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WAS PROSSER’S FOLLY ALSO TRAYNOR’S?

OR

SHOULD THE JUDGE’S MONUMENT BE MOVED TO A FIRMER SITE?

Reed Dickerson*

It is a happy privilege to join in this tribute to one of our finest judges, Roger J. Traynor. At the same time, I must reveal my distress at having to witness the watering down of a richly deserved tribute through exposing the object of our admiration to the possibly libelous charge that he participated in what has been, in the opinion of some, a legal catastrophe.

Because I lack the time on this occasion to document the affirmative basis for my admiration, I am relegated to the secondary mission of trying to soften any stigma of judicial guilt by association by suggesting that the central or greater fault, if any, may have lain elsewhere. But even if this fails, I can still enthusiastically salute a great judge whose only known legal shortcoming may be occasional fallibility. The accolades of my fellow contributors, I trust, have been grounded more fully on other and more impressive accomplishments.

I undertake this thankless task recognizing that most of the commentators whom I know and respect disagree with me, and that at this juncture my position still rests partly on surmise. So be it.

The burden of the following analysis is that, under the doctrine of legislative supremacy, courts should respect not only the text of a statute but its negative implications. To this end they should fully and objectively explicate it. Unfortunately, there is reason to believe that, in the case of the Uniform Commercial Code, many courts have been beguiled by the Restatement (Second) of Torts into subverting these principles.

More specifically, the Code has a legislative reach, within the domain of products liability, that has been materially frustrated

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1. The New Hampshire Supreme Court recently had this to say:

The question of when a plaintiff should be permitted to recover under the law of warranty or under strict liability and whether strict liability has superseded the warranty approach has been argued by legal scholars with all the zeal, fury, and abstruseness of medieval theologians.

by simplistic, probably spurious, and ultimately irrelevant distinctions between "tort" and "contract," and, perhaps, even by irrelevant distinctions between "warranty" and "non-warranty." Such frustrations have lain largely undetected, their visibility sharply reduced by their having been clothed in verbiage seemingly unrelated to the Code.

What part, if any, has Justice Traynor played in this misadventure?

It seems to be popularly assumed\(^2\) that \textit{Greenman v. Yuba Power Products, Inc.}\(^3\) furnished direct support for Dean William Prosser's brainchild, § 402A of the \textit{Restatement (Second) of Torts}. Whatever Judge Traynor had in mind on that occasion beyond what is disclosed by his opinion, it seems clear that that opinion can be justified without necessarily throwing full support to this unsightly blemish on the \textit{Restatement}.

The gist of \textit{Yuba} is that in defining the legal relationships between immediate buyer and seller, the \textit{Uniform Sales Act} did not preempt the area constituting the relationship between the manufacturer and a remote buyer or user.\(^4\) Because the legislature had not provided an answer to situations lacking privity, the court was free to create either a derivative third-party benefit or, better yet, something approximating a leaping warranty directly in favor of the consumer. Here the court was free to work by analogy with the statute, but depart from it where, as in the case of privity, disclaimer, and notice, the analogy did not seem apt. This was done on the basis of authority such as \textit{Klein v. Duchess Sandwich Co.}\(^5\) There was precedent also in other states. In this regard, \textit{Yuba} did not break significantly with the legal past.

Justice Traynor used language in his opinion that can be, and has been, read as importing more than it expresses. In stating that "...the liability is not one governed by the law of contract warranties...," he was expressly rejecting, not warranties as such, but "contract" warranties. Unless there was an accompanying implication, he did not necessarily close the door on non-contract warranties. And by espousing "strict liability in tort," he was embracing a concept wholly consistent with warranties

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\(^5\) 14 Cal. 2d 272, 93 P.2d 799 (1939).
other than those founded on implied promise, as, for example, one founded on implied representation, or one simply implied by law. Indeed, the assumption that breach of warranty for consequential injuries sounded properly in tort had been a theory often seized upon by courts as a doctrinal justification for doing away with the privity requirement. Reaffirmation of the tort theory of breach of a warranty implied in law did not, therefore, constitute a break with existing theory as already adopted in many cases. Certainly, there is nothing in *Yuba* that requires building a partition between breach of warranty implied in law and “strict liability in tort.” The two ideas, if not identical, are fully compatible. The only rationale that Justice Traynor expressly rejected in *Yuba* was reliance on warranties based on promise expressed or implied in fact. But even rejecting promise-in-fact did not involve rejecting the contract-in-fact that constituted the underlying sale. *Yuba* was still conditioned on an underlying sale, as is, indeed, § 402A.

