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The Application of the Doctrine of Unconscionability to Warranties: A Move Toward Strict Liability Within the U.C.C.

COMMENTS

THE APPLICATION OF THE DOCTRINE OF UNCONSCIONABILITY TO WARRANTIES: A MOVE TOWARD STRICT LIABILITY WITHIN THE U.C.C.

I. INTRODUCTION

The sales warranty has long played a major role in the field of product liability, chiefly because the concept of warranty has always possessed a unique flexibility permitting development in accordance with the prevailing social policy, whether the impetus of that policy was toward protection of the manufacturer or protection of the consumer. The application of the unconscionability doctrine to warranty disclaimers presents a new method by which the sales warranties presently arising under Article 2 of the Uniform Commercial Code (U.C.C.), may be expanded to provide more effective consumer protection. This new development, however, while potentially significant, comes at a time when the position of the traditional warranty concept is being challenged by a new concept—a system of strict liability based upon tort—that may ultimately displace, at least partially, the Code warranties in the product liability field.

Long one of the traditional bases of product liability, warranty occupies a unique position in the law primarily due to the difficulty attendant in its theoretical classification—a difficulty that has arisen because the courts have wavered in their application of contract and tort theories to warranty. The conflict within the Uniform Commercial Code between contract and tort theories is an outgrowth of the manner in which warranty has developed. Breach of warranty was originally regarded as a pure tort action for deceit, properly initiated under a writ of trespass on the case, and was held to be entirely distinct from the contracts field.[1] This classification remained unchallenged until 1778, when *Stuart v. Wilkens* held that assumpsit was the proper form for an action based upon the breach of a vendor's express warranty.[2] The eventual result of this decision was that warranty came to be regarded as contractual in nature.[3] The new character of the action gave rise to a question: If warranty was contractual, was it exclusively so, or did it still contain elements of tort? The courts have provided no easy solution. While some have held that a breach of warranty will, in and of itself, admit of either a contract action or a tort action,[4] others have held that a contract

1. W. Prosser, Torts § 95, at 651 (3d ed. 1964); Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888); Note, Necessity for Privity of Contract in Warranties by Representation, 42 Harv. L. Rev. 414 (1929).

2. Stuart v. Wilkins, 1 Dougl. 18, 99 Eng. Rep. 15 (K.B. 1778).

3. Mahurin v. Harding, 28 N.H. 128, 130, 59 Am. Dec. 401, 403 (1853); Wells v. Oldsmobile Co., 147 Ore. 687, 691, 35 P.2d 232, 233 (1934); W. Prosser, Torts § 95, at 651 (3d ed. 1964); S. Williston, Sales § 197 (rev. ed. 1948).

4. Shippen v. Bowen, 122 U.S. 575 (1887); Dushane v. Benedict, 120 U.S. 630, 636

action is the sole remedy in the absence of evidence of actual fraudulent intent.[5]

II. Nature of Warranty

The traditional distinction between tort and contract is that tort is based upon duties imposed by law in furtherance of social policy.[6] Breach of these duties results in liability for proximately resulting injuries.[7] Contract, on the other hand, involves obligations agreed to by consenting parties,[8] and liability is restricted to injuries within the contemplation of those parties at the time of contracting.[9] Contractual limitations surrounding warranty actions would appear to identify warranty as essentially contractual. Under the common law a privity requirement, which has not been completely eliminated by the Code,[10] was imposed upon warranty actions.[11] In addition, the Code contains provisions expressly permitting the manufacturer to limit warranty remedies and damages, and to exclude warranties entirely.[12] These limitations are essentially contractual in that they operate, in their purest sense, to make warranty liability dependent upon contractual relationship rather than legal duty. Yet these contractual elements are counterbalanced by factors pointing to warranty as a tort. The liability for breach of warranty is tortious in character because it extends to personal and property injuries proximately caused by the breach,

(1887); Schuchardt v. Allens, 68 (1 Wall.) U.S. 359, 368 (1863); Wells v. Oldsmobile Co., 147 Ore. 687, 691, 35 P.2d 232, 233 (1934).

5. Emerson v. Brigham, 10 Mass. 197, 200, 6 Am. Dec. 109, 110 (1813); Mahurin v. Harding, 28 N.H. 128, 134-37, 59 Am. Dec. 401, 406-07 (1853); Price v. Lewis, 17 Pa. 51, 52, 55 Am. Dec. 536 (1851).

6. W. Prosser, Torts § 93, at 634 (3d ed. 1964); 38 Am. Jur. Negligence § 4, at 645 (1941). See Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939).

7. Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948). See McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911); Lang v. Stadium Purchasing Corp., 216 App. Div. 558, 215 N.Y.S. 502 (1st Dep't 1926); 5 S. Williston, Contracts § 1344, at 3774 (rev. ed. 1937). The liability is only for those proximately resulting injuries which the breached duties had been imposed to avoid. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). But this limitation is not nearly so restrictive as that imposed upon contract actions. See notes 9 & 10 infra and accompanying text.

8. W. Prosser, Torts § 93, at 634 (3d ed. 1964).

9. New York Water Serv. Corp. v. City of New York, 4 App. Div. 2d 209, 163 N.Y.S.2d 538 (1st Dep't 1957); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S.2d 383 (1st Dep't), aff'd, 304 N.Y. 942, 110 N.E.2d 884 (1952); New York Market Gardeners' Ass'n v. Adams Dry Goods Co., 115 App. Div. 42, 100 N.Y.S. 596 (2d Dep't 1906), aff'd, 190 N.Y. 514, 83 N.E. 1128 (1907); 5 S. Williston, Contracts § 1344, at 3774 (rev. ed. 1937).

10. Uniform Commercial Code § 2-318 (hereinafter cited as U.C.C.) exempts members of a purchaser's family, household and guests from "technical rules as to 'privity.'" But it does not abolish the requirement of privity and leaves any development in that direction up to case law. See U.C.C. § 2-318, Comment 2.

11. See, e.g., Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923), rev'g 200 App. Div. 864, 192 N.Y.S. 920 (1st Dep't 1922).

12. U.C.C. §§ 2-316, 2-719.

whether or not the full extent of those injuries was foreseeable by the parties at the time the warranty arose.[13] Furthermore, once the law abandoned the position of enforcing only warranties expressly intended as such by the parties[14] and created a class of implied warranties,[15] the essence of contract, *i.e.* voluntary agreement, had been abandoned in favor of a tort concept of obligations imposed by law. To speak of such obligations as true contracts is a fiction.[16]

It thus appears that warranty is neither tort nor contract, but rather a hybrid, a unique mixture of elements of both contract and tort.[17] Because it is a combination of both tort and contract, warranty may be said to possess a certain flexibility that would be lacking if it were entirely one or the other. This flexibility allows it to be interpreted and developed in whatever manner is best suited to the furtherance of prevailing social policy. If, for example, that policy is directed toward the protection of the manufacturer, emphasis will be placed upon the contract aspects of warranty and it will be employed in such a manner as to restrict liability for defective products.[18] If, on the other hand, the underlying idea is the protection of the consumer, then warranty will be treated and developed as a tort in order to impose relatively extensive liability.[19] The ultimate development in protecting the consumer would be to treat breach of warranty as a tort imposing a strict, or absolute, liability.[20]

Breach of warranty resulting in personal injury will impose liability upon the manufacturer without the plaintiff having to establish either the technical cause of the product's failure or that the manufacturer's negligence was the proximate cause of such failure.[21] This relatively light burden of proof and the decline of the privity requirements[22] point to the conclusion that warranty is moving in the direction of strict liability. While strict liability may have been approached, however, it has not yet been attained within the framework

13. See U.C.C. § 2-715(2)(b); U.C.C. § 2-715, Comment 5.

14. See, e.g., Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603).

15. Uniform Sales Act § 15; U.C.C. §§ 2-314, 2-315.

16. J. Ames, Lectures on Legal History 160 (1913); Smith, Surviving Fictions, 27 Yale L.J. 317, 324 (1918); Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 420 (1911).

17. W. Prosser, Torts § 95, at 651 (3d ed. 1964); Note, Necessity for Privity of Contract in Warranties by Representation, 42 Harv. L. Rev. 414 (1929). For cases allowing an action in tort without allegation or proof of scienter, see cases cited note 4 supra, which demonstrate a recognition of the hybrid character of warranty. Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 420 (1911).

18. E.g., by the imposition of a privity requirement.

19. See note 10 supra and accompanying text.

20. See, e.g., Restatement (Second) of Torts § 402a (1964).

21. Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960).

