Strict Liability and Economic Harm in Ohio

Edward J. Howlett II

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I. INTRODUCTION

In Temple v. Wean United, Inc., the Ohio Supreme Court formally adopted section 402 (A) of the Restatement (Second) of Torts, thus recognizing in Ohio the Restatement's strict liability cause of action for injury caused by defectively manufactured products. Although the Restatement clearly states that recovery may be had in strict liability for personal injury and for property damage, there is debate over whether "economic loss" should be recoverable under the doctrine of strict liability. This comment will review existing case law to determine whether economic loss may be recovered from the manufacturer of a defective product under a theory of strict liability in Ohio.

Economic loss encompasses two areas of recovery, direct economic harm and consequential economic harm. Direct economic harm exists where the manufacturing defect causes damage to the product itself rendering

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2 Restatement (Second) of Torts § 402(A) (1965), states:
   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.


4 For discussions favoring the recovery of economic loss in strict liability see Note, Products Liability: Expanding the Property Damage Exception In Pure Economic Loss Cases, 54 Chi.-Kent L. Rev. 963 (1978); Comment, Products Liability: Recovery of Economic Loss in California, 13 Cal. W.L. Rev. 297 (1977) (hereinafter cited as Comment, Recovery of Economic Loss); Comment, Strict Liability: Recovery of "Economic" Loss, 13 Idaho L. Rev. 29 (1976); Note, Manufacturer’s Strict Tort Liability to Consumers for Economic Loss, 41 St. John's L. Rev. 401 (1967) (hereinafter cited as Note, Manufacturer’s Strict Tort Liability).

For a contrary view see Speidel, Products Liability, Economic Loss and the U.C.C., 40 Tenn. L. Rev. 309 (1973); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966) (hereinafter cited as The Fall of the Citadel); Note, Economic Loss From Defective Products, 4 Willamette L.J. 402 (1967); Comment, Manufacturer’s Liability to Remote Purchasers for “Economic Loss” Damages—Tort or Contract, 114 U. Pa. L. Rev. 539 (1966).

[565]
the product inferior in quality and preventing it from fulfilling the purpose for which it was purchased. Consequential economic harm, as the name implies, consists of damages which arise as a consequence of the direct economic harm. Examples of consequential economic harm include lost profits, expenses incurred in renting a substitute product, and repair costs.

It is the opinion of this writer that to allow recovery of direct and consequential economic harm in every factual situation is to undermine the warranty provisions of the Uniform Commercial Code. While direct economic loss should always be recoverable, since it is in reality property damage, recovery of consequential damages should be limited to consumer transactions. Recovery for consequential economic loss in the commercial setting does not further any of the policies underlying the doctrine of strict liability and may place an unjustifiable burden on the shoulders of the manufacturer.

II. THE BASIC CONFLICT: Seeley AND Santor

The decision as to whether damages for economic harm should be recoverable in a strict products liability action rests on what the court sees as the philosophy underlying the strict liability doctrine. Dean Prosser suggested that there are three convincing arguments for the doctrine of strict products liability: 1) "[t]he public interest in human life, health and safety;" 2) the representation by the supplier of the safety of the product by placing it on the market; 3) the manufacturer may be reached by one suit instead of a series of suits. An alternative basis for the adoption of strict liability is suggested in Henningsen v. Bloomfield Motors, Inc. Under this view strict liability would grow from the inequality of bargaining power between the manufacturer and the consumer. Contract law, which is based on the equal bargaining power of the parties, is inadequate to serve the needs of the consumer and thus a remedy must be created elsewhere.

How the court's perception of the philosophy behind strict products liability affects economic recovery can be seen by examining the two major decisions in this area, Seely v. White Motors Co. and Santor v. A. & M. Karagheusian, Inc.  

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6 Id.
9 For a discussion of inequality of bargaining power as the underlying basis of strict liability recovery see Note, Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort, 54 Notre Dame Law. 118 (1978).
10 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
In *Seely* plaintiff, a small businessman, brought an action against the manufacturer of a truck which had overturned, seeking to recover the money he had paid on the purchase price and lost profits in his business caused by his inability to use the truck. Chief Justice Traynor, speaking for the majority of the California Supreme Court, found that plaintiff could recover his economic losses because the defendant had breached an express warranty. Continuing on in dictum, however, Chief Justice Traynor stated that recovery for such economic losses could not be based upon the doctrine of strict liability in tort:

The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code, but, rather, to govern the distinct problem of physical injuries.\(^{12}\)

Chief Justice Traynor felt that imposing strict tort liability for these "economic" injuries would subject the manufacturer to damage claims of unknown and unlimited amounts; such liability should not exist unless there is an agreement between the buyer and manufacturer. Strict tort liability was not a question of bargaining ability in the Chief Justice's view. It emerged from the "overwhelming misfortune" caused by personal injury and the fact that the manufacturer is in the best position to spread the cost of these injuries among the public. As to economic harm "[t]hat rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers."\(^{13}\) Interestingly enough, Chief Justice Traynor concluded that plaintiff would have been able to recover for the damage to his truck if he had proved that the defect caused the damage since "[p]hysical injury to property is so akin to personal injury that there is no reason for distinguishing them."\(^{14}\)