There is even stronger evidence in the opinion that Justice Traynor, by adopting “strict liability in tort,” was not necessarily rejecting warranty in the non-promissory sense. He said, “Implicit in the machine’s presence on the market . . . was a representation that it would safely do the jobs for which it was built.” This statement has representational warranty written all over it. Nor was this interpretation contradicted when he said, “It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff’s wife were such that one or more of the implied warranties of the sales act arose.” A leaping warranty need not be cramped by the sales transaction from which it leaps.

What about Justice Traynor’s quotation from *Ketterer v. Armour & Co.?* “The remedies of injured consumers ought not be made to depend upon the intricacies of the law of sales.” Was this a rejection of sales law as such, or a rejection only of the current version of commercial sales law as being inadequate for

9. 59 Cal. 2d at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.
10. “(1) One who sells any product in a defective condition unreasonably dangerous. . . .” *Restatement (Second) of Torts* § 402A(1).
12. 59 Cal. 2d at 59, 377 P.2d at 901, 27 Cal. Rptr. at 701.
14. Id. at 323.
products liability personal injury cases? Because Sales Act law, the common law of products liability in supplementation of the Sales Act, and even § 402A itself were premised on a sale of goods, the latter interpretation of Ketterer's statement would seem the more plausible. Briefly, then, Ketterer and Traynor were thus contending, not necessarily for an abandonment of "sales law," but for a simpler version of sales law, one better tailored to the consumer's needs. Even "strict liability in tort," however emancipated (if at all) from warranty, remains part of "the law of sales."  

And yet, read hurriedly, Yuba suggests that Justice Traynor was doing something more than merely expanding strict liability in tort, under the label "breach of warranty", over a wider product base. What was it? On this occasion, his sense of social need may have outrun his usual talent for doctrinal clarity.

Justice Traynor's impulse to move away from "contractual" (promissory) warranty in favor of something else was undoubtedly encouraged by Dean Prosser's stricture, most recently stated in his article in the Yale Law Journal, that warranty (unless inclosed by quotation marks) lies basically in a contractual mold. This view was first stated in Dean Prosser's Minnesota article of the early forties, when he argued, not wholly convincingly, that the warranty of merchantability was best rationalized as a promise implied in fact, free from any consideration of reliance. If this

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15. Any attempt to show that today's products liability has become emancipated from the commercial sale or its near equivalent seems fatuous, despite increasing judicial statements to the contrary. For example, there is no indication that bystander protection is other than derivative; in each case the defendant is a commercial operator who launched the product in the plaintiff's general direction by sale. And, although clearly beyond the reach of statutory sales law, the lease is for present purposes the perfect analog of the sale. The same is true of the commercial service. In the blood cases, although the hospital may or may not "sell" the plasma to the patient, the blood bank certainly sells it to the hospital. That is enough to establish the necessary commercial context for a court that, having established defectiveness, wants to hold the blood bank liable to the patient. Even in the "gift" cases, commercial sale at least hovers nearby. Thus, the "gift" in Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681, 688 (1970), was incidental to a conventional sale. Whether a sale is immediately present, commercial transaction continues to inhere in the general rationale of products liability, the gist of which is to protect the amateur against the professional. Moreover, commercial sellers simply do not make gifts that are unrelated to actual sale or its solicitation. Conversely, if there is a bona fide gift unrelated to commercial solicitation, that is strong evidence that the donor is not the kind of person on whom it is appropriate to impose strict liability.  


17. Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 125, 168 (1943).
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approach was sound, which is subject to severe doubt, it gave a strong incentive to cut loose from warranty altogether and find a better basis of action, that is, some kind of non-warranty. Although Justice Traynor refrained from adding the tag "warranty," it is not clear from Yuba that he was willing to go so far.

Dean Prosser's reasons for wanting to chuck warranty may be challenged on several grounds. First, as witness Yuba itself, misrepresentation (which smacks of tort) is as often a basis of implied warranty as promise. The fact that the underlying transaction, a sale of goods, is necessarily contractual cuts no ice here, because the presupposition of an underlying sale has, until recently at least, been a constant factor regardless of the theory the courts have adopted. Dean Prosser's contention, therefore, had to rest on the contractual character of the warranty as distinct from the contractual character of the underlying sale.

Second, one of Dean Prosser's arguments for concluding that the warranty of merchantability has not rested on the tort of misrepresentation, but rather on contract, is that "... the warranty of fitness, does not specifically mention "reliance." However, its omission from the text of the statute does not necessarily indicate that reliance is not a factor upon which the seller's responsibility to the consumer is generally predicated. A more plausible explanation of its absence is that expressing it would have been redundant, because reliance is normally a built-in aspect of any sale by a professional seller that contemplates an ultimate non-professional buyer or seller. Reliance inheres in that kind of deal. This observation would seem to apply equally to § 402A, notwithstanding its comment m.

