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IS THE ORDINARY CONSUMER LEFT WITH A DAMAGED PRODUCT AND NO REMEDY?

Sharp Brothers Contracting Co. v. American Hoist & Derrick Co.[1]

A 1986 Missouri Supreme Court decision has held that a plaintiff cannot recover on a theory of strict tort liability if the only damage caused by the defective product is to the product itself.[2] While this issue had not been previously addressed in Missouri, earlier case law had intimated an opposite result.[3] This Note will question the soundness of the decision as to its effect on subsequent strict tort liability cases. A short summary of the case and the majority's reasoning will be discussed first.

Sharp Brothers Contracting Company brought suit against the manufacturer of a crane after the crane's counterweight broke and crushed the crane's cab.[4] The jury, on a strict tort liability theory,[5] awarded Sharp Brothers damages for loss of value of the crane and for loss of use of the crane.[6] The court of appeals affirmed the damages for loss of the crane but reversed as to the damages for lost use.[7] The Missouri Supreme Court granted transfer to consider whether the cause should have been determined on a strict tort

1. 703 S.W.2d 901 (Mo. 1986) (en banc).

2. Under a strict tort liability action, the plaintiff has the burden of establishing (1) he was injured by the product, (2) he was injured because the product was defective or otherwise unsafe for his use, and (3) the defect was in the product when sold by the defendant manufacturer. *See* Winters v. Sears, Roebuck and Co., 554 S.W.2d 565, 569-73 (Mo. Ct. App. 1977); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840-41 (1966).

3. Strict liability would be appropriate "for personal injury, including death, or property damage either to property other than the property sold or to the property sold where it was rendered useless by some violent occurrence." Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978) (en banc); *see also* City of Clayton v. Grumman Emergency Prods., 576 F. Supp. 1122, 1125, (E.D. Mo. 1983); Gibson v. Reliable Chevrolet, Inc., 608 S.W.2d 471, 472 (Mo. Ct. App. 1980).

4. *Sharp Bros.*, 703 S.W.2d at 902.

5. The petition had three counts: negligence theory, breach of warranty theory, and strict tort liability theory. On motion by American Hoist (the manufacturer), the trial court dismissed the negligence and warranty counts before trial. *Id.* at 903.

6. Sharp Brothers was awarded $631,000 in damages. *Id.* at 902.

7. The cause was remanded with orders to reduce the award by $263,578.54. *Id.* at 902.

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liability theory.[8] Relying on Dean Keeton, the court concluded that contract law and contract restrictions on warranty liability should control.[9] Therefore, as a matter of policy, recovery under strict tort liability should not be allowed where the only damage is to the product sold.[10]

Because *Sharp Brothers* resulted in damage to the defective product only,[11] the discussion in this Note will focus on "economic loss"[12] and the various approaches and factors used by other jurisdictions.

The majority of jurisdictions do not allow recovery under a strict tort liability theory for pure economic loss.[13] In one of the leading cases, *Seely v. White Motor Company*,[14] Seely purchased a truck that bounced violently due to a defect. Because of alleged brake failure, the truck overturned when Seely was turning a corner.[15] Seely was not personally injured, but the truck

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8. *Id.*

9. "[T]he risk of harm to the product itself due to the condition of the product would seem to be a type of risk that the parties to a purchase and sale contract should be allowed to allocate pursuant to the terms of the contract." *Id.* at 902-03 (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 101(3) (5th ed. 1984) (footnotes omitted)) [hereinafter PROSSER & KEETON].

10. On retransfer back to the court of appeals, Sharp Brothers was barred by the four year statute of limitations on the warranty claim. However, it was found that Sharp Brothers' petition did state a negligence claim, and the case was remanded. Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 714 S.W.2d 919, 922 (Mo. Ct. App. 1986).

11. The three primary types of losses resulting from a defective product are personal injury, damage to property other than the defective product, and damage to the defective product itself. Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355, 363 (N.D. Ohio 1979).

12. Economic loss is the reduction in value of the product because of inferior quality and failure to work in the normal manner for which it was produced and sold. Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?,* 114 U. PA. L. REV. 539, 541 (1966). There are two categories of economic loss: direct and consequential. Direct loss is the cost to repair or replace the damaged product and loss of bargain, and is arrived at by subtracting the value of the defective product from the product's value if properly made. Consequential loss, known as indirect loss, includes lost profits due to the buyer's inability to make normal use of the defective product. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 566, 489 A.2d 660, 665 (1985) (citations omitted).