In contrast to *Seely* is the view taken in the New Jersey case of *Santor v. A. & M. Karagheusian, Inc.*\(^{15}\) In *Santor*, plaintiff purchased a carpet sold as Grade 1. Almost immediately after the carpet was laid it developed an unusual line in it. Plaintiff received assurances that the line would "walk out," but the problem grew worse, and two new lines appeared. Plaintiff brought an action seeking recovery for the cost of the carpeting based on a breach of an implied warranty of merchantability by the manufacturer defendant. The trial court awarded plaintiff his damages.

\(^{12}\) 63 Cal. 2d at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

\(^{13}\) Id. at 19, 403 P.2d at 151, 45 Cal. Rptr. at 23.

\(^{14}\) Id., 403 P.2d at 152, 45 Cal. Rptr. at 24.

\(^{15}\) 44 N.J. 52, 207 A.2d 305 (1965).
The Appellate Division reversed the decision of the lower court, holding that there was no action for implied warranty without privity absent personal injury. The Supreme Court of New Jersey, however, in an opinion by Justice Francis, saw no reason for limiting the implied warranty to cases of personal injury.

But we see no just cause for recognition of the existence of an implied warranty of merchantability and a right to recovery for breach thereof regardless of lack of privity of the claimant in the one case [personal injury] and the exclusion of recovery in the other simply because loss of value of the article sold is the only damage resulting from the breach.

According to Justice Francis, present contract requirements of privity did not adequately protect the consumer in “this era of complex marketing practices and assembly line manufacturing conditions.” Adequate protection could only be found in the “realistic view of strict tort liability.” The great mass of consumers, being unable to determine if articles are defective, must rely on the manufacturer. The realities of this situation create an enterprise liability which “should not depend upon the intricacies of the law of sales.”

This being the case, plaintiff was entitled to recover the “economic” loss.

III. The Development In Ohio

Up until 1957 Ohio law held a manufacturer liable for injuries caused by defective products under two theories, negligence and warranty. Under the negligence theory of recovery, privity was required unless the article was inherently dangerous, or imminently dangerous as a result of the alleged negligence. Privity was also required in a warranty action. Then in 1958 the Ohio Supreme Court decided Rogers v. Toni Home Permanent Co.

In Toni, plaintiff alleged that, relying on the representations and claims made by the defendant to her through its advertisements, she had purchased a Toni Home Permanent set labeled “Very Gentle.” Claiming that she had explicitly followed the directions contained in the set, plaintiff alleged that the ingredients in the set caused her hair to fall off “to within one-half inch of her scalp.” Plaintiff sought recovery under three theories: negligence, express warranty, and implied warranty. There was

17 44 N.J. at 59, 207 A.2d at 309.
18 Id. at 66, 207 A.2d at 312.
19 Id.
20 Id. at 65, 207 A.2d at 312.
21 Jenkins, supra note 3, at 151.
22 167 Ohio St. 244, 147 N.E.2d 612 (1958).
23 Id., 147 N.E.2d at 613.
no privity between plaintiff and the defendant manufacturer. The question before the court was whether plaintiff could maintain an action for breach of express warranty for personal injuries without privity. The court, through Justice Zimmerman, held that a cause of action existed under express warranty.

According to the court, the action for breach of warranty had its origins in tort, not contract. An express warranty was found to be created here by the manufacturer's advertisements upon which plaintiff had relied. The realities of modern manufacturing techniques and the reliance that the consumer places on the advertisements of the manufacturer led to the conclusion that the manufacturer must be held to "strict accountability" when a consumer suffers personal injury because the product is defective and fails to live up to the representations. Since "[o]ccasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization," privity could be dispensed with. The court left open the question whether privity would be required for an action in implied warranty.

Seven years after deciding Toni the court was faced with the question of whether direct economic harm was recoverable in a products liability action in Inglis v. American Motors Corp.

In Inglis, plaintiff purchased a Rambler automobile from an authorized dealer. According to the plaintiff he had paid $2,700 for the automobile, but due to defects in manufacturing, it was only worth $1,200. Plaintiff did not allege any personal injuries. Recovery was sought under express and implied warranty and under negligence. In alleging his cause of action under express warranty, plaintiff claimed that he purchased the Rambler in reliance upon the defendant manufacturer's representations made in the mass communications media. According to the plaintiff, the manufacturer's advertisements stated that the automobile was "trouble-free, economical in operation and built and manufactured with high quality of workmanship." Plaintiff alleged that the defendant manufacturer had breached this express warranty. Plaintiff's second cause of action relied on an implied warranty of quality and fitness, while his third cause of action

24 Id. at 248, 147 N.E.2d at 615.
25 The court hinted that privity might be dispensed with in an action under implied warranty. In Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1952), the court held that privity was essential to an action in implied warranty. In Toni the court stated, "suffice it to say that should a case come before this court with facts resembling those in the Wood case, it would then be time to re-examine and reappraise that decision." 167 Ohio St. at 249-50, 147 N.E.2d at 616.
26 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
27 Id. at 133, 209 N.E.2d at 584.
28 Plaintiff alleged, among other things, that the cargo door was out of line, the trimming was torn, the doors were out of line, the engine was extremely noisy, and it leaked oil. Id. at 134, 209 N.E.2d at 584.
alleged negligence on the part of the manufacturer in failing to inspect the automobile prior to delivery.

