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Property Damage Caused by Defective Products: Strict Tort Recovery: *Hawkins Construction Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973)

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Casenote

Property Damage Caused by Defective Products: Strict Tort Recovery

Hawkins Construction Co. v. Matthews Co.,
190 Neb. 546, 209 N.W.2d 643 (1973).

*The law itself is none too clear and I am doing the best I can to explain it as I understand it from the cases that have been handed down.*¹

The Nebraska Supreme Court in *Kohler v. Ford Motor Co.*² held that a manufacturer was strictly liable in tort when an article he placed in the market had a defect causing an injury to a *human being* rightfully using that product.³ This very restrictive statement of the strict tort theory left open the question of whether in Nebraska the doctrine would be extended to allow recovery for damage to property. The Restatement (Second) of Torts section 402A (hereinafter referred to as "section 402A" or the "Restatement") explicitly provides that a plaintiff may recover in strict tort for physical harm to his property.⁴ Many cases from jurisdictions

1. *Macres v. Coca-Cola Bottling Co.*, 290 Mich. 567, 570, 287 N.W. 922, 923 (1939) (Buchnell, J., quoting the trial judge).

2. 187 Neb. 428, 191 N.W.2d 601 (1971).

3. *Id.* at 436, 191 N.W.2d at 606.

4. 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 and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(Emphasis added).

other than Nebraska have held in accord with the Restatement.⁵ The Nebraska Supreme Court in *Hawkins Construction Co. v. Matthews Co.*⁶ addressed this important question that had been left unanswered in *Kohler*.⁷ The majority opinion in *Hawkins* subdivided property damage cases into two categories—cases where the defective product causes damage to itself and cases where the defective product causes damage to other property.⁸ It is clear from *Hawkins* that in Nebraska damage to the defective product itself is not recoverable in strict tort. Recovery on such claims is to be governed exclusively by the warranty provisions of the Uniform Commercial Code (hereinafter referred to as the “UCC” or the “Code”).⁹ Whether strict tort recovery for damage to other property is permitted depends on which of two alternative interpretations *Hawkins* is given. This casenote will analyze the court’s effort to determine the applicability of strict tort theories to property damage claims.¹⁰

I.

The factual setting in *Hawkins* is complex, but a simplified version will facilitate discussion of the legal issues in the case. Scaffold equipment was manufactured by defendant Waco Scaffold and Shoring Company (“Waco”) and leased to plaintiff Hawkins Construction Company (“Hawkins”) by defendant Matthews Company (“Matthews”). Before leasing the equipment, Hawkins received advertising brochures published by Waco and stamped with the

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5. See, e.g., *Arrow Transportation Co. v. Fruehauf Corp.*, 289 F. Supp. 170 (D. Ore. 1968); *Lee v. Sears Roebuck & Co.*, 262 F. Supp. 232 (D. Tenn. 1966); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Brewer v. Reliable Automotive Co.*, 240 Cal. App. 2d 173, 49 Cal. Rptr. 498 (1966); *State Store Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966); *Rosenau v. City of New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968); *O.M. Franklin Serum Co. v. C.A. Hoover & Son*, 418 S.W.2d 482 (Tex. 1967); *Monsanto Co. v. Thrasher*, 463 S.W.2d 25 (Tex. Civ. App. 1970). In view of the subsequent confusion created by *Hawkins*, an interesting case is *Norfolk Develop. Corp. v. St. Regis Pulp & Paper Corp.*, 338 F. Supp. 1213 (D. Neb. 1972), which applied strict tort liability to property damage.
 6. 190 Neb. 546, 209 N.W.2d 643 (1973).
 7. “We are faced squarely with the proposition of the extension of a doctrine beyond personal injuries to permit recovery for all property damage.” *Id.* at 559, 209 N.W.2d at 652.
 8. *Id.* at 560, 209 N.W.2d at 652.
 9. *Id.* at 562, 209 N.W.2d at 653.
 10. The *Hawkins* opinion is also concerned with the creation of express warranties by advertising, *id.* at 564-65, 209 N.W.2d at 654; contributory negligence, *id.* at 566-67, 209 N.W.2d at 655-56; and liability of lessors in a strict tort action, *id.* at 565-66, 209 N.W.2d at 655. This casenote will not consider these other areas.

name and address of Matthews. The brochures, according to the court, expressly warranted the scaffold equipment's load capacity.¹¹ The parties consulted extensively about the use of the equipment and Waco submitted drawings showing the recommended scaffold configuration.

