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**Strict Liability and UCC Warranties
Down on the Farm**

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STRICT LIABILITY AND UCC WARRANTIES DOWN ON THE FARM

Uniform Commercial Code farm product liability is well established, but strict liability is being applied with increasing frequency. Due to agricultural variables, either theory presents proof problems regarding causation, defects, and damages. In addition, there is a serious question whether the UCC provides the exclusive remedy for economic loss. The author addresses these questions and assesses relevant South Dakota case law.

INTRODUCTION

Feedlots and croplands provide fertile ground for the growth of product liability. Products used in agriculture and the care and feeding of animals are expensive, highly technical and potentially harmful. Farmers must rely on the representations of the manufacturers and retailers concerning the safety and effectiveness of the products they use in their work. Too often these products let them down.

The farmer commonly uses alternative theories—negligence, breach of warranty and strict liability—to recover for injury or losses caused by defective products.¹ This comment will discuss the relative merits of warranty and strict liability as remedies for personal injury, property damage and economic loss caused by defective goods sold to farmers and feeders. Before strict liability becomes a complete remedy for all these types of losses, the courts will have to deal with the question of whether the Uniform Commercial Code (UCC) alone should govern economic loss. This comment will examine this critical issue, the current trend in farm product liability and the state of the law in South Dakota. The cases will emphasize property damage and economic loss from farm products such as animal feed and drugs, seed, fertilizers, herbicides and insecticides.

CONFRONTATION: STRICT LIABILITY AND THE UCC

A Comparison of Strict Liability and the UCC Warranty

Both strict liability and warranty are concerned with the quality of goods in the marketplace. Strict liability is consumer-oriented and arose to compensate persons for physical harm—personal injury and property damage—from defective products. Strict liability is expressed in section 402A of *Restatement (Second)*

1. Note, *Product Liability for Animal Food and Drugs*, 48 IA. L. REV. 631 (1962); see also Annot., 81 A.L.R.2d 183 (1959).

of Torts.² The warranty provisions of Article Two of the UCC also create liability for the seller of defective goods.³ The UCC regulates contract transactions and encourages fair dealing and free bargaining. While the UCC is statutory, strict liability is judicially imposed.

In addition to a similar concern over the quality of goods, strict liability and warranty have other common factors. Both strict liability and warranty involve the concept of liability without fault; plaintiff does not have to prove the negligence of the defendant. In order to recover under either theory, the plaintiff must establish a minimum of three things:⁴ 1) that he was injured; 2) that the product was defective at the time it left the defendant's control; and 3) that the defect caused the injury.

There are also differences between the two theories which have spurred the growth of strict liability. The first difference is the requirement of privity. In a commercial setting where goods were manufactured and sold locally, privity meant that the buyer had dealt directly with the seller. As commerce expanded, it became impractical to deal directly with the manufacturer. Therefore, the buyer had privity with a retailer who had no direct control over the manufacturing process. Under the privity concept, if the action is based on a warranty theory, the warranty is presumably addressed to the person who purchased the product. Strictly applied, the purchaser alone should benefit from the warranty.⁵ However, recovery under strict liability is based on a tort theory and requires no privity of contract between the plaintiff and defendant.⁶

A second difference between strict liability and warranty is how "defect" in the product is defined and proved. Under strict liability the plaintiff must prove a defect that is "unreasonably

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

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

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

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

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

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

3. S.D. COMPILED LAWS. ANN. §§ 57-4-25 to -41 (1967); UNIFORM COMMERCIAL CODE §§ 2-313 to 2-318.

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103, at 671-72 (4th ed. 1971) [hereinafter cited as PROSSER].

5. Southland Milling Co. v. VegeFat, Inc., 248 F. Supp. 482, 485 (E.D. Ill. 1965).

6. RESTATEMENT (SECOND) OF TORTS § 402A, comment b at 352 (1965).

dangerous." "Unreasonably dangerous" means a defect in the product which causes an injury that a reasonable person would not expect to occur in ordinary use. The definition of defect in a warranty action varies according to the type of warranty. If a product fails to comply with an express warranty, or fails to fit a particular purpose, or fails to meet one of the tests of merchantability such as fitness for the ordinary purpose, it is defective in regard to that purchaser. An insecticide, for example, which fails to perform adequately could be unmerchantable under the UCC and yet not meet the "unreasonably dangerous" standard of strict liability. Frequently, courts are being asked to find strict liability where the defect merely causes harm in ordinary use or is defective and in a condition not reasonably contemplated by the ordinary purchaser.⁷ This trend would expand the scope of strict liability, making the definition of defect for strict liability and implied warranty of merchantability the same.

A third difference between warranty and strict liability is the condition precedent of notice in the breach of warranty. Section 2-607(3) of the UCC indicates that if notice of the defect is not given within a "reasonable time," the warranty action will be barred.⁸ Claimants under strict liability have no notice requirement.

A fourth difference is the option under the UCC to shift the risk to the buyer through the use of disclaimers and modification of remedies.⁹ Disclaimers and modifications of remedy are inoperative if the action is brought in strict liability.

Compliance with the appropriate statute of limitations is a fifth difference. The UCC statute of limitations for breach of warranty is four years from tender of delivery.¹⁰ This applies whether or not the buyer knows of the defect at that time. When the action is brought on the theory of strict liability, the shorter tort statute applies and usually runs from the time of injury. Depending on the time frame, a careful choice of the theory of action may prevent an unjust result.

A sixth difference may exist in the burdens of proof and the defenses available. Proximate causation, contributory negligence,

7. *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976, 978 (D. Alas. 1973); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973); *Brown v. Western Farmers Ass'n*, 268 Ore. 470, 521 P.2d 537 (1974).

8. S.D. COMPILED LAWS ANN. § 57-7-15 (1967); UNIFORM COMMERCIAL CODE § 2-607(3) (a).

9. S.D. COMPILED LAWS ANN. §§ 57-4-34 to -39 (1967); UNIFORM COMMERCIAL CODE § 2-316.

10. S.D. COMPILED LAWS ANN. §§ 57-8-61 to -62 (1967); UNIFORM COMMERCIAL CODE §§ 2-725(1), (2). The statutes provide, in pertinent part, that "except that where a warranty explicitly extends to future performance of the goods . . . the cause of action accrues when the breach is or should have been discovered." S.D. COMPILED LAWS ANN. § 57-8-62 (1967); UNIFORM COMMERCIAL CODE § 2-725(2).

assumption of the risk, misuse, intervening cause and mitigation of damages must be considered in bringing a cause of action for farm product liability because the courts apply these theories differently. In one instance a court stressed that the defendant's erroneous directions for use of the product, rather than the plaintiff's contributory negligence, were the proximate cause of the injury.¹¹ One court considered plaintiff's imprudent actions as a failure to mitigate damages rather than contributory negligence,¹² while another court viewed plaintiff's failure to follow the defendant's recommendations after notice as an assumption of the risk.¹³

Assumption of the risk by knowingly encountering danger or by misusing the product constitutes a defense to strict liability and implied warranty in most courts.¹⁴ However, contributory negligence may not be a defense to warranty actions or strict liability actions.¹⁵ In this disputed area of the law, a thorough understanding of the decisions of the jurisdiction and the use of artful pleading are important.

These comparisons make it apparent that strict liability is a short route to placing liability on the manufacturer. Where the injury is to person or property, an "unreasonably dangerous" defect caused the damage, and the jurisdiction accepts strict liability, pleading strict liability should be successful. Where the damage is economic loss, the outcome is doubtful. The UCC warranty, as opposed to strict liability, is the more accepted theory in economic loss cases.

Actions Based on Express Warranty

An express warranty arises when the seller by word or action indicates that the goods shall conform to an affirmation or promise, and this promise becomes part of the "basis of the bargain."¹⁶ The seller may not even intend to warrant the product. In an express warranty under the UCC, the focus is on the buyer's reasonable expectation rather than the seller's intention. Reliance by the

11. *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971) (mismanagement by feedlot operator and failure to use correct processes was not misuse of product amounting to a known risk).

12. *Bigelow v. Agway, Inc.*, 506 F.2d 551, 556 (2d Cir. 1974) (continuing to add hay to barn after becoming aware of "hot spots").

13. *Gompert v. Great W. Sugar Co.*, 183 Neb. 790, 164 N.W.2d 459 (1969) (refused to follow defendant's direction as to crop to plant after soil was treated with chemical).

