INTRODUCTION

Nebraska explicitly adopted strict tort liability for personal injury in Kohler v. Ford Motor Co.1 In that case, the Nebraska supreme court held that a manufacturer was strictly liable in tort when an article he placed on the market, knowing it would be used without inspection for defects, proved to have a defect which caused injury to a human being rightfully using the product. Any effort of the manufacturer to limit liability by rules applying to warranties was held ineffective.2

In the recent case of Hawkins Construction Co. v. Matthews Co.,3 the court refused to extend the strict liability principles of Kohler to include damage to the defective product itself [hereinafter referred to as product damage].

Although Hawkins clearly established that product damage is not compensable under strict tort liability in Nebraska, the extent of strict tort coverage remains unclear. This article will delineate some confusing aspects of the court's decision by analyzing several problems raised by the Hawkins case. First, what is the relationship between strict tort liability and the Uniform Commercial Code (UCC)? Specifically, where strict tort liability and the UCC conflict, does the UCC preempt strict tort? Although Hawkins found that strict tort liability, if extended to include product damage, would conflict with the UCC's more demanding requirements, the court avoided the preemption problem by determining that extension of strict tort was unwise and unnecessary in this case.

Second, the soundness of the court's reasons for refusing to extend strict tort liability to product damage will be examined.

Third, whether Hawkins can be distinguished from a future case

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2. 187 Neb. at 436, 191 N.W.2d at 606-07.
involving damage only to property other than the defective product will be discussed. The court's treatment of damage to property other than the defective product is one of the most perplexing aspects of the Hawkins decision.

HAWKINS CONSTRUCTION CO. v. MATTHEWS CO.

Hawkins Construction Company desired scaffolding for the construction of a factory in Omaha, Nebraska. A brochure published by Waco Scaffold and Shoring Company (the manufacturer), which Hawkins received from the Matthews Company (the distributor), stated that Waco shoring equipment was designed to safely carry working loads up to 20,000 pounds per panel. After referring to this brochure, Hawkins leased Waco equipment from the Matthews Company.

The scaffolding supported a twenty-foot high platform to be used as a temporary base during the pouring of a cement floor. Since each scaffold section was only six-feet high, the sections were stacked on top of each other and secured by tubular connectors.

When the scaffold panels reached eighteen feet, Hawkins constructed joists on the scaffold to support the platform. In preparing the joists, Hawkins departed from Waco's plans concerning the proper method for affixing the platform to the scaffolding.

4. Id. at 548-49, 209 N.W.2d at 646-47. The brochure was rubber stamped with a Matthews Co. trade name, "Scaffold Rental & Sales Co."

5. See Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965), concerning recovery under an implied warranty by a passenger in a truck leased by his employer.

6. One question was whether the brochure was part of the "basis of the bargain" within the meaning of Neb. Rev. Stat. (UCC) § 2-313 (Reissue 1971). The court found that the advertisement was part of the basis of the bargain. 190 Neb. at 566, 209 N.W.2d at 655. Hawkins' president testified in a deposition that he relied on the brochure, but that "no particular thing" influenced him. Id. at 549, 209 N.W.2d at 647. The court noted that Neb. Rev. Stat. (UCC) § 2-313, Comment 3 (Reissue 1971) states that "... no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." Id. at 566, 209 N.W.2d at 655.

7. Tubular connectors are hollow tubes which fit over the tubular supports of the bottom scaffold panel. The feet of the upper scaffold panel are then fitted into the connector. The Waco connectors were ordered by Hawkins from Matthews. Id. at 550-51, 209 N.W.2d at 647.

8. When the panels reached eighteen feet, they were topped with "shore heads." The shore heads cradle "ledgers," boards nailed together and placed into the shore heads on edge. Ledgers support the joists, lumber placed on edge on top of the ledgers, and at right angles to the ledgers. Id. at 551, 209 N.W.2d at 647-48.
While cement was being poured onto the platform, the platform collapsed. One man fell, but was not seriously injured. The scaffolding and other property of Hawkins was damaged.

Hawkins claimed that the damage was proximately caused by defectively manufactured connectors which allegedly failed to hold the sections of the scaffold together. Waco contended that the collapse was caused by Hawkins' deviations from Waco's plans for the proper construction of the joists. The district court submitted strict tort and express warranty to the jury as alternative theories of liability. The jury allowed recovery for all property damage without specifying whether recovery was granted under strict tort liability or express warranty.

