Tort Liability for Products Causing Physical Injury and Articles 2 of the U.C.C.

John W. Wade
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JOHN W. WADE*

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I. INTRODUCTION

This Article is the result of my taking a second look1 at the relationship
between Article 2 of the Uniform Commercial Code and the current tort

* Dean and Distinguished Professor of Law, Emeritus, Vanderbilt University. J.D., 1934, University of Mississippi; LL.M., 1935, Harvard University; S.J.D., 1942, Harvard University.

1. The first look was in Wade, Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?, 42 TENN. L. REV. 123 (1974).
remedies for physical injuries\(^2\) caused by defective products. The question is whether the Sales Article preempts and supersedes the common law tort remedies.

Article 2, with its implied warranties of merchantability and fitness for the purpose\(^3\) and its specific provision for the awarding of consequential damages, which include "injury to person or property proximately resulting from any breach of warranty,"\(^4\) is broad enough to cover all product-produced injuries to person or property unless the factual situation comes within an exclusionary provision such as lack of privity or the existence of a valid disclaimer. Under our Anglo-American legal system, if there is an unavoidable conflict between an applicable statute and the common law that would otherwise apply, the statute prevails. It makes no difference which of the two came first. If the common law was in existence when the statute was passed, the statute controls and supplants the common law rules. If the statute was already in existence when the common law development transpired, the constitutional principle of separation of powers means that the statute still governs and the common law development has no legal force or effect.

There are substantial differences between the provisions of Article 2 and the common law principles of negligence and strict tort liability. The only way to reconcile them is to find that Article 2 provides only an additional remedy, not an exclusive remedy that necessarily invalidates the common law remedies. Simply stated, the issue is whether the statutory provisions preempt the field, eliminating the tort actions of negligence and strict liability.

If the statute had expressly provided that it was exclusive there would have been no problem; preemption would have to be applied. The Code, however, does not do this. It thus becomes necessary to study the legislation to ascertain the intent of the legislative body. This is a matter of statutory construction for the court, rather than the jury, to undertake. The court looks carefully for any indication of legislative intent in the content and arrangement of the sections of other parts of the act, including the title and the preamble. It may also consider the official comments and study the legislative history if that history is available and meaningful. Even if the court finds no direct indications at all, most probably because the legislature did not specifically advert to the question, it must still make a decision. In this situation, usually without saying so, the court is likely to think about what the legislature would have intended if it had specifically considered the issue and decided it.\(^5\) In treating this question, the court will naturally

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2. "Physical injuries" are injuries to person or property.
4. Id. §§ 2-714(3), 2-715.
be influenced by its own opinion as to what it thinks would be the better result.

On the issue of whether Article 2 preempts negligence and strict liability, the score from the standpoint of court decisions is quite one-sided. One court, the Delaware Supreme Court, recently held in *Cline v. Prowler Industries of Maryland*\(^6\) that the legislature intended the statute to be preemptive and that the court therefore had no authority to adopt judicially a rule of strict tort liability.\(^7\) One or two appellate judges in other states have reached the same conclusion in dissenting opinions, but their views did not prevail.\(^8\) On the other hand, a substantial number of courts have held that the statute was not intended to be exclusive and that tort liability for products may exist as an alternative remedy.\(^9\) Many additional courts have continued to apply negligence liability and adopted strict tort liability without referring to the issue at all. By implication they must be regarded as construing the statute as not preemptive. A few courts have adverted to the issue but have declined to pass on it because they found the decision not necessary in the particular case.\(^10\)

The score on the issue from the standpoint of law review treatment is more evenly divided.\(^11\) Indeed, the preemption viewpoint may perhaps be

\(^{5)}\) The position that Article 2 preempts the field of strict liability for products, whether characterized as tort or not, is taken by the following: *Dickerson, The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 Tenn. L. Rev. 439 (1969); *Dickerson, Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 Tenn. L. Rev. 205 (1977) [hereinafter cited as Dickerson, Constitutionality]; *Dickerson, Was Prosser's Folly also Traynor's? or Should the Judge's Monument be Moved to a Firmer Site?*, 2 Hofstra L. Rev. 469 (1974) [hereinafter cited as Dicker-
the weightier side from the standpoints of both the number of articles and
the vehemence of the position taken. The lineup from the standpoint of the
validity and strength of the arguments is, of course, subjective, depending
upon the point of view of the reader. My own position, rendered more firm
as a result of research and contemplation for a second article on the subject,
remains that the statute was not intended to supplant tort remedies, but
that both tort and warranty remedies were expected to exist together as
alternatives. This is, of course, the status of the law in the great majority of
the states today.

Abandoning the position of objective depicter of the state of the law, I
now become an advocate to present the argument that products liability in
tort for physical injury may constitutionally and properly be utilized by
the state courts despite the existence of the U.C.C. I hope the argument proves
to be not only moderate and judicious, but also convincing.

II. PROVISIONS OF THE CODE ITSELF

A. The Title

The title of the enactment is “Uniform Commercial Code.” Emphasis
may be laid on the adjective “commercial.” The preface to the Code de-
clares that it “is a comprehensive modernization of various statutes related
to commercial transactions, including sales, commercial paper,” and other
topics.12 Article 2 is simply entitled “Sales.” This alone does not conclu-
sively impel the conclusion that a tort action for physical injury is not ex-
cluded, but it does mean that the primary emphasis and concern of Article

son, Prosser’s Folly]; Franklin, When Worlds Collide: Liability Theories and Disclaimers in
Defective Product Cases, 18 STAN. L. REV. 974 (1966); Miller, The Crossroads: The Case
for the Code in Products Liability, 21 OKLA. L. REV. 411 (1968); Shanker, A Case of
Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory), 11 AK-
RON L. REV. 697 (1978); Shanker, Strict Tort Theory of Products Liability and the Uniform
Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeon Holes, and Communication
Barriers, 17 CASE W. RES. L. REV. 5 (1965) [hereinafter cited as Shanker, Strict
Tort Theory]; Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial

The position that Article 2 does not preclude the judicial development of strict
tort liability for products is taken by the following: R. KEETON, VENTURING TO
DO JUSTICE 114-25 (1969); Donovan, Recent Developments in Products Liability Litiga-
tion in New England: The Emerging Confrontation Between the Expanding Law of Torts and
the Uniform Commercial Code, 19 ME. L. REV. 181 (1967); Littlefield, Some Thoughts on
Products Liability Law: A Reply to Professor Shanker, 18 CASE W. RES. L. REV. 10
(1966); Murray, Random Thoughts on Mendel, 45 ST. JOHN’S L. REV. 86 (1970);
Wade, supra note 1. See also Donnelly, After the Fall of the Citadel: Exploitation of the
Victory or Consideration of All Interests, 19 SYRACUSE L. REV. 1 (1967); Rapson, Products
Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict

2 is the commercial aspect of the contract of sale, the protection of the expectancy interests of the parties. This is to be observed in a number of sections in Article 2.\textsuperscript{13}

One may also lay emphasis on the word "code" and urge that it is the sole basis for determining all rights coming within its general purview. The response to this is that

\textquote{[t]he Code itself is not a traditional, authentic code. It is often called a group of statutes. The article on Sales Law, Article 2, may be viewed as a subgroup of statutes concerned with contracts for the sale of goods, the performance of those contracts, their discharge and remedies for breach.}\textsuperscript{14}

Particularly important in this connection is section 1-103, which provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."\textsuperscript{15} The first sentence in comment 3 to the section says, "The listing given in this section is merely illustrative; no listing could be exhaustive."\textsuperscript{16}

This section, which White and Summers call the most important in the Code,\textsuperscript{17} reflects an approach that is inconsistent with the position that the

\textsuperscript{13} See, e.g., id. § 1-106 ("remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed") (emphasis added); id. § 2-316 (exclusion and modification of warranties); id. § 2-725 (breach occurs when tender made, not when injury occurred).

