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THE CITADEL SURVIVES A NAVAL BOMBARDMENT: A POLICY ANALYSIS OF THE ECONOMIC LOSS DOCTRINE

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I. INTRODUCTION

Professor Prosser's choice of military terminology to depict the emergence of strict liability in tort generates images of an embattled fortress under assault from the forces of progress.\(^1\) Hindsight demonstrates that progress prevailed, and the Restatement (Second) of Torts section 402A is the result.\(^2\) In at least one area, however, the conquest by the progressive forces is not so clear. The citadel remains a barrier against recovery for losses that can be labeled purely "eco-

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1. The Citadel is the "citadel of privity." See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, The Fall]; Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, The Assault]. These articles have helped to create and shape modern strict liability laws. Apparently, Cardozo was the first to use this terminology in Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931). Prosser, The Assault, supra at 1099; Comment, The Vexing Problem of the Purely Economic Loss in Products Liability: An Inquiry in Search of a Remedy, 4 SETON HALL L. REV. 145, 145 n.1 (1972-73) [hereinafter cited as Comment, The Vexing Problem]. The military jargon has been picked up by others discussing this issue. See Edmeades, The Citadel Stands: The Recovery of Economic Loss in American Products Liability, 27 CASE W. RES. L. REV. 647 (1977); Donnelly, After the Fall of the Citadel; Exploitation of the Victory or Consolidation of All Interests?, 19 SYRACUSE L. REV. 1 (1967) [hereinafter cited as Donnelly, After the Fall].

2. Section 402A 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.

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nomic." Economic losses are damages to the product itself or consequential damages to the economic interests of the injured party. The Restatement provides for liability to the "consumer or to his property" for "physical harm." The majority of American courts consid-

(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 or entered into any contractual relation with the seller.


4. Restatement (Second) of Torts § 402A (1).
erring the economic loss issue in the strict liability context have embraced the rationale of Seely v. White Motor Co.\(^5\), which rejects recovery for purely economic losses, over the reasoning of Santor v. A. & M. Karagheusian, Inc.\(^6\), which allowed recovery for such damages.\(^7\) Ten years ago, one author was able to assert without fear of contradiction that "the biggest part of the citadel—the economic loss section—did indeed remain in the hands of the enemy."\(^8\)

The conflict centers on whether the Uniform Commercial Code (UCC) warranty provisions\(^9\) provide the exclusive remedy for economic loss caused by a defective product. If, as most courts have held, warranty provides the exclusive remedy, then recovery is restricted to limited claimants who can meet the stringent require-

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5. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). In Seely the plaintiff sought to recover the value of a truck that had proved to be defective as well as profits lost due to the defect. The California Supreme Court allowed recovery under a warranty theory, but denied recovery under a strict liability theory.

6. 44 N.J. 52, 207 A.2d 305 (1965). The New Jersey Supreme Court allowed a plaintiff not in privity with the manufacturer to recover for the difference between the price paid and the value of a defective carpet. Interestingly, the New Jersey Supreme Court recently found the Santor reasoning inapplicable in transactions between commercial entities. Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985).


8. Edmeades, supra note 1, at 648. In his article, Edmeades claims that Prosser was a secret agent for the enemy! Even Prosser, who has been cited as opposing allowing recovery for purely economic losses, does not necessarily go that far. He would have refused recovery in cases where the only loss is of the bargain:

The difficulty concerns mere loss on the bargain, which is to say that the product which the plaintiff has received is only worth less than the price he has paid for it. Here a small majority of the courts have denied the strict liability; but there are three that have permitted the recovery. The denial would appear to be the sounder rule. Such pecuniary loss is a matter, not only of what the plaintiff has received, but also of what he has paid for it. Loss on the bargain must depend upon what the bargain is . . . .

Prosser, The Fall, supra note 1, at 823. Prosser does not seem to consider that economic losses may occur in cases where the defect is far more than the loss of the bargain. It may be a defect that endangers the life and property of the user.

ments of UCC warranty provisions. Moreover, warranty disclaimers may bar recovery altogether.

Under some circumstances, however, courts have permitted a broader tort recovery for economic loss. Undisputably, strict liability in tort recovery is allowed for personal injury or property damage caused by a dangerous product. Recovery for economic losses is sometimes allowed when accompanied by such physical damages.\(^{10}\) Most courts have been unwilling to extend tort recovery further when the alleged damage is purely economic.

Because of the *Erie*\(^{11}\) doctrine, most development in the area has come from state courts or from federal courts applying state law. The *Erie* doctrine, however, does not preclude the federal courts from developing rules of law in admiralty. The rejection of recovery for economic losses in products liability cases has recently been challenged by a bombardment from federal courts considering issues arising out of admiralty claims. In differing contexts, the Fifth,\(^ {12}\) Eighth,\(^ {13}\) Ninth,\(^ {14}\) and Eleventh Circuits\(^ {15}\) have allowed recovery for economic losses. When the Third Circuit Court of Appeals recently rejected recovery for purely economic damages,\(^ {16}\) the United States Supreme Court granted certiorari to resolve this apparent conflict among the circuits\(^ {17}\) in *East River Steamship Corp. v. Transamerica Delaval, Inc.*\(^ {18}\)

*East River* presented the Court with the opportunity to determine whether damages should be awarded for purely economic losses in admiralty products liability cases. The case, however, may be of even broader importance. After all, the Supreme Court rarely decides

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questions relating to products liability law. Although the admiralty decision does not bind the states, the Supreme Court’s reasoning may certainly be persuasive.

The potential importance of *East River* is evidenced by the attention surrounding the suit’s pendency before the Court. Parties with very little interest in admiralty law were eager to present their views. The Product Liability Advisory Council, Inc.\(^{19}\) and the Motor Vehicle Manufacturers Association of the United States, Inc.\(^{20}\) jointly filed a brief *amicus curiae* arguing that recovery should not be allowed for purely economic losses in strict liability cases. Having little interest in admiralty law, the groups’ concern was that a Supreme Court admiralty decision allowing recovery for purely economic loss could have wider ramifications. The Supreme Court agreed with this view, disallowing the recovery for purely economic losses.

In a unanimous opinion, the Court found that maritime strict liability principles permit no recovery unless there is damage to a person or property other than the defective product itself — even if the product can be considered unreasonably dangerous. *East River* is already being hailed by the products liability defense bar as promoting predictability and simplifying commercial litigation.\(^{21}\) In reality, the decision provides comfort to manufacturers seeking to minimize their responsibility for losses caused by their dangerous products.\(^{22}\)

Justice Blackmun’s unanimous opinion fails for several reasons.

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20. AM General Corporation; American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; International Harvester Company; M.A.N. Truck and Bus Corporation; PACCAR, Inc.; Volkswagen of America, Inc.; and Volvo of North America Corporation are the members of the Motor Vehicle Manufacturers Association of the United States. *See id.*


22. Of course, litigation will be simplified because the manufacturer will always win these cases under the Supreme Court’s holding.
First, and most importantly, the Court does not adequately consider the policies underlying products liability cases involving purely economic losses. Second, the Court's theoretical rigidity on the issue of maritime products liability can lead to bad decisions and hamper further development of the law. Finally, the Court did not address the special conditions present in the admiralty. In failing to do so, it produced a broadly worded opinion whose effect will undoubtedly reach beyond admiralty.

This analysis begins with an examination of the products liability decisions of common law courts relating to the economic loss doctrine. The same questions are then reviewed in the admiralty context. After an examination of the important policy considerations implicated in the dispute, the article will suggest a preferred approach for courts faced with the economic loss issue. Finally, the probable impact of the Supreme Court's decision in *East River* will be examined in light of the preferred approach.

II. BACKGROUND

A. Defining Economic Loss

There is no agreement concerning what constitutes an economic loss. Absent a working definition, understanding the law of economic loss is difficult. Economic losses can be categorized into two primary groups. The first is loss in value of the product itself.\(^{23}\) If the product is not worth what it was represented to be, the purchaser has been harmed to the extent of the decrease in value or the cost of making the product live up to the manufacturer's representations.\(^{24}\) The second group, consequential economic losses, can be far more harmful to the purchaser. This group includes all other economic losses attributable to the product defect.\(^{25}\) Lost profits, a contract breach forced by the defect, or lost wages may all be termed consequential economic losses. When it is necessary to differentiate between these varieties of economic losses, the first group will be referred to as product economic losses, while the latter can best be thought of as consequential economic losses.\(^{26}\)

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26. These losses are often referred to as direct and indirect or consequential. Note, *Product
Although the line between property loss and economic loss can sometimes be obscure, the legal result of attaching a particular label to a loss can be quite different. If the loss is deemed to be property loss, recovery will be allowed. Most courts, however, will not grant relief where the damages are termed "economic." Some courts define economic loss as "damages which do not result from a dangerous or unsafe condition of a product." If the losses do result from such a dangerous or unsafe condition, they are termed property losses. Although the manner in which a defect manifests itself may prove helpful in determining liability for a loss, it is less useful in defining economic loss. An economic loss caused by a defective product that is not dangerous is still an economic loss. It may be a non-compensable economic loss, but it is an economic loss nonetheless. This article will use the phrase "economic loss" in its broader sense to more accurately reflect the injuries caused by defective products.

B. Common Law Decisions

A brief review of the law of products liability is useful in understanding why economic losses traditionally have not been compensated. The term "products liability" encompasses all claims arising out of the production of a defective product. Today such claims generally fall within three areas: (1) negligence, (2) breach of warranty, and (3) strict liability.

The law was not always so expansive. In Winterbottom v. Wright, the Court of Exchequer held that the breach of a contract to maintain a coach gave no tort remedy to a passenger injured when the coach collapsed. The landmark case is traditionally read to stand for the proposition that one wishing to sue for a product defect must be in

Defects, supra note 3, at 626-27; Note, Economic Loss, supra note 3, at 918. The term "product economic loss" avoids the difficulties in defining the word "direct."

27. See Edmades, supra note 1, at 651.
30. See text accompanying notes 171-174.
privity with the manufacturer.\textsuperscript{34} This rule, which normally insulated the manufacturer from liability, was firmly established in the United States by the end of the eighteenth century.\textsuperscript{35}

Over time, courts began to develop exceptions to the privity requirement. The first involved poisoned food and drink cases,\textsuperscript{36} where recovery was allowed on the theory of a breach of an implied warranty.\textsuperscript{37} Later exceptions concerned products that were inherently dangerous, such as firearms and explosives.\textsuperscript{38} In \textit{MacPherson v. Buick Motor Co.},\textsuperscript{39} the inherently dangerous exception was expanded to include products that are dangerous due to negligence in their manufacture. The \textit{MacPherson} doctrine was quickly accepted, tending to make the exception more important than the rule.\textsuperscript{40}

The next major development in products liability law came in \textit{Henningsen v. Bloomfield Motors, Inc.}\textsuperscript{41} The New Jersey Supreme Court held both the manufacturer of an automobile and the dealer liable for injuries to the purchaser’s wife despite the absence of privity, finding that the defective car breached an implied warranty that it was reasonably suitable for its intended purpose. A line of decisions subsequent to \textit{Henningsen} applied the rule to claims involving other products.\textsuperscript{42} Although this approach removed the plaintiff’s burden of proving negligence, it retained some of the difficulties inherent in warranty law. For instance, notice was required within a reasonable time of the breach, and a warranty could be disclaimed. These impedi-

\begin{itemize}
\item \textsuperscript{34} \textit{See W. Prosser, Handbook on the Law of Torts} § 95 at 641 (4th ed. 1971) [hereinafter cited as \textit{Prosser, Handbook}].
\item \textsuperscript{35} \textit{See Lebourdais v. Vitrified Wheel Co.}, 194 Mass. 341, 80 N.E. 482 (1907); \textit{Burkett v. Studebaker Bros. Mfg. Co.}, 126 Tenn. 467, 150 S.W. 421 (1912).
\item \textsuperscript{36} \textit{See, e.g., Thomas v. Winchester}, 6 N.Y. 397 (1852) (mislabeled poison); \textit{Prosser, Handbook}, \textit{supra} note 34, at § 97; \textit{Prosser, The Assault, supra} note 1, at 1104-10.
\item \textsuperscript{37} This caused conflicts with the Uniform Sales Act, which provided a short limitations period and allowed disclaimers. \textit{Prosser, Handbook, supra} note 34, § 97.
\item \textsuperscript{38} \textit{See Cadillac Motor Car Co. v. Johnson}, 221 F. 801 (2d Cir. 1915).
\item \textsuperscript{39} 217 N.Y. 382, 111 N.E. 1050 (1916) (automobile with defective wheel).
\item \textsuperscript{40} \textit{See Johnson v. Cadillac Motor Car Co.}, 261 F. 878 (2d Cir. 1919), rev’d, 221 F. 801 (2d Cir. 1915); \textit{Sheward v. Virtue}, 20 Cal. 2d 410, 126 P.2d 345 (1942) (chair); \textit{Smith v. S.S. Kresge Co.}, 79 F.2d 361 (8th Cir. 1935) (hair combs); \textit{Carter v. Yardley & Co.}, 319 Mass. 92, 64 N.E.2d 693 (1946) (perfume); \textit{Simmons Co. v. Hardin}, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (sofa bed).
\item \textsuperscript{41} 32 N.J. 358, 161 A.2d 69 (1960).
\end{itemize}
ments to recovery led courts to develop the concept of strict liability.\textsuperscript{43}

The origins of strict liability in tort are found in cases involving physical injuries caused by dangerous animals and ultra-hazardous activities.\textsuperscript{44} The landmark products liability decision in \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{45} held that a “manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes an injury to a human being.”