The Nebraska supreme court held on appeal that it was error to permit recovery for damage to the product itself under strict liability, but that recovery was proper under the express warranty provision of UCC section 2-313.11

9. Id. at 559, 209 N.W.2d at 651.
10. In his petition plaintiff prayed for the following damages:
   Formwork and Sharing Lumber: $5,977.75
   Concrete: 2,120.44
   Reinforcing Steel: 1,880.20
   Replace Finishing Machines: 884.00
   Mechanical Work: 327.98
   Electrical Work: 836.06
   Scaffold Replacement & Freight: 7,167.08
   Equipment Rental: 3,106.15
   Hawkins Labor, Insurance, Taxes: 5,944.39
   Work to be done (hauling debris, masonry): 865.36
   Delay Costs: 1,963.00
   Overhead 5%: 1,554.07
   Sum: $32,635.48


11. 190 Neb. at 563, 209 N.W.2d at 653-54. NEB. REV. STAT. (UCC) § 2-313 (Reissue 1971) provides:
(1) Express warranties by the seller are created as follows:
   (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
   (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
   (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
As a matter of law, the Nebraska supreme court found that (1) the claims in the brochure constituted an express warranty;" (2) Waco waived absolute compliance with the plans; (3) Matthews adopted Waco warranties; and (4) the brochure was part of the basis of the bargain. Recovery was allowed for damage to the leased scaffolding as well as for damage to other property in the vicinity."

THE COURT'S REASONING

THE MAJORITY OPINION

Hawkins presents two interrelated problems — the proper range of strict tort liability and the role of the UCC in products liability cases.

Extension of strict tort liability beyond personal injuries seemed to the court to be "irresistible."" However, strict tort liability coverage of all property damage would conflict with warranty provisions of the UCC." The court stated that a plaintiff would always prefer strict tort rather than the Code's restrictive provisions." For example, the UCC requires the plaintiff, under section 2-607(3)," to give notice of the breach. Additionally, manufacturers may disclaim warranties under section 2-316." In sharp con-
Contrast, neither Kohler nor section 402A of the Restatement (Second) of Torts requires notice or allows disclaimers. The court concluded that "... comprehensive strict tort liability would clearly emasculate the ... warranty provisions of the Uniform Commercial Code."21

This collision between strict tort and statutory warranty was emphasized with respect to product damage. The Hawkins court found it necessary "in light of the Uniform Commercial Code"22 to

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "[t]here are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which is common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (section 2-718 and 2-719).

20. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

21. 190 Neb. at 561, 209 N.W.2d at 652.
22. Id. at 560, 209 N.W.2d at 652.
distinguish between product damage and damage to other property. The UCC, according to Hawkins, was "designed to apply where the product is defective but where no damage results from the defect, either to persons or other property."\(^{13}\) [Emphasis added.] The court did not fully explain why it was necessary to distinguish between product damage and damage to other property. A logical reason for the distinction would be the court's apparent conclusion that the UCC provides the exclusive remedy for product damage, while strict tort is the exclusive remedy for personal injury and for damage to property other than the defective product. Although a conclusion that the UCC does not apply to persons or property other than the defective product is probably erroneous,\(^{24}\) it is difficult to ascertain any other reason which would explain the court's distinction between the two types of property damage in light of the UCC. Whatever the reason for the distinction, the court remained preoccupied with product damage.

After discussing the UCC-strict tort conflict, the court decided that extension of strict tort to product damage was not desirable. Strict tort liability for personal injuries in Nebraska is based on a policy of enterprise liability.\(^{25}\) Under that policy, the burden of injury is transferred from the plaintiff to the manufacturer, who is purportedly more capable of bearing the loss. Without elaborating on its reasoning, the Hawkins court concluded that unspecified jurisdictional and policy considerations in personal injury cases "are not persuasive" when losses are "commercial."\(^{26}\) (Here the court was apparently referring to product damage, but did not define what constituted a commercial loss).

Second, the court concluded that extension of strict tort liability to product damage was unnecessary, since the UCC provides a sufficient alternative.\(^{27}\) The court was apparently referring to the express warranty provision in UCC section 2-313.\(^{28}\)

\(^{23}\) Id. at 561, 209 N.W.2d at 652.

\(^{24}\) See Neb. Rev. Stat. (UCC) §§ 2-318, 2-715 (Reissue 1971) which together permit recovery for personal injuries and/or property damage that was caused by a breach of warranty.

\(^{25}\) 190 Neb. at 562, 209 N.W.2d at 653. Enterprise liability is designed to place the economic burden of personal injury on the manufacturer rather than on the victim who is presumptively ill-equipped to bear it. See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

\(^{26}\) 190 Neb. at 653, 209 N.W.2d at 653.

\(^{27}\) Id. at 562, 209 N.W.2d at 653.

