
Steven P. Morstad

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cause the information of hearing dates and evidence relied upon would be within the knowledge of the Board. The only additional administrative burden would consist of making the information available to the inmate.

V. Conclusion

In assessing the nature of an inmate's interest in being released on discretionary parole when eligible, the Court in Greenholtz blurred its traditional two-step procedural due process analysis by examining the nature of the state's determination procedures affecting that interest. This approach not only leaves unclear what analysis courts are to apply in future procedural due process determinations but, as applied in Greenholtz, also reveals an improper interpretation of the proceeding employed in recent procedural due process cases.

In finding that there was no protected interest in parole releases, the Court ignored the importance of parole to society in many respects, including sentencing and rehabilitation. It similarly treated lightly the practical effects of the right to parole created by the mere existence of a state parole system. This was emphasized by the Court's analysis of the interest created by statutory language, which interest was not satisfactorily distinguished from that created under the existence of a parole system itself. Finally, even where the Court found an interest entitled to some measure of constitutional protection, the minimum requirements approved are insufficient to overcome the risk of error and prejudice to the inmates.

BARBARA S. SMITH


I. Introduction

When the Wisconsin Supreme Court first adopted a strict tort liability theory in products liability cases,¹ it was pre-

¹ Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (holding that fulfilling the elements of RESTATEMENT (SECOND) OF TORTS § 402A (1965) constituted “negli-
dicted that "this case may well become the forerunner for the eventual removal of all products liability cases from the provisions of the Uniform Commercial Code." Eleven years later, the court apparently has fulfilled this prophecy while purporting to send the warranty theory of products liability, in Prosser's words, "on its way to the ashcan." In *Austin v. Ford Motor Co.*, the court held that a party cannot maintain a claim for breach of warranty if the party can plead the strict liability in tort theory.

Prosser long had advocated that courts "jettison" warranty theory and "discard" the word warranty because strict liability was the proper ground for relief in products liability cases. Reliance on Prosser's theoretical predilection led the Wisconsin court in *Austin* to reject plaintiff's warranty claims in favor of strict liability. In rejecting warranty theory, the Wisconsin court seems to have treated warranty as a creature of the common law, a court-created transitional fiction "born of the illicit intercourse of tort and contract."

Two objections to this aspect of *Austin* arise: (1) the case fails to confront the twentieth century legislative basis for warranty and operates as an inappropriate judicial nullification of a statutory remedy; and (2) because strict liability does not entirely overlap warranty, *Austin* will completely prevent recovery in certain situations where plaintiff would otherwise succeed under, and only under, Chapter 402 of the Wisconsin Statutes.

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4. 86 Wis. 2d 628, 273 N.W.2d 233 (1979).
5. See text accompanying notes 63-68 infra, concerning whether the intended holding or practical effect reaches only implied warranty or express warranty as well.
6. 86 Wis. 2d at 644, 273 N.W.2d at 239-40.
8. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 802 (1966) [hereinafter cited as Prosser, *The Fall*], quoted in Dippel v. Sciano, 37 Wis. 2d at 456, 155 N.W.2d at 61, and relied upon in *Austin v. Ford Motor Co.*, 86 Wis. 2d at 645-46, 273 N.W.2d at 240.
9. Id.
10. 86 Wis. 2d at 646, 273 N.W.2d at 241.
II. Austin and Warranty Law in Context

A. Wisconsin Products Liability History

Prior to 1967, Wisconsin permitted two theories of liability for cases involving defective products: negligence and warranty. Under the old Uniform Sales Act and the Uniform Commercial Code adopted in 1965, breach of express or implied warranties could lead to recovery for personal injury, property damage and economic loss. Similarly, the scope of

(Wisconsin's version of § 2-314 and § 2-315 of the U.C.C.). Most important to products liability, since it is the more frequently applicable of the two implied warranties under the Code, is the implied warranty of merchantability under Wis. Stat. § 402.314:

Implied warranty: merchantability; usage of trade.

(1) Unless excluded or modified (s. 402.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (s. 402.316) other implied warranties may arise from course of dealing or usage of trade. Wis. Stat. § 402.314 (1977).


Property damage and personal injury are, under the Uniform Commercial Code, matters of "consequential damages" under Wis. Stat. §§ 402.714 and 402.715. Detailed differences between the measure of damages among tort, U.C.C. and contract claims are outside the scope of this article. This article focuses on the availability of liability theories and treats matters of recovering for personal injury, damage to property other than the product itself, and defective condition of the product itself or other economic loss only insofar as they constitute very general types of harm which satisfy or fail to satisfy the requisite elements for application of a given liability theory.

13. See Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961) (defective construction required repairs); A. E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764 (1974) (negligent design resulted in unusable floor; loss of profits recovered). While these are not products cases, they demonstrate negligence will apply for pure economic loss, an important factor in determining the scope of tort re-
negligence liability was developed by case law. Wisconsin followed McPherson v. Buick Motor Co.\textsuperscript{14} in rejecting the old common law "lack of privity" defense for negligence cases\textsuperscript{15} involving products "imminently dangerous" when defective.\textsuperscript{16} The last remnant of privity in negligence was expressly abolished in the 1959 case of Smith v. Atco.\textsuperscript{17}

However, in warranty cases the court had retained the privity requirement that existed under common law and the Uniform Sales Act,\textsuperscript{18} even for cases involving food and products for intimate bodily use.\textsuperscript{19} Then, in 1962, the court noted both the apparent harshness of the privity rule and the trend among other courts to discard the privity requirement.\textsuperscript{20}

With the 1965 adoption of the Uniform Commercial Code, the Wisconsin Legislature expressly provided that the class of beneficiaries of warranties under the Code extended beyond the immediate buyer to include:

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.\textsuperscript{21}

The official comment to this section indicated that this provision was a minimum standard and gave no further opinion on the privity question. Rather, the comment stated that the recovery and of product liability.

\textsuperscript{14} 217 N.Y. 382, 111 N.E. 1050 (1916).

\textsuperscript{15} Under the infamous English case of Winterbottom v. Wright, 152 Eng. Rep. 402 (1842).

\textsuperscript{16} Flies v. Fox Bros. Co., 196 Wis. 196, 218 N.W. 855 (1928). Flies extended the exception to the privity defense from products "inherently and normally dangerous" to those imminently dangerous because of negligent construction. \textit{Id.} at 207, 218 N.W. at 859.

\textsuperscript{17} 6 Wis. 2d 371, 94 N.W.2d 697 (1959).

\textsuperscript{18} \textit{Id.} at 383 n.2, 94 N.W.2d at 704 n.2 (dictum); see also Strahlendorf v. Walgreen Co., 16 Wis. 2d 421, 435, 114 N.W.2d 823, 831 (1962) (dictum).

\textsuperscript{19} Bethia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927). Both cases rejected an opportunity to establish the special food warranty which other jurisdictions extended to non privity plaintiffs.

\textsuperscript{20} Strahlendorf v. Walgreen Co., 16 Wis. 2d 421, 114 N.W.2d 823 (1962). See also Kennedy-Ingalls Corp. v. Meissner, 5 Wis. 2d 100, 92 N.W.2d 247 (1958) (remote buyer allowed to circumvent privity by intervention in suit by dealer against manufacturer).

courts could freely expand the class of beneficiaries reached by warranties.\textsuperscript{22}

In \textit{Dippel v. Sciano},\textsuperscript{23} an injured plaintiff alleged, \textit{inter alia}, that the manufacturer and distributor of a product had breached express and implied warranties of merchantability and fitness for intended purpose. The trial court sustained the demurrer of the two defendants on grounds of lack of privity. On appeal, the plaintiff argued that the privity requirement should be dropped from warranty.\textsuperscript{24} The court declined to decide the question, choosing instead to reformulate the issue in terms of the new strict liability in tort doctrine.