13. *See* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 285-90 (3d Cir. 1980) (applying Illinois law); Morrow v. New Moon Homes, Inc., 548 P.2d 279, 285-86 (Alaska 1976); Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. 444, ____, 666 P.2d 544, 548 (1983); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 85, 435 N.E.2d 443, 450 (1982); Local Joint Executive Bd., Culinary Workers Union Local 226 v. Stern, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982).

14. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (en banc).

15. *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.

was damaged.[16] Action was brought against the manufacturer[17] seeking damages for the repair of the truck resulting from the accident and for damages unrelated to the accident.[18] Those damages unrelated to the accident included payments previously made on the truck and lost profits due to Seely's inability to use his truck in the normal business manner.[19] The lower court held the manufacturer liable for breach of warranty and entered judgment for Seely on the payments made and for lost profits.[20] The claim for repairs was denied because the lower court found Seely had not proved the bouncing caused the truck to overturn.[21]

The California Supreme Court upheld the manufacturer's liability for breach of warranty by finding the purchase order warranted the truck to be free from defects.[22] Because the court concluded that Seely had relied on this warranty,[23] the statutory requirement had been met and it was immaterial whether Seely was aware that the manufacturer, and not the dealer, was making the warranty.[24] The court disagreed with the contention that breach of warranty had been replaced by strict tort liability.[25] While warranty laws may have prevented deserved compensation for personal injury, the court found they were written to serve the "needs of commercial transactions."[26] The manufacturer is allowed to determine the quality of product promised and the quality he must deliver.[27] The buyer is allowed to "shop around" to find a product which meets his needs.[28] Only if the manufacturer had agreed that the product would satisfy the buyer's needs would the manufac-

16. Repair costs were $5,466.09. *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.

17. Action was also brought against the dealer, Southern Truck Sales. The action against Southern was dismissed without prejudice during the trial. *Id.* at 12-13, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.

18. *Id.* at 13, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.

19. *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.

20. Seely recovered $11,659.44 paid on the truck and $9,240.40 for lost profits. *Id.*

21. *Id.*

22. *Id.*

23. Reliance by Seely was evidenced by his continuous attempts to have the defect cured. The warranty was evidenced by the manufacturer's acceptance of this responsibility. *Id.*

24. *Id.* The statute requires that the warranty "induce the buyer to purchase the goods, and . . . the buyer purchases the goods relying thereon." CAL. COM. CODE § 2313 (West 1964) (amending CAL. CIV. CODE § 1732).

25. Sales law was to govern the economic relationship between buyer and seller while strict tort liability "was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries." Seely v. White Motor Co., 63 Cal. 2d 9, 15, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21, (1965) (en banc).

26. *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

27. *Id.*

28. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.

turer be liable if the product did not meet the buyer's economic expectations.[29] Because Seely's truck was not free from defects as warranted, the court held the manufacturer liable.[30]

However, the court reasoned that had strict tort liability been applied, the manufacturer would have been liable regardless of any agreement that the truck would perform as Seely had expected.[31] Damages of unknown and unlimited scope would result.[32] Imposed liability would not consider what representations were made by the manufacturer.[33] The court feared that if strict tort liability were applied in this case, the manufacturer would be liable not only for the commercial loss suffered by Seely but for all business losses of truck drivers whose trucks failed to meet their specific needs even though the dealer was not aware of those needs.[34]

While the court rejected the application of strict tort liability to alleviate a buyer's frustrated economic expectations,[35] the court agreed it should be extended to cover physical damage to the plaintiff's property as well as physical injury.[36] "Physical injury to property is so akin to personal injury that there is no reason for distinguishing them."[37]

In *Santor v. A and M Karagheusian, Inc.*,[38] Santor brought an action against the manufacturer, Karagheusian, for defective carpeting.[39] The New Jersey Supreme Court held that Santor could recover on a breach of implied warranty theory even though Santor's only damage was the cost of the carpeting.[40] In abandoning the privity requirement, the court found no reason

29. *Id.*

30. *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

31. *Id.* Under a strict tort liability theory, liability cannot be disclaimed since one of its purposes is to prevent a manufacturer from limiting his responsibility. *Id.* at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22 (citing Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (en banc)).