\textsuperscript{14} Murray, The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code, 21 WASHBURN L. REV. 1, 1 (1981) (footnotes omitted). A footnote to the first quoted sentence says:

\begin{quote}
A genuine code totally displaces any pre-existing law. The Code depends upon supplementary principles of law and equity not displaced by its provisions. . . . A genuine code directs courts to look at the statute afresh in each case, regardless of prior interpretations. The Code must be read in the light of the precedents which have provided interpretations of the statutory language. It is clear that our courts, proceeding from the common law tradition, continue the concept of stare decisis in their interpretations. One of the principal draftsmen and commentators on the Code, Professor Grant Gilmore, suggests, "We shall do better to think of it as a big statute—or a collection of statutes bound together in the same book—which goes as far as it goes and no further."
\end{quote}


\textsuperscript{15} U.C.C. § 1-103 (1972).

\textsuperscript{16} \textit{Id.} § 1-103 comment 3.

\textsuperscript{17} J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 6, 19 (2d ed. 1980).
Code is a traditional code, supplanting all previous statutory and judicial law. Many of the fields specifically mentioned are general principles of torts or restitution, outside the immediate scope of contract law. A recognition of the availability of other tort principles such as negligence seems implicit.

B. Application of Article 2 to Products Liability

Using the term “products liability” to mean recovery for physical injury to person or property, Code provisions make it clear that Article 2 will provide relief. Section 2-714(3) provides that “[i]n a proper case any . . . consequential damages under the next section may also be recovered.”

Section 2-715(2) states that “[c]onsequential damages resulting from the seller’s breach include . . . (b) injury to person or property proximately resulting from any breach of warranty.”

Do these provisions not only provide for recovery under Article 2 but also imply that this recovery has become the sole available remedy, supplanting any action in tort? It is well to recall that these two provisions are not new but are merely declaratory of the common law and the corresponding provisions of the Uniform Sales Act. At common law, the action for breach of implied warranty—awarding recovery for physical injury on the basis of consequential damages—existed side by side with the tort action for putting a dangerous product on the market, with recovery for physical damages as the principal basis of the action. The same is true of the relationship between the two causes of action under the Uniform Sales Act. If the Code made no ostensible change in this aspect of the law in other respects, why should it be held abruptly to preempt the tort action?

In this connection reference may also be made to section 1-106: “The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.” Surely the tort law of products liability is “another rule of law.”

19. Id. § 2-715(2).
20. See UNIF. SALES ACT §§ 68(7), 70 (1906).
21. For a collection of cases, see 2 S. WILLISTON, SALES §§ 614, 614a (2d ed. 1924).
24. One commentator regards § 1-106 as more readily interpreted as preemptive when read in conjunction with the Code definition of contract in § 1-201(11).
C. Primary Concern of Article 2

Look again at section 1-106, quoted just above. The primary purpose of the remedies is to ensure that the aggrieved party is "put in as good a position as if the other party had fully performed." It is the expectation interest that is the prime subject of protection. Contract damages are the essential means of enforcing the sales contract. True consequential or special damages, including physical injury for breach of implied warranty, may also be included but, like the damages themselves, this relief is also incidental or consequential. Sections 2-714 and 2-715, providing for the recovery of damages, show the same aspect of priority. This approach is to be contrasted with the common law tort action, which was established for the primary purpose of affording recovery for physical injury and had its surrounding rules and principles developed for the essential purpose of accomplishing this result through a careful weighing and balancing of conflicting interests. This aspect of Article 2 is not cited as itself having a controlling influence on the answer to the question of preemption but as a background for evaluating the interpretive implications of certain other sections of the article.

D. Sections in Article 2 that Fail to Make Suitable Provision for Physical Injury Actions

There are Code sections that have been drafted from the point of view of protecting the expectation interest without any consideration of the problems involved in obtaining compensation for physical injury caused by a dangerous product.

(1) Tests for actionability of the product (sections 2-314 and 2-315): The implied warranties of merchantability and fitness for special purposes are clearly phrased in terms of the expectation interest and thus could have caused serious difficulties in providing remedies for physical injuries. In practice, however, it has turned out that the test for determining the actionability of a product is essentially the same whether the action is implied warranty under the Code or in tort for either negligence or strict liability. Some difficulties may arise regarding instructions to the jury in the warranty cases.

(2) Requirement of privity (section 2-318): This has probably been the most controversial section in Article 2. Privity of contract was tradition-
ally required in breach of warranty actions involving the quality or fitness-for-purpose of goods.\textsuperscript{27} In personal injury cases, courts had been resorting to various devices for getting around the requirement.\textsuperscript{28} After several false starts in the process of drafting this section, the version of the draft adopted and promulgated extended the application of the warranties to members of the buyer’s family and guests in his home.\textsuperscript{29} This proved to be an inadequate palliative, and in 1966 the Permanent Editorial Board promulgated two alternatives (B and C) to the original section, which was then designated Alternative A. Alternative B extended coverage to “any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person.” Alternative C eliminated the “injured in person” requirement.\textsuperscript{30} The reaction of the states was mixed. Each of the three alternatives was adopted in some states, and uniformity was lost. Others cut the Gordian knot and abolished the requirement of privity altogether. Still others relied on the Official Comment’s statement that the original section was neutral and not intended to enlarge or restrict the developing case law regarding privity.\textsuperscript{32} Many states took care of the matter by permitting the tort action to be maintained with its common law developments regarding privity. In general, states now allow an action even to a bystander who is injured by a dangerous product.\textsuperscript{33} The experiment has shown the difficulties of attempting to apply the same rules to actions for commercial damages or rescission and actions for personal injuries. A different rule was needed and the Official Comment indicates strongly that the draftsmen came to recognize this.\textsuperscript{34}

(3) Requirement of notice (section 2-607(3)(a)): The requirement that a buyer must “within a reasonable time after he discovers or should have discovered” a breach of warranty, give notice of the breach “or be barred from any remedy,”\textsuperscript{35} is taken from the Uniform Sales Act.\textsuperscript{36} As between the buyer and the seller, the requirement may serve a useful purpose if the product does not perform as might normally have been expected,

