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Erratum
PAGE 10: invert lines 1 and 2. PAGE 27, F00TNOTE 89: should read Restatement § 402A, comment m. PAGE 48, PARAGRAPH 2, LINE 1: delete "that."

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Strict Tort Theory of Products Liability and the Uniform Commercial Code:  
A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers  

Morris G. Shanker*

The rapidly-expanding area of products liability has witnessed the emergence of two separate bodies of law affecting the right of parties to recover for injuries caused by defective products. Professor Shanker analyzes the interrelationship between the body of law developed under the strict tort doctrine and that developed under Article 2 of the Uniform Commercial Code. He argues that the recent trend toward strict tort threatens to "eclipse" the Code in this area and suggests that the results of the strict tort cases would have been equally attainable under Code principles. The author criticizes the jurisprudential approach of adjudicating claims by "pigeonholing" them into a particular area of law. He urges that "communication barriers" between the legal specialties be broken down and that a single, unified system of products liability law be developed to eliminate the possibility of confusion. As a first step in seeking that goal, he makes specific proposals for changes needed in the Commercial Code.

Strict liability in tort for defective products is now rapidly sweeping the land. The theory was apparently conceived by Professor Prosser who wrote about it in 1960. It was first used as the basis for a judicial decision by the California Supreme Court in 1962. Since then, its acceptance by other courts has been phenomenal, and it has already gained the approval of the second Restatement of Torts. If this trend continues, strict tort will likely be accepted as part of the case law of most of the American jurisdictions in the near future.

During the same time period, there has also been widespread adoption of the Uniform Commercial Code. In January 1962 — the birthdate in California of strict tort liability — the Commercial

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* This article was written in association with Leslie Crocker, an Associate Editor of the Western Reserve Law Review, whose assistance is gratefully acknowledged. Miss Crocker’s initial research in this area and the original draft of her Note, Limitation upon the Remedy of “Strict Tort” Liability for the Manufacture and Sale of Goods — Has the Citadel Been Devastated?, 17 W. RES. L. REV. 300 (1965), served as the springboard for this article. Her critical comments during the preparation of the manuscript were most useful.

1 Distinguish from so-called “strict liability” for defective products based on theories
The Code was effective in only seven jurisdictions. Now it has been adopted as the statutory law of more than forty jurisdictions, and most of the remaining ones are likely to enact it in the near future.

of law other than tort. In particular, distinguish from liability arising from breach of a sales warranty. While many authors and courts have referred to liability arising from a breach of a sales warranty as "strict" liability, it is only since Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 372 P.2d 897, 27 Cal. Rep. 697 (1963), that modern courts have considered it a tort matter. Prior to this case, the courts of the 20th century generally considered the breach of a sales warranty as a contract matter. One of the purposes of this paper is to discuss the implications of shifting from the former contract theory of products liability to a new theory based on strict tort.


3 Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1134 (1960) where he states:

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 contract law of sales; and it is only by some violent pounding and twisting that [sales] "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. It does not arise out of or depend upon any contract, but is imposed by the law, in tort, as a matter of policy.


But see Smyser, Products Liability and the American Law Institute: A Petition for Rehearing, 42 U. Det. L.J. 343, 345-46 (1965), where the author discusses a series of
The case law development of strict tort liability deals with a seller's liability for his defective products. Similarly, the Uniform Commercial Code, particularly Article 2, also has a great deal to say in statutory form about the same subject. Yet the interrelationship between these two bodies of law on products liability — one case law and one statutory law — has been little explored. This is not to say that there has been complete silence on the subject. Quite to the contrary, the Restatement has boldly declared the independence of strict tort liability from any connection with the Uniform Commercial Code and the courts have indicated that they will concur in this declaration. Putting it more precisely, the courts have stated that strict tort liability is not restricted by contract warranty exclusions or any other means authorized by a sales statute whereby a seller may limit his liability for his defective products. Ac-
tually, the specific statute involved usually was the Uniform Sales Act since most of the strict tort cases so far (July 1965) were decided before the Commercial Code was effective in the particular jurisdiction. However, the language used by the courts implies strongly, and at least one court has expressly held, that they will continue with the same approach even after the Commercial Code does become effective in their state.

The courts up to the present time (July, 1965) could have avoided using this language declaring the independence of strict tort from the Commercial Code (as distinct from the Uniform Sales Act) since it is likely that the decisions probably would have been the same if the Uniform Commercial Code had been effective in the particular jurisdiction and if the court had been willing to apply it. As such, it may be that these judicial declarations of independence are in the category of dictum and, therefore, are not binding precedent for future developments under the Uniform Commercial Code.

On the other hand, if the Restatement and the courts really mean what they seem to be saying about the independence of strict tort from the Uniform Commercial Code, then it appears that some sort of jurisprudential eclipse may be taking place. It is an eclipse wherein at least some of the Commercial Code’s statutory rules on products liability are being blotted out and displaced by case law rules of strict tort.

Some legal writings might dispute that such an eclipse is taking place. Instead, these writings suggest that the Commercial Code’s implied warranty is a matter of strict tort liability, not dependent upon a contract between the parties. It arises because the manufacturer or seller, in marketing his goods, assumes such a responsibility toward any consumer or user who in reasonable contemplation might be injured.” Most of this language apparently was inspired by Prosser's writings, supra note 3.


In a case published after this manuscript was prepared, the California Supreme Court has also made it clear that strict tort, where applicable, displaces the parallel rules of the Uniform Commercial Code. Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965). See Addendum for further discussion of this case.

12 See text, section VI, at 23-30 infra.

13 One should distinguish between a jurisprudential eclipse and a legislative repeal. A repeal of a statute takes place when the legislature by official act brings it to an end. In an eclipse, the statute remains unrepealed on the books but is blotted out by what the courts consider a superior body of law covering the same subject. Astronomical eclipses do not last forever and the eclipsed body eventually re-emerges from the shadow. One therefore wonders whether the Uniform Commercial Code will one day also re-emerge from the shadow which has been thrown upon it by strict tort.
statutory rules on products liability are intended primarily to cover only the relationship between the immediate parties to the sale (i.e., the seller and his immediate buyer)\textsuperscript{14} and that, therefore, the Code does not satisfactorily deal with the relationship of the seller to parties remote from his immediate buyer.\textsuperscript{15} These writings then imply that it is to govern this latter relationship that the law of strict tort has been developed. If this is the correct approach, it may negate the idea that the Commercial Code is being eclipsed by strict tort. Instead, it would suggest that two distinct bodies of law have recently emerged in the jurisprudential heavens: (1) the Commercial Code, covering in statutory form the relationship between the seller and his immediate buyer; and (2) strict tort, covering in case law form the relationship between the seller and remote consumers of the product.

If, indeed, this is the correct observation, then apparently a reverse kind of privity has emerged. Prior to the Commercial Code, remote consumers were often denied the benefit of a sales warranty on the theory that they were not in privity of contract with the seller. Most leading tort authorities considered this an obnoxious doctrine and, indeed, the desire to eliminate it was probably the most compelling reason for the invention of strict tort.\textsuperscript{16}

But, under the non-eclipse theory suggested above, those not in privity with the seller (i.e., the remote consumer) will have the

\textsuperscript{14} See Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 383, 205 N.E.2d 92, 98, \textit{motion to certify granted}, 38 OHIO BAR 700 (June 23, 1965) (No. 39493). The recently reported case of Mobberly v. Sears, Roebuck & Co., 4 Ohio App. 2d 126, 130 (1965), seems also to point in this direction.

\textsuperscript{15} Compare Boshkoff, \textit{Some Thoughts About Physical Harm, Disclaimers and Warranties}, 4 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 285, 298 (1962), where he expressed the view that there was "a place for both types of liability because they actually attempt to accomplish different things." It should be noted, however, that Professor Boshkoff was considering this matter under an earlier draft of the \textit{Restatement (Second), Torts} which applied strict tort liability only to those engaged in the business of selling food or other products for intimate bodily use. The final draft of the \textit{Restatement § 402A} goes further and applies to all products so long as the seller is engaged in the business of selling the products. It should also be noted that Boshkoff does not suggest that the dividing line between the two separate systems should depend upon the immediacy or remoteness of the buyer.

\textsuperscript{16} See quotations in notes 3 and 14 \textit{infra}; see also Prosser, \textit{supra} note 9, at 167 where he states: "Furthermore, warranties are governed by the Uniform Sales Act, and today, via the statute which is sweeping over the country, the Uniform Commercial Code; and these statutes were not drawn with the idea of third parties in mind."

\textsuperscript{18} All of the strict tort cases have been concerned with overruling the defense of "lack of privity." See text accompanying notes 72-88 \textit{infra}. In so doing, almost all these cases mention Professor Prosser’s statement, \textit{supra} note 3, that liability can only be in tort once we are beyond the relationship between the immediate buyer and the immediate seller.
limitations respecting a seller's liability. On the other hand, those benefit of strict tort and thereby be freed from the Code's statutory in privity (i.e., the immediate buyer), curiously, would be denied that advantage.

Few authorities, however, seem to seriously accept this non-eclipse theory; namely, that the Commercial Code and strict tort have distinct orbits in the jurisprudential heavens wherein each shines without interfering with the other. Quite to the contrary, the Restatement clearly insists that strict tort rules apply both to immediate and remote parties to the sale.17 The Commercial Code apparently does likewise. At best, the Code's position is that case law beyond the Code may play a part in determining the classes of parties, beyond the immediate buyer, who may also be beneficiaries of a sales contract warranty.18 But once case law has made this determination, that is the end of its function. From that point on, the beneficiary's rights will be governed entirely by the Code's statutory rules, including those authorizing a seller to exclude or to limit his liability. The Code expressly states this to be the rule where the remote parties are family members or household guests of the immediate buyer.19 It is therefore hard to believe that the Code intended a different approach where case law determined that some other classes of remote parties were also to be given the benefit of the sales warranty. Otherwise, the Code would create the anomalous situation that its own statutory beneficiaries (i.e., family members and household guests of the immediate buyer) would have less total protection in products liability matters than a beneficiary developed by case law. The former would be subject to warranty exclusions and contractual limitations of liability authorized by the Code whereas the latter would not.

For the purposes of this paper, it therefore will be assumed that strict tort and the Commercial Code have parallel but competing products liability rules for both immediate and remote parties; and that if the courts are sincere in declaring the independence of strict tort from the Commercial Code, then the necessary effect is that

17 Restatement § 402A, comment l.
18 See Uniform Commercial Code § 2-318, comment 3 [hereinafter cited as UCC]. Citations are to the 1962 official text published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. See also text accompanying notes 72-88 infra.
19 UCC § 2-318, particularly comment 1 which states: "To the extent that the contract of sale contains provisions under which the warranty is excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section."
strict tort rules will displace and eclipse the parallel products liability rules of the Commercial Code.20

The purpose of this article is to explore and comment upon this intersection of the Commercial Code with the case law doctrine of strict tort liability for the sale of defective products. Having done so, it will deplore the fact that there have emerged two separate bodies of products liability law rather than a single, integrated one. It will then make suggestions for changes and clarifications needed in the Uniform Commercial Code if it is to play an important role in future products liability cases. But the main purpose of this article is to register a plea that the courts reject — while they may still do so — any doctrine urging the independence of one body of products liability law from the other. In particular, this article will urge that the law hereafter refrain from placing products liability cases either in a pigeonhole of strict tort or a pigeonhole of the Commercial Code and then declaring that one of these pigeonholes somehow has eclipsed the other. To continue to press a jurisprudence which emphasizes pigeonholes and eclipses is to ignore the lesson of history. It is submitted that such a jurisprudence can only assure continued confusion and injustice in the law of products liability where confusion and injustice have already reigned too long.