The court granted plaintiff recovery under a breach of express warranty theory, relying on the reasoning found in *Toni* to reach this conclusion. The court, however, did not stop there. After a review of the principles in *Toni*, the court examined the *Santor* decision. Expressing approval of *Santor*'s statement that there should be no difference between a product which causes personal injury and one that is merely worthless because of the defect, the court concluded that the plaintiff could recover for his "pecuniary loss" under a theory of express warranty. The court prefaced its discussion of *Santor*, however, by noting that the carpeting involved "was widely advertised" and that "[p]laintiff Santor was aware of this advertising."

Since plaintiff had alleged express warranties, the court did not reach the question of whether "pecuniary" loss could be recovered under a theory of implied warranty without privity. The court did make it clear, however, that plaintiff could not recover for economic loss against the manufacturer under a negligence theory. The court expressed its agreement with the following comment by Dean Prosser:

> The one kind of damage not included is pecuniary loss. In other words, loss of the benefit of the bargain. If somebody sells an automobile to a dealer and the dealer sells it to the plaintiff, and it turns out that it is just no good as an automobile, so that having paid let us say $3,000 for the car, the plaintiff has received $1,500 worth of car and is out of pocket on a $1,500 loss, that kind of pecuniary loss is still, so far as I can see, limited to contracts between the parties and the usual rule that for negligence there is no liability for mere pecuniary loss of a bargain, that is apparently carried over into this new tort, if that's the name for it.

Thus, the court in *Inglis* established that "direct" economic loss was recoverable under a theory of breach of express warranty. Though the court relied on *Santor* to reach this decision, it should be noted that the *Inglis* court attached significance to the advertising of the carpeting in *Santor* and the fact that the plaintiff in *Santor* was aware of this advertising. The court in *Inglis* also treated the injury to the plaintiff as direct economic loss. Although not reaching the issue of whether such damages are re-

29 See text accompanying notes 22-25 supra.
30 3 Ohio St. 2d at 138, 209 N.E.2d at 587. Compare Chief Justice Traynor's statement in *Seely*: "It was only because the defendant in that case [Santor] marketed the rug as Grade #1 that the court was justified in holding that the rug was defective." 63 Cal. 2d at 17-18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
32 "Plaintiff does not allege that this negligence caused any damage to his person or to any property he owns other than that the auto is not worth what he paid for it." 3 Ohio St. at 140, 209 N.E.2d at 588.

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coverable under implied warranty without privity, the court's agreement with Dean Prosser's statement that the negligence rule would carry over to this "new tort" would seem to preclude recovery.

One year after the court decided Inglis, a cause of action for breach of implied warranty without privity resulting in personal injury was recognized in Lonzrick v. Republic Steel Corp. In this case, plaintiff, an ironworker, was injured when steel roof joists manufactured by the defendant collapsed and fell upon him. Plaintiff was not in privity with the defendant manufacturer since there was no contract of sale between them. Plaintiff did not claim negligence and did not allege a breach of express warranty.

The court began its opinion by stating that in Ohio, a plaintiff may pursue three causes of action in a products liability case: 1) a tort action in negligence; 2) a cause of action under contract law; and 3) a tort action "based upon the breach of a duty assumed by the manufacturer-seller of a product." The duty assumed by the manufacturer arises from "his implicit representation of good and merchantable quality and fitness for intended use when he sells the product." The court then turned to the precise question of whether plaintiff could recover under implied warranty or whether he was restricted to a negligence theory because of the lack of privity.

Relying on Toni, the court held that privity was not required to maintain the implied warranty action. The court pointed out that warranty grew from tort rather than from contract and quoted Justice Zimmerman's statement in Toni: "Undoubtedly, the recognition of such a right of action [warranty] rested on the public policy of protecting an innocent buyer from harm rather than to insure any contractual rights." The court also pointed out that although Toni was a minority decision when it was decided, the overwhelming weight of authority had accepted its view and extended it to include implied warranties. The court then went on to say that Inglis had extended the rule of Toni to allow a tort action for breach of warranty for property damage where there was no privity. The warranty in tort action in Ohio did not depend upon the defendant's use of national advertising since "[s]uch a rule looks not to the defect in the product which produced the injury, but focuses upon the question of whether the plaintiff saw an advertisement, which is not relevant to the creation of the risk of harm to the plaintiff."
Having established that plaintiff could recover for breach of an implied warranty in tort, the court then stated the necessary elements of this action. For a plaintiff to recover he must prove: 1) that the product was defective (a defect exists where the product is not fit for the ordinary purpose for which it was intended to be used); 2) that the product was defective when it left the hands of the manufacturer; 3) that the defect was the direct and proximate cause of plaintiff's injuries; and 4) that his presence was in a place that could reasonably be anticipated by the defendant. The manufacturer has available to him the defenses of assumption of the risk and intervening cause. 40

