St. Mary's Law Journal

Volume 10 | Number 3 Article 8

9-1-1979

Economic Loss, 402A, and an Unreasonably Dangerous Product: Can Mid Continent Aircraft, Signal Oil, and Nobility Homes be Reconciled.

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ECONOMIC LOSS, 402A, AND AN UNREASONABLY DANGEROUS PRODUCT: CAN *MID CONTINENT AIRCRAFT, SIGNAL OIL,* AND *NOBILITY HOMES* BE RECONCILED?

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What will the mode of recovery be in a case in which an unreasonably dangerous product damages itself? The rapid development of products liability law has made the answer to this question less than clear in many jurisdictions. Confusion has resulted from the confrontation between new rules and their common law predecessors.[1] This confusion is evidenced by three recent Texas Supreme Court opinions which have addressed the issue of economic loss. In *Nobility Homes, Inc. v. Shivers*[2] the court decided that strict liability in tort is not the proper vehicle for recovery of damages for economic loss but that recovery is available under a contract theory.[3] In *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*[4] economic loss was defined to include damage that a defective product causes to itself[5] and the remedy for this loss was held to be adequately provided by the Uniform Commercial Code (UCC).[6] As a result of these two decisions, the court held in *Signal Oil & Gas Co. v. Universal Oil Products*[7] that strict liability in tort was applicable only so long as the product causes damage to a person or to "other" property.[8] The question presented by these holdings is whether labeling as economic loss the damages caused by an unreasonably dangerous, defective product is based upon sound principles and reasoning.

THE INTERTWINED HISTORY OF TORT AND CONTRACT

Tort and contract law have a long and convoluted history.[9] While usually

1. *See* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases,* 18 STANFORD L. REV. 974, 974-79 (1966).

2. 557 S.W.2d 77 (Tex. 1977).

3. *Id.* at 78. Economic loss has been variously defined but generally it is considered to include loss of the benefit of the bargain, loss of value, and loss of repair cost. *See* Ribstein, *Guidelines for Deciding Product Economic Loss Cases,* 29 MERCER L. REV. 493, 496 (1978).

4. 572 S.W.2d 308 (Tex. 1978).

5. *Id.* at 312-13.

6. *Id.* at 313; *see* Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977); TEX. BUS. & COM. CODE ANN. §§ 2.314 (implied warranty of merchantability) & 2.315 (implied warranty of fitness for a particular purpose) (Tex. UCC) (Vernon 1968).

7. 572 S.W.2d 320 (Tex. 1978).

8. *Id.* at 325; *see* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977).

9. *See generally* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code,* 22 STANFORD L. REV. 713, 728-34 (1970).

considered as separate bases for the orderly functioning of society, they overlap to some degree. This is evidenced by the fact that both tort, under the strict liability theory, and contract, under the UCC, allow recovery for a product that fails to perform as promised. Since most products liability litigation involves both tort and contract principles, there is little wonder that judicial decisions are often confusing and conflicting.[10]

Common Origin

The confusion evidenced in current decisions, between contract law on the one hand and tort law on the other, has its roots deep in common law.[11] Breach of warranty, for instance, was originally a common law tort similar to deceit.[12] From this unity the two bodies of law grew steadily apart until contract law became the recognized medium for commercial transactions and matters such as warranty disputes.[13] Tort law, on the other hand, was concerned with redressing wrongful injury to persons or property.[14] The advent of the industrial revolution, however, resulted in manufacturers' becoming farther removed from consumers.[15] This remoteness, without a commensurate relaxation of contract privity requirements,[16] eventually

10. *See* Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 MERCER L. REV. 493, 493-96 (1978).

11. *See* W. PAGE, THE LAW OF CONTRACTS § 25 (2d ed. 1920); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 2 (1888).

12. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 616, 164 S.W.2d 828, 831 (1942); *see* W. PAGE, THE LAW OF CONTRACTS § 25 (2d ed. 1920); S. WILLISTON, THE LAW GOVERNING SALES OF GOODS § 195 (rev. ed. 1948); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1126 (1960).

13. *See* Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 616, 164 S.W.2d 828, 831 (1942); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 1-3 (2d ed. 1977); W. PAGE, THE LAW OF CONTRACTS § 26 (2d ed. 1920); S. WILLISTON, THE LAW GOVERNING SALES OF GOODS §§ 195, 196 (rev. ed. 1948).

14. Gray v. Blight, 112 F.2d 696, 699 (10th Cir. 1940) (torts are of two general classes: personal and property); United States v. Rogers & Rogers, 36 F. Supp. 79, 80 (D. Minn. 1941) (two classes of torts are injury to person and damage to property); Cooper v. Steen, 318 S.W.2d 750, 753 (Tex. Civ. App.—Dallas 1958, no writ) (action in tort is one for personal or property injury); Wartman v. Empire Loan Co., 101 S.W. 499, 500 (Tex. Civ. App. 1907, no writ) (tort is an injury to person or property); *see* T. COOLEY, THE ELEMENTS OF TORTS 20-21 (1895); J. FLEMING, THE LAW OF TORTS 1 (4th ed. 1971); W. SEAVEY, P. KEETON & R. KEETON, LAW OF TORTS 1 (2d ed. 1964).

15. 2 J. DOOLEY, MODERN TORT LAW § 32.02 (1977); Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 3 (1976-77). Other contributing factors were the growth of society and general economic expansion as well as changes in marketing procedures. *Id.* at 3.

