Missouri Law Review

Volume 62
Issue 2 *Spring 1997*

Article 5

Spring 1997

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Recommended Citation

Sean M. Flower, *Is Strict Product Liability in Tort Identical to Implied Warranty in Contract in the Context of Personal Injuries*, 62 Mo. L. Rev. (1997)
Available at: https://scholarship.law.missouri.edu/mlr/vol62/iss2/5

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Notes

Is Strict Product Liability in Tort Identical to Implied Warranty in Contract in the Context of Personal Injuries?

Denny v. Ford Motor Company[1]

I. INTRODUCTION

Product liability has evolved from a combination of contract and tort theories. Under current contract analysis a manufacturer is liable for injuries resulting from a product which is "unmerchantable,"[2] while under strict liability in tort a manufacturer is liable for injuries resulting from a product which is "defective."[3]

The majority of legal scholars and jurisdictions have found that in the area of personal injury these two underlying tests are synonymous.[4] This means, in effect, that all products found unmerchantable should also be found defective, and vice versa.[5]

The holding in *Denny v. Ford Motor Company* conflicts with this general rule, in that it finds a product unmerchantable, yet not defective. This decision illustrates the complicated condition of modern product liability law which has resulted from its mixed contract and tort roots, and the need for further clarification of contract and tort roles in a product liability case.

II. FACTS AND HOLDING

In 1986, Nancy Denny was severely injured when the Bronco II she was driving rolled over.[6] The rollover occurred when Denny slammed on her brakes in order to avoid a deer crossing her path.[7]

In 1992, Denny and her husband brought suit for damages against the Bronco II's manufacturer, Ford Motor Company, in the United States District

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1. 662 N.E.2d 730 (N.Y. 1995).

2. U.C.C. § 2-314(1). This assumes that the manufacturer has not accepted a higher level of liability through an express warranty or an implied warranty of fitness for a particular purpose.

3. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965); *see also infra* note 40.

4. *See infra* Part III.B and accompanying text.

5. *See infra* Part III.B and accompanying text.

6. Denny v. Ford Motor Co., 662 N.E.2d 730, 731 (N.Y. 1995).

7. *Id.*

Court for the Northern District of New York.[8] The Dennys asserted claims for strict tort liability for design defect, and breach of the implied warranty of merchantability.[9] At the close of evidence both claims were submitted to the jury.[10]

The Dennys introduced evidence which demonstrated that the Bronco II's high center of gravity, relatively narrow track width, and short wheel base presented a greater danger of rollover accidents than the average passenger vehicle.[11] In addition, a Ford engineer testified that he would not recommend the Bronco II for ordinary commuting because of these features.[12] The Dennys also introduced a Ford marketing manual which stated that the sales presentation of the Bronco II should emphasize the vehicle's "suitab[ility] for commuting and for suburban and city driving."[13] The manual also stated that the Bronco II's ability to switch from two to four-wheel drive would be attractive to women "concerned about driving in snow and ice with their children."[14] The Dennys then testified that it was the safety benefits of the four-wheel-drive feature that attracted them to the Bronco II, and that they had no interest in its off-road capability.[15]

Ford contended that the features complained of by the Dennys were necessary for the Bronco II's off-road ability, and that the Bronco II was primarily intended to be an off-road vehicle.[16]

The jury found the Bronco II was not defective, and therefore the defendant was not liable under the strict tort liability claim.[17] The jury also found,

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8. *Id.*

9. *Id.* The Dennys also asserted a claim for negligence, but the jury rejected this claim for lack of proximate cause. *Id.* at 733 n.1.

10. *Id.* at 732. Ford objected to the submission of both claims to the jury, arguing that the two causes of action were identical. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 733. The District Court instructed that "[a] product is defective if it is not reasonably safe.... It is not necessary for the plaintiffs to prove that the defendant knew or should have known of the product[']s potential for causing injury to establish that the product was not reasonably safe. Rather, the plaintiffs must prove by a preponderance of the evidence that a reasonable person ... who knew of the product's potential for causing injury and the existence of alternative designs ... would have concluded that such a product should not have been marketed in that condition. Such a conclusion should be reached after balancing the risks involved in using the product against the product[']s usefulness and its costs against the risks, usefulness and costs of the alternative design as compared to the product defendant did market." *Id.* at 732.

however, that Ford had breached its implied warranty of merchantability, and that this breach was the proximate cause of Nancy Denny's injuries.[18] The jury awarded her $1.2 million.[19]

Ford moved for a new trial based upon Federal Rule of Civil Procedure 59(a), claiming the jury's finding of liability on the breach of warranty claim was irreconcilable with its finding of no liability on the strict tort liability claim.[20] The trial court rejected this motion, holding that the jury's verdict was not inconsistent.[21]

The defendant appealed to the United States Court of Appeals for the Second Circuit.[22] The Second Circuit decided that the answer to the inconsistency issue was dependent upon the proper application of the law of the State of New York.[23] The Second Circuit then certified three questions to the New York Court of Appeals:

> (1) whether the strict products [tort] liability claim and the breach of implied warranty claim are identical; (2) whether, if the claims are different, the strict products [tort] liability claim is broader than the implied warranty claim and encompasses the latter; and (3) whether, if the claims are different and a strict liability claim may fail while an implied warranty claim succeeds, the jury's finding of no product defect is reconcilable with its finding of a breach of warranty.[24]

