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Reverberations from the Collision of Tort and Warranty

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REVERBERATIONS FROM THE COLLISION OF TORT AND WARRANTY

JAMES J. WHITE*

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I. INTRODUCTION	

In his famous *Stanford Law Review* article, *When Worlds Collide*,¹ Professor Marc Franklin foretold the troubles for American law in the impending collision of the tort of strict liability with the warranty of merchantability.² We daily suffer the reverberations from that collision as courts struggle with the proper application of strict tort liability and breach of warranty in products liability cases.

Lawyers who have not studied Article 2 of the Uniform Commercial Code (U.C.C.) are surprised to learn that virtually every buyer who has a strict tort claim for an injury caused by a defective product also has a potential claim in warranty for the same injury.³ Of course, the converse is not true; many unmerchantable products are not “unreasonably dangerous,”⁴ cannot fulfill strict tort’s “physical harm” requirement,⁵ and therefore cannot be the source of a strict tort claim. These products might cause loss of revenue or commercial disappointment but do not threaten life, limb or property. Thus, the courts must not only untangle tort from warranty where each is available, but also draw the line that marks warranty’s

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

2. *Id.* at 990-1016. The collision is not just with the warranty of merchantability but also with express and other implied warranties.

3. Of course, that statement is a slight exaggeration, for each legal claim is subject to different defenses that might be available in one regime but not the other and vice versa. These are defenses like statute of limitations, absence of reliance, disclaimer of warranty, or lack of privity, to name a few.

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

5. *Id.*

exclusive domain. This line is sometimes called the “economic loss” doctrine; loss that is solely “economic” may be recovered in warranty but not in tort.⁶

In Part II of this Essay, I discuss the early development of strict tort, the framers of which could not have foreseen the later erosion of warranty defenses. In Part III, I discuss the reverberations of the collision of strict tort and warranty, as evidenced by cases in which courts have struggled with the proper application of those theories in the products liability context. In Part IV, I discuss several cases that reach conflicting conclusions about the availability of damages in tort or warranty where there has been no overt failure of the plaintiff’s product. As I suggest below, this is a significant reverberation from the collision of tort and warranty, for the courts have sometimes confused tort and warranty, sometimes confused liability with remedy, and frequently failed to identify the theory that they were considering. In Part V, I conclude by noting that if, as appears, some damages are often available in warranty in these cases, but not in tort, then the cases raise questions as to which outcome is better and about the *res judicata* effect of a modest warranty recovery on a later and larger potential tort recovery.

I start by defending this endeavor. Why would anyone, who did not have to do so, write about the collision of tort and warranty? Lawyers and judges must deal with this mess in our law, but any right thinking law professor could content himself with criticizing the current regime and explaining why it should be radically modified.

If there were even the smallest prospect of that modification, such criticism and explanation would be justified. But there is no prospect for real reform. Having been through a fourteen-year attempt to revise the parts of Article 2 that are much farther from the heat than the warranty of merchantability, I am certain that the National Conference of Commissioners on Uniform State Laws (NCCUSL) could not propose, nor the states adopt, a uniform law on products liability that would take the place of warranty and tort. The plaintiffs’ lawyers would be bitter and effective opponents of such a change, and the defense bar would pay no more than lip service. Indeed, the difficult birth of the *Restatement (Third) of Torts: Products*

6. See, e.g., *Rich Prods. Corp. v. Kemutec Inc.*, 241 F.3d 915, 918 (7th Cir. 2001) (“From its inception the economic loss doctrine has been based on an understanding that contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena.”) (quoting *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998)); *Calloway v. City of Reno*, 993 P.2d 1259, 1264 (Nev. 2000) (“Because of . . . the . . . confusion created between tort and warranty theories, the economic loss doctrine gained recognition and support. The doctrine serves to distinguish between tort, or duty-based recovery, and contract, or promise-based recovery, and clarifies that economic losses cannot be recovered under a tort theory.”); *Steiner v. Ford Motor Co.*, 606 N.W.2d 881, 884 (N.D. 2000) (“Under the doctrine, economic loss resulting from damage to a defective product, as distinguished from damage to other property or persons, may be recovered in a cause of action for breach of warranty or contract, but not in a tort action. . . . ‘The economic loss doctrine recognizes the distinction between the bargain expectation interests protected by contract law under the Uniform Commercial Code and the safety interests protected by tort law.’”) (quoting *Clarys v. Ford Motor Co.*, 592 N.W.2d 573, 578 (N.D. 1999)).

Liability (Products Liability Restatement) in the American Law Institute (ALI),⁷ where any proposal needs only the vote of the membership and not the vote of any state legislature, indicates that a more radical reform would not pass the state legislatures without great difficulty. That being so, I content myself with repair of a small part of the collision's damage.

II. ANCIENT HISTORY

Though they could hardly have foreseen the collision of strict tort with warranty, our brightest activist judges and law professors of the early and mid-twentieth century set tort in motion towards the collision that now seems to have been inevitable. The most prominent of these men were Cardozo, Traynor, and Prosser. We thank Justice Cardozo for the abolition of privity in tort,⁸ Justice Traynor for advocating strict liability as the most efficient means of risk allocation,⁹ and Dean Prosser as the academic¹⁰ and legislative advocate of expanded tort liability. Prosser was the Reporter for the *Restatement (Second) of Torts*; he drafted § 402A, the source of most strict tort law.

Prosser was an unashamed advocate of "risk spreading;" in his hornbook¹¹ and in scholarly journals¹² he openly asserted the virtues of adopting a system that could

7. David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 279 (1998) (noting that the full ALI membership debated and voted on drafts of the *Products Liability Restatement* in 1994, 1995, and 1996 "until the Institute's final debate and adoption of the *Proposed Final Draft* in May 1997."). Professor Owen further notes that prior to the publication of the final version of the *Products Liability Restatement*, "the ALI published a total of twelve drafts of various portions of the work." *Id.* at 279 n.39. The vote approving the *Proposed Final Draft* in May 1997 was unanimous. *Id.* at 279.

8. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

9. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (adopting strict liability as advocated in Traynor's *Escola* dissent and noting that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J. dissenting) ("In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.").

10. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter Prosser, *The Fall of the Citadel*]; William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *The Assault Upon the Citadel*]; see also G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 168-73 (1985) (describing Dean Prosser's contributions to products liability law).

11. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 495 (4th ed. 1971) ("The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it.").

12. Prosser, *The Assault Upon the Citadel*, *supra* note 10, at 1120 ("Entitled to more respect is the 'risk-spreading' argument, which maintains that the manufacturers . . . should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in a better position to do so, and through their prices to pass such losses on to the community at large."); Prosser, *The Fall of the Citadel*, *supra* note 10, at 799 ("The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel.").

make manufacturers involuntary insurers of the buyers of their products. Judges spoke from a different pulpit; their voices were constrained by the cases that came before them, but I suspect that Justice Traynor¹³ and many others¹⁴ shared Prosser's thinking about the virtues of spreading the cost and risk of injury by putting the loss on the defendant and causing him to add it to the cost of products.

Clearly, Prosser saw the relation between strict tort and warranty. He defended strict tort by noting that it would be free of the defenses that, in his mind, hobbled warranty as a source of risk spreading. He noted that plaintiffs were often turned away by disclaimers, notice requirements, or by lack of privity when they sued in warranty¹⁵ and so Prosser supported § 402A.¹⁶

What Prosser failed to foresee was the erosion of those warranty defenses. Today, privity is in decline as a defense in warranty cases.¹⁷ Of course, removal of

13. See *supra* note 9 and accompanying text.

14. See Albert A. Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422, 1472 (1966) (stating that it is preferable for the manufacturer to bear the loss of defective products since he "can protect himself against just that kind of loss by insurance or price computation"); Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 192, 215 (1955) (discussing the imposition of strict liability for ultrahazardous products and noting that "[t]his would pave the way for liberating this branch of the law from the restrictions on warranties which operate so arbitrarily and capriciously" in the commercial context); Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963) ("If . . . the underlying basis for the imposition of strict liability is the notion that the manufacturer is a better risk bearer because of his capacity to shift losses incurred from the use of the products to the consuming public generally, then . . . the problem is one of allocating . . . losses resulting from . . . the use of a product."); Dix W. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1010 (1957) ("[S]trict liability of the manufacturer would serve to provide a desirable spreading of the risk or of the loss caused by defective products. The spreading would be accomplished by removing the burden from the injured individual to the manufacturer, who is . . . in a [better] position to pass on the costs to the users of the product by raising prices . . . to cover the cost of judgments or of insurance."); see also *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 311-12 (N.J. 1965) (Francis, J.) ("[T]he great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely upon the skill, care and reputation of the maker. . . . The purpose of [strict] liability is to insure that the cost of injuries or damage . . . resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves."); *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960) (Francis, J.) ("Under modern conditions the ordinary layman . . . has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery.").

15. Prosser, *The Assault Upon the Citadel*, *supra* note 10, at 1127-34. In discussing the use of warranty to achieve strict liability, Prosser argued that "the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish." *Id.* at 1127.

16. *Id.* at 1134 ("If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.").

17. See U.C.C. § 2-318 cmt. 2 (1987) ("The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'"); see, e.g., *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 15 n.12 (1st Cir. 2001) (stating that "[u]nlike a contract based warranty, the implied warranty applies even though the parties are not in privity"); *In re Bridgestone/Firestone Inc. Tires*

the privity requirement means that plaintiffs can sue remote parties who have not had the opportunity to require the plaintiffs to sign a disclaimer.¹⁸ Therefore, the consequence of the abolition of privity is twofold. Moreover, Prosser's concern about the reliance requirement in warranty was met by its dilution in Article 2¹⁹ and by courts' further dilution of even the basis of the bargain requirement.²⁰ Prosser

Prods. Liab. Litig., No. IP 00-9373-C-B/S, 2001 WL 1735050, at *21 (S.D. Ind. Dec. 31, 2001) (noting that "privity is not required for breach of implied warranty actions under Michigan law"); *Dawson v. Canteen Corp.*, 212 S.E.2d 82, 82-83 (W. Va. 1975) (abolishing "the requirement of privity of contract in actions grounded in breach of express or implied warranty").

18. U.C.C. § 2-318 (1987); *see, e.g.*, *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1252 (10th Cir. 1988) (holding that manufacturer's disclaimer of implied warranties in sale to dealer did not preclude the ultimate purchaser from bringing a warranty action against the manufacturer); *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 482-83 (Mass. 1985) (holding that seller's disclaimer of warranties in sale to employer did not preclude employee from bringing a breach of warranty action); *Velez v. Craine & Clark Lumber Corp.*, 305 N.E.2d 750, 753-54 (N.Y. 1973) (holding that seller's disclaimer of warranties in sale to contractor did not apply to contractor's employees who "were complete strangers to the contract").

19. The U.C.C.'s express warranty provision, § 2-313, requires that a seller's representation be part of the "basis of the bargain" in order for it to qualify as an express warranty. U.C.C. § 2-313(1)(a) (1987). Section 12 of the Uniform Sales Act was the precursor to the U.C.C.'s express warranty provision. Section 12 provided that

[a]ny affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods *relying* thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

UNIF. SALES ACT § 12 (1906) (emphasis added). Although courts and commentators have interpreted § 2-313's "basis of the bargain" requirement differently, most agree that the requirement is a more relaxed standard than § 12's "reliance" requirement. *See, e.g.*, *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 644-45 (10th Cir. 1991) (finding reliance is not required to create express warranties); *Mainline Tractor & Equip. Co. v. Nutrite Corp.*, 937 F. Supp. 1095, 1106 (D. Vt. 1996) (holding that the lack of evidence of particular reliance does not preclude an express warranty action); *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 530 (App. Div.) (declining to accept the argument that the warranty must be a procuring cause of the contract in order to be part of the basis of the bargain).