16. Privity of contract has been described as the "connection, mutuality of intention, and interaction" of the parties to a contract. *See* Van Buren Div. of the Toledo & S.H.R. Co. v. Lamphear, 20 N.W. 590, 593 (Mich. 1884). Another court has described it as a "legal relationship to the contract or its parties." *See* La Mourea v. Rhude, 295 N.W. 304, 307 (Minn. 1940). Still another has said that it "implies a connection, mutuality of will, and interaction of parties." *See* State v. District Court, 420 P.2d 845, 847 (Mont. 1966). *See also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 243 (2d ed. 1977).

drew these two bodies of law back toward each other.[17] It became increasingly apparent that privity of contract, a reasonable requirement in less commercialized times, had become an irrational barrier protecting the manufacturer responsible for producing defective products from liability to innocent and injured purchasers.[18]

Initially, the courts responded to the need to remove the privity barrier by providing injured consumers a remedy upon proof of the manufacturer's negligence.[19] The leading case in this area, *MacPherson v. Buick Motor Co.*,[20] laid the groundwork for recovery despite lack of privity.[21] Even though negligence suits were generally restricted to cases of personal injury,[22] a few courts successfully applied the negligence theory to cases of "economic loss".[23] Proof of negligence was often difficult or impossible for the consumer to show,[24] however, and the courts developed various other

17. *See* 2 J. DOOLEY, MODERN TORT LAW § 32.02 (1977); Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 3 (1976-77).

18. *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 799-800 (1966); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1099-1100 (1960). *See also* Comment, *Product Liability and the Privity Rule, Circa 1964*, 7 S. TEX. L.J. 118, 118-21 (1963-64).

19. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1100 (1960). *See also* Seely v. White Motor Co., 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965).

20. 111 N.E. 1050 (N.Y. 1916).

21. *See id.* at 1053 (remote manufacturer held liable for negligent construction of car with defective wooden-spoked wheels).

22. *E.g.*, Greyhound Corp. v. Brown, 113 So. 2d 916, 917 (Ala. 1959) (plaintiff injured by negligently manufactured tire); Carter v. Yardley & Co., 64 N.E.2d 693, 694 (Mass. 1946) (plaintiff burned by toxic perfume); Ryan v. Zweck-Wollenberg Co., 64 N.W.2d 226, 228 (Wis. 1954) (plaintiff shocked by negligently manufactured refrigerator). *See generally* Prosser, *The Assault upon the Citidel*, 69 YALE L.J. 1099, 1103 (1960); Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 147 (1972).

23. *See* International Harvester Co. v. Sharoff, 202 F.2d 52, 53-54 (10th Cir. 1953); C.D. Herme, Inc. v. R.C. Tway Co., 294 S.W.2d 534, 537 (Ky. 1956); Quackenbush v. Ford Motor Co., 153 N.Y.S. 131, 133 (App. Div. 1915). In *International Harvester* the plaintiff recovered for damage caused to his truck as a result of defendant's negligent inspection. The plaintiff showed that the defective parts caused the accident, and the court held that recovery under negligence was available when the nature of the product, if negligently constructed, placed life or limb in danger. International Harvester Co. v. Sharoff, 202 F.2d 52, 54 (10th Cir. 1953). In *C.D. Herme* plaintiff recovered for the cost of damage to his trailer after alleging that the defendant negligently failed to exercise reasonable care in the inspection of the trailer. The court held that once the jury determined that the defendant failed to exercise reasonable care in inspection, the fact that only a person's property was injured did not relieve the manufacturer of liability. C.D. Herme, Inc. v. R.C. Tway Co., 294 S.W.2d 534, 537 (Ky. 1956). In *Quackenbush* plaintiff's car was damaged when the brakes failed. The court rejected the defendant's theory that it would be liable for its negligent construction only if personal injury was caused thereby. Instead, the court held that the defendant's liability depended on its failure to properly construct the car and not upon whether either a person or his property was injured. Quackenbush v. Ford Motor Co., 153 N.Y.S. 131, 133 (App. Div. 1915).

24. Manzoni v. Detroit Coca-Cola Bottling Co., 109 N.W.2d 918, 920 (Mich. 1961) (impossible to show negligence in manufacture of one of a million bottles). *See also* W. PROSSER, THE LAW OF TORTS § 103 (4th ed. 1971); Comment, *The Vexing Problem of the Purely*

theories designed to scale the privity barrier.[25]

Eventually, tort and contract were tied together by the theory of an implied warranty running with the product to the consumer.[26] In 1942 the Texas Supreme Court adopted this theory in *Jacob E. Decker & Sons, Inc. v. Capps.*[27] The basis of the liability imposed in *Decker* was not found in any implied terms of the contract of sale,[28] but liability was based on a broad public policy aimed at protecting the life and health of consumers.[29] The theory of implied warranty based on tort policy has been described as a freak hybrid of tort and contract law.[30] It was an improvement, though, over a negligence cause of action because the plaintiff could simply prove a breach of warranty rather than negligence.[31]

Strict Liability In Tort

The need to separate tort from contract law was illustrated by the implied warranty theory. While the theory was effective in defeating contract privity requirements and providing recovery without proof of negligence it was still subject, as a warranty, to other contract defenses such as disclaimers and notice requirements.[32] The search for a more satisfactory

Economic Loss in Products Liability: An Injury in Search of a Remedy, 4 SETON HALL L. REV. 145, 147 (1972).

25. *See, e.g.*, Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391, 392 (3d Cir. 1932) (marketing is offer to warrant product if consumer buys); Ward Baking Co. v. Trizzino, 161 N.E. 557, 559 (Ohio Ct. App. 1928) (retailer is manufacturer's agent to sell); Wisdom v. Morris Hardware Co., 274 P. 1050, 1052 (Wash. 1929) (retailer is consumer's agent to buy). *See generally* Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958) (listing 26 other theories).

26. *See* Seely v. White Motor Co., 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965) (warranty theory borrowed from sales for consumer's benefit); Coca-Cola Bottling Works v. Lyons, 111 So. 305, 307 (Miss. 1927) (implied warranty runs with title); Coca-Cola Bottling Co. v. Smith, 97 S.W.2d 761, 767 (Tex. Civ. App.—Fort Worth 1936, no writ) (warranty ran with product to benefit of consumer).

27. 139 Tex. 609, 164 S.W.2d 828 (1942). Contaminated sausage produced by Decker was consumed by the Capps family, resulting in sickness in the family and the death of one child. *Id.* at 610, 164 S.W.2d at 828.

