1983


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Casenotes and Statute Notes


In 1966, National Tank Company manufactured and sold a 500,000 bushel, bolted-steel, grain storage tank¹ to Moorman Manufacturing Company for use at its feed-processing plant in Alpha, Illinois.² By early 1977, a crack had developed in one of the steel plates on the second ring of the tank.³ The plaintiff, who was the purchaser of the grain storage tank, filed suit against the manufacturer alleging that the tank was not reasonably safe due to certain design and manufacturing defects,⁴ that the defendant had made misrepresentations in the sale of the tank,⁵ and that the defendant had negligently designed the tank.⁶ The plaintiff prayed for damages representing both the loss of use and cost of repairs and reinforcement of the tank.⁷ The trial court specifically held that the plaintiff could not recover for purely economic losses under strict tort liability and the other tort theories advanced by the plaintiff⁸ and that the damages sought were economic losses

² Id. at 7.
⁴ 414 N.E.2d at 1304. Count I was based on strict liability. Id.
⁵ Id. Count II was based on misrepresentation. Id.
⁶ Id. Count III was based on negligence. Id. A fourth count sounding in contract claimed that the plaintiff had relied upon an express warranty made by the defendant at the time of the sale. Id.
⁷ Id.
⁸ See supra notes 4-6.
On appeal to the Supreme Court of Illinois, the defendant, National Tank Company, argued that none of the policy reasons supporting strict liability or other tort doctrines would be furthered by expanding the doctrine to encompass cases involving only economic losses and that such an extension would undermine the statutory law of sales in Illinois and the principle of freedom of contract. Held, reversed: Consumers may not recover purely economic losses in Illinois strict product liability actions. Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

I. THE EARLY CASES

The question of whether a consumer can recover under a strict liability in tort theory for solely economic loss was first

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*414 N.E.2d at 1304. The trial court refused to dismiss Count IV, which alleged an express warranty, because it found that such a warranty existed and extended to future performances of the tank. Id.

10 Id. at 1305. The appeals court answered “no” to the question presented by the trial court’s refusal to dismiss Count IV in express warranty on the basis of the statutes of limitations:

Does the following express warranty “explicitly extend to future performance” within the meaning of § 2-725(2) of the Uniform Commercial Code . . . so as to toll the otherwise long-since-run four (4) year Statute of Limitations of 2-725 of the Uniform Commercial Code . . .:

“Tank designed to withstand 60 pounds per bushel grain and 100 m.p.h. winds”?

Id. at 1315.

The policy reasons as defined in the National Tank Company’s Brief are: (1) safeguarding public safety and health, (2) enhancing the manufacturer’s incentive to produce safe products, and (3) imposing the loss on the one creating the risk and reaping the profit. Reply Brief for Appellant at 2-4, Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).


“Economic loss” has been defined variously as: (1) “damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits — without any claim of personal injury or damage to other property”. Note, Economic Loss in Products Liability Jusrisprudence, 66 COLUM. L. REV. 917, 918 (1966) [hereinafter cited as Note, Economic Loss] (2) “the diminution in the value of
addressed by a court in Santor v. A. & M. Karagheusian, Inc., in which the plaintiff purchased carpeting manufactured by the defendant from a third-party seller. After several months, unsightly lines began to appear on the surface of the carpet. The trial court determined that there was an implied warranty of merchantability and concluded that the defendant breached that warranty. The Supreme Court of New Jersey affirmed and held that the plaintiff could maintain a breach of implied warranty claim directly against the manufacturer despite the lack of privity between them. In dicta, the court stated that the plaintiff also possessed a cause of action in strict tort liability. As with cases involving personal and property injuries caused by defective products, the Supreme Court of New Jersey held that a manufacturer of an unsatisfactory product is better able to insure against and to spread the risk of economic losses than are individual consumers. The court observed:

[W]hen the manufacturer presents his goods to the public for sale he accompanies them with a representation that they are suitable and safe for the intended use . . . . The obligation of the manufacturer thus becomes what in justice it ought to be - an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, 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.

Thus, the New Jersey court imposed an implied representa-

the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?, 114 U. Pa. L. Rev. 539, 541 (1966).

19 207 A.2d at 307.
20 Id.
21 Id.
22 Id. at 310.
23 Id. at 311-13.
24 Id. at 311-12.
tion of quality even in the absence of an actual representation by the manufacturer.\textsuperscript{22} According to Santor, if an article is defective\textsuperscript{23} in design or manufacture, or if the defect arose while under the manufacturer's control, and the defect proximately caused damage to the ultimate purchaser or reasonably expected consumer, liability exists whether the damages are personal injuries, injuries to other property of the consumer, or damage to the article sold.\textsuperscript{24} Several months after Santor, in Seely v. White Motor Co.,\textsuperscript{25} the Supreme Court of California, in dicta, rejected the extension of strict liability as embodied in Santor.\textsuperscript{26} In Seely, the plaintiff sued the defendant manufacturer to recover for damages sustained by one of its trucks when it overturned as a result of defective brakes.\textsuperscript{27} Although no damages for personal injury were alleged,\textsuperscript{28} plaintiff sought to recover damages for the purchase price of the truck, the repair of the truck after the accident, and profits lost from deprivation of the normal use of the truck resulting from the accident.\textsuperscript{29} The court held that the plaintiff was entitled to recover on the basis of the express warranty existing between the parties.\textsuperscript{30} The court, in dicta, examined the relationship between warranty or contract theory and strict liability tort theory. The court rejected strict liability on the ground that economic loss involves the failure of the product to perform to the level of the party's expectations, a concept grounded essentially in the law of contracts, not the law of torts.\textsuperscript{31} With regard to the relationship between