32. *Id.* at 17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23.

33. *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23.

34. *Id.* at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22.

35. The court distinguished types of damage to the defective product. If the product was defective and failed to match a buyer's economic expectations, there would not be strict tort liability recovery. However, if an accident to the product resulted from the defect, the court suggested strict tort liability recovery would be appropriate. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.

36. Because the trial court found no proof that the defect caused the accident, strict tort liability recovery was denied. *Id.*

37. *Id.* (citations omitted).

38. 44 N.J. 52, 207 A.2d 305 (1965).

39. After carpeting had been installed, Santor noticed a line running through it. The dealer assured Santor the lines would "walk out." However, during continued use, the defect increased. *Id.* at 56-57, 207 A.2d at 307.

40. *Id.* at 63, 207 A.2d at 310-11. "Loss of bargain" is the term applied by this court to destruction or diminished value of the product sold. *Id.* at 59, 207 A.2d at 308.

to distinguish cases in which personal injury resulted from a defective product from those in which the injury was a reduction in the product's value.[41] Breach of implied warranty should apply regardless of the resulting injury because the manufacturer put a defective product into the stream of commerce.[42]

After holding that Santor could recover on a breach of implied warranty theory, the court also said that recovery in strict tort liability would have been possible.[43] By placing the product on the market, the manufacturer represents that the product is safe for its intended use.[44] This type of representation is implied because the majority of consumers lack the knowledge or opportunity to determine if a product is defective, and they must rely on the skill and care of the manufacturer.[45] Strict tort liability ensures that manufacturers bear the costs associated with putting a defective product on the market, whether there is personal injury or "damage, either to the goods sold or to other property."[46]

After the broad holding in *Santor* that economic losses were recoverable under a strict tort liability theory,[47] the same court has limited the decision by introducing another factor—the commercial buyer as opposed to the ordinary consumer.[48] In *Spring Motors Distributors v. Ford Motor Company*,[49] a truck dealer brought an action against three commercial defendants to recover damages resulting from defective transmissions.[50] Despite its ruling in *Santor*, the court held that a commercial buyer could not recover for economic losses under a strict tort liability theory.[51] In making this deter-

41. *Id.* at 59, 207 A.2d at 309. The manufacturer argued the removal of the privity requirement only applied to situations where personal injury resulted. *Id.* at 58, 207 A.2d at 308.

42. *Id.* at 59-60, 207 A.2d at 309.

43. *Id.* at 63-64, 207 A.2d at 311.

44. The court stated that "such representation must be regarded as implicit in their presence on the market." *Id.* at 64-65, 207 A.2d at 311 (1965) (citing Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (en banc)).

45. *Id.* at 64, 207 A.2d at 311.

46. *Id.* at 65, 207 A.2d at 312.

47. *Id.* at 66, 207 A.2d at 312.

48. In this Note, "commercial buyer" and "ordinary consumer" are given their common meanings. A commercial buyer is one who purchases goods for use in a business. An ordinary consumer is the "everyday" purchaser who buys goods for the home, car, personal use, etc.

49. 98 N.J. 555, 489 A.2d 660 (1985).

50. Spring Motors sought to recover from the manufacturer, dealer, and supplier of transmissions the costs of towing, replacement parts for repairs, lost profits resulting from cancelled truck leases, and the decrease in value of the trucks. *Id.* at 561, 564, 489 A.2d at 662, 664 (1985).

51. *Id.* at 561, 489 A.2d at 663; *see also* Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 429 (9th Cir. 1979) (applying California law); Avenell

mination, the court applied the policies underlying strict tort liability to the parties involved.[52]

One policy consideration behind strict tort liability is equality of bargaining positions.[53] The court stated "[p]erfect parity is not necessary to a determination that parties have substantially equal bargaining positions," and therefore, Spring Motors was found to have had sufficient bargaining power with Ford to have negotiated for installation of the desired transmissions.[54]

Allocation of risk is another policy consideration. The court determined that Spring Motors was just as able to allocate the risk of loss as the defendants were.[55] The price Spring Motors paid for the trucks was considered in light of the agreement that stated Ford was responsible only for repair or replacement of parts.[56] If the risk of loss had been placed on Ford, Spring Motors would have received a better bargain.[57] Also, it would have caused Ford to increase prices, which would have affected all consumers.[58] Therefore, the allocation of risks as agreed to by the commercial parties would better serve the public interest.[59] In general, the court concluded that the Uniform Commercial Code is "[r]egarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself."[60] While the

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v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 158-59, 324 N.E.2d 583, 588-89 (1974). The court in *Spring Motors* indicated a commercial buyer could recover for economic loss under a breach of warranty theory. Spring Motors, however, was barred by the four year statute of limitations. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 562-66, 489 A.2d 660, 663-65 (1985).