20. In interpreting § 2-313's "basis of the bargain" requirement, many courts hold that the buyer need not have relied on the seller's affirmation about the product in order for the affirmation to be part of the "basis of the bargain." *See, e.g.*, *Martin v. Am. Med. Sys.*, 116 F.3d 102, 105 (4th Cir. 1997) ("Any description of the goods, other than the seller's mere opinion about the product, constitutes part of the basis of the bargain It is unnecessary that the buyer actually rely upon it."); *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 41 S.W.3d 270, 283 (Tex. App. 2001) ("In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.") (quoting U.C.C. § 2-313 cmt. 3 (1987). *But see* *Danise v. Safety-Kleen Corp.*, 17 F. Supp. 2d 87, 97 (D. Conn. 1998) ("In order for a statement to form part of the basis of the bargain between parties, the buyer must demonstrate that he relied on the statement."); *Hillcrest Country Club v. N.D. Judds Co.*, 461 N.W.2d 55, 61 (Neb. 1990) (holding that the plaintiff must prove reliance in order to establish that an affirmation was part of the basis of the bargain).

also underestimated the cleverness of plaintiffs' lawyers and the willingness of some courts to expand warranty liability by hobbling other warranty defenses.²¹

This expansion of tort in the courts and in the ALI and the later paring down of warranty defenses by the courts mostly happened before Judge Posner and his posse galloped to the defendants' aid.²² In Prosser's day the very idea of a "least cost risk avoider"—or for that matter the notion that the consumer, by insuring or by being more careful, might be the least cost risk avoider—was unknown to academic lawyers. There was no intellectually respectable, theoretical argument against shifting the risk from the plaintiff (read injured consumer) to the defendant (read large, corporate manufacturer).

The collision of tort and warranty arising from the work of Prosser, Cardozo, Traynor, and others, probably was not foreseen by them even though it was made inevitable by their individual acts. By their success in the courts and in the ALI, Prosser and his friends hastened and intensified the collision.

III. RECENT HISTORY

In the last thirty years, the reverberations from the collision have come one after another. Courts must sort through the defenses unique to tort to be sure that they are not applied in warranty, and vice versa. Courts must define "defect" in each regime and must ask how the damages in one regime might differ from those in the other. Among the most persistent of the consequences of the collision of tort and warranty is the need to draw the line between injury to life, limb and

21. Section 2-607(3) requires that the buyer notify the seller of the breach "within a reasonable time" before bringing a warranty action. U.C.C. § 2-607(3) (1987). However, some jurisdictions provide that a third-party beneficiary who is injured by a defective product is not required to give notice. *See, e.g., Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998) (adopting the majority approach "that a non-purchaser in a suit on warranty, need not comply with the notice requirement of the Uniform Commercial Code in order to recover for personal injuries rather than for economic loss"); *Morgan v. Sears, Roebuck & Co.*, 700 F. Supp. 1574, 1582 (N.D. Ga. 1988) ("[T]he notice provisions of [§ 2-607] cannot apply to a plaintiff who is a third-party beneficiary . . ."); *Yates v. Pitman Mfg., Inc.*, 514 S.E.2d 605, 607 (Va. 1999) (holding that buyer's employee who was injured by defective product was not required to give notice of breach of warranty because the employee was not the "buyer" of the product). Additionally, some jurisdictions allow the plaintiff to sue the manufacturer, without providing the manufacturer with notice of the breach, as long as the plaintiff provides notice to the seller from whom the plaintiff directly purchased the product. *See, e.g., Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 830 (N.D. Iowa 2000) (holding that plaintiff was not required to provide cigarette manufacturer with notice of defect because the manufacturer did not sell cigarettes to the plaintiff); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 59, 416 S.E.2d 655, 663 (Ct. App. 1992) ("In the context of Section [2-607(3)], . . . the term 'seller' means the immediate seller with whom the buyer has contracted for the goods, not a remote seller who did not tender the goods to the buyer. Thus, this section requires a retail buyer to notify only the retail seller who tendered the goods to him, not wholesalers, distributors, manufacturers, or others who sold the goods further up the chain of commerce.").

22. *See WHITE, supra* note 10, at 219-23 (describing Posner's contributions to, and identifying flaws in, economic tort theory); James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 316-21 (1997) (describing Posner's economic approach to tort theory and products liability).

property—the domain of both tort and warranty—and injury that is purely economic, the exclusive domain of warranty. Consider the following examples.

A 1999 decision of the New York Court of Appeals and the responses of the ALI and the NCCUSL to that decision expose the most basic potential conflict between tort and warranty—a conflict about the standard of liability. In *Denny v. Ford Motor Co.*, Mrs. Denny, attempting to avoid a deer, rolled her Ford SUV.²³ Her arm came out through the sunroof and was badly injured.²⁴ At trial, Ford convinced the jury that the SUV was not in a “defective condition unreasonably dangerous” because the utility of having a car that would go off-road and through deep snow was a benefit that outweighed the risk of rollover arising from a correspondingly high center of gravity.²⁵ To Ford’s surprise, the jury decided that while the car was not in a “defective condition unreasonably dangerous,” it was nevertheless unmerchantable.²⁶ Thus, Ford was liable in warranty but not in tort. In charging the jury on the strict liability claim, the judge instructed the jury to “balanc[e] the risks involved in using the product against the product’s usefulness and its costs and against the risks, usefulness and costs of the alternative design as compared to the product defendant did market.”²⁷ In charging the jury on the breach of the implied warranty claim, the judge instructed the jury to determine whether the SUV was “defective and not reasonably fit to be used for its intended purpose.”²⁸ Thus, in finding the SUV unmerchantable, the jury apparently did not compare the SUV’s risks with its benefits as it had with respect to the strict liability claim. In deciding whether the SUV was merchantable, the jury seems merely to have considered Mrs. Denny’s expectations as a consumer.²⁹

Denny was tried in federal court. Ford appealed and the Second Circuit Court of Appeals certified the following three question to the Court of Appeals of New York:

- (1) [W]hether the strict products liability claim and the breach of implied warranty claim are identical;
- (2) whether, if the claims are different, the strict products liability claim is broader than the implied warranty claim and encompasses the latter; and
- (3) whether, if the claims are different and a strict liability claim may fail while an implied warranty claim succeeds, the jury’s

23. *Denny v. Ford Motor Co.*, 42 F.3d 106, 108 (2d Cir. 1994).