28. *Id.* at 617, 164 S.W.2d at 831-32.

29. *Id.* at 620, 164 S.W.2d at 833; *accord* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

30. Santor v. A & M. Karagheusian, Inc., 207 A.2d 305, 311 (N.J. 1965); *see* Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1124-27 (1960). Prosser concludes his discussion of the theory by stating that "if warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise and exist between parties who have not dealt with one another." *Id.* at 1127.

31. *See* Hill v. Harbor Steel & Supply Corp., 132 N.W.2d 54, 57 (Mich. 1965); LaHue v. Coca-Cola Bottling, Inc., 314 P.2d 421, 422 (Wash. 1957). *See also* Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 3 (1976-77); Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 149 (1972).

32. *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 801 (1966).

solution was initiated by the New Jersey Supreme court in 1960 in *Henningsen v. Bloomfield Motors, Inc.*[33] The implied warranty theory, with its contract connections, was applied in a manner similar to that of strict liability in tort.[34] It was subsequently reasoned that strict liability in tort would more readily ensure that the consumer would be protected and that the costs of injuries would be borne by those who placed the defective product on the market.[35]

This same purpose is reflected in section 402A of the *Restatement (Second) of Torts*.[36] The section extended strict liability to any unreasonably dangerous, defective product that caused physical harm to a person or his property.[37] The drafters of section 402A indicated that one justification for imposing strict liability on the manufacturer is that by placing the product on the market, the manufacturer owes a special responsibility to the public in the event the product caused injury.[38] Consequently, in the field of products liability a separate remedy sounding completely in tort has evolved.

UCC

The purpose of the UCC was to simplify commercial laws governing business transactions by unifying several diverse "uniform acts" under one

33. 161 A.2d 69, 84 (N.J. 1960). Plaintiff was injured when her car, purchased from the defendants, crashed due to an unexplained, undiscoverable defect. *Id.* at 75. The court concluded that it was unfair and unjust to allow manufacturers to stimulate demand for their products and then allow them to escape liability when their products injured someone. *See id.* at 81.

34. *See id.* at 84. *See also* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

35. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 898, 27 Cal. Rptr. 697, 698 (1962). Strict liability in tort has been described as similar to an implied warranty action, and while neither contract nor tort completely, it is more tort than contract. *See* Keckler v. Brookwood Country Club, 248 F. Supp. 645, 647 (D. Ill. 1965). Strict liability has been said to be the same as an implied warranty action "divested of contract doctrines of privity, disclaimer, and notice." *See* Fisher v. Gate City Steel Corp., 211 N.W.2d 914, 917 (Neb. 1973). Additionally, the governing principles of the two doctrines have been said to be identical. Jackson v. Muhlenberg Hosp., 232 A.2d 879, 884 (N.J. Super. Ct. Law Div. 1967).

36. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states in pertinent part: "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 . . . ."

37. *Id.*

38. *Id.* Comment c. Additional reasons given were:

> [T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; . . . and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id. Comment c.

uniform code.[39] As written the UCC provides for a measure of damages determined by the difference between the value of the goods as accepted and the value of the goods as warranted, as well as consequential and incidental damages.[40] The typical commercial or economic loss contemplated by the Code therefore includes those cases in which the purchaser suffers lost profits or repair costs but no personal injury.[41] In any event, if the product does not perform as warranted the underlying objective of the UCC is to return the purchaser to the position in which he would be if no breach had occurred.[42]

STRICT LIABILITY AND ECONOMIC LOSS

Adoption of strict liability in tort and section 402A by the overwhelming majority of the states[43] has firmly established the preeminence of tort over contract law in cases in which physical injury or property damage is caused by an unreasonably dangerous, defective product.[44] On the other hand, contract, sales law, and the UCC have traditionally governed cases in which a defective product damages itself and the resulting loss is merely pecuniary.[45] The expansion of products liability law, however, has made unclear the extent to which strict liability should be applied in cases which formerly would have been considered mere economic loss.[46]

Early Cases

Cases decided in 1965 by the supreme courts of New Jersey and California represent the two different views regarding recovery for economic loss under a strict liability theory. In the New Jersey case, *Santor v. A & M*

39. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1 (1972); Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). *See also* R. ANDERSON, THE UNIFORM COMMERCIAL CODE § 1-102 (2d ed. 1970) (underlying purposes of act).

40. *See* R. ANDERSON, THE UNIFORM COMMERCIAL CODE §§ 2-714(2), -715 (2d ed. 1970).

41. *See* Franklin, *When Words Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 980-84 (1966).

42. *See* R. ANDERSON, THE UNIFORM COMMERCIAL CODE, § 1-106 (2d ed. 1970).

43. 2 J. DOOLEY, MODERN TORT LAW § 32.34 (1977) (citing decisions from 34 states).

44. *See, e.g.*, Fresno Air Serv. v. Wood, 43 Cal. Rptr. 276, 279 (Dist. Ct. App. 1965); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969); Davis v. Gibson Prods. Co., 505 S.W.2d 682, 688 (Tex. Civ. App.—San Antonio 1973), *writ ref'd n.r.e. per curiam*, 513 S.W.2d 4 (Tex. 1974).

45. *See* Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 144-49 (1976-77).

46. *See, e.g.*, Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 144-49 (1976-77); Comment, *Implied Warranties and "Economic Loss,"* 24 BAYLOR L. REV. 370, 371-72 (1972); Comment, *Strict Liability: Recovery of "Economic" Loss*, 13 IDAHO L. REV. 29, 39-42 (1972). *Compare* Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 797 (5th Cir. 1973) (strict liability not applicable to economic loss) (applying Texas law) *with* Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 428 (Wis. 1973) (strict liability applicable to economic loss) (applying Pennsylvania law).