Whatever weight this analysis may have for retail sales, the warranty of merchantability is not so limited; it applies also to sales to commercial buyers. But, to a lesser degree, the same rationale applies even here. A deal between two corporations does not necessarily represent the same balance of bargaining strength as is supposed to exist in a deal between two farmers. In an age of ever-increasing specialization, even a parity of economic power does not automatically guarantee a parity of technical sophistication. Today, reliance is almost inevitable.

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18. See extended discussion in Dickerson, supra note 8, at 37-42.
19. Id.
20. Prosser, supra note 17, at 149.
However, for me, the whole tort-contract issue is, in this context, a red herring, a view that Dean Prosser himself tentatively espoused. Within existing statutory limitations, desirable rules of law should be freely adoptable by the courts on the ground of social need, without cluttering the rationale by classifying them as "tort" or "contract".

Yuba would probably have created no great stir except for the fact that it is almost always read, despite its more conservative language, as underwriting the views of Dean Prosser that culminated in § 402A. Some support for that reading, of course, lies in the fact that Justice Traynor was on the advisory board that helped Dean Prosser develop § 402A.

But what was so new about Yuba or even § 402A? A well established strict liability was already available to cope with the privity requirement, as we have seen and as Henningsen v. Bloomfield Motors, Inc. well illustrated, and many cases had found its breach easily classifiable as "tort." And so it is not true, as many now assume, that Dean Prosser and Justice Traynor invented "strict products liability in tort" in the early 1960's. The theory was already there, and the main problem was that in the states that could not develop an accommodation with the cognizant sales statute, it carried too much doctrinal baggage with respect to privity, disclaimer, and notice.

In the days before Yuba, §402A, and the Uniform Commercial Code, the bolder courts, best exemplified by Chapman v. Brown, examined the Uniform Sales Act, found (whether justifiably or not) that it did not preempt the area of the rights of remote buyers, and created either a derivative third-party right or a new, leaping warranty without the unwanted impediments of privity, disclaimer, and notice. The latter approach had a theoretical advantage over the former, because it was not hobbled by limitations, if any, in the deal between the manufacturer and his immediate buyer. Quaere whether it had the theoretical disadvantage of being harder to square with the Uniform Sales Act.

21. See Dickerson, supra note 8, at 103.
22. Prosser, supra note 17, at 124.
23. See Dickerson, supra note 8.
24. 32 N.J. 358, 161 A.2d 69 (1960). That it was already well established in 1944 as part of the broad concept of warranty was made clear by Justice Traynor himself in his famous concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 466, 150 P.2d 436, 443 (1944). It made its first effective appearance in 1913. Dickerson, supra note 8, at 101.
25. 198 F. Supp. 78 (D. Hawaii 1961), aff'd 304 F.2d 149 (9th Cir. 1962)
If a new legal concept was generated by the conjunction of the Prosser article, *Yuba*, and § 402A, it was not strict liability in tort or even the leaping warranty, but strict liability in tort emancipated from warranty. But to what avail? Although the currently prevailing view is that a distinctive third stream of products liability was thus added to the twin streams of negligence and warranty, the fact was not immediately evident. *Yuba* had excluded only contractual (promissory) warranty and § 402A only the conventional, *Sales Act* type.

What is it to be emancipated from warranty? Is it to be emancipated from a name or from something substantive? The underlying problem revolved, not around “tort” or “contract,” or even “warranty,” but around an issue that in the cases had only rarely been discussed and almost never thoroughly investigated. Did the *Uniform Sales Act* carry a negative implication against the existence of warranties (whether in form or substance) benefiting persons other than the immediate buyer? If the *Act* had, indeed, preempted the field of “warranties” in the sale of goods, no court could properly create a leaping warranty, or perhaps even extend the benefits of a “running” warranty, to third parties without subverting the principle of legislative supremacy. Even the characterization of “warranty” was irrelevant if the *Act* preempted not merely warranty, but the whole field of consumer protection, by civil action, against the consequences of defective commercial goods.

Most cases have assumed an answer without considering, or at least articulating, its basis. Cases like *Chysky v. Drake Brothers Company*, which upheld the privity requirement, did so solely on common law principles, even though the *Uniform Sales Act* was in effect. And so, when the states got around to abolishing privity, as New York did in *Greenberg v. Lorenz*, they almost always treated it as a matter of overturning a common law rule without regard to the statute.

*Smith v. Salem Coca-Cola Bottling Co.*, one of the few cases ever to face up to this problem, found that the *Uniform Sales Act* had, indeed, preempted the field, with the result that the New

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26. Some cases read §402A as having created a new kind of warranty. See, e.g., Dagley v. Armstrong Rubber Co., 344 F.2d 245, 253 (7th Cir. 1965).
28. See Restatement (Second) of Torts, §402A, comment m.
Hampshire court felt compelled to stay with privity. More typical was Arizona’s Crystal Coca-Cola Bottling Co. v. Cathey, which blithely ignored the Act. Cases, like Swift & Co. v. Wells, that were decided in states that did not have the Uniform Sales Act did not, of course, face the problem. The few cases under the Act that even recognized it held either that the Uniform Sales Act preempted the field or that it did not, but in almost no case other than Chapman was there a careful exegesis of the Act. Whether the Act preempted the warranty field or not is not my immediate concern. The point is that almost all courts have either ignored the issue or given it the shortest of shrifts.