14. L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A(5)(f) (1975).

15. *Id.* §§ 16.01(3), 16A(5)(f) (1975); PROSSER, *supra* note 4, at 522. See also *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1973) (plaintiff's failure to read directions not a defense); *Williams v. Allied Chem. Co.*, 270 So. 2d 157 (La. App. 1972) (plaintiff's failure to follow oral directions was not a defense when written instructions failed to warn that a product might be dangerous).

16. S.D. COMPILED LAWS ANN. §§ 57-4-25 to -29 (1967); UNIFORM COMMERCIAL CODE § 2-313.

buyer was an element in a warranty action under common law. However, the UCC "basis of the bargain" has replaced the role of reliance. The exact significance of the change remains unclear but courts continue to use the term reliance more frequently than basis of the bargain.¹⁷ Although no *particular* reliance on the statement need be proven,¹⁸ courts still are concerned whether the representation was an inducement to the agreement.¹⁹ Thus, it is probably wise to show proof of reliance.

The express warranty may arise in a number of ways. The warranty may occur through a description on the label, invoice or catalogue,²⁰ through advertising,²¹ or through reliance on past deliveries. A warranty may also be created when a sample or model is made part of the basis of the bargain.²²

Frequently a warranty arises in the representations of the seller or manufacturer that the goods will compare favorably with others or that they will be good for a certain use.²³ A careful distinction must be made between a warranty and "puffing" or mere opinion.²⁴ A seller's bragging will usually be opinion rather than fact, but the distinction may be close.²⁵ The distinction may rest upon a weighing of the expertise of the buyer and seller,²⁶ the specificity of the promise,²⁷ the context, or the obviousness of the defect.

17. Comment, "Basis of Bargain"—What Role Reliance?, 34 U. PITT. L. REV. 145 (1972).

18. UNIFORM COMMERCIAL CODE § 2-313, Comment 3.

19. *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974); *Veretto v. Eli Lilly & Co.*, 369 F. Supp. 1254 (N.D. Tex. 1974).

20. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969) (percentage of germination); *Wilgro, Inc. v. Vowers & Burbank*, 190 Neb. 369, 208 N.W.2d 698 (1973) (guaranteed analysis of ingredients); *Sexaur & Son v. Watertown Co-op Elevator Ass'n*, 76 S.D. 381, 79 N.W.2d 220 (1957) (variety of seed); *Gray v. Gurney Seed & Nursery Co.*, 27 S.D. 280, 231 N.W. 940 (1930) (adapted to climate).

21. *Ducote v. Chevron Chem. Co.*, 227 So. 2d 601 (La. App. 1969).

22. S.D. COMPILED LAWS ANN. § 57-4-28 (1967); UNIFORM COMMERCIAL CODE § 2-313(1)(b).

23. *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974) (hay ready for baling); *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973) (feed additive for dairy cattle); *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E.2d 808 (1974) (fertilizer on tobacco); *W.G. Tufts & Son v. Herider Farms, Inc.*, 485 S.W.2d 300 (Tex. Civ. App. 1972) ("same as other product").

24. UNIFORM COMMERCIAL CODE § 2-313(2), Comment 8. The basic question is, have the representations become part of the "basis of the bargain"? See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-3, at 274 (1972) [hereinafter cited as WHITE & SUMMERS]. The distinction may depend upon such factors as the reasonableness of the buyer's reliance or the seriousness of the buyer's injury.

25. *Brown v. Globe Laboratories*, 165 Neb. 138, 84 N.W.2d 151 (1957) ("as good as any obtainable"); *Gray v. Gurney Seed & Nursery Co.*, 57 S.D. 280, 231 N.W. 940 (1930) ("would out-yield any variety").

26. *Heil v. Standard Chem. Mfg. Co.*, — Minn. —, 223 N.W.2d 37 (1974) (Trained agent better able to posit results than livestock feeder with 20 years experience). But see *Cook Livestock Co. v. Reisig*, 161 Neb. 640, 74 N.W.2d 370 (1956).

27. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969) (80% of seed would germinate).

The UCC suggests that a warranty may be made after the close of the deal and regarded as modification.²⁸ One authority has suggested that, in practice, this modification may only apply to face-to-face deals modified shortly after the sale, because of the statute of fraud provisions of the UCC.²⁹ One court has suggested that modification may be made much later.³⁰

Actions Based on Implied Warranty of Merchantability

While the express warranty is a direct part of the basis of the bargain between the seller and the buyer, the implied warranty of merchantability is implied by law.³¹ The warranty is created because public policy and fair dealing dictate that when a merchant dealing in goods of that kind makes a sale, he warrants the quality of the product. If the goods do not conform to the warranty and cause injury, the warranty is breached. For example, a farmer buying fertilizer has the right to expect that the fertilizer will do the job of the average fertilizer. If the product is ineffective, he may have a cause of action based on implied warranty of merchantability.

Since the parameters of merchantability are not defined, the plaintiff bears considerable responsibility for particularizing the warranty in each case. The plaintiff must prove that the defect makes this particular product unmerchantable. The UCC provides a list of standards of merchantability.³² That list, however, is not exhaustive. For example, the product must conform to promises or affirmations of fact made on the container or label.³³ The product must be adequately contained, packaged and labeled.³⁴ Proof of the quality of other brands on the market may also indicate a standard of merchantability. The goods should "pass without objection in the trade," be of "fair average quality within the description," and be "fit for the ordinary purposes for which such goods are used."³⁵ The price may indicate what quality was intended in the good and how far the warranty extends.³⁶

An implied warranty may also arise from the course of dealing

28. UNIFORM COMMERCIAL CODE § 2-313, Comment 7.

29. WHITE & SUMMERS, *supra* note 24, at 281.

30. *Bigelow v. Agway, Inc.*, 506 F.2d 551, 555 n.6 (2d Cir. 1974).

31. S.D. COMPILED LAWS ANN. §§ 57-4-30 to -31 (1967); UNIFORM COMMERCIAL CODE § 2-314.

32. S.D. COMPILED LAWS ANN. § 57-4-31 (1967); UNIFORM COMMERCIAL CODE § 2-314.

33. S.D. COMPILED LAWS ANN. § 57-4-31(6) (1967); UNIFORM COMMERCIAL CODE § 2-314(2)(f).

34. S.D. COMPILED LAWS ANN. § 57-4-31(5) (1967); UNIFORM COMMERCIAL CODE § 2-314(2)(e); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

35. S.D. COMPILED LAWS ANN. §§ 57-4-31(1), (2), (3) (1967); UNIFORM COMMERCIAL CODE §§ 2-314(2)(a), (b), (c).

36. UNIFORM COMMERCIAL CODE § 2-314, Comment 7.

or trade usage.³⁷ Federal and state standards and regulations may also provide a measure of merchantability.³⁸

Actions Based on Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose readily lends itself to products used on the farm, because agriculture is a specialized business. Courts frequently speak of the implied warranties interchangeably. The goods, however, may be "merchantable" and yet not fit for a particular purpose.³⁹ The scope of the warranty of fitness is narrow and precise. Its existence is determined by the facts. The UCC provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.⁴⁰

A seller has reason to know the particular purpose when the buyer purchases goods with a specific use which is peculiar to the nature of his business.⁴¹ The buyer does not have to explicitly inform the seller of his proposed use for the product if the circumstances indicate that the seller would have good reason to realize that the purpose exists or that the buyer is relying on the seller's representations.

With a warranty of fitness for a particular purpose the buyer must prove his reliance on the seller. Often this reliance is proven because the seller selects or recommends the product.⁴² Liability cannot be avoided by separating the questions of erroneous professional advice on use of the product from that of the defectiveness of the product.⁴³ Under the UCC, when the buyer chooses a product because of a patent or trade name, his choice is only one of the facts to be considered in determining reliance.⁴⁴ Trade custom, however, may indicate a lack of reliance and thus exclude or modify an implied warranty.⁴⁵

37. S.D. COMPILED LAWS ANN. § 57-4-32 (1967); UNIFORM COMMERCIAL CODE § 2-314(3).

38. See Van Den Bosch, *Insecticides and the Law*, 22 HASTINGS L.J. 615 (1971).

39. See, e.g., UNIFORM COMMERCIAL CODE § 2-315, Comment 2.

40. S.D. COMPILED LAWS ANN. § 57-4-33 (1967); UNIFORM COMMERCIAL CODE § 2-315.

41. UNIFORM COMMERCIAL CODE § 2-315, Comment 2.

42. *California Chem. Co. v. Lovett*, 204 So. 2d 633 (La. App. 1967) (aerial spray on boll weevils and boll worms); *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971) (herbicide on corn).