Karagheusian, Inc.,[47] Mr. Santor had purchased some "grade #1" carpet that proved defective when it developed unsightly lines. Santor sued the remote manufacturer for the cost of the carpet but the defendant claimed that lack of privity precluded any recovery by Santor. Cognizant of the fact that strict liability had usually been imposed only when personal injury had been caused by the defective product,[48] the court reasoned that the type of injury, whether physical or economic, was irrelevant since the manufacturer had represented in either instance that the goods were both suitable and safe for their intended use.[49]

In *Seely v. White Motor Co.*,[50] the California Supreme Court reached an opposite conclusion. Mr. Seely sued the remote manufacturer for the purchase price of a truck and lost business profits due to a defect in the truck that caused it to bounce violently. The court held that the UCC properly governed economic losses of this type.[51] Strict liability in tort was held to be limited to cases of physical harm to a person or his property caused by a dangerously defective product.[52] Under the reasoning of the California court, therefore, only if the carpet in *Santor*[53] had been unsafe and caused injury would strict liability in tort have been available.[54]

Texas Cases

A majority of the courts in the United States have adopted the reasoning of the California court in *Seely* and thus have refused to extend strict liability in tort to instances of simple economic loss in which the product is not found to be unreasonably dangerous.[55] The Texas Supreme Court likewise followed this reasoning in *Nobility Homes, Inc. v. Shivers*.[56] Shivers bought a mobile home found to be defective in workmanship and materials, and unfit for the purposes for which it was sold. The trial court did not find, however, that the home was unreasonably dangerous or that it had caused physical harm to the plaintiff or his property. Instead, eco-

47. 207 A.2d 305 (N.J. 1965).

48. *Id.* at 312; *see* Chairaluce v. Stanley Warner Management Corp., 236 F. Supp. 385, 387 (D. Conn. 1964); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. Dist. Ct. App. 1967); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972).

49. *See* Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 312 (N.J. 1965). If the court had not held the type of injury to be irrelevant, lack of privity would have barred recovery under contract law. *See id.* at 309.

50. 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

51. *See id.* at 152, 45 Cal. Rptr. at 24.

52. *Id.* at 151, 45 Cal. Rptr. at 23.

53. Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 307 (N.J. 1965).

54. Seeley v. White Motor Co., 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

55. Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 145 (1976-77); *see, e.g.*, Beauchamp v. Wilson, 515 P.2d 41, 44 (Ariz. Ct. App. 1973); Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 653 (Neb. 1973); Price v. Gatlin, 405 P.2d 502, 503 (Or. 1965).

56. 557 S.W.2d 77 (Tex. 1977).

nomic loss in the form of loss of market value, was found to be the only "injury" Shivers had suffered.[57] Therefore, the Texas Supreme Court adopted the distinction developed in *Seely* and held that economic loss was adequately provided in the Uniform Commercial Code[58] and that tort law was properly restricted to cases of personal or property damage.[59] When the plaintiff's losses relate to the product itself the similarity of this type of property damage to typical economic loss raises the question which of the two theories of liability should be applied. Quoting Justice Traynor in *Seely* the Texas court noted that the distinction between tort law and the UCC does not rest with the "luck" of a plaintiff being injured but with the "nature of the responsibility a manufacturer must undertake in distributing his products."[60] In other words, a manufacturer is not held liable in tort for the level of performance of his product unless the manufacturer makes such an agreement.[61] He is held strictly liable in tort, however, for distributing products "that create unreasonable risks of harm" and cause injury.[62] Since there was only economic loss and no physical harm or unreasonable risk of danger, recovery in strict liability was not allowed.[63]

Nine months later, the same court decided *Signal Oil & Gas Co. v. Universal Oil Products.*[64] Signal sued to recover for property damage and economic loss resulting from an explosion and fire caused by a defective oil heater manufactured by defendant. The court held that Signal had asserted a valid claim of economic loss under strict liability because Signal had alleged the heater was unreasonably dangerous and the product had caused damage not just to itself but also to *other* property.[65]

The requirement that damage to "other property" must be alleged in a suit in strict liability, followed from the holding of the Texas Supreme Court in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*[66] Curry County purchased a rebuilt spray plane "as is" from Mid

57. *Id.* at 78. The mobile home's value was determined to be $8,750 less than its purchase price. *Id.* at 78.

58. *Id.* at 81.

59. *See id.* at 80.

60. *Id.* at 79 (citing Seely v. White Motor Co., 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965)).

61. *Id.* at 79.

62. *Id.* at 79; *see* Mitchell v. Miller, 214 A.2d 694, 698 (Conn. Super. Ct. 1965); Allen v. Coca-Cola Bottling Co., 403 S.W.2d 20, 21 (Ky. 1966); Ford Motor Co. v. Lonon, 398 S.W.2d 240, 248-49 (Tenn. 1966).

63. Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 80 (Tex. 1977). Plaintiff did recover, however, since the court abolished the privity requirement in actions against a remote manufacturer resulting from the manufacturer's breach of the UCC's implied warranty of merchantability. *Id.* at 81; *see* 8 ST. MARY'S L.J. 865, 866 (1977).

64. 572 S.W.2d 320 (Tex. 1978).

65. *Id.* at 325-26. There was dictum by the court that had the jury found in Signal's favor, the cost of replacing the oil heater could be included with the "other" property damages and need not be considered economic loss. *Id.* at 325. *See also* 10 ST. MARY'S L.J. 675 (1978).

66. 572 S.W.2d 308, 313 (Tex. 1978).