Even Yuba discusses only the consequences of non-preemption; non-preemption it takes for granted. Although the assumption may have been sound, the problem was worth consideration in a legal system in which the negative implication has been so prevalent that conscientious jurisprudes have promoted it to a cosmic, even latinized, principle.

Dean Prosser knew that the interpretative basis of these cases was shaky, and he resolved to bolster their results. But how could he be sure that something was beyond the preemptive reach of an uncertain statute without making a decent attempt to find out whether, and how far, it preempted? If it did not preempt the field, § 402A added nothing that was not already available from Henningsen, Chapman, and probably Yuba, under a theory of warranty implied in law. If the statute did preempt the field, action inconsistent with it was ipso facto invalid.

In view of the low visibility of the problem, even while the responsibility in question remained clothed in the semantics of “warranty,” it is not surprising that for most courts it has disappeared almost entirely, now that it no longer carries the label most likely to draw attention to the conflict between a possibly preemptive statute and an inconsistent creation of the courts.

That Dean Prosser was thinking principally of names is suggested by the context in which § 402A was developed. He sold the section on the basis that it represented a continuing growth of an otherwise slow judicial process exemplified by the large number of food (and, later, drug and cosmetic) cases, which had, in effect, created a warranty benefit flowing directly to the consumer, in

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34. Expressio unius est exclusio alterius (the expression of one thing is the exclusion of another).
supplementation of the *Uniform Sales Act* where that *Act* was in effect.

Even those members of the Institute who might have preferred to restate existing common law rather than future common law ("...this is the law of the immediate future") were comforted by the impression that § 402A was only broadening an existing stream of legal responsibility, not creating a new one.

Comment m to § 402A provides: "There is nothing in this section which would prevent any court from treating the stated rule as a matter of 'warranty' to the consumer." But if a court did treat it as a warranty, how could the rule be useful to a court that, upon careful exegesis, read the *Uniform Sales Act* as preempting the field of warranty? And assuming that were a problem, how would not treating it as a warranty save the section from the negative sweep of preemption, if the section contained all the elements of a warranty and omitted only the name and characterization (or if the *Act* preempted not merely the field of warranty but the broader field of consumer response, by civil action, to defective commercial goods)? To say that a mere change of name or characterization would save a provision that in substance constituted a warranty is to use a kind of verbal legerdemain that enlightened courts preen themselves on being skilled in penetrating.

And, so, Dean Prosser moved on from form to substance. Comment m accordingly continues: "But if [§ 402A is treated as creating a warranty] it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales. . . . The rule stated in this Section is not governed by . . . the Uniform Sales Act or . . . the Uniform Commercial Code . . . ." Nice going! A more beautiful example of bootstrap-pulling, not involving the pain of reading the statute, would be hard to imagine. And the amazing thing is that for most judges and pedagogues Dean Prosser got away with it.

If § 402A created a warranty (however indirectly), in what material respect was it "different", and on what basis (other than pedagogical fiat) did that difference place it beyond the sweep of a potentially preemptive statute? One difference is that the ap-

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35. Restatement (Second) of Torts, § 402A, comment m. Whether or not § 402A met the American Law Institute's criteria for a "restatement" need not concern us here.
proach of § 402A was exactly opposite to the warranty provisions of the Uniform Sales Act or the Uniform Commercial Code. Whereas both Act and Code stated the seller’s quality responsibility in terms of what he was obliged to deliver, the Restatement stated it in terms of the legal consequences to the seller if he failed to meet that responsibility.

Why was it useful to turn the seller’s responsibility inside out for the purpose of codifying it? Was it to distract attention still further? Coupling this aspect with the omission of the warranty name and characterization, and an almost universal judicial repugnance to exegeting a statute in any sophisticated sense, it is not hard to see why most courts have been unaware of the possibility that the Uniform Sales Act or the Uniform Commercial Code might carry a negative implication undercutting the attempted thrust of § 402A. But this, again, is form, not substance. What, if any, are the significant substantive differences in nature and sweep as distinct from attendant legal consequences?