The scope of \textit{Greenman} was expanded in the Restatement (Second) of Torts section 402A, in the area of personal injury and property damage, and has been followed in most states.\textsuperscript{46} Efforts to expand section 402A to include economic losses have not met with success because most states have chosen to apply the law of sales, rather than tort, to cases involving purely economic losses.\textsuperscript{47} Thus, in claims involving defective products causing purely economic loss, the majority of states apply UCC warranty provisions.

Under the minority approach, damages are recoverable in tort on the basis of strict liability for injury to persons as well as property. An example of this approach is the New Jersey Supreme Court’s decision in \textit{Santor v. A & M Karagheusian, Inc.}\textsuperscript{48} In \textit{Santor}, an unusual line was detected in the plaintiff’s carpet shortly after installation in the plaintiff’s home. Unable to pursue a claim against the local dealer, the plaintiff sued the manufacturer of the carpet for breach of an implied warranty of merchantability.\textsuperscript{49} The trial court found a breach of the implied warranty of merchantability despite the lack of

\textsuperscript{43} See Prosser, \textit{Handbook}, supra note 34, \S 97, at 690-91.
\textsuperscript{44} Rylands v. Fletcher, 3 H. & C. 774 (Ex. 1865); Isaacs v. Powell, 267 So. 2d 864 (Fla. Dist. Ct. App. 1972).
\textsuperscript{45} 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).
\textsuperscript{46} For the text of \S 402A, see note 2.
\textsuperscript{47} See cases cited in note 7.
\textsuperscript{48} 44 N.J. 52, 207 A.2d 305 (N.J. 1965).
\textsuperscript{49} The court described the plaintiff’s efforts in some detail:

[The carpet] was laid around January 1958 and almost immediately plaintiff noticed an unusual line in it. He telephoned the dealer who advised him it would wear away. Some weeks later the dealer examined the carpeting and expressed the view that the line would “walk out” as the pile subsided, and he counseled patience... Then, instead of improving when the pile wore down, it became worse and two additional lines appeared.

About eight months after delivery plaintiff decided to “really have it out” with the dealer. But when he drove to the place he found a sign in the window saying “Out of Business”... Santor wrote to Karagheusian in September 1960 complaining about the carpeting and requesting that a mill representative be
privity and awarded the plaintiff the purchase price.\textsuperscript{50} The manufacturer argued that, in the absence of privity of contract, it could not be held liable for breach of warranty. In addition, the manufacturer argued that the case did not fall within the scope of \textit{Henningsen v. Bloomfield Motors, Inc.}\textsuperscript{51} because the product was not dangerous to the consumer.

The New Jersey Supreme Court rejected the manufacturer’s position because it saw:

no just cause for recognition of the existence of an implied warranty of merchantability and a right to recovery for breach thereof regardless of lack of privity of the claimant in the one case and the exclusion of recovery in the other simply because loss of value of the article sold is the only damage resulting from the breach.\textsuperscript{52}

Despite the nonexistence of injury or the likelihood that the defect might cause injury, the \textit{Santor} court was willing to uphold an award of damages under a strict liability theory for injury to property as well as human life, even where the only damage was to the defective product itself.\textsuperscript{53} The court based its conclusion on “considerations of justice” that require a finding of liability even when there was “simply loss of bargain.”\textsuperscript{54}

The \textit{Santor} approach was rejected by the California Supreme Court in \textit{Seely v. White Motor Co.}\textsuperscript{55}, where the purchaser of a truck sued the defendant manufacturer for damages resulting from a defect in the design of the truck. Calling the use of strict liability principles “inappropriate,” Chief Justice Traynor responded to the \textit{Santor} court’s

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\item 44 N.J. at 56, 207 A.2d at 307.
\item Id.
\item 32 N.J. 358, 161 A.2d 69 (1960).
\item Santor, 44 N.J. at 59, 207 A.2d at 309.
\item Id.
\item Santor, 44 N.J. at 59, 207 A.2d at 309.
\item Id.
\item Id.
\item 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). The case involved a defective truck that turned over necessitating repairs and causing lost profits to the purchaser’s business. The purchaser sued for repair costs, lost profits, and the money he had paid towards the purchase price. The court found for the plaintiff on the lost profits and consideration claims. The decision was based on a breach of warranty theory. The court refused to find for the plaintiff on the repair issue because it had not been proved that the defect caused the accident.
\end{enumerate}
\end{footnotesize}
assertion that a contrary ruling would be without just cause in the following manner:

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.\(^56\) 

Without such a rule, Justice Traynor reasoned that the "manufacturer would be liable for damages of unknown and unlimited scope."\(^57\) The law of warranty had been designed to make such exposure impossible.\(^58\)

The Seely court was also asked to determine whether strict liability extends to property damage. The court stated in dicta that strict liability applied to property damage, but that it had not been proved that the defect caused the property damage to the truck itself. The court did not seem to differentiate between property damage to the product itself and other property damage, apparently indicating that recovery would be appropriate in either case. Interestingly, despite the dicta relating to the truck, the case is usually read as standing for the proposition that purely economic losses are not recoverable in strict liability.\(^59\) To avoid confusion, this article will employ Seely for the proposition that purely economic losses are not recoverable in a strict liability action.

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56. 45 Cal. Rptr. at 23, 403 P.2d at 151.
57. 45 Cal. Rptr. at 22-23, 403 P.2d at 150-51.
58. 45 Cal. Rptr. at 23, 403 P.2d at 151.
59. Concurring in part and dissenting in part, Justice Peters argued that the ability to recover should not depend on the type of injury incurred, but on whether the product was "unmerchantable" under the UCC. If the product is unmerchantable, the manufacturer should be liable for all damages, including economic losses. 45 Cal. Rptr. at 28, 403 P.2d at 156 (Peters, J., concurring and dissenting). Justice Peters would go farther than what is suggested in this article, which limits recovery to cases involving products that are unreasonably dangerous.
The United States Court of Appeals for the Third Circuit established an intermediate position between the opposing views of Santor and Seely in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co. In that case the plaintiff sought damages for the repair and replacement of machinery badly damaged when a faulty design failed to prevent the spread of fire. There was no other damage to property or person. In awarding damages, the court noted that the underlying policy of products liability recovery is “that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or his property.” The court drew upon language from Seely to devise a formula for determining whether recovery is appropriate for property damage to the product itself when the defect causes a safety hazard:

In cases such as the present one where 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.

The Pennsylvania Glass court interpreted the term “economic loss” as a legal conclusion. Recovery would not be allowed in an economic loss case, but the court would not term the case purely economic unless a review of the factors suggested dictated that result. One would not rely on the nature of the damages.

The battle lines were drawn. In subsequent cases addressing the

60. 652 F.2d 1165 (3rd Cir. 1981) (applying Pennsylvania law). For a full discussion of the case, see Fallon, supra note 3.
61. 652 F.2d at 1169.
62. See id. at 1169 n.2.
63. Id. at 1173. The court found that tort law should apply because fire is a “sudden and highly dangerous occurrence” and “constitutes a safety hazard.” Id. at 1174.
economic loss issue, the Seely reasoning has prevailed for the most part.\textsuperscript{65} Damages are generally not allowed for purely economic loss in either product or consequential economic loss cases unless accompanied by physical injury or property damage. The intermediate approach suggested in Pennsylvania Glass has found some judicial support, while the Santor approach has been followed less often, except in the admiralty courts.

III. ECONOMIC LOSS IN ADMIRALTY

Two lines of admiralty authority are relevant to an economic loss discussion. The first is admiralty's traditional approach to economic loss in tort cases. The second is the development of products liability principles in admiralty. Each line is helpful in determining whether admiralty courts should apply a different rule for purely economic loss claims than do the land courts.

A. Traditional Admiralty Law Decisions on Economic Loss

Two early United States Supreme Court decisions established that economic losses could be recovered in admiralty. In The Potomac,\textsuperscript{66} the Court held that the libellant could collect for loss of a vessel's use when a collision puts it out of commission. Appropriate damages could be determined by reference to estimated net profits.\textsuperscript{67} The Conqueror\textsuperscript{68} reaffirmed the rule, but declined to permit recovery to ships used solely for recreational purposes. Thus, a commercial vessel owner could recover for her economic losses while the ship was being repaired.\textsuperscript{69}

The Supreme Court's decision in Robins Dry Dock & Repair Co. v. Flini\textsuperscript{70} quickly complicated the issue. Robins involved a claim against a dry dock by a vessel's time charterer for economic losses caused by the dry dock company's negligence in servicing the vessel. The Court held that there could be no recovery because "[a] tort to the person or

\textsuperscript{65} The Seely reasoning has not been accepted in all states, however. See, e.g., Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818, 1977 AMC 58 (1976) (applying Washington law to allow a purchaser to collect economic losses in a negligence action against a manufacturer).

\textsuperscript{66} 105 U.S. 630 (1881).

\textsuperscript{67} 166 U.S. 110, 125-33 (1897).

\textsuperscript{68} Interestingly enough, the owner could not recover for economic losses when the vessel was destroyed. The Umbria, 166 U.S. 404 (1897).

\textsuperscript{69} 275 U.S. 303, 1928 AMC 61 (1927).

\textsuperscript{70} 275 U.S. 303, 1928 AMC 61 (1927).
property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.\textsuperscript{71} Since the charterer had no property right in the ship and there was no intention to create a third party beneficiary contract, the charterer had no cause of action against the dry dock.\textsuperscript{72}

Although many courts adhere to the Robins rule,\textsuperscript{73} some cases have avoided the Robins result. In \textit{Carbone v. Ursich},\textsuperscript{74} the Ninth Circuit Court of Appeals suggested an exception to the Robins rule that would allow commercial fishermen to recover damages from another vessel that had negligently fouled the fishermen's nets. Damages were awarded for the loss of the fish in the net, as well as for fish that could have been caught while the net was under repair, despite the fact that the damage had been done to the vessel and its trappings, not to the property of the fishermen.

Similarly, in \textit{Union Oil Co. v. Oppen},\textsuperscript{75} commercial fishermen recovered for economic loss caused by an oil spill. The court found that the oil company owed a duty to the commercial fishermen because of the special relationship between the parties and the oil company's status as the cheapest cost avoider.\textsuperscript{76} Such arguments could have been made in the Robins case since the dry dock was in the best position to prevent its own negligence. In addition, the relationship between the dry dock and the charterer was apparently more intimate than the relationship between the oil company and the fishermen in \textit{Union Oil}. Perhaps the distinction is attributable to anti-pollution or pro-fishermen sympathies. At any rate, the Robins rule continues to be consistently applied,\textsuperscript{77} although the number of exceptions may continue to

\textsuperscript{71} \textit{Id.} at 309, 1928 AMC at 63.