I. THE AREA OF THE ECLIPSE

It is important to know the precise overlap between the Commercial Code and strict tort — in other words, to know that common area where both have parallel rules to govern the same particular products liability problem — since it is in this overlap area that

20 If such an eclipse is taking place, then it poses this interesting jurisprudential question: How may a court under our system of law ignore a valid statutory enactment covering a case which is before it? If a statute intends that a seller's liability for his defective products may entirely be excluded or partly limited, how can a court ignore these statutory limitations by developing some kind of superior case law? This question is merely raised at this point, without attempting to propose what may be the final answer. However, it should be noted that most of the writings have generally suggested an answer along these lines: "[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's [seller's] liability to those injured by its defective products." Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rep. 697, 701 (1962). This is a valid criticism of a statute. However, does that by itself permit a court to ignore it?

Nevertheless, it is interesting to note that possible support for this type of answer may be found in UCC § 1-102, comment 1. There, it is suggested that the application of the Code may "be limited to its reason" and that statutory limitations of remedy may be disregarded "where the reason of the limitation did not apply." However, one may appropriately ask whether the reason of the Code's limitations was not intended to apply to the cases which were decided under strict tort?

Perhaps another answer to this question is based on the rigidity and unconscionability of the rules which had developed under the Uniform Sales Act (see text accom-
the case law rules of strict tort are eclipsing and displacing the statutory rules of the Commercial Code.

Strict tort presently claims the right to govern products liability cases arising from defective products sold by a "seller engaged in the business of selling such a product." This looks strikingly similar to what the Commercial Code calls a sale by a merchant "who deals in goods of that kind." It therefore appears that whenever a professional merchant sells his regular products in his normal course of business, we are within the eclipsed area.

At one time, it appeared that this eclipsed area might have gaps through which the Commercial Code might continue to shine. Even though defective goods were sold by a professional merchant who dealt in goods of that kind, suggestions were found that strict tort liability would not be applicable if: (1) the sale involved commercial goods rather than consumer items; (2) the consumer claimed only property damage rather than personal injury; or (3) the consumer claimed damages only for the loss of his sales bargain. How-

panying notes 39-53 infra) thereby permitting an equity court to exercise its historical jurisdiction to fashion new and more equitable remedies. See UNIFORM SALES ACT § 73, and UCC § 1-102. However, one may appropriately ask whether the rigidity found in the Sales Act is necessarily found in the Commercial Code? See text accompanying notes 51-71 infra.

§ 402A(1) (a) 

The quoted language is found in UCC § 2-104. Such merchants have special responsibilities in many areas of a sales transaction. For purposes of this paper, the most important responsibility is that imposed by UCC § 2-314 wherein such merchants may be bound by an implied warranty of merchantability respecting their goods.

See Note, 17 W RES. L. REV. 300 (1965) This view was rejected in Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92, motion to certify granted, 38 OHIO BAR 700 (June 23, 1965) (No. 39493) (involving steel items sold to a commercial buyer) and Suvada v. White Motor Co., 2 UCC Rep. Serv. 762 (Ill. Sup. Ct. 1965), (involving a tractor trailer unit, a commercial product).

Compare Justice Peters separate opinion in Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17, 24 (1965), discussed in Addendum, where he states that only sales to an "ordinary consumer" should be covered by strict tort. This "consumer" view was rejected by the majority in Seely.

See the opinion of District Court of Appeals in Seely v. White Motor Co., 39 Cal. Rep. 805 (1964), aff'd on other grounds, 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965) This approach was rejected in Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 309 (1965) (involving damage to a carpet) and Suvada v. White Motor Co., infra note 23 (involving damage to the purchased tractor-trailer and the bus with which it collided)

Prosser, infra note 9, at 175, states: "The usual rule that for negligence there is no liability for mere pecuniary loss of bargain is apparently carried over into this new [strict] tort." Prosser's view was accepted by the majority of the court in Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965), discussed in Addendum, infra. However, loss of bargain has been allowed in Santor v. A & M Karagheusian, Inc., infra note 24, where the only loss complained of was delivery of an inferior carpet.

For a curious bit of judicial gymnastics, see Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965) which approves both the above Prosser
ever, the most recent strict tort decisions seem to reject these exceptions to its coverage. Thus, the conclusion now seems to be that in any case where a professional merchant sells goods in which he regularly deals, both strict tort and the Commercial Code have overlapping rules to govern the liabilities which may arise. Sales of this kind obviously represent the major portion of the sales in our economy. But, if the strict tort declaration of independence is final, the Commercial Code rules purporting to govern them have been eclipsed.

II. THE AREA BEYOND THE ECLIPSE

The Commercial Code apparently has not been eclipsed in all matters of products liability. Beyond the eclipsed area there yet remains a smaller, but not insignificant, area of products liability cases in which strict tort has not yet claimed the right to govern and in which the Commercial Code remains shining as the sole governing body of law. This non-eclipsed area covers four kinds of sales: (1) sales by non-merchants (i.e., those persons who are not regularly in

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statement and the Santor case although they appear to be diametrically opposed to each other. The plaintiff's damage was only loss of bargain, i.e., delivery of an inferior car. He claimed under three causes of action: one for breach of an express sales warranty, one for breach of implied sales warranties and one for negligence. The defense was lack of privity. The Ohio Supreme Court ruled that an action would be allowed for breach of the express sales warranty despite lack of privity between the auto manufacturer and the ultimate purchaser. In so ruling, the court relied heavily on the Santor case which actually was decided on a theory of strict tort and not one of express sales warranty. Having so ruled, the court then dismissed the plaintiff's cause of action based on negligence (not strict tort) by relying on Dean Prosser's language that loss of bargain may not be recovered in any tort action. It is indeed difficult to see how the Ohio court could rely on Dean Prosser's language in dismissing the negligence cause of action and then rely on the Santor case to sustain the breach of express sales warranty action. To confuse the matter further, the court refused even to consider the cause of action for breach of implied warranty since "there is no need for the law to imply a warranty [of merchantability]" where express warranties are alleged on the same subject matter. Id. at 140, 209 N.E.2d at 588. This case leaves the precise theory of products liability recovery in Ohio somewhat in doubt. Perhaps the doubt will be resolved by the Ohio Supreme Court when it renders its decision in Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92, motion to certify granted, 38 Ohio BAR 700 (June 23, 1965) (No. 39493).

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But see authorities cited note 26 supra. At least so it seemed when the manuscript to this paper was prepared. Since that time there has been reported the case of Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965), discussed in Addendum infra. This case opens the question whether strict tort or the Uniform Commercial Code will govern where the only damages claimed are economic (e.g., loss of profits), due to the delivery of inferior goods. See also the recent article by Chief Justice Traynor, who wrote the majority opinion in Greenman (See discussion note 10 supra) and Seely, where he suggests that the Commercial Code would govern where "commercial satisfaction" was sought, but that strict tort would govern to redress "compensation for physical injury." Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 TENN. L. REV. 363, 374 (1965).

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But see authorities cited note 26 supra.
the business of selling the product which caused the injury), such as a housewife who sells a jar of jelly to her neighbor; (2) sales by professional merchants not involving their regular products, such as a grocer who sells his delivery truck rather than a head of lettuce; (3) sales by professional merchants of their regular goods but not in their regular course of business, such as an execution sale or bulk sale; and (4) sales by professional merchants in which there are given warranties respecting the goods which have nothing to do with their basic safety or merchantability for ordinary purposes. These four kinds of sales undoubtedly represent a significant part — although far from the bulk — of the total sales of this nation. Products liability cases arising from these sales will apparently continue to be governed solely by the Commercial Code.

III. THE EFFECT OF THE ECLIPSE

The advent of the strict tort-Commercial Code eclipse thus has the effect of dividing products liability cases into two categories. The largest category in terms of sales volume covers sales by professional merchants of their regular products which will be governed by the case law of strict tort. The second and smaller category covers all other sales (which may be broken down into the four classes mentioned above) which will be governed by the Commercial Code.

Without regard to the individual merit of the two competing systems of products liability law, few can be happy that the dichotomy has emerged. At the minimum, it will require line-drawing — never a happy or easy process — to determine which of the two bodies of law is to be applied in a particular case. And, even if the dividing line could be easily drawn, that might not necessarily end the problem in a particular case. One can readily imagine a situation where part of the liability might be governed by strict tort and part by the Commercial Code. This might happen where a merchant-seller made express warranties regarding his goods which had nothing to do with their basic safety or merchantability for ordinary purposes — apparently a Commercial Code category. But if

28 RESTATEMENT § 402A, comment f.
29 Strict tort applies only if the seller is engaged in the business of selling the product. RESTATEMENT § 402A(1) (a)
30 RESTATEMENT § 402A, comment f.
31 Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 151, 45 Cal. Rep. 17, 23 (1965) "[Strict tort requires] goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. [The seller] cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." Compare Santor v.
these goods were unsafe in ways not connected with the express warranty, strict tort would undoubtedly insist on the right to govern that part of the liability. As a result, the total losses arising from a single sale might have to be pleaded, proved, and tried partly by one system of products liability law and partly by the other. An example might be where an electrical distributor expressly warranted to a purchaser buying 500 light bulbs that each would burn with a red glow for a period of 2500 hours. The liabilities arising if that express warranty was breached would be governed by the Commercial Code. But if one of the bulbs shattered and injured the buyer, then the liabilities resulting from the injury would undoubtedly be governed by strict tort.

Line-drawing and the difficulties which inevitably flow therefrom are a curse which is probably unavoidable in any legal system. Certainly, a great deal of it would have been required in products liability cases even if the Commercial Code-strict tort eclipse had never taken place. But developing a new system of law which increases the amount of line-drawing and then accentuates the substantive results that follow from the placement of the line is clearly a negative factor which may need to be carefully weighed before the new system is finally accepted.

A further shortcoming in having a dichotomy is the inevitable inconsistency which will develop even on non-substantive matters. Products liability cases covered by strict tort will likely develop one set of rules for pleading, proof, measure of damages, statute of limi-

A & M Karagheusan, Inc., 44 N.J. 52, 207 A.2d 305 (1965) where strict tort was applied when the court apparently felt that the defect in the carpet went to its basic merchantability as an ordinary carpet. This holding was criticized in Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 151, 45 Cal. Rep. 17, 23 (1965). See discussion in Addendum.

32 See note 31 supra and accompanying text.

33 For example, one would still have to determine who is and who is not a merchant for purposes of the implied warranty of merchantability under UCC § 2-314.

34 Those interested in the problems which can develop when one is forced to draw a line between two competing systems of law might gain instruction from examining the materials in the financing field. As matters now stand, one set of financing rules exists for a chattel and another set for a fixture. Havoc is raised because of the difficulty in drawing the line between a chattel and a fixture. For discussion of the problem, see Coogan, Security Interests In Fixtures Under the Uniform Commercial Code, 75 HARV. L. REV. 1319 (1962). For a proposal to integrate the two separate systems to reduce the problems involved, see Shanker, An Integrated Financing System for Purchase Money Collateral, 73 YALE L.J. 788 (1964). Is it not likely that the same kind of difficulties will arise in the products liability field by reason of the fact that one will have to draw the line between Commercial Code coverage and strict tort coverage? For a graphic example of how judges can disagree on where to draw this line, see discussion in Addendum of Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965).
tations, etc. which are likely to be quite different than those for cases governed by the Commercial Code. It is predictable that no sound policy reason will exist for the differences in at least some of the parallel rules. Instead, the differences will arise merely because they grew from different systems — one based on tort, and the other on statute.

Not only are there likely to develop inconsistencies between the two systems, but within the strict tort system internal inconsistencies will likely arise merely because its growth must depend on a case to case development in 50 separate jurisdictions. Under a case law development, each strict tort decision may decide only the peculiar problem before the court. In so doing, the court’s viewpoint is necessarily a narrow one and it is understandable, although regrettable, if the court loses sight of overall objectives, or if different courts view the overall objectives from different points of view.