The New York Court of Appeals held:

> (1) the strict products liability claim and the implied warranty claim were not identical; (2) the merchantability claim is not necessarily subsumed by the product liability claim; and (3) on these facts it is theoretically reconcilable

18. *Id.* The instruction to the jury for the merchantability claim stated "[t]he law implies a warranty by a manufacturer which places its product on the market that the product is reasonably fit for the ordinary purpose for which it was intended. If it is, in fact, defective and not reasonably fit to be used for its intended purpose, the warranty is breached." *Id.* In addition, the court stated "[t]he plaintiffs claim that the Bronco II was not fit for its ordinary purpose because of its alleged propensity to rollover and lack of warnings to the consumer of this propensity." *Id.* at 733.

19. *Id.*

20. *Id.*

21. *Id.* The district court also held that Ford had waived the Rule 59(a) argument of inconsistency, but this holding was reversed by a majority of the Second Circuit Court of Appeals. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The certification was done pursuant to article VI, section 3(b)(9) of the New York State Constitution and Rule 500.17 of the Rules of the Court of Appeals of New York. *Id.*

to find liability under an implied warranty claim but no liability for product liability under New York Law.[25]

III. LEGAL BACKGROUND

A. The Historical Development of Strict Product Liability in Contract and Tort

Early American courts, employing the doctrine of *caveat emptor*, held that absent fraud, deceit, or express warranty, consumers had no legal recourse, in tort or contract, against a seller of goods for damages resulting from a defective product.[26] Early in the nineteenth century the courts developed the theory of implied warranty.[27]

While the courts originally developed the theory of implied warranty as a means of holding sellers responsible for intangible economic and commercial losses caused by improper performance of the item sold,[28] the warranty has also become a method by which to hold a seller liable for personal injury.[29] The

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25. *Id.* at 733. The New York Court of Appeals did not decide the issue of whether the particular verdict in this case was reconcilable under Federal Rule of Civil Procedure 59(a), holding this issue was a matter for the Second Circuit to decide. *Id.* at 739. Rule 59(a) reads:

> (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

FED. R. CIV. P. 59(a).

26. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 95A, at 679 (5th ed. 1984).

27. *See id.* at 680. *See* William L. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, at 800 (1966). For a thorough analysis of the historical origin and policy behind the implied warranty, see William L. Prosser, *Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). *See also* MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ch. 6 (3d ed. 1994) (history of implied warranty).

28. KEETON ET AL., *supra* note 26, at 680.

29. *See generally* KEETON ET AL., *supra* note 26, at 690 (detailing the progression of warranty coverage for personal injury from the food cases).

ability to recover under a warranty theory was heavily limited by traditional contract rules requiring privity, reliance on an express or implied promise of the seller, and notice within a reasonable time of knowledge of breach.[30] Even if the previous requirements were met, sellers could often completely avoid liability through disclaimers.[31]

Two of these traditional contract law limitations, privity and disclaimer, were eliminated in the seminal case of *Henningsen v. Bloomfield Motors, Inc.*,[32] which was soon widely accepted in other jurisdictions.[33] This elimination of the traditional contract law limitations in warranty was further enhanced by the adoption of the Uniform Commercial Code (hereinafter U.C.C.),[34] currently adopted in all fifty states.[35] In order to prove a claim for breach of implied warranty under the U.C.C. a plaintiff must prove that the product sold was unmerchantable or not fit for the ordinary purposes for which such goods are used.[36]

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30. *See* Prosser, *The Fall of the Citadel*, *supra* note 27, at 801. *See also* 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-314:13 (1992).

31. KEETON ET AL., *supra* note 26, at 691.

32. 161 A.2d 69 (N.J. 1960).

33. Prosser, *The Fall of the Citadel*, *supra* note 27, at 794-99.

34. *See* U.C.C. § 2-314 (warranty that goods are merchantable, fit for ordinary purposes is automatically implied), § 2-715(2)(b) (consequential damages include personal injury), § 2-318 (privity substantially eliminated), and § 2-719(3) (disclaimer of warranty is *prima facia* unconscionable). For a more extensive explanation of these provisions and their application, see also JAMES V. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980). For a critical analysis of section 2-318's elimination of the privity requirement for personal injury, see Allan J. Fanning, Comment, *Implied Warranty, Strict Liability for Personal Injuries, and the Uniform Commercial Code, Section 2-318*, 13 U. KAN. L. REV. 411 (1965).

35. Missouri's version of the U.C.C. is contained in Missouri Revised Statutes, Chapter 400.

36. U.C.C. § 2-314(2)(c). *See also* John Neely Kennedy, *The Role of the Consumer Expectation Test Under Louisiana's Products Liability Tort Doctrine*, 69 TUL. L. REV. 117, 139-54 (1994) (generally explaining the strengths and weaknesses of the consumer expectation test, and describes the situations in which it is the best test for defect); David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 348-352 (1974); Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 230-233 (1978) (defends the consumer expectation test in product liability). *See generally* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1296-1314 (1974) (presents a thorough analysis of the consumer expectation analysis); SHAPO, *supra* note 27, at ¶¶ 8.05-8.06.

