1969

The ABC's of Products Liability -- With a Close Look at Section 402A and the Code

Reed Dickerson

Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Consumer Protection Law Commons, and the Torts Commons

Recommended Citation

http://www.repository.law.indiana.edu/facpub/1518

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact watttn@indiana.edu.
I take as my text an old limerick:
An epicure dining at Crewe
Found quite a large mouse in his stew
Said the waiter, "Don’t shout
And wave it about,
Or the rest will be wanting one, too!"

Although most epicures are not crying for mice, those who have found mice in their stews have been increasingly crying for compensation. Indeed, products liability threatens to upstage the other forms of personal injury liability.

I have been interested in this subject for 30 years but, every time I think I understand it, it begins to fall apart on me. I know of no field of the law where, in fairly simple fact situations, legal doctrine is so subtly complicated. For example, there are 8 or 9 possible theories of liability, and the matter of plaintiff's participation, alone, can be approached in at least 5 ways. There are few fields that are changing so fast; you could teach a respectable course in products liability without referring to a case decided before 1960.

Unfortunately, trying to explain products liability in the brief span available is like trying to engrave the Lord's Prayer on the head of a pin. I will do my best.

I am not going to try to tell you how to try a products liability case; the tactics of offense and defense you can learn better elsewhere. Instead, I want to talk about broad legal doctrine, which is basic to a products case. Too many lawyers and writers underestimate the difficulties of doctrine, and as a result too many judges are inadequately educated by counsel.

What is "products liability"? Until recently at least, the term suggested civil liability to an ultimate consumer for physical injury resulting from using a defective article that had been sold by a person in the business of selling such articles. Although products doctrine is be-
ginning to spill over these boundaries, its rationale has been, and still is, a theory for protecting personal consumption. Thus, we may disregard for the time being the fact that courts are beginning to extend products liability doctrines from ultimate consumer to commercial consumer and from consumer to bystander.

To understand products liability, we need a philosophy of consumer protection seen against the background of modern technology and merchandising. Modern products liability law proclaims the death of caveat emptor and the economic background it once reflected: a miscellany of sellers and buyers bargaining with each other in circumstances of relatively equal financial power and technical sophistication. Compare the typical situation today: a relatively sophisticated and financially powerful seller dealing with a relatively unsophisticated and financially weak consumer respecting a complicated product whose capacities for inflicting injury are often hidden, all in the context of a highly complex system of merchandising and distribution. That such a situation carries a high potential for exploitation poses the basic problem to which the law of products liability is addressed, and understanding it is necessary to understanding the direction that sales law and tort law are now taking. The key idea, then, is consumer vulnerability to an unknown risk that is largely controllable by a sophisticated and well-heeled professional.

In this context, a products liability suit may serve three different purposes:

1. It may compensate the plaintiff for his injury.
2. Cumulatively with similar suits, it may help to induce manufacturers and other handlers to improve their operations.
3. So far as a seller can increase prices to cover the costs of meeting his civil responsibilities, it can provide a kind of industry "do it yourself" insurance whereby consumers in general pay the costs of compensating individual consumers for their injuries.

Examining how the courts have met the challenge of protecting the consumer with traditional legal weapons is a fascinating exercise.

What have been the available approaches? There are surprisingly many. The approaches of fraud and deceit have not been particularly fruitful, except in the relatively rare situations in which it has been possible to prove the seller's knowledge.

Until recently, the traditional approach has been to use breach of warranty, which is a form of strict liability, against the immediate seller and, because of privity considerations, to use negligence against more remote sellers. Negligence has rarely been successful against mere distributors, unless their own operations have been implicated.
other hand, it has been generally successful against the manufacturer wherever the plaintiff could trace the offending condition back to the defendant's plant.

For defects of design, it has been possible to try the traditional issue of negligence. For defects resulting from manufacturing slips, on the other hand, neither party has ordinarily been able to reconstruct what actually happened to the particular product. Here the courts have helped the plaintiff by making rather free applications of *res ipsa loquitur* to develop either a presumption or a *prima facie* case. Many have relaxed the requirement of defendant's control of the product to help the plaintiff bridge some of the difficulties in finding direct proof that the defect existed when the product left the defendant's plant. The result has been that, in relying on mere proof of causation to establish fault, the courts have in effect been applying a kind of strict liability under the guise of "negligence." This approach persisted only because the privity requirement continued to apply to warranty cases long after it was relaxed for negligence cases by *MacPherson v. Buick Motor Co.*¹

Where proof of negligence has been a serious problem for the plaintiff, he has sometimes been helped by the doctrine of negligence *per se*, but only if there was an applicable regulatory statute and if he could show that it had been breached. In practice, the approach has offered a significant advantage only where the statute does not require *mens rea* and its breach is more than mere evidence of negligence. Current statutory controls of manufacture or labeling are largely confined to food and drugs, flammable fabrics, hazardous substances, automobiles, refrigerators, cigarettes, insecticides, fireworks, bedding, upholstered furniture, glass doors, plastic bags, electrical appliances, and space heaters.