As of 1966 and the Lonzrick decision, recovery for economic injury did not seem to be a real possibility. Although economic recovery was allowed in Inglis and the court had relied on Santor, it is clear that Santor was treated as an express warranty decision and that Inglis was decided on such a theory. This treatment echoes the position taken by Chief Justice Traynor in Seeley. 41

Other indicators that Ohio would follow the Seeley position emerged from the Lonzrick decision. While Inglis clearly stated that the plaintiff was seeking only pecuniary losses, the Lonzrick decision explained Inglis as allowing recovery for “property” damage, an injury recoverable under the Seeley rationale. 42 Finally, the language used to justify recovery in Lonzrick, that warranty arose from the public policy of protecting the buyer from harm, rather than from protecting “contractual” rights, echoes the position taken by Chief Justice Traynor in Seeley. 43

That Ohio was leaning toward the Seeley position seemed clear to at least one Ohio court of appeals. In Avenell v. Westinghouse Electric Corp., 44 plaintiffs filed a suit for consequential damages resulting from a failure and breakage of the turbine blades of a generator sold to them by the defendant manufacturer. Pursuant to a written warranty the manufacturer replaced the blades. Plaintiff sought $185,000 in damages for additional costs to maintain its electricity output, loss of demand charges from other utility companies, and loss of sales to other utility companies. As part of his complaint, plaintiff included a cause of action under implied warranty in tort.

Echoing the views of Chief Justice Traynor, the court held that such consequential damages could not be recovered under an implied warranty in tort:

40 Id., 218 N.E.2d at 192-93.
For a comparison between the Lonzrick holding and Restatement (Second) § 402 (A), see Jenkins, supra note 3, at 160-61.
41 See note 24 supra.
42 See text following note 11 supra.
43 See text accompanying note 9 supra.
44 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).
The purpose of the doctrine of implied warranty in tort—to insure that the costs of injuries resulting from defective products are borne by the manufacturers, rather than the injured person powerless to protect himself—would not be served by permitting the plaintiffs herein to rely upon the theory of implied warranty in tort.\(^5\)

The court also felt, as did Chief Justice Traynor, that implied warranty in tort must be limited in its applicability to preserve the provisions of the Uniform Commercial Code:

[W]here implied warranty in tort applies, the parties are not free to determine by contract the quality of goods which the seller is bound to deliver or the remedies available to the buyer in the event that the goods do not measure up to the agreed quality. It is clear, then, that the doctrine of implied warranty in tort must be limited in its applicability. Otherwise, unlimited application of the doctrine would emasculate the Uniform Commercial Code provisions dealing with products liability.\(^6\)

The court then gave three reasons for denying recovery to the plaintiff: 1) the plaintiff was in privity and thus free to negotiate with the defendant over terms; 2) the plaintiff was seeking “purely consequential damages in contrast to damages for injury to persons or property;” and 3) the product involved was “not an ordinary consumer product.”\(^7\) Thus, the possibility of recovery for “direct” economic harm in the consumer setting was left open.

In *Iacono v. Anderson Concrete Corp.*,\(^8\) plaintiff contracted with a construction company for installation of a driveway, patio, and sidewalk at his home. The construction company performed the work with cement furnished by the defendant manufacturer. Shortly after completion, changes in the weather produced small round holes known as “popouts” in the driveway. Plaintiff also noticed considerable surface scaling. These “popouts” were a result of soft shale aggregates contained within the cement. Plaintiff contended that concrete for outdoor use should not contain such aggregates. The defendant manufacturer was aware that the concrete would be used outdoors. Plaintiff brought an action alleging damages of $15,000 for breach of an implied warranty of fitness in tort, since he lacked privity with the manufacturer. He received a verdict in the trial court, but the court of appeals reversed, holding that plaintiff’s complaint sounded in contract.

The Ohio Supreme Court reversed the decision of the appeals court. Citing *Lonzrick*, the court stated that an injured party in a products liability action has an action in tort for breach of implied warranty. A fair reading of plaintiff’s complaint supported a tort theory of recovery in

\(^{45}\) *Id.* at 158, 324 N.E.2d at 589.

\(^{46}\) *Id.*, 324 N.E.2d at 588.

\(^{47}\) *Id.* at 158-59, 324 N.E.2d at 589.

