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Recent Decisions

RECENT DECISIONS

TORTS—Damages for mental and emotional distress—Mother who suffered shock and mental illness upon viewing her son's injuries resulting from a gunpowder explosion was entitled to damages in event negligence on part of defendant was proved. *Archibald v. Braverman* (Calif. 1969).

The defendant, in violation of state statute,[1] sold a quantity of gunpowder to the plaintiff's minor son, who subsequently was severely injured[2] by an explosion of the gunpowder. Moments after the explosion, the plaintiff appeared at the scene of the accident, and in an attempt to aid her son, suffered severe shock, fright, and mental illness requiring institutionalization. In this action for the mother's injuries, the trial court granted a summary judgment for the defendant, and the plaintiff appealed. The Court of Appeal, Fourth District, Second Division, for the State of California, *held* that the shock suffered by the plaintiff was fairly contemporaneous with the accident and thus, plaintiff was entitled to damages for mental and emotional distress, in the event that defendant's negligence was proved. *Archibald v. Braverman*, 79 Cal. Rptr. 723 (Dist. Ct. App. 4th Dist. 2d Div. 1969).

Damages for mental and emotional distress caused by a negligent injury to a third person have been a subject of great judicial controversy for many years. The majority rule is best stated as follows:

> [N]o recovery is permitted for a mental or emotional disturbance, or for a bodily injury or illness resulting therefrom, in the absence of a contemporaneous bodily contact or independent cause of action, or an element of wilfulness, wantonness, or maliciousness, in cases in which there is no injury other than one to a third person, even though recovery would have been permitted had the wrong been directed against the plaintiff. The rule is frequently applied to mental or emotional disturbances caused by another's danger, or sympathy for another's suffering. It has been regarded as applicable

1. CAL. HEALTH AND SAFETY CODE § 12082 (West Supp. 1969).
2. The injuries were: traumatic amputation of the right hand, wrist, and forearm; traumatic amputation of a portion of the left hand; severe lacerations of the body; injury to the right eye; and loss of copious amounts of blood.

> to mental or emotional disturbance resulting from an injury not only to a stranger, but also to a relative of the plaintiff, such as a child, sister, father, or spouse.[3]

The reasons most courts will not entertain these actions are expressed in the leading case of *Waube v. Warrington*,[4] which involved a mother who watched her infant child being run over by a negligent defendant. In *Waube*, the court analogized the plaintiff's position to that of Mrs. Palsgraf,[5] and held, that since no duty was owed, there was no negligence as to the plaintiff. Concern for an expansion of liability greatly overshadowing the defendant's culpability and the difficulty of effective administration of justice in these cases also led the court to deny recovery for Mrs. Waube's injuries.[6]

In *Amaya v. Home Ice, Fuel & Supply Co.*[7] the California Supreme Court originally adopted the *Waube* rationale. In *Amaya* another mother observed her infant child being run over by a negligent defendant. The court, in accord with the general rule[8] held that the defendant would not be liable for the mother's injuries because no duty was owned to her.[9]

Six years later in *Dillon v. Legg*,[10] the California Supreme Court overruled its decision in *Amaya*[11] and allowed a mother who witnessed her daughter's death in an automobile accident

3. 52 AM. JUR. *Torts* § 70 (1944).

4. 216 Wis. 603, 258 N. W. 497 (1935); *see* 18 A.L.R. 2d 220 (1951).

5. Palsgraf v. Long Island R. R., 248 N.Y. 339, 162 N.E.99 (1928). *Palsgraf*, the firecrackers—falling scales case, stands for the proposition that there is no negligence towards the plaintiff unless there is a duty of due care owed by the defendant to the plaintiff. Since Mrs. Palsgraf was an unforeseeable plaintiff there was no duty of due care owed to her.

6. Other courts have expressed concern with the problems of distinguishing between valid and false claims, the supposed lack of competent medical evidence, and the probability of being inundated with lawsuits if recovery is allowed to this class of plaintiffs.

7. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

8. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 518, 29 Cal. Rptr. 33, 38 (1963).