A possible variant of the negligence *per se* approach was suggested by *Williams v. Paducah Coca-Cola Bottling Co.*² This seemed to say that a seller of a statutorily regulated product impliedly warrants that he has complied with the statute. If so, there is an implied warranty in addition to those provided by the Uniform Commercial Code. No other case that I know of has taken this approach.

The traditional approach where privity considerations are not a barrier has been that of implied warranty. This is a form of strict liability, because it does not depend on showing that the defendant has been careless. The two main implied warranties are those of merchantability, which requires that a product perform as well as that kind of product is generally supposed to, and of fitness for a particular

¹ 217 N.Y. 382, 111 N.E. 1050 (1916).
purpose, a custom-tailored obligation that requires that the product meet the special need of a particular consumer who has communicated that need to the seller and relied on him to meet it. Under the Uniform Commercial Code, the consumer depends mainly on the warranty of merchantability.

These warranties are rules of law relating to minimum standards of quality that apply irrespective of whether they are actually implied in the particular case. Although courts now tend to treat all breaches of implied warranty involving personal injury as a form of tort, it is not entirely clear what significance classification as "tort" or "contract" should have in the states in which sales transactions are governed by statute.

Another kind of warranty, which has apparently existed almost from the time of the yearbooks, seems to be of little importance today. This is the special warranty of wholesomeness that applies to a merchant's sale of food. Although recognized in Swift & Co. v. Wells and several earlier American cases, it offers no advantages not now provided by more conventional warranties.

Possibly another approach to seller's liability for defective goods is that expressed by section 402A of the Restatement of Torts, Second. This provides that a commercial seller who sells a product in a defective condition unreasonably dangerous to the user is liable for physical harm caused to the user, even though the seller was not negligent and even though he was not in privity with the user. This approach was first proposed in that form by Dean Prosser in the Yale Law Journal and first adopted judicially by Judge Traynor in Greenman v. Yuba Power Products, Inc. Since then, it has been enthusiastically adopted by most courts that have had the chance, and it promises to carry the day. Its main appeal is that it appears to be a tidier piece of legal doctrine than its predecessors and it produces a social result that liberal jurisprudences applaud.

The main feature of section 402A is that it makes a seller, whether manufacturer or distributor, directly liable to the consumer for physical harm irrespective of the existence of privity. But it is noncommittal on liability to a bystander, liability for products that are changed by others before they reach the consumer, and liability for defective component parts.

Most lawyers would probably agree that the section reaches a defensible social result. What is not so clear is how the tort liability envisaged

ABC'S OF PRODUCTS LIABILITY

by this section differs, if at all, from the tort liability flowing from a breach of implied warranty.

The substantive differences, if any, are less significant than the differences in language would seem to suggest. The implied warranty of merchantability is couched in terms of a standard of quality that the seller is expected to meet. In safety terms, this means that the product must not injure the consumer. Section 402A, on the other hand, tells us that the seller will be liable if his product is unreasonably dangerous as a result of being defective. Because the standard of compliance with the safety aspects of merchantability is the exact converse of the standard of noncompliance envisaged by section 402A, there appears to be no significant difference in the two standards of safety. Each creates a general obligation of quality and each creates it with reference to a sale of personal property. Both are said to carry the flavor of tort. The most important difference, apparently, is that section 402A does not use the word "warranty."

In view of the substantive similarities, it is not surprising that some courts have found these two approaches substantively the same. In Greeno v. Clark Equipment Co.5 the federal district court for the Northern District of Indiana said, "This warranty imposed by law, irrespective of privity and based on public policy, is more aptly called 'strict liability'. . . . If the Restatement correctly states the conditions of recovery now in practice, let those elements have a fresh name. . . ." This judgment echoes that of a New York court in Goldberg v. Kollsman Instrument Corp.,6 where, in referring to the "strict tort liability" invoked in the Yuba case, the court described it as "surely a more accurate phase." Neither court suggested any difference in substance.

A local federal judge recently wrote me as follows: "... the distinction between these theories is more academic than real. I have almost concluded that while under the Federal Rules a plaintiff is entitled to go to the jury on several alternative theories, it is not proper to submit the same cause on both theories of implied warranty and strict liability." This view is supported by the fact that almost all the precedent that the authors of section 402A relied on to support the section involved breach of implied warranty. Had section 402A been a new breed of cat, it would hardly have belonged in a "restatement" of the law.