24. *Id.*

25. *See id.* at 108, 110; *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 731-32 (N.Y. 1995).

26. *Denny*, 42 F.3d at 110.

27. *Id.* at 108.

28. *Id.*

29. At trial, the plaintiffs introduced into evidence Ford marketing materials, which advertised that the SUV was “suitab[le] for commuting and for suburban and city driving” and “‘fashionable’ in some suburban areas.” *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 732 (N.Y. 1995). Additionally, the marketing materials emphasized that the SUV was particularly suitable for “women who may be concerned about driving in snow and ice with their children.” *Id.*

finding of no product defect is reconcilable with its finding of a breach of warranty.³⁰

The Court of Appeals of New York held that the meaning of “defective” in strict tort was not necessarily the same as “unmerchantable” in warranty and that a warranty claim could survive in a personal injury case even when a strict tort claim failed.³¹

The *Denny* outcome was a surprise to many who had never imagined that “unmerchantable” could have one meaning and “defective” another.³² Among those most concerned with the decision were the Reporters and others involved with the *Products Liability Restatement*.³³ The proponents of the *Products Liability Restatement* had just fought for four years in the ALI debating, among other things, whether a balancing of risk with utility was the proper test of defectiveness.³⁴ They feared that every clever plaintiff could avoid the Restatement’s command to compare risk with utility simply by bringing a warranty claim.

Ford and its friends came to the drafters of the Article 2 revision for help. They left with what is known to the *cognoscenti* as the “*Denny* comment.” That comment reads as follows:

Suppose that an unmerchantable lawn mower causes personal injury to the buyer, who is operating the mower. Without more, the buyer can sue the seller for breach of the implied warranty of merchantability and recover for injury to person “proximately resulting” from the breach. Section 2-715(2)(b).³⁵

30. *Id.* at 733.

31. *Id.* at 734-39.

32. See Franklin, *supra* note 1, at 979-80 (noting that Justice Traynor was the only judge to conclude that a defect in tort could be different from “unmerchantable” in sales warranty law”).

33. In comment *n* to the *Restatement (Third) of Torts: Products Liability* § 2, the Reporters state that a plaintiff’s “failure to meet the requisites of § 2(a), (b), or (c) will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 Reporters’ Notes cmt. n (1998). The Reporters note that the *Denny* court used independent tests for establishing defectiveness for strict liability and breach of warranty. However, the reporters state that “[t]his Restatement contemplates that a single tort definition of defect will emerge regardless of the characterization of the claim as sounding in tort or implied warranty of merchantability. *Id.* Notably, the Reporters cite a critique of *Denny* written by Victor Schwartz and Mark Behrens, two scholars who are usually aligned with defendants in tort debates. See *id.* (citing Victor E. Schwartz & Mark A. Behrens, *An Unhappy Return to Confusion in the Common Law of Products Liability—Denny v. Ford Motor Company Should Be Overturned*, 17 PACE L. REV. 359 (1997)).

34. See Owen, *supra* note 7, at 279 (describing ALI debate over the *Products Liability Restatement* and noting that the ALI voted on four different drafts over a period of four years before agreeing on the final version).

35. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 2—SALES 70 (Draft, Aug. 10, 2001) (proposing changes to U.C.C. § 2-314, cmt. 7).

The proposed comment 7 continues:

This opportunity does not resolve the tension between warranty law and tort law where goods cause personal injury or property damage. The primary source of that tension arises from disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, *i.e.*, if goods are merchantable under warranty law can they still be defective under tort law, and if goods are not defective under tort law can they be unmerchantable under warranty law? The answer to both questions should be no, and the tension between merchantability in warranty and defect in tort where personal injury or property damage is involved should be resolved as follows:

When recovery is sought for injury to person or property, whether goods are merchantable *is to be determined by applicable state products liability law*.³⁶

Whether the revision of Article 2 will ever become law and, if so, whether the *Denny* comment will have the intended effect, remains to be seen. As this is written, the train on which the comment has a ticket—the revision of Article 2—has yet to leave the station.

Another quite obvious issue caused by the collision has also been one of the most intractable.³⁷ Since strict tort covers only injury to life, limb, and property but not “economic” injury, how does one draw the line between “economic” loss and other loss? The test that travels in the words of judges and trial lawyers under the rubric “economic loss doctrine,” is far from perfect. The loss of an arm by a major league pitcher to a defective power saw will be a severe “economic” loss, yet the pitcher can clearly state a case in strict tort for the injury. Furthermore, what if the defect in the power saw does not cause catastrophic injury, but only a gradual yet early destruction of the saw itself?³⁸ Courts must place cases on one or the other

36. *Id.* (emphasis added).

37. See William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the “Economic Loss” Rule*, 23 TEX. TECH. L. REV. 477, 481 (1992) (noting that the economic loss rule is controversial and that “different courts have disagreed about the precise boundary between property damage and economic loss”); Steven C. Tourek et al., *Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 891-92 (1999) (asserting that the economic loss rule was intended to apply only to negligence and strict liability claims and not fraud or misrepresentation claims).

38. Some jurisdictions provide an exception to the economic loss rule for situations in which the injury was caused by “a sudden and highly dangerous occurrence.” See, e.g., *Vulcan Materials Co. v. Driltech, Inc.*, 306 S.E.2d 253, 257 (Ga. 1983) (adopting exception to the economic loss rule for “a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to other persons or property.”); *Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 763 N.E.2d 428, 434 (Ill. App. Ct. 2002) (noting that economic loss doctrine bars tort

side of the economic loss line to determine whether the plaintiff can state a case in both tort and warranty or only in warranty.

