage of unmerchantable products,190 and, since there is

185. In Vacwell Engineering Co. v. B.D.H. Chemicals Ltd., 3 All E.R. 1681 (1969), a products liability case in which there was a contract between plaintiff and defendant, the court concluded that "[a] minor explosion involving minor damage to property and to persons was reasonably foreseeable. A violent explosion which killed one man and did 174,000 worth of damage to a building was not." Id. at 1696. The judge nevertheless found for the plaintiff: "I am unable to find that, because the damage to property was much greater than could have been reasonably foreseeable, it was too remote to be recoverable in law." Id. at 1696. See also U.C.C. § 2-715 (2) (b).
188. 156 Eng. Rep. 145 (Ex. 1854). Hadley imposed the following limits upon damages for breach of contract. For the most part, only those damages which arose generally from the breach were recoverable. Damages resulting from the special circumstances of the plaintiff would not be compensated unless the plaintiff had communicated those special circumstances to the defendant. Id. at 151.
a strict requirement that the buyer mitigate his loss wherever possible, the UCC allows him the expenses of doing so. The stinginess of the rule becomes apparent in relation to larger claims such as loss of anticipated profit on resales, settlements made with dissatisfied subpurchasers, losses associated with the breakdown of profit-earning chattels, and loss of goodwill. Faced with one of these claims (or, more typically, a combination of such claims) courts will often find that the consequential loss is too speculative to be the subject of an award, or that the special circumstances giving rise to the buyer's loss were not in the supplier's contemplation. Even where the plaintiff succeeds, the court's assessment of his loss is likely to be cautious.

This article has suggested that the law regards a defect as a product dangerous as a more important and urgent concern than one that merely renders it worthless or unusable. To the extent that this means we ought to regard personal injury as the most serious of all the undesirable consequences attendant upon the supply of defective products, it is a rational priority. This priority does not, however, adequately explain all presently applicable liability rules. The high value given to the integrity of the body only explains why there is out-of-privity liability for property damage in those cases where the destructive chattel is also potentially dangerous to life and limb. It does not explain the imposition of this kind of liability where there is no such risk, in the face of continuing out-of-privity immunity for economic loss even in cases where the risk does exist.

Academic commentators generally regard themselves as being under a duty to deal exhaustively with the arguments which have been put forward on any question with which they find themselves occupied, but in this case it would take a Joseph Heller to summon up the necessary gravity:

191. U.C.C. § 2-715 (1).
194. Where minks are, for example, killed by unsuitable feed.
195. Where we refuse, for example, to compensate the owner of a defective crane for lost profits when he is forced to withdraw it from operations to repair a potentially lethal defect. Rivtow Marine Ltd. v. Washington Iron Works, 40 D.L.R.3d 530 (Can. 1973).
Milo Minderbinder: It's senseless to bother manufacturers with liability to the consumer for direct economic losses—the amounts are just too small.197

Yossarian: Well, what about consequential economic loss?

Minderbinder: Too big.198

3. Disclaiming Liability for Economic Loss

The final argument against out-of-privity economic loss concerns disclaimers. In the United States the seller's right to disclaim liability for economic loss is a well-established one. While the UCC says that a disliamer of liability for loss caused by personal injury is prima facie unconscionable,199 there is no presumption in regard to economic loss. The UCC specifically provides, in fact, that a disclaimer of consequential economic loss is not prima facie unconscionable.200 What justification is there, then, for depriving the seller of this right by making him liable to a plaintiff with whom he has had no opportunity to bargain for a disclaimer? Lack of opportunity for a market transaction may, of course, affect the buyer's right to bargain for an expansion of the rather limited liability for economic loss placed on the seller by UCC sections 2-714 and 2-715 in exactly the same way. But, recognizing that in the real world there are more disclaimers than assumptions of liability, should we not simply admit that we are depriving the supplier of something that his market power would otherwise have assured him?

There is no need for a rule which denies that disclaimers have any effect outside privity of contract. When a consumer has made a free and informed choice to purchase, notwithstanding clear instructions accompanying the product that draw his attention to specific limitations upon its performance or durability, no supplier ought to be denied protection simply because he is not in privity. The presence or absence of privity is so irrelevant to the real question of whether or not there has been free consent that it should never affect the validity of a disclaimer per se.201

Even if one accepts, however, that the power to disclaim may weaken or disappear when there is no privity of contract, the very market power which

197. "The limited nature of liability for direct economic loss is itself an argument denying the necessity or utility of a direct action against the manufacturer. Where damages are limited to the price paid by the subpurchaser, his remedy against the retailer will, in most cases, prove adequate." Products Liability Jurisprudence, supra note 22, at 957.


199. U.C.C. § 2-719 (3).

200. Id.

makes it possible for a given supplier to disclaim will often enable him to contract directly with consumers or other recipients of his products if he should consider this in his interest. It is, after all, the immunity which manufacturers continue to enjoy toward plaintiffs who are not in privity of contract with them that has hitherto made it expedient for them to avoid characterizing their distributors who might link them contractually to the consumers of their products as agents.²⁰²

VI. CONCLUSION

Blanket immunity for loss caused by "merely" worthless or unworkable products (economic loss) which is still maintained in most jurisdictions when there is no privity of contract between plaintiff and defendant should be abandoned. Although this change in the law will produce no more than a modest increase in suppliers' liability, there is some justification for viewing any proposal to increase liability as an expression of distrust for technology and perhaps for the industrial system itself. However, the fine and worthwhile products which we produce demand a rational system of products liability as strongly as the defective ones. The common law itself is a uniquely useful precision instrument for achieving this rationality,²⁰³ as it has proven by producing a remedy like warranty which borrows freely from the law of tort and contract to deal with all the different kinds of loss which may be caused by defective products.

²⁰². The Ford Motor Company recently gave a convincing demonstration that this traditional arrangement does not represent the natural order of things when it tried unsuccessfully to persuade the District Court of Appeals of Florida that it was in privity of contract with a consumer plaintiff in an economic loss suit in order to render a disclaimer clause (which complied with all the formal requirements of section 2-316) operative against him. Ford might well have succeeded if its contracts had not been carefully drafted in the traditional manner to avoid this conclusion. Id. at 249.

²⁰³. Precision instruments are designed to achieve an idea, dimensional precision, whose perfection is impossible. There is no perfectly shaped part of the motorcycle and never will be, but when you come as close as those instruments take you, remarkable things happen, and you go flying across the countryside under a power that would be called magic if it were not so completely rational in every way. It's the understanding of this rational intellectual idea that's fundamental. John looks at the motorcycle and he sees steel in various shapes and has negative feelings about these steel shapes and turns off the whole thing. I look at the shapes of the steel now and I see ideas. He thinks I am working on parts. I'm working on concepts.