<table>
<thead>
<tr>
<th>Warranty of Merchantability (U.S.A. and U.C.C.)</th>
<th>Section 402A</th>
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<tbody>
<tr>
<td>(1) Seller’s responsibility to provide minimum quality</td>
<td>(1) Seller’s liability for failing to provide minimum quality</td>
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<tr>
<td>(2) Legal defect (“not merchantable”)</td>
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<td>(3) Underlying sale</td>
<td>(3) Underlying sale</td>
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<td>(5) Causation</td>
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<tr>
<td>(6) Consequential damages for injury to person and probably property</td>
<td>(6) Consequential damages for injury to person and property</td>
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It is clear that, besides differences in form, there are probably substantive differences in scope. Yet, despite those differences there is a wide area of overlap within which the problem of preemption is very real. Indeed, so far as the problem of preemption is concerned, the areas of non-overlap are simply irrelevant.

36. It is generally conceded that the same standard of legal defectiveness applies to both the warranty of merchantability and § 402A, except that what is technically a legal defect for the former may not be “unreasonably dangerous” for the latter. Usually, this exception appears to make no significant difference. Markle v. Mulholland’s, Inc., ___ Ore. ___, 509 P.2d 529, 533 (1973); Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 Ind. L.J. 303, 304 (1967). But see infra note 60.
Thus, the fact that § 402A might cover damage to the consumer's property to an extent that strict liability in warranty did not is irrelevant to the question of whether the section clashes with the Uniform Commercial Code in the area of consequential damages for personal injury. This makes it easier to define the respects, if any, in which the two sources of law conflict.

One common approach to possible conflict with the Code attempts to make legal way for § 402A by establishing that the Code is a "commercial document" not designed to deal adequately with consumer rights,7 which, of course, §402A is designed to do. A supporting argument points to the fact that § 2-318 of the Code and its comment 3 leave the matter of vertical privity to "developing case law."

It is not clear whether (1) this approach is merely that the Code was not well designed for the consumer's purposes or (2) it is one that successfully steers around the broad field of "commercial" sales. That the Code may have been ill-conceived for consumer protection is no constitutional warrant for the courts to brush it aside or amend it, although possible inequities may be a relevant factor in interpreting it. Although the second approach can pass constitutional muster, the question remains whether the Code can sustain such a reading.

Persons familiar with the history of the Code know that it was originally drawn to solve the problems of vertical as well as horizontal privity. But, when confronted in 1951 with formidable industry opposition, the Code's editorial board reluctantly concluded that it would be able to buy enactment only at the price of leaving the abolition (or maintenance) of vertical privity requirements in the hands of the courts. Ironically, this left the Code even less a barrier, with respect to the probability of preemption, than the Uniform Sales Act, to circumvent which § 402A was originally designed. Thus, the Code's failure to deal affirmatively with the particular consumer problem resulted, not from any decision by its authors to deal only with "commercial" law, but from a painful concession to political expediency.

In fact, the Code has "consumer" sharply engraved on it. First, who can doubt that the Code is up to its ears in consumer protection so far as the retailer or direct-selling manufacturer is concerned? Not only is the immediate consumer-buyer protected

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against the tort consequences of a breach of the warranty of merchantability (§ 2-314), but this consumer protection is expressly extended to guests and members of his family or household (§ 2-318). This is consumer law in spades, and it raises a nice question of preemption with respect to at least two classes of persons, horizontally related to the consumer-buyer, who were left unmentioned and thus unprotected by § 2-314. When it said that horizontal privity was no problem for the guest or member of the family or household, was it excluding by implication, or simply omitting without prejudice, such persons as non-family and non-household employees and bystanders? 38

This is the kind of legal doubt that deserves better than wholesale indifference or even passing consideration. That it is for the most part getting neither is hardly a tribute to the perceptiveness of the great bulk either of our judges, who appear to subsist solely on a diet of case law, or of our pedagogues, who have even less excuse for ignoring the constitutional preeminence of statutes or for not maintaining a decent respect for the principles of statutory interpretation.

There are other indicators that the Code was not intended to by-pass the consumer. 39 No one who knew Professor Karl N. Llewellyn, the Code's main architect, could doubt that he had the consumer very much in mind, and he did not leave confirmation of this to either mind readers or the scavengers of legislative history. It is especially clear in states like Georgia, Rhode Island, Virginia, and Wyoming, in which the Code was enacted without the hole punched in it in 1951. 40 With both vertical and horizontal privity problems thus buttoned up in favor of the consumer, can it be persuasively argued in those states that the Uniform Commercial Code is not a basic (however imperfect) charter of consumer protection? And, if the answer is no, can it be persuasively argued that the mere presence of the 1951 concession in the

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38. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 613, 187 A.2d 575, 577 (1963), opted for preemption. Cf. cases cited infra note 53. Note that the second sentence of comment 3 to § 2-318 is ambiguous. Does it apply only to vertical privity, or to horizontal privity as well?

39. Further evidence that the Code is deeply concerned with consumer protection is found in § 2-715(2)(b) (consequential damages include injury to person or property), § 2-719 (to limit consequential damages in the case of consumer goods is prima facie unconscionable), and the comments to § 2-607(3)(a) (notice requirements as applied to consumers).