9. *Id.* at 520-22, 29 Cal. Rptr. at 40-42. The *Amaya* court, in part, relied on Reed v. Moore, 156 Cal. App. 2d. 43, 319 P.2d 80 (Dist. Ct. App. 3d Dist. 1957), which held that a plaintiff must fear for her own safety and could not recover for fear of an act which endangered her husband alone. *Amaya* also dealt at length with administrative and policy reasons in support of denying recovery—primarily the fear of overextension of defendant's liability and the increased possibility of whimsical and fraudulent claims.

10. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

11. There is an interesting sidelight to such a rapid reversal of *Amaya*. The trial court in *Amaya* ruled that the mother could not collect, and she appealed to the district court of appeal. There Justice Tobriner, in a decision slightly ahead of its time, held that Mrs. Amaya could collect for her mental and emotional distress. 23 Cal. Rptr. 131 (1962). The defendant appealed to the California Supreme Court.

During the interval between the district court of appeal decision in Amaya

to collect for the fright and shock she suffered. To establish a duty to the mother, the court adopted a policy proposed by Prosser: "it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock."[12] Asserting the position that duty is only the sum total of those policy considerations on which the defendant's liability is predicated, the court allowed Mrs. Dillon to recover.[13] *Dillon* substituted for an inflexible rule denying all recovery, the policy of determining case-by-case the merits of each particular action.

To aid the court in its case-by-case determination and to place *some* limit on the defendant's liability, *Dillon* adopted three factors[14] to be considered in cases where the plaintiff suffered an emotional shock which resulted in a physical injury. These factors are to be used in determining the foreseeability of injury to the plaintiff, or if a duty of due care is owed by the defendant to the plaintiff. The factors are as follows:

(1) Whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.

(2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and *contemporaneous observance* of the accident, as contrasted with learning of the accident from others after its occurrence.

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and the supreme court review of the case, Justice Tobriner was appointed to the California Supreme Court. The supreme court, Tobriner not participating, in a 4-3 decision, overruled the district court of appeal decision in *Amaya* and held that Mrs. Amaya could not collect for emotional and mental distress. The judge who acted in place of Justice Tobriner voted with the majority.

Six years later, when essentially the same factual circumstances arose in *Dillon v. Legg*, the California Supreme Court in a 4-3 decision overruled the *Amaya* decision. The opinion, written by Justice Tobriner, bears a remarkable resemblance to the district court of appeal decision in *Amaya*.

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55 (3d ed. 1964), at 353.

13. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 923, 69 Cal. Rptr. 72, 83 (1968). The court disposed of the contentions involving administrative difficulties of a rule that would allow recovery by quoting from Hambrook v. Stokes Bros., [1901] 2 K.B. 669, 681.

> I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim.

14. Prosser suggests two other limiting factors. That the injury inflicted on the third person must be a serious one, and that the plaintiff's shock must result in physical harm. W. PROSSER, *supra* note 12, at 354.

(3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[15] (emphasis added)

The court in *Archibald v. Braverman*[16] was called upon for the first time to make a judicial determination of the factors set forth in *Dillon*. The court easily disposed of the "nearness" and "realtionship" factors, since the victim was Mrs. Archibald's son, and she appeared on the scene of the accident within moments of its occurrence.[17]

Thus, the primary basis of contention in *Archibald* centered on whether or not the plaintiff must actually observe the accident. The court viewed the contemporaneous observance factor as not necessarily requiring the plaintiff to be present at the time of the accident, but only as requiring that the plaintiff's shock be fairly contemporaneous with the accident itself.[18] Taking notice of the fact that viewing her son's grievous injuries could be as traumatic to the mother as witnessing the accident itself, the court decided that since the shock to the mother resulted from observance of her son's injuries a short time after the accident that she was in the class to be protected.

