CASE NOTES

PRODUCTS LIABILITY—MANUFACTURER IS LIABLE TO REMOTE PURCHASER UNDER STRICT LIABILITY FOR ECONOMIC LOSSES INCURRED DUE TO FAILURE OF CUSTOM-BUILT EQUIPMENT TO ACCOMPLISH PURPOSE FOR WHICH IT WAS BUILT.—*Schiavone Construction Co. v. Elgood Mayo Corp.* (N.Y. Div. 1981).

Plaintiff, Schiavone Construction Company, contracted for a truck hoist mechanism from defendant Elgood Mayo Corporation (Mayo).[1] Mayo entered into a contract with defendant Timberland Equipment Limited to construct the hoist.[2] The hoist mechanism was manufactured by Timberland according to the plaintiff's contract specifications and was furnished to the plaintiff through defendant Mayo.[3] The truck hoist mechanism was designed to be used in connection with tunnel construction which the plaintiff had undertaken.[4]

The plaintiff brought a strict liability action in the Special Term against defendants Mayo and Timberland alleging that the hoist was defective and had caused him economic damages.[5] The plaintiff alleged that the hoist was inoperable for a number of reasons.[6] The court ruled that a cause of action in negligence against the manufacturer by a remote purchaser could not be based merely on economic loss caused by a product's failure to perform.[7] The Special Term concluded, however, that the alleged facts were "sufficient to state a cause of action in strict liability."[8] The court "granted

---

1. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d 221, _, 439 N.Y.S.2d 933, 933-34 (1981).

2. *Id.* at _, 439 N.Y.S.2d at 934.

3. *Id.*

4. *Id.*

5. *Id.* at _, 439 N.Y.S.2d at 937 (Silverman, J., dissenting). Plaintiff was seeking damages for the cost of repairs required to place the custom-built equipment in operating condition, in addition to monetary loss because of downtime, production loss, costs for additional labor incurred and for rental of substitute equipment. *Id.*

6. *Id.* at _, 439 N.Y.S.2d at 934. The shaft was improperly designed and did not properly fit into the drum, and the cable equalizer failed to fulfill the function for which it was intended. *Id.*

7. *Id.* at _, 439 N.Y.S.2d at 934 (citing Snyder Plumbing & Heating Corp. v. Purcell, 9 A.D.2d 205, 195 N.Y.S.2d 780 (1960)). *See also* Steckmar Nat'l Realty and Inv. Corp. v. J. I. Case Co., 99 Misc. 2d 212, 415 N.Y.S.2d 946 (1979).

8. Schiavone Constr. Co. v. Elgood Mayo Corp., 1 A.D.2d at _, 439 N.Y.S.2d at 934. The plaintiff's original cause of action was sought on the basis of negligence and breach of warranty.

plaintiff an attachment on the assets of defendant Timberland Equipment Limited."[9] The Appellate Division *held*, affirmed. A manufacturer is liable to a remote purchaser under strict liability for economic losses incurred due to failure of custom-built equipment to accomplish the purpose for which it was built. *Schiavone Construction Co. v. Elgood Mayo Corp.*, 81 A.D.2d 221, 439 N.Y.S.2d 933 (1981).

The concept of strict liability in tort as applied to products liability cases has been developed to provide a remote consumer with a remedy more effective than those provided by the law of negligence and warranty.[10] With regard to products liability actions, strict liability imposes liability upon the manufacturer for personal injuries that are proximately caused by his defective and unreasonably dangerous products.[11] The problem of compensating consumers for purely economic losses under the doctrine of strict liability, however, has been a particulary troublesome area.[12]

At first glance it might appear that the decision in *Schiavone* represents a severe departure from previous decisions that have refused to allow recovery under a doctrine of strict liability for economic loss only.[13] The *Schiavone* decision, however, must be viewed within the context of the specific facts of the case.[14] It involved a custom-designed, custom-built piece of equipment, intended for use for a specific purpose.[15] The court acknowledged the argument that "there must be physical damage or personal injury before strict liability will be imposed."[16] The court also stated that strict liability is in theory grounded in tort while the economic loss represented in this case might be more closely related to contract damages for breach of warranty necessitating privity.[17] The court contended, however, that the

---

Id. at _, 439 N.Y.S.2d at 934. The Special Term ruled that no recovery could be maintained against the defendant manufacturer under New York law on a theory of breach of warranty because there was no privity. *Id.* (citing Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 403 N.Y.S.2d 185, 374 N.E.2d 97 (1978)). The court also concluded that a cause of action for negligence was not available because in the absence of privity, the product must be shown to be inherently dangerous and that damage to persons or property resulted therefrom. 81 A.D.2d at _, 439 N.Y.S.2d at 934.