Consider finally the reverberation I discuss below. Breach of warranty occurs and the cause of action arises upon the sale of an unmerchantable product.³⁹ The buyer's knowledge of, or appreciation for, the defect is not relevant.⁴⁰ If the buyer discovers the defect before four years have passed, he may recover damages.⁴¹ That is so whether his damages are a grave injury to life, limb, or property or whether the injury is but a small diminution in value (because of the defect) from what was promised.

In tort, the judges and scholars generally require more than diminished value. Usually the courts call for a "manifestation" of the defect or some measurable damage to a person or property. It is not necessarily enough that the product is defective. But even in tort there must be cases where one is not required to ride his Ford Explorer or Bridgestone tires over the brink before he can sue, not so?⁴² The issues I discuss below should perhaps be regarded as a subspecies of the economic loss question, but they are not entirely comfortable in that category.

IV. DAMAGES IN TORT AND WARRANTY FOR INCHOATE INJURY

Nowhere is the difference between tort and warranty more stark, or the confusion more deep, than when defective and potentially dangerous goods have yet to cause physical injury. Since physical injury is never a requirement for warranty recovery, at least modest damages are always available to one suing in warranty because of a defective product. Tort, on the other hand, was slow to recognize injuries, such as emotional distress, that one could not see and touch.⁴³

recovery for product deterioration, but does not bar recovery caused by a "sudden or dangerous occurrence"); *Hofstee v. Dow*, 36 P.3d 1073, 1077 (Wash. Ct. App. 2001) ("If the [product] failure was a sudden and dangerous event, it constitutes a tort," rather than a breach of warranty). *But see E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 870 (1986) (declining to adopt the sudden injury exception to the economic loss rule and noting that "[e]ven when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law.").

39. U.C.C. § 2-725(2) (1987).

40. *Id.*

41. U.C.C. § 2-725(1) (1987).

42. *See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1104-05 (S.D. Ind. 2001) (holding that Michigan's economic loss doctrine did not bar consumers' tort claims against tire manufacturer for selling tires that had propensity for tread separation but which had not yet caused injury to person or property); *cf. Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 808-17, 821-26 (Cal. 1993) (allowing possible recovery of damages for medical monitoring costs and fear of developing cancer to plaintiffs who had been exposed to carcinogens but who had suffered no cognizable injury).

43. *See David Crump, Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 446-47 (1992) (noting that emotional distress claims are a modern phenomenon and that efforts have been made to limit such claims); *see also Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by*

Even § 402A itself speaks of “physical harm thereby caused.”⁴⁴ Thus, it is not surprising to find that many courts decline to grant recovery for defective and dangerous products that have not yet taken their bite. As the following discussion shows, the courts often ignore the difference in the theories and sometimes wander willy-nilly between liability and damages.

As I suggest above, the world of warranty is comfortable with the idea that a plaintiff can recover from his seller for a defect in a product even though that defect has not caused, and may never cause, any injury to person or property. This is implicit in the idea that the statute of limitations commences to run on the sale under § 2-725⁴⁵ and is recognized by the normal standard of recovery for breach of warranty that is stated in § 2-714(2): “The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted”⁴⁶ If a computer program is unmerchantable because of a bug, the buyer need only show that the bug has reduced the value of the program by ten dollars. The ten dollars is available even if the bug has caused no idiosyncratic damage during the buyer’s use. It is enough that the buyer has suffered a reduction in his wealth. Note too that this rule applies equally to potentially dangerous products. If the Ford Explorer proves to be unmerchantable, buyers who have never had a moment’s trouble with their cars will state a case under § 2-314 and § 2-714 for the difference in value between the Explorer as warranted and the Explorer as delivered.

Although some might cite the economic loss rule as a bar to recovery in strict tort where there is danger but no overt damage to person or property,⁴⁷ I do not believe that the case is so clear. The usual work of the economic loss doctrine is to bar tort recovery where the plaintiff’s injury constitutes lost profits or injury to the product itself and never could develop into personal injury or other property damage.⁴⁸

Furthermore, some tort cases do allow recovery for those with the merest of physical injuries, and even a few for those who have fear and anxiety but no

Outrageous Conduct, 82 COLUM. L. REV. 42, 43 (1982) (stating that the availability of intentional infliction of emotional distress claims was advocated by scholars such as Magruder and Prosser in the early twentieth century until the tort was recognized in the *Restatement (Second) of Torts* in 1965).

44. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

45. U.C.C. § 2-725 (1987).

46. *Id.* § 2-714(2).

47. See *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 803 (E.D. La. 1998) (denying tort recovery to plaintiffs who had suffered no injury, but who owned vehicles containing air bags that would cause injury if deployed); *Nichols v. Gen. Motors Corp.*, No. 99-C-566, 1999 WL 33292839, at **3-4 (N.H. Super. Ct. Dec. 13, 1999) (holding that the economic loss doctrine barred plaintiffs negligence and strict liability claims against manufacturer who installed allegedly defective seats in plaintiff’s car).