The extension of protection for mental and emotional distress to plaintiffs who only observed the injuries of the victim and not the accident itself is the real significance of *Archibald*. As the distance of the plaintiff from the scene of the accident grows longer, as the relationship between the plaintiff and the victim becomes more remote, as the time between the accident and the plaintiff's observance of the injuries increases, the outer limits to be placed on the defendant's liability will necessitate the California courts' drawing fine lines of distinction based upon more subtle facts than those in the present case.[19]

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15. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal Rptr. 72, 80 (1968).
16. 79 Cal. Rptr. 723 (Dist. Ct. App. 4th Dist. 2d Div. 1969).
17. The record did not disclose where Mrs. Archibald was at the time of the accident or how long it took her to arrive at the scene, but only that she appeared within "moments" of its occurrence.
18. Archibald v. Braverman, 79 Cal. Rptr. 723, 725 (Dist. Ct. App. 4th Dist. 2d Div. 1969); citing W. PROSSER, *supra* note 12, at 354.
19. The court itself made a similar statement in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 921, 69 Cal. Rptr.72, 81 (1968).

CONSTITUTIONAL LAW—Apportionment—Statutory provision allowing each land owner to cast one vote for each $100 assessed value of real property within an irrigation district is not a denial of equal protection. *Schindler v. Palo Verde Irrigation District* (Ct. App. Cal. 1969).

Schindler, a small property owner, brought a class action in which he challenged a statutory provision which allowed each owner of real property to cast one vote for each one hundred dollars assessed value of real property owned in the irrigation district, alleging that the voting scheme deprived him and other small land owners of equal protection of the law. The California Court of Appeals for the Fourth Division *held* that such an apportionment of voting power did not deny the plaintiff and other members of his class equal protection of the law because the voting procedure was necessary to further a compelling state interest, and because the statute was drawn with such precision that no one affected by the election was denied a fair voice in the electoral process. *Schindler v. Palo Verde Irrigation District*, 82 Cal. Rptr. 61 (Ct. App. Cal. 1969).

The importance of *Schindler* lies in the fact that while it is not technically a "one man, one vote" case, the Califorina court thought it necessary to use the test devised for "one man, one vote" cases by the Supreme Court of the United States, beginning in *Reynolds v. Sims*,[1] and *Avery v. Midland County*,[2] and further refined in *Kramer v. Union Free School District* [3] and *Cirpriano v. City of Houma*.[4] The California courts, in applying this doctrine, had in the past upheld its applicability to the election of county boards of supervisors[5] as well as to water districts.[6] These cases turned on the idea that voter influence should not be diluted by improper districting. What the plain-

1. 377 U.S. 533 (1964).
2. 390 U.S. 474 (1968).
3. 395 U.S. 621 (1969). In *Kramer* the Court fashioned a two-pronged test, considering first whether the classification was necessary to further a compelling state interest and second whether the statute was drawn so that no one with a direct interest in the activity is effectively disenfranchised.
4. 395 U.S. 701. (1969) This case dealt with a Louisiana statute which allowed only those persons owning real property to vote in an election concerning the issuance of revenue bonds to finance improvements in the municipal water system. In a per curiam opinion, the Supreme Court said that the impact of the bond issue upon the property owners was unconnected to their status as real property owners, and that those who owned no property had the same interest in the bond election as those who did own property.
5. Miller v. Board of Supervisors of Santa Clara Co., 63 Cal.2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965).
6. Thompson v. Board of Directors of Turlock Irr. Dist., 247 Cal. App. 2d 587, 55 Cal. Rptr. 689 (Ct. App. 1967).

tiff in *Schindler* contended was that his influence as a voter was being unjustly diluted by the franchise apportionment scheme within the district.

The Palo Verde Irrigation District Act,[7] passed in 1923, provided for the establishment of an irrigation district to encompass the area of Imperial and Riverside counties, the activities of which were to be governed by a seven-man board of trustees, elected at large from within the district.[8] In the election of this board, each land owner, real or corporate, was allowed to cast one vote for each one hundred dollars worth of assessed value of land and other real property held within the district.[9]

The plaintiff, Schindler, had initiated a class action seeking relief from what he claimed was a denial of equal protection. The complaint as originally filed alleged that the plaintiff had written to the defendant demanding that land owners be allowed to cumulate their votes pursuant to section 2235 of the Corporations Code,[10] or in the alternative, that each land owner be granted one vote regardless of the amount of property held. The plaintiff later amended his complaint demanding further alternative relief, namely, that the irrigation district be divided into seven divisions, according to the provisions of the Irrigation District Law.[11] The defendant district's demurrer was sustained.