43. *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660, 668 (5th Cir. 1971).

44. UNIFORM COMMERCIAL CODE § 2-315, Comment 5.

45. S.D. COMPILED LAWS ANN. § 57-4-38 (1967); UNIFORM COMMERCIAL

The warranty of fitness is given by a "seller" even if he is not a "merchant."⁴⁶ Therefore, this warranty covers the occasional sale. If a neighbor, for example, prepares silage and represents it as suitable for dairy cattle, he will have given a warranty if the buyer relies on him.⁴⁷

The sale of goods may include a warranty of merchantability and of fitness, as well as an express warranty. The warranties are to be construed as consistent with each other and cumulative.⁴⁸ If this construction is unreasonable, the intention of the parties governs. The express warranty usually displaces an inconsistent warranty of merchantability and the warranty of fitness for a particular purpose prevails over any other type of warranty.⁴⁹

With the three basic warranties in mind, the plaintiff must first determine whether another provision of the UCC may prevent his recovery. The most obvious obstacles may be the notification requirement, disclaimer, modifications of remedy and privity.

CONDITIONS FOR RECOVERY

Notice

A possible pitfall in a cause of action for breach of warranty is the requirement of notice within a "reasonable time."⁵⁰ The reason for the notice requirement is not to trap the unwary, but to permit the seller to investigate the claim and protect himself. The requirement "is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."⁵¹ The notice may be informal and oral.⁵² Usually the buyer gives notice by contacting the seller in frustration over the performance of the product.

Courts tend to construe the time for notice liberally.⁵³ The court will look at different factors used to measure "reasonable time" such as the scope of the warranty, the perishable quality of the goods, the likelihood that the seller would have limited the damages, and whether the defect was latent.⁵⁴ The plaintiff has the burden of pleading and proving notice.⁵⁵

CODE § 2-316(3)(c); *Zicari v. Joseph Harris Co.*, 33 App. Div. 2d 17, 304 N.Y.S.2d 918 (1969).

46. UNIFORM COMMERCIAL CODE § 2-315, Comment 4.

47. *Borman v. O'Donley*, 364 S.W.2d 31 (Mo. 1962).

48. S.D. COMPILED LAWS ANN. § 57-4-40 (1967); UNIFORM COMMERCIAL CODE § 2-317.

49. S.D. COMPILED LAWS ANN. § 57-4-40 (1967); UNIFORM COMMERCIAL CODE § 2-317.

50. S.D. COMPILED LAWS ANN. § 57-7-15 (1967); UNIFORM COMMERCIAL CODE § 2-607(3).

51. UNIFORM COMMERCIAL CODE § 2-607(3), Comment 4.

52. *Id.* UNIFORM COMMERCIAL CODE § 1-201(26) states that notice includes taking steps reasonably required to inform.

53. *White & Summers*, *supra* note 24, at 343; *Hellenbrand v. Bowar*, 16 Wis. 2d 264, 114 N.W.2d 418 (1962).

54. *Q. Vandenburg & Sons, N.V. v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

55. S.D. COMPILED LAWS ANN. § 57-7-16 (1967); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717, 720 (1969).

Disclaimers and Modification of Remedies

Part of the "basis of the bargain" between the manufacturer or other seller and the buyer may be an agreement to shift the risk of defect to the buyer through a disclaimer⁵⁶ or a limitation of remedies.⁵⁷ Courts do not favor disclaimers, and they are strictly construed against the seller.⁵⁸ In one case, the court upheld a specific clause in the product label disclaiming liability and denied recovery.⁵⁹ The dissenting judge said that it was against public policy to allow a company to produce and advertise a chemical to serve a particular purpose and then ask the court to enforce payment for the product when it wasn't as represented.⁶⁰ Under the UCC the claim of unconscionability⁶¹ can also be raised against a disclaimer especially where there is inequality in bargaining position between the parties.

An express warranty is not easily disclaimed. The UCC intends to protect the buyer from "unexpected and unbargained for language" which is inconsistent with the express warranty.⁶² Where inconsistencies exist, an express warranty displaces the disclaimer.⁶³

Specific rules govern disclaimers of implied warranties.⁶⁴ All disclaimers must be conspicuous.⁶⁵ A disclaimer of fitness for a particular purpose must be explicitly negotiated between the buyer and seller and be set forth in particularity in writing showing the specific qualities and character of fitness which are being disclaimed.⁶⁶ Where a warranty of merchantability exists, a disclaimer will not be honored when it is not conspicuous and not received until after the contract is complete.⁶⁷ Although the

56. S.D. COMPILED LAWS ANN. §§ 57-4-34 to -39 (1967); UNIFORM COMMERCIAL CODE § 2-316.

57. S.D. COMPILED LAWS ANN. §§ 57-8-49 to -51 (1967); UNIFORM COMMERCIAL CODE §§ 2-316(4), 2-719.

58. *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291 (5th Cir. 1962); *Burr v. Sherwin Williams Co.*, 268 P.2d 1041, 42 Cal. Rptr. 682 (1954).

59. *California Chem. Co. v. Lovett*, 204 So. 2d 633 (La. App. 1967), cited in *Swenson v. Chevron Chem. Co.*, — S.D. —, 234 N.W.2d 38 (1975).

60. *Id.* at 639-40.

61. S.D. COMPILED LAWS ANN. §§ 57-4-2 to -3 (1967); UNIFORM COMMERCIAL CODE § 2-302.

62. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969); UNIFORM COMMERCIAL CODE § 2-316, Comment 1.

63. S.D. COMPILED LAWS ANN. § 57-4-34 (1967); UNIFORM COMMERCIAL CODE § 2-316(1); *Woodbury Chem. Co. v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971).

64. S.D. COMPILED LAWS ANN. § 57-4-35 (1967); UNIFORM COMMERCIAL CODE § 2-316(2).

65. S.D. COMPILED LAWS ANN. § 57-4-35 (1967); UNIFORM COMMERCIAL CODE § 2-316(2). See also S.D. COMPILED LAWS ANN. § 57-1-2(10) (1967) and UNIFORM COMMERCIAL CODE § 1-201(10). These sections provide that a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.

66. *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

67. *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

disclaimer of merchantability may be oral or written, the word "merchantability" must be used.⁶⁸

An "as is" clause,⁶⁹ or a demand or opportunity to examine,⁷⁰ may also serve as a disclaimer, shifting the risk to the buyer. Of course, the buyer's skill in examining the product is considered in evaluating a disclaimer by examination. The customs of trade usage may also operate as disclaimers, especially in the field of agriculture.⁷¹

In addition to the disclaimer, the parties are free to shape their own remedies within the limits of conscionability.⁷² The limitation of damages for personal injuries is prima facie unconscionable.⁷³ The limitation of damages can be a useful commercial device if reasonably employed. It can also produce an outrageous result. In one instance damages were limited to the purchase price of a weed control product.⁷⁴ Although the product was proven to be defective, the buyer recovered nothing for damages to his crops. Despite his compliance with five of six specific conditions, he was denied even the limited purchase price because he could not prove the precise depth and speed of the application. No doubt these are the kinds of decisions which make the use of strict liability attractive.

Where the parties bargain with awareness, are on equal terms, and the price reflects the distribution of the risk, courts uphold limitation of damage clauses. A seller of seed at a relatively low cost may want to protect against liability for the cost of an entire crop. However, courts have viewed such limitations as contrary to public policy because, where seed is defective, "loss of an intended crop is inevitable" and "always causes disaster."⁷⁵ It is questionable whether farmers buying goods are aware of the presence of disclaimers or limitation of damages clauses, realize their legal implications, and can freely bargain where such protective disclaimers are commonly used.