52. *Spring Motors*, 98 N.J. at 575-77, 489 A.2d at 670-71.

53. *Id.* at 575, 489 A.2d at 670.

54. *Id.* at 576, 489 A.2d at 671. *Contra* Seely v. White Motor Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) (en banc) ("law of warranty is not limited to parties in a somewhat equal bargaining position"). *See generally* Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 32 (S.D. Iowa 1973) (in an action to recover commercial loss, strict tort liability was not applicable when parties of equal bargaining power negotiate a contract).

55. The court even suggested that Spring Motors, being a commercial buyer, could be in a better position than the manufacturer to distribute the risk of loss into the price of its products. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 576, 489 A.2d 660, 671 (1985); *see* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 952-58 (1966).

56. *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.

57. *Id.*

58. *Id.*

59. *Id.* at 577, 489 A.2d at 671. The underlying U.C.C. policy is that parties should be allowed to enter contracts of their choice; once an agreement is reached, society has an interest in upholding the contract. *Id.* at 571, 489 A.2d at 668.

60. *Id.* at 581-82, 489 A.2d at 673 (quoting PROSSER & KEETON, *supra* note 9, § 95A).

majority in *Seely v. White Motor Company* did not question whether Seely was a commercial buyer,[61] the concurring opinion found Seely to be an ordinary consumer.[62] Because Seely, as an ordinary consumer, did not assume the risk of loss through equal bargaining, strict tort liability recovery under the *Santor* rationale should have been allowed.[63]

Another factor courts consider is how the damage to the product itself occurred. Defects of quality are evidenced by internal deterioration or breakdown and are called economic losses while property damage is a loss resulting from a violent accident.[64] This distinction is drawn by looking at the nature of the defect, the type of risk that was imposed, and how the injury arose.[65]

In *Nobility Homes of Texas, Inc. v. Shivers*,[66] action was brought against Nobility to recover the economic loss that resulted from defects in a mobile home. While the trial court found the mobile home was defective in its workmanship and materials, it did not find that these defects made the mobile home unreasonably dangerous to Shivers or his property.[67] The court relied on Section 402A of the Restatement of Torts (Second)[68] in holding that Shivers could not recover his economic losses under a strict tort liability

61. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (en banc) ("Plaintiff purchased the truck for use in his business;" Seely sought lost profits "because he was unable to make normal use of the truck"). *Id.* at 12-13, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.

62. "Plaintiff was an owner-driver of a single truck he used for hauling and not a fleet-owner who bought trucks regularly in the course of his business." *Id.* at 28, 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30 (Peters, J., concurring and dissenting).

63. *Id.* at 28, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., concurring and dissenting).

64. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1169 n.13 (3d Cir. 1981) (citing Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

65. *Id.* at 1173.

66. 557 S.W.2d 77 (Tex. 1977).

67. *Id.* at 78.

68. Section 402A reads:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

theory.[69] The court found that "physical harm" resulting from an unreasonably dangerous defect as required by the Restatement was not the same as "economic loss."[70]

Although strict tort liability was also denied in *Northern Power & Engineering Corporation v. Caterpillar Tractor Company*,[71] the court stated that "when a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate remedy even though the damage is confined to the product itself."[72] Northern sought recovery when a diesel powered electric generator was damaged due to engine failure.[73] Since there was no evidence that the oil leak that caused overheating posed a danger to persons or other property, the loss was purely economic.[74]

Recovery under strict tort liability was allowed in *Pennsylvania Glass Sand Corporation v. Caterpillar Tractor Company*.[75] Pennsylvania Glass Sand (PGS) brought suit to recover repair and replacement costs from the manufacturer when a front-end loader caught fire due to a defect.[76] Caterpillar, the manufacturer, asserted the loss was economic and therefore not recoverable under a strict tort liability theory.[77] PGS, on the other hand, alleged there was no economic loss, but rather physical injury to its property due to a violent occurrence.[78] The court, in looking at the nature of the defect

69. Shivers' economic loss was $8,750 — the mobile home's reasonable market value less its purchase price. Although Shivers could not recover these losses under a strict tort liability theory, the court held he could recover under a breach of warranty theory. *Nobility*, 557 S.W.2d at 78.