\textsuperscript{22} Note, Economic Loss, supra note 14, at 937.
\textsuperscript{23} The court defined "defective" as being "not reasonably fit for the ordinary purposes for which such articles are sold and used." Santor, 207 A.2d at 313.
\textsuperscript{24} Id. at 312-13.
\textsuperscript{25} 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
\textsuperscript{26} 403 P.2d at 151, 45 Cal. Rptr. at 23.
\textsuperscript{27} Id. at 147, 45 Cal. Rptr. at 19.
\textsuperscript{28} Id. at 148, 45 Cal. Rptr. at 20.
\textsuperscript{29} Id. at 147-48, 45 Cal. Rptr. at 19-20.
\textsuperscript{30} Id. at 148, 45 Cal. Rptr. at 20.
\textsuperscript{31} Id. at 151, 45 Cal. Rptr. at 23. See also Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) (discussing the difference in tort and contract theories); Wade, Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?, 42 Tenn. L. Rev. 123, 127 (1974).
contract and tort law, Chief Justice Traynor, writing for the court, stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to recovery for economic loss alone. 3

Critical of the decision in Santor, the Seely court noted that "[o]nly if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort". 33 Pointing out that strict tort liability was developed to deal with the problem of physical injuries caused by defective products, the court reasoned that warranty doctrines, developed to meet the needs of commercial transactions, 4 function well when solely economic loss is suffered. 34 The court, in reaching this decision, expressed concern with the potentially broad base of liability facing the manufacturer if strict liability for economic loss were im-

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3 403 P.2d at 151, 45 Cal. Rptr. at 23.
33 Id.
34 Id. at 149, 45 Cal. Rptr. at 21 (quoting Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)).
35 403 P.2d at 150, 45 Cal. Rptr. at 22.
posed. While strict liability for physical injuries is restricted to "conditions that create unreasonable risks of harm," the creation of non-disclaimable liability for failure of the product to function as the purchaser expected would subject the manufacturer to liability "for damages of unknown and unlimited scope." The court noted that the policy placing the burden of the risk of physical injury on the manufacturer who can distribute it among the consuming public "in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of his customers."

In his concurring and dissenting opinion in Seely, Justice Peters disagreed with the majority's approach to economic loss in strict liability. He argued that there were no public policy reasons requiring a distinction between physical injury and economic loss and cited with approval the Santor Court's refusal to limit the strict liability doctrine to personal injury claims. Justice Peters argued that the distinction between physical injury and economic loss in the application of strict liability makes sense only if "protection of life and limb is of greater social value than protection against financial loss," and then, only if strict liability acts as a deterrent, thus inducing manufacturers to be more careful in their production methods. In Justice Peters' opinion, if a manufacturer is not moved to caution in production by the prospect of negligence liability, res ipsa loquitur, and the effect of a de-

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36 Id. at 150, 45 Cal. Rptr. at 22. See also Note, Economic Loss, supra note 14, at 939.
37 403 P.2d at 151, 45 Cal. Rptr. at 23.
38 Id. at 150-51, 45 Cal. Rptr. at 22-23.
39 Id. at 151, 45 Cal. Rptr. at 23.
40 Id. at 152, 45 Cal. Rptr. at 24.
41 Id.
42 Id. at 153, 45 Cal. Rptr. at 26.
43 Id.
44 Id. at 154, 45 Cal. Rptr. at 25.
45 Id.
46 "The thing speaks for itself." Res ipsa loquitur is a rebuttable presumption or inference that defendant was negligent, which arises upon proof that the instrumentality causing the injury was in the defendant's exclusive control, and that the acci-
fective product upon his business reputation, that manufacturer will be unmoved by the relatively slight increase in possible liability resulting from the application of strict liability for physical injuries. Thus, in Justice Peters' view, it is highly unlikely that the imposition of strict liability furnishes a deterrent. Rather, the purpose of strict 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 injured persons who are powerless to protect themselves." This purpose, according to Justice Peters, appropriately supports economic loss cases as well as actions for personal injury or property damage.

Furthermore, Justice Peters argued that creation of strict liability for economic loss would not subject the manufacturer to the probable consequences of negligence. See Hillen v. Hooker Const. Co., 484 S.W.2d 113, 115 (Tex. Civ. App.—Waco 1972, no writ). Under the doctrine, the happening of an injury permits an inference of negligence where the plaintiff produces substantial evidence that the injury was caused by an agency or instrumentality under the exclusive control and management of the defendant, and that the occurrence was such that in the ordinary course of things would not happen if reasonable care had been used. Id.

A skeptic may well question whether the callous manufacturer, who is unmoved by the prospect of negligence liability, plus *res ipso loquitur*, and by the effect of any injury whatever upon the reputation of his goods, will really be stimulated by the relatively slight increase in possible liability to take additional precautions against defects which cannot be prevented by only reasonable care.


Justice Peters disagreed with the majority's reasoning which requires the manufacturer to bear the risk of personal injury damages because the cost of an injury and the loss of time and health might be an overwhelming misfortune. He pointed out that an economic loss might be an equally overwhelming misfortune:

> Suppose, for example, defective house paint is sold to two homeowners. One suffers temporary illness from noxious fumes, while the other's house is destroyed by rot because the paint proved ineffective (a loss generally uninsured). Although the latter buyer may clearly suffer the greater misfortune, the majority would not let him recover under the strict liability doctrine because his loss is solely "economic," while letting the first buyer recover the minimal costs and lost earnings caused by his illness.