Not all courts agree. Influenced no doubt by the widely different wording used, many apparently reject the notion that section 402A is

simply a rose under another name; they perceive attendant differences in substance. This is strongly implied in *Long v. Flanigan Warehouse Co.*, where the Nevada Supreme Court said that, although its reading of the Uniform Sales Act ruled out a privity-exempt warranty running directly to the consumer, the Act did not necessarily rule out the strict tort liability approach taken by the California Supreme Court in the *Yuba* case, later codified in section 402A.

Similar implications appear in *Suvada v. White Motor Co.*, in which the court said that its reliance on strict tort liability made it unnecessary to consider the possible effect of the Uniform Commercial Code. Such notions also inhere in judicial statements that the strict tort liability approach is free of any substantive limitations (such as privity, disclaimer, and notice) that the Uniform Sales Act or the Uniform Commercial Code may have imposed on its counterparts in implied warranty. If these cases are sound, we have two streams of liability with different consequences and not merely one operating under two names. Comment *m* to section 402A says that even if we call the responsibility "warranty" it "is a very different kind of warranty." It "must be given a new and different meaning if it is to be used in connection with this section."

There may be still another legal approach to protecting the consumer. This is expressed in section 402B of the *Restatement*, recently adopted by the Tennessee Court in *Ford Motor Co. v. Lonon*. This section bears the same general relationship to the express warranty of quality as section 402A bears to the implied warranty of merchantability.

Section 402B provides,

One engaged in the business of selling chattels who . . . makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from, or entered into any contractual relationship with, the seller.

Here, too, the question arises: Is this simply a kind of privity-free express warranty obligation that is expressed in differing terms, or is it a separate counterpart with different substantive consequences? The *Lonon* case suggests the latter. The issues and their importance are the same as those already discussed.

---

8. 32 Ill.2d 612, 210 N.E.2d 182 (1965).
So much for the alternative approaches to liability. Let us turn now to the notorious issue of privity. Briefly, the privity requirement says that consumer Smith cannot sue manufacturer Rogers for breach of a contract (including breach of warranty) unless the deal was between those two people. In other words, a consumer who has been hurt by a defective product cannot sue the manufacturer if he bought it from a retailer. At one time, the consumer could not sue the manufacturer even if the manufacturer had been downright careless. But ever since MacPherson v. Buick Motor Co.,\textsuperscript{10} the privity requirement in negligence cases has been a dead letter in most states. In Indiana, strangely enough, the official funeral was conducted only five years ago by J. I. Case Co. v. Sandefur.\textsuperscript{11}

In warranty suits, on the other hand, the privity requirement retained most of its vitality and even today is to be reckoned with in some states. What was the basis for the privity requirement? Originally, it made a lot of sense, particularly in the kind of sales transaction that once prevailed: the casual, isolated transaction that took place between two farmers in the simple sale of a horse, where the seller had no reason to anticipate or be concerned with any transaction beyond that with the immediate buyer. If the buyer later resold the horse, that was likely to be a wholly independent and unrelated transaction. That each sale was a self-contained and isolated unit made the privity requirement a plausible doctrine.

Whether or not the privity requirement was written into the Uniform Sales Act, expressly or impliedly, has been the subject of some conflict. Cases like Smith v. Salem Coca-Cola Bottling Co.,\textsuperscript{12} and Long v. Flanigan Warehouse Co.\textsuperscript{13} found that the language of the Act (especially in the introductory clause and clause 1 of section 15) expressed a legislative intention to confine the implied warranties to those expressed by the Act and to limit their benefits to the immediate buyer. Cases like Chapman v. Brown,\textsuperscript{14} Henningsen v. Bloomfield Motors, Inc.,\textsuperscript{15} and Greeno v. Clark Equipment Co.,\textsuperscript{16} found otherwise.

In any event, the social and economic assumptions that underlay the development of the privity doctrine no longer prevail. Today, the manufacturer knows, when he sells to a primary distributor, wholesaler,

\textsuperscript{10} 217 N.Y. 382, 111 N.E. 1050 (1916).
\textsuperscript{11} 245 Ind. 213, 197 N.E.2d 519 (1964).
\textsuperscript{12} 92 N.H. 97, 25 A.2d 125, 127 (1942).
\textsuperscript{13} 79 Nev. 241, 382 P.2d 399, 402 (1963).
\textsuperscript{14} 198 F. Supp. 78, 98 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962).
\textsuperscript{15} 32 N.J. 358, 161 A.2d 69, 80-84, 99-102 (1960).
or retailer, where the goods are ultimately going and he is equally interested in seeing that they get there. The manufacturer's knowledge of and interest in the ultimate consumer is reflected in the patterns of distribution, direct advertising appeals, and the ways goods are packaged or packaged. No longer can it be assumed that the manufacturer's sale to his immediate purchaser has no functional relationship with later transactions involving the same goods.