\(^{28}\) Section 2-313 is stated at note 11 supra.
In sum, the court acknowledged a potential conflict between strict tort liability and the UCC, and clearly refused to extend strict tort liability to product damage. However, the court's focus on product damage—a small percentage of plaintiff's recovery—obscured the decision's effect on strict tort liability coverage of property other than the defective product.

**Justice McCown’s Concurring and Dissenting Opinion**

Justice McCown concurred in the result but felt that strict tort liability should extend to *all* of the property damage incurred by Hawkins.

First, the Justice noted that under section 402A of the Restatement (Second) of Torts a seller is liable for physical harm caused to the ultimate user or consumer, or to his property. Without elaborating on his reasoning, Justice McCown stated that there was no logical reason for applying strict tort liability to physical harm caused to the person, while refusing to apply strict tort liability to physical harm caused to his property.29

Taking issue with the majority's characterization of product damage as "commercial loss," Justice McCown labeled the damage as "physical harm."30 Justice McCown indicated that while economic loss is grounded in the UCC, physical harm is compensable under strict tort. To bolster this argument, he quoted from Seely v. White Motor Co.31 where Chief Justice Traynor, speaking for the California supreme court, stated that a manufacturer could be held liable under strict tort liability for physical injuries caused by defective goods, but that he ordinarily could not be held liable for the level of performance of his product in the consumer's business.

Justice McCown concluded without extensive discussion that the plaintiff should have recovered under either the UCC or strict tort for all of the property damage including product damage, and that section 402A should be judicially adopted in Nebraska.

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29. 190 Neb. at 568, 209 N.W.2d at 656.
30. Id. at 568-69, 209 N.W.2d at 656-57.
31. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
Although Justice Clinton concurred in the result, he elaborated on a rationale for refusing to extend strict tort liability beyond allowing recovery for personal injury. Justice Clinton outlined two primary reasons for refusing to extend strict tort to property damage cases.

First, extension of strict tort would repeal UCC limitations by judicial fiat, since property damage was already covered by the UCC. Although personal injuries were also covered by the UCC, Justice Clinton explained that personal injuries were compensable under either strict tort or the UCC, while property damage was compensable only under the UCC. According to Justice Clinton, strict tort in personal injury cases has a foundation antecedent to the UCC.\(^3\) Since section 1-103 of the UCC provides that the principles of law and equity shall supplement the UCC,\(^4\) it is arguable that the UCC did not displace existing remedies relating to personal injury. In addition, section 2-719 states that limitations on consequential damages for personal injury in the case of consumer goods is prima facie unconscionable, but a limitation on damages where the loss is commercial is permitted.\(^5\) These distinctions, reasoned Justice Clinton, justify strict tort recovery for personal injuries, in spite of the UCC.

Second, the Justice argued that the purpose of strict liability is to shift the risk of loss from an injured party to the manufacturer, who can readily pass on the cost of insurance through higher prices.\(^6\) According to Clinton, the property damage in Hawkins is of the type already covered by insurance.\(^7\) Thus, according to Justice Clinton, strict tort would simply transfer the risk of loss from one insurer to another.\(^8\) In personal injury cases, however, the insured party's insurance often does not match potential damages, while in property damage cases, the insured party is often adequately insured.\(^9\) Under Justice Clinton's view, the policy of distributing risk, and the typical-
ly insufficient insurance coverage of personal injuries, justify strict
tort coverage in personal injury cases."

PREEMPTION

Hawkins noted a conflict between strict tort liability and the more
restrictive provisions of the UCC. The court then found it un-
necessary and unwise to extend strict tort liability. Thus, the
Nebraska supreme court avoided the question of whether the UCC
preempts conflicting strict tort remedies. The Hawkins court's un-
usual deference toward the legislative scheme as well as its
avoidance of the preemption question provide an opportunity for a
re-examination of that as yet unresolved issue.

Academic writers and the courts have ordinarily diverged on the
question of UCC-strict tort conflict. Often courts have permitted
recovery under strict tort liability in cases where statutory
limitations (such as notice and disclaimer) might otherwise preclude
recovery. The main vehicle for "eclipsing" statutory warranties in
this manner has been section 402A of the Restatement (Second) of
Torts, which has been considered an alternate ground of recovery.
On the other hand, some academic writers have argued that strict tort
is inconsistent with the legislative intent of the UCC to permit
limitations on liability and to provide conditions precedent to
recovery (such as notice).