*Id.* at 155-56, 45 Cal. Rptr. at 27-28.
to liability for unlimited damages.\textsuperscript{61} If “defective” within the
meaning of the strict tort rule were to be defined as “un-
merchantable,”\textsuperscript{62} Justice Peters insisted, a well-defined stan-
dard could be imposed.\textsuperscript{63} Also, a manufacturer would still be
allowed to sell his product “as is.”\textsuperscript{64} As a result, if the pur-
chaser were to buy with knowledge of the “as is” description,
he would be barred from obtaining relief for economic loss in
strict liability by the doctrine of assumption of risk.\textsuperscript{65}

II. Cases in Jurisdictions Following Seely

Following the lines of separation between Santor and Seely,
courts in this country have divided over whether an action
may be maintained in tort against a manufacturer for recov-
ery of economic losses unaccompanied by personal injury or
damage to other property. A large majority of courts, follow-
the Seely approach, have held that pure economic losses are not recoverable under claims sounding in strict tort liability.\textsuperscript{66} A strong minority of jurisdictions, however, have fol-

\textsuperscript{60} 403 P.2d at 156, 45 Cal. Rptr. at 28.
\textsuperscript{61} U.C.C. § 2-324(2) (1979) provides:

Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description;
and
(b) in the case of fungible goods are of fair average quality within the
description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even
kind, quality, and quantity within each unit and among all units in-
volved; and
(e) are adequately contained, packaged, and labeled as the agreement
may require; and
(f) conform to the promises or affirmations of fact made on the
container or label if any.
\textsuperscript{62} 403 P.2d at 156, 45 Cal. Rptr. at 28.
\textsuperscript{63} U.C.C. § 2-316(3)(a) (1979) provides: “[U]nless the circumstances indicate other-
wise, all implied warranties are excluded by expressions like “as is,” “with all faults”
or other language which in common understanding calls the buyer’s attention to the
exclusion of warranties and makes plain that there is no implied warranty . . . .”
\textsuperscript{64} 403 P.2d at 158, 45 Cal. Rptr. at 30. The doctrine of assumption of the risk, also
known as \textit{volenti non fit injuria}, provides that a plaintiff may not recover for an
injury to which he assents; in other words, a person may not recover for an injury
when he voluntarily exposes himself to a known and appreciated danger. See, e.g.,
\textsuperscript{65} See, e.g., Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d
lowed or expressly adopted the permissive, Santor decision.  

After the landmark cases of Santor and Seely, one of the first courts to grapple with the problem of pure economic loss recovery in strict liability was the Supreme Court of Oregon in Price v. Gatlin.  

In an action for damages for economic loss resulting from the defective manufacture of a tractor, the court, which had previously imposed strict tort liability on the manufacturers of products causing personal injury, refused to extend that doctrine to include the defendant wholesaler in


405 P.2d 502 (Or. 1965).

a suit for economic loss. The court, citing Seely, stated that "the social and economic reasons which courts elsewhere have given for extending enterprise liability to the victims of physical injury are not equally persuasive in a case of a disappointed buyer of personal property."

More recently, the Supreme Court of Oregon refined its ruling regarding the recovery of economic loss in Russell v. Ford Motor Co. The court drew a distinction between products which simply do not live up to their economic expectations and those which, although they did not break down in a manner which proved hazardous to persons or other property, could foreseeably have done so. The court reasoned:

Insofar as the premise of responsibility for the marketing of a dangerously defective product states a norm for the producer and seller, the norm either has or has not been met at the time the product is sold. Whether the seller has met this responsibility cannot depend on the fortuitous extent of the damage done when the danger created by the defect subsequently comes to pass . . . .

[T]his does not imply that once a product is dangerously defective its seller is liable for any and all losses consequent upon its use . . . . The loss must be a consequence of the kind of danger and occur under the kind of circumstances, "accidental" or not, that made the condition of the product a basis for the strict liability. This distinguishes such a loss from economic loss due only to the poor performance or the reduced resale value of a defective, even a dangerously defective, product. It is the distinction between the disappointed users . . . and the endangered ones . . . .

Cited with approval in another jurisdiction, this "degree of danger test" formulated by the Oregon Court has been received with approval in a recent commentary.

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40 405 P.2d at 503.
41 Id.
42 575 P.2d 1383 (Or. 1978).
43 Id.
44 Id. at 1386-87.
46 Comment, Oregon Adopts the Degree of Danger Test for Strict Liability — The
The Supreme Court of Alaska has also adopted the distinction between economic loss caused by commercial disappointment in a defective product's performance and economic loss caused by damage to the product itself resulting from a dangerous defect. In *Morrow v. New Moon Homes, Inc.*, the plaintiff sued a mobile home manufacturer for damages resulting from various defects in the product including a defective furnace, cracked windows, a leaky bathroom, and a leaky roof. The court denied recovery stating that strict liability in tort does not extend to the consumer who suffers only economic loss. Permitting strict liability in tort for purely economic loss, in the court's view, would have jeopardized rights granted the manufacturer under the Uniform Commercial Code and would be contrary to legislative intent.

One year later, the court again considered a case involving a mobile home which had been defectively manufactured. In *Cloud v. Kit Manufacturing Co.*, the court clarified its opinion in *Morrow*. Plaintiffs claimed that a polyurethane foam rug padding, which was part of their mobile home package,
ignited, causing the mobile home to catch fire and burn.\textsuperscript{72} Concluding that the resulting injury constituted property damage, which was recoverable in strict liability, rather than economic loss which was not recoverable (as in \textit{Morrow}), the court stated:

We recognize that the line between economic loss and direct property damage is not always easy to discern, particularly when the plaintiff is seeking compensation for the loss of the product itself. We cannot lay down an all inclusive rule to distinguish between the two categories; however, we note that sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss.\textsuperscript{73}