40. In 1966, the Permanent Editorial Board for the Code proposed three alternative versions of § 2-318 that plugged the vertical privity hole.
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Code as it appears in other states transforms the Code into a purely "commercial" instrument? And since when is a provision that protects the consumer against the commercial enterprises with which he deals, directly or indirectly, "noncommercial"?

The basic division that results from trying to drive a crude wedge between "consumer law," which is supposed to be the peculiar, and even exclusive, province of § 402A, on the one hand, and "commercial sales law," which is supposed to be confined to deals between merchants, on the other, squares neither with the history of the Code nor with its terms and comments, even as scarred in 1951.

Not only is there a basic constitutional issue at stake, but a rich legacy of doctrinal confusion. It is likely that, after the celebration of the death of the privity requirement has cooled down, calmer heads will discover that the § 402A avenue to perfect consumer justice, in addition to providing an unneeded substitute for Henningsen and Chapman and far from bypassing "the intricacies of the law of sales," has made what is still inherently sales law far more intricate than it was before; a new set of complexities has simply been layered over the old. The great irony is that the law must pay a high doctrinal price, and for what? If the Henningsen approach was constitutional, § 402A offered nothing better than the risk of overlooking the Code in some of its other applications. If the Henningsen approach was unconstitutional, § 402A offers only the advantage of obscuring the clash between judicial decision and uncongenial statute. This would make it the shabbiest of legal strategems.

The legacy of confusion has come gradually. At first there was speculation as to whether there were now two streams of strict tort liability or only one. Gradually the view that independent streams exist, and that the courts are free to choose between them, began to take hold.

For courts that found the Uniform Sales Act not to have preempted the field of consumer-benefiting warranty, § 402A provided only welcome confirmation. But for those that interpreted the Act as containing a negative implication against additional,


and *a fortiori* competing, warranties, how could they create what the statute impliedly forbade? Under the *Uniform Sales Act*, the Nevada court reluctantly concluded that the door was closed to dispensing with privity.\(^4\) And yet it was intrigued with the possibility of granting under the *Yuba* doctrine the very protection that the *Act* had preemptively withheld, forgetting that *Yuba* reached its result on the assumption that the *Act* had *not* preempted the field.

How could *Yuba* be useful to a court that had found preemption in the *Act*? Only on the assumptions (1) that the right recognized by *Yuba* was warranty in neither name nor substance, and (2) that the *Act*'s preemption did not reach beyond warranty so as to cover every kind of strict liability, whether warranty or otherwise, that was designed to protect the consumer of commercial goods from the consequences of less-than-acceptable quality.

Having neutralized much of the *Code*’s impact on consumer protection, the courts are now fumbling to discover where consumer protection ends and “commercial law” begins.\(^4\) First, a few courts are drawing the line at personal injury. A much larger number are taking a second step, and are following the guideline laid down in § 402A by including injury to the consumer’s property.\(^4\) Some courts have gone still farther, and taken a third step, thus crossing the line into the consumer’s economic loss flowing from the inferior quality of the product that he bought.\(^6\) (A few have even imposed “strict liability in tort,” uninhibited by privity considerations, on behalf of the commercial user.)\(^4\)

It is interesting to observe the solicitude for the *Code* that courts, refusing to take the third step, are willing to show.\(^4\) But


\(^4\) *Id*; see *Webb v. Zern*, 422 Pa. 424, 428, 220 A.2d 853, 855 (1966). The problem gets even stickier when the property damaged is the defective property itself. See *supra* note 44.

\(^4\) Santor *v.* A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The court wavers between “strict liability” (*Id.* at 64, 207 A.2d at 311) and warranty (*Id.* at 67, 207 A.2d at 313).


a refusal to "emasculate" the Code in this respect raises the question why the same reticence was not equally becoming with respect to steps one and two.

More disturbing is the general attitude, now settling in, that somehow we may generally forget the Code so far as the consumer is concerned. Now becoming typical is the statement in Suvada v. White Motor Company, that "[o]ur holding of strict liability in tort makes it unnecessary to decide what effect section 2-318 has on an action for implied warranty." Most shocking of all was Justice Peters' dissent in Seely v. White Motor Company: "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." He should have been concerned.

The corrosive effects may now be less visible. Now that the Code is being forgotten, may we stop wondering whether § 2-318 of the Code retains some negative implication with respect to the two classes of persons, horizontally related to the consumer-buyer, who were omitted from that section?

Today the ascendant view is that there is again only one strict liability stream in the consumer area, except that now it is § 402A, and not the Code.