The California court, in upholding the trial court's dismissal of the claim, used, not the traditional test of equal protection, by which a statute was upheld if there was any rational basis for the classification used in the distribution of the franchise, but rather the test utilized in the recent decision of *Kramer v. Union Free School District.*[12] In *Kramer* an adult male, otherwise qualified to vote, successfully contended that a New York statute which allowed only the owners of real property or those whose children attended schools within the district to vote in elections of school board members denied him equal protection of the law. The test announced in *Kramer* was twofold: first, the classification in the statute must be necessary to further a compelling state interest; and second, the statute must be drawn with

7. CAL. WATER CODE—APP., §§ 33-1 to -75 (West 1968).
8. *Id.* at § 33-5.
9. *Id.* at § 33-6.
10. CAL. CORP. CODE § 2235 (West 1955). The court failed to find any provision in this section to grant the relief which the plaintiff sought.
11. CAL. WATER CODE § 21550 (West 1956). *But see* CAL. WATER CODE § 20513 (West 1956), in which the Palo Verde Irrigation District is expressly exempted from the operation of § 21550.
12. 395 U.S. 621 (1969).

such precision that no one with a direct interest in the activity is denied a voice in the election. In dealing with the application of the test to the facts of the *Schindler* case, the California Court first dismissed the claim that *Schindler* was different from *Kramer* in that the latter case dealt with complete disenfranchisement while the *Schindler* case dealt only with claimed dilution of voter influence:

> Any disparity in the statutory grant of the franchise, whether it be in the quantum of influence distributed among the voters or in the total denial of franchise to some and its grant to others, must be subjected to close judicial examination to determine whether the classification meets the standards prescribed by *Kramer*.[13]

The court also refused to make the distinction employed in *Thompson v. Board of Directors of Turlock Irrigation District*[14] by stating:

> The fact that a service provided by a public corporation or special district in one which could be provided by a private agency is not a valid ground of distinction . . . . [W]hen the state engages in those activities through a governmental agency and provides for citizen participation through the election process, the distribution of voting rights must meet the equal protection standards prescribed in *Kramer* and *Cipriano*.][15]

In applying the first *Kramer* test, that of a compelling state interest, the court noted such an interest in the reclamation of waste lands through flood control, drainage, and irrigation works.[16] Before the passage of the act which established the district, the farmers in the valley had been repeatedly and seriously damaged by the flooding of the Colorado River. One of the most important reasons for the act was to eliminate the

13. 82 Cal. Rptr. at 65. *Cf. Reynolds v. Sims*, 377 U.S. 553, 562, (1964) " . . . [A]ny alleged infringement of the right to vote must be carefully and meticulously scrutinized."

14. 247 Ca. App. 2d 587, 55 Cal. Rptr. 689 (Ct. App. 1967). This case held that divisions within an irrigation district need not be re-drawn to comply with "one man, one vote" requirements unless the board of directors abused the discretion given them to draw the districts.

15. 82 Cal. Rptr. at 65.

16. People *ex rel* Chapman v. Sacremento. Drainage District, 155 Cal. 373, 103 P. 207 (1909), " . . . It was clearly desirable and beneficial to the state that all of these lands should be reclaimed for purposes of husbandry. This improvement would add great wealth to the state, and this improvement therefore would result in a public benefit." *Id.* at 379, 103 P. at 211.

expense and inefficiency caused by the operation of three independent agencies in the valley.[17] The court stated:

> The grant of election franchise to land owners, resident and non-resident, is necessary to "further a compelling state interest." Absent the voting qualification provided by the Act, it is doubtful that the District could have been formed or functioned.[18]

The court felt that, even though the Act authorized the District to provide domestic water service,[19] that purpose was secondary to the primary legislative intent of insuring that the farming interests in the valley were protected against flood damage and had an adequate irrigation system.