39. Id.
40. As used herein "preemption" refers to the question of whether statutory war-
ranfy is an exclusive remedy in those cases where the UCC and strict tort have in-
consistent requirements applicable to the same facts. The term is used to indicate
legislative overruling of the common law. The term should not be confused with the
constitutional doctrine of preemption. Rather, the term refers to the possibility of
a legislative enactment displacing a judge-made doctrine.
41. Shanker, Strict Tort Theory of Products Liability and the Uniform Commer-
cial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Commu-
nication Barriers, 17 W. RES. L. REV. 5 (1965) [hereinafter cited as Shanker].
42. Id.
44. For discussions of the UCC-strict tort conflict see Titus, Restatement (Second)
of Torts Section 402A and the Uniform Commercial Code, 22 STAN. L. REV. 713
(1970) [hereinafter cited as Titus]; Franklin, When Worlds Collide: Liability Theories
and Disclaimers in Defective-Product Cases, 18 STAN. L. REV. 974 (1966) [hereinafter
cited as Franklin]; Shanker, supra note 41; Speidel, The Virginia "Anti-Privacy"
Statute: Strict Products Liability Under the Uniform Commercial Code, 51 VA. L.
REV. 804 (1965).
ARGUMENTS AGAINST PREEMPTION

In contrast to Hawkins, most judicial discussion of the strict tort-UCC conflict has been cursory. For example, the Illinois supreme court in Suvada v. White Motor Co. found it unnecessary to decide the effect of the UCC once strict liability was applied. By deciding the case under strict tort liability before considering the UCC, the preemption issue was conveniently ignored. In Wachtel v. Rosel, the court stated that "nothing in the action of the General Assembly indicate[d]" that strict tort should not apply.

Other courts have maintained that statutory warranties are limited to commercial transactions. In Greenman v. Yuba Power Products, Inc., Justice Traynor stated that "rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products ..." The notice requirement of the Uniform Sales Act was considered inappropriate in actions "by injured consumers against manufacturers with whom they have not dealt."

A few courts have reflected on the issue more extensively. In Markle v. Mulholland's, Inc., the plaintiff was injured when a tire

45. 32 Ill. 612, 210 N.E.2d 182 (1965).
46. Id. at 210 N.E.2d at 180.
47. 159 Conn. 496, 271 A.2d 84 (1970).
48. Id. at 271 A.2d at 87.
50. Id. at 377 P.2d at 901, 27 Cal. Rptr. at 701. The court was referring to the Uniform Sales Act in the material quoted, but the rationale applies with equal force to the UCC.
51. Id. at 377 P.2d at 900, 27 Cal. Rptr. at 700. Similarly the Supreme Court of Washington held that the Uniform Sales Act applied in a commercial transaction between buyers and sellers, but that a remote consumer could recover from a manufacturer under an implied-in-law warranty of wholesomeness. Le Hue v. Coca Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421, 422 (1957). Thus, theoretically a buyer might not be able to recover in a case where a non-privity consumer would be able to recover (although presumably the implied warranty of wholesomeness would also apply to the buyer). See Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965). In Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968) the court concluded that UCC Section 2-318 (dealing with personal injury) does not handle problems of vertical privity. Vertical privity concerns the question of who, besides the immediate seller, is liable to the consumer. Horizontal privity concerns the question of who, besides the buyer, may sue the manufacturer or seller.
52. Shanker, supra note 41, at 7. One of the most extensive discussions of the conflict between tort and statutory warranties can be found in a case dealing with the Uniform Sales Act. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961).
blew out. The court held that strict tort survived enactment of the UCC. Markle argued that "impediments to recovery" such as notice and disclaimer make little sense in personal injury cases. In effect, this argument pertained to the wisdom of legislative limitations found in the UCC. However, the court considered other factors which militated against preemption. First, the UCC was designed for business transactions. Second, the lack of legislative history on the issue indicated that the legislature probably never considered the possibility of conflict between the UCC and strict tort. The court speculated that the legislature would not have intended to abort development of consumer protection by preempting the field. Finally, warranty impediments to recovery would make preemption "regrettable." Under these circumstances, the court refused to find preemption since there was an "absence of fairly specific legislative language."

Arguments For Preemption

Statutory preemption of strict tort has been discussed extensively by legal writers. Since Hawkins showed a rare degree of deference toward UCC warranties, reconsideration of arguments for preemption may help to place Hawkins in perspective.

Arguably, in cases where UCC warranties apply, conflicting strict tort remedies may be excluded due to the statutory pre-eminence of the action for breach of warranty. This argument is based on three premises: (1) UCC warranty provisions and section 402A of the Restatement (Second) of Torts cover substantially the same area of non-negligent liability; (2) the UCC and section 402A conflict, since the Restatement lacks certain restrictive provisions enacted by the Code (e.g., notice and disclaimer); (3) in applicable cases, UCC warranty provisions must be adopted in lieu of section 402A in order to implement legislative policy.