In this long trail of confusion one of the most amusing ironies occurred recently in Mississippi, where its Supreme Court, which had apparently been brainwashed to believe that the Code was irrelevant to consumer protection faced a case in which it was asked to apply § 402A on behalf of a consumer who had been injured by a latent defect in the heel of a shoe bought from the defendant retailer, and thus beyond his scrutiny. The court held that strict liability in tort was inappropriate for a defendant who could neither discover nor correct the defect. In so doing, the court used reasoning that disqualified the plaintiff not only from collecting under § 402A but also from pressing his claim for breach of the conventional retail warranty of merchantability.

49. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
50. 32 Ill. 2d at 622, 210 N.E. 2d at 188.
51. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
52. Id. at 21, 403 P.2d at 157, 45 Cal. Rptr. at 29.
53. See note 38 supra. And see Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). If the result in the last case is free of preemption under § 402A, it should be free of preemption under supplementary common law warranty, unless the Code preempts only warranty and § 402A is non-warranty.
Such an absurd result cannot, of course, be laid on the doorto-step of Dean Prosser, because § 402A and its rationale did not support such a conclusion. At the same time, Dean Prosser and his disciples must accept the ultimate blame for fostering a rationale that ultimately produced a judicial climate in which the Uniform Commercial Code has been reduced to irrelevance in the field of consumer protection.55

The Mississippi Court's reasoning completes one of the most beautiful ironies of recent times. In effect, a court that would perhaps be the first to agree that the Code did not preempt the field of warranty read into its own truncated version of § 402A a negative implication that wiped out the strict retailer responsibility imposed by the Code. Its sweeping rationale, which applied equally to the retailer's warranty obligations, seems to leave no room for rationalizing the Court's result on the ground that the plaintiff may not have pleaded or argued a breach of the Code's retail warranty of merchantability.

And so the ultimate result of building a Chinese wall around the Code has even been the occasional denial to the consumer of a protection that would have been routinely conferred under the Code or under its predecessor, the Uniform Sales Act. Is this progress? Because the Code and its judicial gloss are now considered irrelevant, the courts are having to re-invent, as the cliché goes, the products liability wheel. Moreover, many of the marginal problems of disclaimer (what about the "as is" sale?) and the closely affiliated problems of warning, unanticipated use, and participation by the plaintiff (contributory negligence, assumption of risk, and causation), simply will not go away. Most of the distasteful "intricacies of the law of sales" not only are still with us but have been supplemented. All of which gives some weight to the possibility that, doctrinally, § 402A has set products liability back twenty years.

If interpretatively sound, Henningsen, Chapman, and perhaps Yuba, gave us the warranty counterpart of MacPherson's56 gift to negligence, and it is a pity that Dean Prosser could not rest content with bolstering it. Anyone who doubts the legacy of added intricacy and confusion should read the several opinions in Markle v. Mulholland's, Inc.,57 and Hawkins Construction Co. v.

55. To confirm the belief that the Mississippi court's reaction was not idiosyncratic, see the dissenting opinion in Buttrick v. Lessard, 110 N.H. 36, 41, 260 A.2d 111, 114 (1969).
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Matthews Co., in which the Supreme Courts of Oregon and Nebraska earned many "Brownie points" by at least facing up to the problem of preemption, an issue that almost all other courts have either totally ignored or, at best, given only a glancing blow.

The reader may wonder why I have not taken a firm stand on whether the sales statutes "preempt the field" and, if so, on what that field is. My main complaint, of course, has been that long ago the courts, and the attorneys whose function it is to educate them, should have fully investigated the matter in the context of specific litigation, which in our legal system normally provides the sharpest incentives to dig deeply.

For those who consider this a cop-out, let me confess my belief (based on something less than an exhaustive study of text and context) that the Uniform Commercial Code preempts at least part of the domain claimed by § 402A. The significant uncertainty lies in the extent of that preemption.

There are several possibilities. If we can justify the much abused practice of relying on legislative history (in this case comment 3 to § 2-318), one area that is not preempted is vertical privity. Nor is it reasonably likely that the Code was designed to enter, let alone preempt, the area of culpability by carelessness.

As for horizontal privity, there appears to be a strong likelihood that the Code preempts the entire field, with the result that employees of the retail buyer are excluded, unless they can be properly classed as "members of the family" or "guests." I am also tentatively persuaded that the Code preempts the field with respect to (1) the disclaimers that it authorizes in retail sales (where the consumer is immediately involved) and (2) notice. Bystanders create no problem here, first, because they were omitted, without prejudice, from § 402A and, second, because they stand outside the immediate domain of sales statutes and even that of consumer protection. So situated, they are fair game for judicial law-making. Thus, courts that consider it socially desirable to protect them should be free to exercise their inherent power of judicial law-making by analogy.

