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Products Liability—Manufacturer Not Liable for Economic Losses of Consumer Under Theory of Strict Liability

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might be feasible to require the general contractor to utilize a main entrance or an entrance reasonably close thereto, so as not to restrict union picketing and publicity to a rear gate where it would lose the benefit of public opinion and pressure. It does seem apparent nevertheless, that the remedy does not lie in the reversal of the "ally" doctrine of *Denver Building*, at least not in its entirety, simply because the result would not be industrial peace, but rather further unrest. The sole object of closing down a multi-employer project is to bring pressure upon the disputant to settle with the union as soon as possible. Such economic pressure unfortunately insures neither equitable nor reasonable settlements.

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PRODUCTS LIABILITY—MANUFACTURER NOT LIABLE FOR ECONOMIC LOSSES OF CONSUMER UNDER THEORY OF STRICT LIABILITY

In October, 1959, plaintiff entered into a conditional sales contract with Southern Truck Sales for the purchase of a truck manufactured by defendant. After taking possession of the truck, plaintiff found that it bounced violently, an action known as "galloping." For eleven months after the purchase, Southern, with guidance from defendant's representatives, made many unsuccessful attempts to correct the defect. In July, 1960, the brakes failed when plaintiff slowed down for a curve and the truck overturned. Plaintiff, who was not personally injured, had the truck repaired for $5,466.09. In September, 1960, after having paid $11,659.44 of the purchase price of the truck, plaintiff served notice that he would make no more payments. Plaintiff brought action against Southern and defendant seeking damages for repair of the truck, for the money he had paid on the purchase price, and for profits lost in his business because he was unable to make normal use of the truck. During the trial, plaintiff dismissed his action against Southern without prejudice. The lower court found that defendant had breached its warranty to plaintiff and entered judgment for plaintiff for $20,899.84, consisting of $11,659.44 for the payments on the truck and $9,240.40 for lost profits. The court denied plaintiff's claim for $5,466.09 for the repair of the truck on the ground that plaintiff had not proved that the "galloping" had caused the accident. Both plaintiff and defendant appealed. The Supreme Court of California *held*, affirmed on the basis of breach of express warranty. One judge, concurring in the result, maintained that the award should have been made on the basis of the strict liability doctrine. *Seely v. White Motor Co.*, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

The earliest cases dealing with the liability of a manufacturer to a consumer were based on negligence and followed the rule that a contractor is

not liable to a third party.[1] Under this harsh rule a purchaser could recover damages caused by a defective product only from his immediate seller. In the mid-nineteenth century the New York courts began to place a special liability on the manufacturer of inherently dangerous products which, if negligently made, were extremely harmful to life and limb. Thus, it was held in *Thomas v. Winchester*[2] that despite the absence of privity, a purchaser could recover damages for personal injury from a manufacturer when the product involved was one whose function it was to injure and destroy, such as poisons, explosives, and deadly weapons. This notion of product liability based on negligence was slowly expanded,[3] culminating in *MacPherson v. Buick Motor Co.*,[4] which extended the liability of a remote manufacturer to *any* product which, if negligently made, was reasonably certain to place life and limb in danger. The damages allowed in personal injury actions have long included such elements as compensation for past loss of time and earnings due to the injury,[5] loss of future earning capacity,[6] and increased living expenses caused by the injury.[7] The courts soon extended this liability based on negligence to include damage done to property. There is now general agreement that a plaintiff may recover damages where a product in its defective condition constitutes a threat to personal safety and results in harm to property, on the theory that ". . . the manufacturer's duty depends not upon the results of the accident but upon the fact that his failure to properly construct the [chattel] resulted in the accident."[8] Recovery was allowed where the damage was to the chattel itself[9] or where the defective chattel caused physical damage to other property.[10] Property damages have also been allowed where the negligently made product was likely to cause only such harm to property as actually resulted.[11] This is seen most clearly in a line of cases allowing

1. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842); Vaughan v. Menlove, 3 Bing. N.C. 468 (1837).

2. 6 N.Y. 397, 57 Am. Dec. 455 (1852).

3. Statler v. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (recovery allowed for personal injuries caused by exploding coffee urn); Devlin v. Smith, 89 N.Y. 470, 42 Am. Rep. 311 (1882) (scaffold which was imperfectly constructed caused personal injury).