The above suggests that a single, unified and internally consistent system covering the entire field of products liability would have been preferable to the dual systems which are now emerging. Certainly, a code — just because it is a code and just because it is drafted through the legislative process — is more likely to accomplish this objective than can a system developed by individual cases. Uniformity among the states — another highly desirable

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35 The writings are replete with the many problems which have yet to be solved by the courts in the strict tort field. See, e.g., Keeton, Products Liability — The Nature and Extent of Strict Liability, 1964 U. ILL. L.F. 693, 697; Prosser, supra note 9. For a particularly perceptive article on the many unresolved questions of what constitutes a defective product, see Traynor, supra note 27.

36 In Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), the court imposed strict tort liability only upon the assembler of the component part and refused to impose it upon the manufacturer of that part. The court stated that adequate protection was provided for the injured party by casting liability on the assembler which put the completed product into the market. It seems highly doubtful that all strict tort courts would have reached the same conclusion on comparable facts. For example, see Suvada v. White Motor Co., 2 UCC Rep. Serv. 762 (Ill. Sup. Ct. 1965), where the manufacturer of the defective component part (Westinghouse Automatic Airbrake Co.) and the company which assembled it into the truck (White Motor Co.) were both held liable in strict tort. The Restatement has refused to take a position on this question. See RESTATEMENT § 402A, comment p. See also Prosser, supra note 9, at 173, who “conceived all sorts of difficulties here in the way of holding the [original] manufacturer.” and pointed out that these are among “the questions that have to be worked out.” Another example of this point is seen in Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 151, 45 Cal. Rep. 17, 23 (1965), discussed in Addendum, supra, where the California court expressly disagreed with the New Jersey court as to whether strict tort was even applicable where only economic losses were involved.

37 For an excellent discussion on the advantages and disadvantages of a code approach as compared to a case law approach to the solution of matters in the commercial arena,
objective in the products liability area — is also more likely to be accomplished by a code.

IV. THE LESSON OF THE ECLIPSE
THE DUTY TO COMMUNICATE

Strict tort is heralded as the great tort reform of recent years. Similarly, the Commercial Code is heralded as the great reform in the law of sales. Where the two intersected in the products liability area, it is regrettable that the leaders of these two legal reform movements could not or did not effectively communicate and work together to bring forth a single, unified system embodying the best ideas from both. Instead, it was apparently deemed sufficient to propose reform solely within the framework of one of the pigeonholes, almost as if the other did not exist. Certainly, more was involved here than just a "tort" problem or a "commercial law"

see Patterson & Schlesinger, Problems of Codification of Commercial Law, 1 NEW YORK LAW REVISION COMMISSION STUDY OF THE UNIFORM COMMERCIAL CODE, Legislative Doc. No. 65A, at 31 (1955) who state: "The balance of the arguments which can be derived from jurisprudential and comparative study is in favor of careful and imaginative codification of all or the major portions of commercial law. A code will not eliminate all questions of doubt, but if well drafted it will confine the areas of doubt to the less frequent and more extraordinary situations. If widely adopted, uniformly construed and protected from non-uniform amendments, a well-drafted uniform Commercial Code will be a step forward in the development of American law. The balance of arguments favors a well drafted Commercial Code as a unit, because simultaneous enactment of the juxtaposed articles means that they must be drafted and considered together, which will minimize the danger of contradictions and inconsistencies between the various articles." Id. at 125. Certainly the same can be said about the many facets and problems which arise in products liability litigation.

See also dissenting opinion by Judge Burke in Goldberg v. Kollsman Instrument Corp., supra note 36, at 437, 191 N.E.2d at 83, 240 N.Y.S. 2d at 595, who also felt that the legislative process was far more competent to resolve the problems posed by the strict tort cases than was the judicial process. To the same effect is Smyser, supra note 5, at 551. It should be noted that Judge Burke and Mr. Smyser were primarily concerned with whether or not liability should even be imposed on the defendants who were not in privity with the seller. The author of this article has little doubt that liability is properly imposed upon a seller who places defective goods in the stream of commerce. The author's thesis merely is that consistent and integrated rules for determining that liability can better be achieved by a legislative process in drafting a code rather than by individual court decisions. See also text accompanying notes 116-20 infra for a suggestion that the Permanent Editorial Board of the Commercial Code consider amending the Code to bring forth a completely integrated and unified law on all aspects of product liability.

88The following language is typical: "[This new approach] is not a [sales] warranty of the seller to the buyer at all, but it is something separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties; and which makes for strict liability in tort." Prosser, supra note 9, at 168. Compare Keeton, supra note 35, at 697, who seems to be willing to take a much broader approach in calling upon other areas of law in fashioning this new development in products liability law. For a further discussion of "pigeonhole" jurisprudence, see text accompanying notes 107-15 infra.
problem. Rather, the law of products liability was involved and its improvement might have and should have been contributed to by both specialties.  

Perhaps, this is the most important lesson to be learned from the strict tort-Commercial Code eclipse; namely, that there is a duty to communicate with each other. Undoubtedly, specialization in the law today is inevitable. But has it reached the point where the specialties have lost touch with and have become unable to communicate effectively with the others? If it has, then individual specialties may flower, but the overall legal system will surely suffer. One begins to wonder whether our specialties have actually become our prisons with walls so high that they are now barriers to meaningful communication between us. Perhaps there is need for an assault on the walls which now seem to surround each specialty. Perhaps, each specialty needs to lessen its commitment to itself and, instead, should be willing to undertake a new commitment to the sound development of law as a whole.

It may have been better if this new and needed reform in the law of products liability had developed other than by a strict tort-Commercial Code eclipse. But since it has, it is pertinent to inquire into the jurisprudential forces, aside from the communication barrier, that brought on the eclipse.

V WHAT BROUGHT ON THE ECLIPSE?

Astronomical eclipses come about because of the gravitational forces which celestial bodies assert on each other. When, by reason of these forces, one celestial body (e.g., the moon) moves between two others (e.g., the sun and the earth), an eclipse takes place. Thus, the astronomical eclipse is in part brought on by the eclipsed body itself. One may therefore wonder whether the jurisprudential forces which caused the strict tort-Commercial Code eclipse may also have stemmed from the eclipsed body itself. One may therefore wonder whether the jurisprudential forces which caused the strict tort-Commercial Code eclipse may also have stemmed from the eclipsed body itself. One may therefore wonder whether the jurisprudential forces which caused the strict tort-Commercial Code eclipse may also have stemmed from the eclipsed body itself.

Rather, it appears that the prime jurisprudential force bringing about the eclipse was the Code's predecessor; namely, the Commercial Code. It seems fair to say that such was not the case. Rather, it appears that the prime jurisprudential force bringing about the eclipse was the Code's predecessor; namely, the now dying Uniform Sales Act and the cases which had been decided thereunder. Too often the results of these cases failed to comport with

89 But so far, the Permanent Editorial Board for the UCC, which is charged with keeping the Code up to date, has refused to become involved, stating that the matter was "controversial and [that] there appears to be no national consensus as to the scope of warranty protection which is proper." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE REP. NO. 2, at 39-40 (1965). It is to be hoped that the Board will reconsider this decision to remain silent. See text accompanying notes 116-120, infra.
a modern day sense of justice. Yet, they apparently were able to perpetuate themselves through the doctrine of stare decisis.

These "unjust" decisions might be roughly divided into four categories: (1) those which denied recovery to a party injured by a defective product simply because he was not in "privity of contract" with the seller; (2) those that denied recovery merely because the injured party had failed to give a reasonable notice to the seller of the defective product; (3) those that denied recovery if the injured party "elected" to waive his damages by an inadvertent or unwitting rescission of the sales contract; and (4) those which permitted a seller, by the sales contract, to exclude entirely or partly to limit the damages which were caused by his defective goods.40

Since the applications of these four doctrines (i.e., privity, notice, rescission, and complete freedom to contract away damages) so often shocked a modern sense of justice, it is not surprising that the courts sought ways to avoid them. Perhaps, the most significant judicial reforms were those decisions that chipped away at the "privity" requirement until it was practically eliminated in many states — even those still operating under the Sales Act — by the early 1960's.41 Relief from the "reasonable notice" doctrine was judicially worked out by liberal interpretations as to what was deemed reasonable.42 Despite the "election" doctrine, some courts found it possible to allow damages even after a rescission.43 And, by strict readings of the contract language or by the use of equitable principles, many courts found ways to refuse to give effect to a seller's unconscionable exclusion of warranties or to his unfair limitation of remedies.44

However, the judicial relief process remained at best a piecemeal affair. The basic doctrines actually remained a part of the jurisprudence of the Uniform Sales Act and too often continued to

40 While not using precisely these same categories, Dean Prosser discusses these doctrines and cites the important cases in Prosser, supra note 3, at 1128-33.


42 See discussion and authorities cited in Prosser, supra note 3, at 1130.

43 Id. at 1131.

44 See discussion and authorities cited in UCC § 2-302, comment 1. See also Note, Disclaimers of Warranty, 77 Harv. L. Rev. 318, 329 (1965).
bring about unfair results. It was not surprising therefore that leading commentators and enlightened judges called for total reform — one which would permit the law of products liability to be rewritten on a clean slate from which the obnoxious doctrines of the Uniform Sales Act had been entirely erased. It was this environment that fathered the invention of strict tort liability and its declaration of independence from the statutory structure of the Uniform Sales Act. If justification was needed for the independence, it was placed on the ground that injuries to the consuming public in the mass marketing economy of the twentieth century could no longer be fairly governed by quaint, technical, and archaic rules of sales contract law which had developed centuries earlier.

It should be noted that the Uniform Sales Act doctrines, which most galled the strict tort authors, stemmed from one basic footing; namely, that a sale is a contract and that all the consequences and liabilities which arise therefrom must be analyzed according to the logic of common law contract principles. Thus, the privity requirement logically flowed from the proposition that only the parties to a contract might have advantage of its benefits. Rescission as a bar to damages stemmed logically from the common law election principle that one cannot have the remedies of the sales contract after he had rescinded it. And, since the parties have complete freedom to write their own contracts, logically they could by agreement, therefore, exclude or limit the liabilities arising from a sale.

The strict tort authors were probably quite correct in assuming that the Uniform Sales Act was, in fact, little more than a codification of the common law of sales contracts as it existed in the late

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45 See discussion by Prosser, supra note 3, at 1128-33.
46 Id. at 1133-34. A list of other commentators is collected in Note, 17 W. RES. L. REV. 300 (1965) See also the list of commentators and articles, supra note 2.
48 See authorities cited notes 3 and 10 supra. See also Keeton, supra note 35, at 696.
49 This "logic" is usually traced to the language of Lord Abinger in the case of Winterbottom v. Wright, 10 M & W 108, 114, 152 Eng. Rep. 402, 405 (Ex. 1842), who stated: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."
50 See WILLISTON, SALES §§ 611-12 (rev. ed. 1948)
51 E.g., Prosser, supra note 3. "[T]he Uniform Sales Act [is] a codification of the common-law rules, which was promulgated in 1906 at a time when there was no such thing as a warranty to any third person." Id. at 1128-29.
nineteenth century. Common law notions, including the complete freedom of contract, were then the vogue and the Uniform Sales Act did little, if anything, to tamper with them.\textsuperscript{53}

What the strict tort authors may have overlooked is that the Commercial Code was drafted under much different premises. Much suggests that the Code drafters were not committed merely to recodifying the common law of sales contracts or even the law of sales contracts as it had developed to the twentieth century under the Uniform Sales Act. Rather, the Code drafters were apparently quite concerned with establishing a sales law which was rid of the old anachronisms and which, instead, made sense in today's modern world.\textsuperscript{64} Interestingly, this approach seems strikingly similar to the ideas expressed by the strict tort authors to justify their development of an entirely new system of products liability law.\textsuperscript{65}

So Article 2, the sales article of the Commercial Code, is much more than an exercise in the logic of common law principles applied to sales contracts.\textsuperscript{66} Indeed, basic common law notions are often rejected outright and replaced by new ones.\textsuperscript{57} When found useful, even doctrines developed beyond the law of contracts were written into Article 2. For example, relief from unconscionable sales agreements — probably originally an equitable or civil law doctrine — is expressly authorized.\textsuperscript{68} The duty of good faith is made a basic requirement and, where a merchant-seller is involved, that duty is measured by the commercial standards of fair dealing in his trade.\textsuperscript{69} More directly related to products liability matters, sellers are restrained in their contractual power to exclude their

\textsuperscript{52} See HONNOLD, CASES ON SALES FINANCING 3 (2d ed. 1962). See also BOGERT, BRITTON & HAWKLAND, CASES ON SALES AND SECURITY 1 (4th ed. 1962), stating that the Uniform Sales Act actually codified the sales law of the seventeenth and eighteenth centuries.