Hawkins used the scaffold equipment to support a roof deck cement pour at a construction site. On the day of the accident, workmen on a portion of the deck were pouring cement. During the pour, the roof deck supported by Waco's scaffold collapsed.¹² There were no personal injuries. Hawkins sued for the cost of rebuilding the damaged structure, and other expenses, as well as replacement of the allegedly defective scaffold.¹³

II.

The principal trial issues were whether the scaffold was defective, and, if so, whether the defect proximately caused the accident. The trial court submitted the case to the jury under the theories of

11. *Id.* at 549, 209 N.W.2d at 646-47.

12. Erection of the shoring equipment necessitated stacking several scaffold panels in order to reach the proper height. To accomplish this task, defendants furnished tubular connectors, manufactured by Waco. Several broken connectors were discovered at the accident scene, and Hawkins contended that the failure of these connectors was the proximate cause of the accident. Waco denied that the connectors were defective. In addition, Waco offered, as an affirmative defense, that plaintiff had not complied with the specifications furnished by Waco; and that such failure to comply was the cause of the collapse. *Id.* at 553, 209 N.W.2d at 648-49.

13. Hawkins sought recovery for the following itemized expenses:

Formwork and Shoring Lumber	\$5,667.97
Concrete	2,120.44
Reinforcing Steel	1,880.20
Replace Finishing Machines	800.00
Collapse Photos	118.49
Mechanical Work	328.19
Electrical Work	836.06
Scaffold Replacement and Freight	9,147.39
Equipment Rental	2,312.80
Hawkins Labor	4,803.53
Insurance and Taxes	696.51
Estimate—Work To Be Done, Haul Away Debris, Masonry	727.95
Delay Costs—Heating, Utilities, Supervision, Watchman	1,150.00
	<hr/>
	\$30,589.53
5% Overhead	1,529.48

Record at 3. It is important to note that the first four items above involved damage to property other than the defective scaffold equipment, while the remaining items are for damage to the scaffold and economic loss claims.

express warranty and strict liability in tort.¹⁴ The jury returned a general verdict for Hawkins and the defendants appealed. On review, the supreme court held the trial court erred in submitting the issue of strict tort liability to the jury. Because the verdict was general there was no way to determine whether the jury resolved the case upon strict tort liability or express warranty. However, the court held that the instructions on strict tort liability did not constitute prejudicial error. The only jury issues—whether the product was defective and whether the defect proximately caused the damage—were identical to both theories of recovery. The jury's verdict would have been for the plaintiff under either strict tort or express warranty; therefore, the trial court was affirmed.¹⁵

This was the holding of the *Hawkins* case. No further elaboration was necessary to affirm the trial court's judgment. However, Chief Justice White, writing for the majority, explained why the issue of strict tort liability should not have been submitted to the jury. He undertook to determine "the proper range of strict tort liability"¹⁶ in Nebraska by addressing the question left open in *Kohler*—the extension of the strict tort doctrine beyond personal injuries to permit recovery for property damage.

The majority opinion in *Hawkins* first subdivided property damage claims into two categories: "Situations where the defective product causes damage to itself and situations where the defective product causes damage to other property."¹⁷ *Hawkins* indicated that strict tort liability is not to be extended to both categories of property damage claims:

We perceive no sound reason for extending the doctrine of strict tort liability to the point where it emasculates the law of sales and the Uniform Commercial Code, and extended to situations in which the loss involves injury to the defective product itself.¹⁸

The chief justice reasoned that

[t]he doctrine of strict tort liability was not conceived as a substitute for warranty liability in cases where the purchaser has only lost the benefit of his bargain. . . . If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code.¹⁹

Where damage is confined to the defective product itself, a plaintiff must seek recovery under the UCC's warranty provisions.

14. 190 Neb. at 559, 209 N.W.2d at 651.

15. *Id.* at 563, 209 N.W.2d at 653-54.

16. *Id.* at 559, 209 N.W.2d at 652.

17. *Id.* at 560, 209 N.W.2d at 652.