48. *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002) (“Economic loss is both loss in the value of a product caused by a defect in that product (direct economic loss) and consequential loss flowing from the defect, such as lost profits (consequential economic loss).”).

physical injury.⁴⁹ I am thinking of the thousands of plaintiffs who have recovered from asbestos manufacturers and distributors even though the plaintiffs have no more than tiny lesions on their lungs that may have come from asbestos and even though those lesions may never turn into anything injurious.⁵⁰ Also, consider plaintiffs with fear and anxiety but no physical injury at all.⁵¹

The courts' analysis in these cases (and, one suspects, the lawyers' explanation) has not been consistent or clear. One of my cases, *Microsoft Corp. v. Manning*, was a straightforward warranty suit in which the plaintiffs complained of a bug and sought damages under § 2-714 even though they had suffered no more than a modest diminution in value of their programs.⁵² Another Texas case, *Coghlan v. Wellcraft Marine Corp.*, was treated by the parties and the Fifth Circuit as a "breach of contract" case.⁵³ In the latter case, Judge Jones let the plaintiffs go forward based on what might have been called an express warranty that the boat was all fiberglass when it apparently was a fiberglass sandwich with a wood filling.⁵⁴ Of course, neither of these cases could have been made into tort claims, and it was easy for Justice Cornelius in *Manning* to conclude that:

[I]f appellees prove that an individual defect exists in all original MS-DOS 6.0 software, it is not necessary for the purchasers to actually suffer a loss of data as a result of that defect for them to suffer damage. They have received less than they bargained for when they acquired the product.⁵⁵

In all of my other cases, tort and warranty compete. Four are class actions against auto manufacturers. Three are suits against heart valve manufacturers.

49. See *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 808-17, 821-26 (Cal. 1993) (allowing possible recovery of damages for medical monitoring costs and fear of developing cancer to plaintiffs who had been exposed to carcinogens but had suffered no cognizable injury).

50. See *Herber v. Johns-Manville, Corp.*, 785 F.2d 79, 83, 85 (3d Cir. 1986) (holding that emotional distress and medical monitoring damages were available even though plaintiff's "lungs may be characterized as involving little impact and the pleural thickening as involving insubstantial injury"); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985) ("Under Texas law [plaintiff] is entitled to compensation for mental anguish proximately caused by his asbestos exposure, even if such distress arises from fear of diseases that are . . . not medically probable."); see also Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 393 (1993) (noting that many asbestos "claims produce substantial payments . . . even though the individual litigants will never become impaired"); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 766 (2002) (noting that by the early 1990s, as many as half of all asbestos claims were brought by plaintiffs with minimal or no physical impairment and many of these plaintiffs were awarded substantial recovery).

51. See *Potter*, 863 P.2d at 808-17, 821-26; *Herber*, 785 F.2d at 85.

52. *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 605-06 (Tex. Ct. App. 1995). The plaintiffs only claimed damages for the \$9.95 upgrade fee for a new version of the software that would have corrected the defect. *Id.* at 606.

53. 240 F.3d 449, 451 (5th Cir. 2001).

54. *Id.* at 454-55.

55. *Manning*, 914 S.W.2d at 609.

An early and frequently cited case, *Willett v. Baxter International, Inc.*, was written by Judge Wisdom for the Fifth Circuit in 1991.⁵⁶ The two Louisiana plaintiffs received artificial heart valves made of pyrolitic carbon.⁵⁷ When one of the plaintiffs, Mr. Willett, read of the defendant manufacturer's voluntary suspension of the marketing of these valves, he sued.⁵⁸ The trial court granted summary judgment to the defendants and the Fifth Circuit affirmed.⁵⁹

Judge Wisdom described the case as one under Louisiana's "products liability law."⁶⁰ Since Louisiana is the only state without Article 2 of the U.C.C., the suit must have been and appears to be stated in Louisiana's version of strict tort. Under Louisiana law, a product is defective only if one of the following four tests is met: 1) the product is unreasonably dangerous *per se*, 2) the product was defectively manufactured, 3) the product was defectively designed, or 4) the manufacturer failed to warn of a non-obvious inherent danger.⁶¹ With his usual care and clarity, Judge Wisdom went through each of the four possibilities and concludes that the plaintiffs could not state a case for a defect under any of them.⁶² Applying the risk/utility standard, he noted that approximately nineteen thousand persons had received these valves and that only seventeen failures had been reported.⁶³ Since all, or almost all, of the nineteen thousand recipients would have died shortly thereafter, had they not received the valves,⁶⁴ and since there was no evidence that better ones were available at the time these were used,⁶⁵ the case against the valves being "defective" on a risk/utility basis was strong, even if a small percentage would fail.

The plaintiffs apparently argued that their anxiety about the possibility of failure, anxiety that had surely been heightened by the defendant manufacturer's suspension of sales, was a compensable injury.⁶⁶ Judge Wisdom expressed reservation about recovery for such a claim: "[W]e have serious concerns about permitting recovery for such fear absent actual failure of the valve."⁶⁷ Furthermore, the judge declined to "decide these issues . . . because of our resolution of the defect issue."⁶⁸ Therefore, in dictum and in what appears to be a tort case, Judge Wisdom hinted that the plaintiffs could not recover until "failure" of the product. Of course, this could not be a statement about § 2-714 of the U.C.C. because that section has not been adopted in Louisiana.

56. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1095 (5th Cir. 1991).

57. *Id.* at 1095-96.

58. *Id.*

59. *Id.* at 1095.

60. *Id.* at 1097.

61. *Id.*

62. *Willett*, 929 F.2d at 1097-99.

63. *Id.* at 1096.

64. *Id.* at 1097.

65. *Id.* at 1099.

66. *See id.* at 1099-1100.

67. *Id.*

68. *Willett*, 929 F.2d at 1100.

Two other cases, *Khan v. Shiley Inc.*⁶⁹ and *Hagepanos v. Shiley, Inc.*⁷⁰ present issues similar to those presented in *Willett* but against a different artificial heart valve manufacturer. Mr. Hagepanos received a Shiley heart valve implant in 1982 at a time when Shiley stated that the failure rate was one in one hundredth of one percent (i.e. one in ten thousand).⁷¹ Estimates six years later put the failure rate between one in one hundred and one in ten.⁷² Unlike *Willett*, Hagepanos asserted a variety of claims ranging from strict tort to breach of warranty.⁷³ Applying Maryland law, the Fourth Circuit affirmed the lower court's dismissal on the ground that one cannot recover "future damages" in Maryland unless one can show that the occurrence of those damages is more probable than not (i.e., that more than 50 in 100 valves would fail).⁷⁴

The court rejected Hagepanos's argument that he was entitled to "present" damages arising from his "present fear."⁷⁵ The court stated that such a recovery would be an evasion of Maryland's rule, for one could always claim distress about the future.⁷⁶ Despite plaintiff's inclusion of a warranty claim, there is no discussion of § 2-714 in the *Hagepanos* opinion, nor is there any suggestion that the plaintiffs ever asserted a claim under that section.