\textsuperscript{53} The authors, supra note 52, point out that the Uniform Sales Act follows closely the substance and the wording of the English Sales of Goods Act; that act was based on the advice of Parliament that it should reproduce as exactly as possible the existing law.

\textsuperscript{64} Noted by HONNOLD, op. cit. supra note 52, at 5, and by BOGERT, BRITTON & HAWKLAND, op. cit. supra note 52, at 3. See also NEW YORK LAW REVISION COMMISSION STUDY OF THE UNIFORM COMMERCIAL CODE, Legislative Doc. No. 65, at 11, 25 (1956).

\textsuperscript{65} See note 48 supra and accompanying text.

\textsuperscript{57} The rules found in UCC §§ 2-201 to 2-210 dealing with the form, formation, and modification of a sales contract are perhaps the most startling. However, there are many other areas where common law approaches were rejected.

\textsuperscript{66} UCC § 2-302.

\textsuperscript{69} UCC §§ 1-208, 2-103.
warranties\textsuperscript{60} or to limit the remedies available for breach thereof.\textsuperscript{61} The implied warranty of merchantability is completely rewritten and updated\textsuperscript{62} and no longer depends on whether the goods were sold by description.\textsuperscript{63} If a description of goods is actually given, then it becomes an express warranty\textsuperscript{64} which cannot be negated.\textsuperscript{65} The privity requirement is expressly eliminated where family members or household guests are injured\textsuperscript{66} and case law is expressly authorized to develop other classes of beneficiaries who may take advantage of a sales warranty.\textsuperscript{67} The obnoxious election doctrine which permitted an injured party to lose his damages by reason of a "rescission" is eliminated.\textsuperscript{68}

Other examples might be cited but the above demonstrates that the Commercial Code's approach to sales law was a far different one than that of the Uniform Sales Act.\textsuperscript{69} Perpetuating the common law logic of contracts and its concomitant doctrines about the unrestrained freedom to contract was not the Code's only concern. Sensible commercial practice and fair dealing with consumers were also important objectives.

Academically, it is therefore regrettable that the first strict tort cases were decided in jurisdictions where the Commercial Code was not yet effective.\textsuperscript{70} It is also regrettable that the authors of strict tort liability apparently assumed that the Commercial Code was

\textsuperscript{60} UCC § 2-316.
\textsuperscript{61} UCC § 2-719.
\textsuperscript{62} UCC § 2-314.
\textsuperscript{63} UNIFORM SALES ACT § 15(2).
\textsuperscript{64} UCC § 2-313(1)(b).
\textsuperscript{65} UCC § 2-313, comment 4; UCC § 2-316(1) For further discussion on this point, see note 124 infra.
\textsuperscript{66} UCC § 2-318.
\textsuperscript{67} UCC § 2-318, comment 3. But see McCurdy, Warranty Privity in Sales of Goods, 1 HOUSTON L. REV. 201 (1964), who finds it regrettable that the Commercial Code did not codify more completely those who were to be the beneficiaries of the sales warranty rather than leaving this to judicial development.
\textsuperscript{68} UCC § 2-703, comment 1. "This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach." See also UCC § 2-720 which prohibits loss of a remedy by inadvertent expressions of "cancellation or rescission."
\textsuperscript{69} Compare McCurdy, supra note 67, who quickly looks at various sections of the Uniform Commercial Code and finds them not unlike the Uniform Sales Act.
\textsuperscript{70} The first case, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rep. 697 (1963), was decided in California in January, 1963, two years before the Commercial Code became effective. It should also be noted that the California version of the Code contains a number of deviations from the uniform text. Perhaps the most important of these deviations from a products liability point of view is the deletion of the unconscionable section of UCC § 2-302 and the beneficiary warranty section of UCC § 2-318. As such, California may be more in need of the strict tort
cursed with the same defects which they had found in the Uniform Sales Act and, therefore, apparently equated the two when declaring the independence of strict tort liability from any statutory ties.\footnote{For example, see Prosser, The Assault Upon The Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1128 (1960), where he points out the defects in the Uniform Sales Act and then calls for the strict tort doctrine which would be free of it. He mentions the Uniform Commercial Code in only a single sentence on page 1129 for the purpose of indicating the warranty beneficiary section of UCC § 2-318. Beyond this, Professor Prosser fails to determine whether the same objections to the Sales Act were necessarily found in the Commercial Code. Rather, he simply concludes that the new liability "does not arise out of or depend upon any contract, but is imposed by the law, in tort as a matter of policy." Id. at 1134. See also Prosser, Spectacular Change: Products Liability in General, 36 CLEVELAND B.AJ. 167 (1965), where after criticizing the Uniform Sales Act, he then curiously concludes that strict tort should therefore have no connection with the Uniform Commercial Code.}

It is intriguing to speculate how the strict tort cases might have come out if they had been determined solely with reference to the Commercial Code. Indeed, the next section of this paper will embark upon this speculative journey. The conclusion is probably predictable: each of the strict tort cases decided so far (July, 1965) would probably have been decided exactly the same way under the Commercial Code. If this conclusion is correct, one cannot help but wonder whether the declaration of independence of strict tort liability from the Commercial Code — as distinct from the Uniform Sales Act — was necessary or wise.

VI. A JOURNEY INTO SPECULATION HOW THE STRICT TORT CASES MIGHT HAVE COME OUT UNDER THE UNIFORM COMMERCIAL CODE

The strict tort cases decided so far (July, 1965) have raised one of three questions: (1) whether "lack of privity" of contract may be asserted as a defense to a seller's liability for his defective prod-
ucts; (2) whether "notice" of the defect in the goods must be given by an injured party to perfect his rights against the seller, and if so, when must the notice be given; and (3) whether a seller who gives a warranty respecting the quality of the goods may then limit the remedy available to a party injured by reason of a breach of that warranty. Each of these questions will be discussed separately.

A. Lack of Privity

The defense of "lack of privity" of contract has been raised and rejected in every one of the cases so far decided (July, 1965) under the strict tort theory. Indeed, a primary reason for the invention of strict tort was the desire to eliminate "lack of privity" as a valid defense in products liability cases. So far (July, 1965), the classes of parties, injured by a defective product, who were not in direct privity with the defendant-seller but who have nonetheless prevailed against him by reason of a court adopting a theory of strict tort have included: (1) members of the household of the buyer of the defective product;72 (2) buyers remote from the defendant-seller but still within the marketing chain;78 (3) employees of the buyer of the defective product;74 (4) a lessee of the defective product;76 (5) an employee of a lessee of the defective product;78 and (6) a passenger in a plane in which the defective product was installed.77

The decisions in favor of these classes of plaintiffs certainly comport with a modern day sense of justice. However, as previously stated, it seems likely that the same decisions could have been reached by the same courts applying the Uniform Commercial Code. In section 2-318 of the Commercial Code, the defense of lack of privity is expressly prohibited where the injured party is a member of the buyer's family or household or is a guest in his home and

75 Putman v. Erie City Mfg., Co., 338 F.2d 911 (5th Cir. 1964)
might be expected to use, consume, or be affected by the defective goods. This statutory language would certainly have protected the injured parties in class 1 above. As to other persons remote from the seller, the Code remains neutral. However, official comment 2 to section 2-318 states that the Code is not intended to "enlarge or restrict the developing case law on the subject." Under this approach, the strict tort courts undoubtedly could have protected the injured parties mentioned in classes 2 through 6 if they so desired. While the Rhode Island court, for reasons of its own, has refused to do so, it significantly pointed out that Code section 2-318 would not prevent other courts from continuing to eliminate the privity requirement as to new classes of persons if "their developing case law has been proceeding in such direction."

It has been suggested that the Commercial Code restricts the permissible development of new case law beneficiaries who may take free of the "lack of privity" defense only to those who actually buy the goods somewhere in the distributive chain, but that case law is prohibited from protecting non-purchasers who are injured by a defective product unless his host or a member of his household had first purchased it. If these suggestions were correct, then the parties mentioned in classes 3 through 6 could not be relieved of the privity defense in Code states.

These suggestions are based on the language of comment 3 of section 2-318 which uses the words "distributive chain" in discussing the extent of the permissible case law development. It is sub-

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78 UCC § 2-318: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

79 UCC § 2-318, comment 3: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."


81 The court felt that the Rhode Island legislature had impliedly consented to its previous decisions which had refused to extend the classes of beneficiaries of a sales warranty. Id. at 48.

82 Id. at 50.

83 Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92, motion to certify granted, 38 OHIO BAR 700 (June 23, 1965) (No. 39493); Miller v. Priz, 2 UCC Rep. Serv. 88 (Pa. C.P. 1965) (now on appeal to the Pa. Sup. Ct., Ibid.). While the Lonzrick case seems to suggest that the UCC is available only where the parties are in privity, this view seems particularly startling in Ohio which has been rather liberal in eliminating the privity defense under the Sales Act. See Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
mitted, however, that such an interpretation is far too strict and rigid and deprives the comment of its intended meaning. The dominant theme of the comment deals with the neutrality of the Code and the power of the courts to add new case law beneficiaries as they see fit. The language dealing with the "distributive chain" seems more of an illustration of one of the situations where statutory neutrality was intended and where case law might be operative. It seems rather strained, however, to say that the "distributive chain" situation was meant to be the exclusive situation where case law might operate under the Code. In a case involving such an injured party out of the distributive chain, the Michigan Supreme Court, relying only on its prior Sales Act decisions, held that lack of privity was not a defense. If such a result could be reached under the Sales Act, which contained no express authority whatsoever to eliminate the "privity" defense, certainly nothing less could be expected under the Commercial Code. And, indeed, a federal court in Pennsylvania, operating under the Commercial Code, found it possible to do so. Similarly, a Connecticut court has also apparently given approval to this approach under the Uniform Commercial Code. It

84 Piercefield v. Remington Arms, Co., 375 Mich. 85, 133 N.W.2d 129 (1965). In the Piercefield case, the defective product had, in fact, been purchased by the bystander's brother. However, no claim was made that the plaintiff's rights derived from any relationship between him and his brother. For purposes of the decision, the court treated the injured party and his brother as complete strangers. 133 N.W.2d at 135.