18. *Id.* at 562, 209 N.W.2d at 653.

19. *Id.* at 561-62, 209 N.W.2d at 653.

Strict liability *may* be available, however, when the defective product damages other property. The majority opinion in several places is careful to distinguish between damage to the product itself and damage to other property. The UCC is “designed to apply,” according to the majority opinion, “where the product is defective but *where no damage results from the defect, either to persons or other property.*”²⁰ The interpretation of *Hawkins* that seems to be dictated by the majority opinion’s reasoning is that recovery would be available in strict tort when persons or property other than the defective product itself are damaged.

The obvious inconsistency between the holding in *Hawkins*—*i.e.*, that the trial court erred in submitting the issue of strict tort liability to the jury—and the majority opinion’s reasoning is that the defective product *did* cause damage to “other property.”²¹ This inconsistency suggests an alternative interpretation of *Hawkins*. The case may be interpreted to exclude recovery in strict tort for any type of property damage claim.

The second interpretation of *Hawkins* is supported by Judge Clinton’s concurring opinion. Judge Clinton indicated that he read the majority opinion as declining to extend strict liability in tort beyond allowing recovery for personal injury.²² He stated that the majority opinion should have elaborated this rationale.²³

20. *Id.* at 561, 209 N.W.2d at 652 (emphasis added).

21. *See* note 13 *supra*. Although the majority apparently failed to apply its own rationale, there are two possible explanations which might reconcile the majority’s language with the facts of the case. First, it could be argued that until the cement attained sufficient rigidity to stand alone, the structure was merely an extension of the scaffold which supported it, and thus a part of the defective product itself. Second, the majority may have felt that, taken as a whole, it was more appropriate to decide *Hawkins* under contract than tort principles. *Hawkins* was a professional builder unlikely to be confused by the Code’s notice and warranty provisions. It probably was insured for the loss or it could pass the cost on to the ultimate purchaser. Many of *Hawkins*’ claims, such as delay costs and labor, were clearly economic. Tort recovery traditionally is applied where plaintiff is confronted with an unexpected risk. *Hawkins*, Waco and Matthews collaborated extensively about the use of the shoring equipment. The product expressly was warranted to meet plaintiff’s needs and the loss involved was a dickered aspect of the bargain.

22. 190 Neb. at 570, 209 N.W.2d at 657.

23. *Id.* Judge Clinton gave three reasons for not extending strict tort liability to property damage cases. First, such extension conflicts with property damage sections of the UCC (NEB. UCC §§ 2-715(2)(b), 2-719(3)) and allowing strict tort recovery in this area would repeal by judicial fiat the UCC provisions pertaining to exclusion and modification of warranties, limitation of damages and modification and limitation of remedies (NEB. UCC §§ 2-316, 2-718, 2-719). *Id.* at

Judge McCown's dissent pointed out the inconsistency between the majority opinion's reasoning and the holding of the case. While he agreed that damages for commercial loss should be governed by the UCC, Judge McCown objected to classifying the damages in *Hawkins* as commercial.²⁴ Strict tort recovery should have been allowed, according to Judge McCown, because the entire damage was in the form of "physical harm" to Hawkins' property.²⁵ Judge McCown urged the court to adopt the Restatement's "physical harm" test.²⁶

In an unreported decision, subsequent to *Hawkins*, Judge Urbom of the United States District Court for the District of Nebraska refused to submit the issue of strict tort liability to the jury where a defective product caused damage to property other than the defective product.²⁷ This decision supports Judge Clinton's interpretation of *Hawkins* that strict tort liability does not allow recovery for any property damage.

III.

Because *Hawkin's* discussion of the proper line of demarcation

571, 209 N.W.2d at 657-58. Clinton explained that strict tort recovery for personal injuries is allowed, despite corresponding UCC provisions, because of the case law antecedent to the Code and NEB. UCC 2-719(3) providing that limitation of consequential damages for personal injuries is prima facie unconscionable. *Id.* at 571-72, 209 N.W.2d at 658. Second, damages of the type involved in *Hawkins* are ordinarily covered by insurance and there is no reason to use strict tort liability to transfer the risk of loss from one insurer to another. *Id.* at 572-73, 209 N.W.2d at 658-59. Third, important information relating to policy in this area is inadequate. *Id.* at 573, 209 N.W.2d at 659.