\(^{48}\) 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
that it alleged that the defendant manufacturer failed to fulfill its duty to provide a fit product. The court noted that plaintiff had not suffered personal injury, but neither had he alleged merely direct economic loss. Plaintiff's injury was "property" damage which should not be distinguished from personal injury, therefore plaintiff had alleged a cognizable cause of action. 49

Taken literally, the Iacono decision held nothing unique in the products liability field. According to its express language, the decision merely states that in Ohio, property damage is recoverable under a theory of implied warranty in tort, a view also accepted under the theory of strict liability. 50 A difficulty arises in the Iacono decision, however, in that what the court calls "property" damage would classify under traditional definitions as economic harm. Under the traditional view "property" damage occurs when the defective product causes "catastrophic" damage. Included within this definition is damage to the product itself. Where the damage amounts to deterioration of the product, in a non-violent manner, however, the damage is usually considered "economic." 51 Thus, under the traditional view, plaintiff's injury in Iacono, since not manifested in a "catastrophic" occurrence, would fall within the definition of "economic" loss. 52

IV. RECENT DEVELOPMENTS

In A.T.S. Laboratories, Inc., v. Cessna Aircraft Co., 53 plaintiff purchased an airplane manufactured by the defendant from a third party who was the plane's original purchaser. The plaintiff brought suit against the defendant manufacturer for damage to the aircraft 54 caused by manufacturing defects and also to recover the following consequential damages: 1) the cost of renting another plane while the original was being repaired; 2) the cost of using alternate commercial transportation; 3) the cost of repair; 4) lost profits. 55 The defendant alleged three assignments of error, only two of which are relevant here, against the trial court's finding that

49 Id. at 93, 326 N.E.2d at 270.
50 See RESTATEMENT (SECOND) OF TORTS § 402 (A) (1965), supra note 2; Prosser, The Fall of the Citadel, supra note 4, at 821.
51 Seely v. White Motors Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Prosser, The Fall of the Citadel, supra note 4; Note, Recovery of Direct Economic Loss, supra note 3, at 687; Comment, Manufacturers' Liability to Remote Purchasers, supra note 4, at 541; Annot., 16 A.L.R. 3d 685 (1967).
52 A possible explanation of this result can be found in Note, Recovery of Direct Economic Loss, supra note 3, at 714 n.208.
54 The court does not explain whether the damage to the aircraft was caused by a crash, or whether the aircraft simply did not function correctly. The court states, "A.T.S. experienced difficulty with the plane and therefore filed a suit . . . ." Id. at 15, 391 N.E.2d at 1042. From a reading of the opinion and the court's failure to mention any catastrophic accident, it is assumed that A.T.S. brought suit simply because the plane failed to function properly.
55 Id., at 23, 391 N.E.2d at 1046.
it had breached an implied warranty in tort.\textsuperscript{56} First, defendant contended that a manufacturer cannot be held liable on a theory of implied warranty in tort for damages to the product itself when the product was purchased in a used condition from a third party. Second, defendant contended that a manufacturer cannot be liable for consequential damages caused by damage to the product itself when the product was purchased in a used condition from a third party.

The court concluded that the plaintiff was entitled to recover under a theory of implied warranty in tort. After discussing the development of products liability law in Ohio from \textit{Toni} to \textit{Iacono} the court quoted at length from the \textit{Santor} decision, noting that \textit{Santor} had "a definitive impact on the emerging product liability law in Ohio."\textsuperscript{57} The court then quoted the language of the Pennsylvania Supreme Court in \textit{Kassab v. Central Soya}\textsuperscript{58}:

The language of the Restatement, speaking as it does of injury to either the individual or his property, appears broad enough to cover practically all of the harm that could befall one due to a defective product. Thus, for example, were one to buy a defective gas range which exploded, ruining the buyer's kitchen, injuring him, and of course necessitating a replacement of the stove itself, all of these three elements of the injury should be compensable. The last, replacing the stove, has been sometimes referred to as "economic loss" . . . There would seem to be no reason for excluding this measure of damages under the Restatement, since the defective product itself is as much "property" as any other possession of the plaintiff that is damaged as a result of the manufacturing flaw.\textsuperscript{59}

The court held that under Ohio law the term "property" includes the product itself.

The court also determined that "consequential" damages were recoverable under the theory of implied warranty in tort. Such damages, however, must be proximately caused by the manufacturer's breach:

The use of the term "consequential" in defining damages is the use of a term most usually coincident with contract actions. As used in connection with actions founded in tort . . . the term is more coincident with the result of proximate cause. Consequential damages as used here, means direct damage suffered as a direct and proximate

\textsuperscript{56} The defendant alleged that there had been a substantial change in the aircraft. The court found that there was sufficient evidence in the record to lead to the conclusion that the defect existed while the plane was in defendant's possession. \textit{Id.} at 21-22, 391 N.E.2d at 1045-46.

\textsuperscript{57} \textit{Id.} at 17, 391 N.E.2d at 1043.

\textsuperscript{58} 432 Pa. 217, 246 A.2d 848 (1968).