9. *Id.* at _, 439 N.Y.S.2d at 934.

10. Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145 (1972). *See also* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

11. *See* note 10 *supra*.

12. *See* note 10 *supra*.

13. *See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980)(failure or unsuitability of roof to perform to parties' expectations did not give rise to a cause of action under tort law); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965)(court rejected extension of strict liability in tort to permit recovery for economic loss for damages resulting from alleged defective truck).

14. *See* text accompanying notes 1-4 *supra*.

15. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 935.

16. *Id.* at _, 439 N.Y.S.2d at 934-35.

17. *Id. See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d

facts of this case did not require strict adherence to historical distinctions.[18] The *Schiavone* court stated its intent to ignore historical precedent and expressly denied any reason to follow the law to the contrary.[19]

While the majority of courts that have considered the issue of economic loss have held that claims for purely economic losses cannot be premised on tort theories,[20] there have been significant exceptions.[21] In a well-reasoned opinion, the Michigan Court of Appeals in *Cova v. Harley Davidson Motor Co.*,[22] held that a purchaser could maintain an action against the manufacturer directly for economic loss resulting from defective products that were attributable to the manufacturer, without having to prove negligence.[23] The *Cova* court reasoned that even when a product caused neither an accident, nor any personal injury, the manufacturer should be required to stand behind a defectively-manufactured product and be held accountable to the ultimate user for economic loss incurred as a result of the defective product.[24]

In *Schiavone*, the court referred[25] to *John R. Dudley Construction Inc. v. Drott Manufacturing Co.*[26] as being factually related to its case. In *Dudley*, defective bolts caused a crane to suffer a sudden structural failure while it was being operated within its performance capacity.[27] The crane was extensively damaged, but there were no personal injuries and there was no damage to its load or to surrounding property.[28] Although there was no contractual relationship between Dudley and the manufacturer,[29] the court held

---

280 (3d Cir. 1980); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

18. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 934-35.

19. *See* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980); Seely v. White Motor Co., 63 Cal. 2d 9, 430 P.2d 145, 45 Cal. Rptr. 17 (1965).

20. *See* note 19 *supra*.

21. *See, e.g.*, Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970)(plaintiff recoverd from remote manufacturer for economic loss resulting from defective golf carts); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975)(plaintff-homeowner recovered under tort theory from supplier and contractor for driveway damages due to defective concrete); Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976) (commercial fisherman entitled to damages from manufacturer for economic loss sustained from defective diesel engine); City of La Crosse v. Schubert, Schroeder & Assoc., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976)(city recovered damages for economic loss from manufacturer in negligence and strict liability for defective roof).

22. 26 Mich. App. 602, 182 N.W.2d 800 (1970).

23. *Id.* at _, 182 N.W.2d at 804.

24. *Id.*

25. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 934.

26. 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979).

27. *Id.* at _, 412 N.Y.S.2d at 513. Certain turntable bolts, which connected the superstructure to the undercarriage, broke. *Id.* The superstructure, which contained the engine and the cab, from which a 62-foot boom extended, came off its mounting and along with the attached boom and load, crashed to the ground. *Id.*

28. *Id.*

29. *Id.*

that under the doctrine of strict products liability, the defendant had a duty not to place a crane with defective bolts into the stream of commerce, where the crane's failure could cause physical injuries to property, whether it be extrinsic from the crane, or to portions of the crane itself.[30]

The court in *Schiavone* pointed out that even though the hoist did not break, as did the crane in *Dudley*, the hoist did not work due to improper design and inadequate part attachment.[31] The *Schiavone* court contended that recovery should not be denied on the basis that there was any "difference between a machine which [was] broke[n]" and subsequently damaged, "and one which did not work,"[32] since neither machine could operate for the purposes intended.[33] The *Schiavone* court simply refused to follow prior law and reasoned that it should be under no compulsion to "bar liability on the theory that strict liability is grounded in tort and not in warranty."[34] The court was unable to comprehend any reason for it to follow other state or federal courts in this regard.[35] The court concluded that the result in *Dudley*, which awarded damages for physical damage resulting from the crane that broke because of the failure of its bolts,[36] justified affirmance for the plaintiff in *Schiavone*.[37]