A further refinement of this "degree of danger" distinction between property damage and economic loss was required by the Alaska court in \textit{Northern Power & Engineering Corp. v. Caterpillar Tractor Co.}\textsuperscript{74} The Supreme Court of Alaska indicated that the difference between a dangerously defective product and a non-dangerous product was at the heart of the \textit{Cloud} distinction between property damage and economic loss.\textsuperscript{75} The court therefore held that when a defective product creates a situation potentially dangerous to persons or other property and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery "even though the damage is confined to the product itself."\textsuperscript{76} In order to recover on such a theory the plaintiff must show: (1) that the loss was a proximate result of the dangerous defect and (2) that the loss occurred under dangerous circumstances.\textsuperscript{77} The plaintiff in \textit{Northern Power} failed to show that the damage to an engine resulting from a defective low oil pressure shutdown mechanism presented such a danger to persons or other property.\textsuperscript{78} In this case, the engine appar-

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 251.
\textsuperscript{74} 623 P.2d at 324 (Alaska 1981).
\textsuperscript{75} Id. at 329.
\textsuperscript{76} Id.
\textsuperscript{77} Idl.
\textsuperscript{78} The low oil pressure shutoff mechanism was not considered by the court to be a
ently just stopped operating. Therefore, under its guidelines, the Alaska court determined that the plaintiff's loss was entirely economic and not recoverable under strict product liability.

In Pennsylvania, the supreme court has yet to expressly consider the rule of strict liability as it applies to cases of economic loss in the absence of personal injury or injury to other property. However, that court's dicta in *Kassab v. Central Soya* has been cited by several courts as an indication of how the Supreme Court of Pennsylvania would rule were it faced with the issue. In *Kassab*, plaintiffs were raisers of breeding cattle whose value was greatly diminished when they ate contaminated feed manufactured by the defendant. Confronted with the question of whether to eliminate the privity requirement in contract in suits by purchasers against remote manufacturers for breach of implied warranty, the court held that privity of contract was no longer a prerequisite to recovery in contract. In reaching this result the court acknowledged that the tort doctrine of products liability expressed in section 402A of the Restatement of Torts would

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component part which due to defect damaged another component part, the engine, so as to result in damage to "other" property of the plaintiff. *Id.* at 330.

79 *Id.* at 329.

80 *Id.* at 330. The court noted that its reasoning in *Morrow* to allow recovery in tort for purely economic loss would jeopardize rights granted to a manufacturer under the U.C.C. and undermine legislative policy. *Id.* at 327 n.3. *See supra* note 70. The court pointed out that the line should be drawn and recovery allowed in strict liability when the product is dangerous. 623 P.2d at 328.


83 246 A.2d at 849.

84 *Id.* at 848.

85 *Id.* at 854.

86 **Restatement (Second) of Torts** § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer without sub-
permit recovery for damage to plaintiffs' cattle business.\textsuperscript{87} Furthermore, the court observed that the language of the Restatement appeared broad enough to cover any harm that could befall the purchaser of a defective product.\textsuperscript{88} Using the example of an exploding gas stove, the court opined that under section 402A a plaintiff could recover the cost of repairing or replacing the stove.\textsuperscript{89} Noting that replacement costs for the defective product itself are sometimes referred to as economic loss, the court stated that there "would seem to be no reason for excluding this measure of damages in an action brought under the Restatement, since the defective product itself is as much 'property' as any other possession of the plaintiff that is damaged as a result of the manufacturing flaw."\textsuperscript{90}

Predicting Pennsylvania law regarding economic loss, the Wisconsin Supreme Court applied a literal interpretation of the dicta in \textit{Kassab} in \textit{Air Products and Chemical, Inc. v. Fairbanks Morse, Inc.}.\textsuperscript{91} The court allowed recovery in strict liability for damages sustained when a defect in a motor, which was "unreasonably dangerous to those parts or portions of the motor which did not contain the defect,"\textsuperscript{92} caused the motor to malfunction.\textsuperscript{93} In a more recent decision, \textit{Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.},\textsuperscript{94} the Third Circuit Court of Appeals interpreted \textit{Kassab}\textsuperscript{95} to allow recov-

\footnotesize{\textsuperscript{87} 432 A.2d at 854.  
\textsuperscript{88} Id. at 854 n.7.  
\textsuperscript{89} Id. at 854-55 n.7.  
\textsuperscript{90} Id. at 855 n.7.  
\textsuperscript{91} 58 Wis. 2d 193, 206 N.W.2d 414 (1973).  
\textsuperscript{92} Id. at 417.  
\textsuperscript{93} Id. at 416.  
\textsuperscript{94} 652 F.2d 1165 (3d Cir. 1981).  
ery in strict liability for damages to a defective front-end loader incurred as a result of a fire.96 In a footnote, however, the court stated that the example in Kassab concerning the exploding stove showed a concern with hazardous products.97 Therefore, it reasoned, the dicta in Kassab was “not addressed to the considerations present when the defect is merely one of quality or suitability.”98 The court applied the “degree of danger” test to categorize the damage done as physical injury to property, allowed in strict liability because it was caused by a hazardous defect, rather than economic loss.99

Other jurisdictions have refused to apply a “degree of danger” distinction in economic loss cases and have refused to allow recovery of economic loss at all in strict tort liability. The Supreme Court of Nebraska, in Hawkins Construction Co. v. Matthews Co.,101 refused to extend strict tort liability to situations in which the loss involved injury to the defective product itself even though the case involved the collapse of defective scaffolding in which a worker “miraculously escaped with only minor injuries.”102 The Nebraska court’s action can be explained in terms of its unique version of strict liability. Nebraska recognizes strict liability only for an “injury to a human being rightfully using that product.”103 Thus, under Nebraska law, any damage to property, whether to the product itself or to other property of the claimant, would be characterized as economic loss and disallowed by the Nebraska court.104