Continent. The engine lacked a crucial part, however, and the plane crashed causing severe damage to itself but no physical harm to any person or any "other" property.[67] The trial court found the plane unreasonably dangerous as a result of the engine defect and both lower courts held Mid Continent strictly liable in tort for the damage to the plane.[68] The supreme court, however, held that damage to the product, the plane itself, was only an economic loss.[69] Since the cost of repair and loss of the benefit of the bargain were the only injuries Curry County suffered, strict liability in tort was not applicable.[70] Clearly influenced by the commercial nature of the transaction, the supreme court reversed the lower courts and held, "In transactions between a commercial seller and a commercial buyer, when no physical injury has occurred to persons or other property, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code."[71] In other words, the court emphasized the commercial nature of the transaction and held that an unreasonably dangerous and defective product that only damages itself is not a matter for strict liability in tort.[72] The court did not, as it could easily have done, limit the applicability of section 402A to non-commercial transactions. Instead it held that section 402A was applicable to business transactions but modified it to apply only to personal and "other" property damage, thereby giving effect to a valid "as is" disclaimer between two knowledgeable businesses.[73]

Justice Pope criticized the decision, however, by pointing out that the "other property" damaged in *Signal Oil* was the remainder of the oil refining unit which included the defective oil heater and which was purchased as an integral unit.[74] Additionally, Justice Pope noted the similarity between *Signal Oil* and *Mid Continent Aircraft,* in which the defective engine damaged the surrounding parts of the airplane, and questioned whether there was a difference between the two cases in this respect.[75] At the very least, the cases illustrate the difficulty of distinguishing between the product and "other property".[76] These difficulties are made even more perplex-

67. Justice Pope indicated, however, that the plaintiff in *Mid Continent* had actually alleged and proved that "other" property, agricultural chemicals, had been damaged by the defective plane. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 332 (Tex. 1978) (Pope, J., concurring).

68. Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 310 (Tex. 1978).

69. *Id.* at 313.

70. *See id.* at 313.

71. *Id.* at 313; *see* TEX. BUS. & COM. CODE ANN. § 2.715 (Tex. UCC) (Vernon 1968) (buyer's incidental and consequential damages).

72. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978).

73. *See id.* at 313.

74. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 332 (Tex. 1978) (Pope, J., concurring).

75. *See id.* at 332 (Pope, J., concurring).

76. *Accord,* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966) (recovery

ing by the fact that section 402A does not include this "other property" distinction.[77]

ANALYSIS OF THE *Mid Continent* DECISION

The majority in *Mid Continent Aircraft,* relied on five cases from other jurisdictions for its decision. Analysis of these five cases and of policy considerations of tort law raises doubt about the validity of the Texas Supreme Court's decision in *Mid Continent.*[78] For example, of the five cases upon which the majority based its opinion, only one, *Cooley v. Salopian Industries, Ltd.,* established the same "other property" distinction.[80] *Cooley* involved a South Carolina resident who purchased a machine to be used in his chicken and egg business. The machine proved defective and Cooley sued the English manufacturer for recovery of the cost of the damage to the product itself.[81] The federal district court interpreted section 402A, which South Carolina had adopted, to mean that damage to the person or his other property was required.[82] As a result, the court held that section 402A did not apply when the product only damaged itself.[83] The court gave no reason for such an interpretation, however, and cited no authority.[84]

The other four cases relied on by the majority in *Mid Continent* do not support the holding. One of two Georgia cases cited involved an automobile with a defective engine which caused it to overheat.[85] After 27,000 miles the engine was ruined and the plaintiff attempted to recover in tort for the loss of market value of the car. The Georgia court held that the

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allowed for water heater that exploded because plaintiff's other property also destroyed), *cert. denied,* 386 U.S. 912 (1967). This case also illustrates the difficulty of distinguishing between the product and other property, since the incorrectly installed water heater was an integral part of the house built by the defendant. *Id.* at 123-24. *See generally* Keeton, *Torts, Annual Survey of Texas Law,* 32 Sw. L.J. 1, 8-9 (1978); Ribstein, *Guidelines for Deciding Product Economic Loss Cases,* 29 MERCER L. REV. 493, 498-501 (1978).

77. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

78. The five cases cited for support by the court in *Mid Continent Aircraft* were: Cooley v. Salopian Indus. Ltd., 383 F. Supp. 1114 (D.S.C. 1974); Long Mfg., Inc. v. Grady Tractor Co., 231 S.E.2d 105 (Ga. Ct. App. 1976); Long v. Jim Letts Oldsmobile, Inc., 217 S.E.2d 602 (Ga. Ct. App. 1975); Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 544 P.2d 306 (Idaho 1975); Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973); *see* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 312 (1978).

79. 383 F. Supp. 1114 (D.S.C. 1974).

80. *Id.* at 1119.

81. It should be noted, however, that the machine was not found to be unreasonably dangerous and Cooley did not allege damage to himself or any other property. *See* Cooley v. Salopian Indus., Ltd., 383 F. Supp. 1114, 1119 (D.S.C. 1974).

82. *Id.* at 1119.

83. *Id.* at 1119.

84. *See id.* at 1119.

85. Long v. Jim Letts Oldsmobile, Inc., 217 S.E.2d 602, 603 (Ga. Ct. App. 1975).

plaintiff's only loss was a pecuniary one and denied recovery in tort for this purely economic injury. Unlike *Mid Continent,* however, there was no finding that the product was unreasonably dangerous.[86] The second Georgia case involved a suit for the loss in market value of a defective portable barn.[87] Again, unlike *Mid Continent,* there was no accident and no finding of an unreasonably dangerous defect.[88] Therefore, the court did not allow recovery under tort for the loss of market value.[89] Another cited case was factually similar to *Mid Continent* in that it involved the crash of a defective plane.[90] The suit was brought as a breach of warranty under contract law, though, and lack of privity barred recovery.[91] Strict liability was not applied as that issue was never raised.[92] A fifth case cited by the majority was decided on the basis of the unique laws of Nebraska, the state in which the suit was brought.[93] Nebraska had not adopted section 402A, and its laws recognized strict liability only for injury to persons.[94] Recovery under strict liability was precluded because no person was injured.[95]

Other Jurisdictions

In other jurisdictions there are a number of cases in which a result opposite

86. *See id.* at 604. This case was distinguished by a later decision that allowed a plaintiff to recover in strict liability when the action was not based solely on an economic loss. *Compare* Mike Bajalia, Inc. v. Amos Constr. Co., 235 S.E.2d 664, 666 (Ga. Ct. App. 1977) (building materials found dangerously defective) *with* Long v. Jim Letts Oldsmobile, Inc., 217 S.E.2d 602, 604 (Ga. Ct. App. 1975) (no finding that burned engine was dangerously defective).