Privity

Privity between the buyer and seller is a general requirement of an action in warranty. Where economic loss is involved, it often

68. S.D. COMPILED LAWS ANN. § 57-4-35 (1967).

69. S.D. COMPILED LAWS ANN. § 57-4-36 (1967); UNIFORM COMMERCIAL CODE § 2-316(3)(a).

70. S.D. COMPILED LAWS ANN. § 57-4-37 (1967); UNIFORM COMMERCIAL CODE § 2-316(3)(b).

71. S.D. COMPILED LAWS ANN. § 57-4-38 (1967); UNIFORM COMMERCIAL CODE § 2-316(3)(c); R.D. Lowrance, Inc. v. Peterson, 185 Neb. 679, 178 N.W.2d 277 (1970).

72. S.D. COMPILED LAWS ANN. §§ 57-8-49 to -51 (1967); UNIFORM COMMERCIAL CODE § 2-719.

73. S.D. COMPILED LAWS ANN. § 57-8-51 (1967); UNIFORM COMMERCIAL CODE § 2-719(3).

74. Veretto v. Eli Lilly & Co., 369 F. Supp. 1254 (N.D. Tex. 1974).

75. Desert Seed Co., Inc. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (limitation against public policy); Gore v. George J. Ball, Inc., 279 N.C. 192, —, 182 S.E.2d 389, 398 (1971).

prevents the buyer from recovering from the manufacturer. Privity has been circumvented in a number of ways, however. For example, an express warranty is frequently considered to run from the manufacturer directly to the buyer where the buyer relied on the manufacturer's advertising or labeling. The retailer is viewed as a mere conduit for the product.⁷⁶

When the retailer has not adopted the express warranty of the manufacturer or made an independent warranty, he may seek indemnification from his seller for the costs he must pay because of the defective product.⁷⁷ This may cause a number of parties to be impleaded or a series of suits up the distribution chain.

The UCC applies a third party beneficiary theory to "horizontal privity," that is to non-purchasers injured in proximity of the product.⁷⁸ Each alternative to section 2-318 opens a broader scope of coverage for third party beneficiaries who suffer personal injury or property damage. This liability can not be disclaimed.

The UCC, however, is silent on the issue of vertical privity—the relationship up the chain of distribution from the buyer to retailer to manufacturer. This question has apparently been left to other state law. Strict liability appears to have developed to fill that void.

A TREND TOWARD STRICT LIABILITY

The theory of strict liability is expanding and has been used in more cases dealing with goods used on the farm. This expansion may be traced to the policies behind strict liability, such as encouraging greater care by manufacturers, avoiding multiple litigation, and the spreading of risk among all consumers through manufacturers' pricing of products.⁷⁹ This broad risk-sharing in strict liability differs from risk-shifting between the contracting parties under the UCC provisions. Originally the majority of cases in which strict liability was used involved animal food,⁸⁰ drugs,⁸¹

76. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134-38 (1960).

77. S.D. COMPILED LAWS ANN. § 57-7-17 (1967); UNIFORM COMMERCIAL CODE § 2-607(5)(a); *Wilson v. E-Z Flo*, 13 N.C. App. 610, 186 S.E.2d 679 (1972).

78. S.D. COMPILED LAWS ANN. § 57-4-41 (1967); UNIFORM COMMERCIAL CODE § 2-318. Alternative A includes as beneficiaries the family, household and guests of the purchaser. Alternative B includes any natural person who may reasonably be expected to use, consume or be affected by the goods. Alternative C, as adopted by South Dakota, reads:

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

79. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

80. *Oakes v. Geigy Agricultural Chem.*, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1961); *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971).

81. *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th

and products causing personal injuries.⁸² As in other areas of product liability, these decisions opened the door to broader liability for other products.⁸³

In *Kassab v. Central Soya*,⁸⁴ the court explained why Pennsylvania was joining the pronounced trend toward eliminating the privity requirement in assumpsit suits against remote manufacturers for breach of an implied warranty. The court pointed out that large, financially responsible manufacturers were putting wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods would find their way into the hands of the consumer. Although absolute liability for breach of implied warranty existed, it ran to the middleman, ignoring commercial reality and encouraging multiplicity of litigation.

ECONOMIC LOSS: THE PROPER REMEDY

Defective products cause different types of harm and strict liability may not be the proper remedy in every instance. Personal injury is harm inflicted upon a person. Property damage is harm to the goods themselves, to products made from the goods, or to nearby property. Often it is difficult to separate property damage from economic loss. For example, it is debatable whether a defective feed which causes cattle to gain weight slowly has caused property damage to the cattle because it has affected their health or has caused economic loss because of the extended feeding period. This might be an argument for extending strict liability to all types of loss from goods used in agriculture. In defining economic loss one writer has said:

The element common to these [economic loss] cases is the lack of any claim for personal injury or tangible damage to other property. For purposes of this analysis, an action brought to recover damages for inadequate value, cost of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property—will be defined as an action to recover for “economic” harm It is also important to distinguish between “direct” and “consequential” eco-

Cir. 1971); *Burnett v. Quaker Oats Co.*, 289 F. Supp. 280 (D. Tenn. 1969); *Williams v. Allied Chem. Corp.*, 270 So. 2d 157 (La. App. 1972); *Brown v. Western Farmers Ass'n*, 268 Ore. 470, 521 P.2d 537 (1974); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

82. *Alaman Bros. Farm & Feed Mill, Inc. v. Diamond Laboratories, Inc.*, 437 F.2d 1295 (5th Cir. 1971); *Waller v. Fort Dodge Laboratories*, 356 F. Supp. 413 (E.D. Mo. 1972); *Denman v. Armour Pharmaceutical Co.*, 322 F. Supp. 1370 (D. Miss. 1970); *Hoover v. O.M. Franklin Serum Co.*, 444 S.W.2d 596 (Tex. 1969).

83. *Shield v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974) (pesticide-fungicide); *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1974) (herbicide); *Portnoy v. Capobianco*, 355 N.Y.S. 86 (Super. Ct. Nassau County 1974) (spray); *Monsanto Co. v. Thrasher*, 463 S.W.2d 25 (Tex. Civ. App. 1971) (herbicide); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598 (Tex. Civ. App. 1971) (weed control chemical).

84. 432 Pa. 217, 246 A.2d 848 (1968).

conomic loss. Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be "out of pocket"—the difference between the value of what is given and received . . . and its value as represented. Direct economic loss may also be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.⁸⁵

Strict liability and the UCC are compatible in regard to the extent of recovery for personal injury and property damage. Section 2-715⁸⁶ provides, in tort-like terms, that consequential damage shall include injury to person or property "proximately resulting" from any breach of warranty. The UCC and strict liability do collide over the extent to which manufacturers, distributors and retailers are liable for economic loss, particularly where there is no harm to person or property. Strict liability does not limit the economic loss to that foreseeable by the parties. Section 2-714⁸⁷ speaks of economic loss in contract terms as "losses of which the seller had reason to know."

The majority of writers appear to agree that strict liability is not the proper theory of recovery for economic loss.⁸⁸ They reason that the legislatures have spoken through the UCC, that manufacturers cannot effectively spread the risk where consequential loss is concerned because the unforeseeable nature of the damage makes it excessively expensive to insure, and that there is less public interest in protecting economic loss. Nonetheless, courts have gone either way on the question.⁸⁹ This controversy is significant in cases concerning goods used on the farm because almost every recovery will involve economic loss.

85. Note, *Economic Loss in Product Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

86. S.D. COMPILED LAWS ANN. § 57-8-40(1) (1967); UNIFORM COMMERCIAL CODE § 2-715(2) (b).

87. S.D. COMPILED LAWS ANN. § 57-8-40(1) (1967); UNIFORM COMMERCIAL CODE § 2-715(2) (a).

88. PROSSER, *supra* note 4, § 101, at 666-67. Loss on the bargain may differ from property damage or personal injury. "Economic loss" or "benefit of the bargain" should perhaps depend on the agreement struck by the parties. See also WHITE & SUMMERS, *supra* note 24, § 11-5, at 334; Dickerson, *ABC's of Products Liability*, 36 TENN. L. REV. 439, 452-53 (1969); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 1012-15 (1966); Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 327 (1973); Note, *Expanding Scope of Enterprise Liability*, 69 COLUM. L. REV. 1084, 1101-04 (1969); Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 955 (1966); Note, *Manufacturer's Liability to Remote Purchases for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 549 (1966). But see Rossi, *Contributory Negligence as a Defense in a Products Liability Suit to Recover Economic Loss*, 38 INS. COUNSEL J. 629, 635 (1971).