85 Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961). There, plaintiff was a guest passenger in an automobile who suffered injuries when the acceleration pedal of the automobile stuck, resulting in a collision. The court held that plaintiff was not precluded from suing in breach of warranty, as the UCC § 2-318 and comment 3 left it to the courts to decide whether privity was necessary in this kind of situation. The court relied heavily on Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) as stating "unequivocally that the requirement of privity in warranty cases had been obliterated from Pennsylvania law." Thompson v. Reedman, supra at 123. That this statement may not represent an accurate view of Pennsylvania law is apparent from an examination of Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963). There, the Pennsylvania Supreme Court denied recovery to an employee who had been injured by an exploding bottle, since he was not a party to the transaction involved and did not fall within the express statutory exceptions of § 2-318 of the UCC. The impact of the Hochgertel case was lessened, however, in Yentzer v. Taylor Wine Co., 414 Pa. 272, 199 A.2d 463 (1964), which extended a seller's implied warranty to include an employee of the purchaser, where the employee had purchased the product himself. See also Miller v. Priz, 2 UCC Rep. Serv. 88 (Pa. C.P. 1965) where a Pennsylvania trial court refused to eliminate the privity defense where the injured party was a nephew who did not live in the purchaser's household. This case is on appeal to the Pennsylvania Supreme Court. Ibid.

86 In Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963), the court allowed a gasoline station employee to maintain an action for breach of warranty against the manufacturer of the defective automobile, despite lack of privity of contract, citing UCC § 2-318.
thus seems clear that Commercial Code courts, if they wish to do so, may eliminate the privity requirement as to all non-purchasers, even those outside the distributive chain.

Indeed, it is hard to fathom why the Commercial Code courts should be denied this power. It appears most incongruous that the Code should permit a court to eliminate privity—a contract idea—within the distributive chain, where the injured party was a party to some contract of purchase respecting the goods, but then should be denied that power as to non-purchasers of the goods who never were involved in any sales contract at all. Moreover, the actual statutory language of the Code expressly protects household members and guests (who equally are non-purchasers of the defective goods) just so long as they may be expected to "use, consume, or be affected by the goods." It is therefore hard to understand what Code policy might be furthered by prohibiting the courts from granting equal protection to other persons outside the distributive chain who do not buy the goods, but who equally may be expected to "use, consume, or be affected by [them]."

Certainly, it is fair to say that nothing in the Commercial Code, its Comments, or the cases decided thereunder, clearly prohibits the courts from going as far as they wish in eliminating the defense of "lack of privity." Considering how vociferously the strict tort courts have attacked that defense, it is hard to believe that they would have had much trouble with it if they were applying the Commercial Code.

B. Notice

Under the strict tort theory, the duty of an injured party to give notice to the seller of any defects in the goods is eliminated. On the other hand, Code section 2-607 requires such notice from the buyer "within a reasonable time after he discovered or should have discovered the defects." However, Comment 5 to section 2-607 makes clear that the "notice" requirement applies only to the immediate buyer and does not apply to remote parties injured by the goods. Since all the strict tort cases have involved plaintiffs who were remote parties, it seems unlikely that any of them would have

87 UCC § 2-318.
88 Ibid.
89 RESTATEMENT, comment m.
90 UCC § 2-607.
91 See cases cited notes 72-77 supra and accompanying text.
been denied recovery under the Code's statutory rules requiring the giving of notice.

But the Code's statutory requirements of notice are not the whole story. One needs also to consider the impact of the Code's comments which suggest that remote parties may have a duty beyond the statute, of notification based on "good faith." But, even under this non-statutory "good faith" approach, the comments make clear that the "reasonable" time within which the notice is required is to be liberally construed, particularly where a lay consumer is involved. According to the comments, the purpose of this notice requirement is "to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." Furthermore, the comments make a point of mentioning that the good faith duty of a remote party to notify arises only at the point where "he has had time to become aware of the legal situation." This almost suggests that the lay consumer need notify only when he becomes legally aware that the notification is required. Typically, this would be after he had retained an attorney. Indeed, it is probable that the usual attorney's demand would, under normal circumstances, satisfy this "good faith" duty of notification.

Under these liberal views, it seems unlikely that any of the plaintiffs in the two strict tort cases where lack of notice was raised as a defense would have been deprived of their remedy if the Commercial Code had been applied. In one of these cases, Santor v. A & M Karagueusan, the facts showed that the buyer, a lay consumer, notified the remote defendant-manufacturer as soon as he could ascertain the manufacturer's name and location. He had previously complained to the dealer, soon after his purchase, but had received no satisfaction. These facts would seem sufficient to satisfy whatever good faith requirement is imposed on lay consumers by the comments to the Code. Moreover, the remote defendant-manufacturer actually responded to the notice and sought to work out an adjustment, thereby, in all probability, waiving any claim to improper or late notice.

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\(^{92}\) UCC § 2-607, comment 5.  
\(^{93}\) UCC § 2-607, comments 4 and 5.  
\(^{94}\) UCC § 2-607, comment 5.  
\(^{95}\) This almost seems designed to meet Professor Prosser's criticism of the notice requirement under the Uniform Sales Act that lay consumers become aware of the notice requirement only after they are legally involved. Prosser, The Assault Upon The Citadel. (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1130 (1965)  
\(^{96}\) 44 N.J. 52, 207 A.2d 305 (1965)
In the other case, *Greenman v. Yuba Power Products*, the notice to the remote manufacturer was delayed for about ten and one-half months. However, it appears to have been given at the time that the lay consumer first became aware of a legal necessity for giving it, which, again, would apparently satisfy the good faith test laid down by the UCC comments.

In summary, no notice is required under the Uniform Commercial Code's statutory rules from a remote party who is injured by the goods. The comments suggest a non-statutory "good faith" duty of notification of injury, but point out that this is to be liberally construed in favor of the injured party. It therefore seems likely that the liberal view adopted by the two strict tort cases where notice was an issue would not, under their facts, have been frustrated by the Commercial Code.

### C. Limitation of Remedy

*Vandermark v. Ford Motor Co.* appears to be the only strict tort decision in which limitation of remedy has been raised as a serious issue. In that case, the dealer sold an automobile — a consumer item — to the plaintiff. In the sales contract, the dealer expressly warranted the automobile from all defects in material and workmanship for a period of ninety days or 4,000 miles, whichever came first. The contract then provided that the exclusive remedy for breach of this warranty was to be replacement of parts. Based on this contract, the dealer claimed it could not be held liable in damages for personal injuries even though the accident had occurred within the warranty period.

The court refused to consider the defense, stating that it was proceeding in strict tort and that, therefore, contractual restrictions of liability were immaterial. That same conclusion could easily have been reached under the Uniform Commercial Code.

Under the Code, one may have the right to exclude warranties entirely. However, once a warranty is actually given, the power to limit the remedies for a breach thereof is severely restrained. In particular, any attempt to limit "consequential damages for injury to the person in the case of consumer goods is prima facie un-

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99 UCC §§ 2-316, 2-719. See text accompanying notes 131-37 infra.
100 UCC § 2-719.
conscionable." This precisely encompasses the facts of the Van-dermark case. A consumer item (an automobile) was involved and a warranty had been given that the automobile would be without defects for 4,000 miles or ninety days. This warranty was breached in that the car did not operate without defects for 4,000 miles or ninety days. As a result, there were serious personal injuries. Therefore, under the Commercial Code, the contractual attempt to limit the remedy to a replacement of the defective parts to the exclusion of the recovery of damages for personal injury was prima facie unconscionable. As such, the plaintiff under the Code could have ignored the contractual limitation and could have proceeded to collect the damages for his injuries. Indeed, this very result was reached on comparable facts by the New Jersey court in Henningsen v. Bloomfield Motors, Inc. In so doing, the court relied heavily on the ideas found in the Commercial Code, even though it was not then a part of the law of New Jersey.

VII. WHERE STRICT TORT MAY MAKE A DIFFERENCE

From the above discussion, it might appear that products liability based on a strict tort theory has really added little to the legal universe. Conceding that each of the judgments rendered in the strict tort cases comport to a sense of modern day justice and are to be applauded, it appears that the same judgments might have been rendered by the same court proceeding under the Uniform Commercial Code. This, then, raises the intriguing question whether the specific judgment rendered under a theory of strict tort would ever be different from one rendered under the Commercial Code. If not, the strict tort-Commercial Code eclipse might be academically interesting. It might even change the method by which litigants hereafter should go about pleading and proving their products liability cases. However, the strict tort theory would not change the substantive judgments which the litigant might otherwise have obtained under the Uniform Commercial Code.

101 UCC § 2-719(3).

102 32 N.J. 358, 161 A.2d 69 (1960) There, Mrs. Henningsen purchased an automobile under a sales contract which contained a disclaimer limiting the buyer's remedies to a replacement of defective parts. Mrs. Henningsen was injured when the car went out of control because of a defective steering mechanism.

103 Thus, although the case was decided under the Uniform Sales Act and not the Uniform Commercial Code, the Henningsen court employed the UCC's concept of unconscionability to vitiate the disclaimer. Relevant factors establishing unconscionability were the adhesive nature of the disclaimer and the "gross inequality of bargaining position occupied by the consumer in the automobile industry." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 391, 161 A.2d 69, 87 (1960)
It is likely, however, that the strict tort-Commercial Code eclipse is more than an academic matter. Cases can and will apparently arise where the actual judgment rendered will be different if a strict tort theory rather than a Commercial Code theory is employed.

As has been pointed out, the strict tort cases decided so far (July, 1965) have been concerned with only three questions: (1) lack of privity; (2) lack of reasonable notice; or (3) a contractual attempt to limit the remedies for a breach of sales warranty. The above discussion demonstrates that these kinds of problems will probably be decided the same way regardless of whether one proceeds under a theory of strict tort or under the Uniform Commercial Code.

But there are other kinds of products liability problems which as yet have not been squarely faced by a strict tort court. Perhaps the most important of these will involve a variation of question 3. It is the case where the seller does more than just limit the remedies available for the breach of a sales warranty which he has given and which at once brings into play the rules on unconscionability set out in section 2-719. Rather than merely limiting the remedy for the breach of a warranty which was given, the seller, instead, seeks by contract to exclude all warranties from the sale entirely. Under the Uniform Commercial Code, complete exclusion of warranties in a conscionable fashion is apparently authorized. It is extremely questionable whether such exclusions will be permitted under strict tort.

The two opposing opinions written in the case of Hypothetical

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104 See text, section VI, at 23-30 supra.

105 See UCC § 2-316, comments 2 and 3; UCC § 2-317, comment 3.

106 The consumer’s cause of action (in strict tort) is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer’s hands.” Restatement, comment m. “It is not a warranty of the seller to the buyer at all, but is something separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties; and which makes for strict liability in tort.” Prosser, Spectacular Change: Products Liability in General, 36 CLEVELAND B.A.J. 167, 168 (1965). (Emphasis added.)

"It may fairly be said that the liability which this section [of the Restatement] would impose is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer and limitation through inconsistencies with express warranties.” Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

"Moreover, this [strict tort] liability could not be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of its responsibility for harm caused by its products.” Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 150, 45 Cal. Rep. 17, 22 (1965).
Scooter Co. v. Nosuch Mfg. Co., etc., shed interesting light on this precise problem. The case was submitted to the courts of the state of Fiction on the following agreed facts.

Nosuch Mfg. Company was in the business of manufacturing grinding wheels for industrial uses. Like other manufacturers, it maintained a research staff which carried on continuing investigations looking toward improvement of the company's products. One of the engineers on the Manufacturing Company's staff was working on a new plastic grinding wheel. Initial experiments suggested that a plastic grinding wheel could do a better job than a traditional grinding wheel, yet could be produced at substantially less cost. The engineer reported the results of his research to a scientific meeting at which representatives of the Hypothetical Scooter Company were present. This report led the Scooter Company to believe that the new plastic grinding wheel might be useful for grinding the component parts of their scooters. Because it would lower production costs, it would also give the Scooter Company a strong competitive position in the scooter market. Accordingly, the Scooter Company approached the Manufacturing Company, seeking to buy a supply of the plastic grinding wheels. The Manufacturing Company pointed out that it had had little experience with the new plastic wheels and no experience whatsoever as to their usefulness for grinding component parts for scooters. Discussions continued which finally led to the signing of a sales contract for a supply of the plastic grinding wheels. In the contract, the Manufacturing Company properly excluded all express and implied warranties in the method authorized by the Uniform Commercial Code which was effective in the state of Fiction.