54. 509 P.2d at 535.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. See authorities cited at note 44 supra.
1. Coverage of the Same Area

Comparison of section 402A and the UCC indicates that they respond to the same broad problem: the circumstances in which a seller engaged in the business of selling a particular product may be liable when that product damages persons or property. Furthermore, UCC warranty provisions are applicable to a specific 402A situation. For example, the Restatement requires that the product be defective. Under the UCC implied warranty section, a seller may be liable only if the product is unmerchantable. It is reasonable to assume that a defective product ordinarily would be unmerchantable. Merchantable goods must be at least "fit for the ordinary purposes for which such goods are used . . . ."

The UCC also applies to the same types of damages that are recoverable under 402A. The Restatement is operative where persons or property are physically harmed. Likewise, the UCC permits recovery of consequential damages for injury to person or property. The UCC is more comprehensive than 402A in permitting recovery for economic loss. Nevertheless, damages for physical harm within the meaning of the Restatement are recoverable under the UCC.

In addition, both 402A and the UCC's implied warranties are limited to sellers engaged in the business of selling the type of product which proximately caused the damage.

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61. The Restatement (Second) of Torts § 402A (1965) is narrower since it applies only to "physical harm," while the UCC allows recovery for economic loss. Neb. Rev. Stat. (UCC) § 2-715(2) (a) (Reissue 1971).
62. Restatement (Second) of Torts § 402A (1) (1965), is stated at note 20, supra.
64. Id. § 2-314(2)(c) refers to "goods," not to "products." However, the terms may, in most cases, be interchangeable although the term "goods" may be broader. "Goods" are defined in the UCC as follows:
   "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section as goods to be severed from realty . . . .
   Id. § 2-105(1).
65. Restatement (Second) of Torts § 402A (1) (1965).
67. Id. §§ 2-315, 2-715(2) (a).
68. Id. § 2-314 is the UCC section governing implied warranties.
69. The code's implied warranty is applicable "if the seller is a merchant with
2. The Conflict

The UCC and 402A conflict in salient respects, the most important of which relates to notice and disclaimer. A plaintiff is barred from all UCC remedies if he does not notify the seller of the breach within a reasonable time. Under UCC 2-316, implied and express warranties can be excluded or modified contractually. Also, remedies may be modified or limited under UCC 2-719. These various warranty limitations exemplify the integrated nature of the Code. The UCC warranties are part of a comprehensive scheme which provides wide-ranging consumer protection, but which places explicit limitations on recovery. A fundamental principle of this scheme is freedom of contract.
trast to this principle and thus to the UCC's "elaborate creation and regulation of disclaimers and remedy limitations." Confronted with the UCC's restrictions, plaintiffs would ordinarily eschew the legislative design and opt for strict tort. Judicial fiat could thus substitute for the legislature's warranties a conflicting strict tort remedy.

3. Legislative Pre-eminence

The solution to this conflict may lie in recognition of legislative pre-eminence. Professor Titus emphasized this point:

Surely . . . the courts must solve nonnegligence products-liability cases within the Code's warranty framework, because the Code represents a legislative judgment that notice should condition recovery for some plaintiffs and that some freedom should be allowed for disclaimers. If legislative supremacy means anything, it must mean that the courts cannot create a new rule of strict tort liability that will displace the products-liability scheme of the Uniform Commercial Code.76

Although the case for preemption may be forceful, two serious problems remain. First, the Code drafters did not explicitly displace existing common law strict tort remedies. Also, the Nebraska Legislature did not clearly and explicitly indicate that Kohler was not to be followed or extended.

DAMAGE TO THE PRODUCT ITSELF (PRODUCT DAMAGE)

Whether or not the UCC should preempt strict tort liability, is a question that Hawkins declined to resolve. The court refused to extend strict tort liability to product damage for other reasons. It labeled damage to the product itself as commercial loss and then concluded that commercial loss was not recoverable under strict tort liability.78 Second, the court stated in a conclusory manner that policy

74. Franklin, supra note 44, at 1013.
75. Titus, supra note 44, at 755.
76. 190 Neb. at 561-62, 209 N.W.2d at 653.
justifications for strict tort coverage in personal injury cases are not convincing when the loss is commercial.” The court’s refusal to extend strict tort liability to product damage should be scrutinized. The following questions will be considered: (1) Is product damage ordinarily recoverable under strict tort; and (2) Even if product damage is not generally recoverable, should it be?

**Is Product Damage Ordinarily Recoverable Under Strict Tort Liability?**

Legal writers are divided on the question of whether product damage is ordinarily recoverable under strict tort.