4. 217 N.Y. 382, 111 N.E. 1050, 1916F L.R.A. 696 (1916).

5. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72 (1901).

6. Bonneau v. North Shore R.R. Co., 152 Cal. 406, 93 Pac. 106 (1907).

7. Kline v. Santa Barbara Consol. Ry. Co., 150 Cal. 741, 90 Pac. 125 (1907).

8. Quackenbush v. Ford Motor Co., 167 App. Div. 433, 436, 153 N.Y. Supp. 131, 133 (3d Dep't 1915). See, *e.g.*, Spencer v. Madsen, 142 F.2d 820 (10th Cir. 1944); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

9. International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953) (truck damaged when it overturned due to defective steel used in springs); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (3d Dep't 1915) (automobile damaged in accident caused by defective brakes).

10. United States Radiator Corp. v. Henderson, 68 F.2d 733 (10th Cir. 1934) (fire damage to house caused by defective furnace); Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, 263 N.Y. 463, 189 N.E. 551 (1934) (water tank exploded causing destruction of barn).

11. Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (S.D. Me. 1947) (boom block on ship caused damage to ship); Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949) (chemical dust used to spray crops reduced yield of crop); Schuylerville Wall Paper Co. v. American Mfg. Co., 272 App. Div. 856, 70 N.Y.S.2d 166 (3d Dep't 1947) (twine used to wrap wallpaper put grease spots on paper making it unusable).

recovery against the manufacturer of defective animal food, where the only damage possible is to the purchaser's property.[12] Although the courts were quick to extend a manufacturer's liability to a consumer on the theory of negligence to include recovery where the damage was to property, they balked when it came to allowing recovery for economic losses.[13] In a case in which adhesive, improperly compounded by the manufacturer, caused shoes purchased from a wholesaler to be unsaleable, the court held that the manufacturer was not liable to the purchaser for his lost profits.[14] Also, where building laths failed to retain plaster and plaintiff sued for the cost of removing and replacing the laths, the court held that the manufacturer was not liable and said:

> The duty of the manufacturer for breach of which liability attaches runs only to those who suffer personal or property injury as a result of either using or being within the vicinity of the use of the dangerous instrumentality.[15]

Thus, only when the danger inherent in a defectively made article caused an "accident" from which either personal or property damage ensued did a cause of action based on negligence arise against a manufacturer in the absence of privity.[16]

Once it became apparent that in an action based on negligence the consumer was limited to the recovery of personal or property damages, a new basis of liability was sought. Plaintiffs turned to the contract principles of implied warranty in order to broaden the coverage of protected consumers and to extend recovery to include economic losses. Although negligence need no longer be proved, an action for breach of implied warranty could be brought only by a purchaser against his immediate seller.[17] Due to the harshness of this rule, several theories were developed in order to evade the privity requirement.

But see Russell v. Sessions Clock Co., 19 Conn. Supp. 425, 116 A.2d 575 (1955); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (1921).

12. Pine Grove Poultry Farm v. Newton By-Products Mfg. Co., 248 N.Y. 293, 162 N.E. 84 (1928); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929); Quaker Oats Co. v. Davis, 33 Tenn. App. 373, 232 S.W.2d 282 (1949); Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W.2d 788 (1952).

13. Donovan Construction Co. v. General Electric Co., 133 F. Supp. 870 (D. Minn. 1955) (manufacturer of defective generators not liable for expenses or lost profits incurred by purchaser in getting generator to function properly); Lucette Originals, Inc. v. General Cotton Converters, Inc., 8 A.D.2d 102, 185 N.Y.S.2d 854 (1st Dep't 1959) (manufacturer of rayon fabric which had offensive odor not liable to purchaser whose dresses were unsaleable after being lined with the fabric); Price v. Gatlin, 405 P.2d 502 (Ore. 1965) (manufacturer of defective tractor not liable to purchaser for lost profits).

14. Karl's Shoe Stores, Ltd. v. United Shoe Mach. Corp., 145 F. Supp. 376 (D. Mass. 1956).

15. A. J. P. Constr. Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 159, 11 N.Y.S.2d 662, 664 (Sup. Ct. 1939), *aff'd without opinion*, 258 App. Div. 747, 15 N.Y.S.2d 424 (2d Dep't 1939), *aff'd without opinion*, 283 N.Y. 692, 28 N.E.2d 412 (1940).