The court adopted section 402A of the Restatement (Second) of Torts\textsuperscript{25} as a rule of law establishing a tort law duty of vendors to sell products free of defects creating an unreasonable danger of physical injury\textsuperscript{26} to a consumer or user. Violation of this standard would make a seller negligent per se under the rule of \textit{Osborne v. Montgomery}.\textsuperscript{27} Any seller in the

\begin{itemize}
  \item \textsuperscript{22} This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. \textit{Beyond this}, the section \ldots is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. U.C.C. § 2-318, Comment 3 (1972) (emphasis added). The later version of the Code offers two alternatives to the original provision, both of which expand the class of beneficiaries further. U.C.C. § 2-318 (1979).
  \item \textsuperscript{23} 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
  \item \textsuperscript{24} Brief for Appellant at 7-29; 37 Wis. 2d at 449, 155 N.W.2d at 57.
  \item \textsuperscript{25} § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
  \begin{enumerate}
    \item 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
    \begin{enumerate}
      \item the seller is engaged in the business of selling such a product, and
      \item it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
    \end{enumerate}
    \item The rule stated in Subsection (1) applies although
    \begin{enumerate}
      \item the seller has exercised all possible care in the preparation and sale of his product, and
      \item the user or consumer has not bought the product from or entered into any contractual relation with the seller.
    \end{enumerate}
  \end{enumerate}
\end{itemize}

\textit{Restatement (Second) of Torts} § 402A (1965) [hereinafter cited as § 402A].

\textsuperscript{26} Physical injury includes damage to other property of the consumer/user. \textit{See} § 402A, \textit{supra} note 25, at Comment d.

\textsuperscript{27} 203 Wis. 223, 234 N.W. 372 (1931). Wisconsin's negligence per se approach received strong approval from Professor Wade in \textit{Wade, Is Section 402A of the Sec-
distributive chain, including a remote manufacturer, could be subject to this form of liability.\textsuperscript{28} Hence, the court created a new, more expansive theory to join negligence as a basis for liability without privity of contract.

The absence of a privity requirement and other features of strict tort liability suggested that strict liability would be an attractive alternative to or replacement for the warranty cause of action. Interpreting provisions of the Uniform Sales Act\textsuperscript{29} as imposing warranty liability only on immediate sellers, the \textit{Dippel} court ignored the invitation in the comments to U.C.C. section 2-318\textsuperscript{30} and simply concluded that the Uniform Commercial Code did not substantially alter the privity requirement. The court further reasoned that even if the Code did not require privity of contract, it still presented notice and disclaimer difficulties.\textsuperscript{31}

\textit{ond Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?}, 42 Tenn. L. Rev. 123 (1974) [hereinafter cited as Wade]. He reasoned that § 402A differs from the type of strict liability of the Rylands v. Fletcher (L.R. 3 H.L. 330 (1868)) variety and that negligence per se makes clear that the cause of action is one in tort, unquestionably outside the preemptive potential of the U.C.C. Id. at 142. Dean Twerski disagreed, and criticized the approach as "sophistry." He was of the view that lacking the doctrine of excused violation, it could not be negligence per se but instead was strict liability. Twerski, \textit{From Defect to Cause to Comparative Fault — Rethinking Some Product Liability Concepts}, 60 Marq. L. Rev. 297, 321 (1977).


29. \textit{See, e.g.,} notes 20-22 \textit{supra} and accompanying text.

30. \textit{See} note 22 \textit{supra}.

31. The principal case, \textit{Austin v. Ford}, relied on this rationale also. 86 Wis. 2d at 644-45, 273 N.W.2d at 240.

Yet, several commentators argue that these factors, and particularly notice of breach and privity, have little actual restrictive effect because of the liberal treatment both intended by the U.C.C. draftsmen and given by the courts when the claimant is a consumer. \textit{See, e.g.,} Shanker, \textit{Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jursiprudential Eclipses, Pigeonholes and Communication Barriers}, 17 W. Res. L. Rev. 5, 27-29 (1965) [hereinafter cited as Shanker]; Franklin, \textit{When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases}, 18 Stan. L. Rev. 974, 1000 (1966) [hereinafter cited as Franklin]; Sedgwick, Conley & Sleight, \textit{Products Liability: Implied Warranties}, 48 Marq. L. Rev. 139, 159-60 (1964) [hereinafter cited as Sedgwick]. \textit{See} note 39 \textit{infra}.

Of course the Code explicitly provides protection for consumers against contractual limitations on warranty recovery, through U.C.C. § 2-719(2), with respect to remedies for consequential damages, which section has been interpreted also to bar unconscionable exclusion of warranties, and through U.C.C. § 2-302, providing courts with great flexibility in defeating clauses or contracts found unconscionable as a matter of law and offering logical authority for prohibiting disclaimers and exclusions of
Another key factor in the Dippel rationale was the ease with which the negligence per se formula fit into Wisconsin's existing comparative negligence framework. The court held that the contributory negligence of an injured party was a proper consideration in products cases, while many courts traditionally had held that warranty did not allow for contribu-


The ability to disclaim implied warranties has been significantly restricted by the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act § 101, 15 U.S.C. § 2301 (1975). 15 U.S.C. § 2308 bars a supplier of consumer products from disclaiming or modifying any implied warranties to a consumer if the supplier has made any written warranties in the transaction or if it enters into a service contract with the consumer within 90 days of the sale. Any disclaimer, modification or limitation made in violation of the Act is rendered ineffective by the Act for purposes of state as well as federal law.

In the past, there was concern that language in the Act "disclaiming" any effect by the Act of liability for personal injury, would negate the effect of § 2308. However, the provision concerned indicates otherwise:

Nothing in this title (other than sections 2304(a)(2) & (4) and 2308 of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

Moreover, it is not perfectly clear that strict liability in tort is completely free of effective disclaimer, whether that term of art is used or not. There may be much more convergence between the two liability theories with respect to the actual scope of permissible disclaimers than some are willing to discuss.


Even restricting one's consideration to the text and comments of RESTATEMENT (SECOND) OF TORTS § 402A, it is ludicrous to state flatly, as does Comment m to § 402A, that strict liability can never be disclaimed or be altered by agreement. A sale and attendant circumstances may be structured in many cases to invoke the doctrine of contributory negligence of the assumption-of-risk type, see § 402A, supra note 25, Comment n, or an effective warning may be given negating the element of unreasonable danger, see § 402A, supra note 25, Comment j. The extremely close inter-relationship of warnings, assumption of risk and disclaimers was not considered in the comments to § 402A.

A bare disclaimer of strict tort liability solely under the formal terms of a contract will not likely succeed in consumer transactions, although in commercial transactions, the results easily could be the opposite as the material above indicates.
The court in Dippel not only adopted a new theory of recovery, it also demonstrated its preference that products cases be brought on a strict tort theory as a replacement for warranty and not as a supplement. The Dippel court stated that "we have determined that physically injured users or consumers . . . should pursue their remedy under the rule of strict liability in tort," and this idea became the point of departure for the court in Austin.

B. The Austin Case

Although questioned, breach of warranty under Article Two of the Uniform Commercial Code survived until 1979, when the court decided Austin v. Ford Motor Co. The underlying facts of this extended litigation occurred prior to the decision in Dippel. Decedent Austin purchased a new 1966 Ford, equipped with seat belts, from a Ford dealer. Evidence tended to indicate that the driver's seat belt was defective, with hidden cuts in the fabric. Four months after the purchase and with only 3,000 miles on the car, the seat belt apparently broke during a roll-over accident, causing Austin to be thrown from the car. She died from her injuries.

Schnabl, the original plaintiff, commenced an action three years later as guardian for decedent's children and as personal representative of the estate. Ford Motor Company, the manufacturer, and Jack White Ford, the dealer, were named as defendants. The complaint alleged negligence, breaches of

32. See, e.g., Note, 51 MARQ. L. REV. 388, 394 (1967-68). But the assumption has been rejected by some courts and commentators relying on Code language itself and on policy.


33. 37 Wis. 2d at 463, 155 N.W.2d at 65.
34. 86 Wis. 2d 628, 273 N.W.2d 233 (1979).
35. Just four days before the third anniversary of the incident or three days prior to extinguishment of the claim under Wis. STAT. § 893.205(2) (1977).
36. Both children had been passengers in the auto at the time of the accident, but they survived.
express and implied warranties and strict liability for the allegedly defective seat belt. 37

On remand for trial after reversal of defendants' summary judgment, 38 the trial court dismissed the warranty claims on a finding of inadequate notice as a matter of law. 39 After the

37. Defendants moved for summary judgment, providing affidavits attempting to establish that the facts took this case outside Wisconsin's wrongful death act, Wis. Stat. § 895.03 (1977), which requires the death be "caused in this state." Id. According to the affidavits, the belts were manufactured and installed in Minnesota, and that if any negligence had occurred, it occurred in Minnesota. Defendants also averred that since the accident itself occurred in Indiana, the Indiana wrongful death statute should apply and this required, inter alia, that the action be commenced within two years of the date of death. Holding that Indiana law applied and that the action was therefore barred as untimely, the trial court granted defendant's motion for summary judgment.