Dean Prosser found that product damage was generally recoverable under strict tort; Professor Franklin maintained that product damage ("repair loss") constituted economic loss and was not recoverable. According to Franklin, product damage "is a classic case for the conventional operation of sales concepts . . . ." Prosser’s view is stated as follows:

> With the extension of the strict liability beyond food, and in particular to products likely to cause harm only to property, such as animal food, physical harm to property began to be included: and there is now general agreement that there may be recovery not only for damage to the defective chattel itself, or to other products made from it, but also to other property in the vicinity . . . . (Emphasis added).**

According to Prosser’s analysis, damages may be organized into four categories: (1) personal injury; (2) property damage (to the product itself and to other property in the vicinity); (3) pecuniary loss; and (4) loss on the bargain. Courts are not in agreement whether the latter two categories are recoverable under strict tort.** Pecuniary loss is "pocketbook damage" such as impairment of good will.** Loss on the

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77. Id. at 563, 209 N.W.2d at 653.
79. Franklin, supra note 44, at 986. Hawkins apparently accepted the Franklin view. 190 Neb. at 562, 209 N.W.2d at 653.
81. Id.
82. Id. at 666-67.
83. Id. at 666.
bargain, according to Prosser, occurs where the plaintiff has purchased a product that has less value than it was supposed to have. For example, a truck may fail to meet the plaintiff's business needs. Prosser's conception of economic loss thus differs from Hawkins. There, the Nebraska court determined that product damage was a form of loss on the bargain.84

One may conclude that Hawkins' classification of damage to the defective scaffold as loss on the bargain is open to question, but it is in accord with Professor Franklin's views.

**Should Product Damage be Recoverable Under Strict Tort?**

Many courts have limited strict tort to personal injury, ostensibly because the victim may suffer awesome losses which can more easily be shouldered by the manufacturer and passed on to the public at large. The argument that strict tort should be limited to personal injuries under such an enterprise liability theory may, however, be more attractive than logical. Those who espouse the enterprise theory ignore Justice Peters' forceful reasoning in his concurring and dissenting opinion in *Seely v. White Motor Co.:*85

"[O]verwhelming misfortune" may not be present in a given personal injury case, but the majority do not indicate that they would deny recovery in a personal injury case if this element were lacking. Conversely, an economic loss might be [such] an "overwhelming misfortune" . . . that any court would allow recovery in such a case and deny it in other economic loss cases. "Overwhelming misfortunes" might occur more often in personal injury cases than in property damage or economic loss cases . . . but this is no reason to draw the line between these types of injury . . . .86

Peter's view is particularly interesting in the factual context of *Hawkins.* The scaffold collapse caused only minor personal injuries. Had those injuries been serious enough to litigate, the injured workman would probably have recovered under strict tort, even if he

84. 190 Neb. at 562, 209 N.W.2d at 653.
85. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
86. *Id.* at ———, 403 P.2d at 155, 45 Cal. Rptr. at 27.
were economically capable of bearing the loss himself. Yet even if property damage were staggering, Hawkins presumably would not have been able to rely on a strict tort theory. Justice Clinton argued that property damage is ordinarily covered by insurance, while "personal injury insurance does not remotely match the damages which are recoverable from a tortfeasor . . . ." Therefore, as to property damage, there is no "social utility in transferring the risk of loss from one insurer to another . . . ." The problem is that not all cases conform to Justice Clinton's paradigm. Property damage may sometimes be in excess of insurance coverage, particularly in a non-commercial situation. Conversely, physical injuries, especially minor physical injuries, may be adequately covered by insurance. Even if plaintiffs are less likely to be adequately insured against potential personal injuries, it is questionable whether insurance should determine who shall bear the loss.

"The great value which we as a society place upon life and health . . . ." has been alluded to as an emotional buttress to the enterprise theory. A court might conclude that barriers to recovery should be relaxed in cases where a plaintiff incurs devastating personal injury. Here again a plaintiff suffering overwhelming property damage might have to prove negligence or fit within the UCC, while a plaintiff incurring only minor personal injuries might recover under

87. 190 Neb. at 573, 209 N.W.2d at 659.
88. Id. at 572, 209 N.W.2d at 658.
89. As stated by Prosser:

What insurance can do, of course, is to distribute loss proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance - and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes. Even the distribution of the losses through insurance may be a process that has its flaws. Until we develop, by analogy to workmen's compensation, a comprehensive system of compulsory insurance with rigidly limited damages - which no one as yet seems to have proposed specifically in this particular field - there will always be . . . liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers. Liability insurance is obviously not to be ignored; but it is a makeweight, and not the heart and soul of the problem.

Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1121-22 (1960).
90. 190 Neb. at 573, 209 N.W.2d at 659 (Clinton, J., concurring).
strict tort. The anomaly could be justified by contending that such a case would occur only rarely and that strict tort was fashioned as a general rule applicable to the bulk of cases which involve serious injuries. Though the situation might arise only infrequently, there is little justification for denying strict tort protection in a case where a plaintiff suffers serious property damage, while simultaneously affording preferential treatment to a plaintiff who has suffered minor physical injury. One who suffers damage should not be denied strict tort recovery simply because his plight is uncommon. Especially in non-commercial cases, economic loss could be more devastating to a consumer and his family than even relatively serious personal injury.

Although the above discussion focuses on serious physical or property damage, other circumstances should not be ignored. In cases where a plaintiff suffers injury, but is capable of bearing the loss, there seems to be no logical reason for distinguishing between personal injury and property damage. The fact that personal injuries are compensable under strict tort may indicate that the enterprise theory is partially a subterfuge for an emotional rationalization. Even minor physical injury seems more noxious than many thousands of dollars in property damage. Ultimately, the noxious character of the damage may be more convincing to courts than a more realistic interest in protecting consumers from unbearable losses.

Another way of distinguishing personal injury and property damage is to suggest that, because of society's interest in life and health, manufacturers should be encouraged to take a high degree of care. Dean Prosser dismissed this suggestion by stating that res ipsa loquitur and potential impairment of the manufacturer's reputation were ample deterrents to careless workmanship.91 Assuming arguendo that strict tort induces a higher standard of workmanship than does negligence liability, deterrence does not justify limitation of strict tort to personal injury. On the contrary, potential strict liability for both property damage and physical injuries would be likely to induce an even greater degree of care than would potential liability for personal injuries alone. Fewer defective products might

91. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L. J. 1099, 1119 (1960).
be produced, thus resulting in diminished occurrence of personal injuries. However, Prosser's argument that negligence liability provides ample deterrence appears convincing, since at some point it is cheaper to insure against defects rather than eliminate them.

The representational tort theory is another rationale which fails to justify a distinction between personal injury and property damage. In Greeman v. Yuba Power Products, Inc., a personal injury case, the court determined that a representation that the product would safely do the job for which it was built was implied by the product's presence on the market. If the representation theory is accepted, extension of strict tort to property damage appears reasonable. If a manufacturer represents anything, he represents that the product will not destroy itself or other property in the vicinity. In Randy Knitwear, Inc. v. American Cyanamid Co., the court adopted a "policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations ..." The representation rationale is, to a certain degree, a remnant of early warranty concepts. Although a manufacturer may sometimes make an actual representation through advertising, the implied representation often may be a theoretical construct. It may be unnecessary to rely on such a rationale.

Strict liability could be imposed for a more straightforward reason. The manufacturer or seller places a product on the market and intends to make a profit. As between the innocent seller and the innocent consumer who should bear the loss if the product is defective? Although the seller may be without fault, the party who caused the product to be placed on the market should bear the responsibility when that product causes injury to person or property. In Santor v. A&M Karagheusian, Inc., the court stated:

92. Restatement (Second) of Torts § 402B (1965) concerns express representations. That section provides:
One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a 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 relation with the seller.
95. Id. at 13, 181 N.E.2d at 402, 226 N.Y.S.2d at 368.
96. 44 N.J. 52, 207 A.2d 305 (1965).
The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than the injured or damaged persons who ordinarily are powerless to protect themselves.97

Finally, if property damage were recoverable, is there a convincing reason for distinguishing between damage to the product and damage to other property? In either case the plaintiff’s property is damaged by the same defective product. He should be compensated in either case. If the UCC protected the plaintiff’s interest in the product, but not his interest in other property in the vicinity, there might be a reasonable basis for distinguishing the two types of injury. But since, as discussed previously, the UCC protects both interests, the UCC cannot provide a basis for distinction. Although Hawkins found it necessary to distinguish between the two types of property damage, the distinction seems arbitrary.

**Damage to Property Other Than the Defective Product**

Although product damage is clearly not compensable under strict tort liability in Nebraska, the Hawkins court treatment of damage to property other than the product itself is perplexing.

Two questions should be considered: (1) Did Hawkins indirectly extend strict tort liability to property other than the defective product? (2) If not, is it possible that strict tort liability would be extended to such damage in a later case?