Not only have the economic assumptions of the privity requirement largely disappeared, but strong affirmative arguments can be advanced to show that the privity requirement, in addition to being unnecessary, is also unwise. One practical argument in the "vertical" privity cases (lack of privity in the chain of distribution) is that in substance the manufacturer is already strictly liable to the consumer through a series of conventional warranty actions whereby the consumer collects from the retailer, who collects from the wholesaler, who collects from the manufacturer. This being the case, why not save time and money by letting the consumer-buyer sue the manufacturer directly? This is the argument against circuitry.

A second argument is that direct suit is necessary to prevent practical inequities existing in cases involving problems of "horizontal" privity (lack of privity with users other than the consumer-buyer). For example, if a guest in a home is injured under circumstances in which only the retailer is implicated, the guest is a sure loser unless he can recover against the retailer for breach of warranty. (Certainly, he cannot collect from his host.) The conventional suit for negligence is out, because the retailer has only rarely been negligent.

A third argument for doing away with the privity requirement, so far as it insulates the manufacturer, is that focusing financial pressure on him tends to sharpen his general incentive to improve the product. This argument has been accepted by most courts. Practically, it makes sense.

The fourth argument for direct responsibility in warranty is that in suits involving defects in manufacture, as distinct from defects in design, the traditional negligence suit has provided relief only by pretending to try an issue of fault that in most cases is inherently untriable because neither party has direct evidence of what happened in the particular case. Because fault has had to be inferred or presumed from a bare showing of causation, there has been no significant evidentiary difference between a successful action based on alleged negligence and a successful action based on a breach of implied warranty. This is the argument against unnecessary fictions.

The general policy arguments for strict liability, which is facilitated
by doing away with the privity requirement, have in the view of some writers coalesced into a principle of "enterprise" liability, the gist of which is that a commercial enterprise should, as an expense of doing business, provide compensation to those injured as a result of unavoidable risks incident to its operations. Presumably, such costs can be passed on to the general run of consumers in the form of higher prices.

The general logic of doing away with the privity requirement has been carrying the day. The first statutory breach in the requirement appeared in Connecticut, in the horizontal-privity situation. This statute allowed a member of the retailer buyer's household to sue the retailer directly without having to show negligence. The same general rule now appears in section 2-318 of the Uniform Commercial Code. On matters of vertical privity, on the other hand, the Code as enacted in most states remains neutral. In 1957, the Georgia legislature enacted a statute that in effect established a manufacturer's warranty of merchantability that ran directly to the ultimate consumer. Recently, Georgia and Virginia adopted versions of section 2-318 that provide that lack of privity is no defense in a warranty or negligence suit brought by one whom the seller should have expected to be a consumer. So much for direct statutory attack.

In the meantime, the courts have been struggling on their own to be rid of the privity requirement. A serious obstacle has been simple stare decisis, and, in states where no statutory provisions were in force, it has been the only obstacle. In some of the Sales Act states, another obstacle has been the notion that the Act may have preempted the field of implied warranty and, in so doing, recognized only warranties running to the immediate buyer.

As usual, the courts have been resourceful. On the assumption that the available warranties may have been limited to those listed in the Uniform Sales Act, the first approach was to extend their benefits to the ultimate consumer. This was expressed in theories that the statutory warranties between the seller and his immediate buyer "ran with the goods" or "inured" to the consumer's benefit, or that the consumer was a "third party beneficiary." This approach was taken by section 2-318 of the Code.

Such an approach has been open to the theoretical but rarely recognized objection that the consumer's rights could rise no higher than those arising between the seller and his immediate buyer. This approach later yielded to the more realistic notion, reflected in section

402A, that, to avoid the hazards of disclaimer or other ills that might infect the original transaction, what was really needed was an obligation that ran directly to the consumer and was adequately tailored to his needs. This has been called a "leaping warranty." Where the courts took the trouble to reconcile their actions with the statute (which was not often), it was accomplished by finding that, although the Uniform Sales Act may have preempted the field of warranty obligations between the seller and his immediate buyer, it did not preempt the field of warranty obligation between the seller and third parties. This approach made it possible for courts to create a special consumer warranty of their own that was not only free of the privity requirement but exempt from any requirement of notice. It was not until *Henningsen v. Bloomfield Motors, Inc.*, 19 that the leaping warranty, which at first applied only to food and drugs, was made to apply to products such as automobiles.