89. Texas courts, for example, are split: *Veretto v. Eli Lilly & Co.*, 369 F. Supp. 1254 (N.D. Tex. 1974); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598 (Tex. Civ. App. 1971) (privity required for economic loss). But see *Monsanto Co. v. Thrasher*, 463 S.W.2d 25 (Tex. Civ. App. 1971) (strict liability is a separate remedy from the UCC).

The best known opinion favoring continuance of the warranty theory where economic loss is involved is *Seeley v. White Motor Co.*⁹⁰ The court denied recovery from the manufacturer for the purchase price and loss of profits because of a defective truck. Justice Traynor, writing for the majority, pointed out that the law of sales was designed to govern the economic relationships between suppliers and consumers of goods. Strict liability, he said, was created to govern the distinct problem of physical injury, not to undermine the UCC.⁹¹ Traynor was concerned about the potentially broad span of liability being cast upon the manufacturer.

The opinion in *Santor v. A. & M. Karagheusian*⁹² represents the viewpoint that strict liability is the proper remedy for economic loss. The *Santor* court held that the plaintiff could maintain an action directly against a carpeting manufacturer for a breach of implied warranty despite lack of privity and a limitation on recovery in the warranty. The court reasoned that liability was not conditioned on advertising but arose through the presence of goods in the marketplace.

The Oregon Supreme Court has been wrestling with the question of whether strict liability in tort or UCC warranty provisions should cover economic loss. In *Brown v. Farmers Association*⁹³ the purchaser of an allegedly defective chicken feed brought a strict liability action against a manufacturer to recover for the value of replacing the chickens, the cost of the defective feed, and lost profits.⁹⁴ The plaintiff argued that a product defect not within the reasonable contemplation of the consumer was by definition "unreasonably dangerous." The Oregon court recognized that some authorities today would not require proof that goods are "unreasonably dangerous." The majority opinion said:

Under that rationale, a dog food which caused a champion show dog to lose the gloss of its coat, thus decreasing its value as a show dog, would be "unreasonably

90. 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

91. *Id.* at 149, 45 Cal. Rptr. at 21.

92. 44 N.J. 52, 207 A.2d 305 (1965). In reaffirming this position, in *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 326 A.2d 90 (1974), the New Jersey court said:

Even in these days of consumerism, economic interests are not out of favor. Injuries to a man's business can be as detrimental to our society as injuries to his person. Severe injuries to a family's economic life can be devastating. . . . (Applying strict liability to economic loss) places the liability where it belongs, with the manufacturer, distributor or retailer, who can in turn, through insurance, spread the cost of injuries due to defective products throughout those further along the distribution system.

Id. at —, 326 A.2d at 97.

93. 268 Ore. 470, 521 P.2d 537 (1974); see also *State ex rel. W. Seed Prod. v. Campbell*, 250 Ore. 262, 442 P.2d 215 (1968) (seed); *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965) (tractor).

94. The complaint pleaded an alternative count of negligence, but did not include counts on implied warranties.

dangerous" despite the fact that the health of the dog was in no way impaired.⁹⁵

Justice O'Connell, dissenting, countered:

It is not illogical to argue that recovery under § 402A should be limited to damage for personal injuries, but it is incomprehensible to me to say that a product must constitute a risk of injury to human life before recovery will be allowed for property damage. . . . Apparently the court would hold that recovery would be allowed for the damage to the chickens if it could be shown that the feed contained a chemical which could, but did not, damage plaintiff's hands.⁹⁶

The majority in this case apparently saw the loss as economic, while Justice O'Connell saw it as economic loss accompanying property damage. Their disagreement demonstrates the difficulty of determining the form of action based on whether personal injury could occur from the use of the product.

In refusing to apply strict liability the majority quoted an earlier opinion:

In establishing liability in personal injury cases courts have been motivated to overlook any necessity for privity because the hazard to life and health is usually a personal disaster of major proportions to the individual . . . and something of minor importance to the manufacturer or wholesaler against which they can protect themselves by a distribution of risk. . . . There has not been the same social necessity to motivate the recovery for strictly economic losses where the damaged person's health, and therefore his basic earning capacity, has remained unimpaired. . . . We believe, however, that the term "unreasonably dangerous," . . . was not intended to be so "watered down" as to extend to any defect which in any way may decrease the value of property⁹⁷

Three of the four opinions stressed that the UCC may be either the preferable theory or only theory acceptable in economic loss cases. Justice Denecke, concurring specially, stated his belief that the UCC should be the sole remedy.

I categorize this as a case that should be governed solely by the UCC because of two characteristics: (1) the loss claimed is purely economic, loss of profits; and (2) the loss was not an "accidental one." . . .

In my opinion there is a need for certainty in this field that outweighs my inability to state more logically why recovery for personal injuries or for . . . damages, . . . can be based upon the tort of strict liability and the economic

95. 268 Ore. 470, —, 521 P.2d 537, 541 (1974).

96. *Id.* at —, 521 P.2d at 543-44 (dissenting opinion).

97. *Id.* at —, 521 P.2d at 541-42 citing *Price v. Gatlin*, 241 Ore. 315, 319, 405 P.2d 502, 504 (1965). *But see* note 85 *supra* and accompanying text for the other side of the argument.

loss claimed by plaintiff in this case can only be based upon the remedies provided for in the UCC.⁹⁸

The court, however, expressly did not rule on whether or to what extent the remedies under strict liability and the UCC should be mutually exclusive in actions for damage to property or for economic loss.

In the area of goods used in agriculture, there is much to criticize about free bargaining under the UCC. The farmer, whether he is a small operator or part of a conglomerate, does not qualify for the protection that courts have given the consumer because he is buying the products for use in his business. Many farmers would be crippled financially when a product causes loss for which they can not recover under the UCC. A few buyers may have the expertise and spending power to have an equal voice in determining the terms that are the basis of the bargain. Realistically, farmers usually have little bargaining power because they are dependent on the seller for credit; because every available product has disclaimers or limitations; or because they are not fully aware of the legal implications of the terms used. Retaining the UCC as the sole remedy for economic loss would have to be justified on the broad spectrum of economics in a free enterprise system rather than as it relates to farmers.

The fruits of strict liability for economic loss in goods for farm use would not all be sweet. On the positive side some party in the distribution chain who has promoted the product would have to distribute the loss rather than the individual farmer. On the other hand, the price of goods would have to increase to absorb the costs of reimbursing the injured parties. The manufacturer would become a guarantor of the performance as well as the safety of the product regardless of fault. This would have wide economic repercussions. Liability insurance is available for personal injury and property damage. Because the extent of liability for consequential loss such as lost profits or good will is so unforeseeable, insurance is not obtainable at a reasonable rate for such loss. Thus, the manufacturer has to be self-insured.

One solution to the burden might include no-fault product liability statutes setting a limit on recovery so that insurance would be available. This would still increase the cost of the product but would free both parties from unreasonable risk. It has been suggested that the burden should be distributed among those in the distributive chain.⁹⁹ The UCC might be revised to eliminate dis-

98. 268 Ore. 470, —, 521 P.2d 537, 542 (1974).

99. See, e.g., Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974). This writer suggests proportioning the liability among the parties in the distribution chain according to comparative fault concerning the defect. This would appear to further complicate a complex field and be contrary to the philosophy of strict liability.

claimers which offend public conscience, but to retain reasonable limitations on damages to be scrutinized by the courts or by special arbitrators.

THE CRITICAL PROBLEMS OF PROOF

Proof of Defect and Causation

In either the warranty theory or strict liability, the plaintiff has to prove a defect and that the defect was the proximate cause of the injury. Often in proving causation the plaintiff has to rely on circumstantial evidence. While circumstantial evidence may be even more persuasive than direct evidence, the circumstances must be so proven that the conclusion sought to be established must be a reasonable and probable one and follows logically from the facts.¹⁰⁰ The plaintiff has the burden of using the circumstantial evidence to exclude other reasonable hypotheses with a fair amount of certainty.¹⁰¹ The conclusion must not arise from guess work, speculation or surmise.¹⁰²

Proof may begin with the nature of the product.¹⁰³ The goods themselves are often introduced into evidence. Expert witnesses should be used if at all practical.¹⁰⁴ Because of the perishable nature of crops or carcasses, the expert should be consulted as soon as possible to assure accuracy in his tests. In some cases, lack of expert testimony may be fatal.¹⁰⁵ In another situation, the court may sympathize with the fact that scientific analysis is not always possible and the plaintiff will still be permitted to establish a *prima facie* case.¹⁰⁶ Technical experts consulted might include veterinarians, pathologists, entomologists, chemists, nutritionists and bacteriologists. Expert witnesses may testify concerning their tests on the product itself, observation of crop damage, examinations and autopsies on animals.