87. Long Mfg., Inc. v. Grady Tractor Co., 231 S.E.2d 105, 106 (Ga. Ct. App. 1976).

88. *See id.* at 106-08.

89. *Id.* at 107-08. The Georgia court, however, did define economic loss to include the case in which a defective product causes injury to *itself. Id.* at 108.

90. *Compare* Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 544 P.2d 306, 308 (Idaho 1975) *with* Mid Continent Aircraft Corp. v. Curry County Spraying Serv. Inc., 572 S.W.2d 308, 308 (Tex. 1978).

91. Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 544 P.2d 306, 313 (Idaho 1975). Plaintiff was also barred from recovery for failure to give defendant proper notice of the alleged breach of warranty. *Id.* at 314.

92. *See id.* at 308.

93. Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 652 (Neb. 1973).

94. *See id.* at 652; Kohler v. Ford Motor Co., 191 N.W.2d 601, 606 (Neb. 1971) (strict liability allowed only for injury to human beings). Texas, on the other hand follows the Restatement and allows recovery by a plaintiff for injury to himself or his property. *See* Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801, 804 (Tex. 1978) (recovery allowed when unreasonably dangerous product harmed plaintiff); O.M. Franklin Serum Co. v. C.A. Hoover & Son, 418 S.W.2d 482, 482 (Tex. 1967) (recovery allowed when defective product harmed plaintiff's property). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

95. *See* Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 653 (Neb. 1973) (plaintiff recovered under the alternative theory of breach of warranty in contract). As further support, however, the court in *Mid Continent* cited Dean Keeton as saying that "a damaging event that harms only the product should be treated as irrelevent to policy considerations directing liability placement in tort." Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 312 (Tex. 1978); *see* Keeton, *Torts, Annual Survey of Texas Law,* 32 Sw. L.J. 1, 5 (1978).

to *Mid Continent* has been reached.[96] In fact, several courts have expressly held that a defective product which causes harm to itself is the proper subject for application of strict liability in tort.[97] The emphasis in these cases is on the unreasonable danger of the product and the fact that an accident occured in which a person's property was damaged.[98] Also, in most of these cases, the product bought by the consumer is considered to be just as much his property as any other property he owns.[99] The "other property" distinction emphasized in *Mid Continent*, therefore, is given little or no consideration.[100]

While certainly not controlling, these and other decisions effectively illustrate the overly restrictive nature of the *Mid Continent* decision.[101]

96. *See* Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974); Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977).

97. Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974) (applying Oklahoma law); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974) (applying Pennsylvania law); Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 425-28 (Wis. 1973). In *Keystone* the plaintiff bought several helicopters "as is" from the defendant. One crashed, causing damage only to the helicopter itself. The court concluded that if the crash resulted from an unreasonably dangerous defect, then strict liability in tort and section 402A would apply. Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 148-49 (3d Cir. 1974). In *Sterner* the plaintiff bought a plane with a rebuilt engine that failed causing the plane to crash and damage itself. The court held that the plaintiff only had to prove that the defective product caused the damage and that the defect had rendered the plane unreasonably dangerous. Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 711-13 (10th Cir. 1974).

98. *See* Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974); Cloud v. Kit Mfg. Co.,563 P.2d 248, 251 (Alaska 1977); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966) *cert. denied*, 386 U.S. 912 (1967); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 428 (Wis. 1973).

99. *See* Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 428 (Wis. 1973).

100. *See* Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974) (no discussion of "other" property distinction); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974) (no discussion of "other" property distinction); Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977) ("other" property damage not required); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 427 (Wis. 1973) (requirement of "other" property damage expressly rejected). *But see* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 123-24 (Miss. 1966) (recovery allowed for water heater that exploded, because plaintiff's other property also destroyed), *cert. denied*, 386 U.S. 912 (1967).

101. *See* Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975); Bombardi v. Pochel's Appliance & TV Co., 515 P.2d 540, 542 (Wash. Ct. App. 1973). In *Hiigel* the trial court had interpreted section 402A as requiring damage to "other" property. The Colorado Supreme court ruled that the lower court's interpretation was too narrow and that the better reading was that damage to the product is covered by section 402A. Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975).

Section 402A clearly applies in these cases when a defective product is unreasonably dangerous to a person or his property and damage occurs to his property.[102] Since section 402A does not include the words "other property" it is reasonable, especially in light of these cases, that it should apply when an unreasonably dangerous product damages itself.[103]

Texas Decisions

A line of cases exists in Texas that indicates the proper emphasis for the court in *Mid Continent.*[104] As early as 1964 the Fifth Circuit, while applying Texas law, determined that an unreasonably dangerous defect that resulted in a product harming a person should give rise to a cause of action under strict liability.[105] The Texas Supreme Court adopted this position in 1967.[106] In subsequent decisions, courts have consistently emphasized the unreasonable dangerousness of the product and not an "other property" distinction as being the line of demarcation for strict liability recovery.[107] In none of these cases was an "other property" distinction, upon which the majority in *Mid Continent* relied for its decision,[108] considered or held to be determinative.[109] Instead, these decisions and others have consistently based the applicability of strict liability in tort on the unreasonable danger of the defective product.[110]

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102. *E.g.*, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713 (10th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149 (3d Cir. 1974); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414, 428 (Wis. 1973).

103. See cases cited notes 102-103 *supra*. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See also* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 316-17 (Tex. 1978) (Pope, J., dissenting).

104. *See, e.g.*, Putman v. Erie City Mfg. Co., 338 F.2d 911, 923 (5th Cir. 1964) (applying Texas law); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-89 (Tex. 1967).