22. See generally Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); Comment, U.C.C. Section 2-318: Effect on Washington Requirements of Privity in Products Liability Suits, 42 Wash. L. Rev. 253 (1966); Note, Limitations Upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods—Has the "Citadel" Been Devastated?, 17 W. Res. L. Rev. 300 (1965).

of the U.C.C. The essence of a system of strict liability is that it is strict: that is, it contains no mechanisms by which liability for defective products may be avoided. The U.C.C., in contrast, makes express provision for the limitation of damages for breach of warranty,[23] for the limitation or exclusion of remedies,[24] and for the exclusion of the warranties themselves.[25] These "loopholes" would, if taken by themselves, appear to indicate that the Code is committed to a contract form of warranty with all its attendant limitations, and they serve to raise the possibility of the concurrent development of two entirely distinct bodies of product liability law: a limited (contract) form of warranty within the Code and a strict liability in tort arising under common law.[26] But the Code is not entirely contract-oriented in its approach to product liability. Its thrust in this area is profoundly affected by its incorporation of the doctrine of unconscionability.[27]

III. Unconscionability

In essence, this doctrine stands for the proposition that courts will refuse to enforce a contract or a provision thereof which is "unconscionable." Such a contract has been very loosely defined as one " 'which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other . . . .' "[28] The Comments to Code sections 2-302 and 2-719(3) suggest that an unconscionable contract is one which, considered in the light of the "circumstances existing at the time of the making of the contract"[29] or "in the light of the general commercial background and the commercial needs of the particular trade or case,"[30] operates to bring about

23. U.C.C. § 2-719(3).

24. U.C.C. § 2-719(1)(a).

25. U.C.C. § 2-316.

26. See Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code, 17 W. Res. L. Rev. 5, 9-10 (1965). In Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), a California court stated that where both strict tort and the U.C.C. rules are applicable, strict tort will displace the Code in cases involving personal injuries or physical injuries to property. (Majority opinion).

27. U.C.C. § 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-719. Contractual Modification or Limitation of Remedy.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

28. Hume v. United States, 132 U.S. 406, 410 (1889); Note, Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165, 168 n.27 (1966). Although Hume is a common law case decided prior to the drafting of the U.C.C., the Code is to a great extent based upon common law principles and definitions. Accordingly, many common law cases are incorporated into the Comments to the Code.

29. U.C.C. § 2-302, Comment 1.

30. Id.

"oppression and unfair surprise"[31] or fails to provide "a fair quantum of remedy for breach of the obligations or duties outlined in the contract."[32] Prior to the U.C.C. the doctrine, at least by name, was generally employed only by courts of equity denying specific performance to agreements they found to be objectionable.[33] Courts of law, however, as a practical matter, adopted its substance to achieve similar results by, among other devices, strictly construing contract language against an offending party,[34] limiting the effectiveness of warranty disclaimers,[35] finding want of mutuality,[36] or holding a contract void as against public policy.[37]

While sections 2-302 and 2-719(3) of the Code now permit courts of law to pass directly on the unconscionability[38] of either an entire contract or specific provisions of it,[39] neither the common law nor the Code has provided a more specific definition of unconscionability than that indicated above. The definition of unconscionability was left as a matter for case law development. *Campbell Soup Co. v. Wentz*,[40] which served as the foundation for section 2-302,[41] presented the classic example of an unconscionably oppressive contract. Campbell's contract required carrot growers to offer their produce to it at a fixed price. If Campbell rejected the carrots, the growers were precluded from offering them to others without written permission from Campbell.[42] The court refused to order specific performance,[43] commenting that the contract represented "too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[44]

31. U.C.C. § 2-302, Comment 1; Hawkland, Limitation of Warranty Under the Uniform Commercial Code, 11 How. L.J. 28, 34 (1965).

32. U.C.C. § 2-719, Comment 1.

33. Note, Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165, 167 (1966). See Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Newton v. Wooley, 105 F. 541 (E.D. Ark. 1900).

34. See Hambrick v. Peoples Mercantile & Implement Co., 228 Ark. 1021, 311 S.W.2d 785 (1958); New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922).

35. See Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (Ct. App. 1928); Sutter v. St. Clair Motors, Inc., 44 Ill. App. 2d 318, 194 N.E.2d 674 (Ct. App. 1963); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

36. See Weil v. Chicago Pneumatic Tool Co., 138 Ark. 534, 212 S.W. 313 (1919).

37. See Hume v. United States, 132 U.S. 406 (1889); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

38. U.C.C. § 2-302, Comment 1.

39. U.C.C. § 2-302, Comment 2.

40. 172 F.2d 80 (3d Cir. 1948).

41. 20 Ark. L. Rev. 165, 167 n.15 (1966).

42. The carrots were of a particular variety noted for retaining their color through processing. Campbell could thus deny the growers permission to sell rejected carrots in order to deny carrots of this variety to competitors.