The *Schiavone* court emphasized that the crane in *Dudley* which failed structurally was purchased "as is" by the ultimate consumer,[38] while the hoist in *Schiavone* was custom manufactured for the job it was designed to perform.[39] Clearly, the consumer's level of expectations are entitled to a higher standard of performance from a piece of equipment contracted to be built to the purchaser's specifications, than from a piece of equipment that was purchased from a second-hand source.[40] This concern with a product built to the purchaser's specifications remained overriding throughout the *Schiavone* analysis.[41]

In substantiating their decision, the court in *Schiavone* referred to the New York Court of Appeals case of *Codling v. Paglia*,[42] which involved actions arising out of an automobile accident.[43] The defendant's automobile in

---

30. *Id.* at _, 412 N.Y.S.2d at 514.
31. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 934.
32. *Id.*
33. *Id.*
34. 81 A.D.2d at _, 439 N.Y.S.2d at 935-36.
35. *Id.* at _, 439 N.Y.S.2d at 935. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
36. John R. Dudley Constr. Inc. v. Drott Mfg. Co., 66 A.D.2d at _, 412 N.Y.S.2d at 513.
37. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 935.
38. *Id.* at _, 439 N.Y.S.2d at 936.
39. *Id.*
40. *Id.* at _, 439 N.Y.S.2d at 935. *See* Seely v. White Motor Co., 63 Cal. 2d 9, _, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).
41. 81 A.D.2d at _, 439 N.Y.S.2d at 935.
42. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).
43. *Id.* at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463.

Codling crossed the center line into oncoming traffic and collided head-on with another automobile in which the plaintiff was a passenger.[44] At the time of the accident, it was alleged that the steering mechanism of the defendant's vehicle failed, which forced it to drift across the center line and cause the accident.[45] The plaintiff sued the defendant car owner for negligence and the manufacturer for negligence and breach of warranty.[46] The *Codling* court held that a manufacturer of a defective product could be held liable to a non-user,[47] without proof of negligence, for damages sustained as a result of the defect.[48]

The *Schiavone* court quoted[49] approvingly the statement from *Codling* that a strict products liability doctrine holds a manufacturer liable to any person injured or damaged by his defective product if the defect was a substantial causative factor.[50] The facts in *Codling*, however, involved liability to a non-purchaser,[51] and the resulting injuries and subsequent damages awarded were not based on economic loss.[52] In utilizing the rationale in *Codling*, the *Schiavone* court inaccurately equated the recoverable damages in *Codling* to be synonymous with economic loss.[53] The *Codling* decision involved damages for personal injury and physical damages, unlike the economic losses incurred in *Schiavone*.[54] Relying on the *Codling* standard, the *Schiavone* court held that it was "appropriate to fasten strict liability upon Timberland even though there was no personal injury as in *Codling*, . . . and no physical breaking of the equipment as in *Dudley*."[55] Since the equipment involved in *Schiavone* was custom-built to the consumer's specifications, the court reasoned that the manufacturer had contemplated that the equipment would be utilized for the purpose for which it was originally designed.[56] The court stated that the equipment's failure to so perform

---

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* The court used the term "innocent bystander" to refer to plaintiff who was a non-user and non-purchaser of the automobile.

48. *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70.

49. 81 A.D.2d at _, 439 N.Y.S.2d at 936 (quoting Codling v. Paglia, 32 N.E.2d at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469 (1973)).

50. Codling v. Paglia, 32 N.Y.2d at 342, 298 N.Y.2d at 628, 345 N.Y.S.2d at 469.

51. *Id.* at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463.

52. *Id.* at 336, 298 N.E.2d at 625, 345 N.Y.S.2d at 464.

53. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 936.

54. 32 N.Y.2d at 336, 298 N.E.2d at 625, 345 N.Y.S.2d at 464. There have been decisions, other than *Codling*, however, that more closely align with the nature of the loss represented in *Schiavone*, but the *Schiavone* court did not choose to utilize them. *See, e.g.*, Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

55. 81 A.D.2d at _, 439 N.Y.S.2d at 936.