During this period in which the U.C.C. product liability claim was developed,[37] legal scholars, most notably Dean Prosser, argued that tort policies were pushing the elimination of traditional contract law limitations in warranty, and therefore tort should recognize strict product liability.[38]

Strict product liability in tort was first applied in the landmark case of *Greenman v. Yuba Power Products, Inc.*[39] Stimulated by *Greenman*, the American Law Institute incorporated section 402A into its Second Restatement of Torts.[40]

Generally section 402A imposes strict liability upon the seller of any product which is sold in "a defective condition unreasonably dangerous to the user or consumer."[41] Defects under Restatement 402A have generally been classified into three categories: manufacturing, failure to warn, and design.[42]

A manufacturing defect is an "abnormality or a condition that was unintended, and makes the product more dangerous than it would have been as intended."[43] Manufacturing defects are determined using the consumer expectation test.[44] Liability for failure to warn occurs when the manufacturer

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37. For a general analysis of the technical aspects of a claim for strict liability, see 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY ch. 9 (1996).

38. *See* Prosser, *The Fall of the Citadel*, *supra* note 27, at 802-05. *See also* Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, at 448-50 (1979) (analysis of the underlying differences between tort and contract policy). *See generally* SHAPO, *supra* note 27, ch. 7. *See also* Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 192 (1955). For a through analysis of the policies underlying a strict product liability theory, see generally *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

39. 377 P.2d 897 (Cal. 1963).

40. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965) provides:

> (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.

41. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

42. *See* KEETON ET AL., *supra* note 26, at 694-702. *See also* JAMES E. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 69-72 (1981).

43. KEETON ET AL., *supra* note 26, at 695.

44. KEETON ET AL., *supra* note 26, at 695. *See* RESTATEMENT (SECOND) OF TORTS

fails to warn about a risk or hazard related to design that the manufacturer knew about or should have known about in the exercise of ordinary care.[45]

Design defects occur not when the individual product is abnormal, but when the overall design is unreasonably dangerous.[46] Design defect is generally determined using risk utility analysis under which the product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product.[47] At this writing, it appears that the test for design defect will be officially changed in the upcoming Third Restatement to the "reasonable alternative design test."[48]

B. The Relationship Between Implied Warranty in Contract and Strict Product Liability in Tort in the Personal Injury Context

The result of the dual development of contract and tort theories of recovery under product liability law is that consumers generally have the ability to bring a claim for personal injury under both the contract implied warranty theory and the tort strict liability theory.[49]

While both claims are generally available, many scholars have argued that warranty and strict liability are substantively the same claim when brought for personal injury damages.[50] One justification for this view is that since implied warranty and strict liability developed in response to the same problems, and are essentially driven by the same policies, they are the same substantive claim.[51] Evidence of this theory that a U.C.C. warranty claim for personal injury and a

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§ 402A cmt. i. For sources detailing the consumer expectation test, see *supra* note 31.

45. KEETON ET AL., *supra* note 26 at 697-98.

46. BEASLEY, *supra* note 43, at 69.

47. *See* Kennedy, *supra* note 36, at 138 (majority of jurisdictions use risk utility analysis to determine design defect and failure to warn); John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980) (in depth examination of different ways the risk utility test is used in design defect); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980) (analyzes the different versions of the risk utility test).

48. RESTATEMENT (THIRD) OF TORTS: CATEGORIES OF PRODUCT DEFECT § 2 (Tentative Draft No. 2, Mar. 13, 1995). Consumer expectation is a factor weighed in this test, *see id.* at cmt. e.

49. *See* KEETON ET AL., *supra* note 26. *See also* Wade, *supra* note 48, at 551.

50. KEETON ET AL., *supra* note 26, at 708-802. *See also infra* notes 50, 51, 52.

51. Prosser, *The Fall of the Citadel, supra* note 27, 801-05. *See also* 2 FRUMER & FRIEDMAN, *supra* note 37, § 9.04[1], at 9-42 ("A product that is defective is inevitably unmerchantable and vice versa, at least in personal injury and property damage lawsuits."). *See also* BEASLEY, *supra* note 43, at 43-56 (discussion of the merger of the two claims in suits for personal injuries).

strict tort liability claim are substantively identical is found in U.C.C. section 2-715(2), which governs consequential damages. U.C.C. section 2-715(2)(a) applies a tort foreseeability test to consequential damages for personal injury, while 2-715(2)(b) applies a more narrow contract foreseeability test for other types of consequential damages.[52]

Some courts and commentators assert that "merchantability" in warranty and "defectiveness" in strict product liability have essentially the same meaning.[53] Others argue that allowing split verdicts could impose absolute liability on manufacturers, as they could be liable for damages from products which are not defective.[54] On a very practical level, Dean Wade has argued that the claims should be merged because, when both claims are presented, the issues and instructions get so complicated that judges and juries are left too confused to make a proper decision.[55]

Article 2 of the U.C.C. is currently being revised. As of this writing, it appears that the revised version will be consistent with the above views, which means that it will continue to advance the merger of implied warranty and strict

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52. U.C.C. § 2-715(2) states:

(2) Consequential damages resulting from the seller's breach include

> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
> (b) injury to person or property proximately resulting from any breach of warranty.