It turned out that the grinding wheels were wholly unsatisfactory for the Scooter Company's operations. Inevitably, the wheels shattered after a few minutes of service and damaged the component scooter parts. Accordingly, the Scooter Company sued the Manufacturing Company in strict tort for its damages. An employee of Scooter Company who had been injured by the shattering of one of the grinding wheels also filed suit against the Manufacturing Company under a strict tort theory. The two suits were consolidated for trial. The Manufacturing Company then filed motions for summary judgment in which it raised the single issue that it was free of any liability either to the Scooter Company or to its employee by reason of the contractual disclaimer of all warranties. The Manufacturing Company conceded that the employee's lack of privity to the sales
contract was not available as a defense to it by reason of recent decisions from Fiction's Supreme Court.

Judge Alpha and Judge Zede wrote conflicting opinions. Judge Alpha's opinion was favorable to the Scooter Company and to the employee. He conceded that all warranties had been properly excluded under the Uniform Commercial Code. However, he pointed out that contractual exclusions of warranties were not significant where the recovery was sought under a strict tort theory of liability, citing comment m of the *Restatement* and language from other recent strict tort cases. Judge Alpha pointed out that the Manufacturing Company was in the business of selling grinding wheels for which it received a profit. The wheels had been used in the manner contemplated by the parties and had been shown to be defective. Thus, the Manufacturing Company was responsible for the losses resulting therefrom. Even though no negligence was shown, sellers in a mass marketing economy must recognize that some of their products may prove to be defective. As such, sellers are in the better position to meet the resulting losses by adjusting their prices or by carrying products liability insurance than is the consuming public who may suffer the loss. Judge Alpha concluded that the liability was one in tort imposed by law for public policy reasons and therefore could not be avoided or affected by contractual disclaimers.

Judge Zede would have ruled in favor of the Manufacturing Company. He expressed doubts that strict tort liability was intended to cover cases where new products were involved, citing comment k of the *Restatement*. But, in any case, he stated that the courts were not free to ignore the valid legislative enactments found in the Uniform Commercial Code by developing a superior case law theory of strict tort liability. The Manufacturing Company had excluded all of its warranties in the manner authorized by the Commercial Code and there was no suggestion that these exclusions were unconscionable under the circumstances. Quite to the contrary, the bargaining position and the sophistication of the parties appeared to have been quite equal. As such, Judge Zede saw no reason why they should not be permitted by contract to allocate between themselves potential losses arising from the sale and to fashion their purchase price in light thereof. To do otherwise in these purely commercial situations would tend to slow down the flow of new products to the market place. With respect to the injuries to the employee, Judge Zede stated that his redress was under the law relating to the rights of an employee against his employer, such as work-
men's compensation, for maintaining an unsafe place of employment, etc. However, since the Manufacturing Company had properly excluded the warranties for the very purpose of avoiding liability for this kind of injury and since the exclusion was not claimed to be unconscionable, the employee had no redress against the Manufacturing Company.

The Fiction court never rendered a judgment on the merits of this case since it was settled by the parties before the third judge could cast the deciding vote. However, some real court will one day have to make a decision on facts comparable to those in the above case; namely, where a seller contractually excludes his warranties in the manner authorized by the Commercial Code and the circumstances show that the exclusion was not unconscionable. It is predictable that the arguments favoring one decision or another are likely to be those found in the conflicting opinions of Judge Alpha and Judge Zede.

The fundamental disagreement between the competing points of view revolves about the question whether strict tort has eclipsed and displaced the Uniform Commercial Code in the products liability area. Judge Zede doubted this proposition. However, Judge Alpha, citing quotations from the Restatement and from recent strict tort decisions, felt that it had. He saw no need even to consider conscionable contractual exclusions of liability when the plaintiff's theory of suit was in tort. As he saw it, the matter was tort law exclusively and not one which might be affected by contracts authorized by the Uniform Commercial Code.

In assuming this attitude, it is submitted that Judge Alpha — and any court which may choose to accept his thinking — overlooks the real lesson of history.

VIII. THE LESSON OF HISTORY

Much has been written regarding the injustice brought about in products liability cases by reason of the contract strictures in which a sale was bound.\textsuperscript{107} Strict tort has been hailed as the welcome means for breaking those contract chains.\textsuperscript{108} As mentioned earlier, the actual judgment rendered in each of the strict tort cases does indeed comport with a sense of modern day justice and can be applauded.\textsuperscript{109}

\begin{footnotes}
\textsuperscript{107} The leading article remains Prosser, \textit{supra} note 95, at 1128.

\textsuperscript{108} See almost any of the strict tort decisions mentioned in this article or any of the recent writings on the field mentioned in this article.

\textsuperscript{109} See text accompanying note 78 \textit{supra}.
\end{footnotes}
However, it is more difficult to applaud the language of those decisions suggesting that strict tort law alone hereafter is to govern most products liability cases and that the Commercial Code may be ignored.

Surely, the real lesson of history is more than the fact that products liability cases have been bound too long in contract chains forged under the Uniform Sales Act. Rather, is not the real lesson of history found in the folly of assuming that products liability cases must be placed in a particular jurisprudential pigeonhole and then decided entirely within the framework of that theory of law?

During most of the twentieth century, the pigeonhole for products liability cases happened to be contract law, as developed under the Uniform Sales Act. This merely happened to be the pigeonhole being used when the strict tort authors appeared on the scene. However, as has been pointed out elsewhere, warranties arising in sales transactions which give rise to products liability problems were earlier looked upon as tort matters. It was only later that legal thinking removed the sales warranty from the tort pigeonhole and placed it into a contract one. Merely revising the theory of products liability from tort to contract by itself would probably have caused few problems. The real evils came about when the courts made the contract pigeonhole the exclusive one, somehow eclipsing and cutting off all ties which it once had had with the original tort. Not only did this exclusive pigeonhole theory prevent injured parties from claiming recovery under a tort theory, it equally prevented them from turning to other areas of law (e.g., equity) in urging their claims. Once the courts began to view contract as the exclusive pigeonhole for determining all aspects of products liability cases, then the obnoxious doctrines of privity, of one's freedom to contract away all liabilities without equitable restraints, of rescission of the contract barring claims for damages thereunder, etc., were predictable. Each followed logically from the proposition that products liability was completely a matter of contract and that there was no room for tempering it with other theories of law or of public policy.

The contract pigeonhole actually cut both ways. Not only did it cut for the seller to reduce his liability for his defective products, it also could unfairly cut against him to increase his liability. It

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110 This point has been made by many authors and legal authorities. See, e.g., McCurdy, Warranty Privity in Sales of Goods, 1 Houston L. Rev. 201, 202 (1964); Prosser, supra note 95, at 1126.
often became fashionable for a court to point out to a seller that he could not plead tort defenses, such as contributory negligence, in products liability suits instituted against him. Contract was the exclusive pigeonhole and both seller and injured party had difficulty breaking out of its strictures.

The strict tort approach has certainly put an end to the chains of contract. However, are we about to embark on a new journey in products liability law wherein we are bound by the chains of tort? Lord Abinger once wrote of "the most absurd and outrageous consequences" which might arise if pure contract theories were departed from in determining products liability cases. Today we condemn his language. Yet, there are cheers for language suggesting that there is something equally absurd and outrageous in looking beyond strict tort rules to rules of the Commercial Code. Will that language be condemned tomorrow? Should products liability law really be so ready to exchange contract chains for ones now fashioned in tort?

Why must the legal mind look so desperately for an exclusive pigeonhole? Has not the time come to recognize that the business of law is to determine liability between people and not to place their claims in pigeonholes? In determining liability, is it too much to ask of the courts that they consider all relevant legal theories rather than playing a game of logic with only one? If all the relevant factors are to be considered in a products liability case, surely one of them is the conscionable contracts authorized by a valid statute which the parties may have made with each other or with others. Concededly, there are other relevant factors to be considered as well. These include the "tort" duty of sellers to assume certain risks inherent in the manufacture and distribution of their products, the "equitable" considerations against enforcing agreements between parties of unequal bargaining power, the "public policy" considerations of placing an economic loss on a party who can best absorb it.

111 See cases cited in Prosser, supra note 107, at 1147 n.287 However, Prosser points out that more enlightened courts found ways of avoiding this doctrinal straightjacket. See cases cited, id. at n.288. Professor Hawkland also points out that the defense of contributory negligence was often allowed by the courts through the back door by articulating it "in terms of 'lack of due care' or simply by finding that there is no breach, since the injury is caused by the buyer and not by the failure of the warranty." BOGERT, BRITTON & HAWKLAND, CASES ON SALES AND SECURITY 86 (4th ed. 1962).

112 Compare McCurdy, supra note 110, at 211 who states that this language "is not authority for the proposition that a manufacturer is in no case liable to a subbuyer or user in tort where there is a defect known to the manufacturer at the time of delivery or unknown to him but which he could have discovered and corrected by the exercise of due care." (Emphasis added.)
etc. But why should the courts deliberately blind themselves to one or any of these considerations in reaching the final decision. It seems that legal responsibility ought to be determined only after a court seeks to blend together and give consideration to all relevant considerations which are found in the legal universe, regardless of the label with which they once were marked.\textsuperscript{113}

If a blend makes more sense than a pigeonhole in determining legal liability, it is hard to condone the strict tort declarations of independence from the Uniform Commercial Code. If anything, it appears that the drafters of the Commercial Code were far more concerned with this blending process as a method of determining legal liability than were the authors of strict tort liability. As pointed out earlier,\textsuperscript{114} the Code, particularly Article 2, is far more than a codification of contract law. Rather it was intended as a statement of modern day commercial law. Within it are found many rules which were developed outside of the contract arena, such as tort, equity, civil law, etc. Indeed, where deemed necessary for the modern commercial world, entirely new rules were readily fashioned. As a matter of general policy, the Commercial Code continues to welcome the impact of other bodies of law upon it and suggests that they may be freely used to supplement the Code.\textsuperscript{115} Regrettably, less of this blending philosophy is apparent in the present strict tort approach.

What has been said thus far should not be construed as an apology for the Commercial Code nor a statement that the Code has reached the ultimate as the law of products liability. It merely suggests that the drafting approach of the Commercial Code in the products liability area may have started out on a sounder footing. As such, the authors of strict tort might have been a bit more restrained in declaring their independence from it. Nonetheless, the strict tort decisions do point up problems in the Commercial Code to which its Permanent Editorial Board, after full consideration of all points of view, might wish to give attention. Certain clarifications and changes appear to be in order if the Code is in the future to play an important role in products liability cases. These are discussed in the next section.

\textsuperscript{113} See Keeton, Products Liability — The Nature and Extent of Strict Liability, 1964 U. ILL. L.F. 693, 697, who apparently would be sympathetic with this view.

\textsuperscript{114} See text accompanying note 56 supra.