16. Trans-World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955), 25 Fordham L. Rev. 368 (1956), 32 N.Y.U.L. Rev. 197 (1957).

17. Gimenez v. The Great Atlantic and Pacific Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533 (1923).

Among those used were agency[18] and third party beneficiary principles.[19] The courts, in a growing sympathy for the purchaser, began to allow recovery in actions based on implied warranty despite the absence of privity, especially in cases involving contaminated food.[20] In New York, after the 1961 case of *Greenberg v. Lorenz*[21] which allowed recovery to members of the purchaser's household, it appeared as if the privity requirement might be done away with entirely. However, in the 1964 case of *Berzon v. Don Allen Motors, Inc.*,[22] it was held that an automobile manufacturer was not liable for injuries sustained by a passenger in the purchaser's automobile. It is apparent that those plaintiffs who may recover personal or property damages under the theory of implied warranty are still somewhat limited by the privity requirement. Although economic losses may be recovered in an action based on implied warranty,[23] the privity requirement once again presents a serious limitation.[24]

In a further attempt to avoid the privity requirement, plaintiffs turned to actions based on *express* warranty. This theory eased significantly the unhappy plight of the purchaser who suffered economic loss due to a defective product. *Baxter v. Ford Motor Co.*,[25] although dealing with personal injuries, was the first case to expound on the theory of express warranty as a basis for liability of a manufacturer to a consumer in the absence of privity. The court in that case said:

> It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.[26]

The *Baxter* case was followed by a line of cases allowing the recovery of economic loss when a manufacturer had in some way made an express representa-

18. Colby v. First Nat'l Stores, 307 Mass. 252, 29 N.E.2d 920 (1940); Grinnell v. Carbide & Carbon Chemicals Corp., 282 Mich. 509, 276 N.W. 535 (1937).

19. Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1938); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928). See Prosser, Torts 678 (3d ed. 1964).

20. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953); Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961). See Prosser, Torts 674-76 (3d ed. 1964).

21. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

22. 23 A.D.2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965). But other jurisdictions have extended coverage to include innocent bystanders; see Mitchell v. Miller, 6 Conn. Supp. 142, 214 A.2d 694 (1965) (action based on strict liability doctrine); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) (action based on breach of implied warranty).

23. N.Y. U.C.C. § 2-714.

24. N.Y. U.C.C. § 2-318.

25. 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932). See, *e.g.*, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 75 A.L.R.2d 103 (1958).

26. Baxter v. Ford Motor Co., 168 Wash. 456, 462-63, 12 P.2d 409, 412, 88 A.L.R. 521, 526 (1932).

tion of fitness.[27] A court which disallowed recovery for commercial loss when the action was based on negligence stated that "upon . . . express promises or representations the purchaser can rely, for they compose a part of the consideration for the purchase and are meant to be conveyed to and relied upon by the purchaser."[28] *Randy Knitwear, Inc. v. American Cyanamid Co.*,[29] a leading New York case, allowed recovery when a plaintiff who had bought supposedly shrink-proof material found that dresses made from the material did in fact shrink after being washed. In allowing the plaintiff to recover its economic losses from the manufacturer who had advertised nationally and had provided tags which said that the garment had been made shrink-proof by treatment with its product, the court said:

> Since the basis of the liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved.[30]

Although the coverage of protected plaintiffs was greatly broadened in actions based on express warranty, the theory still presented serious obstacles. In many instances there is no express warranty on which to base an action, and, also, the manufacturer's use of a disclaimer as allowed under the Uniform Commercial Code[31] might limit plaintiff's recovery.

Because of the limitations placed on the plaintiff in actions based on negligence and contract some courts have recently turned to the doctrine of strict liability. The California court has held in *Greenman v. Yuba Power Products, Inc.*[32] that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[33] The strict liability doctrine has been the source of much confusion in recent years due to the fact that it sounds both in tort and contract. Deleted from the law of torts was the necessity of proving how the manufacturer was negligent in producing the product. Under the doctrine of strict liability the plaintiff need only show that there was a *defect* in the product which caused the damages that he suffered. The class of protected consumers has been widely expanded due to the fact that the manufacturer's liability is based on an implied warranty created by his market-

27. Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (representations in manual given at time of purchase); Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950) (printed warranty contained in instrument given with product); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (legend on container); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965) (mass media advertising); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966) (manufacturer's booklets and trademark). *But see* Dimoff v. Ernie Majer, Inc., 55 Wash. 2d 385, 347 P.2d 1056 (1960).