See also 3 HAWKLAND, *supra* note 30, § 2-715:06 (in the area of personal injury damages "the Code abandons the foreseeability limitation on the recovery of consequential damages and replaces it with a less rigorous standard of proximate cause. In other words, the only requirement for the recovery of consequential damages involving an injury to a person or property due to any breach of warranty is that the buyer must prove that the injury was proximately caused by the breach. He does not have to show that the loss was foreseeable by the seller at the time the contract was made, and he, the buyer, has no duty to mitigate or prevent the loss.").

53. Gumbs v. International Harvester, Inc., 718 F.2d 88 (3d Cir. 1983) ("merchantability and the unreasonably dangerous standard are nearly synonymous") (citing JAMES V. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE COMMERCIAL CODE § 9-7, at 355 (4th ed. 1996)). *See also* Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37 (1973); Wade, *supra* note 48, at 522-23 ("the measure of lack of safety will turn out to be essentially the same for each of the three theories", referring to negligence, warranty, and strict liability); SHAPO, *supra* note 26, at ¶ 26.03. *See generally* Schwartz, *supra* note 38, at 479.

54. Herman v. General Irrigation Co., 247 N.W.2d 472, 476 (N.D. 1976) ("The imposition of liability without proof of a defect would in effect convert strict liability in tort into an absolute liability concept . . . [t]he law has not gone that far.").

55. Wade, *supra* note 48, at 576-77.

tort liability.[56] While not stating that the two claims are exactly identical, it is likely that an official comment to section 2-314 will state that merchantability will be determined by the tort strict liability test used in the relevant jurisdiction.[57]

The majority of the states that have considered this issue has found no substantive difference between implied warranty and strict tort liability in the context of an action for personal injury.[58] Jurisdictions which adopted the majority rule include the District of Columbia,[59] Illinois,[60] North Dakota,[61] and the U.S. Virgin Islands,[62] all of which held that verdicts which find liability for breach of implied warranty, but not for strict product liability in tort, are inconsistent.

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56. Conversation with Professor William Henning, Uniform Commercial Code Commissioner and Member, Committee to Revise Article 2-Sales, Nov. 28, 1996.

57. *Id.*

58. The American Automobile Manufacturers Association conducted extensive research on the status of implied warranty and strict tort liability in different jurisdictions. The research was undertaken in an effort to demonstrate to the Uniform Code Commissioners that the *Denny v. Ford* decision was a minority position. *See* American Automobile Manufacturers Association, Position Paper in Opposition to Proposed U.C.C. Section 2-319 & Supporting Documentation (July 1996) [hereinafter AAMA, Position Paper].

59. Bowler v. Stewart-Warner Corp., 563 A.2d 344, 348 (D.C. 1989) (cited in AAMA, Position Paper, *supra* note 58) (failure to warn) (the jury's finding "that the product was not unreasonably dangerous on one hand, and yet on the other hand, so unreasonably fit for its intended purpose as to cause injury (and therefore unreasonably dangerous), are so inconsistent as to neutralize each other.").

60. State Farm Fire & Cas. Co. v. Miller Elec. Co., 562 N.E.2d 589, 596 (Ill. App. Ct. 1990) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (because of "the inherent similarities between implied warranty of merchantability and strict liability causes of action," it was inconsistent for the jury to return a verdict for the plaintiff on an implied warranty claim, but against the plaintiff on a strict liability claim).

61. Herman v. General Irrigation Co., 247 N.W.2d 472, 476 (N.D. 1976) ("Once it is established, however, that the product is defective under warranty theory, it becomes fairly clear that the product is also defective for purposes of strict liability in tort.").

62. Gumbs v. International Harvester, Inc., 718 F.2d 88, 95 (3d Cir. 1983) ("[W]e can conceive of no theory under which the allegedly defective U-bolt could have been defective and unfit for its ordinary purposes under section 2-314 but not also defective and unreasonably dangerous within section 402A.").

Arkansas,[63] California,[64] Connecticut,[65] Florida,[66] Iowa,[67] Minnesota,[68] Nebraska,[69] and Wisconsin,[70] endorsed the majority position in holding that it was not prejudicial or reversible error for the court to submit the case to the jury on either implied warranty or strict liability theory, but not both.

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63. Brewer v. Jeep Corp., 724 F.2d 653, 655 (8th Cir. 1983) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing and design defect). In Arkansas the burden of proving a strict liability claim, due to the unreasonably dangerous language, is "quantitatively" higher than the burden of proving an implied warranty claim. *Id.* at 655. Therefore it is usually prejudicial error when the implied warranty instruction is not given. *Id.* In this case, however, since the jury must have found that there was no design defect, "the failure to instruct on breach of warranty did not affect any substantial right of the appellant." *Id.* at 656.

64. Angle v. Sky Chef, Inc., 535 F.2d 492, 494-95 (9th Cir. 1976) (cited in AAMA, Position Paper, *supra* note 58).

65. Basko v. Sterling Drug, Inc., 416 F.2d 417, 427 (2d Cir. 1969) (cited in AAMA, Position Paper, *supra* note 58) (failure to warn) ("Since the two theories are virtually identical, separate instructions were not necessary.").