\textsuperscript{59} 59 Ohio App. 2d at 20-21, 391 N.E.2d at 1045.
result of defendant's breach of the duties imposed by the warranty implied.\textsuperscript{60}

Under this decision by the court of appeals, therefore, both "direct" and "consequential" economic injury is recoverable in Ohio. Direct economic harm is recoverable since it is "property" damage and consequential damages are recoverable if they are a proximate result of a breach.

Recovery for both direct and consequential economic injury was also held to be permitted under Ohio law by a federal district court in Mead Corp. v. Allendale Mutual Insurance Co.\textsuperscript{61} In 1965 Mead purchased a steam turbine from a distributor. Under the contract between Mead and the distributor, liability was limited to repair and replacement of defective parts for one year. This was the exclusive remedy and consequential damages were expressly excluded. Within a one-year period the turbine broke down. Pursuant to the warranty, the distributor made the repairs and Mead did not seek any consequential damages.

In March of 1974, long after the contractual warranty had run its course, the turbine again broke down. Mead brought action against the manufacturer of the steam turbine, and against the manufacturer of the generator used in the steam turbine for breach of an implied warranty in tort, claiming $250,000 in direct damages and $1,510,000 in consequential damages.

The substantive issue before the court was whether these damages were recoverable under a strict liability theory in Ohio. The court held that they were. It first developed the distinction between the opinions expressed in Seely and Santor, and then proceeded to examine the development of the implied warranty in tort theory in Ohio. The court noted that the Inglis\textsuperscript{62} decision, while based on express warranty, clearly relied on Santor, and also made it clear that the express warranty theory used sounded in tort, not contract. In addition, the court stated that any doubt as to whether direct economic injury was recoverable under strict liability theory in Ohio was resolved by the Iacono decision:\textsuperscript{63}

While the Ohio Supreme Court labeled the recovery in Iacono to be for "property damage," the plaintiff was really compensated for his direct economic loss. Just like the plaintiff in Inglis, the plaintiff in Iacono sought to recover the difference between the value of what he had paid for and the value of what he received. This is clearly a recovery of direct economic loss. Therefore, after Iacono, it is clear that Ohio law allows recovery of economic loss under a strict liability theory.\textsuperscript{64}

\textsuperscript{60} Id. at 23, 391 N.E.2d at 1046.
\textsuperscript{62} See text accompanying notes 26-33 supra.
\textsuperscript{63} See text accompanying notes 48-52 supra.
\textsuperscript{64} 465 F. Supp. at 366.
In addressing the question of consequential damages the court believed *Avenell* rested upon a "tenuous and unarticulated, distinction of an earlier Ohio case law," and since it pre-dated *Iacono*, declined to follow it. The court saw no logic in limiting recovery to direct economic loss when there has also been indirect economic loss.

V. THE IMPACT OF A.T.S. LABORATORIES AND MEAD

In 1962 Ohio adopted the Uniform Commercial Code (U.C.C.). Under U.C.C. section 2-314 a warranty of merchantability is implied in a contract for sale of goods if the seller is a merchant with respect to goods of that kind. To be merchantable the goods must be "fit for the ordinary purposes for which such goods are used. . . ." This warranty of merchantability may be excluded or modified under U.C.C. section 2-316 provided that the modifying language mentions merchantability, and, if in writing, is conspicuous. Exclusion or modification of the warranty is inoperative to the extent that it is unreasonable.

The persons protected by the U.C.C. warranty provisions are set out in U.C.C. section 2-318. Three alternatives are offered, of which Ohio has adopted Alternative A. Under this formulation seller's warranties extend to:

- Any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty . . . .

Under U.C.C. section 2-607 "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy . . . ." A reasonable time for a consumer, however, is to be judged on a different standard than that used in the commercial setting.

Under U.C.C. section 2-714 the measure of damages for breach of warranty is the difference between the value of the goods as accepted
and their value as warranted. Under U.C.C. section 2-715[77] recovery is permitted for the buyer's incidental[78] and consequential[79] damages.

Thus, the U.C.C. allows recovery for both direct and consequential damages for a breach of an implied warranty. Privity is a requirement for such recovery, although this requirement has been loosened under the Code.[60] The seller is permitted to limit or to exclude this warranty to the extent that such limitation or exclusion is reasonable. The seller's liability is also contingent upon his receiving notice of the breach within a "reasonable time." For the buyer to recover under the Code, therefore, he must comply with the procedure established in the Code, and overcome the defenses available to the seller.[81]

Under Restatement (Second) section 402(A) a manufacturer's liability arises from selling "any product in a defective condition unreasonably dangerous to the user or consumer . . . ."[82] Some courts have not stressed the "unreasonably dangerous" language and this is not considered a separate element for proof by the plaintiff.[83] Ohio follows this view in its judicial construction of section 402(A). The plaintiff must, however, show that the product was defective while it was in the seller's hands. According to the Ohio Supreme Court a product is defective when it is not "of good and merchantable quality, fit and safe for . . . [its] ordinary intended use."[84] Thus, in Ohio, a defective product is one which fails to live up to the implied warranty of merchantability.[85]