\textsuperscript{27} Since the action was on the contract itself, legal theory required that the plaintiff be a party to the contract or at least a third-party beneficiary.
\textsuperscript{28} See Prosser, \textit{The Assault Upon the Citadel (Strict Liability to the Consumer)}, 69 \textit{Yale L.J.} 1099 (1960); Titus, \textit{supra} note 11.
\textsuperscript{29} See U.C.C. § 2-318 (1962).
\textsuperscript{30} \textit{Id.} § 2-318 Alternative B (1972).
\textsuperscript{31} \textit{Id.} § 2-318 Alternative C.
\textsuperscript{32} \textit{Id.} § 2-318 comment 3.
\textsuperscript{33} See, e.g., Passwaters \textit{v.} General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Elmore \textit{v.} American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Cottom \textit{v.} McGuire Funeral Serv., 262 A.2d 807 (D.C. App. 1970); Giberson \textit{v.} Ford Motor Co., 504 S.W.2d 8 (Mo. 1974).
\textsuperscript{34} See U.C.C. § 2-318 comment 3 (1972) (alternatives “follow the trend of modern decisions . . . in extending the rule beyond injury to the person”).
\textsuperscript{35} \textit{Id.} § 2-607(3)(a).
\textsuperscript{36} See \textit{Unif. Sales Act} § 49 (1906).
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since the seller can repair or replace it and thus minimize damages. With
regard to personal injury caused by the product, replacement does no good.
Notice of injury is not regarded as a requirement for the bringing of a tort
action for that injury and is alien to the whole treatment of the matter,
particularly where the suit is brought against the manufacturer with whom
the plaintiff had no dealings. It is hard to believe that the drafters of the
Code were thinking of personal injury actions when they continued this
traditional mercantile practice in the Code. Indeed, it was the inappropri-
ateness of this requirement that produced the seminal strict products liaibil-
ity case, Greenman v. Yuba Products, Inc. 37

(4) Disclaimers (sections 2-316, 2-719(3)): Section 2-316 permits a
seller to exclude or modify all warranties, including the general implied
warranty of merchantability; the only restrictions are on the form and lan-
guage used and its conspicuousness. 38 This is in accordance with the cus-
tomy mercantile practice of allowing the parties to a sales contract to
make their own contract, so long as it deals with the quality and usefulness
of the product. It is completely inconsistent with the tort concept that one
who puts an unreasonably dangerous product on the market is subject to
liability for the harm it causes regardless of the contract, especially when
the injured person may not have been a party to the contract. 39 The draft-
ers did think of a personal injury action when they provided in section 2-
719(3) that consequential damages can be limited or excluded unless it is
unconscionable and that limitation of damages for injury to the person is
"prima facie unconscionable." 40 But this is of no consequence if the im-
plied warranty of merchantability, including safety, is excluded by dis-
claimer. If the original buyer accepts a disclaimer, protection of the injured
user or bystander is nonexistent.

(5) Limitation of action (section 2-725): Section 2-725 sets the period
for limitation of action at four years from the time the breach of warranty
occurs. The breach occurs "when tender of delivery is made." 41 This is
obviously based entirely on the concept that the product is not in accord-
ance with expectations so the buyer has been damaged and has a cause of
action at the moment the article is tendered to him. 42 It completely fails to

been adopted in California at the time of the injury in the case, and it was the
Uniform Sales Act provision that caused the trouble. See also Chapman v. Brown,
F.2d 149 (9th Cir. 1962).
38. See U.C.C. § 2-316(2) (1972).
39. The leading case on this, of course, is Henningsen v. Bloomfield Motors,
41. Id. § 2-725(2).
42. That this is entirely a contract statute of limitations is indicated by the
language of the section, which speaks of "contract of sale" in both the title and the
text. Id.
provide appropriate relief in the case of personal injury, where the cause of action arises only when the injury occurs. If the injured party is not the buyer, the statute of limitations may well have run before he even has a cause of action. The drafters were clearly not thinking of personal injury cases in this section, and if it applies to them the unjust result carries overtones of unconstitutionality. The courts have uniformly felt that they must be resourceful to find a way around such an "unbelievable" result. The usual method is to find that the provision is not intended to apply to tort actions.43

(6) Damages (section 1-106): This section provides that, for the Code as a whole, there can be no recovery of consequential or special or penal damages except as specifically provided.44 In appropriate situations involving reckless disregard of safety, punitive damages are regarded as desirable in tort actions. The courts continue to apply them in products liability tort actions.45

(7) Causation: Problems of cause in fact and proximate cause have frequently arisen in tort products cases, and sophisticated methods of dealing with them are continually developing. The Code has no such treatment and, though the comments occasionally refer to the expression "proximate cause," the references provide no helpful guidance. If tort actions are held to be preempted, are the courts left to improvise?

(8) The plaintiff's fault: Here, too, the tort cases have developed a network of rules involving contributory negligence, assumption of risk, misuse, and comparative negligence. Article 2 offers no means of solving the problem of apportioning responsibility between the plaintiff and the defendant. The nearest approach is comment 5 to section 2-715, which uses the idea of proximate cause to determine the effect of the buyer's unreasonable failure to inspect the goods for defects or discover the defect before use.46 This is obviously a torts milieu rather than one of contract law.

(9) Indemnity and contribution: There is no provision for this in Article 2. Perhaps it could be added as a supplementary common law rule under section 1-103. It may be well to add that the Code concept of


44. See U.C.C. § 1-106(1) (1972).


“vouching in,” found in section 2-607(5), might serve a useful purpose in the tort cases, particularly in regard to the retailer’s liability.

(10) Significance of these sections or omissions: These sections were drafted as treatments appropriate for adjusting the interests of a buyer and seller in a contract for sale of certain goods. They grew out of the practices of merchants in commercial transactions and the experience with common law and statutory developments over the years prior to the Code. But they are inappropriate for adjusting the interests of the parties when the defendant supplies a dangerous product that causes physical injury to the plaintiff or his property. Experience with the Code has fully demonstrated this, but the experience was unnecessary. The inappropriateness of the statutory provisions was easily recognizable to any well trained member of the legal profession who was ready to give due consideration to the matter. Professor Karl Llewellyn and his associates were wise and well trained lawyers, and they surely recognized that they were not adequately taking care of the problems involved in personal injury actions, although the language of Article 2 indicated that personal injury actions could be brought under the statutory provisions.

I submit that reconciliation of these apparent contradictions is quite simple. Article 2 was drafted with the primary purpose of treating the commercial law of sales. Rather than complicating that law unduly by putting in numerous special provisions to take care of physical injury cases—and thereby probably jeopardizing widespread adoption of the Code—the drafters were content to leave Article 2 as primarily a commercial statute under which a personal injury action could be maintained if desired but not supplanting the common law tort developments that had come about for the precise purpose of taking care of personal injury situations. In other words, Article 2 could be applied to the latter situation but was not intended to become the exclusive means of handling it.

This is entirely a matter of statutory interpretation, based on the actual language of the Code and reasonable inferences to be drawn from it. Any court deciding to draw these inferences is acting in accordance with recognized principles of statutory interpretation and is neither judicially re-

47. See id. § 2-607(5) comment 7.
48. The omissions listed above merely serve to confirm this general conclusion. If Article 2 had been drafted for the primary purpose of handling personal injury cases some statutory provisions would have been expected.
49. Perhaps the illustration par excellence of this is U.C.C. § 2-725 (1972), providing a limitations period that is quite appropriate for a contract action but utterly unsuitable for a personal injury action, whether in negligence or strict liability. Surely the draftsmen would have taken the time to prepare a separate limitations period for the personal injury actions if they had intended that all of these actions be brought under Article 2. These were experienced men and women, expert not only in the case law developments in products liability but also in the drafting of statutes.
pealing a legislative provision nor violating the principle of separation of powers.