This confession has so far assumed that the field occupied simultaneously by § 402A and the Code is that of "warranty." If, on the other hand, § 402A has engrafted on sales contracts some non-warranty version of strict liability in tort, I think it nevertheless more likely than not that, with the exception noted, the

legislative intent behind the Code (supported by the text of the Code and its reasonable implications) was to preempt the field of consumer protection from defective products, not involving personal culpability, so far as it is secured by civil actions for consequential damage traceable to a sale by the defendant. If so, the dichotomy between warranty and non-warranty is irrelevant. And if what the legislatures have accomplished by adopting this approach does not provide enough consumer protection, there is always the constitutional prerogative of nagging the several state legislatures into taking corrective action.

For me, the clinching argument for preemption is reflected in this question: When the Code opened the door to judicial disposition of all or part of the privity issue, what reason was there to assume that it opened the door any farther than it specified, especially to judicial versions of seller responsibility so much more stringent (with respect to disclaimer) and so much more lax (with respect to notice) that their availability could only undermine their counterparts in the Code? To attribute this kind of death wish to the legislature would give a strange new dimension to legislative purpose.

There may be several lessons here. One is that a hell-for-leather push for adequate consumer protection does not make it a matter of indifference what doctrinal route is taken. This is especially true where taking a disadvantageous route is wholly unnecessary in view of the availability of an alternative route that not only carries no worse risks, but may even have a few material advantages (mentioned later) that the other route lacks.

Even if the analysis of this article is logically valid (which it may not be), the question naturally arises whether there is any point in whipping a now very dead horse. Section 402A has already carried the day, and if the legal realists are right, why quibble about a fait accompli, especially a socially valuable one? This question is appealing from a practical point of view and, if it were merely a matter of enjoying a good social result built on bad doctrine, I would be the first to fold up and turn to legal matters more current and more important.

It is not as easy as that. Presumably the contributors to this distinguished symposium have all taken professional oaths to support the constitutions under which they have respectively chosen to operate. And, if my informants are correct, each of these constitutions recognizes the basic separation of powers and the consequent supremacy of the legislature in the field of constitutional policy making. One who takes these principles seriously
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cannot rest on the easy rationale that it is now water over the dam. Courts have been known to overturn earlier rationales and sometimes even to confess error.

The nub of the problem may be quickly stated. And here let me quote my favorite author, who on an earlier occasion wrote most perceptively as follows: 59

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 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?

And so I offer this challenge: if, indeed, we have a constitutional problem that we have compromised by being in too great a hurry to get to our social destination, let us have the professional courage to own up to our sins, and try to achieve a decent judicial regard for the basic constitutional principle of legislative supremacy. Oddly enough, we can do this without materially jeopardizing the consumer; my guess is that correcting the rationale would jeopardize but few consumer recoveries. But if this turns out not to be the case, the ultimate responsibility rests with the legislature.

Actually, giving § 402A less, rather than fuller, sweep might in some instances even improve the consumer’s legal lot. One of the odd ironies in § 402A is that, while it pretends bold doctrinal innovation, it turns mealy-mouthed and timorous in three important respects. With respect to the field of latent side effects for

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which there is no firm scientific basis for suspicion, it veers away from strict accountability to a modified negligence concept, an approach that compromises away part of the fruits of a hard-won doctrinal “victory.” It also “chickens out” with respect to products that change their character from what the defendant manufactured to what ultimately injured the consumer. One would have thought that intellects capable and courageous enough to create §402A would have been capable of coping with what is (in the field of doctrine as distinct from practical determinability) a relatively straightforward matter of causation. The same may be said with regard to component parts and perhaps even the derivative rights of innocent bystanders. Finally, the legal protection offered by §402A is, in at least one minor respect, less generous than that offered by the current warranty of merchantability: in warranty, the plaintiff need show only a legal defect, whereas under §402A he must also show that the legal defect was “unreasonably dangerous,” an added burden recently repudiated by the court that gave us Yuba.

If this analysis appears to be more emotive than scholarly, it is the best I can do with the time here available. Having been torn between the pull of other and more relentless current responsibilities and the compulsive desire to move Justice Traynor’s monument to firmer ground, I have yielded, as much as I prudently could, to the latter. (Those who insist on fuller documentation should pursue the work of other writers who seem to support my position.)

But, whatever the merits (if any) of the article, the occasion has provided me with a therapeutic exercise, coupled with the pleasure of joining in a warm tribute to a great American judge.

60. I am assuming that the words “unreasonably dangerous” read in the light of comment k support the result in Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963). The critical situation is that in which the dangerous side effect is unknown even to scientists, so that even a warning is impossible. See Dickerson, supra note 36, at 327-28, and supra note 59, at 455-56.


62. See Chief Justice O’Connell’s surprising and welcome concurring opinion in Markle v. Mulholland’s, Inc., __ Ore. ___, 509 P.2d 529, 536 (1973), together with the sources he cites in his footnote 4.