70. *Id.* at 80; *see also* Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976) (applying Pennsylvania law, filmmaker denied strict tort liability recovery where scratched film found not to be unreasonably dangerous).

71. 623 P.2d 324 (Alaska 1981).

72. Plaintiff must show that (1) the loss resulted from the dangerous defect and (2) the loss occurred under a dangerous circumstance. *Id.* at 329.

73. *Id.* at 325.

74. *Id.* at 329-30; *cf.* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (strict tort liability recovery denied because crack in grain storage tank was economic loss, but court held that when a product is sold in a defective condition which renders it unreasonably dangerous to user or property, strict tort liability was applicable).

75. 652 F.2d 1165 (3d Cir. 1981) (applying Pennsylvania law); *see also* Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978) (damage to truck resulting from fractured axle recoverable under strict tort liability because defect dangerous to persons and property).

76. PGS alleged the front-end loader was defective because it was not equipped with a fire suppression system or with adequate warnings of action to take if a fire resulted. *Pennsylvania Glass*, 652 F.2d at 1166.

77. Caterpillar also asserted the warranty limited PGS's recovery to replacement of defective parts, and it specifically excluded economic loss recovery. *Id.* at 1167.

78. Only the front-end loader (the defective product) was damaged in the fire. *Id.*

and the type of risk it imposed, held the damage was physical injury and recoverable under a strict tort liability action.[79] The manufacturer has a duty to "produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself."[80]

In a case virtually identical to *Sharp Brothers, John R. Dudley Construction, Inc. v. Dott Manufacturing Co.*, recovery was allowed under a strict tort liability theory even though only the crane was damaged.[81] Dudley Construction had purchased a used crane "as is."[82] While the crane was being operated in its normal capacity, the turntable bolts broke, causing the crane's superstructure, containing the engine and cab, to crash to the ground.[83] In addressing the question of whether strict tort liability recovery should be allowed, the court reasoned that if the crane's load "or other property had been injured or damaged by the crane's collapse, such damage would have been recoverable."[84] The court found no logical reason to distinguish between damage to other property and damage to the product itself.[85] The damage in either case would still be the result of the manufacturer's tortious conduct in supplying a crane that was unreasonably dangerous because of the possibility of collapse due to defective bolts.[86] An action for strict tort liability "seeks to provide a remedy for an individual injured because of another's violation of an obligation imposed not by contract, but by law."[87]

Under its admiralty jurisdiction, the United States Supreme Court, in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, held there is no strict tort liability recovery when the defect results only in economic loss.[88] Char-

79. The nature of the defect resulted in a fire which is considered a sudden and dangerous occurrence, and the design defect constituted a safety hazard to people and property. *Id.* at 1174-75.

80. *Id.* at 1173. Because the manufacturer has this duty, buyers are not required to bargain for a safe product. The court pointed out PGS did not assert a warranty claim to protect its benefit of the bargain, but rather, sought to recover for a hazardous defect. *Id.* at 1175.

81. 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979).

82. *Id.* at 370, 412 N.Y.S.2d at 513. The court found no evidence that the "as is" and disclaimer clauses were intended to exclude claims of physical injury to the product under a strict tort liability theory. *Id.* at 375, 412 N.Y.S.2d at 516.

83. *Id.* at 370, 412 N.Y.S.2d at 513.

84. *Id.* at 371, 412 N.Y.S.2d at 513 (citations omitted).

85. *Id.* at 371, 412 N.Y.S.2d at 514. The court pointed out that it's declining to distinguish between damage to other property and damage to the defective product did not mean that it had to allow strict tort liability recovery against the manufacturer where the plaintiff had suffered economic loss. *Id.* at 372, 412 N.Y.S.2d at 514.

86. *Id.* at 371, 412 N.Y.S.2d at 514.

87. *Id.* at 371-72, 412 N.Y.S.2d at 514 (quoting Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978)).