105. Putman v. Erie City Mfg. Co., 338 F.2d 911, 923 (5th Cir. 1964).

106. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

107. *See, e.g.*, Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-89 (Tex. 1967); Melody Home Mfg. Co. v. Morrison, 468 S.W.2d 505, 506-07 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

108. Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978). *See also* Seely v. White Motor Co., 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965). In fact, *Seely*, which formed the basis of the Texas Supreme Court decision in *Nobility Homes*, never considered the "other" property aspect. Instead the court in *Seely* held that without proof that the "bouncing" defect caused damage to the truck itself, strict liability would not lie. *Id.* at 152, 45 Cal. Rptr. at 24. Additionally, there was no finding of unreasonable danger in *Seely*. *See id.* at 152, 45 Cal. Rptr. at 24.

109. *See* Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 79-80 (Tex. 1977); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-89 (Tex. 1967); Melody Home Mfg. Co. v. Morrison, 468 S.W.2d 505, 506-07 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

110. Putman v. Erie City Mfg. Co., 338 F.2d 911, 923 (5th Cir. 1964) (wheel chair from

Policy Considerations

While many theories have existed that stress why tort liability has been imposed, the public policy considerations have changed little.[111] From its early beginning with contaminated food to its current extension to any type of defective product, the fundamental policy of strict liability in tort has always been to protect the innocent consumer from unreasonable risks of harm.[112] In this respect, the manufacturer who actively solicits purchases is logically responsible for any dangerously defective products he distributes.[113] Therefore, when a manufacturer does distribute an unreasonably dangerous, defective product the harm done is countered by strict liability in tort under section 402A.[114]

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which wheel fell found unreasonably dangerous) (applying Texas law); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969) (defective brakes found unreasonably dangerous); Eli Lilly & Co. v. Casey, 472 S.W.2d 598, 599 (Tex. Civ. App.—Eastland 1971, writ dism'd) (ineffective weed control chemical not found unreasonably dangerous); Thermal Supply, Inc. v. Asel, 468 S.W.2d 927, 929 (Tex. Civ. App.—Austin 1971, no writ) (defective air conditioner not found unreasonably dangerous).

111. *See* McDonald v. Sacramento Medical Foundation Blood Bank, 133 Cal. Rptr. 444, 448 (Ct. App. 1976); Milau Assocs., Inc. v. North Ave. Dev. Corp., 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977); Klages v. General Ordinance Equip. Corp., 367 A.2d 304, 310 (Pa. Super. Ct. 1976). In *McDonald* the court listed four policies as justification for strict liability: to provide a shortcut to liability when negligence is hard to prove, to provide incentive to manufacture safer products, to reallocate resources for product safety, and to spread the risk of loss among all users. McDonald v. Sacramento Medical Foundation Blood Bank, 133 Cal. Rptr. 444, 448 (Ct. App. 1976). In *Milau* the court held that strict liability was based on sound social policies including "consumer reliance, marketing responsibility and the reasonableness of imposing loss redistribution." Milau Assocs., Inc. v. North Ave. Dev. Corp., 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977). In *Klages* the court held that a few reasons for strict liability were "the inability of the consumer to protect himself against defectively manufactured goods, the superior risk-bearing ability of the manufacturer, [and] the lack of a sound basis in public policy to allow the manufacturer to avoid responsibility . . . ." Klages v. General Ordinance Equip. Corp., 367 A.2d 304, 310 (Pa. Super. Ct. 1976).

112. Lemley v. J. & B. Tire Co., 426 F. Supp. 1378, 1380 (W.D. Pa. 1977) (strict liability based on social policy of protection of the consumer); Shaffer v. Victoria Station, Inc., 572 P.2d 737, 739 (Wash. Ct. App. 1977) (purpose of strict liability is protection of consumer); *see* RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965). Comment c states in pertinent part: "On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . ." *Id.*

113. Daly v. General Motors Corp., 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978) (manufacturer who distributed product has burden of loss for injury caused by defective product); Keen v. Dominick's Finer Foods, Inc., 364 N.E.2d 502, 504 (Ill. App. Ct. 1977) (cornerstone of liability is fact that manufacturer actively placed product in stream of commerce); Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 520 (Iowa Ct. App. 1977) (manufacturer liable for distribution of unreasonably dangerous defective product that injures person or property).

114. *See* cases cited notes 112-113, *supra*.

The *Mid Continent* decision goes a long way toward abrogating this basic policy of tort law.[115] No justification exists either in tort law or section 402A for the arbitrary separation of a person's property between his "other property" and the product itself.[116] The policy that seeks to compensate for damage caused by unreasonably dangerous products does not require that recovery be limited to the person who could not avoid harm to himself or to some other property he owns.[117] Rather, to be in accordance with section 402A and basic tort policy, strict liability in tort should be available to every person who can show that the defendant manufactured a defective product that was unreasonably dangerous and that caused injury to person or property.[118] Further, while many various policy justifications for strict liability have been espoused, ranging from simply providing a short cut to liability when negligence is difficult to prove,[119] to providing purely economic risk distribution,[120] to providing "incentive" for manufacturers to produce safer products,[121] the objective is the same in each case. That objective is protection of the purchaser from unreasonable risks of harm.[122] As the Texas Supreme Court has noted, this does not mean that a manufacturer should be held strictly liable in every instance in which his product fails to perform in accordance with the expectations of the purchaser,[123] but strict liability should be imposed on manufacturers of unreasonably dangerous, defective products in order to reduce the risk of harm to innocent purchasers.[124]

RECONCILIATION OF *Mid Continent*, *Signal* AND *Nobility Homes*

The decision in *Mid Continent* is confusing, in light of these considera-

115. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 316 (Tex. 1978) (Pope, J., dissenting).

116. *See* Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 316-17 (Tex. 1978) (Pope, J., dissenting).

117. *See* Seely v. White Motor Co., 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 79 (Tex. 1977).

118. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

119. McDonald v. Sacramento Medical Foundation Blood Bank, 133 Cal. Rptr. 444, 448 (Ct. App. 1976).

120. Milau Assocs., Inc. v. North Ave. Dev. Corp., 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977).

121. McDonald v. Sacramento Medical Foundation Blood Bank, 133 Cal. Rptr. 444, 448 (Ct. App. 1976).

122. *See* Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 79 (Tex. 1977).

123. *See id.* at 79. As Justice Pope has said, "A defect that is not unreasonably dangerous, does not result in an accident, or one that must only be repaired or replaced, is not a tort action." Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 317 (Tex. 1978) (Pope, J., dissenting).

124. *See* Daly v. General Motors Corp., 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978); Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 520 (Iowa Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

tions, and poses other possible problems for the courts. Division of section 402A property into "other property" and the product itself is likely to require lengthy and unnecessary litigation in order to distinguish between the two.[125] Other technical questions, such as how much "other property" must be damaged before strict liability will be allowed, are raised by the *Mid Continent* decision.[126]

The Texas Supreme Court adopted section 402A in 1967.[127] Section 402A requires that the plaintiff allege a defect in the manufacturer's product rendering it unreasonably dangerous and an injury to the plaintiff or his property caused by the defect.[128] Had the supreme court simply applied section 402A as it was adopted without the "other property" modification, the cases of *Nobility Homes,*[129] *Signal Oil,*[130] and *Mid Continent Aircraft*[131] could easily be reconciled. Since *Nobility Homes* did not involve a defective product that was unreasonably dangerous, section 402A was not applicable.[132] On the other hand, *Signal Oil* did involve a defective product, but that defect was not found to have caused the damage.[133] Thus, section 402A was applicable but the jury findings were unfavorable.[134] Finally, *Mid Continent Aircraft* involved a defective product found to be unreasonably dangerous and which caused damage to the plaintiff's property. The court defined the damage to the plaintiff's property as economic rather than property damage and did not apply section 402A.[135] Section 402A as written, however, does not limit liability to "other property" damage.[136] Thus, section 402A should have been applied[137] since the product was unreasona-

125. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325 (Tex. 1978); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 312-13 (Tex. 1978).

126. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 332 (Tex. 1978) (Pope, J., concurring).

127. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

128. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See also* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325 (Tex. 1978); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 314 (Tex. 1978) (Pope, J., dissenting); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 79-80 (Tex. 1977).

129. Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977).

130. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978).

131. Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978).

132. Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 79-80 (Tex. 1977).

133. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 324, (Tex. 1978).

134. *Id.* at 326; *see, e.g.,* Eck v. Helene Curtis Indus., Inc., 453 P.2d 366, 368 (Ariz. Ct. App. 1969) (proof that product caused injury essential to strict tort liability); Essex Wire Corp. v. Salt River Project Agr. Improvement & Power Dist., 451 P.2d 653, 660 (Ariz. Ct. App. 1969) (strict tort liability does not eliminate requirement of proving proximate causation); O'Lander v. International Harvester Co., 490 P.2d 1002, 1005 (Or. 1971) (defect must proximately cause accident for strict liability in tort to apply).

135. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978).

136. *See id.* at 316 (Pope, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

137. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d

bly dangerous and the damage it caused was to person or property.[138] This result is proper regardless of the commercial or non-commercial nature of the transaction. Transactions between commercial entities may be an important consideration in determining the effect to give to warranties and disclaimers, but should not affect the overall application of section 402A.

CONCLUSION

Section 402A is the accepted rule applied by the courts to determine whether a case of strict liability exists. As adopted in Texas, it is applied in those cases in which an unreasonably dangerous, defective product causes damage to a person or his property. While case law and the history and policy considerations of tort law favored its application in *Mid Continent,* the Texas Supreme Court chose to do so only with modification. As a result, the "other property" distinction is now law.

The effect of the *Mid Continent* decision is to place all similar cases in which a product damages only itself, in the category of economic loss. Remedy for such loss is to be governed by the Texas Business & Commerce Code.[139] As a result, the plaintiff in such a case will be faced with all the obstacles of contract law such as disclaimer and notice requirements.[140] The plaintiff who is lucky enough to hurdle these obstacles will generally recover only the difference between the value of the product as received and the value as warranted.[141] In general, in a case of economic loss the plaintiff's proof will be more complex, the manufacturer's defenses stronger, and the recovery less than under strict liability in tort.

Damage to property other than the product itself, however, will release a plaintiff from the restraints of contract liability. Under *Mid Continent,* strict liability in tort will be available when an unreasonably dangerous, defective product damages "other property" of the consumer. The plaintiff can avoid contract disclaimers and the like, therefore, by proving damage to some "other property".[142] Should the courts choose to interpret this

308, 319 (Tex. 1978) (Pope, J., dissenting); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977); Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969).

138. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

139. *See* TEX. BUS. & COM. CODE ANN. §§ 2.313 (express warranty), 2.314 (implied warranty of merchantability) & 2.315 (implied warranty of fitness for a particular purpose) (Tex. UCC) (Vernon 1968); *id.* § 17.41-63 (deceptive trade practices-consumer protection act) (Vernon Supp. 1978-1979).

140. As the plaintiff in *Mid Continent* learned, obstacles such as "as is" disclaimers are difficult to overcome. *See* Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308. 313 (Tex. 1978). Additionally, while there is a four-year statute of limitations under the UCC for breach of warranty, the statute starts to run at the time of the sale, and notice of breach of warranty must be given before it runs. *See* TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968).

141. 2 J. DOOLEY, MODERN TORT LAW § 32.31 (1977). This is normally described as the "benefit of the bargain rule." *Id.*

142. While proving damage to "other" property may appear to be a heavy burden for

requirement liberally, the "other property" distinction will not cause plaintiffs much further concern. And if policy and precedent are any guide, this is the course Texas courts will follow in future cases in which an unreasonably dangerous, defective product damages itself.

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the plaintiff, one authority has said that "if damage to other property is necessary, it can almost always be found." Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 MERCER L. REV. 493, 499 (1978).