In applying the second *Kramer* test to the facts of the *Schindler* case, the court observed that the provisions of the act establishing the district provided that the financial burdens of operating the district were borne only by real property owners and that residents who did not own real property paid none of the assessments paid by the landowners. The assessments[20] were placed annually on the real property in relation to the amount of real property owned in the district,[21] and in this manner, the assessment paid by the land owner would be in proportion to the land he owned in the district. Thus,

> . . . the benefits and burdens accrue to each land owner in proportion to the extent of land owned, [and] the grant of franchise in proportion to the assessed value of land ownership fairly distributes voting influence among those primarily and directly interested in direct proportion to the stake each has in the district.[22]

17. The Palo Verde Drainage District controlled the drainage activities; the Palo Verde Joint Levee District provided flood control; and a private mutual water company provided irrigation facilities.

18. 82 Cal. Rptr. at 66.

19. CAL. WATER CODE—APP. § 33-10 (West 1968). It is interesting that the court should note this, since an allegation that the District actually provided domestic water service would presumably raise the precise issue which the court explicitly stated was not involved—the constitutionality of the provision limiting the franchise to property owners, when the District's acts; i.e., supplying the homes of the district with domestic service, would directly and substantially affect all those in the valley, whether or not they owned real property. *Cf.* Cipriano v. City of Houma, 395 U.S. 701 (1969).

20. CAL. WATER CODE—APP. § 22-27 (West 1968). It should be noted that an assessment is not a tax in the sense that it raises revenue for general governmental purposes, since an assessment is levied only on real property within a limited area for the payment of the costs of local improvements. *See* 48 AM. JUR. *Special or Local Assessments* § 3 (1943).

21. *See* CAL. WATER CODE—APP. § 33-28 (West 1968).

22. 82 Cal. Rptr. at 66.

The court deemed it unnecessary to deal with the validity of the requirement of owning real property in order to vote, but the court did use a test which was devised to deal with precisely that fact situation. It is significant that the *Kramer* test, which in effect requires the state to show that its scheme for the distribution of voter influence is not a denial of equal protection was applied in a case not strictly analogous to *Kramer* in that the *Schindler* "special district" situation is one of the areas between those cases in which the Supreme Court applied the "one man, one vote," doctrine and those cases in which the doctrine has been held not relevant.[23]

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23. *See* Sailors v. Board of Educ., 387 U.S. 105 (1967), ("one man, one vote" not applicable to a county school board appointed by a properly elected local school board); Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala. 1969), *aff'd mem.*, 394 U.S. 812 (1969), ("one man, one vote" not applicable to selection of board of commissioners chosen from judicial circuits of unequal population).

CONTRACTS—Limitation of Liability—Where limiting clause failed to mention "merchantability" specifically, limitation of liability to purchase price under Uniform Commercial Code § 2-719 held ineffective to limit recovery under an implied warranty of merchantability, *Zicari v. Joseph Harris Co.*, (App. Div. N.Y. 1969).

The plaintiffs[1] purchased cabbage seed from the defendant seed company and plaintiff Zicari used the seed to plant 70 acres on his farm. When the crop matured it was discovered that the entire crop was infested with Blackleg fungus, rendering it worthless. In his complaint, plaintiff Zicari had alleged that his original order was for 80 pounds of domestic cabbage seed, and contained a warranty[2] to the effect that the seed would be labeled on the containers and that the seed would conform to the label description as required by law. This warranty also made a general disclaimer of other or further warranties, express or implied, and limited liability to the purchase price of the seed. This written order was subsequently modified to 19 pounds of an Australian seed when the seed company was unable to deliver domestic seed. He further alleged that the defendant gave an oral warranty that the Australian seed was free of Blackleg fungus at the time the order was modified.

The plaintiffs brought action to recover alleged damages of $77,000 for the 1966 cabbage crop and $100,000 for inability to supply customers with cabbage after the 1966 growing season. The trial court granted summary judgment for the defendant on plaintiffs' third cause of action, implied warranty of fitness, and summary judgement for the plaintiff, limited to the

1. Five plaintiffs were represented in this action against Joseph Harris Co. Three of the plaintiffs obtained their seed from plaintiff Zicari who was acting as their agent. A fourth plaintiff, Frank Swerczynski, purchased his seed directly from the defendant as did plaintiff Zicari. All plaintiffs alleged essentially the same causes of action.