\textsuperscript{72} \textit{Id.} at 309, 1928 AMC at 64.


\textsuperscript{74} 209 F.2d 178 (9th Cir. 1953).

\textsuperscript{75} 501 F.2d 558 (9th Cir. 1974).

\textsuperscript{76} \textit{Id.} at 569. See text accompanying footnote 144 for a discussion of the most efficient cost avoider concept.

\textsuperscript{77} See, e.g., Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 1985 AMC 2600 (1st Cir. 1985) (following Robins in an oil spill case); Petition of Kinsman Transit Co., 388 F.2d
grow.

B. Products Liability Cases in Admiralty

Admiralty courts\(^{78}\) adopted a broad reading of the *Winterbottom* privity requirement in *The Germania*.\(^{79}\) There, a longshoreman employed by a stevedore was injured when he fell through a hatchway. The court denied recovery because there was no contract between the longshoreman and the ship.\(^{80}\)

Just as the common law developed exceptions, however, so did the admiralty courts.\(^{81}\) Finally, in *Sieracki v. Seas Shipping Co., Inc.*,\(^{82}\) the admiralty courts adopted the reasoning of *MacPherson*. The case involved a longshoreman injured by a boom that collapsed while loading freight cars onto the vessel. The longshoreman sued the ship owner and the manufacturer. Concluding that the manufacturer was liable, the court applied the reasoning of *MacPherson*:

...the principles in *MacPherson v. Buick Motor Co.*... are broadly applicable, that law having become so widely

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\(^{80}\) Id. at 257. A similar decision was reached in *The Mary Stewart*, 10 F. 137 (E.D. Va. 1881). The case involved a longshoreman injured by a falling bale of cotton. Because the longshoreman was not in privity of contract with the charterer, the court denied recovery.

\(^{81}\) See McCune, *supra* note 78, at 847.

\(^{82}\) 149 F.2d 98, 1945 AMC 407 (3d Cir. 1945), aff'd, 328 U.S. 85, 1946 AMC 698 (1946). This case is usually cited for the proposition that the shipowner's duty of seaworthiness extends to longshoremen. The same opinion, however, adopts the reasoning of the *MacPherson* decision. McCune, *supra* note 78, at 848; Lugenburg, *supra* note 78, at 860.
accepted as to be construed as a part of the general law of
torts, maritime as well as common law. . . . That the appli-
cance here in question was one concerning which great pre-
cautions were necessary in order to comply with the
requirements of reasonable care is clear.83

Thus, the privity requirement was abolished in admiralty cases involv-
ing negligence.84

Strict liability was first addressed in Middleton v. United Aircraft
Corp.85 The plaintiff brought suit under the Death on the High Seas
Act86 for breach of implied warranties after a helicopter crash caused
the death of its pilot and passengers. The manufacturer argued for
dismissal because of the lack of privity.87 Although the court seemed
to confuse contract and tort terminology in its opinion,88 it rejected
the privity requirement in favor of strict liability.89

This approach was rejected in Noel v. United Aircraft Corp.,90 a
similar action against an airplane parts manufacturer for breach of an
implied warranty of fitness. The court found that an action for breach
of an implied warranty was particularly inappropriate in admiralty.
The court noted that no admiralty court other than Middleton had
recognized the theory.91 Rejecting the importance of privity argu-
ments, the court focused on whether admiralty should adopt a doc-
trine based on insurance and consumer loss shifting concepts.92
Balancing the policy considerations underlying implied warranty, the

83. Id. at 99-100, 1945 AMC at 409-10.
84. See McCune, supra note 78, at 849-50.
85. 204 F. Supp. 856, 1962 AMC 1789 (S.D.N.Y. 1960). For a more in-depth discussion of
the case, see Note, Admiralty's Stepchild, supra note 78, at 487-88.
88. For a full discussion see McCune, supra note 78, at 857-59.
89. See also Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 1965 AMC
1622 (S.D.N.Y. 1964) (agreeing with Middleton); Sevits v. McKiernan-Terry Corp., 264 F.
component part).
90. 204 F. Supp. 929, 1965 AMC 2305 (D. Del. 1962). For a more complete discussion of
the case, see Note, Admiralty's Stepchild, supra note 78, at 488-89.
91. Id. at 934, 1965 AMC at 2313. The court does admit that this could be because the
contract to build a ship is not normally considered to be within the ambit of admiralty law. A
ship is not a ship until it is launched. Hence, a contract to build a ship is not an admiralty
In addition, the availability of the remedy in the common law courts may have made it
unnecessary for the admiralty courts to consider the issue.
92. Id. at 935, 1965 AMC at 2315.
court rejected the claim as too revolutionary.\textsuperscript{93}

The view expressed in \textit{Middleton} prevailed. Admiralty courts have readily applied strict liability law in recent cases,\textsuperscript{94} and the Supreme Court affirmed the presence of strict liability in admiralty in \textit{East River}.\textsuperscript{95}

The existence of a cause of action for economic loss caused by defective products has been a much more hotly contested question. In \textit{Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.},\textsuperscript{96} the owner of a shrimp boat which had sunk because of a defective shaft assembly sued the manufacturer for breach of warranty, negligent design and construction, and strict liability. The jury found that a defect in the design or construction caused the boat to sink. On appeal, the manufacturer argued that the only remedy was in warranty, rather than tort, and that its disclaimer precluded recovery.

The Fifth Circuit rejected the manufacturer's arguments. The court concluded that tort law should apply to actions for negligent design and manufacture and that the UCC's implied warranty of merchantability\textsuperscript{97} did not replace the negligence action. Given the case law allowing tort recovery even when the parties had equal bargaining power and the only damage was to the defective product itself,\textsuperscript{98} the court upheld the jury award in favor of the plaintiff. Thus, \textit{Jig the Third} can be seen as permitting recovery in negligence for purely economic loss.\textsuperscript{99}

The reasoning in \textit{Jig the Third} was expanded to include consequential damages in \textit{Jones v. Bender Welding & Machine Works, Inc.},\textsuperscript{100} a suit by a fishing vessel owner against the manufacturers for


\textsuperscript{94} See, e.g., \textit{Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.}, 726 F.2d 121, 1984 AMC 1979 (3d Cir. 1984); \textit{Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.}, 565 F.2d 1129, 1978 AMC 2315 (9th Cir. 1977); \textit{Lindsay v. McDonnell Douglas Aircraft Corp.}, 460 F.2d 631 (8th Cir. 1972); \textit{McKee v. Brunswick Corp.}, 354 F.2d 577, 1966 AMC 344 (7th Cir. 1965).

\textsuperscript{95} 106 S. Ct. 2295, 2299, 1986 AMC 2027, 2031 (1986).


\textsuperscript{97} U.C.C. § 2-314.

\textsuperscript{98} 519 F.2d at 175, 1976 AMC at 122.

\textsuperscript{99} For a critique of the court's reasoning, see Note, \textit{Admiralty-Products Liability-The Contract-Tort Question}, 50 Tul. L. Rev. 955 (1976) (arguing that the court should have followed \textit{Seely}).

\textsuperscript{100} 581 F.2d 1331, 1979 AMC 1300 (9th Cir. 1978).
damage to the vessel and lost profits caused by the negligent design of the engine's oil cooler supply line.\textsuperscript{101} The Ninth Circuit found the defendants liable for both damage to the vessel and lost profits:

While it is arguably true as [the defendant] contends that the lack of a bracket did not cause a safety hazard to the ship's passengers, the danger posed to the engine and the ship itself, if not the shipper's lost profits, is sufficient to create a duty to act in a reasonable fashion.\textsuperscript{102}

Although this approach allowed recovery for economic loss (including consequential economic loss) even though the only property at risk was the defective product itself, the case suggests a more limited application. Since the court had shown special regard in prior opinions for the plight of commercial fishermen,\textsuperscript{103} the case may stand for the narrower holding that fishermen have a special right to collect such damages. In either case, \textit{Jones} represents a major chink in the armor of the economic loss doctrine.

The \textit{Jig the Third} decision was again broadened by the Eleventh Circuit Court of Appeals in \textit{Miller Industries v. Caterpillar Tractor Co.}\textsuperscript{104} The defendant in \textit{Miller} was the constructor of a defective engine installed in the F/V Priscilla Ann, a vessel owned by Miller Industries. After the engine's defects had caused substantial delay to Miller's fishing operations, Miller and the crew of the F/V Priscilla Ann filed suit to recover lost profits and wages under theories of negligence, breach of warranty, and strict liability. The trial court awarded damages for lost profits to the owners and lost wages to the crew. On appeal, Caterpillar argued that warranty law afforded the exclusive remedy since there was no physical loss; the product had merely failed to fulfill the purchaser's expectations.\textsuperscript{105} Citing \textit{Jig the Third}, the court refused to follow the majority rule adopted by the land courts. Although Caterpillar argued that \textit{Jig the Third} was dis-

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\textsuperscript{101} The decision was actually based on the manufacturer's negligence in failing to give appropriate advice to its dealers on how to correct the problem. The court decided that since liability on this issue was clear, there was no need to go on to decide whether there was negligence in design or negligent analysis of warranty claims. 581 F.2d at 1334, 1979 AMC at 1304.

\textsuperscript{102} \textit{Id.} at 1335, 1979 AMC at 1306.

\textsuperscript{103} Specifically, the court cited Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953); United States v. Laffin, 24 F.2d 683 (9th Cir. 1928).

\textsuperscript{104} 733 F.2d 813, 1984 AMC 2559 (11th Cir. 1984).

\textsuperscript{105} \textit{Id.} at 816-17, 1984 AMC at 2562-63.
tistinguishable because it involved physical damage,\textsuperscript{106} the court rejected that suggestion, and instead declared:

We find the defendant's proposed distinction unpersuasive. First . . . the rationale for the rule not allowing recovery where only pecuniary loss is claimed is fundamentally the same for not allowing recovery where only the product is damaged: the performance of the product — whether it explodes or fails to function — is conceptualized as part of the bargain and thus properly covered by the law of sales. The court in \textit{Jig the Third}, however, explicitly rejected this approach.

Second, the argument for finding that a warranty was not intended to preclude a negligence action is even more compelling here than in \textit{Jig the Third}. In \textit{Jig the Third}, the plaintiff's claim was premised on the negligent design and manufacturing of the product and thus was closely related to the quality of the product and the plaintiff's expectations of how the product would perform. Here, however, the gravamen of the plaintiffs' complaint is that the defendant failed to properly warn of defects that it discovered after the engine was already on the market. . . . A duty to warn of a product's defects of which the seller becomes aware goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy.\textsuperscript{107}

\textsuperscript{106} Of course, the physical damage referred to here was only damage to the product itself. In this case, the problem was caused by a gear that was not hardened, causing vibrations which eventually resulted in a crack in the engine. In response to the plaintiff's argument that this did constitute physical damage, the court said in a footnote:

The plaintiffs contend that there was physical damage here, because when the sun gear failed it apparently caused a crack in the engine. The term "physical damage" in this context, however, is a term of art contemplating an accident "involving some violence or collision with external objects." Note, Economic Loss and Products Liability Jurisprudence, 66 Columbia Law Review 917, 918. The damage occasioned by the faulty sun gear thus would not qualify as "physical damage" as the term is generally used in the products liability context. (Citation omitted).

\textsuperscript{107} \textit{Id.} at 817-18, 1984 AMC at 2564-65.

733 F.2d at 817 n.6, 1984 AMC 2564 n.6. Similarly, the court did not think there had been physical damage in the \textit{Jig} case: "[m]oreover, the damage that resulted in \textit{Jig the Third} was not occasioned by an accident with an external object but was due to faulty design and manufacturing. Such damage, therefore, might more properly be defined as 'economic loss' rather than 'physical damage.' " \textit{Id.} at 818 n.7, 1984 AMC at 2564 n.7.
Thus, the Eleventh Circuit permitted the vessel owners to recover their lost profits for the period during which the ship was out of commission.