96 A fire suddenly broke out in the front portion of the loader near the hydraulic line. 652 F.2d at 1166. The operator left the machine without turning off the motor. Id. Consequently, hydraulic fluid continued to fuel the fire and the loader was severely damaged. Id. The loader did not come equipped with a system to suppress or extinguish fires, and there were no operating instructions concerning fire hazards. Id.
97 Id. at 1173 n.23.
98 Id.
99 See supra notes 62-66 and accompanying text.
100 Id.
102 209 N.W.2d at 648.
103 Id. at 652.
104 Mid Continent Aircraft v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 319 (Tex. 1978) (Pope, J., dissenting).
In Nobility Homes of Texas, Inc. v. Shivers, the Supreme Court of Texas was faced with the question of whether the remote manufacturer of a mobile home could be held liable under strict liability for the economic loss his product caused a consumer. The trial court found that the mobile home was defective in its workmanship and materials, but there were no findings that these defects made the unit unreasonably dangerous or caused physical damage to the plaintiff or his property. Noting that, in Texas, a strict liability action is defined by Section 402A of the Restatement (Second) of Torts, the court based its rejection of the plaintiff's claim upon the section's requirement that a defective product be "unreasonably dangerous to the user or consumer or to his property".

In 1978, the Texas Supreme Court, in Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc., left no doubt that economic loss occurring when a defect causes damage only to the product itself is not recoverable in Texas. A rebuilt airplane, sold to the plaintiff by the defendant "as is," crashed when the engine failed while the plane was spraying insecticide on crops. The crash stemmed from a repairman's failure to attach a crankshaft gear bolt lock plate when the engine was overhauled before the sale to the plaintiff. Substantial damage was done to the fuselage and wings of the airplane; but the pilot suffered no personal injury, and no prop-

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106 557 S.W.2d 77 (Tex. 1977).
107 Id. at 77-78.
108 Id. at 78. Because the mobile home was found to be defective in workmanship and materials, the court held Nobility Homes liable without regard to privity for the economic loss to the plaintiff resulting from Nobility's breach of the Uniform Commercial Code's implied warranty of merchantability. Id. at 81.
109 Id. at 78.
110 Id. at 79 (citing McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967)). See supra note 86 for text of Section 402A.
111 557 S.W.2d at 79-80 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).
112 572 S.W.2d 308 (Tex. 1978).
113 Id. at 313.
114 Id. at 310.
115 Id. The airplane was overhauled by Robert Hawkins, a Federal Aviation Administration licensed engine mechanic who maintained Hawkins Aircraft Shop in Quanah, Texas. Hawkins was a co-defendant held liable in tort by the trial judge. Hawkins, however, chose not to appeal. Id. at 309.
erty other than the aircraft itself was damaged. In refusing to allow recovery in *Mid Continent*, the court chose not to distinguish between a defect that damages only the product itself but at the same time causes a dangerous condition and a defect that is not hazardous. The court noted that the Uniform Commercial Code (U.C.C.) was adopted by the Texas legislature as a comprehensive codification of the law of commercial transactions. The court reasoned that the contemplated expansion of strict liability in cases where a defect harms only the product would frustrate the Code's purpose. A dissent in *Mid Continent* analyzed the policies underlying tort and contract law and concluded that tort policy reaches property damage caused by hazardous defects. Concluding that the defective airplane constituted an unreasonably dangerous product within the meaning of section 402A of the Restatement (Second) of Torts, the dissent, implicitly applying the "degree of danger" test, would have permitted tort recovery for the damage to the airplane.

In an opinion decided the same day as *Mid Continent*, the

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115 Id. at 310.
116 Id. at 313. In an earlier decision, *Nobility Homes of Texas, Inc. v. Shivers*, discussed supra at notes 105-10, the court's refusal to allow recovery in strict liability absent a finding that the product was unreasonably dangerous implied that the court would follow the "degree of danger" reasoning, if faced with appropriate facts. See supra notes 62-66.
118 572 S.W.2d at 312.
119 Id. at 313. The court stated:

The consumer protection needs upon which strict liability is based are not sufficiently strong to impose that theory of recovery over the existing sales law remedies for Curry County's loss in this case. In transactions between a commercial seller and commercial buyer, when no physical injury has occurred to persons or other property, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code.

Id.
120 Id. at 313-20 (Pope, J., dissenting).
121 Id.
122 See supra notes 62-66 and accompanying text.
123 572 S.W.2d at 313-20. Justice Pope concluded that the majority decision rejects the criteria adopted in *Nobility Homes*, discussed supra at notes 105-10, that findings of a defect and unreasonable danger underlie a products liability case. 572 S.W.2d at 315.
Supreme Court of Texas further refined its rulings regarding the recovery of economic loss in strict liability. In *Signal Oil and Gas Co. v. Universal Oil Products*, the plaintiff sued in strict liability to recover for property damage and economic loss resulting from an explosion and fire at Signal's Houston refinery, allegedly caused by defects in the manufacture, design, and installation by the defendant of an isomax reactor charge heater. The court reiterated that where only the product itself is damaged, the economic loss is recoverable only as damages for breach of an implied warranty under the U.C.C. The court clearly recognized, however, that when a defect in the product causes collateral harm to other property, recovery for the product itself is properly considered as part of the property damage, rather than as economic loss. Therefore, the plaintiff in *Signal Oil*, who correctly alleged a cause of action in strict liability based upon its allegation of property damage, could recover for the cost of the product itself.

### III Cases in Jurisdictions Following Santor

One of the earliest decisions explicitly following the reasoning of *Santor*, allowing recovery for economic loss in strict tort liability, was *Cova v. Harley Davidson Motor Co.* The plaintiff alleged that golf carts manufactured by the defendant and purchased from a third party were defective and prayed for recovery for loss of his bargain, cost of making repairs, and lost profits. The Michigan Court of Appeals quoted approvingly from the text of *Santor* and similarly reasoned that on principle the manufacturer should be re-

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154 572 S.W.2d 320 (Tex. 1978).
155 Id. at 322.
156 Id. at 325.
157 Id.
158 Id. Justice Pope concurred in the decision because the defect in the product was unreasonably dangerous. Id. at 331-33.
159 See supra notes 17-26 and accompanying text.
161 182 N.W.2d at 801.
162 Id. at 801 n.1.
163 Id. at 804.
quired to stand behind his defectively manufactured product and should be held accountable to the end-user even though the product caused neither accident nor personal injury.  