2. The text of the warranty is as follows:

> All orders subject to the following conditions: Joseph Harris Co., Inc., warrants that seed, plants or bulbs sold will be labeled on the containers and that they will conform to the label descriptions as required under State and Federal Seed Laws. Our liability on this warranty is limited to the purchase price of the seeds, plants, or bulbs.
>
> We make no other or further warranty, express or implied, including any other or further warranty for fitness of purpose. Our liability for (1) breach of contract, or (2) mistake or omission in connection with these seeds, plants or bulbs, shall be similarly limited in amount to the purchase price. No liability hereunder shall be enforceable unless the buyer or user reports to the seller within a reasonable period (not to exceed 30 days) after discovery, any condition that might lead to a complaint.

purchase price of the seed, on the plaintiffs' fourth cause of action, implied warranty of merchantability. In its holding the trial court found that while the defendant had failed to effectively disclaim the implied warranty of merchantability, recovery under this warranty was limited to the purchase price of the seed. This appeal was taken from the third and fourth causes of action only, the first two causes of action, based on negligence and negligent misrepresentation, not being raised here.

In reversing the trial court's decision on the limitation of recovery to the purchase price of the seed, the Supreme Court, Appellate Division, *held* that in order to limit damages for breach of the implied warranty of merchantability, "merchantability" must be expressly mentioned in the limiting clause. *Zicari v. Joseph Harris Co.*, 33 App. Div.2d 17, 304 N.Y.S.2d 918 (1969).

While not indicated in the opinion, the specific interrelationship of sections 2-316 and 2-719 of the Uniform Commercial Code, with regard to the limitation of recovery under implied warranties of merchantability, appears to be one of first impression.[3] The basic question raised here is whether the implied warranty of merchantability may be effectively nullified by a general clause limiting damages to the purchase price of the product.

Subsection (2) of U.C.C. section 2-316[4] requires the specific mention of the word "merchantability" in any clause excluding or modifying the implied warranty of merchantability or any part of it. Subsection (4) of that section permits the limitation of remedies for breach of warranty in accordance with sections 2-718 and 2-719 of the Code. Subsection (1)(a) of section 2-719 indicates that one acceptable method of limiting the buyer's remedy is to limit recovery to the purchase price of the goods. On its face then, it would seem clear that the Code does require the mention of "merchantability" in any clause attempting to limit the buyers recovery under section 2-719. However the official Comment to section 2-316 states, "Under subsection (4) the question of limitation of remedy is governed by the sections referred to [sections 2-718 and 2-719] rather than by this [section 2-316] section."[5] From this comment, one could con-

3. Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968), cited as support for the holding in this case, dealt with an unlimited express warranty of merchantability.
4. Uniform Commercial Code § 2-316(2) (1962 version).
5. Uniform Commercial Code § 2-316, Comment 2.

clude that the modification or limitation of remedies for breach of warranty available under section 2-719 of the Code is to be considered independently of section 2-316. One consequence of such an interpretation could be the effective nullification of the implied warranty of merchantability which a seller had failed to disclaim specifically as required by section 2-316(2) of the Code. This danger appears to have been recognized by the drafters of the Code however, and would seem to be covered by subsections (2) and (3) of section 2-719, which makes it clear that:

> [A]ny clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similiarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.[6]

Additional protection from this danger is provided by section 1-102(3)[7] of the Code, which provides that the provisions of the Code may be varied by agreement, except that the obligations of reasonableness and good faith may not be disclaimed by agreement of the parties. The provision in section 1-106(1) that remedies provided by the Code are to be "liberally administered so that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ," gives the buyer still further protection.

This line of reasoning appears to have been followed in *Neville Chemical Co. v. Union Carbide Corp.*,[8] where the buyer brought action to recover consequential damages under an implied warranty of merchantability. Here, the seller had limited his liability to the refund of the purchase price and had further required notification of breach within 15 days of delivery as a condition precedent to recovery of damages. With reference to the limitation of damages to the refund of the purchase price, the court stated:

> Like the fifteen day limitation, it is obviously designed to cover a situation where the defect is discoverable

6. Uniform Commercial Code § 2-719, Comment 1.
7. Vlases v. Montgomery Ward & Co., 377 F.2d 846, 850 (3d Cir. 1967). *See* Uniform Commerical Code § 1-102, Comment 2.
8. 294 F. Supp. 649 (W.D. Pa. 1968).