38. Plaintiff appealed, producing the first of three supreme court opinions connected with this litigation. Reversing in Schnabl v. Ford, 54 Wis. 2d 345, 195 N.W.2d 602 (1972), the supreme court agreed with plaintiff that Wisconsin's wrongful death statute would apply, along with the applicable three year statute of limitations, Wis. Stat. § 893.205(2) (1977). The court held that a breach of warranty constituted a "wrongful act, neglect or default" under the Wisconsin act. Id. In the instant case, held the court, the breach of warranty and therefore the wrongful act could have occurred in Wisconsin because delivery of the auto was effected in the state. While the defect did not cause the accident, the court reasoned that it could have been a cause of the death itself. Hence, if the defect existed at time of sale or delivery, the death could have been caused at least partially in Wisconsin.

39. The trial court evaluated a letter to Ford from plaintiff's counsel a month after the accident advising Ford that counsel had been retained to represent the children whose mother was killed when her safety belt broke causing her to be thrown from the car and resulting in her death. The letter included a copy of a newspaper clipping describing the accident and indicating a faulty seat belt had broken. Counsel asked Ford to have a representative contact them. The trial court held as a matter of law that this was insufficient as notice because it did not state the buyer's claim that the facts constitute a breach of warranty or that plaintiff will look to defendant for damages. Appellant's Brief and Appendix, 17-18, 126-27.

It would appear that the trial court erred in so holding. First, Official Comments of the Uniform Commercial Code indicate that the purpose of the notice requirement is to "defeat commercial bad faith, not to deprive a good faith consumer of his remedy." U.C.C. § 2-607, Comment 4, 5. Second, remote persons or nonbuyers are not under the explicit notice requirement, but are obligated only to use good faith in notifying upon awareness of their legal situation. See Shanker, supra note 31, at 27-29. Third, the question of adequacy is generally for the jury, "and the defendant would probably have to show prejudice for notice to be defective as a matter of law." Sedgwick, supra note 31, at 160.

It is questionable that Ford was prejudiced by the content of this letter. A defendant of such enormous resources, financial and legal, must have understood from the letter that the parties were pursuing a claim arising from Ford's defective seat belt. The issue of adequacy of notice, which opened the door for the demise of warranty, need not have been present at all.
verdict, the trial court ordered a new trial and plaintiff's children appealed.40

40. The case went to the jury on strict liability. The jury verdict allocated 35% of the causal "negligence" to Ford and 65% to the decedent. On motions after verdict, the trial court struck the allocation of negligence to decedent on grounds that there was no credible evidence to support the verdict finding that her negligence causally contributed to her death. Asserting that the issue of contributory negligence had not been adequately tried, the trial court ordered a new trial in the interest of justice. See Wis. Stat. § 805.15(1) (1977).

On appeal, plaintiffs sought judgment on the verdict as "impliedly modified" by the trial court's ruling that the causal connection between decedent's negligent driving and her death had not been established. The supreme court agreed with this request and modified the order below by directing the trial court to enter judgment on the verdict minus the contributory negligence finding; i.e., Ford was held liable for 100% of the damages. Defendant had no right to a second attempt at carrying its burden on the contributory negligence defense, reasoned the court. The primary issue on this appeal was whether decedent's contributorily negligent driving could be a substantial factor in her death. Defendants had proven her negligent driving had caused the accident, but introduced no expert witness to state that her negligence was a substantial factor in her death as opposed to the accident itself. The trial court held there was no credible evidence to support the jury verdict finding that decedent's negligence was a cause of her death. "[I]s it permissible inference or conclusion that decedent's negligent driving was a cause of her death as well as to the extent it was a contributing factor? The court is persuaded to the conclusion that it is not." 86 Wis. 2d at 637, 273 N.W.2d at 233. Juxtaposition of the trial court's recognition that the negligent driving was "a contributing factor" against his refusal to infer that it was a cause begs the question whether judicial analysis has now become completely alienated from analysis by other persons. But the supreme court agreed:

The legal conclusion that the jury could not be permitted to infer the cause of death from the speed and management of the vehicle alone is correct, although such evidence could be used to prove the cause of the accident.

. . . .

[The transcript [which was not provided] might reveal facts sufficient to support the jury's finding that Barbara Austin's contributory negligence was a cause of her death as well as of the accident.

86 Wis. 2d at 642, 293 N.W.2d at 239.

Summing up the court's positions, the facts and argument are as follows: Decedent's negligent driving resulted in a rollover accident at high speed, during which she was thrown about inside and thrown out of the vehicle after the defective seat belt she was wearing broke, resulting in her death. But, without more than these facts, her negligent driving cannot be considered as significant in causing the death. To reduce this to simplest form, one must first recognize that her negligent driving was a substantial, if not the sole factor in causing the accident. Thus to break the causal connection between her driving and the death, there is only one point in the linkage remaining — the accident itself. The positions of both courts can only mean that they refused to recognize that the accident was significant in causing her death.

While these holdings distinguish themselves ipso facto from common sense, this would not necessarily be true in a case with several causal forces in varying degrees of remoteness, because one or more remote causes may be too attenuated to recognize it even under the liberal Wisconsin "substantial factor" test (which, incidentally, does not require a cause to be exclusive or even primary in order to be legally recognized). See the earliest opinion in this same litigation, Schnabl v. Ford, 54 Wis. 2d 345, 353-
Plaintiffs sought, *inter alia*, review of the trial court's dismissal of the warranty claims for lack of notice. Noting its probable lack of jurisdiction to reach the notice question in this appeal, the court held that it was not necessary to do so in view of its actual disposition. Nonetheless, the court did find it "appropriate" to seize the moment and announce that "it is inappropriate to bring an action for breach of warranty where a tort remedy is sought." The preference for strict liability expressed in *Dippel* was not explicitly amplified to require dismissal of warranty allegations in products cases, or at least in those cases that are, as *Austin* was, grounded "in tort."  

54, 195 N.W.2d 602, 607 (1972).  

But here the incident was relatively simple and no such attenuation occurs. Decedent's negligent driving caused an accident which was joined by one other cause, a breaking seat belt, which other cause itself was set in motion from its passively defective state by her negligent driving, to produce fatal injuries. The legal nicety of distinguishing cause of death from cause of accident leading to death may be correct, but it does not support the artificial, arbitrary severing of cause in a classical, straightforward case of dual causation or causation by chain-of-events-set-in-motion by a negligent actor. The court failed to recognize any problem in seemingly requiring of defendants proof that the death would have occurred without the break in the belt. This unrealistic and restrictive single-cause concept is inconsistent with prior Wisconsin practice. For instance, the inference of cause of injury or death from cause of accident which the court eschewed in *Austin* is routinely accomplished in other comparative negligence cases, particularly where active-passive negligence questions are involved. See Wisconsin Civil Jury Instructions 1500, 1580 and Comment to 1500, paragraph 4.  

The next appeal was *Austin v. Ford Motor Co.*, 73 Wis. 2d 96, 242 N.W.2d 251 (1976), involving post verdict motions and rights of appeal, and holding that plaintiff had the right to appeal from an order for a new trial even though plaintiff had moved for a new trial in the alternative to judgment n.o.v. or judgment on the verdict "as approved" by the trial court's partial rejection of the verdict on causal contributory negligence. Finally, the principal case, *Austin*, resolved the litigation 13 years after the incident.  

41. The instant appeal was from an order. "[D]efendant also asserts correctly that . . . where the appeal is taken from an order, prior intermediate orders are not before the court. On appeals from orders, this court lacks jurisdiction to review a prior intermediate order. United States v. Burczyk, 54 Wis. 2d 67, 194 N.W.2d 608 (1972)." 86 Wis. 2d at 644, 273 N.W.2d at 240.  

The strict liability claim provided a recovery of 100% of damages making the warranty claim "irrelevant and extraneous." *Id.* at 644, 273 N.W.2d at 239.  

42. 86 Wis. 2d at 644, 273 N.W.2d at 240.  