88. 106 S. Ct. 2295, 2305 (1986). Although *East River* and *Sharp Brothers* reach the same result, it should be noted that *Sharp Brothers* was decided first. While *Sharp Brothers* obviously could not have relied on *East River*, the Missouri Supreme Court would not have been bound by the *East River* decision because the U.S. Supreme Court was exercising its admiralty jurisdiction.

terers of supertankers sought recovery from Delaval, the manufacturer and installer of turbines, when an internal ring disintegrated and caused additional damage to the turbine.[89] In affirming the district court's granting of summary judgment for Delaval, the court of appelas held strict tort liability was not applicable when the defect does not create an unreasonable risk of harm to persons or other property.[90] Because the court of appeals found the damage to the turbine to be gradual deterioration, warranty law controlled.[91]

In affirming the court of appeals, the Supreme Court focused on the ability of the commercial buyer to protect itself.[92] In distinguishing economic loss from personal injury, the Court stated "the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service."[93] The Court went on to say contract law should govern because the parties, having relatively equal bargaining power, could negotiate the terms of their agreement and there was "no reason to intrude into the parties' allocation of risk."[94]

The concept of strict tort liability was first embraced by the Missouri Supreme Court in *Morrow v. Caloric Appliance Corporation*.[95] Morrow purchased a defective gas stove that resulted in a fire which destroyed the personal property in his home.[96] The court held the manufacturer had impliedly warranted the reasonable safety and fitness of the stove and was therefore liable despite lack of privity between Morrow and the manufacturer.[97]

In *Keener v. Dayton Electric Manufacturing Company*,[98] the warranty language requirement in *Morrow* was eliminated by adopting Section 402A of the Restatement of Torts (Second) which recognized strict tort liability.[99] The court's basis for adopting strict tort liability was that it would "insure that the costs of injuries resulting from defective products [were] borne by

89. *East River*, 106 S. Ct. at 2296-97.

90. East River S.S. Corp. v. Delaval Turbine, Inc., 752 F.2d 903, 909-10 (3d Cir. 1985) (en banc), *aff'd sub nom.* East River S.S. Corp. v. Transamerica Delaval, Inc., 106 S. Ct. 2295 (1986).

91. *Delaval Turbine*, 752 F.2d at 909.

92. The Court stated: "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *East River*, 106 S. Ct. at 2302.

93. *Id.* at 2303.

94. *Id.* Under the contract the charterers agreed to take the ships "as is" and to maintain, repair, and insure the ships. *Id.* at 2304.

95. 372 S.W.2d 41 (Mo. 1963) (en banc).

96. *Id.* at 50.

97. *Id.* at 55.

98. 445 S.W.2d 362 (Mo. 1969).

99. *See supra* note 68 for text of Section 402A Restatement (Second) of Torts.

the manufacturers that put such products on the market rather than by the injured persons who [were] powerless to protect themselves."[100]

In *Crowder v. Vandendeale*,[101] action was brought against a home contractor to recover for foundation cracks resulting from settling of the house. The court concluded that an implied warranty theory was appropriate for deterioration damages[102] and reasoned that a failure to meet the desired standard of quality should be governed by the agreement of the parties.[103] The court suggested, however, that should there be personal injury or property damage "either to property other than the property sold or to the property sold where it was rendered useless by some violent occurrence," then strict tort liability would be appropriate.[104]

Subsequent Missouri cases have relied on the court's suggested application of strict tort liability where there had only been damage to the defective product and have determined what constituted a violent occurrence. In *Gibson v. Reliable Chevrolet, Inc.*,[105] Gibson sought to recover damages that resulted when the car's heater core ruptured, permitting the coolant to escape and irreparably damaging the engine.[106] Based on *Crowder*, the court denied recovery in strict tort liability because the damage had not resulted from a violent occurrence.[107] Similarly, the court denied recovery in strict tort liability where the City of Clayton brought an action to recover for a cracked foundation on a fire truck.[108] Based on the city's allegations in its complaint, the court concluded the damage was not the result of a violent occurrence.[109]

The court again denied strict tort liability recovery in *Clevenger & Wright Company v. A.O. Smith Harvestore Products, Inc.*[110] Clevenger sought to

100. *Keener*, 445 S.W.2d at 364 (quoting Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (en banc)).

101. 564 S.W.2d 879 (Mo. 1978) (en banc).

102. Crowder's claim was dismissed, however, because the court limited the implied warranty theory to first purchasers of a home; Crowder was the second purchaser. *Id.* at 880, 884.