E. Express Language in Official Comments to Section 2-318

The conclusion stated just above is essentially confirmed by two express statements in the Official Comments to section 2-318, the section involving privity of contract. As discussed above, the section as originally drafted and promulgated extended the application of warranties to members of the buyer's family and guests in his home. This later became Alternative A; Alternative B extended the warranties further, to persons who might be affected by the goods and who were personally injured by them, and Alternative C eliminated the requirement of personal injury.

Comment 2 states that the purpose of the section is to extend the benefit of the warranty to the designated beneficiaries and then adds that the section "seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence." This statement has been in the comment since the original promulgation. The final sentence of comment 3, which was added when Alternatives B and C were promulgated in 1966, reads: "The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A . . . in extending the rule beyond injuries to the person." The first quoted sentence seems clearly to state that there is no intent that Article 2 should interfere with the existence or use of negligence liability for products and thus there is no preemption. The second quoted sentence demonstrates that the Permanent Editorial Board in 1966 recognized the existence of strict tort liability for products and expressed no objection to it, instead offering an optional amendment to section 2-318 to make that section coterminous with section 402A. There is no negative implication of repeal here, but rather a positive indication of co-existence.

These two sentences from the comments to section 2-318 would alone be quite sufficient to convince many courts that Article 2 should be construed as leaving the tort law of products liability—whether negligence or strict liability—for the courts to develop without restriction.

F. Whose Intent—Draftsmen or Legislature?

Ordinarily, the legislature would have no intent independent from that of the Code draftsmen, but it could, of course, specifically advert to the problem and thereby acquire a different intent. In Delaware, the only state to hold categorically that the Code preempts strict liability, the state supreme court found that this had occurred. In Ciociola v. Delaware Coca Cola

50. Id. § 2-318 comment 2.
51. Id. § 2-318 comment 3.
52. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).
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Bottling Co., 53 a 1961 case, the court held that it was outside the judicial function for the court to change the common law requirement of privity of contract or adopt a rule of strict tort liability for products since those matters should be left to the legislature. 54 In 1967, when the Delaware legislature adopted the Code, it adopted a slightly modified version of Alternative B to section 2-318 on the recommendation of a legislative committee which stated that the recommendation was in response to the Ciociola case. 55 In 1980, when the issue of strict liability again came before the Delaware Supreme Court in Cline v. Prowler Industries of Maryland, 56 the court found that the legislative action meant that it intended the Code provisions “to be the sole remedy beyond negligence in products liability involving sales transactions.” 57

If the court had already adopted strict liability, would continuing inaction amount to an approval of that position? The court suggested that possibility. Suppose, in the recent so-called “products liability crisis,” the state legislature passed one of the numerous statutes putting some restrictions on the cause of action. Would this be regarded as a recognition of the proper existence of the strict tort action, since it was been modified? Should it make any difference which came first, Code or strict liability? I tend to distrust resort to these fortuitous circumstances as a basis for finding legislative intent either way, unless there is a reasonable and logical inference that the legislature did actually contemplate the issue and decide it.

III. LEGISLATIVE HISTORY

In the late 1930’s and early 1940’s, the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) was engaged in the preparation of a revised Uniform Sales Act. Professor Karl Llewellyn, recognized as the leading expert on sales law, was draftsman and chairman of both the Special Committee on a Revised Uniform Sales Act and the Section on Uniform Commercial Acts.

In 1941, the Section presented a second draft of the Revised Uniform Sales Act. This draft contained a “new” section 16-B, entitled “Obligation

54. Id. at 483, 172 A.2d at 257.
55. Del. Code Ann. tit. 6, § 2-318 (1978) provides: “A seller’s warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.” The “by breach of the warranty” language was added in response to Ciociola and in order to bring Delaware into line with the developing law in the larger commercial states. Id. § 2-318 study comment.
56. 418 A.2d 968 (Del. 1980).
57. Id. at 979. In Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 587 (Del. 1976), the court had held that a truck rental was subject to strict liability since Article 2 did not purport to cover that type of transaction and therefore did not preempt it, leaving the court to reach its own decision.
to Consumer and to Dealer for Non-Apparent Dangerous Defect," which provided:

(1) Where it can reasonably be foreseen that goods, if defective, will in their ordinary use cause danger to person or property, the manufacturer of the goods, by selling them or delivering them under a contract to sell when such defect is not reasonably apparent, assumes responsibility as follows—

(a) To any owner who derives title from the manufacturer and through the merchandising of the goods as unused goods, and to any non-owner authorized as such an owner, who in the ordinary course of use or consumption is injured in person or property or otherwise by reason of the defect; and

(b) To any buyer or sub-buyer, under a contract to sell or a sale between merchants, who, through a warranty reasonably made or incurred in ignorance of the defect and in reliance on its absence, suffers damage due to such injury as is described in paragraph (a).

(2) The general purpose of this section is to make the remedy available directly against a person able to arrange both reduction and spread of the risk of dangerous defects, and also to make the remedy accessible to the person injured. “Manufacturer” within the meaning of the section therefore includes a person who processes or assembles or repacks goods which he thereafter markets for ultimate use in consumption, and includes a person who by brand, trade-name, label, or otherwise assumes as against the user the position of a manufacturer or supervisor or sponsor of the manufacture. The liability also extends to any seller who delivers goods with knowledge of the dangerous defect.

(3) This section is not subject to negation or modification by contract, except that between merchants (and so far as is consistent with the warranty by operation of law in Section 14 and with the rules on modification of remedy in Section 57), a merchant buyer may limit his own rights hereunder.

(4) This section neither states nor implies a policy with regard to goods which in their ordinary use, and without defect, are dangerous only to particular persons allergic or super-sensitive to such goods.\(^58\)

The comment to section 16-B stated that the problem involved had become a serious matter, and that the “courts have thus far worked out . . . [3] major lines of remedy.

(1) A chain of actions and actions over, by way of breach of warranty in each successive role.”\(^59\) This works out to “clean up the whole matter” if all parties can be reached, but involves “delay, expense, waste and uncertainty.”\(^60\)

\(^58\) Revised Unif. Sales Act § 16-B (Proposed Second Draft 1941).

\(^59\) Id. § 16-B comment.

\(^60\) Id.
(2) "An action in negligence against the manufacturer." This covers all necessary plaintiffs and goes against the most important defendant directly, but there are difficulties in proving negligence.

(3) "A third party warranty by the manufacturing seller based on a number of different theories by different courts . . . ." Other selections from the comment follow:

The solution here proposed does not attempt to displace any of these lines. It is modelled on the third, and so far as concerns the proper original plaintiff upon the second also. It seeks to place direct responsibility upon the link in the chain best able at once to insure or absorb the loss and to prevent its recurrence. It takes as the gravamen of liability the putting of dangerously defective goods, by sale or delivery, upon the market.

The chain of actions is not abolished under the proposal. It runs side by side with this section. But it is believed that with this section in force such a chain of actions will fall into rapid desuetude . . . .

Does such a section belong in a Uniform Sales Act? The law in this general field is tort-law and market-law rolled into one. The growth has been in negligence-law (with res ipsa loquitur aiding) and warranty-law (with third-party beneficiary rules aiding) and in a deliberate fusion of the two. All that has kept warranty-law from absorbing the whole field has been the traditional limitation of "privity"; and some courts have already moved into the concepts of "warranty running with the goods" and of "warranty for the benefit of third persons." . . .