The neatest trick was turned by the California Supreme Court in *Klein v. Duchess Sandwich Company*, 20 which not only found the Uniform Sales Act no barrier to recovery but discovered in it an affirmative legislative intent, in the case of food, to prescribe a direct responsibility to the consumer. Its interpretative rationale remains obscure.

Most courts that dispense with the privity requirement have taken considerable comfort from the notion that breach of warranty is more tort than breach of contract, a notion that makes good sense in the side-effect cases and those involving implied misrepresentation but somewhat less sense in the cases in which the seller simply failed to deliver what he agreed to. Unfortunately, a serious defect in the tort cliché is that for solving the problem that section 402A was mainly intended to solve—how to avoid the reach of a possibly uncongenial Uniform Sales Act or Uniform Commercial Code—resolving the tort-contract issue may have no material bearing on the issue of whether or not either act preempted all or part of the field of quality obligation surrounding a sale of goods.

It has long been debated whether specific statutory sales warranty law carries a negative implication against quality obligations that run in the first instance to persons other than the immediate buyer and, if so, whether it also carries a negative implication against third-party rights to participate in the enjoyment of quality obligations that run in the first instance only to that buyer. The sole question, then, is one of statutory interpretation. If under a proper interpretation of the statute it is appropriate to attribute to it a design to establish an exclu-

---

sive list of quality obligations relating to a sale of goods, it seems profoundly irrelevant that a court might choose to characterize the violation of an obligation so excluded as "tort." Certainly, a proposed obligation of quality attending a sale is no less an aspect of sales law by being in tort. Nor is it any less such an aspect because the court carefully avoids the unwholesome incantations "warranty" and "sales law."

Of the many cases that ultimately found their way around the Uniform Sales Act, I know of only one that dealt in any professionally acceptable way with the specific language of the Act: Chapman v. Brown.21 This was the hula skirt case. There the federal court for the District of Hawaii gave some evidence of having actually read the Act. More typical was the Arizona Supreme Court, which blithely dumped the previously accepted privity requirement without so much as a nod to the Uniform Sales Act.22 Even the landmark Henningsen case is a pretty shoddy piece of judicial merchandise in this respect. In Greenberg v. Lorenz,23 the New York Court of Appeals found as an important statutory justification for repudiating the privity requirement the fact that the Uniform Sales Act did not use the word "privity." Surely the court that fathered MacPherson v. Buick could do better than that!

I am not saying that the Uniform Sales Act in effect imposed the privity requirement. I am only saying that very few courts have ever bothered to ascertain what the Act meant so that they could find out.

What about the Uniform Commercial Code? First, in section 2-318 it expressly abolishes the privity requirement in the great bulk of horizontal privity situations: a member of the family or a guest in the house (it says nothing about a commercial employee) can recover from the retailer. Second, in comment 3 under that section, the Code proclaims its neutrality on the matter of vertical privity, thus passing the buck to the courts. Third, there is no language in the Code, comparable to the introductory clause of section 15 of the Uniform Sales Act, that says that the implied warranties mentioned are the only ones permitted by it. Does this mean that privity is no problem under the Code?

In Hochgertel v. Canada Dry Corp.24 the Pennsylvania Supreme Court found that the benefits of section 2-318 did not extend to an employee of the buyer and thus barred him for want of privity, presumably because the Code preempted at least the field of horizontal

privity. I do not know whether that interpretation is correct (the second sentence of comment 3 is, in this respect, ambiguous) but, if it is, a nice question arises whether the court might, instead, grant comparable relief under section 402A of the *Restatement of Torts*.

Indeed, this precise question came before the Pennsylvania Supreme Court in *Webb v. Zern*.

In a capsule opinion, the court summarily adopted section 402A in a situation in which neither a buyer nor a consumer, but a bystanding son, was involved. The nearest thing to a reason that the court gave was a passing reference to "the modern view" as elucidated in *Miller v. Preitz*,

upholding *Hochgertel* amid a chorus of concurrences and dissents sufficient to suggest several bases for *Webb v. Zern*. Did *Webb* overrule *Hochgertel* in the area of warranty, or did it leave *Hochgertel* theoretically intact by using section 402A to steer around the area of warranty and a Uniform Commercial Code that the court assumed to be uncongenial? It was probably the latter.

If there is a negative implication in the Code, can section 402A be used as a practical expedient to circumvent it? If the cases I have read are correct, the answer is yes. As a teacher of products liability, I find this result socially desirable and just. As a teacher of legislation and an amateur jurisprude, I find it unprofessional and even shocking.