\textsuperscript{115} UCC § 1-103. It should be noted, however, that comparable language found in § 73 of the Uniform Sales Act failed to do much good.
Indeed, it might not be remiss for the Permanent Editorial Board to give attention to the entire products liability area. Products liability litigation often requires consideration of areas of law beyond sales warranty and strict tort. Negligence of the seller is often alleged and this usually raises the question whether the doctrine of *res ipsa loquitur* is applicable.\(^\text{116}\) In addition, there are federal and state statutes, beyond the Commercial Code, governing the quality, packaging, safety, and labeling of various products which often play an important role in this kind of litigation. An integrated and unified products liability law ideally would enclose all of these areas.\(^\text{117}\) If that is not possible, the Commercial Code ought at least to define its precise relationship to the other component areas of products liability law which are not covered by the Code.\(^\text{118}\)

In other situations, the Code drafters have been quite willing to use this pervasive approach. The commercial paper area is a good example. Article 3 is the basic law and is largely an updating of the former Uniform Negotiable Instruments Law. However, Article 3 goes much further and encompasses legal rules affecting commercial paper which had developed beyond the NIL. Thus, the rules dealing with the conversion of commercial paper — formerly a tort matter — were codified at section 3-419. Ideas developed in equity dealing with the right of a payor of commercial paper to recover a payment made under mistake of fact were written into section 3-418, 3-417(1), and 4-207(1) Estoppel rules were codified at section 3-406 and suretyship ideas were incorporated into section 3-606. Even questions of collateral estoppel, normally considered civil procedure items, are codified at section 3-803.

Article 3 then goes on to define its relationship with other areas of law which might affect commercial paper, but which are not written into Article 3. For example, the relationship of Article 3 to the law of security transactions is spelled out in sections


\(^\text{117}\) For an informative article illustrating the many areas of law which might impact on products liability cases, see Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207 (1965).

\(^\text{118}\) The need for this was graphically demonstrated in the recent case of Nelson v. Boulay Bros., 27 Wis. 2d 637, 135 N.W.2d 254 (1965). The court noted that UCC § 2-607 (3) "barred [the buyer] from any remedy" for failure to give proper notice to the seller of a defect in the goods. 135 N.W.2d at 256. (Emphasis added.) The court then raised the question whether this broad language would bar the buyer from proceeding against his seller in negligence as well as under the Commercial Code. However, the court did not find it necessary to determine this question since the Commercial Code was not effective in Wisconsin at the time that the case arose.
3-103 (2) and 9-309. Its relationship with chattel paper is spelled out in Comment 5 of section 9-105; with investment securities at sections 3-103 and 8-102(1)(b), with bank collections and deposits at 3-103(2), with the law of civil liability (tort, contract or otherwise) for failure to accept a draft at Comment 3 of section 3-410.

It should not be thought that the law of commercial paper is the only place where the Code drafters integrated or established the Code’s relationship with all component areas which might impact on a single body of law. Another example is found in Article 9, Secured Transactions. In particular, the relationship of Article 9 secured transactions with federal law of secured transactions is carefully spelled out in section 9-104(a) and Comment 1 thereof. The relationship of Article 9 to real estate law is touched on at sections 9-102(3) and 9-313.

In regard to Article 2, it should be repeated that it has already done a great deal to unify and integrate all component areas of law which might affect a sales transaction. Perhaps, it is now time to extend that process to encompass the entire field of liabilities which emanate because of a sale of defective products. This is an ambitious project but probably a worthwhile one. While the idea deserves hearty approval, it is beyond the scope of this paper to go into it further. Instead, the balance of this paper will be limited to a discussion of changes and clarifications which seem to be needed in the Code’s present sections on sales warranties. Hopefully, these suggestions will be considered when a total re-examination of the entire area of products liability is undertaken.

IX. SUGGESTIONS FOR THE COMMERCIAL CODE

A. The Implied Warranty of Merchantability

(1) How to Exclude It.—The policy underlying strict tort liability for defective products is comparable to the Commercial

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119 See Coogan, Fixtures — Uniformity in Words or in Fact, 113 U. PA. L. REV. 1186 (1964) where it is stated:
The great strength of article nine is derived largely from the willingness of its draftsmen to discard much long established chattel security law which had no support but history and to cast its rules along logical and functional lines. Much of the nonfixture law proved to be sound and is carried over into Article 9; the senseless portions have been dropped. Also dropped were many sensible and fully intelligible rules of particular states which had to give way because they were in conflict with what seemed on balance to be the better rule for uniform adoption. The same policy must now be pursued with the Code’s fixture provisions. Id. at 1197.

120 See text accompanying notes 56 and 114 supra.
Code's policy underlying the implied warranty of merchantability.\textsuperscript{121} Both require that the usual goods sold by a professional merchant in his regular course of business should be fit for the ordinary purposes for which those goods are used. If they are not, then the professional merchant-seller is held responsible for the losses which his defective goods caused.

The point of departure between strict tort and the Commercial Code is on the issue of how and/or whether the professional seller may free himself of this liability. Strict tort will rarely, if ever, permit it.\textsuperscript{122} The Commercial Code may be more liberal in this respect.\textsuperscript{123}

Yet there can be little doubt that the Code drafters felt strongly that professional merchants should not be able easily to rid themselves of the basic responsibility that arises merely because they place their goods in the stream of commerce. As such, a merchant can exclude the implied warranty of merchantability imposed by the Code only: (1) if the word "merchantability" is mentioned in a conspicuous fashion or (2) if the seller uses language stating that the goods are being sold "as is," "with all faults," or some comparable expression.\textsuperscript{124} The obvious purpose of these Code rules is to give

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\textsuperscript{121} "[I]t may fairly be said that the liability which this section \cite{Restatement § 402A} would impose is hardly more than what exists under implied warranty when stripped of contract doctrines etc." Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) See also the separate opinion of Justice Peters in Seely v. White Motor Co., 63 Cal. 2d 145, 156, 45 Cal. Rep. 17, 28 (1965), which suggests that strict tort and the implied warranty of merchantability are co-extensive. See also \textit{Restatement} § 402A, comment \textit{f}, which suggests that the Code implied warranty of merchantability, found at \textit{UCC} § 2-314, is in some respects analogous to the rule of the \textit{Restatement}. But compare Traynor, \textit{The Ways and Meanings of Defective Products and Strict Liability}, 32 \textit{Tenn. L. Rev.} 363, 366 (1965), where it is suggested that strict tort imposes a higher standard than the usual warranty of fitness for ordinary purpose.

\textsuperscript{122} See the language in the various authorities pointing out that the tort liability cannot be disclaimed by contract, \textit{supra} notes 9-11. In particular, see \textit{Restatement} § 402A, comment \textit{m} and opinions in Greeno v. Clark Equip. Co., \textit{supra} note 120, and Seely v. White Motor Co., 63 Cal. 2d 145, 150, 45 Cal. Rep. 17, 22 (1965).

\textsuperscript{123} See \textit{UCC} § 2-316, comment 3. See text accompanying note 131 \textit{infra}.

\textsuperscript{124} \textit{UCC} § 2-316. In considering the means by which the Code limits the ability of a merchant to relieve himself of liability, one should not overlook that any description of the goods becomes an express warranty under \textit{UCC} § 2-313 which cannot be excluded under \textit{UCC} § 2-316. \textit{UCC} § 2-313, comment 4 points out that "the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described; the probability is small that a real price is intended to be exchanged for a pseudo obligation." From this, one could certainly argue that a requirement that the goods must be useful is embraced within this express warranty approach. Thus, if one sells a "truck" then one has expressly warranted that he will deliver a "truck." Certain, it is not hard to argue that this means
timely warning to the buyer that the goods which he is purchasing from his merchant-seller will not be merchantable and that the buyer is assuming all risks with respect to them.\textsuperscript{125}

The trouble with these Code rules is that they are unrealistic. They assume that exclusion language mentioning the word "merchantability" will be effective to forewarn the buyer. In consumer goods situations at least, it is hard to believe that most consumers will be adequately forewarned of anything just because the word "merchantability" is used by his seller in excluding warranties. The word "merchantability" is a word of art. It is fully understood only by the legally sophisticated and it is highly doubtful that it carries the meaning intended to most buyers. Thus, if words on a label or in a sales contract are going to be effective to forewarn buyers of the real legal consequences which arise when the implied warranty of merchantability is excluded, then the words used must carry more impact than does the mere word "merchantability."\textsuperscript{126}

Even where the seller states that the goods are being sold "as is" or "with all faults," this is probably not sufficient. Certainly, most persons buying goods in regular course from a professional merchant assume that the goods will suit some useful purpose and that, at least, they will not subject him to unreasonable risk of harm. In the eyes of many consumers, language such as "as is" or "with all a workable truck and one which will not cause harm. Indeed, such thinking is supported by UCC § 2-719, comment 1, which states that:

\begin{quote}
if the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.
\end{quote}

Arguably, many injuries to consumers might well be redressed under this approach, namely, that the description of the goods gave rise to an express warranty of which the consumer might take advantage. If so, the consumer need not concern himself with whether a comparable implied warranty of merchantability had been excluded, since under UCC § 2-316(1) the exclusion would not operate to deprive the consumer of the benefit of the express warranty by description. A fuller consideration of this idea is beyond the scope of this paper, except to mention that it seems rather similar to the recently developed British doctrine of a fundamental breach of contract which is discussed in Meyer, \textit{Contracts of Adhesion and the Doctrine of Fundamental Breach}, 50 VA. L. REV. 1178, 1187 (1964).

\textsuperscript{125}See UCC § 2-316, comment 1.

\textsuperscript{126}Boshkoff also recognized that the language by which warranties may be excluded under the Code "could not really inform the consumer of what is happening." Boshkoff, \textit{Some Thoughts About Physical Harm, Disclaimers and Warranties}, 4 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 285, 306, n.100 (1962).
faults" probably only suggest that the goods are not top quality, but hardly that the goods may have no usefulness at all and, in fact, may actually be harmful.\textsuperscript{127}

If language alone is going to be sufficient to forewarn the buyer, it should be such that states exactly what the exclusion of implied warranty of merchantability really means. A possibility might be conspicuous language along these lines: "These goods are not fit for the ordinary purposes for which they are normally used and may actually cause you physical harm." It is only language of this sort that will effectively bring home to most consumers the legal effect of the exclusion of a warranty of merchantability; namely, that potentially he is buying a pig in a poke and, in fact, a potentially harmful pig as well.\textsuperscript{128}

The Commercial Code also permits the implied warranty of merchantability to be excluded as to defects which a buyer discovered or might have discovered upon a full examination.\textsuperscript{129} This rule is unfortunate for the same basic reason discussed above. It unrealistically assumes that a buyer will understand that a professional seller has no further responsibility for the goods just because the buyer is aware or should be aware of the defects in them. Perhaps a more sensible approach is one which limits or excludes recovery to the buyer not just because he knows of defects in the goods, but only if he knows that use of the defective goods will likely lead to the harm of which he now complains.\textsuperscript{130} For example, a buyer may be aware that a screw is missing on a machine. He may not have sufficient engineering sophistication to be aware that the machine will fly apart under operation just because of the missing screw. If so, the buyer ought not be denied all recovery for injuries caused him by the flying parts. When one weighs the professional seller's responsibility to supply usable goods against the limited

\textsuperscript{127} See discussion by Keeton, supra note 113, at 694, dealing with consumer frustration when a defective product harms him.

\textsuperscript{128} Boshkoff, supra note 126, seems to suggest a similar approach. This idea may have its first test under the recently enacted Federal Cigarette Labelling and Advertising Act of 1965, 79 Stat. 282 (effective Jan. 1, 1966), wherein all cigarette packages must state that cigarette smoking "may be hazardous to your health." For an interesting discussion suggesting that this statute actually is a victory for the tobacco industry, see 30 CONSUMERS REPORTS 488 (1965).

\textsuperscript{129} UCC § 2-316(3) (b)

\textsuperscript{130} This is the approach apparently adopted by strict tort. In discussing defenses available, the Restatement § 402A, comment n, states that "mere failure to discover the defect is not enough. The defense arises only when there is something akin to assumption of the risk, that is where the consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product." See also Prosser, supra note 95, at 1148.
knowledge of buyer as to the potential consequences of using goods with apparently minor defects, the balance seems to favor the injured party.