The Draft proceeds upon the position that the regulation of rights between immediate seller and buyer is in this particular area impossible of sound adjustment, in the absence of such a section as the present one . . . . The position is, further, that the lines of the tremendous case-law development require consolidation, and require a clear theory for their unification in a national market.

The base-line of the section reflects the case-law trend. The new feature lies in a relative precision which some hundreds of cases cannot be expected to provide as they proceed from particular instance to particular instance.

. . . .

(1) Defect. The term is intended to be broad enough to include defects of manufacture or design, adulteration, presence of foreign substances, and indeed the whole range of hidden danger, when the net product appears and ought to be safe to use in the ordinary manner, but is not.

61. Id.
62. Id.
63. Id. (emphasis in original).
"Assumes Responsibility": This amounts, in theory, to an imposition, by operation of law and from the fact of putting the goods upon the market, of a third-party warranty obligation running with the goods. The responsibility depends upon deliberate action, but cannot be negated by intent to have the benefits of the action without the burdens.\(^4\)

Several remarks can be made about this proposal of section 16-B:

1. The draftsmen were fully aware of case law developments in products liability and wanted to do something about them.

2. They realized that the privity problem would have to be taken care of and they were prepared to do that by imposing responsibility directly by law rather than by a warranty implied into a necessary contract. They failed to take care of the "bystander," but section 402A also did that and left it for developing case law.

3. They were concerned about whether a section of this nature could be justified as a part of the Uniform Sales Act.

4. The proposal is remarkably prescient. The comment about the "gravamen of liability" is almost a precise duplication of some explanations of section 402A.

5. It was expected that case law would develop the scope and application of the section if it was adopted.

6. In light of subsequent case development, some minor modifications of the provisions of the section would have been warranted.

The proposed revision came before the annual conference meeting of the N.C.C.U.S.L. in Indianapolis in September, 1941, and was presented before the Committee of the Whole. In presenting proposed section 16-B, Professor Llewellyn said:

This presents one of the most controversial and troublesome matters which has come before your Conference or come before the courts of your country for the past forty years. It has occupied more attention in the legal literature than any private law subject, bar none, including the Federal Rules. It is simply amazing how much noise this problem has made, how much litigation it has caused, the purely quantitative number of cases that have been appealed to the courts of last resort and the inordinately larger body of material that has never come to appeal. When therefore we present this section to you, we do it with proper hesitancy and trepidation. At the same time, it is suggested that something has got to be done to clarify the matter. I will proceed to the reading of the section.\(^5\)

He then read the section. Discussions initially centered around subsection (4) and the allergy problem, and that subsection was tentatively approved.

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64. *Id.* (emphasis in original).

The question was raised whether the liability should be strict—an insurer's liability, given a defect. To this, Professor Llewellyn responded:

The question of whether the liability should be as strict as it is stated is a deep and difficult question. Perhaps I am unduly moved by being a sales lawyer. Being a sales lawyer, I have come to the problem over the years by way of seller's responsibility. I notice, however, that in the accompanying development of negligence law which has gone on side by side the sales development—and they have often gotten mixed together, many courts have explicitly mixed them together—the trend toward absolute obligation in the event of defect is as unmistakable as it is in sales law. Res ipsa loquitur on this matter has been spread to the place by the courts where it stops being res ipsa loquitur and becomes insurance. I think the thing ought to stand upon the proposition laid down in the section, but I would not fight for that one.66

The question of explosive cleaning fluids was raised, and the argument was made that there was no defect if there was a warning of the danger.67 Much of the discussion, largely between Professor Llewellyn and Hiram Thomas, counsel for the Merchants Association, was on the question of whether the section should be included in the act. Some of the discussion is quoted:

MR. LLEWELLYN: By and large the cases involving . . . [products liability] have been badly seen by the writers and confusedly seen by the courts. The writers have an idea that there is something peculiar about food. As a matter of fact, the cases do not show that food is the problem. The cases show that what is the problem is the manufactured articles of the kind that a normal customer today doesn't know the innards of and uses at his peril, and whether it be an electric pad which, for example, burns you up and your bed, or whether it be a can of beans which turns out to break your teeth or provide you with an undesired virus or glass broken in your stomach, it comes to the same thing. In either event, what you do, as we all know, is to go out and take it. If you happen to see anything wrong with it, you don't use it, and if you don't happen to see anything wrong with it, you do use it, and then you are sorry.

. . . .

[W]e do not have the experience of the insurance companies who handle insurance in this matter to assure us that this type of case runs to a materially less figure in the main than the cases on maintenance of premises and automobile accidents, so that the danger of false abuse of such a provision as this appears to be materially less than one has in other phases of the law.

Contrariwise, the actual need for remedy and reform is tremendous. It is a need requiring attention by such a body as yours,

66. Id. at 92.
67. Id. at 87.
and it is a need requiring such attention because the legal tools for giving any remedy are confused, are uncertain, don’t guide trial courts and lead to a welter of appeals which is simply outrageous.

The theory on which the remedy is given is utter nonsense wherever there has been a theory. I speak quite deliberately. I have been on this trail for twenty years, and every time I have found the first beginnings of a good idea in a court, I have found neighbor courts rejecting it.

If, for example, you proceed along the lines of warranty, then you run into court after court that says, “But a child can’t have the remedy.” You even run into a court that says, “When a wife buys, she buys as the assumed agent of her husband; therefore she has not got the remedy.” You see, it is nuts, just nuts!

I think that the theory of the section is a clean, intelligent theory. I think the danger involved is a minor danger. I urge, therefore, that you include it.

MR. THOMAS: May I be heard very briefly? Commissioner Llewellyn, in his comment on this section, has raised, and I think very properly raised, the question of whether a law like this really belongs in a sales act. I think that goes to the roots of the whole matter. The element of sale in cases of this character seems to me a mere matter of machinery by which a question gets in litigation. Essentially the wrong done in matters of this kind is a tort. As I say, the sale is only a triviality. What difference does it make in common sense that the man who is injured through a can of beans that cost him ten or fifteen cents? That isn’t the point, and the cases never take any account at all of the prices paid. The damages don’t get the man back his ten or fifteen cents. It is a liability based primarily on tort, a duty really imposed by law, if we are going to have that class of thing. I don’t think the contractual element is really worth talking about.

Logically, the policy of this section seems to me admirable, and it is beautifully worked out. I know, however, that several bills of this character, perhaps not going as far as this in their language or implication, have been uniformly defeated in the New York legislature largely for the reason that they would open the door to so much strike litigation. We have an awful lot of it in New York.

The statistics from insurance I have not considered, but it is my impression that the amount of insurance against risks of this kind is not nearly as great or as wide as the amount of insurance taken out against automobile accidents.

MR. LLEWELLYN: Nor are the collections under it anything like as large.

MR. THOMAS: No, that is true, but the number of small claims, very vexatious small claims, that are utterly without merit, is amazing, and those cases don’t get into the appellate courts at all.

Whether you should have any law at all like this, in view of
these practical considerations, I don’t know, and I am not advocating or opposing, but I do seriously question whether a sales act is the place for it.