Although the court did not mention the series of Ninth Circuit fishermen decisions\textsuperscript{108} in discussing the owner’s claims, the court did include these cases in its analysis of the crew’s claims. The defendant argued that the \textit{Robins} approach prohibited the crew’s recovery because the damages were remote and speculative. In adopting the Ninth Circuit precedent, the court found this option particularly appropriate since the crew’s compensation was based on a percentage of the ship’s take, making their interest less of an unknown factor than the charterer’s interest in \textit{Robins}.\textsuperscript{109} Thus, since the crew’s loss was foreseeable to the tortfeasor, the concerns that were expressed in \textit{Robins} were not implicated.

The \textit{Miller} case extended the recovery permitted in \textit{Jig the Third} and \textit{Jones}. The court in \textit{Miller} established that a products liability tort remedy is appropriate when the only damages were product economic losses, even in the absence of physical loss.\textsuperscript{110} Consequential damages such as lost profits were also appropriate. The \textit{Miller} court reached this result without relying on the special status of fishermen in admiralty courts.

The Ninth Circuit also allowed recovery for economic loss in a strict liability setting in \textit{Emerson G.M. Diesel v. Alaskan Enterprise}.\textsuperscript{111} The district court had allowed the plaintiff $227,919.64 in damages for lost fishing profits during the Alaskan crab season. While recognizing the general rule that purely economic loss cannot be recovered,\textsuperscript{112} the court noted that the rule was not followed in admiralty cases involving products liability claims based on negligence.\textsuperscript{113} The court explained this distinction with the familiar maxim that “seamen are favorites of admiralty and their economic interest is entitled to the

\begin{footnotesize}
\begin{enumerate}
\item 108. \textit{Id.} at 819-20, 1984 AMC at 2565-66.
\item 109. \textit{Id.} at 820, 1984 AMC at 2566.
\item 110. \textit{Id.} at 818, 1984 AMC at 2565.
\item 111. 732 F.2d 1468, 1985 AMC 2069 (9th Cir. 1984). The case involved a suit against the manufacturer of a reduction gear that proved to be defective, causing the vessel and its crew to miss the height of the crab season.
\item 112. \textit{Id.} at 1472, 1985 AMC at 2074.
\item 113. The only cases cited by the court in support of this proposition were its own earlier opinions in \textit{Jones v. Bender Welding & Machine Works, Inc.}, 581 F.2d 1331, 1979 AMC 1300 (9th Cir. 1978); \textit{Union Oil Co. v. Oppen}, 501 F.2d 558 (9th Cir. 1974); and \textit{Carbone v. Ursich}, 209 F.2d 178 (9th Cir. 1953).
\end{enumerate}
\end{footnotesize}
fullest possible legal protection," and concluded that this reasoning should be extended to strict liability claims. Its attack on the Seely rationale was much more general than the "special fishermen’s exception":

Allowing an admiralty plaintiff to recover lost profits promotes the primary purpose of the strict liability doctrine which is to protect consumers from losses caused by defective and unreasonably dangerous products. Liability is imposed on the manufacturer because the manufacturer is in a better position than the purchaser or consumer to spread the cost of insuring against losses caused by the defective product and to prevent such products from entering the stream of commerce. Extending the scope of the manufacturer’s liability to economic losses would provide manufacturers with additional incentive for manufacturers to produce safer products.

* * *

We decline to follow Seely in the case at hand for a number of reasons. First, its rule against awarding economic loss has become riddled with exceptions. A plaintiff can now recover economic losses if he has also suffered some personal injury or property damage. Requiring recovery for economic loss to depend on the presence of personal injury or property damage is an arbitrary distinction leading to opposite results in cases that are virtually the same.

* * *

Second, Seely seems to regard economic loss as inherently different from property damage or personal injury and therefore not properly redressed by tort liability. We disagree. Economic loss is not different from personal injury or property damage in the sense that it is also a loss that is proximately caused by the defendant’s conduct.

* * *

Finally, we disagree with the Seely court’s concern that providing for the recovery of economic loss in strict liability would expose manufacturers to “damages of unknown and unlimited scope.” The manufacturer knows the purpose for which its product is to be used and by whom. Although the purchasers are not identical, the manufacturer can deter-

114. Emerson, 732 F.2d at 1472, 1985 AMC at 2074.
mine within a reasonable range of predictability the ramifications of a product failure for the ordinary user. (Citations and footnotes omitted).\textsuperscript{115}

The court rejected the Seely rationale in favor of a tort based remedy in cases involving solely economic loss.

The Eighth Circuit also allowed a plaintiff to recover economic losses, at least when he could prove negligence. In Ingram River Equipment, Inc. v. Pott Industries, Inc.\textsuperscript{116} the court declared that justice required a manufacturer who produced a defective product due to lack of care to pay for all losses incurred. The court did not say whether it would have extended this rule to strict liability, but it did not rule out the possibility.

Although most admiralty courts have allowed recovery for economic losses in products liability cases, some have not. In two cases before the United States District Court for the Southern District of New York, the court found that warranty rather than tort law applied. In Maru Shipping Co. v. Burmeister & Wain American Corp.,\textsuperscript{117} the plaintiff brought contract and tort claims against the supplier of defective engine parts that caused economic losses when the ship was out of service. Following Seely, the court held that there could be no tort recovery for economic losses unless accompanied by property damage or physical injury because section 402A covered "dangerous" products causing "physical harm,"\textsuperscript{118} not pure economic losses. The holding was much the same in Anglo Eastern Bulkships Ltd. v. Ameron, Inc.,\textsuperscript{119} which held that the warranty remedy was exclusive because the policies supporting section 402A were inapplicable.\textsuperscript{120} The court found no reason to protect the purchaser, which was a large, sophisticated corporation, rather than an innocent consumer. Cost internalization measures were not a consideration for the court.

\textsuperscript{115} Id. at 1473-74, 1985 AMC at 2074. The court also rejected the assumption in Seely that the purchaser had an adequate remedy in warranty law because strict liability law better protects the consumer and avoids the pitfalls of warranty law. Id. at 1474 n.7, 1985 AMC at 2077 n.7.


\textsuperscript{118} Id. at 215, 1982 AMC at 1326.

\textsuperscript{119} 556 F. Supp. 1198 (S.D.N.Y. 1982).

\textsuperscript{120} Id. at 1203-04.
because such matters would have been taken into account in writing the contract. In addition, because the particular product in question required a great deal of user sophistication,\textsuperscript{121} the court did not need to consider which party could most easily avoid the cost.

The only other admiralty decision adopting the Seely approach was the Third Circuit Court of Appeals opinion in \textit{East River} which is discussed in detail below.

III. \textbf{Policy Perspectives}

Many of the difficulties presented by the analysis of economic loss in products liability cases stem from the multiple variables that can come into play. Four possible causes of action can be brought in any products liability case. Tort provides relief under a negligence or a strict liability standard. Warranty also provides these remedies through breach of an express or implied warranty. These theories overlap and thereby create difficulties for courts who attempt to distinguish them, producing overly formalistic, and occasionally absurd, analyses in their attempts to clarify the doctrines.

The reasoning behind this need to delineate the remedies of contract and tort is not altogether clear. It may stem from a nineteenth century view of contract law that strives to limit liability under a classical free market theory.\textsuperscript{122} This need could also stem from a desire for tidiness rarely found in the law. After all, it is not uncommon for tort actions to arise out of contractual relationships.\textsuperscript{123} Any tidiness found is often illusory or at the expense of justice and efficiency. Finally, this need for delineation may originate in law school curricula that frequently present the first year subjects in a vacuum of sterility. In any event, Professor Gilmore points out that the separation of contract from other civil obligations is a relatively recent event in legal history, and the lines between the two become ever more obscured as the law progresses.\textsuperscript{124}

How does one decide which remedy is appropriate? The only reliable way is to evaluate the policies brought into play in any particular

\textsuperscript{121} \textit{Id.} at 1204.
\textsuperscript{122} G. Gilmore, \textit{The Death of Contract} 7 (1974). Gilmore points out that “[t]he theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything.” \textit{Id.} at 14.
\textsuperscript{123} Wade, \textit{Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?}, \textit{42 Tenn. L. Rev.} 123, 126 (1974) [hereinafter cited as Wade, \textit{Section 402A}].
\textsuperscript{124} Gilmore, \textit{supra} note 122, at 55-103.
case.\textsuperscript{125} Once these policies have been recognized, it is possible to determine which theory should be applied. Although considerations underlying warranty and products liability overlap, they do diverge. This divergence is useful in determining whether a particular case may be decided more appropriately on tort or contract principles. Although courts addressing these problems invariably are forced to make policy choices whether they admit it or not,\textsuperscript{126} they frequently fail to articulate the policies being applied or simply do not understand the policies implicated by their decisions.

\subsection{Warranty Law Policies}

The purposes of contract law generally, and warranty law in particular, are fairly limited. Contract serves to effectuate exchanges.\textsuperscript{127} Contract law accordingly encourages such transfers to be efficient, avoiding costs and disputes.\textsuperscript{128} Warranties provide more specific protections for the purchaser, thereby furthering the broader goals of contract law. The warranty ensures that the buyer receives the benefit of his bargain\textsuperscript{129} by requiring that the product be merchantable or fit for a particular purpose.\textsuperscript{130} By assuring the expectancy interest of the purchaser, the warranty encourages parties to make the transfer.\textsuperscript{131}

Warranty law makes transfers more efficient by placing the burden on the manufacturer to discover defects that would be difficult or costly for the consumer to discover.\textsuperscript{132} For example, it would be inefficient for the law to require that a consumer become a mechanic before buying a car. It is more efficient to protect the consumer who relies on the manufacturer's greater expertise. Herein lies the greatest overlap with tort products liability law policies.

The policy goals of contract law must coexist with the need for predictability and limited liability in the marketplace. Thus, warranty law allows certain disclaimers to be made. Such disclaimers may

\textsuperscript{125} Wade, \textit{Section 402A, supra} note 123, at 127.
\textsuperscript{127} See FARNSWORTH, \textit{CONTRACTS} § 1.2, at 6 (1982). Professor Farnsworth suggests that peaceful exchange is the basis for a civilized society.
\textsuperscript{128} \textit{Id.} § 1.3, at 9; POSNER, \textit{ECONOMIC ANALYSIS OF LAW} § 4.1, at 65 (2d ed. 1977) [hereinafter cited as POSNER, \textit{ECONOMIC ANALYSIS}].
\textsuperscript{129} Murray, \textit{Products Liability, supra} note 3, at 278-79; Wade, \textit{Section 402A, supra} note 123, at 127.
\textsuperscript{130} Wade, \textit{Section 402A, supra} note 123, at 127.
\textsuperscript{131} Murray, \textit{Products Liability, supra} note 3, at 279.
\textsuperscript{132} POSNER, \textit{ECONOMIC ANALYSIS, supra} note 128, § 4.7 at 83-84.
allow the purchaser to obtain the product at a lower price, or may be
the only way to encourage manufacturers to produce certain prod-
ucts. Between commercial parties, the manufacturer and the pur-
chaser may share equal knowledge and ability to avoid the difficult
problems inherent in a product. Warranty law also limits the time for
bringing a claim, which allows greater certainty for the manufacturer
and makes it easier to do business.\textsuperscript{133} Thus, warranty is a compromise
that fosters the intentions of private parties transferring goods. The
public policy concerns tend to be subordinate to the effectuation of
these private agreements.\textsuperscript{134}

\textbf{B. Policy Goals of Tort Law in Products Liability Cases}

The policy goals behind tort law reject the notion that liability must
be based on a contractual relationship between the manufacturer and
the ultimate consumer. The focal point is the existence of an unrea-
sonable risk of injury to person or property.\textsuperscript{135} The duty arises from
society's determination that such activity should be regulated beyond
the mere enforcement of the parties' contractual commitments — that
certain responsibilities cannot be contracted away. Public policy
therefore sets a minimum standard. Rejecting the notion that manu-
facturers should not be burdened by liability to parties not in privity,
society makes the manufacturer responsible to all who come in con-
tact with its product, at least when the product is defective in such a
way as to make it dangerous. Warranty simply does not provide ade-
quate protection.\textsuperscript{136} Society has an interest in protecting its members
by preventing the spread of dangerous products.\textsuperscript{137}

A second policy concern is fairness. When a manufacturer places
his product on the market, it impliedly represents that the product is
safe and fit for use by the consumer.\textsuperscript{138} It is accordingly fair to hold
the manufacturer to this representation. After all, the consumer right-
fully relies on it in making purchases.