66. McQuiston v. K-Mart Corp., 796 F.2d 1346, 1349 (11th Cir. 1986) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (implied warranty and strict liability are "theoretically different," but these differences "are not of practical significance" since under either theory the plaintiff must prove there was a "defect"). *See also* Sansing v. Firestone Tire & Rubber Co., 354 So. 2d 895 (Fla. Dist. Ct. App. 1978) (cited in AAMA, Position Paper, *supra* note 58).

67. Patterson v. F.W. Woolworth Co., 786 F.2d 874, 880-81 (8th Cir. 1986) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (ordinarily strict liability is the theory pleaded in cases alleging personal injury, both claims would only be necessary where economic loss is involved).

68. Goblirsch v. Western Land Roller Co., 246 N.W.2d 687, 690 (Minn. 1976) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (the strict liability instruction is "stronger and broader" than the implied warranty instruction, so no error if implied warranty instruction is not given).

69. Fisher v. Gate City Steel Corp., 211 N.W.2d 914, 917 (Neb. 1973) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("[S]trict liability theory is essentially the liability of implied warranty divested of the contract doctrines of privity, disclaimer, and notice.").

70. Austin v. Ford Motor Co., 273 N.W.2d 233, 240 (Wis. 1979) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("It is inappropriate to bring an action for breach of warranty where a tort remedy is sought.").

The District of Columbia,[71] Indiana,[72] and Mississippi[73] seemingly endorsed the majority position when they found it redundant, although not reversible or prejudicial error, for a trial court to instruct the jury on both strict product liability claims and implied warranty claims.

A large number of jurisdictions have also generally recognized that implied warranty and strict liability claims are identical in a personal injury suit. This has occurred in Alaska,[74] California,[75] Colorado,[76] Delaware,[77] the District of

71. Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1305 (D.C. Cir. 1982) (cited in AAMA, Position Paper, *supra* note 58).

72. Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977) (cited in AAMA, Position Paper, *supra* note 58).

73. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374 (Miss. 1986) (cited in AAMA, Position Paper, *supra* note 58).

74. Roe v. Miles Labs., 704 F. Supp. 740, 742 (D. Alaska 1989) (cited in AAMA, Position Paper, *supra* note 58) (type of defect not identified) (a Uniform Commercial Code statute which barred implied warranty claim also barred strict product liability claim because "implied warranty claims in situations such as this are indistinguishable from strict liability claims.").

75. Hutchinson v. Revlon Corp., 256 Cal. App. 2d 517, 524 (Cal. Ct. App. 1967) (cited in AAMA, Position Paper, *supra* note 58) (failure to warn) (it was not reversible error if the jury instruction for strict liability was given on a charge for implied warranty of merchantability).

76. Belle Bonfils Mem'l Blood Bank v. Hansen, 665 P.2d 118 (Colo. 1983) (cited in AAMA, Position Paper, *supra* note 58). The defense listed in comment k of Restatement section 402A, unavoidably dangerous products, could be used to defend against a claim for implied warranty. *Id.* at 126. This case should not be read to have completely synthesized the two claims, as it does state that "a product might be unavoidably unsafe in its most common use or application but impliedly warranted as fit for some other particular purpose. Comment k would not preclude a finding that a manufacturer breached an implied warranty of fitness for such a particular purpose." *Id.*

77. Cline v. Prowler Indus., 418 A.2d 968, 976 (Del. 1980) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (the court stated that the theories of strict product liability in tort and implied warranty were intertwined, but refused to adopt strict product liability because of U.C.C. preemption).

Columbia,[78] Florida,[79] Hawaii,[80] Idaho,[81] Illinois,[82] Kentucky,[83] Massachusetts,[84] Mississippi,[85] New Hampshire,[86] New Jersey,[87] Tennessee,[88] and Utah.[89] A small

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78. Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1058 (D.D.C. 1987) (cited in AAMA, Position Paper, *supra* note 58) (design defect) ("[T]he current doctrines of implied warranty and strict liability in tort are but two labels for the same legal right and remedy, as the governing principles are identical."). The court also concluded that since implied warranty and strict product liability were the same claim, the two counts against the plaintiff could be viewed together for purposes of summary judgment. *Id.*

79. West v. Caterpillar Tractor Co., 336 So. 2d 80, 88 (Fla. 1976) (cited in AAMA, Position Paper, *supra* note 58) (design defect) (defect in strict product liability is no different than unmerchantability in warranty law).

80. Larsen v. Pacesetter Sys., Inc., 837 P.2d 1273, 1283 (Haw. 1992) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("[D]espite the disparity in terminology, many courts and commentators have concluded, and we agree (to the extent that the implied warranty action is based on a claim of personal injury), that any difference between the two standards is largely formal.").

81. Oats v. Nissan Motor Corp., 879 P.2d 1095, 1105 (Idaho 1994) (cited in AAMA, Position Paper, *supra* note 58) (design defect) (a non-privity warranty claim for personal injury is "essentially one of strict liability in tort").

82. Nave v. Rainbo Tire Serv., 462 N.E.2d 620, 625 (Ill. App. Ct. 1984) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (the court stated that "the theories of breach of implied warranty and strict liability are nearly identical").

83. McMichael v. American Red Cross, 532 S.W.2d 7, 11 (Ky. 1975) (cited in AAMA, Position Paper, *supra* note 58) ("[W]e view strict liability under section 402A and implied-warranty liability under the Uniform Commercial Code as being expressions of a single basic public policy as to liability for defective products.").

84. Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 89 n.1 (1st Cir. 1993) (cited in AAMA, Position Paper, *supra* note 58) (design defect) ("Under Massachusetts law, the theory of breach of an implied warranty of merchantability is basically the same as strict liability theory in tort."). *See also* Hayes v. Ariens Co., 462 N.E.2d 273 (Mass. 1984) (design defect) (cited in AAMA, Position Paper, *supra* note 58).

85. Global Truck & Equip. Co. v. Palmer Mach. Works, Inc., 628 F. Supp. 641, 650 (N.D. Miss. 1986) (cited in AAMA, Position Paper, *supra* note 58) (design defect) ("[W]here recovery under section 402A of the Restatement (Second) of Torts is denied, recovery under U.C.C. section 2-314 is also improper.").

86. Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 680 (D.N.H. 1972) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect).

87. Spring Motors Distrib. v. Ford Motor Co., 489 A.2d 660, 674 (N.J. 1985) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("breach of implied warranty action recognized in *Henningsen* was strict liability in tort"); Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980) (cited in AAMA, Position Paper, *supra* note 58) (design defect). The court recognized that in New Jersey strict liability in tort and implied warranty were identical claims. *Id.* at 955. In footnote 5, the court noted that most jurisdictions do not treat implied warranty and strict liability as "identical concepts," but the court was referring to states which allow recovery for economic

minority of states, including Georgia,[90] North Carolina,[91] Pennsylvania,[92] and Texas[93] have held that implied warranty and strict product liability are substantively different causes of action. Generally these states have not

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damages under contract and personal injuries under tort. *Id.* at 955 n.5; *see also* Aversa v. Public Serv. Elec. & Gas Co., 451 A.2d 976, 979 n.2 (N.J. Super. Ct. Law Div. 1982) (cited in AAMA, Position Paper, *supra* note 58).

88. Mello v. K-Mart Corp., 792 F.2d 1228, 1234-35 (1st Cir. 1986) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) (in predicting Tennessee law, the court found that "the elements of a claim based on strict liability and a claim based on breach of implied warranty are essentially the same").

89. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing and design defect). The Utah Supreme Court held that the elements of the implied warranty of merchantability and strict product liability claims "are essentially the same and analysis for the purpose of determining defenses to breach of implied warranty parallels that for strict products liability." *Id.* at 159. Therefore, the defenses used to negate strict product liability, misuse and assumption of risk, are available to negate implied warranty of merchantability claims. *Id.* at 158-59.

90. Buford v. Toys R' Us, Inc., 458 S.E.2d 373, 375 (Ga. Ct. App. 1995) (cited in AAMA, Position Paper, *supra* note 58).

91. Seese v. Volkswagenwerk, 648 F.2d 833, 838 (3d Cir. 1981) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("We observe, however, that most jurisdictions do not treat these doctrines as identical concepts.") (citing Dawson v. Chrysler Corp., 630 F.2d 950, 955 n.5 (3d Cir. 1980).

92. Walsh v. Pa. Gas & Water Co., 449 A.2d 573, 576 (Pa. Super. Ct. 1982) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect) ("Even though the range may not have been defective for purposes of imposing strict liability under a products liability theory . . . [t]his was evidence sufficient to support a breach of warranty verdict."). The Pennsylvania Superior Court gave no substantial justification or reasoning for its decision on the issue of inconsistency. *Id.*

93. Hyundai Motor Co. v. Chandler, 882 S.W.2d 606 (Tex. Ct. App. 1994) (cited in AAMA, Position Paper, *supra* note 58) (manufacturing defect). The Hyundai court held:

> a defect in an implied warranty of merchantability case is not the same as a defect in a strict products liability case. In the former, the word "defect" means a condition of the goods that renders them unfit for thee ordinary purposes for which they are used because of a lack of something necessary for adequacy. In the latter, the word "defect" means a condition of the product that renders it unreasonably dangerous.

Id. at 613 n.3. The case cited as authority for this statement, *Plas-Tex*, did not involve personal injuries. *See* Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 444 (Tex. 1989) (cited in AAMA, Position Paper, *supra* note 58).

elaborated on the theoretical differences in the claims, and in one case the court simply focused its attention on the procedural differences in the claims.[94]

With this background of strong support from both scholars and other jurisdictions for the proposition that warranty and strict liability were substantively the same claim, the New York Appellate Court faced the issue of whether Nancy Denny could lose on her strict tort liability claim, and yet still recover for her injuries under the implied warranty theory.

IV. INSTANT DECISION

A. The Majority

In *Denny v. Ford Motor Company*,[95] the court initially dealt with the first certified question of whether a strict product liability claim and a breach of implied warranty claim are identical under New York Law.[96]

The court first emphasized that in cases involving a design defect the "core element of defect is subtly different in the two causes of action."[97] The court stated that strict product liability in tort uses the risk utility test to determine whether a design defect exists.[98] The court then asserted that this risk utility analysis was a "negligence-inspired" test since it requires the parties to introduce evidence about the manufacturer's choices, and make a judgment about those choices.[99]

The court then stated that the test for design defect under the implied warranty theory required an inquiry only into whether the product "was fit for the ordinary purposes for which such goods are used."[100] The court stated that the focus of this test was on the purchaser's disappointed expectations.[101] The court found that warranty claims involve "true strict liability" since no weight is given to the feasibility of alternative designs or the reasonableness of the

94. *See Seese*, 648 F.2d at 838.