100. *Denman v. Armour Pharmaceutical Co.*, 322 F. Supp. 1370 (N.D. Miss. 1970).

101. *Shipton Supply Co., Inc. v. Bumbaca*, 505 P.2d 591 (Wyo. 1973).

102. *Green v. Ralston Purina Co.*, 376 S.W.2d 119 (Mo. 1964).

103. See generally Rheingold, *Proof of Defect in Product Liability Cases*, 76 CASE AND COM. 18 (1971).

104. *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 700, 518 P.2d 873, 881 (1974).

105. *Green v. Ralston Purina Co.*, 376 S.W.2d 119, 124 (Mo. 1964) (question of medical science which court or jury could not answer without aid of expert opinion).

106. *Savage v. Peterson Distrib. Co.*, 379 Mich. 197, 199, 150 N.W.2d 804, 806 (1967):

[W]e feel compelled to point out that positive direct evidence resulting from an analysis of the alleged contaminated food is not a *sine qua non* to the establishment of a *prima facie* case of alleged poisoned or contaminated food. . . . There are circumstances . . . in which a complaining plaintiff cannot obtain a scientific analysis of the involved product. Such plaintiff should not be totally without a basis of making out a submissible fact question. Neither is an absence of the finding of the alleged contaminant by autopsy, standing alone, conclusive. . . .

Expertise need not be equated with education. The farmer himself may be an expert witness when he has had practical experience in a particular specialty.¹⁰⁷ An experienced layman who has observed sickness in livestock following consumption of a particular feed may testify that the feed was the cause.¹⁰⁸

Mere proof that there was something in the product which could explain the damage is not usually sufficient proof in itself,¹⁰⁹ nor is proof of the injury alone sufficient.¹¹⁰ Mere compliance with minimum product standards does not establish that the product was not defective.¹¹¹ Where the jury is left to conjecture as to which of a number of causes may have caused the injury, the court will direct that the plaintiff's case has not been established.¹¹²

Sometimes, demonstrating that the accident is an isolated event may infer the existence of a defect. For example, in *Brown v. Globe Laboratories*,¹¹³ a farmer gave a vaccine to some of his sheep. The vaccinated sheep died promptly, while the remainder of the sheep remained well. The unusual nature of the incident makes it reasonably probable that the vaccine was defective.

Comparisons with similar products may be probative circumstantial evidence.¹¹⁴ In using similarity evidence it is important to show that the circumstances in the accident are the same or sufficiently similar to the sample so that the comparison is admissible and persuasive.¹¹⁵ Experimental evidence is admissible if the experiment was conducted under the conditions similar to those existing in the case in question. Such evidence would not be conclusive, but might provide further proof.¹¹⁶ Proof of ineffectiveness may be more difficult to demonstrate, but comparisons may be persuasive.¹¹⁷ Absence of other complaints may be introduced by the defense, but this proof is not conclusive.¹¹⁸ Establishing the

107. *Bean v. Diamond Alkali Co.*, 93 Idaho 32, 454 P.2d 69 (1969) (13 years experience using herbicides); *but see Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1974) (not expert after first attempt in using herbicides).

108. *Western Food Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612, 617 (1962); *see also Annot.*, 49 A.L.R.2d 932 (1959).

109. *Olano v. Rex Milling Co.*, 154 So. 2d 555 (La. App. 1963) (glass in feed, glass in horse's intestines but no causation proven).

110. *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1974).

111. *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 17 (Tex. Civ. App. 1968).

112. *Heil v. Standard Chemical Co.*, — Minn. —, 223 N.W.2d 37 (1974).

113. 165 Neb. 138, 84 N.W.2d 151 (1957).

114. *Savage v. Peterson Distrib. Co.*, 379 Mich. 197, 150 N.W.2d 804 (1967) (evidence of an epidemic of similar food poisoning).

115. *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1974).

116. *Western Feed Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612 (1961).

117. *Yellow Bayou Plantation v. Shell Chem., Inc.*, 491 F.2d 1239 (5th Cir. 1974) (photographs used to compare crop years); *Swenson v. Chevron Chemical Co.*, — S.D. —, 234 N.W.2d 38 (1975) (evidence of 20 insect-free acres within an infested 100-acre field).

118. *Vermont Food Indus., Inc. v. Ralston Purina Co.*, 514 F.2d 456 (2d Cir. 1975).

defect and causation in farm product liability cases is a particular challenge because extraordinary variables, such as the growth of live animals or weather conditions, must be overcome by proof.

Proof of Damages

After the defect and proximate causation are established, plaintiff must prove his damages. According to the UCC the measure of damage is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted.¹¹⁹ The damages must also be "reasonable."¹²⁰ In proper cases, incidental and consequential damages are also recoverable.¹²¹ For example, where defective feed decreases egg production, the general damage might be the cost of the feed. The incidental damage might be the cost of replacing the hens. Consequential damage might be the lost profits from the decrease of egg production.

The UCC allows recovery of consequential damages of which the seller had "reason to know."¹²² This updated version of *Hadley v. Baxendale*¹²³ does not require that a tacit agreement is made between the parties, but only that a reasonable person could have foreseen the consequences.¹²⁴ Consequential damages also include injury to a person or property proximately resulting from any breach of warranty.¹²⁵

Recovery of damages for breach of warranty, where there is a reasonable certainty that substantial damages have resulted, will not be denied because the exact amount is difficult to ascertain.¹²⁶ If reasonable basis for computing an approximate amount of damages is provided, that is all the law requires.¹²⁷ The party injured by a breach of contract is entitled to just and adequate compensation for his injury, but no more.¹²⁸

The measure of damages for the death or destruction of livestock, poultry or other animals is generally the market value

119. S.D. COMPILED LAWS ANN. § 57-8-37 (1967); UNIFORM COMMERCIAL CODE § 2-714(2).

120. S.D. COMPILED LAWS ANN. § 57-8-36 (1967); UNIFORM COMMERCIAL CODE § 2-714(1).

121. S.D. COMPILED LAWS ANN. § 57-8-38 (1967); UNIFORM COMMERCIAL CODE § 2-714(3).

122. S.D. COMPILED LAWS ANN. § 57-8-40(1) (1967); UNIFORM COMMERCIAL CODE § 2-715(2)(a).

123. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854) (consequential damages must have been within the contemplation of the parties at the time of contracting).

124. WHITE & SUMMERS, *supra* note 24, § 10-4, at 316.

125. S.D. COMPILED LAWS ANN. § 57-8-40(2) (1967); UNIFORM COMMERCIAL CODE § 2-715(2)(b).

126. *Ellendale Farmers Union Cooperative Ass'n v. Davis*, 219 N.W.2d 829, 830 (N.D. 1974).

127. *Id.* at 830; *Olson v. Aldren*, 84 S.D. 292, 294, 170 N.W.2d 891, 893 (1969).

128. *Ralston Purina Co. v. Jungers*, 86 S.D. 583, 199 N.W.2d 600 (1972).

of the animals immediately prior to the wrongful act.¹²⁹ Unborn or newborn cattle require a special measure of damage.¹³⁰ If the animal has any salvage value, the value should be deducted from the damages.¹³¹

Out of pocket expenses are granted where proven. Some special costs which have been allowed include: special feeding costs,¹³² revaccination of survivors,¹³³ veterinary costs and medicine,¹³⁴ and yardage.¹³⁵ The extra cost of labor has been granted in some instances,¹³⁶ and denied in others.¹³⁷ Values may be determined by the market value at the nearest market, by the plaintiff's testimony if he is experienced in the business,¹³⁸ or by plaintiff's reference to community values.¹³⁹

Older cases did not always allow lost profits, but today they are generally recoverable if they can be established with reasonable certainty.¹⁴⁰ Once it is established that loss has occurred, considerable latitude will be permitted in proving the amount, provided that the evidence is the best available under the circumstances.¹⁴¹ Charts, records and checks have been sufficient circumstantial evidence to prove lost profits,¹⁴² but monthly production records and income tax forms have been considered too speculative as evidence of lost profits.¹⁴³ A comparison with the profit from similar animals or crops raised at the same time or nearly the same time may provide a reasonable degree of certainty as to lost profits.¹⁴⁴

Lost crops also mean lost profits. Unless disclaimed, the method of ascertaining damages generally accepted for the destruc-

129. *Park v. Moorman Mfg. Co.*, 121 Utah 339, 241 P.2d 914 (1952).