24. 190 Neb. 568, 209 N.W.2d 656 (1973).

25. *Id.* at 569, 209 N.W.2d at 656-57.

26. *Id.* at 570, 209 N.W.2d at 657.

27. *West Nebraska Express, Inc. v. United States Thermo Control Co.*, No. CV72-L 148 (D. Neb.). *West Nebraska Express* ("WNX"), an interstate shipper, transported a load of beef for a shipper, Swift & Co., from Scottsbluff, Neb., to Syracuse, N.Y. When the WNX unit arrived in New York, due to an alleged defect in the refrigeration unit, the meat was in an off condition. WNX was absolutely liable to Swift under 49 U.S.C. § 20(11) (1970) which prescribes the liability of carriers to shippers. WNX brought an action against the manufacturer of the refrigeration unit for the damage to the beef. Judge Urbom refused to instruct on strict tort liability:

Whether strict liability attaches under Nebraska law to damage from a malfunctioning article to property other than the defective product is not crystal clear, but I read *Hawkins Construction Company v. Matthews* . . . as saying that strict liability does not attach, because the Uniform Commercial Code provides a remedy for property damage both to the defective article, and to other property.

between strict tort liability and the UCC's warranty provisions²⁸ is susceptible of two divergent interpretations, the case does not go very far toward delimiting the appropriate scope of the two theories of recovery. A hypothetical case is illustrative of the interrelationship between these two bodies of law in products liability cases.

Suppose that a Buyer, B, purchased a new color television. One evening while B was watching television, the set exploded. A brilliant flash caused by the explosion permanently damaged B's eyes and destroyed the television and several pieces of furniture in B's family room. The manufacturer had expressly warranted the set to be free from material and workmanship defects. All other warranties, express or implied, were disclaimed and the remedy was limited to repair or replacement of the defective part, which was identified as a \$12 tube. Liability for consequential damages were expressly denied.

Under *Kohler*, B could use a theory of strict tort liability to recover for his personal injuries.²⁹ He also could recover for his personal injuries under the UCC. The Code provides for a recovery of consequential damages for breach of express warranty.³⁰ The manufacturer's exclusion of consequential damages from injury to the person in the case of consumer goods is prima facie unconscionable.³¹

28. For general discussions of this topic, see Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code; A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 W. RES. L. REV. 5 (1965); Speidel, *Products Liability Economic Loss and the UCC*, 40 TENN. L. REV. 309 (1973); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 32 STAN. L. REV. 713 (1970).

29. 187 Neb. at 436, 191 N.W.2d at 606.

30. NEB. UCC § 2-715(2):

Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

31. NEB. UCC § 2-719(3):

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The real distinctions between the alternative interpretations of *Hawkins*, section 402A and the UCC surface in B's property damage claims against the manufacturer. Under the UCC warranty provisions, B's recovery technically is limited to repair or replacement of the \$12 tube. It has been held, however, that such a warranty implied the product was repairable.³² The proper measure of damages would be the value of the television at the time of its destruction.³³ It is proper under the Code to limit remedies and to exclude liability for consequential damages resulting from property damage;³⁴ therefore, B would not recover for the damage to his furniture. The only arguments B could make in attempting to defeat the manufacturer's disclaimers and exclusions are that they are unconscionable³⁵ or that the remedy provided fails of its essential purpose.³⁶ In this hypothetical, however, these arguments probably would be little assistance to B.³⁷

32. In *Russo v. Hilltop Lincoln-Mercury*, 479 S.W.2d 211 (Mo. App. 1972), plaintiff's new car was destroyed by fire started by a defective electrical system. The manufacturer's express warranty provided for repair or replacement of defective parts. The court held that provision in the warranty to imply the car was repairable. It would be ludicrous, the court reasoned, to require plaintiff to ask the defendant to do the impossible.

33. *Id.* at 213.

34. NEB. UCC § 2-719(1) (a):

[T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and replacement of the price or to repair and replacement of non-conforming goods or parts

35. NEB. UCC § 2-302 authorizes courts to refuse to enforce "unconscionable" contracts or portions thereof. However, Comment 1 to that section states that the basis of unconscionability is "prevention of unfair surprise . . . not disturbance of allocation of risks because of superior bargaining power." See, e.g., *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

36. NEB. UCC § 2-719(2) provides that "when circumstances cause an exclusive or limited warranty to fail of its essential purpose, remedy may be had as provided in this act."