There is a problem here only if section 402A creates something different from, and inconsistent with, quality obligations created by the Uniform Sales Act and the Uniform Commercial Code. Although the authors of section 402A claimed direct lineage from a series of warranty cases that had done away with the privity requirement, the main motivation for the section was to create a new and different product, vis-à-vis privity, in any jurisdiction in which the privity requirement still showed signs of life. The strategy was to throw the vast prestige of the American Law Institute and the *Restatement* behind a movement designed to influence courts to line up with the new thought. One of the baits offered was an allegedly simplified rule of law to replace what have often been called the "intricacies of the law of sales." This is very appealing and, on the basis of the returns so far, it has been received with open arms. Courts that either did not understand those intricacies or were impatient with them have leaped at the chance to conform.

Because the results are socially desirable, why raise questions at this late date? I have several specific misgivings here even though, long before Judge Traynor's decision in the *Yuba* case and long before Dean
Prosser's 1960 article in the *Yale Law Journal*,\(^2\) I was in print urging the adoption of strict liability without privity restrictions.

My most serious misgiving about section 402A is that its adoption has been urged, not merely in what were then common law states, but in statutory states as a way of obtaining legal results that the authors of the section assumed might otherwise be ruled out by the Uniform Sales Act or the Uniform Commercial Code.

In such states, either the statute is an impediment to the adoption of strict liability free of privity limitations or it is not. If it is not an impediment, there is no problem and section 402A was unneeded. If it is an impediment, the adoption of section 402A would impliedly amend the statute. Specifically, this would be the case where the court, like those in New Hampshire, Nevada, and Pennsylvania, believed that the subject of the seller's responsibility for defective products had been preempted by the Uniform Sales Act or its successor, the Uniform Commercial Code.

The authors of section 402A would contend vehemently that section 402A does not try to make new law inconsistently with either of those acts, but tries, rather, to steer around them. But how can you steer around a statute simply by not characterizing your action by the terms used in the statute? Can you avoid a larceny statute simply by calling a permanent violation of possession by another name? I would have thought that that kind of word magic had long since died. Comment m to the Restatement in effect answers, "OK; call it 'warranty,' if you like. This is a different kind of warranty." But if it is warranty (it meets all the established tests), how can a court justify it as such if by hypothesis the court has already read the statute as preempting the field of the seller's minimum obligations as to quality? Either section 402A is unnecessary or it attempts the unconstitutional, judicial amendment of an uncongenial statute.

The first court to fall into this trap was the Nevada Court in *Long v. Flanigan Warehouse Co.*\(^2\) Having said that the Uniform Sales Act, in requiring privity, preempted the field of warranty obligation, it went on to say that it might later entertain a direct action in strict tort liability under the Yuba approach, apparently without realizing that the seller's quality obligation that it recognized might be substantively indistinguishable from warranty.

---

The problem here affects not only the matter of privity but those of notice, disclaimer and statute of limitations.

Again, I have not said that section 402A is in fact inconsistent with the Uniform Sales Act and the Uniform Commercial Code. (A hard look at the Code may well show this to be the case.) I have merely said that there may be a problem of statutory interpretation here and, if so, the courts ought to face up to it in the way the federal district court faced up to it in Chapman v. Brown. It is not merely that the courts may be misinterpreting these acts; they are not even recognizing that an interpretative question may arise when a common law rule is introduced into an area where a statute already exists.

In Suvada v. White Motor Car Co., the Illinois Court was induced by the absence of the word "warranty" to say, "Our holding of strict liability in tort makes it unnecessary to decide what effect section 2-318 has on an action for breach of implied warranty." On the contrary, if the two kinds of obligation differ only in name, it is necessary to see what backlash, if any, is wielded by that section of the Uniform Commercial Code. This can be ascertained only by ascertaining (1) whether the statute carries such an implication, (2) what kinds of seller's quality obligations it relates to, and (3) whether this "different kind of warranty" is one of the kinds impliedly so proscribed. The problem is already being compounded as courts extend section 402A or 402B to cover commercial loss. Add enough 402's and we can neutralize the Code altogether!