95. 662 N.E.2d 730 (N.Y. 1995).

96. *Id.* at 733.

97. *Id.* at 735. The court also mentioned the dictum in *Mendel v. Pittsburgh Plate Glass Co.*, 253 N.E.2d 207 (N.Y. 1969), which stated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Denny*, 662 N.E.2d at 734. The court found that while this statement is largely correct, it is not true in light of the different underlying tests of warranty and strict liability in tort. *Id.*

98. *Id.* at 735.

99. *Id.*

100. *Id.* at 736.

101. *Id.*

manufacturer's choices.[102] The court then briefly discussed the different policies which guide implied warranty and strict tort liability.[103] The court explained that strict tort liability's risk utility test was based on "social policy and risk allocation by means other than those dictated by the marketplace."[104] The court explained that the law of warranty was only concerned with a buyer's disappointed expectations.[105]

Based on this analysis, the court held that implied warranty and strict liability in tort were not identical claims because the theories used different tests for defect, and they were based on different policies.[106]

The court then discussed the next certified question, which asked whether the warranty claim had been subsumed by the strict tort liability claim.[107] The court found that the warranty claim had not been subsumed by the tort claim because the warranty claim still had statutory authority based on New York's version of the Uniform Commercial Code.[108] The court also found that most states which merged the warranty and tort claim into one cause of action had relied on a specific merger statute.[109] The court found further that the current version of New York's U.C.C. section 2-318 did not perform the function of a merger statute, because the legislative history demonstrated that the legislature wanted to expand the class of plaintiffs who could recover under 2-318, and not simply convert it into a tort cause of action.[110]

The court then answered the dissent's assertion that even if the claims were not formally merged, the risk utility test was the appropriate test for defectiveness under a warranty design defect claim.[111] The court stated that there was no authority for this proposition, and rejected the dissent's authority of the proposed Third Restatement of Torts and legal scholars.[112] The court found that while the proposed Third Restatement endorses the risk utility test in design defect cases, it does not state or imply that risk utility should be used in warranty claims.[113] The court then stated that other scholars who advocate the risk utility test have not concluded that risk utility should be applied to warranty analysis.[114]

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 735-36.
107. *Id.* at 736-37.
108. *Id.* at 736.
109. *Id.* at 737.
110. *Id.*
111. *Id.* at 736.
112. *Id.* at 736-37.
113. *Id.* at 738.
114. *Id.* at 737-38.

The court then cited authority for the proposition that the consumer expectation test should continue to be used in the warranty analysis of defect.[115]

The court then dealt with the issue of whether the verdict in *Denny* was inconsistent under Federal Rule of Civil Procedure 59(a).[116] The court answered that it was not well positioned to answer a question of federal procedure, and interpreted the question to ask whether the verdict in *Denny* was hypothetically possible under New York law.[117]

The court noted that the theoretical differences in these two causes of action may have little practical effect in most cases. However, the unique facts of this case demonstrated the substantive difference between the implied warranty and strict liability tests.[118] Under the implied warranty test the car was unfit, due to its high center of gravity, for one of the ordinary purposes for which it was sold, ordinary street driving.[119] Under the strict tort liability claim the car was not defective since the danger imposed by the high center of gravity was outweighed by the utility the vehicle gained from its ability to drive off road.[120] Thus it was on this unique set of facts, where the ordinary purpose for which the product was marketed and sold to the plaintiff was not the same as the utility against which the risk was to be weighed, that the different tests for defect produced opposite results.[121] The court finally held that it was reconcilable under New York law for a manufacturer to be found liable for breach of implied warranty, but not liable under a strict product liability theory.[122]

B. The Dissent

Judge Simons first agreed with the majority's conclusion that implied warranty and strict product liability were not identical.[123] He then asserted that the term "defective," while it had no clear meaning, was broader under strict liability than under implied warranty when personal injury claims were at issue.[124] This was based on the idea that since strict liability's "foreseeable" use standard would include more activities than warranty's "ordinary" use standard.[125]

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115. *Id.* at 738.
116. *Id.* at 739.
117. *Id.*
118. *Id.* at 738.
119. *Id.*
120. *Id.*
121. *Id.* at 739.
122. *Id.*
123. *Id.* (Simons, J., dissenting).
124. *Id.*
125. *Id.* at 740.