28. Silverman v. Samuel Mallinger Co., 375 Pa. 422, 429, 100 A.2d 715, 719 (1953).

29. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), 27 N.Y.U.L. Rev. 753 (1962), 36 St. John's L. Rev. 325 (1962).

30. *Id.* at 15, 181 N.E.2d 399, 404, 226 N.Y.S.2d 363, 370.

31. N.Y. U.C.C. § 2-719.

32. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

33. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

ing of the product. Thus, the liability is based on a contractual relationship between the parties. In addition, the disclaimer provision in the warranty section of the Uniform Commercial Code[34] has been done away with. The Restatement of Torts has recently recognized the doctrine as a "special liability" of the manufacturer for defective products which are unreasonably dangerous and thereby cause harm ". . . to the ultimate user or consumer, or to his property. . . ."[35] The strict liability doctrine was carried to its limit in *Santor v. A. & M. Karagheusian, Inc.*,[36] which allowed recovery of economic loss in a strict liability action, although the court could have based its decision on the presence of an express warranty, in that the defective carpeting upon which the claim was based had been advertised and was represented as being of Grade #1 quality.

In the instant case Chief Judge Traynor, speaking for the majority, affirmed the trial court's award of damages for lost profits and for money paid on the purchase price of the truck on the basis of breach of an express warranty which was contained in the purchase order signed by plaintiff. In its dicta, the the court limited the *Greenman*[37] holding to situations in which there has been personal or property damages. The court stated that the reason for this limitation is that if recovery for economic loss was allowed on the basis of strict liability, the manufacturer would be liable for the business losses of other purchasers for the failure of its product to meet the specific needs of their businesses even though those needs were communicated only to the dealer. Also, "this liability could not be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his product."[38] The court disapproved of the decision in the *Santor*[39] case in that the award should have been allowed on the basis of express warranty rather than on the basis of strict liability. Chief Judge Traynor stated the basis for this distinction in the type of damages allowed in actions for breach of express warranty and actions based on strict liability:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.[40]

Judge Peters, in his concurring opinion, stated that the award should have been affirmed on the basis of strict liability. He stated that the distinction drawn by the majority in limiting the strict liability doctrine to situations in which there

34. N.Y. U.C.C. § 2-719.
35. Restatement (Second), 2 Torts § 402A (1965).
36. 44 N.J. 52, 207 A.2d 305 (1965).
37. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
38. Instant case at 150, 45 Cal. Rptr. at 22 (1965).
39. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
40. Instant case at 151, 45 Cal. Rptr. at 23 (1965).

has been either personal or property damage is artificial and arbitrary. Judge Peters suggests that a distinction should, rather, be drawn between the consumer who deals within the world of commerce, ". . . where parties generally bargain on a somewhat equal plane and may be presumed to be familiar with the legal problems involved when defective goods are purchased"[41] and the ". . . ordinary consumer, who is usually unable to protect himself from insidious contractual provisions such as disclaimers, foisted upon him by commercial enterprises whose bargaining power he is seldom able to match."[42] He thus maintains that the "ordinary consumer" should be allowed to recover economic losses in an action based on strict liability.

In considering the expansion of the strict liability doctrine to include economic or pecuniary loss, it is significant to note that recovery was never extended this far in an action based on negligence. In a negligence action, where the purchaser must either offer proof of the manufacturer's negligence or rely on *res ipsa loquitur*, the courts have consistently limited recovery to personal or property damage. Perhaps the basic reason for this judicial restraint was a desire to remain within the general framework of the policy decisions underlying the *MacPherson*[43] rule.

> In establishing liability in personal injury cases courts have been motivated to overlook any necessity for privity because the hazard to life and health is usually a personal disaster of major proportions to the individual both physically and financially and something of minor importance to the manufacturer . . . against which they can protect themselves by a distribution of risk through the price of the article sold. There has not been the same social necessity to motivate the recovery for strictly economic losses where the damaged person's health, and therefore his basic earning capacity, has remained unimpaired. . . . To allow recovery for purely economic losses because they arise from the same defect is to apply the doctrine of strict liability when the original motivating factor therefor is not present.[44]