This general trend makes me wonder whether there isn't material here for an article called How to Amend a Statute Without Really Trying. Although I like the substance of the rule stated in section 402A, the use of it suggested by comment m leads me to ask why its use to circumvent possibly uncongenial sales statutes was urged and so successfully. Having rejected the implausible explanation that Dean Prosser, Judge Traynor, and other members of the judiciary are either stupid or intellectually dishonest, I have come to rest with the only

29. 32 Ill.2d 612, 210 N.E.2d 182, 187-188 (1965).
A court that applies section 402A without taking account of the Code is defaulting on its constitutional responsibility to respect the legislative will. That some judges are willing to derogate from statutory limitations on implied warranty even intentionally is suggested by Justice Peters' dissent in Seely v. White Motor Co., 45 Cal. Rptr. 17, 29, 403 P.2d 145, 157 (1965): "I am not concerned over the fact that if damages on the strict liability theory are allowed here, this may limit the application of some of the restrictive statutory provisions relating to warranty." For several areas of possible conflict, see Rapson, Products Liability under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692, 704-711 (1965).
other explanation that makes sense to me: Most American lawyers and judges simply have never learned how to deal with statutes. Having been brainwashed in a system that still puts the courts at the top of the legal order, they either ignore statutes or treat them as if they stood no higher than case law. Indeed, the whole trend beginning with Yuba and section 402A makes beautiful sense if we assume that courts may treat statutes similarly to cases. But how can we square such an assumption with the tripartite system of separating legislative from judicial and executive powers that has been adopted by every American constitution?

Examination of the Pennsylvania cases also leads one to wonder whether the speed-up of judicial conversions that section 402A has produced will turn out to be worth the doctrinal confusion that it is producing in the courts and law journals. Henningsen and especially Chapman had already given us a workable approach for doing away with privity, and it would be ironical if the impatience underlying section 402A and the consequent disregard of statutory sales law turned out to set products liability doctrine back a dozen years instead of advancing it.

I make this prediction: Much of the apparently greater simplicity of doctrine that section 402A purports to offer will disappear when the courts face up to some of the problems involving special arrangements between the manufacturer and his immediate seller, not all of which can be written off as bald “disclaimer.” More of this simplicity will disappear when the courts face up to the three problems, mentioned earlier, that the section now ducks. The problems of causation, special arrangements and expectations, warning, and plaintiff's contribution to the harm will not go away even if we pretend that these intricacies belong to sales and not to tort law. So much for section 402A!

Another approach to privity is to admit that there is a privity requirement, but argue that with modern methods of packaging, advertising, and distribution the requirement is in fact satisfied. The manufacturer's pitch in most cases is made directly to the consumer and the consumer so understands.31

Now that we can almost say a final good-by to the privity requirement, what important elements of products liability remain?

Almost every legal issue in this field can now be subsumed under a simple formulation, whether we talk warranty or not: Strict liability equals causation plus a legal defect. The formula works, so far as the

matter of proof is concerned, also for negligence suits involving defects in manufacture. The only element that might not fit comfortably within this pattern is individual assumption of risk.

When we examine what constitutes a legal defect, we also find that strict liability may not be as "strict" as it may have seemed. The gist of product defectiveness is a condition that carries a risk of harm not normally anticipated and guarded against by the consumer. This explains why trichinous pork is not necessarily defective (the consumer normally expects to cook it sufficiently), while a chicken bone in a chicken sandwich may be. The key idea here is to protect the normal safety expectations of the typical consumer of that kind of product.

The consumer's reasonable expectations may be frustrated in several ways:

(1) The product may fail to perform the function that it is supposed to perform (brakes that fail).
(2) The product may create the very danger that it is supposed to guard against (polio vaccine that causes polio).
(3) While adequately performing its intended function, a product may have a bad unanticipated side effect (emphysema from smoking cigarettes).
(4) It may fail to minimize partly avoidable consequences in case of an accident (car without a head rest).

Consumer expectations relate both to the kind of use that the consumer makes of the product and, respecting such a use, to the minimum level of performance. Suppose that, while a consumer is standing on an apparently sturdy chair, it collapses and he breaks his leg. Or suppose he uses a wire rope for purposes for which a hemp rope is ordinarily used. In either case, does the consumer have reasonable expectations that the law should try to protect? The answer depends on what normal people do normally. I suspect that the consumer might have a cause of action in the case of the chair, but not in the case of the wire rope. In the latter case, he may be expected to know that wire rope is subject to special crimping hazards when its folds are not protected by the contours of a wheel or other curved surface.

Assuming that the consumer's use is an accepted one, what level of performance should be legally assured? How long is it reasonable to expect an automobile tire to last? What kind of performance can reasonably be expected of used or reconditioned goods? Here, again, reasonable consumer expectations provide a valuable general guide,

---

because they measure the degree of his reliance on the seller and thus the extent of his vulnerability.

The most troublesome situations are those in which consumer attitudes have not sufficiently jelled to define an expected standard of performance. What, for example, should the law do about tractors that overturn, surgical implants that break, and rear engined automobiles that tend to swerve at high speeds? That it is hard to measure consumer expectations precisely does not invalidate the general approach. Fortunately, problems of this kind are common grist for the courts; a judgment defining specific patterns of consumer expectation for a particular product is a familiar exercise in judicial empathy.