In 1975, in *Iacono v. Anderson Concrete Corp.*, the Supreme Court of Ohio upheld the right to recover economic loss under a strict liability theory. Plaintiff sued a concrete manufacturer whose concrete was used to pour the plaintiff’s driveway. The driveway was poured in the spring of 1969 and that winter “pop-outs” began to form. The plaintiff sued both the manufacturer of the concrete and the contractor who poured the driveway. The only damages sought were for the repair of the driveway. A jury awarded the plaintiff $13,000, but on appeal the court held that a tortious act had not been alleged against the manufacturer and reversed the jury verdict as to the manufacturer. In reversing the appellate court, the Supreme Court of Ohio quoted approvingly from Santor:

From the standpoint of principle we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively made product has caused personal injury and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it.

While the Ohio Supreme Court labeled the recovery in *Iacono* to be for property damage, other courts have consistently interpreted the decision as allowing the plaintiff compensation for direct economic loss under a strict liability theory.

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134 Id.
135 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
136 326 N.E.2d at 268.
137 “Pop-outs” are small holes. Id.
138 Id.
139 Id.
140 Id. at 269.
141 Id. at 268.
142 Id. at 270-71 (quoting from Santor, 207 A.2d at 309).
143 326 N.E.2d at 271.
In *City of La Crosse v. Schubert, Schroeder & Associates*,\(^{144}\) the Supreme Court of Wisconsin explicitly followed the reasoning of *Santor* when it allowed a plaintiff to recover repair and replacement costs and lost profits arising from an allegedly defective roof manufactured by the defendant.\(^{146}\) Quoting *Santor*, the Wisconsin court agreed that the principles of product liability should be applied on the basis of whether the manufacturer was "the father of the transaction,"\(^{147}\) and not on the basis of whether the plaintiff had incurred personal injury or simple economic loss. Citing *Cova V. Harley Davidson*,\(^{148}\) with approval, the court held that a strict liability claim for pure economic loss involving only the cost of repair or replacement of the product itself and loss of profits is not demurrable.\(^{149}\)

**IV. EARLY ILLINOIS CASES**

One of the earliest cases in Illinois concerning an action for economic loss in tort was *Rhodes Pharmacal Co. v. Continental Can Co.*\(^{150}\) The plaintiff therein sued an aerosol can manufacturer for damages that resulted from the leakage of cans in which the plaintiff's product was packaged.\(^{151}\) In reversing the lower court decision, the appellate court concluded that liability could be based on the existence of an implied warranty of fitness, but held that the plaintiff had no cause of action in strict tort liability.\(^{152}\) The court stated simply, "We are not persuaded that the doctrine of strict tort liability should be

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\(^{144}\) 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

\(^{145}\) Id. at 127.

\(^{146}\) Id. at 128 (quoting *Santor*, discussed supra at notes 15-24).

\(^{147}\) Id. at 128 (quoting *Santor*, discussed supra at notes 15-24).


\(^{149}\) City of La Crosse v. Schubert, Schroeder & Assocs., 240 N.W.2d at 127. A demurrer is an assertion that the complaint does not set forth a cause of action upon which relief can be granted, and it admits, for the purpose of testing the sufficiency of the complaint, all properly pleaded facts, but not conclusions of law. Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972).


\(^{151}\) 219 N.E.2d 726.

\(^{152}\) Id. at 730-32.
applied here.”

More recently, in *Alfred N. Koplin & Co. v. Chrysler Corp.*, the intermediate appellate court extensively considered the justifications underlying the refusal to impose tort liability on a product manufacturer for the failure of its product to perform satisfactorily. Plaintiff had purchased two air-conditioning units manufactured by Chrysler. When the units failed to work correctly, plaintiff brought suit against Chrysler for the costs of repairing and replacing the units. In considering whether Illinois tort law provided a basis for recovery in such a situation, the appellate court asserted that “this case falls within the narrow range of situations dividing tort theory from contract theory. This is so because the loss suffered by the plaintiff in this case was economic loss . . . .” The court defined economic loss as damages for inadequate value, costs of repair and replacement of the defective product, or consequential loss of profits without any claim of personal injury or damage to other property. The court chose to follow *Rhodes* and refused to extend tort theory (negligence) to permit recovery against a manufacturer for solely economic losses absent property damage or personal injury from the use of the product.

Relying on *Koplin*, the Third Circuit Court of Appeals, predicting Illinois law, refused to allow the recovery of economic losses under a claim based on tort principles. In *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, the plaintiff sued the defendant manufacturer in strict liability for defects in roofing material which blistered, wrinkled, and cracked, requiring extensive repairs and eventual replace-

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153 Id. at 730.
155 364 N.E.2d 100.
156 Id. at 101.
157 Id.
158 Id. at 103.
159 Id. (quoting Note, *Economic Loss*, supra note 14, at 918).
161 Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980). The Illinois Supreme Court had not yet dealt with this issue. Id.
162 Id.
The court reasoned that the rationale behind strict liability in personal injury situations was not well-suited to claims alleging only economic loss and that the extension of strict liability in such cases would conflict with the decision by the Illinois Legislature to enact the sales provisions of the U.C.C. In as much as the doctrine of strict liability does not permit a manufacturer to limit its liability through the use of a waiver or a limited warranty, the court asserted that importation of strict liability into the economic loss area would effectively supersede the state's adoption of the U.C.C. Rellying on intermediate Illinois appellate court decisions, opinions of other courts, public policy, and judicial deference, the court refused to allow recovery for economic loss.