In Seely, Chief Justice Traynor denied recovery for economic harm by expressing concern that if such recovery were allowed the doctrine of strict liability would undermine the warranty provisions of the U.C.C.[86] It is clear that under the decisions rendered in A.T.S. Laboratories[87] and

[77] Id. § 1302.89.
[78] "Incidental damages . . . include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." U.C.C. § 2-715(1).
[79] Consequential damages . . . include:

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty. U.C.C. § 2-715(2).
[80] See text accompanying notes 71 and 72 supra.
[81] The term defenses is used loosely here to refer to the seller's ability to limit his liability through disclaimers.
[86] 63 Cal. 2d at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.
[87] See text accompanying notes 53-60 supra.
Mead, Chief Justice Traynor's fears have become reality in Ohio. In both situations plaintiffs were able to obtain full recovery from the manufacturer, who was completely stripped of his ability to limit his liability since under the Restatement the ability to disclaim liability and the notice requirements cease to exist. The defendant is left with the defenses of misuse and assumption of the risk.

The anomalous results such a ruling permits can be seen by the result reached in Mead. The plaintiff and distributor had contracted for the sale of the turbine. The contract included disclaimers limiting the distributor's liability to replacement of defective parts and excluding consequential damages. Since plaintiff and the distributor were in privity, the U.C.C. was applicable and the distributor was able to insulate himself from liability. The manufacturers, however, found themselves in a completely different position. They were potentially liable to the plaintiff for $1,760,000 simply because they were not in privity with the plaintiff and therefore unable to avail themselves of the U.C.C. disclaimer provision.

It is hard to imagine a clearer case of the manufacturer being subjected to "limitless liability." It is also hard to imagine a justification for such a result. Mead knew who would be manufacturing the steam turbine and there is no hint in the facts of the case that Mead was in a disadvantaged bargaining position. To say that this result is compelled by public policy is most inappropriate, as the U.C.C. would allow for a completely different result if privity existed.

It should be noted that the decision places the manufacturer in a very difficult position. To be able to effectively limit his liability, the manufacturer must seek to establish privity with every user or consumer of his product, since it is clear that if privity exists any claim for direct and consequential economic harm will be governed by the U.C.C. warranty provisions. The buyer, however, can avoid the notice requirement of the U.C.C. and effectively eliminate the manufacturer's use of disclaimers if he can manage to avoid establishing privity with the manufacturer, a simple matter of buying through an intermediary. This being the case, a manufacturer's best course of action, though undoubtedly impractical, is to deal not through retailers, but directly with the purchaser. This same situation follows from the decision reached in A.T.S. Laboratories.

These decisions thus allow a plaintiff to reap the benefits of the U.C.C. warranty provisions without having to bear any of the burdens. The plaintiff must suffer the defenses afforded by the Code only if he is unfortunate

88 See text accompanying notes 61-65 supra.
89 RESTATEMENT (SECOND) OF TORTS § 402(A), Comment m (1965).
91 "The negotiations between Mead and ASEA the distributor were long and involved." 465 F. Supp. at 357.
enough to be in privity with the defendant. We therefore have one party, the manufacturer, striving for privity and the other party, the buyer, seeking to avoid it.

VI. A PROPOSED SOLUTION

When determining whether to allow recovery for direct or consequential economic harm under a theory of strict liability it should be recognized at the outset that the underlying policies of strict liability are not necessarily mutually exclusive propositions. Strict liability is justified not simply because of the "overwhelming misfortune" caused by personal injury. It is equally justified by a lack of bargaining power. There is no need to place one policy above the other, since both are serious enough to require the attention of the law. Both are situations which require redress, so recovery for economic harm should be allowed where these underlying policies will be served.

The present Ohio case law, taken as a whole, presents a rational solution to the economic recovery problem. To implement this solution a distinction must not only be made between direct and consequential economic recovery, but also between consumer and commercial transactions.

As pointed out in A.T.S. Laboratories, direct economic harm should always be recoverable under strict liability. This is because of the simple fact that direct economic harm is nothing less than property damage. The product is just as much the property of the buyer as is any other chattel which he possesses. The conflict revolving around recovery in this area is simply a matter of how the "property" was injured. Seely established that recovery could be had for the product if the defect manifested itself in a catastrophic manner. Santor, however, did not require such catastrophic injury to the "property." In both cases, however, the claim is that the product, a form of property, was defective. Whether the defect becomes apparent through a catastrophic incident or remains latent in the product should not make a difference in liability. Recovery should not turn simply on a dubious classification; a manufacturer who places a useless product in the hands of the buyer should be required to make good for the product. This proposition should apply with equal force in both the consumer and the commercial setting.