Judge Simons then argued that, even though implied warranty and strict products liability had their bases in separate legal doctrines, in the area of personal injury, their tests for defectiveness should not be materially different.[126] He based his argument on the theory put forth by Dean Prosser that the warranty in personal injury is really a tort cause of action, and that New York's history of removing traditional contract rules was really pushed by tort concepts.[127] Judge Simons concluded his discussion on this point by stating that since a breach of warranty that produces personal injury is really a tort, there is no reason for warranty and strict tort liability to use different standards for defectiveness.[128]

Judge Simons then concluded that the risk utility standard should be used in claims under either theory of product liability cases for defective design.[129] He supported this proposition by detailing the faults of the consumer expectation test, specifically finding it unrealistic in application to cases where the parties did not actually have a contract, and the test's possible use of subjectiveness which could result in absolute liability. In addition, Judge Simons argued that the consumer expectation test did not give juries enough structure upon which to conduct their legal analysis of the facts of a design defect case.[130]

Basing his conclusion on the work of the legal scholars cited above and the proposed Third Restatement of Torts, Judge Simons concluded that the risk utility standard was the proper test for defectiveness in design defect cases, under either a warranty or tort theory of liability.[131]

V. COMMENT

The decision reached in *Denny v. Ford*—that implied warranty and strict tort liability are not identical, and that implied warranty can provide more protection then strict liability for personal injury damage—directly conflicts with the conclusions reached by the majority of jurisdictions and scholars who have dealt with these issues.[132]

The majority in *Denny* justified its conclusion primarily on the grounds that design defects in warranty are determined using the consumer expectations test, while strict product liability uses the risk utility analysis.[133] The court found that

126. *Id.*
127. *Id.* at 741.
128. *Id.* at 742.
129. *Id.* at 742-44.
130. *Id.* at 743.
131. *Id.* at 743-44.
132. *See generally supra* Part III.B.
133. *Denny*, 662 N.E.2d at 735.

since the underlying tests were substantially different, it was possible to recover under implied warranty but not under strict product liability.[134]

The first issue raised by the *Denny* court's opinion is whether the consumer expectations test and the risk utility test are really different in application. The court in *Denny* seemed to imply that there is very little difference in the tests as applied.[135]

Another issue raised is whether the facts of *Denny* actually presented a situation in which the consumer expectation test provides more protection than the risk utility test. It is possible that implied warranty provided more protection than strict tort liability in *Denny*, not because the consumer expectations test provides more protection than the risk utility test, but because the Dennys failed to plead the appropriate strict product liability theory.[136] It is arguable that the Dennys had a colorable claim for failure to warn.[137] This would mean that the strict liability claim would have been equivalent to the warranty claim had both design defect and failure to warn been pleaded in tort. In sum, the two theories are identical when they are used in their entirety, but if the appropriate theories of strict tort liability are not pleaded, strict liability may give a plaintiff less protection than an implied warranty claim.

Another issue raised by *Denny* is whether the consumer expectations test or the risk utility test is better suited to determine liability for design defect. Again, there is much that has been written on this topic, and both sides have plausible arguments. But regardless of one's preference for a particular test, the larger question is whether there should be two different tests which allow recovery for product liability in a given jurisdiction. There is weighty authority for the proposition that product liability law as it exists today is a blend of both warranty and tort concepts.[138] Tort and contract borrowed concepts from each

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134. *Id.* at 739.

135. *Id.* at 738. ("As a practical matter, the distinction between defect concepts in tort law and in implied warranty theory may have little or no effect in most cases.").

136. *See* Letter from Gary T. Schwartz, Professor of Law, University of California at Los Angeles to Richard Speidel, Professor of Law, Northwestern University (June 4, 1996), supporting this argument. AAMA, Position Paper, *supra* note 58. Based on the information given in the case the tort failure to warn claim was not plead by the Dennys. Denny v. Ford Motor Co., 662 N.E.2d 730 (1995). There did seem to be ample evidence to prove this claim as Ford's engineer stated he would not recommend the car for ordinary suburban commuting, and Ford advertising targeted this type of car buyer, and specifically appealed to the buyers sense of safety for the purpose of ordinary driving. *Id.* at 732.

137. Letter from Gary T. Schwartz, Professor of Law, University of California at Los Angeles to Richard Speidel, Professor of Law, Northwestern University (June 4, 1996) supports this argument. AAMA, Position Paper, *supra* note 58.

138. *See supra* note 27.

other in order to evolve with the changing needs of the society.[139] However, these theories were designed to fill a gap in the law, not to allow double recovery or enforce absolute liability. To allow a jurisdiction to employ two different tests in the product liability setting means that, as in *Denny*, a manufacturer is held liable even though its product is not defective. Absolute liability was not intended for product liability.[140]

Regardless of whether the tests are actually different, or which test is ultimately chosen to determine liability, the important change which must occur is that only one test must be applied in a given jurisdiction. Any other result could potentially change product liability from strict to absolute.

VI. CONCLUSION

Denny v. Ford is a decision which conflicts with the majority of jurisdictions and legal scholars in the area of product liability. The court essentially found that under certain narrow facts, a product may be found "unmerchantable" under a contract theory of implied warranty, while at the same time not "defective" under a strict tort liability theory.[141] The thorough discussion in *Denny v. Ford* of the underlying theories of recovery demonstrates the analytical difficulties that arise when traditional areas of law, such as contract and tort, are merged to provide adequate remedies for the changing economic and social settings. In light of the proposed changes to the U.C.C. and the Third Restatement of Torts, *Denny* demonstrates the complicated state in which product liability (design defect in particular) is currently found, and illustrates the need for consistency and uniformity in this area.

SEAN M. FLOWER

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139. *See supra* note 27.

140. *See supra* note 27.

141. Denny v. Ford Motor Co., 662 N.E.2d 730, 739 (N.Y. 1995).