A few months later, another Illinois intermediate appellate court was faced with a similar situation. In Album Graphics, Inc. v. Beatrice Foods Co., the court of the First District decided a case in which the plaintiff sued the defendant for the negligent manufacture of defective glue which caused its cosmetic packages to fall apart. Holding that the plaintiff failed to state a cause of action in tort to recover purely economic losses, the court relied on Koplin's analysis and limited the plaintiff to recovery under a contract theory.

In Fireman's Fund American Insurance Co. v. Burns Electronic Security Services, Inc., the First District again refused to allow the recovery of economic loss under a strict lia-

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168 Id. at 281-82.
169 Id. at 288-89.
166 Id. at 289.
166 Restatement (Second) of Torts § 402A comment m, § 402B comment d (1965).
167 626 F.2d at 289.
170 626 F.2d at 289.
172 408 N.E.2d at 1043.
173 Id. at 1050.
bility theory. The plaintiff sued for the value of jewelry stolen when the defendant's burglar alarm system failed to function properly. Citing Album Graphics and Koplin, the court reasoned that if economic loss resulting from negligence is not recoverable in tort, neither should recovery for loss of the same character be permitted in strict liability. In some aspects the court differed from Koplin in that it declined to make the presence or absence of physical harm the determining factor in a definition of economic loss. Rather, the court stated that economic loss should be contrasted with loss which the parties could not reasonably be expected to have in mind, such as "hazards peripheral to what the product's function is." Suggesting that a buyer losing the benefit of his bargain because the goods are defective should look to his contract for remedies, the court denied recovery in tort.

V. MOORMAN MANUFACTURING CO. v. NATIONAL TANK CO. — THE ILLINOIS SUPREME COURT'S REASONING

Before reaching its decision in Moorman Manufacturing Co. v. National Tank Co., the Supreme Court of Illinois was faced with a split in the state appellate court opinions regarding the recovery of economic loss in tort actions. The appellate courts of Illinois, beginning with the Rhodes decision in 1966, refused to allow a cause of action in strict tort liability for the recovery of economic losses. The courts in Koplin, Album Graphics, and Fireman's Fund reasoned that the rationale of tort theory was not well-suited to claims alleging economic loss.

In 1981, however, in its extensive opinion in Moorman, 185

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176 417 N.E.2d at 132.
177 Id. at 133.
178 Id.
179 Id.
180 Id. at 134.
181 91 Ill.2d 69, 435 N.E.2d 433 (1982).
183 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977), discussed supra at notes 154-60.
the Illinois Fourth District Court of Appeals held that recovery should be allowed for economic loss under the tort theories of strict liability, misrepresentation and negligence.\(^\text{186}\) The court stated that "to deny recovery for economic loss because there is no accompanying personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually indistinguishable."\(^\text{187}\) The appellate court refused to follow a rule\(^\text{188}\) which would allow Moorman to recover the repair cost of the grain storage tank if it alleged the loss of a mere bushel of corn as a result of the defect, but which would prohibit recovery in the absence of such property damage or personal injury.\(^\text{189}\) "A party suffering economic ruin . . . should not be denied the protection of the law simply because he was 'fortunate' enough to escape physical injury."\(^\text{190}\) When a manufacturer has placed a faulty product into the stream of commerce and the buyer has paid the price demanded, the court ruled, the manufacturer should bear the loss because it is in the best position to spread the cost of that fault to other buyers or to insure against loss.\(^\text{191}\)  

\(^{186}\) Id.  
\(^{187}\) 414 N.E.2d at 1307.  
\(^{188}\) The court noted that Seely required the presence of personal injury or property damage to state a cause of action in strict liability. Id. at 1306.  
\(^{189}\) 414 N.E.2d at 1307. The court suggested that if an employee of Moorman had cut his finger while inspecting the tank, he would have suffered a personal injury allowing for the recovery of all types of harm, implicitly including the repair cost of the tank. Id.  
\(^{190}\) Id.  
\(^{191}\) Id. at 1308. The court noted that those jurisdictions denying the plaintiff recovery for economic loss contend that the U.C.C. preempts the field. Id. at 1309. The court disagreed, reasoning that the U.C.C. was designed for transactions in which the parties are in roughly equal bargaining positions. Id. at 1310. The court reasoned that forcing a plaintiff to proceed under the warranty provisions of the U.C.C., rather than under the doctrine of strict liability in tort, works a considerable hardship on the plaintiff, who must contend with:  

section 2-316 (allowing exclusion or modification of the Code's implied warranties);  
section 2-718 (enforcing reasonable liquidated damages clauses in sales contracts);  
section 2-719 (allowing a seller to limit the buyer's remedy for consequential damages); and  
section 2-607 (requiring, as a condition precedent to recovery, that the buyer give notice of a breach of warranty within a reasonable time after the breach is discovered or should have been discovered).
Resolving the conflict in the jurisdictions, the Supreme Court of Illinois reversed the appellate court in Moorman and held that recovery for qualitative defects is best handled by contract law, rather than tort theories. Beginning its discussion with an analysis of strict liability, the Supreme Court noted that in its adoption of strict liability in 1965, the court had emphasized the unreasonably dangerous nature of certain products by adopting the language of section 402A of the Restatement (Second) of Torts. The court in Moorman held that the language of that section, limiting its application to unreasonably dangerous defects resulting in physical harm to the ultimate user or consumer or to his property, reflected sound policy. The Court noted that: (1) adopting strict liability in tort for economic loss would effectively eviscerate section 2-316 of the Uniform Commercial Code which permits

Id. at 1309. According to the court, the development of the doctrine of strict liability in tort is evidence of the inadequacies of the U.C.C. remedies. Id. at 1310.