\textsuperscript{133} See generally Wade, Section 402A, supra note 123, at 127.
\textsuperscript{134} Of course, even contract law places some restraints on the parties. Certain things
cannot be disclaimed. There are notions of unconscionability. These are exceptions to the
general thrust of contract law, however.
\textsuperscript{135} Wade, Section 402A, supra note 123, at 127.
\textsuperscript{136} See East River S.S. Corp. v. Transamerica Delaval, Inc., 106 S. Ct. 2295, 2300, 1986
AMC 2027, 2034 (1986).
\textsuperscript{137} Prosser, The Assault, supra note 1, at 1122.
\textsuperscript{138} Id. at 1123; Note, Manufacturers' Liability, supra note 3, at 539.
Advancements have also been made in risk distribution theories.\textsuperscript{139} No longer is it acceptable to allow the risk simply to lie where it falls. This outmoded position had placed the risks of a particular activity on the individual consumer, who was often not in a position to absorb the losses without severe, socially detrimental consequences.\textsuperscript{140} Since the state often ends up caring for the injured party or replacing his property, the costs are often borne by the public at large.

It is more efficient to require that the costs of a product's use be shouldered by all those who use the product and benefit from it. The law allocates the risk evenly among all beneficiaries by placing liability on the manufacturer, who is best able to distribute the loss by including the estimated cost of the losses or the cost of insuring against those losses in the purchase price.\textsuperscript{141} This makes the pricing of the product appropriate. If the product's price did not take into account such costs, the product's use might be inefficient. A product that is underpriced because the manufacturer has not included the risk of injuries in his pricing scheme will be overutilized,\textsuperscript{142} while a product that includes these costs will only be purchased when those risks have been considered and the product is still deemed worthwhile.

Another goal of products liability law is to provide appropriate incentives for the manufacturer to make safe products.\textsuperscript{143} A manufacturer who knows that he will not be liable for damages caused by defective products may not be as concerned about the possibility of damages. On the other hand, one who knows he must bear the cost of damages caused by his products will be more likely to improve his goods. Of course, this presupposes that the manufacturer's only incentive to produce safe products is found in tort liability law. This is not the case. A manufacturer is also concerned about the reputation of his business, recognizing that it will not stay in business if it consistently produces defective goods.

It is beyond question, however, that products liability laws have provided additional incentive to produce safe products. In most

\textsuperscript{139} See Apel, \textit{Strict Liability}, \textit{supra} note 3, at 43; Prosser, \textit{The Assault}, \textit{supra} note 1, at 1120; Note, \textit{Manufacturers' Liability}, \textit{supra} note 3, at 539.

\textsuperscript{140} See G. CALABRESI, \textsc{The Costs of Accidents, A Legal and Economic Analysis} 39 (1970) [hereinafter cited as CALABRESI].

\textsuperscript{141} See Apel, \textit{Strict Liability}, \textit{supra} note 3, at 43-44; Note, \textit{Manufacturers' Liability}, \textit{supra} note 3, at 539.

\textsuperscript{142} See A.M. POLINSKY, \textsc{An Introduction to Law & Economics} 98 (1983).

\textsuperscript{143} See Apel, \textit{Strict Liability}, \textit{supra} note 3, at 43.
cases, the manufacturer is the cheapest cost avoider since it is in the best position to make sure that the loss does not occur. For example, an automobile manufacturer is in a much better position than a consumer to make sure that the steering on an automobile is safe. The costs of every consumer giving his entire car the type of safety inspection that would show hidden design and manufacturing defects exceeds the costs incurred by the producer to avoid those defects in the first place. The consumer generally lacks the sophistication and the resources to determine whether the product is safe, a factor that has become increasingly true in our highly technological society. This same reasoning often applies in a commercial setting, since even business purchasers may lack the expertise necessary to evaluate whether a product is defective. After all, the owner of a flower shop is in no better position than the average consumer to determine whether a delivery truck is defective. Increasing technological advances make it less likely that the business or average consumer will understand all of the dangers inherent in a product.

C. The "No Recovery" Reasoning

Most courts addressing the economic loss question have concluded that these policy considerations dictate the denial of recovery. What makes these decisions particularly interesting is their similarity to the arguments made against the development of negligence and strict liability principles in products liability law. These arguments are similarly unpersuasive in the economic loss area.

1. Tort or Contract: Never the Twain Shall Meet

One of the major concerns to courts and commentators addressing economic loss has been a perceived necessity to define strictly the parameters of tort and contract law. "Contract will drown in a sea of tort!" is the battle cry of those espousing this view. It is difficult to see how a line can be drawn between tort and contract law that comports with the policy goals outlined above. Moreover, the oft-repeated maxim that tort and contract must be forever kept separate lacks a supporting policy rationale.

One might assume that the approach stems from the policy of encouraging the free transfer of goods. After all, contract limitation principles such as warranty or privity encourage the manufacturer to produce goods, lessening its liability and thus its costs. The manufac-

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144. Comment, The Vexing Problem, supra note 1, at 152.
urer is less likely to produce goods if it is responsible for all of the costs of its activities. The producer's relationship with the consumer is basically an economic one, and when purely economic losses are incurred, perhaps the remedy should be exclusively contractual. This argument may have merit when no tort policies are implicated. When a product is unreasonably dangerous, however, the need for a tort recovery overcomes contract law's accommodation of the manufacturer's interests.

Attempts to achieve justice by blurring the tort/contract distinctions are often met by objections from those who want to compartmentalize every legal area. The development of products liability principles in tort, however, has destroyed the compartmentalized system. Contract and tort now mix in an attempt to provide a just result. This alone justifies the extension of the current law to economic losses, at least when tort policies come into play. As one commentator has suggested:

Future legal historians will look back on the last century or so of tort and contract as representing something of an aberration in English Law, whereby the deep underlying similarities between the two principal forms of civil obligation were somehow forgotten. Even now, with the wisdom of hindsight, it seems clear that attempts to rigidly and artificially separate claims in tort and contract were doomed to fail given the close relationship which must inevitably exist between them in the light of their key common features. Together, both represent the principal obligations owed by the citizen to other citizens, rather than the state. Both are the only remedies where the award of damages has been the chief form of redress, at least traditionally, ignoring relatively recent statutory intervention. Indeed, in many cases, the content of the obligation is the same, whether framed in tort or contract (footnote omitted).
This position is also supported by history, which suggests that warranty was originally a tort action:

The adoption of this particular device was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to be mainly in contract" (footnotes omitted).\[148\]

Thus, even the development of warranty law suggests that contract and tort cannot be totally separate in theory or practice.\[149\]

2. The UCC Provides the Exclusive Remedy

The second reason often suggested by those opposing the extension of tort law to cover economic losses is that the UCC's warranty provisions should provide the exclusive remedy since the Code preempts the area. The creation of additional remedies, it is argued, would "totally emasculate" the provisions of the UCC.\[150\] A similar argument could be made relating to all products liability actions in tort.

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149. Another commentator has made the same point:

Courts in developing products liability do not have to choose between the tort concept of strict liability and the mercantile concept of warranty. In the history of modern American law the concepts have been intimately related. Only a purist who has not learned the lessons taught by legal realists would insist upon a choice. During the twentieth century the common law has witnessed a two-pronged development of products liability and the fruitful cross-fertilization that has occurred because of the mixture of tort and mercantile doctrines. Donnelly, *After the Fall*, supra note 1, at 3. Dean Wade also rejects this artificial distinction, but he still believes that recovery should not be allowed in an economic loss case:

What happens when the product supplied by the defendant damages itself? Suppose the brakes in an automobile are defective; they fail and the automobile crashes and is destroyed. Suppose the electric wiring system in the car is defective; it develops a short and soon drains the battery so that it has to be replaced. . . . [O]ne could say that tort recovery is not available whenever the damage is to the product itself. Or he could say that tort recovery is permissible whenever the harm to the product itself is of the "accident" type, as in the first illustration above. There is no clearly correct decision between the two positions. My personal inclination is toward the second one, but it is by no means a conviction.

Wade, *Section 402A*, supra note 123, at 129.
This approach fails for several fundamental reasons. First, it does not recognize that the UCC was never meant to serve the functions of a civilian-style code. After all, the UCC was not intended to preempt all law remotely related to it or be followed to the letter by the courts. On the contrary, the Code was written to provide guidelines for common law courts, which were expected to continue common law development of the law.

In addition, the UCC was meant to deal with commercial transactions. When tort law policies are implicated, the Code was not meant to apply. In fact, tort is nowhere mentioned in the Code, and Karl Llewelyn's attempts to have a provision similar to section 402A added to the Code were rejected. Believing that the Code was meant to be only commercial in nature, the Code's drafters never intended that it alter or stop the progress of tort law.

The drafter's intentions are borne out by the Code's operation. The requirements of the UCC simply do not fit cases that are essentially tort. For example, UCC section 2-607 requires that the purchaser notify the seller of the breach of warranty within a reasonable time of when the purchaser knew or should have known of the defect. The purpose of this rule is to alleviate the harsh common law rule that acceptance constitutes a waiver of all rights against the seller. There is no justification for this requirement in the non-commercial context. In addition, UCC remedies are inappropriate because they allow the buyer and seller to waive warranties. This could allow the manufacturer to avoid liability even when his product is considered to be unreasonably dangerous.

3. Unlimited Liability

A third rationale is based on a public policy concern that placing liability on the manufacturer for all of the problems created by a

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151. See Murray, Products Liability, supra note 3, at 270.
152. Id.
153. Id. at 271. Professor Murray points out that Karl Llewelyn had a fondness for the common law court. The development of civilian codes was brought about because of a distrust of the court system. Id.
154. Id. at 272.
155. Wade, Section 402A, supra note 123, at 130.
156. Murray, Products Liability, supra note 3, at 274-75.
157. See Note, Economic Loss, supra note 3.
158. See id. at 925.
defective product goes too far.\textsuperscript{159} This argument is particularly persuasive in this period of escalating insurance costs. Manufacturers have argued, sometimes successfully, that economic loss differs from other types of loss in that the ripple effects could lead to unlimited liability. For example, assume that a defective engine breaks down, causing a parcel delivery service to fail to deliver a part to a manufacturer. The manufacturer is unable to complete a production run that had been promised to a wholesaler, who in turn was obligated to a retailer. The ripple effects could be endless. If, the manufacturer would argue, the chain of liability remains unbroken, it could be subject to liability to any potential consumer who was unable to purchase the product.

Although this argument has some merit, it fails to take into account several considerations. After all, similar arguments could be made in cases involving personal injury or property loss accompanied by economic loss. In those cases, however, the economic losses are compensated, and the consequences feared by those who argue against imposing liability have yet to happen. The judicial requirement of foreseeability has reasonably restrained the ripple effect problem. Some argue that foreseeability is not a powerful enough tool to limit liability in a straight economic loss case, even if it does function well in cases of physical injury and property damage. This argument is, however, somewhat confusing. The foreseeability doctrine recognizes that almost every act has far-reaching consequences and that public policy demands a rational limit to liability. There is no reason why a similar line cannot be drawn to limit liability in economic loss cases.\textsuperscript{160} The line can be drawn very close to the source, as it was in the \textit{Robins} case, or it can be extended to those injuries that are truly foreseeable by the producer. Either way, the manufacturer is able to predict what damages might arise from the use of his product:


\textsuperscript{160} It has been suggested that the test in an economic loss case should be whether the loss is an "immediate consequence," rather than whether it is foreseeable. Hewitt, \textit{Negligence and Economic Law}, 115 SOLIC. J. 255, 256-57 (1971). An example of immediate consequence can be seen in the following situation:

\ldots the example of a lorry which is damaged while carrying the plaintiff's goods. The latter are undamaged, but have to be unloaded and carried forward in some other vehicle. The cost of unloading and carriage is immediate and not too remoted. Where is the line to be drawn? \ldots "the good sense of the judge. \ldots"

\textit{Id.} at 256. The author considers this definition to be too narrow. It does show, however, another attempt to draw the line to allow economic recovery in some cases.
The manufacturer knows the purpose for which its product is to be used and by whom. Although all purchasers are not identical, the manufacturer can determine within a reasonable range of predictability the ramifications of a product failure for the ordinary user. Having this information, the manufacturer can include in its costs the expense of adequate insurance coverage.\footnote{161}

4. Insurance

It has also been suggested that if recovery is extended to economic loss, manufacturers will be unable to obtain insurance to cover their increased exposure. This argument is not persuasive. Even if the requisite insurance coverage is not currently available, the need for such insurance would eventually result in its availability.\footnote{162} A similar argument was made when strict liability was developing. As the law of products liability developed, so did products liability insurance.