In *Khan v. Shiley Inc.*, Judy Khan fared a little better in court. She received a Shiley artificial heart valve implant in 1983.⁷⁷ The valve worked fine; it remedied the serious problems she had been experiencing, such as fatigue, double vision, and shortness of breath.⁷⁸ In 1985, Shiley recalled many valves, including Khan's.⁷⁹ The recall was accompanied by new information that the valves were failing at a rate slightly greater than 1 in 100⁸⁰ and by the admonition that one should "go to the nearest hospital if [the] valve ceased to operate" because the failure "could be fatal."⁸¹ One would not have to be paranoid to read that warning to mean that only those who suffered failure while in the operating room of a major hospital were likely to survive a failure. The term "recall" may be too generous since one's risk of death from a second operation to implant a new heart valve was greater than the risk of failure in keeping the original valve implanted.⁸²

69. 217 Cal. App. 3d 848 (Ct. App. 1990).

70. No. 87-3141, 1988 WL 35752 (4th Cir. Apr. 18, 1988); 846 F.2d 71 (4th Cir. 1988) (unpublished table decision).

71. *Id.* at **1.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Hagepanos*, 1988 WL 35752, at *1.

77. *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848, 850 (Ct. App. 1990).

78. *Id.* at 851.

79. *Id.*

80. *Id.* at 851 n.1.

81. *Id.* at 851.

82. *Id.*

Khan sued in strict tort, fraud, implied and express warranty, and several other causes of action.⁸³ The trial court dismissed them all, explaining that “there’s no indication this valve ha[d] failed or will fail” and that “[t]here’s been nobody injured yet. . . . We’ve been asked to speculate about something that may or may not happen, and there is no allegation . . . that show[s] any basis now that there is a defect.”⁸⁴ The trial court’s statement could be interpreted to mean that when there is no injury (i.e., no liability), there are no damages, even in warranty.

The court of appeals’ decision is worse. At one point, Judge Sonenshine seems to be saying that there is no liability: “[The plaintiffs] insist the owner of a product, functioning as intended but containing an inherent defect which may cause the product to fail in the future, has an action against the manufacturer. Plaintiffs are mistaken.”⁸⁵ This paragraph, apparently considering liability, is followed by several paragraphs that note the absence of the “essential element of causation.”⁸⁶ That sounds like a statement that there are no compensable damages. The court concluded this part of the opinion with a flatly erroneous statement: “So long as the valve continues to function, no cause of action exists under any products liability theory.”⁸⁷ When applied to warranty, one of the theories Khan pled as part of her “products liability” case, this statement is incorrect. Whether Mrs. Khan can recover more than the diminution in value under § 2-714 is questionable, but she could surely have recovered the difference in value between a valve as warranted and the valve as delivered if she could have shown that her valve was unmerchantable or deviated from the seller’s express warranty. As it was, the court threw Khan a small bone at the end of the opinion by reinstating her fraud claim against Shiley.⁸⁸

A third set of opinions, *Carlson v. General Motors Corp.*,⁸⁹ *Briehl v. General Motors Corp.*,⁹⁰ *Haenisch v. General Motors Corp.*⁹¹ and *In re Bridgestone/Firestone, Inc. Tires Products*,⁹² arose from class actions that sought recovery from auto manufacturers and their suppliers for injuries arising from allegedly defective products that did not cause personal injury or property damage. The earliest case, *Carlson*, was a pure warranty claim for “lost resale value” attributable to the poor operation and poor reputation of a line of diesel engines that GM had installed in its trucks.⁹³ The second case, *Briehl*, was also primarily a warranty suit; it did not state a strict tort cause of action.⁹⁴ In *Briehl*, the anti-lock brakes on the SUVs apparently had an unusual characteristic: when they were in

83. *Khan*, 217 Cal. App. 3d at 851-52.

84. *Id.* at 853 (first alteration in original).

85. *Id.* at 854 (footnotes omitted).

86. *Id.* at 855.

87. *Id.* at 857.

88. *Id.* at 857-58.

89. 883 F.2d 287 (4th Cir. 1989).

90. 172 F.3d 623 (8th Cir. 1999).

91. Nos. 98 C 5836, MDL 1266, 2001 WL 103434 (N.D. Ill. Jan. 31, 2001).

92. 155 F. Supp. 2d 1069 (S.D. Ind. 2001).

93. *Carlson*, 883 F.2d at 289.

94. *Briehl*, 172 F.3d at 625.

operation, the pedal would go all the way to the floor.⁹⁵ The plaintiffs claimed that this would mislead the driver who would associate that action with brake failure.⁹⁶ There was no claim that the brakes malfunctioned in any other way. In *Haenisch*, the plaintiffs complained of a "Type III" door latch that would allow a door to pop open in certain circumstances.⁹⁷ The door latches could be replaced for \$3.09 each.⁹⁸ In *Carlson*, *Briehl*, and *Haenisch*, the courts granted the defendants' motions to dismiss or motions for summary judgment.⁹⁹

The court in *Carlson* correctly dismissed the claim because the plaintiffs failed properly to allege a breach of warranty. They appear to have claimed that their vehicles were defective because they had "diminished resale value."¹⁰⁰ Diminished resale value might be the measure of damages under § 2-714 for a plaintiff who could prove that the diminution came from a breach of warranty,¹⁰¹ but these plaintiffs did not claim this. The plaintiffs confused damages with liability and were properly dismissed.¹⁰²