43. Whether the qualifier "in tort" is a meaningful definition or limitation may be questionable. *See* text accompanying notes 63-110 *infra*. Practically speaking, *Austin* will reach any case brought over a substantial defect in a product.
C. Other Jurisdictions

There is a split of authority among the states as to whether a plaintiff may properly maintain an action grounded in breach of warranty, where the remedy sought is compensation for personal injuries caused by a defective product which is unreasonably dangerous. Even those courts that advocate this restriction of warranty theory acknowledge that such a restriction might conflict with the express provisions of the U.C.C.\(^4\)

Six months prior to *Austin*, for instance, the New York Court of Appeals hinted that it was willing to impinge on the U.C.C. by restricting or eliminating the availability of its warranty provisions.\(^5\) Only three years earlier, the Appellate Division had stated:

> [T]he fact that New York now recognizes a strict-products-liability cause of action does not mean that breach of warranty under the Uniform Commercial Code no longer exists. The breach-of-warranty causes of action under the code are primarily related to the sales contract . . . and are separate from a strict-products-liability cause of action, which is wedged to the concept of a tortious wrong.\(^6\)

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\(^4\) The express warranty provisions of the Uniform Commercial Code are contained in the following language from U.C.C. § 2-313:

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.


The New York Court of Appeals affirmed the Appellate Division and expressly stated that four theories — express warranty, implied warranty, negligence, and strict liability — were available to plaintiffs and could be pleaded alone or in combination. This reflects the majority rule and the pre-Austin Wisconsin rule.

Then, in Martin v. Julius Dierck Equipment Co., New York suggested that it might not continue to recognize a separate warranty cause of action based on the U.C.C. Martin involved a local sale but an out-of-state injury. The court held that negligence and strict liability claims accrue in the state of injury and that breach of warranty claims which would accrue in the state of sale required privity. Because the parties were not in privity, the plaintiff was out of court. This strict interpretation of privity occurred despite the fact that after the approval of the concurrent availability of warranty and strict tort liability, the New York Legislature had liberalized the Code's warranty coverage to include any natural person who could reasonably be expected to be affected by the product.

The dissent in Martin argued that the legislative policy was now so clearly expressed that the court should have applied the new amendment by analogy and brought the case within the Code:

As a third party beneficiary, anyone who falls within the protected class may, of course, bring a direct action for breach of warranty against the seller . . . . Such a cause of action is independent of the strict products liability cause of action which we recognized in Codling and characterized as tortious in Victorson; it is instead a contractual remedy created solely by the provisions of the Uniform Commercial Code and the terms of the contract between the buyer and the seller . . . .


50. See text accompanying and note 47 supra.

51. U.C.C. § 2-318 [alternative B].

52. 43 N.Y.2d at 595, 374 N.E.2d at 403, 403 N.Y.S.2d at 192 (dissenting opinion).
Justice O'Connell of the Oregon Supreme Court has argued that acceptance of strict liability in tort terminates the applicability of the Code.

I can see no reason for recognizing a cause of action as arising under the Code once this court has taken the step of designing its own theory of products liability outside the Code. The practical effect of our holding is that §402A is the exclusive test of liability.53

Justice O'Connell also argued, in the same opinion, that a court was not free to adopt section 402A in situations covered by U.C.C. warranty theory because the Code had preempted it.54 He found that the legislature had effectively acted in the


One of the most thorough and balanced treatments of the preemption problem is Titus, supra note 54. Professor Titus develops a comprehensive and sophisticated analysis of the doctrinal foundation for adoption of § 402A despite enactment of the U.C.C. on a state-by-state basis.

Other useful authorities include: Dickerson, Was Prosser's Folly Also Traynor's?, 2 Hofstra L. Rev. 469 (1974) [hereinafter cited as Dickerson]; Franklin, supra note 31; Miller, supra note 32; Prosser, The Fall, supra note 8; Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rut. L. Rev. 692 (1965); Speidel, Products Liability, Economic Loss and the UCC, 40 Tenn. L. Rev. 309 (1973) [hereinafter cited as Speidel]; Wade, supra note 27.

In Dippel, the Wisconsin court relied in part on Prosser, The Fall, supra note 8, at 801, to the effect that 1) potential molding of the substantive U.C.C. remedies would take too much development time, and 2) in somewhat of a contradiction, that it was really only a change in terminology. 37 Wis. 2d at 456, 155 N.W.2d at 61. Other
area and had created "an integrated and comprehensive scheme under which recovery for personal injuries may be sought by privity and non-privity plaintiffs."\textsuperscript{55} He contended that the undesirability of the restrictive Code features "does not give us license to purge them from the statutes,"\textsuperscript{56} even while finding license to nullify the entire Code warranty scheme.\textsuperscript{57}

Professor Dickerson has traced the evolution of the Wisconsin position as follows:

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

\ldots

More disturbing is the general attitude, now settling in, that somehow we may generally forget the Code so far as the consumer is concerned. Now becoming typical is the statement in \textit{Suvada v. White Motor Company} that "[o]ur holding of strict liability in tort makes it unnecessary to decide what effect section 2-318 has on an action for implied warranty."

\ldots

Today the ascending view is that there is again only one
strict liability stream in the consumer area, except that now it is §402A, and not the Code.\textsuperscript{58}

On the other hand, California, the state that first adopted the formal theory of strict tort liability in \textit{Greenman v. Yuba Power Products},\textsuperscript{59} recognized that different policies and sources of law necessarily co-exist in the extremely broad area of "products liability." Holding in \textit{Seely v. White Motor Co.}\textsuperscript{60} that the U.C.C. governed products cases involving economic loss,\textsuperscript{61} the court observed that strict liability "was designed not to undermine the warranty provisions of the Sales Act or the Uniform Commercial Code."\textsuperscript{62}

III. \textbf{An\textit{a}lysis — The Practical Effects of \textit{Austin}}

\textbf{A. Scope: Intended v. Practical}

The threshold difficulties in evaluating the legal impact of \textit{Austin} are the numerous issues the case has raised, and the wide variety of possible interpretations. A preliminary question is whether the case affects express warranty as well as implied warranty since much of the language in the opinion refers to warranties in general.\textsuperscript{63} At one point, the court referred to "warranty and implied warranty," suggesting that express warranty was included. In several other instances, the court utilized broad language, which seemed to subject both types of warranties to its imperatives. In addition, to the extent that the context aids in determination of intent, the case itself involved both express and implied warranty theories, both of which were dismissed for lack of notice.

On the other hand, the \textit{Austin} court referred several times to implied warranty only in the later stages of its discussion. One of these references included an expression of approval of the lower court's dismissal of the "implied warranty" count,\textsuperscript{65} indicating the court may have assumed that only implied war-

\begin{footnotes}
\item[58.] Dickerson, \textit{supra} note 54, at 481, 483 (footnotes omitted).
\item[59.] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
\item[60.] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
\item[61.] Typically defined as damage to or defect in the product itself and lost profits. \textit{See} Annot., 16 A.L.R.3d 683, 685 (1965).
\item[62.] 63 Cal. 2d at \textit{supra} note 54, at 483.
\item[63.] The common features include privity, disclaimer, and notice.
\item[64.] 86 Wis. 2d at 645, 273 N.W.2d at 240.
\item[65.] 86 Wis. 2d at 646, 273 N.W.2d at 241.
\end{footnotes}
ranty had been employed. Thus, a case could be made for the proposition that the court intended no impact on breach of express warranty claims. Were this true, Austin's effect probably would not be narrowed substantially. Implied warranty has proven more significant than express warranty in products case recoveries,\textsuperscript{66} in part because actual promises of specified quality by sellers are less common than the existence of reasonable expectations of buyers. A case could be made also for the proposition that the strong "preference" of the court for strict liability\textsuperscript{67} and the ambiguous references to warranty in general may have the actual, pragmatic effect of trial court dismissals of express warranty and implied warranty cases.\textsuperscript{68}

It might be helpful in examining the other questions raised by Austin to note the ambiguous and inconsistent use throughout the discussion of old and new procedural terms of art.\textsuperscript{69} At one point, the court referred to actions really brought "in tort" as mislabeled as breach of implied warranty, and stated that the word "warranty" should be discarded from the products liability vocabulary. This would suggest that the Austin change is one of name only, or that warranty is an obsolete tort theory.