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92 See text accompanying notes 53-60 supra.
94 As one commentator has stated: What practical difference exists between the following two situations? In the first, a person purchases a set of new tires for his company car from a retail tire store. The tires prove to have been poorly manufactured and must be replaced after 500 miles. In the second situation, a person purchases a set of new tires for his family car at the same store. He similarly finds the tires defective and must replace them after 500 miles of normal use. . . . Obviously they should be treated alike. Comment, Recovery of Economic Loss, supra note 4, at 315-16.
As suggested by the *Avenell* decision, the consumer/commercial distinction becomes important in the area of consequential damages. In the commercial setting the justification of inequality of bargaining power is usually not present. The commercial plaintiff is experienced in the workings of the market place. In his quest for a product, he is usually able to assess his exact needs and negotiate directly with the manufacturer for what he requires. By being involved in a commercial enterprise, the commercial plaintiff is also in a position to spread the risks that he will be injured economically. On the other hand, recovery for consequential economic harm in the commercial setting subjects the manufacturer to unlimited liability. The plaintiff in *Mead*, for example, sought $1,510,000 in consequential damages.

Consequential economic harm in the consumer area, however, should be recoverable. Unlike the plaintiff in a commercial setting, the consumer plaintiff is not in any position to deal directly with the manufacturer on equal terms. He also lacks the ability to effectively spread the risk of loss. In contrast to the commercial plaintiff, the consequential losses suffered by the consumer are more apt to be of a modest amount. The manufacturer is, therefore, not subjected to unlimited liability.

The difficulty inherent in limiting recovery of consequential loss to the consumer is, of course, establishing the definition of a “consumer.” The question arises in the context of the small businessman who may be in a position to distribute his losses, yet lacks equal bargaining power. A simple definition of consumer, restricting the category to one who buys a product for personal use as opposed to one who buys a product for a profit making purpose, would foreclose recovery to the small businessman. To prevent this result further inquiry is necessary. The bargaining power of the parties should be the central focus in reaching a definition of consumer. With this in mind, the small businessman who is not in a position to bargain on an equal footing with the manufacturer would fall into the category of a consumer. Justice Peters in his dissent in *Seely* suggested that the definition of a consumer should be developed on a case by case basis, with the emphasis on the bargaining ability of the plaintiff. This is a logical approach to the problem, since the question of whether the plaintiff is in a poor bargaining position will depend on the particular facts of the case.

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95 See text accompanying notes 44-47 *supra*.

96 It has been contended that consequential losses to the consumer should not be recoverable since they are not of “sufficient social importance to concern the law of tort.” Tobin, *Products Liability: Recovery of Economic Loss?*, 4 N.Z.U. L. REV. 36, 43 (1970). California allows recovery for economic loss in the consumer setting by statute. CAL. CIV. CODE § 1792 (West 1973).

97 63 Cal. 2d at 28, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., dissenting). See also Note, *Manufacturer's Strict Tort Liability, supra* note 4, at 414.
The Ohio Supreme Court has maintained a steady and progressive pace in the area of products liability. A reading of the court’s decisions in this area shows that the court is concerned with the policies set forth in both Seely and Santor justifying strict liability for defective products. The court’s existing decisions relied upon by the appellate courts and the federal district court to allow recovery for direct economic harm seem correctly decided, since direct economic harm is really nothing less than property damages. However, the extension of this holding to the area of consequential damages in the commercial setting by the lower courts should be restrained. Although recovery of these damages in the consumer area gives substance to one of the policies behind strict liability, recovery in the commercial area undermines the warranty provisions of the U.C.C.

EDWARD J. HOWLETT II

RELEASE FROM CONFINEMENT OF PERSONS ACQUITTED BY REASON OF INSANITY IN OHIO*

I. INTRODUCTION

AN OHIO JURY verdict of not guilty by reason of insanity presumes that such insanity continues. Upon an affirmative finding, the trial judge shall commit the defendant to Lima state hospital. According to statute, the defendant must remain hospitalized until “restored to reason.”

This phrase was interpreted by the Ohio Court of Appeals, Allen County, in Wolonsky v. Balson. The defendant was actively psychotic at the time of his commitment. By reason of the administration of psychotropic drugs he attained a state of complete remission from the symptoms of his psychosis and sought release from his commitment in a habeas corpus action. Among the questions at issue concerning insanity defense law were

*While this Comment was at the press, the Ohio General Assembly passed Senate Bill 297 (sponsored by Senator Morris Jackson) which became effective April 30, 1980. Among other things, this law strengthens the control of the trial judge over a person who has been acquitted by reason of insanity. It also relieves the probate court of commitment and release authority in these situations. See S.B., 297, 113th Ohio Gen. Ass., 2d Sess. (1980).


3 Id.


5 Throughout the note, “insanity” will denote the degree of mental illness that exculpates a defendant in a criminal trial. “Insanity defense” will denote the invocation of mental illness as a defense to criminal liability. “Release” will denote release from a mental hospital or institution. “Acquitted patient” will denote any person who has successfully invoked the insanity defense and then has been hospitalized.