(2) The Right to Exclude It.—The strict tort cases actually point up even a more basic question. That question is not how a merchant-seller may exclude his warranty of merchantability, but whether the exclusion should even be permissible. The actual language of the Code suggests that exclusion is probably permissible. On the other hand, strict tort seems to take the position that it is not,\(^{131}\) that public policy and present day marketing conditions make it quite inconsistent for a professional merchant-seller to sell the goods and then refuse to stand behind the losses which come about by reason of their defects.

Under the Code, it is curious that once the warranty is given, the seller may not readily exclude or modify the remedies for a breach thereof. In particular, if the seller seeks by contract to limit damages for personal injuries caused by breach of a warranty, then, the Code declares this to be prima facie unconscionable where consumer goods are involved. On the other hand, a contractual limitation of consequential damages is not prima facie unconscionable where the losses are purely commercial.\(^{132}\)

If prima facie unconscionability can accrue in some situations where a merchant-seller seeks to limit his remedy, it is hard to fathom why the Code did not write a comparable prima facie unconscionability rule where the merchant-seller sought to exclude warranties entirely.

Of course, exclusion of warranties might subject the contract to attack on other grounds: (1) the general unconscionability provisions of section 2-302 which are applicable throughout Article 2\(^{133}\) and (2) the good faith duty of a merchant to observe reasonable commercial standards of fair dealing in this trade.\(^{134}\) Where the exclusion was of the implied warranty of merchantability, the merchant might be particularly vulnerable on these grounds since, in effect, the merchant is seeking to abdicate his basic professional responsibility respecting the quality, usefulness, and safety of his goods.\(^{135}\)

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131 See text accompanying notes 122 and 123 supra.
132 UCC § 2-719.
133 UCC § 2-302.
134 UCC § 2-103.
135 Professor Hawkland would apparently disagree. So long as the formal requis-
Nonetheless, it might be wise for the Code to make equally clear in the warranty exclusion area what it has already made clear in the limitation of remedy area; namely, that at least certain attempts to exclude the implied warranty of merchantability are prima facie unconscionable. Perhaps the same line for determining prima facie unconscionability should be drawn; namely, that exclusions of the implied warranty of merchantability are prima facie unconscionable in the case of consumer goods, but are not necessarily prima facie unconscionable in the case of commercial goods where, assumedly, the buyer and seller are more equal in terms of their sophistication and bargaining power. But even this assumption may be too naive. Certainly, there are many commercial sales where the buyer basically is at the mercy of his seller and has little ability to determine possible defects in the goods or to take appropriate measures to guard against losses which the defects may cause. Sales to small businessmen certainly fall in this category. It is even conceivable that certain sales to large buyers may be in this category if no inspection or testing of the goods by the buyer is expected. For example, even General Motors probably has a right to expect that food purchases for its cafeteria, medical supplies for its first aid room, or sports equipment for its recreation programs, are merchantable.

Perhaps a better approach for declaring an exclusion of the implied warranty of merchantability prima facie unconscionable is one based upon the use to which the goods are put. If in fact they are used for their ordinary purposes, then any attempt to exclude the merchantability warranty should be declared prima facie unconscionable. At first blush this may appear to be no different than
the strict tort approach which imposes strict liability on the professional seller wherever his goods are used in their usual fashion.\textsuperscript{136} However, the suggested amendment to the Code gives flexibility which may not be available under the strict tort cases. The proposal does not entirely prevent a merchant from excluding the warranty of merchantability when his goods are used for their ordinary purposes as may be the case under strict tort. Rather, if the merchant does exclude it, the burden then shifts to him to show that the exclusion was a conscionable one in the particular commercial setting. This at least will leave some leeway to permit justifiable exclusions, such as where new or experimental products are involved, or where a buyer of equal sophistication and bargaining power with the seller is willing to pay a lesser price for the goods in return for assuming the risk that may go with them, etc.\textsuperscript{137}

B. Notice Requirement

Section 2-607 of the Commercial Code requires that a buyer who has accepted goods must give notice to his seller of any defects therein within a reasonable time after the buyer discovers or should have discovered the defects. Failure to give the required notice carries a severe penalty to the buyer; it bars him from any remedy whatsoever against the seller.

Pre-Code decisions had been liberal in finding what was meant by notice within a "reasonable" time.\textsuperscript{138} Obviously, these courts were motivated by a strong desire to protect a buyer, particularly a buyer of consumer goods, from easily losing his remedies. The Code's official comments suggest that this liberality is favored. They also make clear that the statutory duty of notification binds only the immediate buyer and is not to be construed as a penalty or limitation on those beyond the immediate buyer who are injured by the goods. However, the comments suggest that such injured parties may, nonetheless, have a duty of notification beyond the statute

\textsuperscript{136} "To establish the manufacturer's liability it was sufficient that the plaintiff prove that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which the plaintiff was not aware that made the [product] unsafe for its intended use." Greenman v. Yuba Power Prods. Co., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rep. 697, 701 (1963).

\textsuperscript{137} "Commercially, a disclaimer may not be at all an unreasonable thing, particularly where the seller does not know the quality of what he is selling and the buyer is willing to take his chances. Commercial buyers are usually quite able to protect themselves." Prosser, supra note 107, at 1133. To the same effect, see Note, supra note 135, at 327.

\textsuperscript{138} Prosser, supra note 107, at 1130-31 nn.183 & 184. Also see cases cited in 3 WILLISTON, SALES 39, nn.8 & 9 (rev. ed. 1948).
based on "good faith." The Code's approach should be compared to the approach under strict tort where apparently no notice whatsoever need be given either by the immediate buyer or the remote parties.

It seems that both approaches are wrong. If the notice required under the Code— even though liberally construed—is not given, then the injured party loses everything. Under strict tort, no notice is required even though this might demonstrate extreme bad faith on the part of the injured party.

Is not the sensible approach one which recognizes that the question of notice is really one concerning the good faith of the injured party and the prejudice caused to the seller who does not get notice? The question ought not to be whether the notice should or should not be given. The question really ought to be whether or not the injured party exercised good faith in failing to give notice and whether a seller was materially prejudiced by the fact that he did not get notice. Perhaps a wiser statutory rule dealing with notice would encompass the following ideas:

1. It would completely eliminate or markedly reduce the requirement of notice for retail consumers on the ground that their lack of sophistication in commercial matters justifies this dispensation.

2. It would provide that the failure of a commercial party to give reasonable notice may reduce the liability of a seller pro tanto to the extent that the seller can show material prejudice thereby.

C. Privity of Contract

The growing trend of cases under the Uniform Sales Act and the Commercial Code suggest that lack of privity of contract is no defense to a products liability suit. Strict tort completely accepts this thinking. Indeed, the desire to completely kill off "lack of privity" as a defense was probably the strongest force giving rise to the strict tort doctrine. To clear the air, the Commercial Code should now make clear that lack of privity of contract is no longer a defense to a suit grounded on breach of warranty. When this

139 UCC § 2-607, comment 4. See text accompanying notes 92-97 supra.


141 Interestingly, this is the approach used in Article 4 of the Commercial Code when there is failure to give notice within a reasonable time of breach of a transfer or presentment warranty of commercial paper. See UCC § 4-207(4).

142 See text accompanying notes 72-88 supra and cases cited therein.
question was considered by the early Code drafters, they chose to remain neutral except where family members and household guests were injured by the defective goods. Whatever reasons impelled this decision for neutrality when the Code was drafted in the late 1940's and early 1950's, can hardly, in light of the recent products liability decisions, carry much weight today.

X. SUMMARY

The strict tort decisions can be applauded in their result. Each comports with a sense of modern day justice. It is more difficult to applaud their language suggesting that the Uniform Commercial Code has been eclipsed and is to play no further role in large areas of products liability. This jurisprudential eclipse raises the spectre of two competing bodies of products liability law with all the difficulties, inconsistencies and confusion which inevitably will result.

What is needed is a single unified system of products liability law. Probably, it can best be accomplished through a Code approach. It would be well if scholars in both the tort field and the commercial law field communicated with each other in preparing such a Code which hopefully would incorporate the best ideas from both. Should this not be done and if instead there is a continuation of a jurisprudence which emphasizes eclipses and pigeonholes (i.e., the exclusiveness of one body of law from the other), then it is submitted that the confusion and injustice which has so long reigned in the law of products liability will likely continue. This seems to be the real lesson which ought to be learned from the history of products liability.

ADDENDUM

Since the preparation of this article a noteworthy opinion has been rendered by the California Supreme Court in the case of Seely v. White Motor Co. In this opinion, the California Supreme Court, the first court to utilize strict tort as the basis for a judicial decision, became the first court to grapple seriously with the interrelationship of strict tort and the Commercial Code.

143 See UCC § 2-318 and accompanying official comments.
144 See Note, Implied Warranty; Let's Abandon Parity, 16 BAYLOR L. REV. 263 (1964). But compare this with the present official position of the Permanent Editorial Board for the Commercial Code, supra note 39.
The court makes clear that in the areas where strict tort is applicable, it displaces the parallel products liability rules of the Commercial Code.\textsuperscript{147} However, the court had difficulty dealing with the question of whether strict tort, rather than the Commercial Code, was to be applicable in cases involving only economic losses (e.g., loss of profits to a trucking business by reason of a defective truck) The lower court\textsuperscript{148} had ruled that strict tort was limited to claims for personal injuries and could not be used where property damage alone was claimed. The California Supreme Court, in its majority opinion written by Judge Traynor, agreed with the lower court that strict tort is available where personal injury is involved. However, it disagreed with the lower court that strict tort was never available where property damage alone was involved. Instead, the majority took the position that strict tort was available to redress damages arising from actual physical harm to property, but that it was not available for redressing pure economic losses, such as loss of business profits or loss of bargain due to delivery of an inferior product. Such pure economic losses would be governed by the Commercial Code. In so ruling, the majority stated that it had been "inappropriate" for the New Jersey Supreme Court in Santor \textit{v. A&M Karagheusian, Inc.},\textsuperscript{149} to have used a strict tort theory for redressing this kind of damages.

In a separate opinion that Judge Peters sharply dissented from the majority's viewpoint. He forcefully argued that there is no intelligent basis for distinguishing between pure economic losses and losses arising from actual physical harm to property. As he saw it, the dividing line between strict tort and the Commercial Code depended on the purchaser. If the sale was to an "ordinary consumer," strict tort applied without regard to the kind of loss suffered, be it personal injury, physical harm to property, or pure economic loss. However, if a commercial person was involved, then strict tort was not available and all losses suffered by him could be redressed only by the Commercial Code. According to Judge Peters, the rationale for this dichotomy is based on the inferior bargaining position and lack of sophistication of the "ordinary consumer" which justified ignoring the limitations of liability which might be authorized by the Commercial Code for commercial transactions.

\textsuperscript{147} See notes 10, 11 supra and accompanying text.
\textsuperscript{149} 44 N.J. 52, 207 A.2d 305 (1965).
Having made this dichotomy, Judge Peters then stated that a purchaser of a truck to be used in his own individual business was still within the "ordinary consumer" class and therefore entitled to redress under strict tort, although he conceded that this was a "close case."\textsuperscript{150}

The divergent views expressed by the judges in the \textit{Seely} case would seem to support a major thesis propounded in this article, namely, that a consistent products liability law can be better developed by the legislative process rather than through the judicial process.\textsuperscript{151}

\textsuperscript{150} \textit{Seely v. White Motor Co.}, 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rep. 17 (1965).
\textsuperscript{151} See text accompanying note 37 \textit{supra}.