43. Refused to compel the defendant farmer to sell his carrots to Campbell under the terms of the agreement.

44. 172 F.2d at 83. Campbell is included in the Comments to U.C.C. § 2-302.

IV. Summary of Cases

Oppression, unfair surprise and inadequacy of remedy were all present in *Henningsen v. Bloomfield Motors, Inc.*[45] The manufacturer of an automobile gave a consumer purchaser a standard form contract in which all warranties, obligations and liabilities other than that of replacing defective parts were expressly disclaimed. The court, in holding the disclaimer void as against public policy,[46] considered the fact that the purchaser was virtually compelled to accept the warranty which was standard throughout the automotive industry; that he was in no position to ascertain the true condition of the vehicle; that he might not have fully understood the extent to which his remedies were limited; and that the remedy provided by contract was hopelessly inadequate in the event the vehicle was totally destroyed or if there were personal injuries.[47]

The recently decided case of *Ford Motor Co. v. Tritt*[48] involved a breach of warranty action against a Ford dealer. The action was brought by the administratrix of a purchaser killed in an accident allegedly caused by a defect in the truck which the dealer had sold. The dealer impleaded the manufacturer, Ford. The fact pattern was similar to that of *Henningsen*. At issue was a warranty contained in a standard form contract prepared by Ford stating that it was given " 'expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness . . .' ",[49] and which provided that Ford's obligation with regard to the vehicle was to repair or replace defective parts.[50] All of the objectionable features of the *Henningsen* warranty were present: The Ford dealer was in no position to refuse to accept an agreement offered by the Ford Motor Company and he was in no better position than the consumer in *Henningsen* to detect manufacturing defects so hidden as to be undiscoverable by reasonable inspection. Furthermore the repair or replacement of defective parts was obviously as inadequate a remedy for personal injuries as it was in *Henningsen*. In both cases, a party in an inferior bargaining position accepted terms that might have been rejected had both parties been on an equal footing. The sole distinction between *Henningsen* and *Tritt* is that in the former the unconscionable warranty[51] was given directly

45. 32 N.J. 358, 161 A.2d 69 (1960). See Comment, Automobile Manufacturer's Liability to the Ultimate Consumer, 7 N.Y.L.F. 59 (1961).

46. The true basis of the decision was, of course, unconscionability, but the New Jersey courts were unable to pass directly on the issue until the Code was adopted in 1963.

47. The limitation of remedy would, under the Code, have been prima facie unconscionable in the event of personal injury. See U.C.C. § 2-719(3).

48. 244 Ark. 883, 430 S.W.2d 778 (1968).

49. Id. at 889, 430 S.W.2d at 781.

50. Id.

51. The court in Tritt erred in stating that the unconscionability of the disclaimer was a fact issue. Unconscionability is clearly a question of law for the court, not a question of fact for a jury. U.C.C. § 2-302(1). The underlying reason for this is that as a question of law it is subject to review by appellate courts, thereby permitting the development of a body of case law in an area not specifically defined by statute. The disclaimer in Tritt

to a consumer, while in the latter it was given to a dealer.[52] Ford attempted to exploit this distinction by asserting that section 2-719(3) of the Code, which would normally have been invoked to exclude its warranty disclaimer as unconscionable, was applicable only to contracts to which a consumer was a direct party. The court rejected this contention, stating that section 2-719(3) was not so limited and that the issue of unconscionability had been fairly raised.[53]

Because of the similarity in fact patterns, the practical effect of this case is to bring *Henningsen*, which had been decided in a New Jersey court prior to that state's adoption of the U.C.C., under the Code. Although the Tritt court's statements dealing with the issue of unconscionability were dictum, they were significant in that they suggest just how far a court, working within the Code, might be prepared to go in applying the concept of unconscionability to a manufacturer's attempt to disclaim warranties. While it did not go quite so far, the emphasis placed by the court upon the dealer's status as "a mere conduit between the manufacturer and the ultimate consumer"[54] who suffered personal injury came very close to an outright policy statement that where personal injury to some party results from a defectively manufactured product, any attempt by a manufacturer to limit remedies or disclaim warranties will be prima facie unconscionable, even if the party to whom the warranty was directly given and to whom the manufacturer meant it to apply suffered a purely economic, or commercial, loss.