103. In the absence of an express agreement, an implied warranty would be imposed. *Id.* at 882. Missouri has continued to deny strict tort liability recovery where there has been only economic loss. *See* Forrest v. Chrysler Corp., 632 S.W.2d 29, 31 (Mo. Ct. App. 1982) (if economic loss only, plaintiff is restricted to remedies provided by the Uniform Commercial Code).

104. *Crowder*, 564 S.W.2d at 881.

105. 608 S.W.2d 471 (Mo. Ct. App. 1980).

106. *Id.* at 472.

107. The car, purchased from Reliable Chevrolet, was 17 to 18 months old and had been driven over 23,000 miles, leading the court to conclude such a rupture was not violent. It was also noted that Gibson could not recover under warranty because it had expired. *Id.* at 472, 474.

108. City of Clayton v. Grumman Emergency Prods., 576 F. Supp. 1122 (E.D. Mo. 1983) (applying Missouri law).

109. The complaint stated plaintiffs had discovered the cracked foundation after noticing the "lean in the profile of the truck." *Id.* at 1126.

110. 625 S.W.2d 906 (Mo. Ct. App. 1981).

recover for damages resulting from a tornado hitting his grain storage silo.[111] Though this was a "violent occurrence," the court stated the term was to be applied only to internal defects or unreasonably dangerous products as contemplated by Section 402A.[112]

While the holding and rationale of the court may be appropriate for the *Sharp Brothers*' situation, will it be appropriate in the case of an ordinary consumer?

The court in *Sharp Brothers* relied on Dean Keeton in stating that strict tort liability recovery will be denied when the only damage caused by the defect is to the product sold.[113] However, the material by Keeton quoted in the decision[114] focuses on commercial parties. Keeton suggests that the contract language should be controlling when the parties allocate the risk of injury.[115] "[T]he risk of harm to the product itself due to the condition of the product would seem to be a type of risk that the parties to a purchase and sale contract should be allowed to allocate pursuant to the terms of the contract."[116] Dean Keeton went on to say that this was especially true with regard to transactions dealing with commercial or industrial products.[117]

One of the reasons Missouri adopted strict tort liability in *Keener v. Dayton Electric Manufacturing Company* was to provide protection for ordinary consumers "who are powerless to protect themselves."[118] Ordinary consumers are "powerless" because there is inequality in the bargaining process. There is not any negotiating as to who will bear the risk of harm. There is not a personalized contract to then allocate the terms agreed to. If the consumer wants the product, he buys it along with whatever warranties or disclaimers the manufacturer has included.

Because *Sharp Brothers* dealt with two commercial parties on an equal footing who could bargain and negotiate a contract for the sale of the crane,[119] the court's reliance on Keeton is well placed. While parties should be free to enter into contracts of their choice, they should also be bound by them.[120] However, as mentioned above, while ordinary consumers may voluntarily

111. *Id.* at 907.
112. *Id.* at 909.
113. *Sharp Bros.*, 703 S.W.2d at 903.
114. PROSSER & KEETON, *supra* note 9, § 101(3) (footnotes omitted).
115. *Sharp Bros.*, 703 S.W.2d at 903 (quoting PROSSER & KEETON, *supra* note 9, § 101(3) (footnotes omitted)).
116. *Id.*
117. *Id.*
118. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969) (quoting Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (en banc)).
119. *Sharp Bros.*, 703 S.W.2d at 903.
120. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 577, 489 A.2d 660, 671 (1985).

enter into a contract, it is not a contract of their choice. The ordinary consumer is powerless, and strict tort liability should protect him as it was adopted to do.

Another policy reason behind strict tort liability as stated in *Keener* is one of risk-spreading.[121] The theory is that the manufacturer is in a better position to absorb the costs associated with a product causing injury than is a consumer.[122] The manufacturer insures against the risk of injury, and this cost is distributed among all of its consumers through increased prices.[123]

By rejecting strict tort liability recovery in *Sharp Brothers*, the policy reason of risk spreading has not been subverted. The parties are equally capable of distributing the loss as a cost of doing business. But if strict tort liability is rejected in the case of an ordinary consumer, the cost is borne completely by the consumer. As stated in *Keener*, "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers. . . ."[124]

The majority in *Sharp Brothers* limits "injuries" to personal injury or injury to the plaintiff's other property.[125] This limitation is questionable because a defect may result in injury to the product itself. If strict tort liability is to insure that manufacturers bear the cost of injury caused by placing a defective product into the marketplace, why should that liability be limited? Manufacturers have a duty to produce a safe product,[126] and by putting the product into the marketplace, they represent it as being safe.[127] If harm results, the manufacturer has breached its duty.