Other passages which refer to the bringing of a warranty "action" or warranty "cause of action" when the "recovery," "remedy," or "action" is actually "in tort" may be viewed in

\begin{footnotes}
\footnote{66. White & Summers, Handbook of the Law Under the Uniform Commercial Code § 9-6 (1980).}
\footnote{67. See text accompanying notes 13-62 supra.}
\footnote{68. Thus effecting what Professor Dickerson, supra note 54, has termed the "single stream" theory.}
\footnote{69. Examples include: "where the cause of action is in tort," 86 Wis. 2d at 644, 273 N.W.2d at 240 (emphasis added); "it is inappropriate to bring an action for breach of warranty where a tort remedy is sought," Id. (emphasis added); warranty "is encumbered with the ancient baggage of contract actions and should not be employed where the recovery is one for tort," Id. (emphasis added); "[t]o assert a cause of action for breach of warranty or implied warranty in a tort action is not fatal to the pleader's cause, but the interest of justice ... will be expedited if warranty claims, as such, are rejected," Id. at 645, 273 N.W.2d at 240 (emphasis added). Finally the longest statement is: [W]here an action is brought in tort but denominated as a breach of implied warranty, the cause of action may be maintained if sufficient facts are alleged to state a claim for strict liability in tort, but the warranty action as such should be dismissed. In the event the facts alleged in the warranty action are insufficient, ... leave to plead over in strict liability in tort may be granted. Id. at 645-46, 273 N.W.2d at 241 (emphasis added).}
\end{footnotes}
at least three ways. The language could suggest that the pleading was intended to allege a tort but is using an outmoded and now unacceptable tort theory. Alternatively, it could mean that a single, unified substantive nature for the whole action is to be identified and is to control what theories may be pleaded — when that nature is tort, no warranty theory may be maintained. Finally, the language may mean that when a conventional tort remedy is in fact sought, the breach of warranty is not appropriate as another claim or theory and must be stricken. In other words, a party may not plead both strict liability and breach of warranty but may plead either alone.

Another question raised by Austin is whether the decision affects warranty outside of its tort-law context. One might suggest that Austin merely defined warranty out of tort law as an obsolete tort theory or as a nomenclature problem. This in turn would require the conclusion that, in merely striking down tort-based warranty, Austin had no effect on U.C.C. provisions or contract law.

This position is not tenable. First, although Schnabl v. Ford itself referred to the tort character of warranty, Wisconsin common law warranties were considered a part of contract law. Second, Austin employed exceedingly general language and seemed to preclude recognition of any substantive basis for implied warranty theory in products cases. Third, the statement referring to "breach of warranty or implied warranty," suggests the court also may have been touching on express warranties, which are founded in the contract relationship.

More importantly, Austin harkened back for its rationale to the philosophy and policy of Dippel v. Sciano. Both the Dippel court and Dean Prosser recognized that warranty

70. 54 Wis. 2d 345, 195 N.W.2d 602 (1972).
71. Id.
73. Notwithstanding the parallel tort doctrine of misrepresentation of fact. See, e.g., Restatement (Second) of Torts § 402B (1965).
74. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
75. Prosser was inconsistent. He realized that the Code had taken over as a foundation for the extension of warranties, yet he advocated the view that warranty should be treated only as a tort matter, thus permitting the judiciary to simply re-
theory was grounded on the Uniform Commercial Code. Both Dippel and Prosser reasoned that the Code draftsmen had had the opportunity to salvage warranty by modifying its objectionable features but had failed to do so, requiring the courts to act. The route taken by Dippel and suggested by Prosser favored outright replacement of warranty theory rather than supplementation. Austin renewed the criticism of those warranty features existing under the U.C.C.

The final blow to reading the case as restricted only to so-called "tort warranties" is the fact that Austin itself was brought on both express and implied warranties, and the express warranty count was successfully challenged by the defendant on U.C.C. notice requirements. The court's approval of the dismissal order in effect affirmed an order rejecting U.C.C. claims because of noncompliance with U.C.C. requirements. Moreover, the subsequent practice under Austin in actual litigation confirms that the real impact is on U.C.C.-based warranty claims. Realistically, in Austin, as in the typical product case, the dispute over warranties involved statutory sales warranties. To assert with respect to Austin the concept of "tort warranty," amounts to a "straw man" argument deflecting the actual thrust of the case.

Realistically, then, the inquiry must be directed at the larger task of developing the rule which defines the circumstances, if any, in which one may maintain claims or counts based on Wisconsin Statute sections 402.314-15 after Austin. The most narrow formulation of the Austin rule would be that a warranty claim is barred only when a plaintiff actually pleads strict liability. This interpretation is unlikely because the court clearly stated the rule is operative even when strict tort liability is not pleaded. If the pleading fails to sufficiently set forth a strict tort claim, it will be dismissed with leave to replead properly.

The more likely interpretation would be that a warranty

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76. Describing the basis for the dismissal order as avoiding encumbering the case with duplication. 86 Wis. 2d at 646, 273 N.W.2d at 241.


78. 86 Wis. 2d at 645-46, 273 N.W.2d at 240.
claim is barred only if the nature of that action is "in tort."
The court evidently is unwilling to allow the pleadings to de-
termine the "nature" of the action. By negative implication, the
court will look to the underlying facts — to the conduct, action, events and type of harm alleged. Under this inter-
pretation, the nature of the action will then be determined by what substantive area of the law appears to fit the facts. Hence, the Austin court implicitly found that a defective product, an accident and a personal injury amounted to a "tort action" seeking a "recovery in tort," notwithstanding the concomitant breach of a U.C.C. warranty. Once the court de-
termines that the true nature of the action is tort, the plaintiff will not be permitted to maintain warranty allegations.

This interpretation conforms most closely to the language of the Austin opinion. It also invokes the type of rigid think-
ing behind the old concepts of "forms of action" and "theory of the pleading." The approach requires an arbitrary defini-
tion of an entire complaint or action as necessarily "of" a single nature and precludes another count which is of a different nature even though the theory independently fits the facts.

Extremely technical analysis, uncertainty, and inconsist-
tency can result when courts are forced to characterize indi-
vidual actions as being of a particular "nature." A host of variables might attend this process. What if the parties are commercial entities? What if one party is a business while the other is an individual consumer? Perhaps a different legal na-
ture would arise if the harm is property damage, or if the only injury is repair cost. What if personal injury is involved? Will unequal bargaining power or a shotgun complaint pschologi-
cally influence the determination? Will a "predominant" char-
acter of the action be sufficient if the choice is not crystal clear? These considerations will come into play as courts at-
tempt to define an action as "in contract" or "in tort."

Further, in contemporary civil practice, the appropriate level of analysis for determining the theoretical nature(s) as-
certed by plaintiff is not the whole action or complaint, but rather each allegation or grouping of allegations which states a claim under some liability theory. Thus, several "natures"

79. See note 78 supra and text accompanying.
may attach to one complaint and action, and because several theories from diverse areas of the law may fit the facts, each may be properly maintainable.

Aside from these analytical burdens, contemporary civil procedure and pleading rules cast doubt on this construction of *Austin*. In Wisconsin, there is only one form of action—a "civil action."*81* In this action, one may set forth several statements of a claim, hypothetically or alternatively, regardless of consistency and whether based on legal or equitable grounds.*82* Thus, a plaintiff may allege multiple theories to support one claim. In addition, a party may join any and all claims the party has against the other party, regardless of their nature, in one action.*83* Finally, an initial challenge to the pleading for redundancy ordinarily should not succeed because strict tort and warranty are not co-extensive theories.*84*

To the extent that the *Austin* holding is a pleading rule in products cases, it seems contrary to the spirit, if not the letter, of the civil procedure code.

The most troublesome aspect of the pleading interpretation of *Austin* is the suggestion that when the *Austin* rule is triggered by the so-called "tort" nature of an action, the technical legal result is that the warranty count fails to state a claim upon which relief can be granted. In other words, a warranty count, sufficient on its face, states a legally recognized liability theory in one complaint but not another.

Normally, if a theory of liability is recognized in a jurisdiction, then a pleading which incorporates the elements of that theory states a valid claim. Recognition of the theory requires that when a set of facts positively meets the terms of the theory, the validity of the resulting claim cannot turn on subjective preferences or extraneous factors that do not negate the elements of the legal theory, such as a pleader's choice to state other theories of the same or different substantive body of

1979) (adoption of 402A does not result in demise of warranty; a given set of facts can support alternative theories in products liability area: in tort for negligence and strict liability and in contract for breach of implied warranty. In this case, each was a sufficiently alleged cause of action).

82. Wis. Stat. § 802.02(5)(b) (1977), provided they are pleaded in good faith.
84. See text accompanying notes 104-10 infra.
law. There is no room for a "here today, gone tomorrow, back the next day" approach to recognizing a legal theory if sufficiently pleaded in its own right.

In summary, application of Austin in the relatively narrow sense of a specific rule of pleading would be a return to the anachronistic procedural games of the code pleading era. In products liability cases, procedural rulings would become more tenuous and substantive rules of law could be subject to inconsistent application, thereby defeating the rational functionalism of the new Wisconsin rules of civil procedure.