> upon receipt of shipment and prompt discovery of defects. The parties can be restored by prompt notification to the seller, return of purchase price, and return of material. But when the defect is not ordinarily discoverable until the material has been processed, . . . then such a remedy is far below a bare minimum in quantum, and is ineffective under the Uniform Commercial Code § 2-719(2).
>
> Such limitations on time and damages, when the defect is latent, are illusory and under the circumstances of this case represent no remedy at all.[9]

In *Wilson Trading Corp. v. David Ferguson Ltd.*,[10] cited as support for the holding of the Appellate Division in the present case, the court noted that "parties to the contract are given broad latitude within which to fashion their own remedies for breach of contract,"[11] but it noted that the official comment to section 2-719 of the Code[12] makes it clear that, "it is the very essence of a sales contract that at least minimum adequate remedies be available for the breach . . . ."[13] Continuing, the court stated that:

> Here the contract expressly creates an unlimited express warranty of merchantability while in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability. Under these circumstances, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty.[14]

From the foregoing, it is evident that the holding of the present case, that "merchantability" must be specifically mentioned in the limiting clause in order to limit in any way the implied warranty of merchantability, is a direct outgrowth of *Wilson*. As noted in the court's opinion, the decision in *Wilson* rests on section 2-719 of the U.C.C., as does the decision in *Neville*. Both of these cases involved latent defects, and both cases dealt with an attempt to limit the buyer's remedy, as does the present case. Thus the same practical effect which this case achieves by re-

9. *Id.* at 655; *see* Hawkland, LIMITATION OF WARRANTY UNDER THE UNIFORM COMMERCIAL CODE, 11 How. L.J. 28, 42 (1965).
10. 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968).
11. *Id.* at 403, 297 N.Y.S.2d at 111, 244 N.E.2d at 687.
12. Uniform Commercial Code § 2-719, Comment 1.
13. 23 N.Y.2d at 403, 297 N.Y.S.2d at 111, 244 N.E.2d at 687.
14. *Id.* at 405, 297 N.Y.S.2d at 113, 244 N.E.2d at 698.

quiring the specific mention of merchantability in the limiting clause, has been obtained on the basis of the ineffectiveness, oppressiveness, or unreasonableness of the result. While "unconscionable" is nowhere defined in the Uniform Commercial Code, these terms would seem to fit within the meaning of Dean William D. Hawkland's statement that, "Terms are unconscionable only if they bring about surprise results or are oppressive."[15]

The holding of this case provides section 2-719 of the Code with the potential for the somewhat mechanical operation previously available under section 2-316 of the Code with regard to the "disclaimer" of the implied warranty of merchantability. While the same results have been obtained previously under section 2-719 on the basis of unconscionability or unreasonableness where latent defects were involved, this holding would appear to give some additional protection to the buyer. It could prove to be especially effective in cases where the seller provides an attractive warranty which he then limits in such a way as to make it illusory. A logical extension of this incorporation of a portion of section 2-316 into section 2-719 would be a requirement that in order for the limitation of damages to be effective, it must be "conspicuous" within the meaning of section 2-316(2) of the code.

In light of this case, it is suggested that contract clauses limiting the buyers remedy for breach should specify that the limitation applies equally to any express or implied warranty of merchantability. In South Carolina, any express or implied warranty of fitness should also be specifically mentioned in the limiting clause.[17]

T.C.R. LEGARE, JR.

15. Hawkland, *Limitation of Warranty Under the Uniform Commercial Code*, 11 How. L.J. 28, 34 (1965).
16. Uniform Commercial Code § 2-316(2) (1962 version).
17. S.C. CODE ANN. § 10.2-316(2) (Supp. 1966). This section differs from the Uniform Commercial Code § 2-316(2) (1962 version) in that the South Carolina version of the Code contains the requirement that the implied warranty of "fitness" as well as the implied warranty of merchantability must be mentioned in specific language in order for the disclaimer to be effective. *See also* Note, *South Carolina Amendments to Article 2 of the Uniform Commercial Code*, 21 S.C.L. REV. 400 (1969).