The cost of insurance to protect against liability for economic loss should not be of great concern. The law presently requires the user to bear much of her economic losses. Compensating economic losses acts only redistribute the loss to the manufacturer, who is in a better position than the individual user to provide insurance. Insurance should not be emphasized as a factor in deciding whether liability for economic loss should be placed on the manufacturer.\footnote{163}

5. Freedom of Contract

Another argument in favor of the economic loss doctrine contends that the producer and purchaser should be able to fashion their own deal. This is an over-simplistic view. The manufacturer cannot disclaim every kind of liability for its defective product, but a producer and consumer certainly can agree that the goods being provided are not of the highest quality. Thus, even though one cannot expect to get a Mercedes for a Yugo price, neither can the Yugo be placed on the market in an unreasonably dangerous condition.

Once tort law has moved out of the realm of physical injury into the domain of property damage, the focus of the law concerns harm to property caused by the product. Because society has an interest in

\footnote{161. Emerson G.M. Diesel v. Alaskan Enter., 732 F.2d 1468, 1474, 1985 AMC 2069, 2078 (9th Cir. 1984).}
\footnote{162. See Apel, \textit{Strict Liability}, supra note 3, at 44.}
\footnote{163. See Prosser, \textit{The Assault}, supra note 1, at 1121.}
protecting property rights, the law readily extends recovery to economic losses associated with such property loss.

The same rationale that supports recovery for economic losses connected with personal injury or property damage also dictates that economic losses be compensated when the loss implicates tort law policies. A product defect that does not make the product dangerous is the concern of warranty law, not tort law. A product that is unreasonably dangerous, however, necessarily implicates tort policies, no matter how that defect manifests itself.

Society has thus determined that parties may not freely contract away liability, at least in cases involving dangerous products. The concern that a purchaser can avoid his deal by invoking tort law is nothing new. Of greater interest, however, is the determination of when recovery for economic losses will be allowed. Minor property damage will permit the potential recovery of all related economic losses. However, when there is loss associated with a failure to perform in contract, and such loss is characterized as economic, recovery is less certain. This means that the entitlement turns upon the elusive and insubstantial distinction between property damage and economic loss. From the individual’s perspective, there is little difference between, say, a damaged house worth $50,000 and a lost contract worth the same amount.

6. Economic Losses Are Not Recoverable in Tort

The final argument against recovery for economic loss is that such losses have traditionally been considered outside the scope of tort law. The emphasis of tort law extends more to physical harm and property damage. Nevertheless, tort law has moved quickly in recent years to allow recovery for economic loss. Perhaps the distinction between property damage and economic damage evolved at a time when a person’s wealth and well-being were dependent on his tangible personal property. The nature of wealth has changed greatly in this century to intangible manifestations of wealth such as contract rights and business interests. In all likelihood this trend toward a recognition of intangible manifestations of wealth will continue, and the law must reflect this reality.

Finally, to draw a distinction between property losses, physical injury, and economic losses is inconsistent with the idea that judicial

164. Comment, The Vexing Problem, supra note 1, at 155.
165. Note, Product Defects, supra note 3, at 647.
remedies for personal injury and property damage are essentially economic in that they are evaluated in monetary terms. The only circumstance demanding a differentiation between these losses is when contract law policies override principles of tort law. This occurs when a defective product is not dangerous to person or property.

D. A Policy-Based Perspective

If, as this article suggests, the majority view conflicts with the policies supporting tort and contract warranty theories, is the minority approach in Santor preferable? Santor, which permitted strict liability recovery for economic loss even in the absence of a dangerous defect, does not provide the answer. The problematic minority approach turns every disappointed purchaser into a tort claimant. Every contract case involving a defective product would necessarily include tort theories as alternative relief. Tort would swallow contract even when policy did not demand the result.

An additional difficulty with Santor is that it might encourage purchasers of inexpensive products to sue in tort when the products do not meet inflated consumer expectations. Different quality levels and varied pricing are part of a capitalist economic system that allows the less affluent to afford a wide range of products. The consumer should be permitted to choose lower quality for a lower price, and the Santor rationale might threaten this economic principle. Consumers of inexpensive, lower quality goods are not without recourse. Consumer fraud laws, and express and implied warranty provisions, provide protection for these solely economic concerns.

What economic loss cases do implicate the tort law principles outlined above? According to the Restatement (Second) of Torts section 402A, tort law addresses the product that is "unreasonably dangerous," as opposed to the product that is of poor quality. As dis-


167. The words of section 402A ("in a defective condition unreasonably dangerous to the user") have been the cause of some confusion. Does the plaintiff have to show that the product is defective and unreasonably dangerous? Some courts have found that the plaintiff must only show that the product is defective and caused injury. E.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). Other courts have required a showing that the product is unreasonably dangerous as well. E.g., Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974). In any case, one court has suggested that these differences may not make much difference:

Although the definitions of the term "defect" in the context of products liability law use varying language, all of them rest upon the common premise that those
cussed above, the issue of product quality alone does not implicate the
same public policy concerns as when the product is also deemed dan-
gerous. In Seely, Justice Traynor argued that it was fair to hold the
manufacturer liable when its dangerous product caused personal
injury and property damage, but not when the only defect was a fail-
ure to meet the user's expectations. A fair expansion of that logic
would hold the manufacturer liable whenever it has placed an unre-
sonably dangerous product on the market and that product causes
losses of any type, even simple economic loss.

The telling distinction lies between a mere qualitative defect and a
defect that makes a product unreasonably dangerous to person or
property. A qualitative defect is best addressed by considering the
warranty principles in our modern commercial system. When the
product is unreasonably dangerous, on the other hand, tort principles
should be applied. A product is unreasonably dangerous when it is
"dangerous to an extent beyond that which would be contemplated by
the ordinary consumer who purchases it, with the ordinary knowl-
edge common to the community as to its characteristics."

Unfortunately, some courts have held that a claimant has to wait
until the defect has caused damage before a determination as to
whether the product was thereby rendered "unreasonably dangerous"
can be made. In Trans World Airlines, Inc. v. Curtiss-Wright Corp.,
for example, the airline sued the airplane manufacturer for economic
losses caused by defective propellers discovered before an accident
occurred. Relief was denied. The court apparently would have

products are defective which are dangerous because they fail to perform in the
manner reasonably to be expected in light of their nature and intended function.
noted in W. Prosser, J. Wade & V. Schwartz, Cases and Material on Torts 771 (7th
ed. 1982).

168. This view also finds support in cases from Commonwealth countries, which have been
more willing to allow recovery for solely economic losses in which the product was dangerous.
See Rafferty, Recovery in Tort, supra note 3, at 137-41. There is even some support for
allowing economic loss recovery in cases where there is a mere qualitative defect. See id. at
141-44.

170. Restatement (Second) of Torts § 402A, comment i.
171. 1 Misc. 2d 477, 148 N.Y.S.2d 284 (N.Y. Sup. Ct. 1955), aff'd without opinion, 2
172. The court explained its reasoning:

Until there is an accident, there can be no loss arising from breach of this duty

The damage asserted by TWA is for replacement cost of allegedly inferior
engines—a matter of qualitative inadequacy in a product purchased from
required that the plane crash before permitting recovery. Such a decision could have unfortunate ramifications, discouraging a user from investigating and repairing defects before a tragedy occurs.

One commentator has suggested that recovery should depend upon whether the defect manifests itself in a violent or calamitous fashion, arguing that losses caused by "deterioration, internal breakage, or other non-accidental cases" are not compensable.\(^{173}\) This distinction ignores common sense and the basic tort policies outlined above by artificially separating tort and contract. The nature of the defect, not its manifestation, implicates tort policies and should dictate the recovery. The tort policies favoring loss prevention, risk spreading, and responsibility are equally applicable whether there is a calamitous event or a mere discovery of the defect. Such policies reflect a desire to avoid the problem by placing responsibility on the most efficient cost avoider, thereby forcing the manufacturer to consider these costs in its production and marketing decisions.

Regardless of whether a dangerous defect causes physical injury or property damage, tort recovery should be permitted. Economic damages should be compensable.\(^{174}\) The volume of litigation and the extent of recovery can be limited by the requirement that the defect encompass traditional tort concerns. Since economic losses are already allowed in cases involving physical injury or property damage, the logical extension is to allow the same remedy in any product liability case involving an unreasonably dangerous defect. This extension best serves the tort principles outlined above while leaving the purely contractual concerns of benefit of the bargain to contract law.\(^{175}\) The extension also avoids the anomaly created by a user who

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Lockheed, a proper subject for a claim of breach of warranty, pure and simple. It is true that when the engines "failed to operate", the planes became "imminently dangerous"; but the danger was "averted". There was no accident. The malfunctioning of the engine had not yet turned into a misadventure.

TWA was not without remedy. Until an accident attributable to a defective engine happened, its only remedy was to hold Lockheed, the seller, for breach of warranty.  

1 Misc. 2d at 481-82, 148 N.Y.S.2d at 290.  
173. Note, Economic Loss, supra note 3, at 918.  
174. This conclusion is reached as well in Apel, Strict Liability, supra note 3, at 41-42. Apel argues that the failure of the law to encompass economic damages is wrong because it "(1) is logically inconsistent, (2) leads to anomalous results, (3) bars recovery when some avenue should be open, and (4) frustrates the policies originally and continually expounded for imposition of strict liability in the first instance. Moreover, the present law of damages precludes any rational formulation of policy."

175. It has been suggested that the lines should be drawn between cases involving an ordinary consumer and cases that are commercial in nature. Comment, Product Defects, supra
can recover economic losses when there is property damage or personal injury, but who is precluded from recovery when the harm encompasses solely economic loss. Thus, under the present majority rule, a plaintiff is allowed to recover all economic losses if an engine defect causes damage to property other than itself, but cannot recover for such losses if the same defect fails to cause other damage. Requiring physical damage makes little sense. The appropriate focus should concentrate on the nature of the defect, not the characterization of the resulting injury. If the defect is likely to cause harm to person or property, the product should be considered unreasonably dangerous, and recovery for economic losses allowed, no matter how that defect is discovered. On the other hand, product losses that are related to mere qualitative defects do not place persons or property in danger. In such situations, warranty is the appropriate remedy because it best serves contract goals of ensuring the benefit of the bargain and encouraging exchange. Thus, the suggested approach appeases the policies underlying both tort and contract.

This approach is somewhat similar to that used in the previously-discussed Pennsylvania Glass case. There are major problems, however, with that court's analysis in light of the policy goals outlined earlier. By attempting to change the definition of economic loss to exclude injury to the hazardous product itself, Pennsylvania Glass further confused an already difficult situation. Product economic loss, even when caused by a hazardous defect, is nevertheless economic loss. The court's emphasis on definitions rather than policy typifies many of the difficulties in this area of the law. Attempting to solve the difficulties by calling an economic loss something else does not address the issue.

The second flaw in the Pennsylvania Glass court's decision concerns the third factor for determining economic loss—the manner in which the injury arose. This factor places too much emphasis on the way a defect manifests itself; recovery should not depend on whether there was a violent explosion or less catastrophic result. The policies supporting strict liability law do not require that the first two Pennsylvania Glass factors, nature of the defect and type of risk, be

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note 3, at 646. This distinction may not be relevant. Often a business is in no better position to protect itself than a consumer. Furthermore, a determination of whether equal bargaining power or sophistication between the parties exists in each case would be problematic. For additional discussion of this issue, see Apel, Strict Liability, supra note 3, at 47-48.