The recent decision by Judge Barker in the Bridgestone-Ford Explorer case was uncommonly acute. The opinion came on Ford and Bridgestone's motion to dismiss "dozens" of class actions that were consolidated in the federal district court in Indianapolis.¹⁰³ There were separate classes consisting of those who had certain Bridgestone tires and those who owned or leased Ford Explorers, regardless of their tires.¹⁰⁴ Excluded from these suits was anyone who had suffered any personal injury or property damage.¹⁰⁵ With a few exceptions, the suits stated causes of action in tort and in warranty.¹⁰⁶

Although the plaintiffs stated their tort claim in negligence, the court read it as a "classic product liability tort claim" and dismissed it on the ground that there were no "cognizable tort injuries."¹⁰⁷ In reaching that conclusion, Judge Barker relied on Prosser and Keeton and cited several of the cases discussed above as well as others that deny recovery.¹⁰⁸ She also rejected the plaintiffs' analogy to asbestos exposure, where one exposed could experience a twenty- or thirty-year progression

95. *Id.* at 626.

96. *Id.*

97. *Haenisch*, 2001 WL 103434, at *1.

98. *Haenisch v. Gen. Motors Corp.*, Nos. 98 C 5836, 99 C 2566, MDL 1266, 2001 WL 548755, at *1 (N.D. Ill. May 21, 2001).

99. *Briehl*, 172 F.3d at 630; *Carlson*, 883 F.2d at 298; *Haenisch*, 2001 WL 103434, at *5.

100. *Carlson*, 883 F.2d at 297.

101. *See* U.C.C. § 2-714(2) (1987).

102. *Carlson*, 883 F.2d at 298.

103. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1076-77 (S.D. Ind. 2001).

104. *Id.* at 1077.

105. *Id.*

106. *Id.*

107. *Id.* at 1086-87.

108. *Id.* at 1086-89.

of the disease without having any symptoms.¹⁰⁹ The alleged deterioration of the Bridgestone tires was not similar.¹¹⁰

Judge Barker then turned to the claims of breach of implied and express warranty. Noting that warranty claims “accrue” on sale and therefore that the warranty must be breached then or not at all, she concluded that there can be a breach of warranty without physical injury.¹¹¹ She correctly distinguished many of the apparently contrary cases by noting that they were not “no injury or no damage” cases but “no liability” cases.¹¹² If the product is merchantable, *a fortiori* there can be no damages for breach of the warranty of merchantability.

The courts in *Briehl* and *Haenisch* were not as careful as the courts in *Carlson* and *Bridgestone*. In *Briehl*, the Eighth Circuit affirmed the lower court’s dismissal.¹¹³ The Eighth Circuit was critical of the plaintiffs’ conclusory pleading, but the court failed to draw a sharp line between warranty and tort.¹¹⁴ Despite the fact that the plaintiffs did not state a strict tort or negligence cause of action, the court cited a string of tort actions and concluded that the plaintiffs failed to “allege any manifest defect.”¹¹⁵ Read generously, the court’s opinion might be a statement that the plaintiffs failed to allege a defect; read less generously, one might conclude that the court mixed tort with warranty.

In *Haenisch*, Judge Zagel first expressed the opinion that the plaintiffs had not shown the possibility that they could put forward facts from which one might conclude that the GM door latches were defective.¹¹⁶ He noted that only a small percentage of the 40 million latches on the road had ever failed and expressed doubt that such a failure rate in such circumstances could ever render the latches unmerchantable.¹¹⁷ So far so good. Although he acknowledged that the “central allegation” was breach of “express and implied warranties,”¹¹⁸ he then cited several tort cases to support his conclusion that the plaintiffs had not alleged compensable damages.¹¹⁹ This is not so good.

V. CONCLUSION

Using the foregoing nine cases as examples, consider what the law is and what it should be. First, any plaintiff must show that his goods are unmerchantable to state a claim under § 2-314.¹²⁰ That a product does not meet a plaintiff’s subjective

109. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d at 1087-88.

110. *Id.*

111. *Id.* at 1099.

112. *Id.* at 1100.

113. *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 625 (8th Cir. 1999).

114. *See id.* at 627-28.

115. *Id.*

116. *Haenisch v. Gen. Motors Corp.*, Nos. 98 C 5836, MDL 1266, 2001 WL 103434, at *2 (N.D. Ill. Jan. 31, 2001).

117. *Id.* at *5.

118. *Id.* at *1.

119. *Id.* at *2-5.

120. Or that the goods violate an express warranty to state a claim under § 2-313.

expectations is not enough. Courts and parties must be careful to avoid the confusion present in cases like *Carlson* where the plaintiffs appear to have claimed that the decline in value of their vehicles *itself* showed that the goods were not merchantable. This same confusion attends part of the *Haenisch* opinion. Many of the cases were, and should have been, resolved in favor of the defendants because the plaintiffs had no chance of proving a defect. Careful readers of these cases will note that any discussion of damages that follows a finding of defect is dictum.

Second, damages are always available in warranty to one who has proven breach of warranty. At a minimum, those damages equal the diminution in value of that product attributable to that breach of warranty *whether the defect has caused or can ever cause physical injury*. Judges Barker and Jones have it exactly right. To the extent that they say the opposite, Judges Zagel and Melloy are wrong.¹²¹

Finally, the courts should reject imprecise pleading and argument that claims merely “products liability” and fails to distinguish tort from warranty. Barring tort recovery for inchoate injury is probably wise, and whether wise or not, is the current law, but that can be done only by careful distinction between the two claims.

121. I leave the hard questions raised by these cases for others to resolve: Should a plaintiff who sues in warranty but who has not yet suffered physical injury be permitted to recover more than just the diminution in value? One thing is clear to me; if we are to allow more than diminution in value, the rule here should be the same in tort and warranty. There is no reason to allow Judy Khan to recover in warranty for her anxiety under § 2-715 at a time when we would not allow her to recover in strict tort. If there are sound policies against recovery of such losses before manifestation of the physical injury, they apply equally in tort and in warranty.