Section 402A of the Restatement of Torts (Second) seems to support application of strict tort liability even when there is only physical damage to the defective product itself. It provides for strict tort liability of a manufacturer when a product is sold "in a defective condition unreasonably dangerous to the user or consumer or his property" that results in physical harm.[128]

The first condition in Section 402A insures that economic losses are not recoverable in strict tort liability. By requiring an unreasonably dangerous

121. *See Keener*, 445 S.W.2d at 364.
122. *Id.*
123. Seely v. White Motor Co., 63 Cal. 2d 9, 18-19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) (en banc).
124. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969) (quoting Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (en banc)).
125. *See Sharp Bros.*, 703 S.W.2d at 903.
126. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981).
127. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64-65, 207 A.2d 305, 311 (1965).
128. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

defect, loss of bargain and deterioration claims are eliminated. The majority in *Sharp Brothers* appears to have ignored this condition. It is concerned that determining whether a loss was the result of an "accident" (and thus a "violent occurrence" or an unreasonably dangerous defect) would be a difficult and irrelevant issue.[129] Its basis for finding the issue irrelevant rests in the contract context involving allocation of risk between the parties, which as discussed earlier, should not be applied to the ordinary consumer. As for it being a difficult issue, it seems to be a question of fact for the jury to determine, and juries must often face difficult determinations.

The second condition is that physical harm must result from the unreasonably dangerous defect. While this harm may be personal injury, it also includes the consumer's property. It is not stated that the harm must be to the consumer's "other property." It seems that the defective product falls within the category of "his property," as the term is used by the Restatement and therefore, if physical harm occurs solely to the defective product, strict tort liability recovery should be allowed.

Determining whether economic loss is recoverable under a strict tort liability theory is addressed in as many different ways as there are different results. The majority of jurisdictions, including Missouri, hold that strict tort liability is not applicable when there is pure economic loss. However, some courts distinguish between economic loss and physical harm, even though in both cases the damage is to the defective product only. If the damage results from a violent occurrence or unreasonably dangerous defect rather than deterioration, then there is physical harm and strict tort liability recovery is allowed.

Other courts look to the parties involved in the transaction. With commercial parties negotiating on equal footing, recovery under strict tort liability is not allowed because the parties are able to allocate the risks and should be bound by the contract terms.

While the decision in *Sharp Brothers* clarifies one issue in Missouri law, it raises another question. The holding affirms prior case law that rejects the application of strict tort liability where there is pure economic loss. The decision also holds that dicta in *Crowder*, suggesting strict tort liability recovery would be allowed if the defect resulted in a violent occurrence, is not to be followed. The question now raised, however, is whether the holding in *Sharp Brothers* applies to all consumers or only to commercial buyers. While the decision broadly rejects strict tort liability recovery where there is only economic loss (whether deterioration or physical harm), the court's reasoning focuses on commercial parties.

As discussed above, the rejection of strict tort liability where there is only economic loss, whether deterioration or physical harm, does not defeat

129. *Sharp Bros.*, 703 S.W.2d at 903.

the policies of strict tort liability when commercial parties are involved. However, with the ordinary consumer, the two main policy considerations relied on in *Keener* are subverted. First, the ordinary consumer cannot negotiate with the manufacturer to allocate the risks. The contract agreed on is the one supplied by the manufacturer. Also, the ordinary consumer is not in a position to distribute the cost of risk of injury, but must bear the entire cost of the loss. While deterioration and quality defects have a direct relationship to the price paid and the consumer "gets what he paid for," a defect that causes physical harm is the result of the manufacturer's breach of duty to produce a safe product, and this cost should not be placed on the ordinary consumer.

It is now clear in Missouri that commercial parties will not be able to recover under a strict tort liability theory. It remains to be determined, however, whether *Sharp Brothers* will be applied to ordinary consumers or whether an exception will be carved out to allow strict tort liability recovery for the ordinary consumer when physical harm to the product itself results from the defect.

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