It seems to me that before a law like this is enacted, it should have the consideration of people who are not primarily interested in the law of sales. . . .

MR. LLEWELLYN: . . . I should be perhaps a little slow to urge the inclusion of any such provision in a sales act if it were not that I can point you to 250 cases that have worked the thing out in terms of sales in appellate reports of the last thirty years. Now, 250 cases, if you will permit me to say so, is not a small body of appellate litigation and would seem to give a touch of validity to the notion that a sales act could properly deal with the matter. If you don’t want it included in the sales act, I will tell you this, gentlemen, you had better expressly exclude it because the body of judicial precedent that will read it in is overwhelming. . . .

MR. THOMAS: May I make one suggestion, and that is that in considering the section, the gentlemen address their minds to the question of whether you are going to get this section in any form adopted by the state legislature. That is a severely practical question. I know New York has turned it down time and again. I think the latest one was to extend a warranty to the family of the purchaser and his guests. Well, we all envisioned what would happen. There would be a party over on the East Side and everybody invited, all the family and all the guests, and there would be about twenty lawsuits started the next day. Now, those are the things that stick in the minds of your legislators, and you can’t ignore them.

MR. LLEWELLYN: Without attempting further to pass on the matter, because it has been deferred for final consideration after we receive critique, I will state only this about what Mr. Thomas has said, because I should like you to bear this in mind, too—I aim to be a practical man as well as my brother. The legislature, when it comes up, in words, in a special act, has again and again refused to move, but the Supreme Court of the State is making movement by the legislature quite unnecessary. It comes to the Supreme Court in cases, and the law widens with a speed which is astounding on the matter. We have done little more in this section than state the actual state of the law, save that we have left out the confusion therein. That we think to be no loss.

In the end, at the suggestion of Professor Llewellyn, the Committee of the Whole agreed to “approve [the section] to be put out for critique and pass on it when we get our critique next year.”

The section was apparently not in the Act when a revision came back to the Conference in subsequent years, and it was dropped from future drafts. In the meantime the joint project between the N.C.C.U.S.L. and the

68. Id. at 88-93.
69. Id. at 92.
American Law Institute for production of the Uniform Commercial Code had developed, and nothing further was heard of section 16-B. But from the remarks made by Professor Llewellyn about the nature and seriousness of the problem and the approval of the Act by the Committee, it must be perfectly clear that the elimination of section 16-B did not come about because of a belief that the revised Uniform Sales Act—and its successor, Article 2—adequately took care of the problem of physical injury to person or property. If this is so, it is obviously unreasonable to construe the remainder of Article 2 as if it was intended to preempt the subject and provide the sole solution. This would have invalidated all of the existing case solutions and constitutionally prevented the courts from developing any satisfactory way of handling what the drafters recognized as a very difficult problem.

Indeed, section 402A of the Restatement comes close to doing exactly what section 16-B was drafted to do, and there is every reason to believe that Professor Llewellyn would have been gratified by it as the culmination of the development of strict tort liability.

It is pertinent here to refer to the position of Dean John E. Murray, recognized as an authority on interpretation of the Code. Commenting in 1970 on the case of Mendel v. Pittsburgh Plate Glass Co., he quoted section 1-102—"[t]his act shall be liberally construed and applied to promote its underlying policies"—and declared that there "is no difficulty in construing the Code in terms of its underlying purposes, and assuming that 'underlying' means, at least, that [as] the purposes are not always clearly expressed, a 'plain meaning' methodology is rejected." He concluded:

[The] Rule of Construction which courts are commanded to use . . . suggests that . . . [certain sections of Article 2 were] not intended as the ultimate or exclusive law on products liability; that a court is permitted if not invited to extend . . . [them] and, therefore, the adoption of something like 402A is not in conflict with such purposeful development. Thus the fundamental error of the majority in Mendel is the failure to construe the Code as it must be construed according to the basic rule of construction expressly set forth.

The episode regarding section 16-B indicates that the drafters were strongly interested in seeing that a forthright, logical, and unitary system for providing adequate relief for injured consumers would be made available to replace the tattered patchwork of fictitious theories described by Professor Llewellyn. When political expediency dictated that the section be dropped from the Act, the drafters would certainly have been ready to rec

72. Murray, supra note 11, at 88.
73. Id. at 88-89.
TORT LIABILITY

recognize that the development of section 402A has accomplished exactly the same goal. This may therefore be characterized as an unexpressed "underlying purpose" that the courts are instructed in section 1-102 to "promote."

A second relevant circumstance is the analogous experience occurring in the 1970's when the Uniform Land Transactions Act (U.L.T.A.) was being drafted. Certain parts of it involved express and implied warranties and their ramifications. The draftsmen used Article 2 of the Code as a model and tracked it rather closely. In the consideration of the Act, some commissioners, remembering the preemption problem with the Code, inquired whether the U.L.T.A. provisions were intended to preempt the tort law on the subject. The response was a clear negative. The suggestion was then made that if this was true it might be well to say so and avoid a recurrence of the Code dispute. This was agreed to, and section 2-314 was prepared, stating:

Nothing in this Act determines or affects the liability or nonliability of a seller to any person, including the buyer, arising apart from this Act for bodily injury, death or property damages caused by a defect in the real estate including any improvement made or arranged for by the seller of the real estate.\(^\text{74}\)

The section was discussed and debated at some length, some minor changes were agreed to, and it was approved.

At the 1975 meeting, toward the end of the discussion of the U.L.T.A., one of the commissioners who had opposed the section in 1974 presented a written statement on it and moved to strike it. Despite a point of order that the issue had been settled the previous year, the commissioner continued speaking, urging that it should be stricken so that further consideration could be given to its implications. He drew some support and the committee protested mildly on the basis that the section was "neutral" so far as the courts were concerned. Commissioners who would have supported the section were all away, working with another drafting committee whose act was to appear later before the Committee of the Whole. The motion to strike the section prevailed by an uncounted voice vote. There was no later opportunity to reconsider the matter and the promulgated U.L.T.A. has no provision on the subject. The relevance to the Code issue is that the draftsmen expressly stated that they had no thought of preempting the tort remedies, directly contradicting the application of a negative implication.

IV. LINEDRAWING: CULPABILITY V. STRICT LIABILITY OR TORT V. CONTRACT

Most of the commentators who argue for Code preemption are willing to concede that the preemption does not apply to a tort action based on negligence. Indeed, some of them go even further and express doubt whether Article 2 applies at all to a case that can be based on negligent

\(^{74}\) UNIF. LAND TRANSACTIONS ACT § 2-314 (Proposed Draft 1974).
conduct by the defendant. Why this latter position should be taken is hard to understand. Sections 2-314 and 2-315 on implied warranties refer only to the condition of the goods. If the goods are unfit or not of merchantable quality because of their unsafe condition, they come within the literal language of the sections no matter what conduct of the defendant was involved in their coming to be in that condition. If the plaintiff can prove negligent conduct on the part of the defendant, it may be in his interest to base his suit on negligence. But as any survey of the products liability cases will show, there are numerous cases in which a plaintiff has successfully sued on both implied warranty and negligence, as well as strict tort liability, without any suggestion that the two are mutually exclusive so that it is not possible to recover on both or choose between them.