A broader reading of Austin is also possible — that products liability cases are to be grounded only in a tort theory of strict liability (or negligence). This construction would eliminate warranty theory in products cases as a practical matter. The advantage of this construction is its simplicity. Instead of leaving some vestige of a cognizable claim in warranty when the action could be characterized as "in contract," this interpretation eliminates the uncertainty by abolishing warranty altogether in the products context.

This more expansive version is supported by the overall thrust of the court's discussion. The court's analysis seems to treat the entire products liability field as a matter of tort law. This view of products liability is evident in the following language from the Austin opinion: "The legal fiction of warranty which was useful in the transitional stage of the development of products liability law should be rejected; and where the action is one in tort, the only appropriate action is that of strict liability in tort . . . ." The fiction of warranty was seen as a disposable stepping stone in route to the destination of strict liability in tort. This historical viewpoint of the court bolsters its current disposition to equate all products cases with tort theory. What emerges from this legal-philosophical posture is the notion that products liability is exclusively a tort matter, free of all "encumbering" hybrid and contractual characteristics.

The accuracy of this broader view of Austin rests on
whether the larger pattern of the court and the Austin discussion taken as a whole convey more content than the court's use of conditional phrases such as "where the action is one in tort." This author believes the intent, spirit and ultimate practical effect of the case is to remove "all products liability cases from the provisions of the Uniform Commercial Code." Even if such intent by the court has not yet fully materialized, the pragmatic effect of the decision likely will be the evisceration of the U.C.C. warranty provisions from the products liability field.

B. Scope of Cases Affected

The reach of Austin rests in part on the question of what constitutes a products liability case within the tort framework of Wisconsin law. Where strict liability is applicable, Austin is applicable. Where Austin is applicable, warranty theory is unwelcome. As it happens, the Wisconsin court has extended strict liability to an unusual degree, beyond Dippel and the case law of other jurisdictions, thus assuring maximum destruction of warranty theory.

In City of La Crosse v. Schubert, Schroeder, & Associates, Inc., plaintiff sought to recover the cost of replacing a defective product, a roof, as well as the repair cost for other property damaged because of the product's defects. The defendants included designers, builders and suppliers. On appeal, the court held that strict liability in tort extends to damage to the product itself that is coincident to damage to other property. More importantly, the court stated in dictum "that a strict liability claim for pure economic loss involving only the cost of repair or replacement of the product itself and loss of

89. 86 Wis. 2d at 645, 273 N.W.2d at 240.
91. And "products liability" has turned into a far reaching area indeed. See text accompanying notes 94-98 infra.
92. See text accompanying notes 94-97 infra.
93. See note 97 infra.
94. 72 Wis. 2d 38, 240 N.W.2d 124 (1976).
95. Note that the court assumed without analysis that this was properly a sale of goods transaction.
96. 72 Wis. 2d at 44, 240 N.W.2d at 127, relying on City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973) (the case first applying this rule — with no analysis).
Thus, the court extended strict liability into prime U.C.C. territory to cover cases where the defect in fact produces no consequential damage or injury, but remains a mere condition requiring correction.

Unless Austin is modified, it could, if read in conjunction with La Crosse, result in the elimination of warranty provisions where they work best — exclusively commercial transactions involving only commercial harm that would otherwise be completely covered by the provisions of the Uniform Commercial Code and the freely negotiated contracts thereunder. Of course, consumers also will gain from the La Crosse extension of strict liability and be subject to the concomitant Austin restriction, even in cases of pure economic loss such as repair and replacement costs.

One might argue that courts will not apply Austin, a consumer personal injury case, to a situation involving economic harm in a transaction between two commercial entities perfectly suited to the U.C.C.'s provisions and policies. However, recent lower court decisions have applied Austin strictly and have therefore dismissed warranty claims, even in the purely commercial setting. In one case, a Wisconsin manufact-

97. 72 Wis. 2d at 44, 240 N.W.2d at 127. Property damage, for purposes of products liability, often is defined so as to exclude damage or defect to the product itself and instead refers only to damage to other property. See Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (App. Ct. 1977); Annot., 16 A.L.R.3d 683, 685 (1967).

An important restriction on the scope of strict tort liability held by a majority of courts, see 1 PROD. LIAB. REP. (CCH) ¶ 4230 (1979), but no longer by Wisconsin, is the refusal to extend a strict tort recovery to nonconsumer, purely commercial or economic losses alone. Here the Code continues to play a dominant role. See Franklin, supra note 31, at 981; Annot., 16 A.L.R.3d 683, 685, n.2. (1967).

The leading case is Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), wherein the California court, through Justice Traynor, became more reflective and less reflexive on the interrelationship between strict tort liability and the U.C.C. The court defined the scope of strict tort as not extending to mere cost of repair of defect and lost profits. See also Hawkins Construction Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N.W.2d 643 (1973); Signal Oil & Gas Co. v. Universal Oil Products, 572 S.W.2d 320 (Tex. 1978). The leading case allowing recovery in strict tort is Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

98. See text accompanying notes 110-18 infra.


100. See text accompanying notes 110-18 infra.
turer brought suit to recover repair or replacement costs and lost profits due to down time resulting from defective machinery parts supplied by the defendant corporation. The plaintiff alleged negligence, breaches of U.C.C. warranties, and strict liability. The court, relying solely on *Austin*, granted the defendant corporation's motion to dismiss the breach of warranty count for failure to state a claim upon which relief could be granted.

In [*Austin*], our Wisconsin Supreme Court concluded that following its decision in [*Dippel*], that it would be inappropriate to bring an action for breach of warranty where a tort remedy is sought . . . . The supreme court said, "Under the rationale of *Dippel*, therefore, where an action is brought in tort but denominated as breach of implied warranty, the cause of action may be maintained if sufficient facts are alleged to state a claim for strict liability in tort, but the warranty action as such should be dismissed." Accordingly, this Court determines that the plaintiff's first claim which this Court views as a breach of warranty should be dismissed and the motion by the defendant is granted.\(^{102}\)

Plaintiff had argued that *Austin* was not intended to apply, nor should apply, to sales warranty provisions in purely commercial transactions. Despite the plaintiff's warning that such an application of *Austin* would "emasculate the Uniform Commercial Code"\(^{103}\) in the very context for which the Code was intended, the court refused to reconsider its dismissal. In effect, it confirmed that *Austin* means what it said, and has left no such pockets of survival for U.C.C. warranties.

### C. Prevention of Recovery

A hypothetical case illustrates further the potential effect of *La Crosse* and *Austin* on U.C.C. warranties and ultimate recovery. Assume that Manufacturer contracts with Supplier to sell and ship, in assembled form, a widget press with which Manufacturer will make widgets. Through no acts of negligence, the rim of an internally rotating disc has

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102. *Id.* at 1-2.
103. *Quoted in* Memorandum of Philadelphia Gear Corporation in Opposition to Motion for Reconsideration, at 3.
been bent during final assembly. Manufacturer accepts, installs and uses the machine. During three months of operation, the defective disc places increased stress on its three anchoring bolts. One breaks, and the disc begins to shimmy noticeably. The press is shut down and Manufacturer complains to Supplier without satisfaction.

In Manufacturer's lawsuit to recover repair cost and profits lost during one week of down time, Manufacturer pleads breach of express warranties, breach of implied warranties, and strict liability in tort. On defendant's motion to dismiss, most states would dismiss the strict liability claim because that theory does not extend to the type of damage claimed. On the other hand, the warranty claims would be sustained, the case being a classic U.C.C. Article Two matter.

In Wisconsin, however, the reverse could occur. *La Crosse* specifically approves recovery under strict tort liability in these circumstances and this claim would not be dismissed. Actions for repair costs and lost profits resulting from defective products are tort remedies in Wisconsin, the recovery is one for tort, and the claim is properly "in tort." Therefore, like the *Allis-Chalmers* court, mentioned earlier, the court here would dismiss the warranty claims pursuant to *Austin*. Had Manufacturer pleaded only in terms of warranty, the court would have tested the sufficiency of the facts for their ability to state an action based on strict liability in tort. If the counts had failed to meet the elements of strict liability, the court would have dismissed the complaint with leave to plead over.

Extending the hypothetical demonstrates that *Austin* further can alter the liability finding under certain circumstances. If the evidence would show that the product clearly had failed to conform to its stated quality or had failed to meet the standards of merchantability. However, expert witnesses for the litigants disagree on the potential danger of the bent disc. The jury is

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104. What if in fact the condition of the product was not unreasonably dangerous? This would rarely have legal effect on the conduct of the action, for it would not be officially found until late in the process.