The courts did not encounter any difficulty in extending the liability based on negligence to include physical damage to the purchaser's property. This liability was placed on the manufacturer under the rationale that damage to the purchaser's property was as much to be expected and as reasonable a consequence of negligent manufacture as was personal injury. Economic loss, on the other hand, is more speculative, both in the nature of its occurrence and in the amount of loss suffered. It would appear the courts feared that extension of liability to include recovery for economic losses would eventually lead to the liability of a manufacturer ". . . for damages of unknown and unlimited scope."[45] In refusing to extend the doctrine, the courts attempted to balance the scales between

41. *Id.* at 157, 45 Cal. Rptr. 17, 29.
42. *Ibid.*
43. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1916F L.R.A. 696 (1916).
44. Price v. Gatlin, 405 P.2d 502, 504 (Ore. 1965).
45. Instant case at 150-51, 45 Cal. Rptr. at 22-23 (1965).

protection of the innocent purchaser and protection of the manufacturer from unlimited liability. It can be, however, argued that the strict liability doctrine, if properly defined and cautiously applied, will allow the courts to grant recovery for economic losses and still maintain this balance. Such a definition can be found in the court's reasoning in the *Santor*[46] case.

> If the article is defective, *i.e.*, not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists.[47]

On the basis of this definition of strict liability, the court in *Santor* allowed the plaintiff ". . . the difference between the price paid . . . and the actual market value of the defective carpeting at the time when plaintiff knew or should have known that it was defective. . . ."[48] Allowing plaintiff to recover that amount of the purchase price which exceeded the value of the carpeting received certainly does not expose the manufacturer to unlimited liability. It seems clear, then, that Chief Judge Traynor's reason for rejecting the strict liability doctrine as the basis for recovery in *Santor* was that he feared an eventual extension of the doctrine to include recovery for lost profits, as in the instant case. But the *Santor* definition of strict liability leaves no room for the apprehension expressed by Traynor when he said:

> If under these circumstances defendant is strictly liable in tort for the commercial loss suffered by plaintiff, then it would be liable for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses, even though those needs were communicated only to the dealer.[49]

As Judge Peters points out in his concurring opinion, this line of reasoning seems to equate strict liability and implied warranty of fitness for a particular use. But under the doctrine of strict liability a manufacturer is liable for any resultant economic loss, including lost profits, only if his product proves defective under *normal* use. Thus, a manufacturer would not be liable under the doctrine of strict liability if his product merely failed to meet the extraordinary requirements of a particular purchaser. The manufacturer's liability is based on an implied representation of fitness created by the manufacturer's placing of the product on the market.

> Existence of the defect means violation of the representation implicit in the presence of the article in the stream of trade that it is suitable for the general purposes for which it is sold and for which such goods are generally appropriate.[50]

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46. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
47. *Id.* at 66-67, 207 A.2d 305, 313.
48. *Id.* at 68-69, 207 A.2d 305, 314.
49. Instant case at 150, 45 Cal. Rptr. at 22 (1965).
50. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).

It is clear that the manufacturer does not open himself to unlimited liability by placing his product on the market. Under the strict liability doctrine he is liable only to a "reasonably expected" consumer who suffers damage when he puts the product he has purchased to a "reasonably expected" use. Judge Peters' distinction between the ordinary consumer and the consumer familiar with the world of commercial transactions seems to be valid. That such a distinction is tenable is made clear by the fact that the Uniform Commercial Code, adopted by over thirty states, defines the term "merchant"[51] and in several sections distinguishes between the requirements that must be met by a merchant and those which must be met by an ordinary consumer.[52] The plaintiff who regularly deals in large commercial transactions is aware of the benefits of express warranties and the dangers of disclaimers and is usually in a position which enables him to bargain for a favorable sales contract. The ordinary consumer is not so well informed and is often in a less advantageous bargaining position. Unlike the consumer who regularly deals in commerce, he has ". . . neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective."[53] If the courts were to adopt Judge Peters' distinction, the ordinary consumer, unaware of the intricacies of warranty law, would receive the protection he needs under the doctrine of strict liability, while the merchant, familiar with the world of commercial transactions and aware of the problems involved when defective goods are sold, would remain under the control of the warranty section of the Code.

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51. N.Y. U.C.C. § 2-104.
52. N.Y. U.C.C. §§ 2-201, 2-207, 2-209, 2-312, 2-314, 2-403.
53. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 64, 207 A.2d 305, 311 (1965).