37. Cases under UCC § 2-719(2) have held that the purpose of the remedy is not to make the buyer whole for damage caused by a defective product; rather the purpose of the remedy is to make the product work. If the buyer is not deprived of any of the remedies provided by contract, the remedy has not failed of its essential purpose.

In *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248 (Tex. Civ. App. 1972), the plaintiff's new car over an 18 month period was in the shop some 45 days for 50 different defects. The warranty limited the remedy to repair or replacement of defective parts. The plaintiff admitted that in each instance diligent attempts were made to rectify the defects, but on occasion it would take from one to five attempts to make a repair. Plaintiff's argument that the remedy had failed

If *Hawkins* is read to allow recovery in strict tort liability for damage to property other than the defective product itself, B could recover for the damage to the furniture. Apparently, however, B could not recover for the damage to the television.³⁸ On the other hand, if the majority opinion in *Hawkins* precludes recovery in strict tort liability for any property damage, B has no cause of action in strict tort theory. He has lost his television and the furniture in the family room. His recovery, unless he is successful against the manufacturer or dealer on a negligence or *res ipsa loquitur* theory, is perhaps only the replacement of a \$12 tube and at most the value of the television.

Section 402A would allow recovery for damage to the furniture and the television because the damage was in the form of physical harm.³⁹

of its essential purpose was rejected because there had been no repudiation of the warranty nor any wilful refusal or failure to make the repair. In another case, *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970), the same remedy was held to have failed of its essential purpose because the dealer was dilatory in making repairs. The dealer allowed plaintiff's tractor to remain in his shop for weeks at a time without working on it. For other cases discussing § 2-719(2), see *V-M Corp. v. Bernard Distrib. Co.*, 447 F.2d 864 (7th Cir. 1971); *Russo v. Hilltop Lincoln-Mercury*, 479 S.W.2d 211 (Mo. App. 1972).

Under the foregoing analysis, B might be able to recover the value of the television. Because it was totally destroyed, B was deprived of the remedy provided by the contract.

38. B might seek recovery in strict tort by arguing that the defective product be defined as the tube. If this definition of defective product were accepted, it would mean the defective product did cause damage to other property. This argument is discussed in Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 982 (1966).
39. A leading case which most clearly reflects the Restatement position is *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). In that case, defective brakes on a truck resulted in a collision. The plaintiff, owner of the truck, sued the manufacturer seeking damages for physical injury to the truck, restitution of the purchase price and profits lost in his business because he was unable to make normal use of the truck. Although the case was decided on warranty grounds, Chief Justice Traynor "gratuitously" expounded on the proper application of strict tort liability. The law of sales was carefully articulated to govern the economic relations between suppliers and consumers of goods, Traynor wrote, while the doctrine of strict liability in tort was designed not to undermine the warranty provisions but to govern the distinct problem of physical injuries. Chief Justice Traynor explicitly included physical injury to property within the scope of strict tort liability:

Plaintiff contends that, even though the law of warranty governs the economic relations between the parties, the doctrine

Conversely, there are situations where the Restatement rule is inapplicable, but the warranty provisions of the UCC provide relief. Suppose, for example, that B's television did not explode, but it simply was a lemon. There is no recovery in strict tort liability under either reading of *Hawkins* because there is no damage to any property.⁴⁰ Similarly, section 402A provides no recovery because there has been no "physical harm" to B or his property.⁴¹ However, since this type of loss is covered by the manufacturer's express warranty, B can recover under the relevant provisions of the UCC.⁴² Here the repair or replacement of defective parts is the appropriate remedy, and in many cases it will satisfy B. This is the economic or commercial loss case where B has lost the benefit of his bargain.

This hypothetical demonstrates the many areas of overlap between strict tort liability and the Code's warranty provisions. The *Hawkins* majority opinion appears to be based on the misconception that no such overlap exists. In his quest to "determine the proper range of strict tort liability," Chief Justice White repeatedly explained that economic loss is properly governed by warranty; the negative implication was that everything else belongs in the realm of strict tort liability.⁴³ Commercial losses are exclusively governed by the UCC, but the negative implication is not true. Recovery for personal injury is available under both strict tort and the UCC. Where a defective product causes injury to other property, the UCC

of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason to distinguish them.