What is the basis for this concession if the action could be brought under the Code? Why distinguish between tort actions of negligence and strict liability in this regard? There is very little discussion of this; it is usually just tacitly assumed. Perhaps one possibility is the language in comment 2 to section 2-318, the privity section, that the section seeks to accomplish its purpose “without any derogation of any right or remedy resting on negligence.” More likely it is due to an awareness of the hue and cry that would have arisen if it were suddenly declared that the long established system of negligence liability for products, with its myriad of cases, had been superseded by the Code and had ceased to exist. It must have been partly due to the fact that, at the time of drafting the Code, the cases imposing strict liability in tort were a disorganized lot, often using the language of warranty and resorting to fictitious circumlocutions. In addition, forthright strict liability for products was a development taking place after Article 2 was promulgated and enacted in some states. On the other hand, strict tort liability for certain types of situations outside the products field is an ancient concept even antedating the separate existence of an action in negligence.

A. Culpability and Strict Liability

However the explanation for the distinction is made, it is described as one between culpable conduct and strict liability. How workable is the distinction in determining the scope of legislative preemption? It runs into trouble because of the difficulty in drawing the line of distinction. From the one side, a negligence action does not always require culpability in the moral sense of that term. Negligence standards are objective. They often hold an actor to a measure of knowledge that he does not actually have. In addition, the use of the “doctrine” of res ipsa loquitur means that juries sometimes hold a person to be negligent when he was not truly culpable at

75. See, e.g., Dickerson, Prosser’s Folly, supra note 11, at 485.
76. U.C.C. § 2-318 comment 2 (1972).
Violation of a criminal or regulatory statute is commonly called “negligence per se.” Often this occurs in situations where no real culpability is involved. Yet long before the drafting of Article 2 it was traditional to call this negligence. In addition, the courts may themselves lay down a specific rule of law in substitution for the general negligence standard of what a reasonable prudent person would do. When they do this, it is still treated as negligence per se. Thus, a court may declare that it is negligence as a matter of law—negligence per se—for a manufacturer to put on the market a product that is unreasonably dangerous. This amounts to saying that his conduct in doing so is culpable.

Indeed, this is exactly what has happened in several states, where the courts in carefully spelled-out opinions explain that “strict products liability” is really negligence per se, to be treated as such. The courts in these states would thus apparently not be subject to the charge of unconstitutional action in violating the principle of separation of powers.

The distinction between negligence and strict liability also runs into trouble from the strict liability side. Strict liability, too, has overtones of culpability; the conduct has fault elements. The traditional strict liability, that deriving from the rule of Rylands v. Fletcher, is commonly recognized as based on the defendant’s engaging in ultrahazardous activity. The fault overtones are obvious. This is not called negligence because there is no need to prove negligence in the way the activity is carried on. Engaging in the activity at all when it creates a greater-than-usual danger of injury to other persons is essentially an objective form of negligence: negligence per se.

So, too, with putting on the market an unreasonably dangerous product. There are overtones of real fault in committing this act whether or not there was fault in creating the dangerous condition or failing to eliminate it. The conduct is tortious and the defendant is a tortfeasor.

Another argument sometimes used for drawing this line of distinction

77. In his discussion of § 16-B, quoted above, Professor Llewellyn made a point of the fact that, as a result of the use of res ipsa loquitur in negligence actions, “the trend toward absolute obligation in the event of defect is as unmistakable as it is in sales law. . . . [It now] becomes insurance.” See Part III supra.


79. The contention has been made, however, that no matter whether it is traditionally called negligence or not, if the conduct does not involve culpability there is no way that it can be negligence. Dickerson, Constitutionality, supra note 11, at 220. Would this mean that despite the traditional name used in a traditional way, the court must decide in each case whether the defendant’s conduct involved factual, subjective culpability?

80. 3 H.L. 330 (1868).

is that strict tort liability for products is a late development in the law of torts—so late, in fact, that it came after Article 2 was completed. This argument might have carried more weight if the creation of strict products liability had been statutory and a complete change in the law. It was neither. First, it was a common law development. And it is the nature of the common law, and especially the common law of torts, to "develop"—to adapt to meet the problems raised by changing social and economic conditions and the corresponding modification of legal ideas and concepts. There existed prior to the completion of Article 2 a substantial number of cases offering varying, somewhat inadequate, bases for imposing what is essentially strict liability for dangerous products of differing types.\textsuperscript{82} One of the functions of appellate judges, "restaters," and text and law review writers is to study and analyze developing trends in the law and to provide a more logical and more satisfactory explanation of the central underlying idea behind the cases. This is exactly what happened with section 402A and the \textit{Greenman}\textsuperscript{83} case. The reception given that development by the courts is an indication of how valid it was. Surely no one could seriously argue that the applicable tort law must necessarily be limited to that which had been expressly decided by the courts prior to the promulgation of Article 2.

B. Tort and Contract

The other line of distinction is that between tort and contract. I cannot contend that this is always a clear, bright line that raises no difficulties in its application. There may sometimes be overlap and not all courts agree on where the line applies for some types of situations.

But it is a traditional distinction that is well established and used for many purposes. It is customary to look to the gravamen of the cause of action. Contract law protects the expectation interest. It seeks to place the plaintiff in the position he would have been in if the defendant had not broken the contract. Tort law has as its gravamen the restoring of the plaintiff to the position he had been in before the defendant's wrongful conduct injured him. The details and ramifications of the two sets of laws were developed in the light of the primary purpose of each.\textsuperscript{84}

\textsuperscript{82} For a collection of the cases and a discussion of the area, see Prosser, \textit{supra} note 28.


The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the
When the courts talk about the gravamen of a cause of action, even though the defendant's acts grew out of a contract between the parties, they almost always find the gravamen to be in tort if the harm is physical injury to person or property. In the personal service cases—involving doctors, for example—they almost always hold that the action must be in tort and should not be brought for breach of contract.

In cases involving a contract for sale of a dangerous product, however, the action can be brought on the contract for breach of an implied warranty. This is because the Code provides as much, in language that leaves no doubt of its effect. The question here is not whether an action for breach of implied warranty can be brought. Instead, it is whether implied warranty is the only action, except possibly negligence, that can be brought.

The distinction between contract and tort is thus to be used only to determine what other actions are available in addition to the contract action for breach of implied warranty. Both negligence and strict tort actions should be available. The gravamen for both is the same.

In addition, the milieu of a tort action is much better suited for the trial of physical injury cases than a commercial action, particularly when the commercial action is subjected to the Code limitations and defenses. This could be spelled out in detail by repeating, with a somewhat different emphasis, some of the matters previously discussed. It may instead be better to advert to the tidal wave of adoptions of strict products liability throughout the whole country. Lawyers and judges have readily realized that the tort milieu is much better adapted for trying the issues and reaching a result fair to both parties.

Even the law review commentators espousing preemption have recognized that (1) in those states adopting strict tort liability the cases are almost always tried on that basis rather than on implied warranty, and (2) the Code restrictions are often likely to produce an unfair result. Their position is that the right construction of the statute requires a holding that

document of strict liability in tort indicates that it 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.