130. *Waller v. Fort Dodge Laboratories*, 356 F. Supp. 413 (E.D. Mo. 1972) (value of newborn calves which died minus the cost of raising the calves to weaning age was allowed as well as diminished value of other cows in the herd); *LaPlant v. E.I. DuPont De Nemours & Co.*, 346 S.W.2d 231 (Mo. App. 1961) (value of aborted calves taken into consideration by estimating the difference in the value of the cow before and after losing the calf).

131. *Miller v. Economy Hog & Cattle Powder Co.*, 228 Iowa 626, 293 N.W. 4 (1940).

132. *Western Feed Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612 (1962).

133. *Brown v. Globe Laboratories*, 165 Neb. 138, 84 N.W.2d 151 (1957).

134. *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971).

135. *Ellendale Farmers Union Cooperative Ass'n v. Davis*, 219 N.W.2d 829 (N.D. 1974) (occupying space which under normal conditions would have been used for other pigs).

136. *Id.*

137. *Western Feed Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612 (1962).

138. *Williams v. Allied Chem. Co.*, 270 So. 2d 157 (La. App. 1972).

139. *Burrus Feed v. Reeder*, 391 S.W.2d 121 (Tex. Civ. App. 1965); see also S.D. COMPILED LAWS ANN. §§ 57-8-58 to -60 (1967); UNIFORM COMMERCIAL CODE §§ 2-723, 2-724.

140. *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973); UNIFORM COMMERCIAL CODE § 2-715, Comment 4.

141. *Western Feed Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612 (1961).

142. *Vermont Food Industries, Inc. v. Ralston Purina Co.*, 514 F.2d 456 (2d Cir. 1975); *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973).

143. *Olsen v. Aldren*, 84 S.D. 292, 170 N.W.2d 891 (1969). The court suggested that the farmer's estimate might have been sufficient.

144. *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971).

tion or injury of crops is the market value of the crop which would have been produced less the expenses which would have been incurred in raising, harvesting and marketing, less the salvage value of the crop actually grown.¹⁴⁵ Again, courts only require a reasonable degree of certainty in demonstrating the yield loss.¹⁴⁶ The cost of fulfilling a custom in the trade may be the measure of damage where the buyer has an obligation to a third party.¹⁴⁷ Where a product has caused lingering damage to fruit trees, the crop loss for the year of the injury and a similar loss for the succeeding year may be allowed.¹⁴⁸ Although more than one ingredient may have caused the harm, it is not necessary to establish an independent amount of damage for each.

Damages for diminished business reputation or good will have generally not been granted in a product liability action. Exceptions have been made in strict liability recoveries. For example, a feedlot operator recovered damages for lost profits and diminished business reputation as well as costs of keeping the cattle for a longer period of time, cost in bringing cattle up to the expected weight and the costs and expenses in returning cattle to unsatisfied customers because a feed supplement did not increase gain as warranted.¹⁴⁹ In restoring the recovery for lost profits and diminished reputation, the judge said that the record showed a decline in profits after using the defective supplement was occasioned by factors other than the defect in Ralston's ration supplement, but the proven existence of the losses, coupled with rebates, refunds and adjustments which the company was forced to make to its customers were sufficient to submit the issue to the jury.¹⁵⁰

In another instance, the court said that loss of good will would have been too speculative and not a compensable element of damages under section 2-715.¹⁵¹ The court, nonetheless, remanded, suggesting that in a proper case the client should be allowed diminution in the value of cattle under section 2-714(2) (b) where the community was apparently reluctant to buy from the plaintiff's stock because they feared the stock had eaten tainted feed.¹⁵² While the court distinguished the diminution in value from loss of good will, the net result was virtually the same.

145. *Nakanishi v. Foster*, 64 Wash. 2d 647, 393 P.2d 635 (1964).

146. *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971).

147. *Woodbury Chem. Co. v. Holgerson*, 439 F.2d 1052 (10th Cir. 1971) (where respraying is required).

148. *Eaton Fruit v. California Spray-Chem. Corp.*, 103 Ariz. 461, 445 P.2d 437 (1968); *Udell v. Rohm & Haas Co.*, 64 Wash. 2d 441, 392 P.2d 225 (1964).

149. *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971).

150. *Id.* at 672.

151. *Kassab v. Central Soya*, 432 Pa. 217, —, 246 A.2d 848, 857 n.12 (1968). Although the court used the UCC damage sections, no privity was required so the effect was that of strict liability.

152. *Id.* at —, 246 A.2d at 857-58.

Occasionally other recoveries are granted. Interest on crops has been awarded at the discretion of the jury.¹⁵³ Punitive damages have been allowed for wanton disregard of the rights of others.¹⁵⁴

Regardless of the commodity lost or injured, the injured party has a duty to mitigate damages. The duty may take the form of using common sense in following up one's suspicions that the product is causing harm.¹⁵⁵ The burden of proving failure to minimize damages for breach of warranty rests upon the party guilty of the breach.¹⁵⁶

THE STATE OF THE LAW IN SOUTH DAKOTA

A crop of cases has recently sprung up in South Dakota concerning warranties in agricultural supplies. These decisions are significant because they are the only interpretations since adoption of the UCC and strict liability.¹⁵⁷ The first warranty case decided after the UCC was adopted in 1966 was *Olsen v. Aldren*.¹⁵⁸ The plaintiff alleged that the defendant had sold him dairy cattle with Bangs disease. The defendant had claimed that the cattle were disease-free. The plaintiff claimed damages under a theory of breach of express and implied warranty for the losses he incurred in culling the herd of diseased animals, loss of calves, veterinary expenses and loss of profits. The supreme court reversed the jury's award to the plaintiff because there was not sufficient evidence to determine damages for loss of profits. The court established that lost profits would be allowable if proven with reasonable certainty. They also indicated that, although the plaintiff had no written records, his testimony as an experienced dairyman might have established the lost profits.¹⁵⁹

In 1972 the court decided *Ralston Purina Company v. Jungers*.¹⁶⁰ Jungers, an experienced cattle feeder, put 90 of 180 healthy head of cattle which had wintered together into his feedlot. He relied on the representations of the feed company's sales-supervisor and contracted for a "Complete Chow" program which was supposed to produce gain without additional roughage or feed. Instead of the projected feed costs of \$4,515.25, the total cost of the feeding program was \$10,232.79. The cost of gain per pound

153. *Kennedy v. Clayton*, 216 Ark. 851, 227 S.W.2d 934 (1950).

154. *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973); *Waller v. Ft. Dodge Laboratories*, 356 F. Supp. 413 (E.D. Mo. 1972) (plaintiff dropped claim on appeal).

155. *Swift & Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140 (1909); *but see Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971).

156. *Western Feed Co. v. Heidloff*, 230 Ore. 324, 370 P.2d 612 (1961).

157. *Engberg v. Ford Motor Co.*, 87 S.D. 196, 205 N.W.2d 104 (1973) (strict liability adopted).

158. 84 S.D. 292, 170 N.W.2d 891 (1969).

159. *Id.* at 297, 170 N.W.2d at 895.