First, the Hawkins case apparently refused to extend strict tort liability to any form of property damage. This was the understanding of both Justices McCown and Clinton in their concurring opinions. 98

Furthermore, there was extensive discussion in the majority opinion of the UCC as at least one basis for affirming the verdict for the plaintiff, yet no explicit statement extending (or refusing to extend) strict tort liability as an alternative basis for recovery for damage to property other than the defective product.

97. Id. at —, 207 A.2d at 312.
98. 190 Neb. at 568, 209 N.W.2d at 656 (McCown, J., concurring), 190 Neb. at 570, 209 N.W.2d at 657 (Clinton, J., concurring).
Second, it is possible that *Hawkins* could be distinguishable in a later case involving only damage to property other than the product. In *Hawkins*, the trial court submitted both the issues of strict tort and express warranty to the jury. The jury returned a general verdict, awarding damages for both product damage and damage to other property. Thus, there was no way of knowing whether the jury relied totally on strict tort liability when it awarded damages for both types of property. Since the supreme court determined that *product damage* was not recoverable under strict tort, error was found in the trial court’s instructions to the jury. Therefore, finding error in the trial court’s submission of the issue of strict tort liability coverage of product damage does not negate the possibility that strict tort liability might be extended to property other than the product in some future case.

Furthermore, the court’s reasons for refusing to extend strict tort liability beyond person injury apply primarily to product damage cases and not to property other than the defective product. One reason for the court’s refusal to extend strict tort liability could be that the policy reasons applicable in personal injury cases are not convincing when the plaintiff loses what the court labeled as “loss on the bargain.” The court was apparently referring to product damage. Since it is difficult to categorize damage to property other than the defective product as “loss on the bargain,” *Hawkins* might be distinguishable from a later case, where property other than the defective product is damaged and the UCC does not permit recovery (e.g., due to a disclaimer of warranties).

One reason for the court’s hesitancy to extend strict tort liability was that strict tort’s maximum extension would conflict with the UCC. The court apparently felt that strict tort coverage of damage to property other than the defective product would not conflict with the UCC to the same extent as would strict tort coverage of product damage. Otherwise, there would have been no reason to distinguish between property damage and damage to property other than the defective product in light of the UCC. If recovery under strict tort liability for property other than the defective product does not conflict with the UCC, it would be arguable that *Kohler* could be extended to property other than the defective product.

99. *Id.* at 563, 209 N.W.2d at 654.
In sum, it would be difficult to use *Hawkins* as authority for the proposition that strict tort liability in Nebraska extends to property other than the defective product. Nevertheless, it is possible to argue that *Hawkins* is distinguishable and that strict tort liability could be extended to such property.

CONCLUSION

The Nebraska supreme court acknowledged a collision between the UCC and strict tort. Instead of determing whether the UCC warranties are exclusive remedies, the court avoided this collision by finding it unwise and unnecessary to extend strict tort liability. Clearly, the plaintiff's recovery of damages for injury to the defective product was affirmed on the basis of UCC section 2-313 (express warranty). Apparently, the plaintiff's recovery for injury to property other than the defective product was also affirmed on the basis of UCC section 2-313.

Some general conclusions may be made concerning the problems raised at the outset of this article.

The court indicated that a conflict exists between the UCC and extension of strict tort liability to product damage. However, *Hawkins* failed to clarify the relationship between the UCC and strict tort liability. For example, the court did not determine whether the UCC preempts conflicting strict tort remedies. *Hawkins* could have been a departure from judicial precedent, but the court went to the precipice and backed away. Still, the court's decision stands as one attempt to show deference to the legislative design.

The *Hawkins* court refused to extend strict tort liability to include damage to the product itself. The court's reasoning on this point is not extensive or compelling. First, it is questionable whether product damage should be considered "loss on the bargain"; second, even if the classification is proper, considerations of the policy behind strict tort should receive emphasis. It is submitted that Nebraska's enterprise theory of strict tort does not provide a fully convincing rationale for distinguishing between personal injury and property damage.

Although it is unclear, the court apparently did not extend strict tort liability to property other than the defective product. Part of the confusion in this area stems from the court's preoccupation with product damage and its failure to adequately discuss damage to property other than the defective product. Although Justice Clinton
would definitely hold that no form of property damage is compensable under strict tort liability, it is at least arguable that a case involving only damage to property other than the defective product would be distinguishable from Hawkins. It is unlikely that strict tort liability will be extended even in such a case. First, the court was presented with an opportunity to extend strict tort liability to property other than the defective product, but declined to do so. Second, the UCC provides an ample alternative to strict tort liability. Third, it is possible that the court's unspecified jurisdictional and policy reasons underlying strict tort liability in personal injury cases would not be persuasive in cases of damage to property other than the defective product.

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