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contained two distinct provisions: (1) an express disclaimer of all warranties, and (2) a statement that the remedy available was the free repair or replacement of defective parts. What is the effect of the latter provision if the former is voided as unconscionable? § 2-719(1)(a) permits parties to agree to remedies in substitution for those normally arising under Article 2. Thus, the second provision would, even standing by itself, appear to effectively limit the purchaser's remedies. However, subsection (1)(b) states that resort to any such limited remedy is strictly optional unless it is expressly stated to be the sole remedy. See U.C.C. § 2-719, Comment 2. As this had not been done in Tritt, the remedy provided was optional rather than binding. Therefore, once the warranty disclaimer was declared void, the normal warranty remedies would come into play regardless of the second provision.

52. Ford gave its warranty to the dealer. The dealer gave its own similarly worded warranty to the consumer. Ford had been impleaded by the middleman. The plaintiff thus predicated his recovery on Ford's being liable for all or part of the middleman's liability. What if, in a similar situation, a middleman issued a valid disclaimer and could not himself be held liable to the plaintiff? The N.Y. C.P.L.R. § 1008 (1963) provides that the impleaded party may assert as a defense any defense that the impleading party could have asserted. It thus appears that a proper disclaimer, if providing a defense for a middleman, would also serve as a defense to any party he impleads in New York.

53. Tritt was reversed and remanded on the ground that insufficient evidence had been presented on the issue of whether the defects specified had actually caused the accident in which the vehicle's purchaser had been killed.

54. 244 Ark. at 890. The language used by the court is similar to that of Prosser, supra note 1, at 674: "The middleman is no more than a conduit, a mere mechanical device, through whom the thing sold is to reach the ultimate user."

V. Strict Liability and the U.C.C.

The manner in which the unconscionability doctrine has been developed by common law courts makes its effect upon the Code's approach to product liability readily appreciable. It emerges as a device, as demonstrated in *Henningsen* and in *Tritt*, by which "loopholes" in warranty liability, such as disclaimers or limitations of remedies or damages, although satisfying other technical requirements of the Code,[55] may be ignored by courts on the ground that they result in "oppression" or a failure to provide "a fair quantum of remedy" and are therefore unconscionable. Thus, by making the doctrine specifically applicable to warranty situations,[56] the drafters of the Code moved away from a contractual concept of warranty and took a significant step in the direction of a system of strict liability for breach of warranty.

The difficulty with this is that it is theoretical. It merely demonstrates that the Code is not *necessarily* contract-oriented in its approach to product liability; it possesses the *potential* for being moved in the direction of strict liability. The realization of that potential is completely dependent upon the courts choosing to apply unconscionability vigorously. But whether that choice will be made, and whether it will be of any consequence if made, is in doubt. Indeed, the role the Code itself is destined to play in the field of product liability may well be severely limited by the case law development of an independent system of strict liability in tort.[57]

In *Greenman v. Yuba Power Products, Inc.*[58] a California court considered the liability of a manufacturer for physical injuries caused by a defective lathe. The manufacturer contended that the plaintiff's failure to give notice of the defects within a reasonable time after acceptance barred his warranty action. The court, in rejecting this contention, rejected also the idea that warranty was the true basis of liability. In so doing, it stated that "[a] manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being."[59] "[T]he liability", it stressed, "is not one governed by the law of contract warranties but by the law of strict liability in tort."[60]

This idea was reaffirmed in *Vandermark v. Ford Motor Co.*[61] The court there, citing *Greenman* with approval, overturned a lower court ruling denying recovery for personal injuries. It did so on the ground that, although the plaintiffs had alleged breach of warranty, their recovery for injuries caused by a defective automobile would actually be based, not upon warranty, but upon a strict liability in tort that was entirely distinct from warranty and hence not bound by limitations affecting warranty actions. A lower court

55. E.g., those set forth in § 2-316.
56. U.C.C. § 2-719(3).
57. See Shanker, note 26 supra.
58. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
59. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
60. Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
61. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

judgment denying recovery to a consumer was similarly reversed in *Santor v. A. & M. Karagheusian, Inc.*[62] The plaintiff had originally sought recovery on a warranty theory and failed for lack of privity. New Jersey's highest court reversed, stating that, whatever theory of recovery the plaintiff had pleaded, the true basis of product liability was strict tort, upon which the privity requirement in warranty actions was not binding.