What about the reasonable expectations of the seller? These, too, are taken into account.

On the one hand, it is reasonable to expect a toy manufacturer to know that children put toys in their mouths and, accordingly, to make sure that there is no arsenic in the paint he uses. On the other, it has been held that, because the manufacturers of steel casement windows had no reason to know that workmen on building construction projects were using unglazed windows as ladders, such a manufacturer was not liable if a steel mullion happened to break while it was being so used.34

Other seller expectations have also been protected. For example, the manufacturer of an unfinished product who sells it to one on whom he can reasonably rely to finish it has been held not liable to the ultimate consumer if his buyer resold the product without completing the contemplated processing.35

The big unresolved problem in the area of legal defectiveness appears in cases involving adverse side effects resulting from defective design. Suppose a product (cigarettes) work well for its intended purpose (smoking), but has an unforeseen and devastating side effect (cancer). Should the seller be held accountable on the ground that he was sold a "defective" product? The answer is clearly yes, if the side effect could reasonably have been anticipated by his kind of seller. This is standard negligence law.

What about strict liability? The seller will also be liable where, although the risk may be unknown to the industry generally, it is known to scientists. But suppose the risk is unknown even to scientists. Here the cases split. Lartigue v. R. J. Reynolds Tobacco Co.36 said that a cigarette manufacturer is not liable for the unforeseen side effect of can-

34. McCready v. United Iron and Steel Co., 272 F.2d 700 (10th Cir. 1959).
36. 317 F.2d 19 (5th Cir. 1963).
cer if even scientists could not have foreseen it. Green v. American Tobacco Co.,\(^{37}\) on the other hand, held that under Florida law the seller's knowledge or opportunity for knowledge is irrelevant, period.

The argument for the former view is that it encourages the manufacturer to keep abreast of scientific developments. The argument for the latter is that it encourages him to help extend the frontiers of science itself. An argument against it is that it may discourage new, needed products.

So far as I know, this controversy does not extend to products that disappoint consumer expectations by failing to perform as both parties reasonably expect. Thus, the manufacturer of an airplane is liable if its wings fall off, even though the best scientists available have given it a clean bill of health.

In the field of legal defect, it is useful to distinguish defects of design, which contaminate a whole product, from defects resulting from slips in manufacture, which affect only particular items. For example, a design feature is often hard to characterize as legally defective, whereas a deviant item is labeled by its very abnormality.

For defects in design, where a real issue of negligence is often triable, strict liability as applied in the side-effect (including allergy) cases is, under the Lartigue approach, only one short step from negligence. The only difference I can perceive is that in negligence the standard of know-how that is attributed to the seller is the industry's, whereas, in the Lartigue version of so-called strict liability, the standard of know-how is the laboratory scientist's. In this particular area, the net advantages achieved by section 402A seem minimal.

For defects in manufacture, on the other hand, liability is almost necessarily strict liability even if the suit is formally in negligence, simply because it is rarely possible to show what went wrong in the specific case. Culpability can only be inferred from causation.

The subject of legal defect is much too complicated to cover adequately here. For some of the refinements, the reader may want to look at an article specially devoted to the subject.\(^{38}\)

Unfortunately, the symmetry of this introduction to products liability is impaired by my failure to leave enough room for the other major issue in any products liability suit: that of causation. Here, two big steps are involved. First, the plaintiff must trace his hurt to the defendant's product, which may take some doing if the reaction has been

\(^{37}\) 150 So.2d 169 (Fla. 1963).

\(^{38}\) The most recent one is Dickerson, How Good Does a Product Have To Be?, 42 Ind. L.J. 301 (1967).
delayed or diffused. Second, he must trace the offending condition back far enough to show that it existed in the product when the defendant let go of it. This, too, may take some doing if there has been any significant chance of intermediate meddling or other intervening cause. Because he has the burden of proof, the plaintiff must theoretically exclude the latter contingency. Fortunately, most courts have been satisfied if he reduces it to a relative improbability. Both on the issue of defectiveness and that of causation, adequate expert witnesses may be crucial.

And then there are special problems such as disclaimer, notice, transactions other than sales, bystanders, statutes of limitations, damages, conflict of laws, and insurance. As for the plaintiff's own possible contribution to the injury, disqualification may result, depending on particular circumstances, under at least five different legal doctrines: contributory negligence, assumption of risk, non-contemplated use, lack of causation, and avoidable consequences.

Although I solemnly promised to cover all of products liability in the short span allotted me, it must be apparent that I have not made good on that promise. I have even oversimplified the few topics that I covered. But if there is some inkling here of the kinds of subtleties and complications that permeate this living area of the law, perhaps the effort has not been misspent.