160. 86 S.D. 583, 199 N.W.2d 600 (1972).

was 32 cents instead of 17 cents as represented. At slaughter the livers and pouches were condemned because of a condition caused by lack of roughage. An expert witness established that this condition would slow gain. The court held that there was probable cause to sustain recovery of damages for breach of warranty of quality or fitness. The court, however, instructed that a directed verdict be given the plaintiff feed company since there was not evidence of a total lack of consideration.¹⁶¹ The question of damages on the defendant-feeder's claim was to be retried. The court considered the jury's award excessive since, in effect, it would have given the feeder the cost of the extra feed and nearly \$5,700 in damages in addition to the profits he had already realized on the sale of the cattle. The object was to make the injured party whole, the court stressed, and in absence of punitive damages, the plaintiff was entitled to just and adequate compensation for his injury, but no more.¹⁶²

In October, 1975, the supreme court reached a different result on the damage issue in *Swenson v. Chevron Chemical Company*.¹⁶³ Plaintiff Swenson purchased 2,100 pounds of Ortho Bux Ten Granular insecticide, manufactured by the defendant and marketed for "control of corn rootworm larvae," from a farm store in Minnesota. He applied this insecticide to 225 acres, but when the supply was exhausted, he applied another insecticide, Thimet, to the remaining 20 acres. These 20 acres were situated in a 100 acre field otherwise treated with the defendant's product. Extensive corn rootworm damage developed in the corn treated with the defendant's product, but not with the Thimet-treated corn or in the untreated first year corn. The plaintiff had to hire a custom combiner to pick the damaged corn. At harvest, corn samples were taken from the fields treated with the different insecticides. The undamaged corn yielded 14.7 bushels per acre more than the damaged corn.

The court found that an express warranty existed from the label as a whole, which listed the chemical ingredients and stated the purpose of the product. The disclaimer was ineffective against an express warranty. The court said emphatically that it was against public policy to allow a manufacturer to avoid responsibility for the ineffectiveness of a product which was expressly offered for one purpose.¹⁶⁴

Since the court found an express warranty, they declined to consider the plaintiff's appeal for a directed verdict on strict liability. The court did allow the express warranty to run directly against the manufacturer without consideration of privity. This is generally granted on the theory that the warranty is expressed

161. *Id.* at 587, 199 N.W.2d at 603.

162. *Id.* at 588, 199 N.W.2d at 604.

163. — S.D. —, 234 N.W.2d 38 (1975).

164. *Id.* at —, 234 N.W.2d at 42.

directly for the benefit of the purchaser, since it is on the label, and the seller merely acted as a conduit. Whether this propensity to overlook privity, combined with a strong feeling in favor of a public policy of protecting the consumer against misrepresentation, would propel the court toward considering an action in strict liability will have to be determined in a later action.

In regard to damages, the court in *Swenson* considered an award reasonable which allowed the plaintiff to recover the total cost of the ineffective insecticide as well as the difference between the yield of the damaged corn and the yield which would have been obtained if the insecticide had performed as warranted. The court literally applied the UCC section for the measure of a breach of warranty,¹⁶⁵ honoring the jury's decision that the insecticide was worthless. The court did not, however, discuss the fact that the insecticide had been applied to the crop to which the plaintiff's crop was compared. The plaintiff actually came out with the profit from his yield as well as the cost of the insecticide. However, he did incur extra costs for custom combining. On the other hand, he had to deduct the cost of the insecticide from his gross profit for the undamaged corn. Remedies are to be liberally administered, according to section 1-106 of the UCC, so that an aggrieved party may be put in as good a position as if the other party had fully performed.¹⁶⁶ In *Swenson* the plaintiff may have been placed in a better position depending upon the costs of combining. The UCC contract theory contrasts with the tort theory of recovery expressed in *Olson v. Aldren*¹⁶⁷ that the purpose of recovery is to make the party whole. The court did not discuss in *Swenson* whether it considered the damages as a penalty against the manufacturer or as reimbursement for additional expenses. South Dakota did not adopt section 1-106 in its version of the UCC. Even without that section, the overriding policy of the UCC would appear to discourage punitive damages.

The South Dakota Supreme Court's decision in *Kent Feeds, Inc. v. Stahl*¹⁶⁸ did not clarify the damage issue. The defendants, doing business as Stahl brothers, engaged in a general farm partnership. They fed their corn, grain and alfalfa to livestock confined in three lots. The cattle were purchased throughout the fall at various auction barns and were of two basic types, mixed or cross-bred beef cattle and holsteins. Originally all the cattle were fed a

165. S.D. COMPILED LAWS ANN. § 57-8-37 (1967); UNIFORM COMMERCIAL CODE § 2-714(2).

166. UNIFORM COMMERCIAL CODE § 1-106(1):

The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

167. 84 S.D. 292, 170 N.W.2d 891 (1969).

168. *Kent Feeds v. Stahl*, — S.D. —, 238 N.W.2d 483 (1976).

ration of hay and dry commercial protein supplement manufactured by the plaintiff. In October, 1970, the local representative of the feed company persuaded the defendants that the company's liquid supplement had marbling factors and health factors superior to the dry supplement and that it would be as efficient but more economical in creating gain than the dry supplement. On the strength of these representations, for approximately three months, the defendants fed the liquid supplement to cattle in lots one and two. The cattle in lot three were fed the dry supplement. At market time the average gain of the cattle fed out in lots one and two was 448 pounds; the average cost per pound of gain was 29.43 cents. In lot three gain was 509 pounds; the average cost per pound of gain was 17.81 cents. The plaintiff feed company brought an action for the balance allegedly due for the feed sold and delivered. The defendants claimed a failure of consideration and counterclaimed for damages for breach of warranty. The trial court directed a verdict for the plaintiff in accordance with its interpretation of the court's decision in *Ralston Purina Co. v. Jungers*¹⁶⁹ concerning lack of consideration. The jury returned a verdict against the defendants on the counterclaim and the defendants appealed.

The supreme court distinguished lack of consideration, which goes to the root of the claim, and failure of consideration, which is based upon events occurring after the alleged contract has been executed. The court reversed the directed verdict against the defendants for the balance of the feed bill because the lack of conformity between the product and what they ordered was sufficient to send their defense of partial failure of consideration to the jury. The court affirmed the jury verdict against the defendants on their counterclaim reasoning that the jury could have found the comparison of gain invalid because of the feeding facilities, the different genetic backgrounds of the cattle and the short period in which the liquid supplement was used. In this case it appears that the combination of the lack of consideration defense and the breach of warranty counterclaim was confusing to the jury in light of the trial court's directed verdict.

Some conclusions about the law in South Dakota on products liability for goods used in agriculture might include:

- 1) Although strict liability has been accepted as a theory for products liability where personal injury has occurred, it has not been applied to a case of economic loss.
- 2) An express warranty may run directly from the manufacturer to the buyer without privity. If there is an express warranty, a disclaimer will be strictly construed in favor of the buyer. An affirmation of fact which becomes part of the basis of the

169. 86 S.D. 583, 199 N.W.2d 600 (1972).

bargain, reliance, defect, damage and proximate causation are all necessary elements of an action for express warranty.¹⁷⁰

3) An implied warranty may be established by circumstantial evidence. Reliance has been mentioned as a significant factor in a warranty of fitness. In a pending case, the court will consider the issue of limitation of damages and indemnification of the seller by the manufacturer.¹⁷¹

4) The cost of the product, incidental costs and consequential damages are recoverable. A combination of tort and contract concepts has been applied in regard to damages for product liability. Pleadings and jury instructions should be carefully constructed to attain a just result.

CONCLUSION

Through an astute pleading of alternative theories of recovery a buyer of goods for use in agriculture or the care and feeding of animals should be able to recover when he suffers injury from a defective product. Because of the variables in raising of crops and handling of animals he will have to lay a careful framework of direct and circumstantial evidence to prove that the product was defective and that the product caused his injury. His damages must be proven beyond mere speculation. The state of the law in South Dakota is generally in accord with other jurisdictions.

The farmer's right to recover damages for personal injury and property damage, if proven, is protected under strict liability or the UCC in most jurisdictions. The theory under which the farmer's recovery for economic loss is obtainable fits into a larger policy issue being debated in our courts today. The legislatures have elected to govern transactions in goods through the Uniform Commercial Code. The policy behind the UCC is essentially one of freedom of contract. Some courts, however, have preferred to protect buyers through strict liability for any losses suffered from defective goods. In addition, the "unreasonably dangerous" criterion of strict liability has begun to weaken. Applying strict liability with this diminished standard of defect would make the manufacturer an insurer for any losses proximately caused by a defective or ineffective product. While this development might have a desirable effect for an individual farmer who suffers loss, courts must thoughtfully consider whether a complete shift to strict liability, which would entail considerable economic ramifications, should be made by judicial decree or by legislative process.

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170. *Swenson v. Chevron Chem. Co.*, — S.D. —, 234 N.W.2d 38, 42 (1975).

171. *Larson v. Meckling Fertilizer Co., Inc.*, No. 11734 (S.D., appeal perfected Aug. 22, 1975).