Id. at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. For other cases applying the physical harm test, see note 5 *supra*.

40. See note 19 and accompanying text *supra*.

41. See note 4 *supra*. An extreme position which goes beyond the Restatement is represented in *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). The plaintiff purchased new carpet for his home; shortly thereafter the carpet developed "lines" or "runs." In an action against the manufacturer for the purchase price, the plaintiff prevailed on a theory of breach of implied warranty of merchantability; however, the court said the action could have been in strict tort liability. Most cases have not gone as far as *Santor* in extending the strict tort theory. It is submitted that the *Santor* case is the same as the television hypothetical where there was no physical harm, but the set was a lemon.

42. NEB. UCC § 2-313.

43. The chief justice stated: "[P]ublic policy only demands an additional remedy be given the buyer which eliminates situations *beyond the range of the Uniform Commercial Code* and the applicable law of sales." 190 Neb. at 562, 209 N.W.2d at 653 (emphasis added).

allows recovery for consequential damages for breach of warranty.⁴⁴ The same result is reached under section 402A.⁴⁵ The crucial distinction between the warranty provisions and strict tort liability is the ability under the Code to disclaim certain liabilities. If the manufacturer excludes liability for personal injuries, it is prima facie unconscionable under the Code, but he may disclaim liability for injury to property.⁴⁶ At this point, which of the two alternative readings of *Hawkins* that eventually prevails becomes extremely important. If the case is read to say that strict tort liability does not include recovery for any property damage, a plaintiff is virtually left without a theory of recovery for injury to property caused by a defective product. As the hypothetical illustrates, there is nothing that could be recovered under such a restrictive view of strict tort liability that could not be recovered under the UCC. Instead of emasculating the provisions of the Code, as the majority opinion feared,⁴⁷ this reading of *Hawkins* would emasculate the doctrine of strict tort liability.

If *Hawkins* is read to allow recovery for damage to property other than the defective product itself, the only remaining difficulty is the distinction between "other property" and the defective product. The majority opinion's reasoning was that economic loss cases should be governed by warranty; and that damage to the defective product itself constitutes economic loss. This is troublesome because damage to the defective product itself is not necessarily limited to economic loss. If the defect in the product causes actual physical harm to the product itself, as in the television hypothetical, this is something other than economic loss. B's interest in the benefit of the bargain is that his television work properly. But, where the defect has reduced the product to a smoldering heap on the family room floor, B's interests go beyond the scope of the benefit of the bargain. His property has been destroyed. If he can recover for a chair that burned when the television exploded, he should recover for physical damage to the set itself.

This is the position of section 402A which Judge McCown thoroughly analyzed in his dissenting opinion.⁴⁸ Unlike *Hawkins*, the Restatement does not distinguish between person and property nor does it subdivide property damage claims into two categories.⁴⁹

44. See note 30 *supra*.

45. See note 4 *supra*.

46. See note 31 *supra*.

47. 190 Neb. at 562, 206 N.W.2d at 653.

48. *Id.* at 567, 209 N.W.2d at 656.

49. See note 4 *supra*.

Conclusion

There is obviously no consensus among the members of the Nebraska Supreme Court as to the proper scope of strict tort liability.⁵⁰ Perhaps, the court should have decided *Hawkins* on warranty grounds and refrained from any further development of the strict tort doctrine until necessary. Had the court been faced with a case like the television hypothetical, where a warranty would not provide a recovery for property damage, the court probably would have provided a more definitive statement on strict tort liability. *Hawkins* created confusion which can only be alleviated by a clear and carefully considered opinion in the next appropriate case. Further, it is urged that the majority reconsider Judge McCown's dissenting opinion and adopt section 402A.

*Steve Timm '75**

50. Six supreme court judges and one district court judge heard the *Hawkins* case. In addition to Chief Justice White's majority opinion, Judges Smith and Clinton wrote concurring opinions. Judge McCown concurred in part and dissented in part. Judge Boslaugh concurred in the result only.

* Robert J. Banta assisted in the writing of this article.