176. See supra text accompanying notes 60-64.
considered. It also should not matter whether the defect is discovered shortly before the explosion.

Despite this criticism, the Pennsylvania Glass result does reflect some understanding of the policies underlying products liability and warranty law. The importance of that case and others like it should not be diminished by its failure to properly articulate its approach. The approach that best reflects both tort and contract policies is suggested earlier. Such an approach would allow a tort action for purely economic losses when the defect is unreasonably dangerous. This preferred approach recognizes contract concerns by freeing the manufacturer from liability when it produces a safe product. The approach likewise uses tort principles to create appropriate incentives for the manufacturer to produce safe products and include all costs related to the use of the product in the price.

IV. EAST RIVER STEAMSHIP CORP. v. TRANSAMERICA DELAVA, INC.

The claims in East River Steamship Corp. v. Transamerica Delaval, Inc., arose out of bareboat charters of four supertankers that proved to have defective turbines. The ships were actually built by

177. In an interesting article looking at economic losses in tort, Professor Rizzo argues that the goal of tort law should be to reduce litigation costs. Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281 (1982). Rizzo argues that litigation costs can be reduced by forcing parties to make contracts that channel losses through the party who has suffered physical losses. Thus a court will only allow recovery when it is sought by a party with physical losses. Rizzo argues that when contracting costs are too high or there is no party with physical losses, the law should permit recovery as long as litigation costs do not exceed the value of recovery. East River is such a case.


179. The transaction was actually quite complicated:

In 1969, Seadrain Shipbuilding Corp. (Shipbuilding), a wholly owned subsidiary of Seadrain Lines, Inc. (Seadrain), announced it would build the four oil-transporting supertankers in issue—the T.T. Stuyvesant, T.T. Williamsburgh, T.T. Brooklyn, and T.T. Bay Ridge. Each tanker was constructed pursuant to a contract in which a separate wholly owned subsidiary of Seadrain engaged Shipbuilding. Shipbuilding in turn contracted with respondent, now known as Transamerica Delaval, Inc. (Delaval), to design, manufacture, and supervise the installation of turbines. That would have been the main propulsion units for the 225,000 ton, $125 million... supertankers. When each ship was completed, its
Seatrain Shipbuilding Corp., which subcontracted the engine work to Transamerica Delaval. The Stuyvesant was the first ship completed and began service in July 1977. Five month later its turbine broke down while on a voyage off the Alaskan coast. Temporary repairs were made in port, but the problem returned at sea, reducing the Stuyvesant’s speed significantly and possibly endangering the ship during a storm that produced 65 foot waves. The vessel continued its voyage to Panama and on to San Francisco, where certain turbine parts were replaced with parts from the second of the four ships, the Bay Ridge. The following spring one of the component parts taken from the Bay Ridge had deteriorated to the point that it had to be replaced from the third ship, the Brooklyn. Four months later the component had to be replaced once again with a newly designed part provided by the manufacturer. Similar problems were discovered in the Brooklyn and the Williamsburgh. The Bay Ridge, fitted with the newly designed part, had other turbine problems.

East River Steamship Corp. sought $3.03 million in damages for repair costs and lost income. The gravamen of the complaint was that Transamerica Delaval, as designer and manufacturer of the turbines, should be strictly liable for the damages caused by the defects. The district court granted the defendant’s motion for summary judgment, and the Third Circuit Court of Appeals affirmed. The court felt that the question to be determined was whether there was an unreasonable risk of harm to person or property. The court adopted the

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106 S. Ct. at 2296, 1986 AMC at 2028. After the corporate structure is eliminated, this case boils down to a shipbuilder/operator suing a subcontractor for doing a poor job. In fact, Seatrain and Shipbuilding had originally been plaintiffs in the suit, alleging breach of contract and warranty claims. They were dropped because of a statute of limitations defense.

180. The damage was caused by the disintegration of the “first-stage steam reversing ring,” which caused damage to other parts of the engine. See id. at 2296-97, 1986 AMC at 2029.

181. These problems arose from the improper installation of a guardian valve and relate to the petitioners’ fifth claim, which was rejected by the Court. See id. at 2297, 1986 AMC at 2029.

182. Id. at 2297, 1986 AMC at 2030. Petitioners’ fifth count in its complaint alleged that Delaval had been negligent in installing the “astern guardian valve” on the Bay Ridge. This portion of the case will not be discussed here.


184. 752 F.2d at 908, 1985 AMC at 919.
three-factor approach used in Pennsylvania Glass, which requires consideration of "the nature of the defect, the manner in which the defect manifested itself, and the nature of the risk which was inherent in the defect."\textsuperscript{185} Applying this test, the court concluded that the nature of the defect was qualitative rather than safety-related. The slow deterioration of the turbine may have disappointed the expectations of the purchasers, but the defect was not "intimately related to the safety of a product."\textsuperscript{186} The court was also swayed by the fact that there had been no "calamitous event" such as an explosion or fire. Finally, it determined that the risks of repairs and down time were not safety related. The court concluded there was no unreasonable risk of harm that should be protected by tort law.

In an interesting aside, the court swept away the argument that the Stuyvesant's defective turbine had put the ship and its crew in imminent peril during a particularly severe storm.\textsuperscript{187} The court declared that tort recovery would be inappropriate "given the qualitative nature of the defect and the gradual manner in which the defect manifested itself."\textsuperscript{188} Apparently, the court was creating an exception to its own rule. Even if the defect placed persons or property in imminent danger of being harmed, the court would deny tort recovery if

\textsuperscript{185.} Id. at 908, 1985 AMC at 920. The court found no difference between this case and one involving a defective car engine. Thus, the land-based approach to the question was applicable. This approach, however, overlooks two points. First, the dangers of the sea are well known. Having no engines during a storm or even in calm seas can be quite a disastrous circumstance for a ship. There is not always a safe harbor to pull into when the engine quits. In addition, the court presumes that the land-based decision is correct. Admiralty has never felt bound to follow the law of the land. The logic which might compel non-recovery on land is not equally applicable in the maritime context.

\textsuperscript{186.} Id. at 909, 1985 AMC at 921.

\textsuperscript{187.} The court assumed that this did not happen:

Even assuming that such allegations of imminent danger are credible* . . . .

*In an unspecified letter, the Stuyvesant's master noted that because of the turbine's malfunction, the Stuyvesant could not reach top speed, and thus had difficulty making headway into a storm off the Gulf of Alaska. The difficulty caused the master to fear that the ship would drift hazardously close to the lee shore of the Gulf. The ship, however, did successfully travel against the storm, and in fact proceeded to Panama, a voyage of some seven weeks . . . As the district court stated, "any nascent allegations of acute peril to the ship or crew resulting from the turbine defect are belied by the course of action undertaken after the defect manifested itself."

\textit{Id.} at 909 & n.3, 1985 AMC at 922 & n.3. The court's skepticism as to the facts alleged seems inappropriate in deciding a motion to dismiss. The court is required to assume that the allegations of the plaintiff are true in making its decision. The court's dismissal of the argument also seems to suggest a lack of insight into the dangers of the sea and certain commercial necessities.

\textsuperscript{188.} Id. at 910, 1985 AMC at 922.
that danger manifested itself in a gradual way.\textsuperscript{189}

In affirming, the Supreme Court did not adopt the Third Circuit's reasoning. In a unanimous opinion written by Justice Blackmun, the Court rejected both the Santor and Pennsylvania Glass approaches in favor of the Seely reasoning.\textsuperscript{190} The Court noted that the development of strict liability required it to take care to respect the differences between contract and tort:

Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort. We must determine whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation (citations omitted).\textsuperscript{191}

The issue presented was whether injury to the defective product alone was cognizable in tort. To answer this question, Justice Blackmun reviewed the three land-based approaches: the majority approach embodied in Seely;\textsuperscript{192} the minority approach of Santor; and the intermediate approach suggested in Pennsylvania Glass.

The Court first rejected the intermediate approach as "too indeterminate to enable manufacturers easily to structure their business behavior."\textsuperscript{193} It also rejected the notion that the manner in which the

\textsuperscript{189} In a concurring opinion, Garth, Circuit Judge, argued that the court's in-depth analysis had been unnecessary because the plaintiff had failed to allege the requisite elements for a section 402A action, namely unreasonable risk of harm and injury. \textit{Id.} at 910, 1985 AMC at 923. Becker, Circuit Judge, concurred in part and dissented in part. Becker agreed with the court's standard, but felt that it had been wrongly applied. Becker felt that the exposure of the ship to dangerous seas did amount to an unreasonable risk. \textit{Id.} at 913, 1985 AMC at 928.


\textsuperscript{191} \textit{Id.} at 2299-2300, 1986 AMC at 2034.

\textsuperscript{192} The Court said that Seely stands for the proposition "that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm." \textit{Id.} at 2301, 1986 AMC at 2036. Of course, depending how one reads the dicta in Seely, that court's reasoning may not preclude recovery when there has been property damage even to the defective product itself. See text accompanying note 59.

\textsuperscript{193} \textit{Id.} at 2302, 1986 AMC at 2037. The petitioner argued that the Court should reject the complicated formula set out in the Third Circuit opinion in favor of a simpler approach due to the axiom that admiralty norms should be simple and practical. See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 1959 AMC 597 (1959). Of course, the simple rule preferred by the petitioners was that adopted by the majority of the circuit courts.
injury occurred is important:

Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even 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 (citations omitted).\textsuperscript{194}

The Court also dismissed the Santor approach because it "fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages."\textsuperscript{195} One by one, the Court dismissed all counter-arguments. First, the safety concern embodied in tort law was deemed less important in an economic loss case than when there was physical injury or property damage. The Court concluded that a commercial case in which the defective product injures only itself involves limited losses: "the value of the product, . . . the displeasure of customers. . . , or . . . increased costs in performing a service."\textsuperscript{196} Such costs could be insured.\textsuperscript{197} On the other hand, the costs of imposing increased liability on the manufacturer were of great concern to the Court.\textsuperscript{198} Extending recovery to

\textsuperscript{194} 106 S. Ct. at 2302, 1986 AMC at 2037.
\textsuperscript{195} Id., 1986 AMC at 2037.
\textsuperscript{196} Id. at 2302, 1986 AMC at 2038. The Court does not recognize that these costs can often be far more significant than personal injuries or property losses. Thus, recovery would be allowed in a case in which a defective product caused $10 of property damage, but it would not be allowed in a case in which there was $3 million in lost profits, as was alleged in this case. One can hardly imagine a situation where the defendant is prepared to meet the large economic loss, but not the relatively small property damage.
\textsuperscript{197} Id., 1986 AMC at 2038. The availability of insurance to cover the costs of lost business due to unhappy customers is unclear.
\textsuperscript{198} See id. The Court speaks of increased costs to the public by imposing liability. Of course, these costs will exist no matter what the legal rule is. What is really being questioned here is how the losses should be distributed. The Court's rule chooses to allow the loss to lie where it occurs. Of course, the very notion of products liability law is to distribute these costs to all of those using the product by placing liability with the manufacturer, who can most
economic losses could subject the manufacturer to "damages of an indefinite amount." Foreseeability principles, according to the Court, would not adequately protect manufacturers in an economic loss case: "[p]ermitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product."

In contrast, the Court viewed warranty as providing the more appropriate remedy because it limits liability and more closely serves the policies implicated when a defective product causes injury to itself. Specifically, Justice Blackmun felt that these cases really involved the customer's failure to obtain sufficient product value and that contract law provided its own protection under the UCC. Justice Blackmun asserted that warranty law provisions allowing the manufacturer to limit its liability through disclaimers were particularly important in the commercial setting. After all, disclaimers allow manufacturers to provide products at reduced prices. Commercial settings reduce concerns about unequal bargaining power. Warranty law provides recovery for repair costs and lost profits, giving the plaintiff its expectation interest.

The Court's final argument was that a clear line must delineate when recovery will and will not be allowed. Justice Blackmun denied that allowing economic losses would avoid this problem. In his view, judicial attempts to limit economic losses rely on a murky distinction not easily applied. Thus, since the charterers only suffered damages to the product itself, they could not recover. The charterers had easily distribute, insure against, and avoid the loss. These policies are equally applicable to economic losses.