This common law theory of strict tort liability will certainly have a profound effect upon the usefulness of the Code warranties. The exact extent of that effect is not certain. In *Seely v. White Motor Co.*,[63] the California Supreme Court, addressing itself to this issue, drew a distinction between cases involving physical injury to property or the person, and those where the loss is purely commercial. Strict liability, it felt, was best suited "to govern the distinct problem of physical injuries",[64] while the law of warranty functioned well in "controlling the commercial aspects of [sales] transactions."[65] With this distinction in mind, the court suggested that strict liability will displace warranty wherever product defects result in actual physical injury to property or the person, and that traditional warranty rules will govern where there is merely a commercial loss. In *Santor*, on the other hand, the New Jersey Supreme Court rejected this distinction, stating that "although the doctrine [of strict liability had] been applied principally in connection with personal injuries . . . the responsibility of the maker [of a defective product] should be no different where damage to the article sold or to other property of the consumer is involved."[66] The court then proceeded to apply strict tort liability for defects in a rug which had merely diminished the value of the rug itself.

Which of these approaches will prevail? The *Secly* rule, suggesting a partial displacement of the Code, places emphasis on the greater responsibility of the manufacturer to the consumer who suffers physical injury to his person or property than to one who merely loses the benefit of the bargain. *Santor*, calling for a total displacement, predicates liability on the manufacturer's having placed a defective product on the market without regard to the nature of the injury incurred. The *Seely* approach could predominate because it is relatively familiar ground in that it reflects the Code, which declares prima facie unconscionable an attempt to limit consequential damages for injury to the person in the case of consumer goods, but not where there is a strictly commercial loss or a loss caused by nonconsumer goods.[67] But is it reasonable to say, as was said in *Seely*, that one rule of liability applies where only the value of the defective goods is lost, while another more liberal rule applies where other property of the plaintiff is damaged? Certainly

62. 44 N.J. 52, 207 A.2d 305 (1965). See also Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).

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

64. Id. at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

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

66. 44 N.J. at 66, 207 A.2d at 312.

67. U.C.C. § 2-719(3).

the defective goods for which the plaintiff paid or at least obligated himself to pay is as much his property as anything else he owns, and its loss would seem to be, in principle, as great a wrong as the loss of any other property. If any distinction is to be drawn, it should be drawn on the basis of injuries to the person as opposed to injuries to property. Logic demands either (1) an across the board application of strict tort liability in place of the Code, or (2) the application of strict tort liability only where there has been personal injury and reliance on Code warranty rules in all other cases.

VI. Conclusion

Whatever rule is ultimately followed, it is obvious that the Code must be displaced to a significant degree by the doctrine of strict tort liability. Even if unconscionability were applied liberally by the courts to expand protection as far as possible, the Code would still contain too many loopholes that could be used to frustrate the law's policy of protecting the consumer by making the manufacturer the insurer of his product.[68] Section 2-719(3) of the Code provides that an attempt to limit or exclude consequential damages for breach of warranty may, in the proper circumstances, be voided as unconscionable. However, no precise definition of unconscionability has been provided as a guide for the courts, and section 2-316 permits a manufacturer to disclaim warranties entirely if the proper form is observed. Thus there is an apparent paradox: While it would indeed seem to be unconscionable to leave a purchaser without adequate remedy by disclaiming all sales warranties, section 2-316 seems to permit such a disclaimer. Under the Code, it is possible for a disclaimer, which is in fact unconscionable, to be allowed to stand solely because a court has failed to look beyond the fact that the technical requirements of section 2-316 had been fulfilled. A strict liability based upon tort, on the other hand, could not be disclaimed.[69] In addition, the expansion of the Code warranties through the use of the unconscionability doctrine would not obviate the possibility of a breach of warranty action being barred on the ground of lack of privity or failure to give notice of the breach within a reasonable time.[70] It is well established that such limitations would not affect an action based upon true strict liability.[71]

The unconscionability doctrine provides a means by which Code warranties can be moved toward strict liability. But case law has already created a strict liability based upon tort that goes well beyond the Code and seems destined

68. See Gow, A Comment on the Warranty in Sale Against Latent Defects, 10 McGill L.J. 243, 253 (1964).

69. The only possibility of anything approaching a Code disclaimer in such a system would be the courts' acceptance of a defense based upon assumption of risk. See W. Prosser, Torts § 78, at 539 (3d ed. 1964).

70. U.C.C. § 2-607(3)(a).

71. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (notice requirement); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (notice requirement); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (privity).

to displace it, either totally or partially, as it is better suited for the furtherance of prevailing social policy in the field of product liability. Where the Code is displaced, there is no incentive for the courts to expand Code warranty protection. But to the extent that it is not displaced, the courts can pursue their policy of consumer protection by using unconscionability to bring warranty as close to strict liability as is possible within the framework of the Code as it presently stands.