That Professor Llewellyn, in drafting Article 2, was thinking in terms of a distinction between contract and tort rather than one between negligence and strict liability is suggested by a comment he made to the 1943 Committee of the Whole. Discussing the privity section and persons outside its coverage, he said that they would be left "to their remedy in tort." N.C.C.U.S.L., Proceedings of the Committee of the Whole on Revised Uniform Sales Act 105 (1943).


86. See, e.g., Dickerson, Prosser's Folly, supra note 11, at 486 ("a good social result built on bad doctrine"); Shanker, Strict Tort Theory, supra note 11, at 39-46 (recommending amendments to the Code); id. at 47 (results of strict tort decisions "comport with a sense of modern justice").
it preempts the action for strict liability and that the parties can conform to the statutory restrictions even though they may work unfairly.

When one is construing a statute that does not expressly answer the issue posed, it would seem to be quite in order to give appropriate consideration to the practicality and overall desirability of the results attained by the decision. The best, and I think most accurate, construction of Article 2 is that although it is ready to afford relief in the case of physical injury from a defective product, it is not competing for the business, at least to the extent of unilaterally imposing a monopoly. 87

V. Future Developments

For the immediate future, it seems unlikely that there will be any substantial change in the products liability situation. Perhaps another state or two will judicially or legislatively adopt strict tort liability. It seems unlikely that the constitutional arguments of the academic preemptionists or the Delaware Supreme Court's holding in Cline v. Prowler Industries of Maryland 88 that it did not have authority to adopt strict liability judicially will have a pronounced effect on the status of the law in general.

A number of states, of course, have handled the issue of preemption by legislatively adopting section 402A or some other provision providing for strict tort liability. Have these amounted to repeal or preemption of the implied warranty action under Article 2? I would think that the answer is no, unless it is expressly provided or clearly implied.

There are some problems with the present state of the law. One is the

87. This should carry with it a corresponding obligation on the part of the strict liability proponents that they also refrain from engaging in unfair competition. Tort law should not seek to "gobble up" the actions whose gravamen is the protection of the expectation interest, putting the buyer in the position he would have been in if the product had performed in the way it should have. Chief Justice Traynor, who gave us strict liability in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), also gave us the limitations on the scope of tort liability in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 195, 45 Cal. Rptr. 17 (1965) ("galloping truck" that did not perform effectively). See Wade, Chief Justice Traynor and Strict Tort Liability for Products, 2 Hofstra L. Rev. 455 (1974). Although there is some disagreement on the matter, the substantial majority rule has come to be, in accord with Seely, that economic loss deriving from a failure of the product to perform in accordance with the implied warranties is not actionable in tort, whether negligence or strict liability. See, e.g., Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Two Rivers Co. v. Curtiss-Breeding Serv., 624 F.2d 1242 (5th Cir. 1980). A remaining problem is how to classify the suit when the product does damage to itself. See Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., 572 S.W.2d 308 (Tex. 1978).

88. 418 A.2d 968, 973 (Del. 1980).
lack of uniformity. The states have developed differing tests for determining whether a product is actionable. Statutes passed during the recent products liability crisis exacerbate the differences and often favor special interests. Ordinarily, differences in tort rules in the several states have no particular significance to parties since the issue is primarily local and local policies may be applied without affecting persons in other states. But this cannot be said of products liability law. The law in one state may adversely affect all three parties to a personal injury case—manufacturer, insurer, and injured party—in other states. The manufacturer's products may be distributed in many states, even nationwide. He must give due consideration to the liability law of all the states where he distributes, and this may affect the nature and cost of his products. The insurance companies are not accustomed to calculating insurance rates according to the actuarial experiences in the individual states. If a state in the northeast or on the west coast develops a rule that is unusually favorable to the injured party, insurance rates and product costs may both rise in other states without any corresponding benefit to the consumer. One of the ironies of the legislative splurge to put restrictions and limitations on liability actions to relieve the products liability crisis was that such an act in a particular state lessened the protection for the local consumer without affording any actual relief to the local manufacturer.

Another problem arising out of the current products liability situation is that it has become a regular practice in many states for a plaintiff to sue on all three bases: implied warranty, negligence, and strict tort liability. While there are many similar aspects among these three theories, there are some differences, too. As a result, instructions to juries may become so complex and confusing that even the judge and the lawyers are unable to sort them out, much less the poor jury. Some courts try to alleviate this condition by requiring an election of the theory relied on before the case is submitted to the jury. A better way of handling the problem would be to develop an amalgam of the three theories, set in the right milieu and using the most desirable features of each.

The United States Department of Commerce undertook to do this by setting up a task force to study the problem and draft a model statute for the states to adopt. The draft prepared as a result was carefully and expertly done but proved unsuccessful in gaining any widespread adoption. More recently, efforts have been made to use the model act as the basis for drafting a federal act to be passed by Congress. Committees in both the Senate and the House have prepared tentative drafts that are gradually approaching a consensus.

A federal act would solve many problems, but it might well create

89. See MODEL STATUTE ON PRODUCTS LIABILITY (U.S. Dep't of Commerce, Tentative Draft 1980).
others. The first and most important is that of making certain that the act establishes a fair balance in protecting the interests of the adverse parties. This requires not only drafting skill and legal expertise but also an innately impartial and objective point of view. It also requires careful avoidance of some of the usual disadvantages of legislation. The gravamen of these problems lies in tort rather than commercial law. Rather than the precision and rigidity often sought for commercial law, what is needed are flexible terms and standards. Professor Llewellyn saw this clearly and sought to use standards like good faith and reasonableness to refer to underlying purposes and to allow case law development.

There is a remarkable coincidence between the situation in 1940, when the revised Uniform Sales Act was being prepared, and the present. On that occasion, while the uniform act was being worked on, a similar federal act was under consideration in Congress.\textsuperscript{91} The federal act did not succeed, but the uniform act became a part of the Uniform Commercial Code and was adopted with resounding success. Today, the model act having fallen by the wayside, a federal act may succeed, provided it deserves success.

It is a tragedy that Karl Llewellyn is not now available to help draft it. I have a vague, fleeting memory of an A.A.L.S. Convention roundtable session some forty years ago. It was apparently an impromptu affair at which Professor Llewellyn presented the idea behind his section 16-B with all of his usual sparkle and verve. Two torts professors who had not seen the draft before coming to Chicago spoke in opposition. They were Leon Green and a brash young law teacher named John Wade. My remarks, as I vaguely recall, were in praise of the flexible standards of the tort law and how they facilitated the attainment of justice between the parties after they had “got-ten into a mess,” as distinguished from the more precise planning rules of commercial law. Professor Llewellyn effectively responded by pointing to the flexible terms and standards in his statutory provisions.

Today, after leisurely studying his section 16-B, I pay belated homage to him. His draft was remarkably prescient.\textsuperscript{92} “There were giants in the earth in those days...”\textsuperscript{93}

\textsuperscript{91} A copy of the bill and articles regarding it are found in \textit{The Proposed Federal Sales Act}, 26 VA. L. REV. 537, 668 (1940).

\textsuperscript{92} One place where it anticipates later developments is the distinction drawn between manufacturer and seller and the provision that the seller’s liability depends on his “knowledge of the dangerous defect.” A number of the recent state statutes have made the retailer’s liability dependant on his negligence—unless it is not feasible to hold the manufacturer liable. This raises some interesting problems.

\textsuperscript{93} \textit{Genesis} 6:4 (King James).