105. Assume that the evidence establishes that defendant exercised more than reasonable care.

106. See U.C.C. § 2-314.
presented with evidence indicating that at shipment time, the defect created little or no danger and was minor in nature, a problem easily detected and rectified. On the other hand, plaintiff's evidence indicates that the disc could have sheared all its bolts, flown loose, pierced the outside casing and struck the operator. The case goes to the jury on the disputed factual issue.

Recall that this case involved no "accident," no damage to property, except for the product, and no emotion-invoking human pain or suffering. The jury finds that the condition of the product was not unreasonably dangerous and thus fails to meet an element of strict liability. Plaintiff is out of court. Although there is evidence sufficient to prove breach of warranties, plaintiff could not proceed on that theory under Austin. The required dismissal of the warranty counts rendered certain warranty evidence and arguments irrelevant and inadmissible. The issues of merchantability and fitness for intended purposes could not be tried or decided. The plaintiff would lose on liability where he would have won prior to Austin.

How would the judicial system respond to such a sequence of events? Because the courts have ruled that products liability actions are to be brought only on strict liability and negligence theories, failure to satisfy their requirements means losing the case. This system, the court might reason, is dictated by the policy advantages of strict tort liability, including its relative lack of procedural pitfalls and its accommodation of comparative negligence. The greater good might justify the unintended harm. Or, perhaps, touched by a concern for justice in the individual case and recognizing the inadvertent result, the court instead might act in a remedial fashion. It could create an exception or proviso to Austin, to the effect that an official finding of fact that the product was not in an unreasonably dangerous condition because of a defect, but was below merchantable quality or other U.C.C. standard, converts the action from one "in tort" to one "in contract." Then a court might resurrect the "rejected" warranty claim so that it would now state a claim upon which relief could be

107. See note 25 supra.
108. See Austin v. Ford, 86 Wis. 2d at 647, 273 N.W.2d at 240.
granted. Finally, the case could go all the way to haunt the supreme court with the unintended ramifications of Austin, and result in clarification of the Austin rule. Then the court could decide that Austin is not authority for summary dismissal of warranty counts.\textsuperscript{109}

This later scenario is more likely to result if the plaintiff subjected to the Austin rule is a consumer, particularly one who is personally injured. Vary the hypothetical so that the press is for home workshop use and the seller is a national retail chain. Again, because any harm to the consumer in terms of repair cost is also recoverable in strict tort, warranty counts probably would be dismissed. If the jury weighs the same contradictory evidence objectively and finds no unreasonably dangerous condition in the product at sale, the consumer's action will fail.\textsuperscript{110} This might be a compelling case for modification of the Austin rule by the supreme court, and the court could avoid a morass of complicated litigation by acting at its next opportunity.

IV. Austin: Improper Means to a Valid End

Regardless of the exact breadth one gives Austin, the case will have, and already has had, the effect of judicially nullifying, to some degree, a statutorily provided theory of liability. The supreme court has made unavailable, either to individuals in certain cases or to all plaintiffs claiming for defects in products, a recovery scheme specifically adopted by the Wisconsin Legislature.\textsuperscript{111}

\textsuperscript{109} See text accompanying notes 110-18 infra.

\textsuperscript{110} One might expect that whenever personal injury results, a jury would be influenced by a de facto presumption that the product was unreasonably dangerous — if it hurt someone, it "must" have been unreasonably dangerous, even if no other evidence indicates this. Of course, evaluation of the degree of danger must focus on the actual condition at time of sale. The injury, without more, can no more properly establish an unreasonably dangerous defective condition than it can establish the defect in the first instance. See W. Prosser, Torts, supra note 3, § 103 at 671.

\textsuperscript{111} Among the problems with the warranty aspects of the Austin case, one preliminary difficulty goes to the court's internal inconsistency through the course of the litigation. One should recall that the court made new law to justify exercising jurisdiction over the case under the Wisconsin wrongful death statute. It held that the Wisconsin statute applied to the case because the contractual breach of warranty claim asserted by plaintiff, based on a sale in Wisconsin, alleged a "wrongful act" causative of death within the meaning of the statute and thus the case was not defeated by the general rule that a tort claim accrues in the state of injury. In view of 1)
There is no constitutional objection to Wisconsin Statute sections 402.314-15 upon which to ground this abrogation. Nor does the court's interest in judicial administration, efficiency, and prevention of wasteful duplicative trials justify the result *Austin* will bring. The court should not have formulated a rule which would result in a preemption of a legislatively extended legal claim. It is submitted that the *Austin* rule exceeds the court's authority by effectively operating as a judicial repeal of Wisconsin statutes.

Obviously, valid interests exist which might justify some form of control over the theories advanced in litigation. These interests surface collaterally in the following language of *Austin*: "It is clear, therefore, that the trial court appropriately ruled that the plaintiffs could not encumber the case by trying it on the duplicative theories of strict products liability and breach of implied warranty." This passage is the key to the court's real concern — a fear of encumbering cases with duplicative theories.

It also clearly indicates that the per se *Austin* ban on warranty theory is the result of an assumption that strict tort and implied warranty are always duplicative. However, that assumption is incorrect. Different facts must be proven to establish liability under the two claims and each potentially could permit recovery where the other would not.\(^{113}\)

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the trial court's dismissal of the warranty claims; 2) the supreme court's characterization — patently contrary to the pleadings and the substantive law — of the *Schnabl* warranty counts as really a misnamed strict liability count, in tort; 3) the fact that the warranty counts were extraneous to recovery; and, 4) the high court's holding that in such a context, warranty counts failed to state cognizable claims, one may have expected illumination from the court on the complete undercutting of *Schnabl*'s justification for keeping the case alive and the alternative legal basis responsible for the continued exercise of jurisdiction.

112. 86 Wis. 2d at 646, 273 N.W.2d at 241. The quoted statement stretches the facts a bit, since the trial court dismissed for lack of required notice. See note 39 supra.


"Merchantability" is the most important standard for warranty, and it is defined in U.C.C. § 2-314(2). The Wisconsin version of U.C.C. 2-314 is Wis. Stat. § 402.314, set out at note 12 supra. Among products held unmerchantable by courts have been watery wine, bad-tasting applesauce, and cars with starting problems. See the cases
The court’s other interest is evidenced by its rather obvious distaste for the “ancient baggage of contract” and “additional hurdles” of warranty, such as privity, disclaimer and notice.\textsuperscript{114} The court clearly is interested in protecting the consumer and permitting his or her just recovery. Strict tort liability is policy-based and justice-oriented.\textsuperscript{115} However, the court’s enthusiasm turned in \textit{Austin} from its previous expansion of strict liability and critical, but hands-off, policy toward warranty, to a negative approach of actually disposing of an additional source of consumer remedy. Preference for one liability theory is fine, but the existence of perceived advantages is no authority for eclipsing a legislative enactment.\textsuperscript{116}

In addition, the cumulative result of recent “progressive” case law in the products area\textsuperscript{117} has paradoxically been a counterproductive limit on the ability of consumers to recover. Practice after \textit{Austin} has shown that lower courts are willing to read the U.C.C. warranty sections right out of the statutes.\textsuperscript{118} This is not a desirable result. The Code reflects important and practical policy choices which ought not be ignored. In particular, commercial entities with equivalent bargaining power should be able to freely allocate risks as between themselves, without subsequent imposition of non-consensual standards based on inapplicable consumer protection policies. Just as the \textit{Dippel}-402A rationale of shifting the loss from the ordinary consumer to the entity more capable of absorbing it does not extend to the disputes about monetary losses between business enterprises, neither should the \textit{Austin}

\begin{itemize}
\item collected at Annot., 83 A.L.R.3d 694 (1978). \textit{See also} Speidel, \textit{supra} note 54, at 311. Mere “unsuitability” will suffice. Signal Oil & Gas Co. v. Universal Oil Products, 572 S.W.2d 320 (Tex. 1978).
\item 114. 86 Wis. 2d at 644, 273 N.W.2d at 240. \textit{But see} note 31 \textit{supra}. The requirements have been increasingly eroded by recent judicial activity.
\item 115. \textit{See generally} the comments to § 402A.
\item 116. An eclipse by a judicial body is defined by one commentator:
One should distinguish between a jurisprudential eclipse and a legislative repeal. A repeal of a statute takes place when the legislature by official act brings it to an end. In an eclipse, the statute remains unrepealed on the books but is blotted out by what the courts consider a superior body of law covering the same subject.
Shanker, \textit{supra} note 31, at 8 n.13.
\item 118. \textit{See text accompanying notes} 99-103 \textit{supra}.
\end{itemize}
rule, especially applied in tandem with the La Crosse case.