199. Id. at 2304, 1986 AMC at 2040.
200. Id. at 2304, 1986 AMC at 2041.
201. Id. at 2303, 1986 AMC at 2039.
202. Id., 1986 AMC at 2039. The Court specifically mentioned the UCC warranty provisions, sections 2-313 through 2-315, and sections 2-601, 2-608, and 2-612, which allow the customer to reject the goods, revoke his acceptance, and sue for breach of contract.
203. Id., 1986 AMC at 2039. The Court does not address the interesting question of whether a manufacturer ought to be able to create a dangerous product, even at a low price. Whether society should condone this activity remains at the very heart of products liability law.
204. Whether the Court would use the same reasoning in a non-commercial context is left unclear by the opinion. Because the opinion continuously refers to the commercial nature of the transaction, it leaves open the possibility that the decision might be different in another factual setting such as a defective pleasure boat. The Court's reasoning, however, tends to show that such recovery would not likely be allowed.
205. Id. at 2304, 1986 AMC at 2041.
no warranty claim, and the court concluded that they had to live with the contract they had made.

In a recent article, Professor Solimine lauded the Supreme Court’s East River opinion:

Several characteristics of the East River decision serve as powerful predictors of the potential influence the opinion may have on the development of the case law in the states. The first is the scholarly quality of the opinion, carefully developing at length the arguments in favor of Seely and refuting opposing rationale. With its frequent reference to leading cases in both tort and contract, East River can literally serve as a textbook example of a court’s struggle with the Santor-Seely dichotomy. Unfortunately, this praise is misplaced. The opinion is less than scholarly, mimicking the arguments supporting the Seely doctrine while rejecting all others with little or no policy analysis. The court did not mention the historically close ties of contract and tort, nor did it address the interweaving of warranty and tort remedies in products liability. The court summarily dismissed the damage economic losses caused to the victim without discussion of risk distribution, cost avoidance, or product safety concerns. As outlined earlier, such considerations are essential if the law is to reflect the policies supporting it.

Professor Solimine also urges that the opinion effectively uses economic analysis in reaching its conclusion:

Equally noteworthy is the Court’s reference to economic analysis. Judge Frank Easterbrook recently has suggested that the Supreme Court is more sophisticated in its use of economic reasoning than in any prior period. This sophistication, he contends, is demonstrated by \textit{ex ante} perspectives as opposed to \textit{ex post} “fairness” arguments, and by reference to incentive and marginal effects. These factors received full attention in East River: The Court referred to the burden on manufacturers if the Santor rule were adopted in the commercial setting, and stated that the increased cost to the public (passed along by manufacturers) of the Santor rule

\begin{footnotes}
206. \textit{Id.}, 1986 AMC at 2041. The statute of limitations prevented the assertion of warranty claims by Seatrain and Shipbuilding. See \textit{supra} note 179.
208. \textit{Id.} at 987-88.
\end{footnotes}
was not outweighed by the benefits of the rule. The Court added that the risk of economic loss, allocated as a matter of law by tort principles, was better allocated by the parties in their contracts in the commercial setting. Thus, the Court seemed to be explicitly adopting what in its mind was an efficient rule to govern this apparent clash between policies of tort and contract law. Though not denominated as such, this reasoning is clearly modern economic analysis, not mere pleas to justice or fairness.209

Although the author may be correct that the Court was unconcerned about justice and fairness,210 the use of economic principles does not necessitate the rejection of such important values. A legal system that is not "just" or "fair" is not likely to be efficient. Even assuming that economic analysis should replace justice and fairness, the East River opinion does not reflect sophisticated economic analysis. The opinion cites Professor Posner, but reached conclusions on the economic effects that are not supported by theory or data. For example, the Court stated that: "[s]ociety need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified."211 The Court reached this conclusion without discussing the effects that economic losses can have on the customer and society. The Court apparently did not appreciate the effects of such losses,212 yet it was certain that the costs of imposing liability did not warrant that imposition. Incredibly, this conclusion was reached without considering the incentives created or the concern that a product produced without taking into account economic losses may be overutilized. There is no serious discussion of risk distribution. The Court blindly assumed that commercial parties have perfect information and can allocate risks in an efficient manner, a particularly unlikely assumption when the defective product is dangerous. What commercial consumer would agree to accept the risk that a product is dangerous to his person or property?

The approach suggested in this article would have yielded a better result. The Court should have examined whether the malfunctioning

209. Id.
210. For a discussion of justice and fairness and their relationship to economic analysis, see Calabresi, supra note 140, at 24-26.
211. 106 S. Ct. at 2302, 1986 AMC at 2038.
212. The Court limits the effects of economic losses to loss of value and displeasure of customers. Id., 1986 AMC at 2038.
turbine could be considered unreasonably dangerous. After all, an oil supertanker with a disabled engine could easily be considered dangerous to the ship itself, its cargo, its crew, other ships, and land-based property. This reasonable possibility alone should have defeated summary judgment. Here the underlying facts strongly supported the dangerous nature of the defect. The disabled ship was allegedly in peril in sixty-five foot seas off the coast of Alaska. Although not necessary to establish the claim, such facts provide additional evidence that the defect was of the type to put persons and property in danger.

What is most interesting about East River is the breadth of the Court's language. This was not an opinion narrowly tailored to apply only in admiralty. The Court did not consider whether special reasons might support such a cause of action in admiralty when it is not available in land courts. Although Justice Blackmun did not specifically address the Ninth Circuit's special protection for fishermen, the Court's decision effectively reverses the Ninth Circuit authority.

Special policies may support a cause of action in admiralty that is not allowed by land-based courts. The dangers of the sea exceed those presented on land. The ship, its passengers, and crew are in an especially precarious position when they are at sea, often miles from land and help. The results of a product defect can be far more serious in this situation than on land. Although there are certainly dangerous situations on land as well, these are more likely to be the concern of legislators. The needs of the maritime industry, however, are not often addressed in a meaningful fashion by the legislature, forcing the admiralty courts to provide an appropriate remedy.

In addition to the sea's heightened dangers to person and property, the admiralty approach may also be distinguished insofar as economic losses are often the greatest damage in the maritime context. The loss of the vessel's use will often be far more costly than actual damage to the vessel itself. To a fisherman, a lost catch can easily exceed property damages to his nets or engine. The loss of use of a supertanker for an extended period will often cost more than the repair. Thus, it is arguably more appropriate to allow economic losses in admiralty where such losses are more likely to be catastrophic.

213. In a cryptic footnote, Justice Blackmun stated, "[t]his case involves no fishermen." 106 S. Ct. at 2301 n.5, 1986 AMC at 2036 n.5. He did not go into the relevance of the statement. One district court has had to decide this issue. In McConnell v. Caterpillar Tractor Co., 646 F. Supp. 1520 (D. N.J. 1986), the court held that the East River reasoning is applicable to commercial fishermen.

214. See Scowcroft, Economic Loss, supra note 78, at 267.
lar problems may exist on land, but the very nature of the maritime industry makes them more likely on the sea.

The Court’s reasoning in *East River* was far broader than necessary to resolve the division among the circuit courts. The Court may have been concerned that a decision allowing recovery for economic losses could have far-reaching ramifications beyond admiralty. The breadth of the reasoning begs for application in the land courts. Although the Court’s holding may be limited to the commercial context, the Court’s expansive reasoning appears to have been directed at cutting off any movement to impose liability for economic losses, even in the consumer context. This is evidenced by the Court’s broad rejection of *Santor*, a consumer case, without discussion of whether the consumer setting presents different considerations.

The Supreme Court’s rejection of an intermediate, policy based approach was therefore ill-advised. The *East River* opinion attempts to draw a “bright line” that is clear and easy to apply, allowing no recovery in admiralty for cases in which the damage is solely to the product itself. The opinion ignores the policies that have developed as products liability law has grown in the last thirty years. Concerns that manufacturers be encouraged to produce safe products, that risks be fairly distributed, and that goods be produced efficiently were ignored in favor of fears that the manufacturer would be subjected to additional liability for which it might be expensive to purchase insurance. The Court also fell into the trap created by attempts to compartmentalize the law in a way that is not likely to provide a just result. The failure of the Court to provide any flexibility is particularly disappointing in an area of law that is continuing to develop.

V. THE CONSEQUENCES OF EAST RIVER

The last consideration that has to be addressed is the effect that the *East River* opinion will have on developing tort law.215 Because of the


The *East River* case has already been cited by a number of land courts in support of decisions refusing to allow recovery for economic losses. See, e.g., Anderson Elec., Inc. v.
Erie doctrine, the Supreme Court rarely provides advice on products liability law or other developing common law areas. The Court’s opinion in admiralty does not bind state courts as they develop their own products liability law and its relationship to economic loss. As a practical matter, however, there is obvious concern that the Court’s statements will persuade other courts.\(^{216}\) This concern was evidenced by the submission of an amicus brief in the case by certain automobile manufacturers. The manufacturers wanted to avoid a major Supreme Court decision rejecting the traditional approach to economic losses. In addition, the unanimity of the Court adds weight to the persuasiveness of the opinion.

Special reasons why economic loss should be allowed in admiralty cases—even when they are not allowed in common law courts—have already been discussed. Special concerns for the industry and those involved require that goods produced for maritime use be particularly safe and reliable. Admiralty courts have exhibited a time-honored paternalistic approach for those who sail the seas. Thus, the East River result appears particularly dissatisfying in an admiralty setting.

Compelling reasons also exist, however, for not extending the Supreme Court’s decision to land-based actions in state courts. The law should develop to allow economic losses in cases in which an

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unreasonably dangerous defect exists, even when that defect causes damage only to the product itself. *East River* is certainly not controlling precedent outside admiralty, an area reflecting policies and problems distinguishable from standard products liability. In particular, it should be remembered that admiralty law is specifically, although not exclusively, attuned to the needs of maritime industry and trade. There is little concern for the unsophisticated consumer. Given this lack of concern, warranty policies may override certain tort concerns in an admiralty setting. For the most part, the parties involved in such actions are commercial enterprises. As such, it might be assumed that these parties are better able to protect themselves through contract negotiation than the average consumer. In addition, the concern about ripple effect damages is of arguably greater concern in admiralty, given the very nature of maritime activities. It is hard to imagine an industry having more far-reaching ramifications than the shipping business. Possible losses and the traditional risks of loss are also quite high.

Finally, the rejection of an intermediate rationale may be based on the particular difficulty in differentiating between a dangerous defect and a qualitative defect in the admiralty setting. Many items used on a ship are vital to the well-being of those on board, and a simple product failure can often put lives and property at risk. Similar arguments can be made in a land setting, but the special risks of the sea are well known. Thus, although land courts may be tempted to follow the Supreme Court’s lead in *East River*, they should not. The Court’s reasoning is flawed, the admiralty setting is different, and the policies behind products liability law demand a fairer result.

VI. CONCLUSION

The Supreme Court’s decision in *East River* has once again brought to the fore the question of whether economic losses should be recovered in products liability suits. Recent admiralty cases in the circuit courts had bombarded the economic loss remnants of the citadel, making its fall appear likely. The Supreme Court stepped in and refortified the old bastion in an opinion that adopts the *Seely* position. The reasons for following the *Seely* rationale, which disallows such damages, have not always been clear. It is often suggested that there is a need to keep contract and tort separate, that manufacturers will be faced with astronomical liabilities that are uninsurable, that the UCC preempts the field, and that economic losses are somehow quali-
tatively less important than property damage and personal injury. These arguments are reminiscent of the arguments that were presented by manufacturers against the development of negligence and strict liability principles in the products liability context. The arguments failed because of quickly advancing social change, as well as a realization that producers must be willing to bear the costs of their activities. Similarly, the complete ban on recovery for economic losses should be rejected. In cases implicating tort policies, recovery must be allowed. Thus, when a product is unreasonably dangerous because of a defect, recovery for economic losses should be allowed no matter how the defect manifests itself. To do otherwise is to encourage sloppy manufacturing, continued use of a defective product, and complete avoidance of liability through disclaimers. Such should not be the goal of a developing tort law.