Id. at 447. The Illinois Supreme Court adopted strict liability in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), in which the brake system in a reconditioned truck tractor failed, and the truck collided with a bus causing a number of injuries to the bus passengers and considerable damage to the bus and the tractor-trailer rig. 210 N.E.2d at 183. In holding the manufacturer of the brake strictly liable, the court noted that its views on product liability coincided with the position taken in RESTATEMENT (SECOND) OF TORTS § 402A. Id. at 187. See supra note 86 for text of § 402A.

U.C.C. § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are not warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults"
parties to limit warranties in a reasonable manner;\(^{196}\) (2) applying the rules of contract warranty, rather than strict liability, prevents a manufacturer from being held liable for damages of unknown or unlimited scope;\(^{197}\) and (3) bargaining for a warranty is the purchaser's best protection against the risk of unsatisfactory performance.\(^{198}\) The court reasoned that "it is preferable to relegate the consumer to the comprehensive scheme of remedies fashioned by the U.C.C., rather than requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers."\(^{199}\) The court held that contract law, which protects the expectation interests of consumers, provides the proper standard when a product is unfit for its intended use.\(^{200}\)

In reaching its decision, the court noted that the characterization of an injury as "property damage," rather than "economic loss," usually depends on the nature of the defect and the manner in which the damage occurred.\(^{201}\) Quoting from Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.,\(^{202}\) the Supreme Court of Illinois expressly agreed with its rationale.\(^{203}\)

\(^{196}\) 435 N.E.2d at 447.
\(^{197}\) Id.
\(^{198}\) Id. at 447-48.
\(^{199}\) Id.
\(^{200}\) Id.
\(^{201}\) Id. at 449.
\(^{202}\) 652 F.2d 1165 (3d Cir. 1981).
\(^{203}\) 435 N.E.2d at 450.
[W]here only the defective product is damaged, the majority approach is to identify whether a particular injury amounts to economic loss or physical damage. In drawing this distinction, the items for which damages are sought, such as repair costs, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.204

The court concluded that tort theory is appropriately suited to personal injury or property damage resulting from a sudden or dangerous occurrence.205 The remedy for economic loss, that is, loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, on the other hand, lies in contract.206

With minimal discussion concerning the nature of the defect alleged, the court refused to allow recovery for the repair of the grain storage tank.207 The court held "this was not the type of sudden and dangerous occurrence best served by the policy of tort law that the manufacturer should bear the risk of hazardous products."208 The court disposed of the negligence and misrepresentation counts209 with a reiteration of its tort policy considerations.210

VI. Conclusion

In its decision to refuse recovery in strict liability for a qualitative defect, the Supreme Court of Illinois in Moorman appears to have joined the jurisdictions which apply a "degree of danger" test211 to distinguish economic loss from property

204 652 F.2d at 1172-73.
205 435 N.E.2d at 450.
206 Id.
207 Id.
208 Id.
209 See supra notes 5 and 6 and accompanying text.
210 435 N.E.2d at 452.
211 See supra notes 65, 66, 74, 100 and accompanying text.
damage when damage occurs only to the product itself. The court held that when only the defective product is damaged, losses caused by qualitative defects relating to the purchaser's expectations cannot be recovered under a strict liability theory. The court's reliance on the Pennsylvania Glass rational implicitly indicates that damage occurring solely to the defective product in a "sudden and dangerous" way will be characterized as property damage and will be allowed in strict liability actions in Illinois.

The reasoning adopted by the court, which applies the "degree of danger" test and stops short of allowing tort liability in cases where the product has incurred harm as a result of a qualitative defect in the product itself, has been criticized as leaving the consumer unprotected in situations where he suffers enormous pecuniary loss. Conversely, it has been condemned for going too far from contract principles. Dean Keeton observes:

A distinction should be made between the type of dangerous condition that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone else can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort.

On the contrary, the court's reasoning in Moorman completely comports with the notion that the essence of a product liability case is the plaintiff's exposure, through a hazardous product, to an unreasonable risk of injury to his person or

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212 435 N.E.2d at 450.
214 435 N.E.2d at 450.
215 See supra notes 62-66 and accompanying text.
216 414 N.E.2d at 1307; Comment, Products Liability: Expanding the Property Damage Exception in Pure Economic Loss Cases, 54 Chi.-Kent L. Rev. 968 (1978).
217 Keeton, Annual Survey of Texas Law, Torts, 32 Sw. L.J. 1, 5 (1978) (discussing Nobility Homes, discussed supra at notes 105-10; and Mid Continent, discussed supra at notes 111-23).
property. Holding a manufacturer liable for losses incurred when a product sustains damage to itself caused by a dangerous defect clearly furthers the policy of strict tort liability by enhancing the manufacturer's incentive to produce safe products and by imposing the loss on the one creating the risk of injury. It does not, however, increase the manufacturer's burden of care because the manufacturer already bears the identical burden of care under section 402A of the Restatement (Second) of Torts which subjects a manufacturer to liability for unreasonably dangerous products. Furthermore, the reasoning of the court does not unduly invade the province of the U.C.C. which was enacted by the Illinois legislature to govern economic relations between the suppliers and consumers of goods in the determination of the quality of a product. The Supreme Court of Illinois, in its decision in Moorman, has wisely reasoned to protect the consumer from dangerous defects which fortuitously cause damage only to the product without imposing an unlimited and uninsurable liability on the manufacturer for losses caused by the product's failure to meet the consumer's qualitative expectations.

Rosemary T. Snider

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318 See supra note 86 for text of § 402A.
319 Mid Continent, 572 S.W.2d at 317 (Pope. J., dissenting).
320 Moorman, 435 N.E.2d at 447.