The court should supplement the U.C.C. with advantageous alternatives when needed. But concurrent, not exclusive strict tort liability, is the treatment mandated by Wisconsin law.

V. A Suggested Approach to Overlap

One sound compromise to the overlap of the Code and strict liability is that adopted by the Iowa Supreme Court. In Hawkeye-Security Insurance Company v. Ford Motor Company,\textsuperscript{119} the court refused to let a plaintiff have both implied warranty and strict liability submitted to the jury in a products case. On the second appeal,\textsuperscript{120} however, the court refined its position on the issue of mutual exclusivity.

We interpret our prior pronouncement to mean simply that \textit{we recognize it as a practical matter, as opposed to a rule of law}, that not many cases will involve both theories sufficiently to warrant having them presented for the consideration of a jury. We do not interpret it to mean \ldots that both theories shall never be given consideration in the same case.\textsuperscript{121}

Emphasizing that the particular facts would control, the court stated that most situations would not require both instructions because there would be duplication; in that situation, only strict liability would go to the jury.

This is an improvement over a preclusion of the whole liability theory, because it protects a plaintiff from being prejudiced by a flat rule where the facts of the case may yield a different result. It is submitted that \textit{Hawkeye} represents the furthest a court can legitimately go towards nullifying the remedies provided by a statute.\textsuperscript{122} Control over the trial and the jury instructions to insure that justice is accomplished without undue jury confusion defines the outer limits of the court's authority for restricting the availability of the statutory remedy when it is applicable by its terms.\textsuperscript{123} The court's

\footnotesize{\textsuperscript{119} 174 N.W.2d 672 (Iowa 1971).  
\textsuperscript{120} 199 N.W.2d 373 (Iowa 1972).  
\textsuperscript{121} Id. at 381 (emphasis added).  
\textsuperscript{122} See Ervin v. Sears, Roebuck & Co., 65 Ill. 2d 140, 357 N.E.2d 500 (1976).  
\textsuperscript{123} See Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971). Cases that}
authority to do so terminates when a material prejudice to the plaintiff would result. An order precluding a U.C.C. warranty theory should be reversible error if plaintiff is prejudiced by losing a verdict on other theories when the evidence justifies maintaining a warranty claim.

Wisconsin employed the same type of analysis in *Howes v. Deere Company*, 124 in which the minor plaintiff was injured when his foot came into contact with a riding lawn mower. The trial court forced the plaintiff to elect between negligence and strict liability theories. Plaintiff indicated a preference for strict liability but submitted instructions and a special verdict formulation on ordinary negligence as well. The trial court submitted only a strict liability question in the jury verdict. The jury found no liability. Reversing, the supreme court stated that it wished to remove any inference that *Dippel* authorized the trial court’s action in forcing an election. The *Howes* court held that a case-by-case analysis of the propriety of submitting either or both theories must be employed.

This is not an either-or situation requiring the plaintiffs to make the decision. The decision as to whether to submit one question or two questions, and the order of submission in the event of two questions is to be made by the trial judge in each case. The reason it might be appropriate to submit both questions on occasion is that the liability imposed in a negligence per se case is not based upon a failure to exercise ordinary care with its necessary element of foreseeability, both common elements of an ordinary negligence case

... 125

Thus, the court recognized that negligence and strict liability differ in proof elements and could potentially lead to

would permit a refusal to instruct on alternative warranty and strict tort theories turn on the countervailing factors of jury confusion and prejudice to the plaintiff; this latter factor is often controlled by whether the definition of defect for strict liability is identical to that of implied warranty or is more demanding. See Goblirsch v. Western Land Roller Co., 246 N.W.2d 687, 690 (Minn. 1978) (no prejudice, explicitly because definitions of “defect” were congruent and jury found no defect at all). See also Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971) (discussed in Goblirsch); Fisher v. Gate City Steel Corp., 190 Neb. 699, 211 N.W.2d 914 (1973) (definitions of defect implicitly the same; no prejudice). *But see* note 113 *supra*.

124. 71 Wis. 2d 268, 238 N.W.2d 76 (1976).
125. *Id.* at 273, 238 N.W.2d at 79.
different results. Both negligence and U.C.C. warranty actions impose burdens that strict liability does not.\textsuperscript{126} But warranty provides the important advantages of freeing a plaintiff from proving the lack of reasonable care required for negligence and the unreasonably dangerous nature of a defect necessary for strict liability.\textsuperscript{127} Therefore, warranty compares favorably with negligence in the \textit{Howes} rationale as an alternative theory to strict liability.

If the court recognizes that someone may be materially prejudiced under a strict reading of \textit{Austin} and decides that this situation is not permissible under the statutory law of Wisconsin, it probably will be able to effect adjustment to \textit{Austin} with little pain. The court could clarify that \textit{Austin} does not preemptorily bar U.C.C. warranty claims, but instead is to be construed as recognizing the authority of trial courts to employ a \textit{Howes} analysis to prevent unnecessarily confusing a jury.\textsuperscript{128} It is suggested, on the other hand, that the best policy in any case where the unreasonable danger element may be questionable, is that all theories supported by evidence be submitted in order to avoid needless relitigation.

\textbf{VI. Conclusion}

There is great temptation to surrender to the elegant simplicity of resorting to section 402A to solve all liability questions involving defective products.\textsuperscript{129} The Wisconsin Supreme Court has demonstrated a strong commitment to the strict liability theory as a vehicle for yielding the "correct" policy results. The court also has demonstrated a valid concern for unnecessary confusion in the litigation process.

But sometimes judges perceive statutes as "alien intrud-

\textsuperscript{126} Currently, Wisconsin warranty requires privity.
\textsuperscript{127} 2 FRUMER & FRIEDMAN, \textit{PRODUCTS LIABILITY} \S 16 A[4][g] (1979); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Heldt v. Nicholson Mfg. Co., 72 Wis. 2d 110, 240 N.W.2d 154 (1976); \textit{supra} note 25, at (1).
\textsuperscript{128} Factors to consider could include evidence to support each theory, potential prejudice to plaintiff in denying instruction on a theory which a jury might sustain exclusively and ability to maintain the theories distinct in the minds of the jurors.
\textsuperscript{129} The court did refrain at least from expanding the \S 402A theory to medical malpractice. Hoven v. Kelbe, 79 Wis. 2d 444, 256 N.W.2d 379 (1977). The dynamics of \textit{Hoven} include the fact that the significant holding concerned a contested issue, unlike \textit{Dippel, La Crosse} or \textit{Austin}. 
PRODUCTS LIABILITY

ers” to be obeyed only grudgingly,130 or to be treated as no
higher than case law.131 By resting on policy preference and
assumptions that sweep a bit too broadly, the court, in Austin
v. Ford, chose improper means of accomplishing its valid
ends. Austin has the effect of improperly preempting a liabil-
ity theory provided by statute which could result in actual de-
nial of recovery where it would otherwise obtain. The court
should modify the Austin rule to make it clear that the re-
striction on products liability theories is only proper to avoid
unnecessary duplication. The court should recognize that, be-
cause warranty and strict liability are not coextensive and
that the necessity of concurrent theory pleading often would
not be known until the factfinder completes its task, interfer-
ence with maintaining concurrent theories should be mini-
mized. The court should be guided in this problem area by the
policies of judicial restraint and separation of powers.

STEVEN P. MORSTAD

PATENTS — Patentable Subject Matter — Living
Man-made Organisms Held to Be Patentable Subject
Chakrabarty, 100 S. Ct. 2204 (1980). Article I, section 8
of the United States Constitution empowers Congress “[t]o
promote the Progress of Science and useful Arts, by securing
for limited Times to . . . Inventors the exclusive Right to
their . . . Discoveries.” Pursuant to this grant of power, un-
known at common law, Congress has authorized patent pro-
tection for the invention or discovery of “any new and useful
process, machine, manufacture, or composition of matter, or
any new and useful improvement thereof.”1 In the much pub-

(1936).
131. Landis, Statutes and the Sources of Law, in HARVARD LEGAL ESSAYS 213
(1934).

States, the Patent Act of 1790, specified the classes of patentable subject matter as
“any useful art, manufacture, engine, machine, or device, or any improvement
Act of 1793, Congress changed the classes of patentable subject matter to “any new