56. *Id.*

should properly impose liability upon the manufacturer in favor of the injured party.[57]

In examining the opposing views of other courts, the *Schiavone* court referred[58] to the leading California case of *Seely v. White Motor Co.*[59] In *Seely*, the plaintiff alleged that his truck overturned and was damaged as a result of a defect in the vehicle manufactured by White Motor Company and sold by a dealer.[60] The court awarded the plaintiff damages for the purchase price and for lost profits on the basis of the breach of an express warranty, but denied a claim for repairs by reasoning that the plaintiff had failed to prove that the defect caused the accident.[61]

In *Seely*, Chief Justice Traynor expressed the view that strict liability is purely a tort doctrine designed to deal with the "distinct problem of physical injuries" as distinguished from the law of warranty which is primarily aimed at commercial losses.[62] Justice Traynor argued in dicta that strict liability would not be imposed under California law in cases similar to *Seely*.[63] In drawing a distinction between tort recovery for physical injuries and warranty recovery for economic loss, Traynor stated:

> [A] manufacturer . . . can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.[64]

The *Seely* court was concerned with the foreseeability of the risk to which the manufacturer would be liable.[65] Since the theory of strict liability is to prevent a manufacturer from limiting the scope of his own responsibility for harm caused by his products, and such responsibility cannot be disclaimed, the manufacturer could be held liable for damages of "unknown

---

57. *Id.*

58. *Id.* at _, 439 N.Y.S.2d at 935.

59. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

60. *Id.* at _, 403 P.2d at 147, 45 Cal. Rptr. at 19 (plaintiff alleged truck bounced violently).

61. *Id.* at _, 403 P.2d at 148, 152, 45 Cal. Rptr. at 20, 24.

62. *Id.* at _, 403 P.2d at 149, 45 Cal. Rptr. at 21 (Traynor, J.). The court contended that "[t]he law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods." *Id.*

63. *Id.* at _, 403 P.2d at 151, 45 Cal. Rptr. at 23.

64. *Id.*

65. *Id.* at _, 403 P.2d at 150, 45 Cal. Rptr. at 22.

and unlimited scope."[66] In determining the damages in *Seely*, the court held that the defendant was liable only because of a warranty in the agreement between it and the plaintiff and that without such warranty, the defendant would not be liable for commercial losses.[67]

The dissent in *Schiavone* agreed with the *Seely* court's conclusion[68] that there should not be a right to recover economic losses from a manufacturer not in privity with the plaintiff unless the manufacturer agreed in advance that the product was designed to meet the consumer's needs.[69] The *Schiavone* majority pointed out that under this standard, recovery should be permitted where it is alleged that the hoist was custom-manufactured by defendant Timberland to specifically meet the plaintiff's needs.[70] The dissent, however, failed to carry the *Seely* standard to its logical conclusion—a manufacturer is liable when he breaches an agreement by failing to manufacture a product that meets his customer's needs.[71] The only real difference between *Schiavone* and *Seely* is that the resulting loss in *Schiavone* involved economic loss[72] rather than property damage.[73]

The dissent in *Schiavone* was concerned that strict liability should not be extended to an economic loss case because the economic ramifications of allowing liability to be placed against the manufacturer would be too "extensive and unforeseeable."[74] Other courts have expressed a similar concern[75] but the "economic ramifications" in *Schiavone* are not as far reaching as the dissent would suggest.[76] It does not appear that under the narrow circumstances involved in *Schiavone*,[77] that the result of this decision will have overly broad effects on future decisions relative to economic loss under strict liability.

In searching for a view similar to *Seely*, the dissent in *Schiavone* noted that *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*[78] was in

---

66. *Id.*

67. *Id.* at _, 403 P.2d at 151, 45 Cal. Rptr. at 23.

68. *See* text accompanying note 67 *supra.*

69. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 938 (dissenting opinion).

70. *Id.* at _, 439 N.Y.S.2d at 935.

71. Seely v. White Motor Co., 63 Cal. 2d at _, 403 P.2d at 151, 45 Cal. Rptr. at 23 (dissenting opinion).

72. 81 A.D.2d at _, 439 N.Y.S.2d at 934.

73. *Id.* at _, 439 N.Y.S.2d at 935.

74. *Id.* at _, 439 N.Y.S.2d at 938 (dissenting opinion).

75. *See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d at 286; Seely v. White Motor Co., 63 Cal. 2d at _, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23. *See also* text accompanying notes 65-66 *supra.*

76. *See* text accompanying notes 112-13 *infra.*

77. *See* text accompanying notes 14-15 *supra* (involved an agreement and subsequent manufacture of equipment designed to customer specifications).

78. Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980) (action by purchaser of roof against seller to recover under strict tort liability and for

accord with the *Seely* court's view.[79] In *Jones*, the Third Circuit Court of Appeals stated that the rationale which justifies "strict liability in personal injury situations is not well-suited to claims alleging only economic loss."[80] The *Jones* court stated that refusal to allow tort claims for losses of an economic nature is in accordance with the Restatement (Second) of Torts.[81] The court further noted that Restatement sections 402A and 402B provide that strict liability for defective products applies only where such "product or misrepresentation causes physical harm to the user of the product."[82]

The *Jones* court reasoned that an original purchaser, particulary a large company such as the plaintiff in *Jones*, could protect its interests against the risk of unsatisfactory performance by bargaining for a warranty, or they could forego a warranty provision in favor of a lower purchase price for the product.[83] The court stated that because persons other than product owners would not incur economic loss due to unsatisfactory product performance, costs resulting from economic loss would probably be reflected in the product price.[84] Therefore, the court could see no reason to internalize those costs by utilization of such a "non-price mechanism" as strict liability.[85] There was no indication that at the time the equipment was contracted to be built that such price concessions were made to the plaintiff in *Schiavone*. The absorption of these costs in the *Schiavone* case merely involved imposing on the manufacturer the responsibility of backing up his promise to the purchaser.

In confronting this economically grounded argument, the court in *Schiavone* stated that "[i]f there is a cause of action by the ultimate purchaser against his supplier premised on a breach of warranty, [it is predictable that] the supplier will have a cause of action against the manufacturer."[86] The *Schiavone* court referred[87] to but did not rely on *Randy Knitwear v. American Cyanamid Co.*[88] In *Knitwear*, the New York Court of Appeals recognized that if the ultimate consumer sues and recovers under breach of warranty from his immediate seller, and the seller sues and recovers from his supplier, eventually after several separate actions along the

---

breach of warranty and contract after roof failed to perform satisfactorily)(recovery for economic losses not permitted in absence of property damage or personal injury resulting from product use).

79. 81 A.D.2d at _, 439 N.Y.S.2d at 939.
80. 626 F.2d at 288.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 288-89.
86. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 935.
87. *Id.*
88. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

chain of distribution, the manufacturer will finally be called upon to accept the responsibility which should have originally been his.[89] The court concluded that this process was unnecessary and expensive.[90] In *Knitwear*, the court further elaborated that "the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved."[91]

The *Schiavone* court inexplicably distinguished its situation from that of another well-known decision. In *Santor v. A & M Karagheusian, Inc.*,[92] the New Jersey Supreme Court held a manufacturer was liable to the consumer under a theory of strict products liability for a defect in the design or manufacturing of a rug.[93] No privity of contract existed between the plaintiff and the manufacturer in *Santor*.[94] The defect caused lines to develop in the carpeting which detracted from the rug's aesthetic qualities.[95] In *Santor*, the plaintiff recovered the difference between the price paid for the carpeting—the value represented without the flaw—and the market value of the carpeting with the flaw, even though the striped effect was not inherently dangerous nor did it pose any threat of physical harm.[96] The court stated that it should make no difference that the product defect did not, nor was likely to cause harm to the purchaser.[97] By agreeing with *Knitwear*,[98] the court in *Santor* averred that though the strict liability in tort doctrine had been applied principally in connection with personal injuries sustained as a result of dangerous or defective products, "the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved."[99] The *Santor* court characterized the manufacturer as "the father of the transaction."[100] The court asserted that "if the article is defective and the defect is chargeable to the manufacturer, his must be the responsibility for the consequent damage or injury."[101]

The *Schiavone* court was very reluctant to identify the similar nature of the claims contained in it and in *Santor*.[102] The court in *Schiavone* pointed out that in *Santor* "although the carpeting was usable, it did not serve the

---

89. *Id.* at 13, 181 N.E.2d at 403, 226 N.Y.S.2d at 368.
90. *Id.* (citing Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099, 1124 (1960).
91. 11 N.Y.2d at 15, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.
92. 44 N.J. 52, 207 A.2d 305 (1965).
93. *Id.* at _, 207 A.2d at 305, 310-11.
94. *Id.* at _, 207 A.2d at 307.
95. *Id.*
96. *Id.* at _, 207 A.2d at 314.
97. *Id.* at _, 207 A.2d at 309.
98. *Id.* at _, 207 A.2d at 312.
99. *Id.*
100. *Id.* at _, 207 A.2d at 309.
101. *Id.* at _, 207 A.2d at 313.
102. 81 A.D.2d at _, 439 N.Y.S.2d at 936.

purpose for which intended."[103] In *Schiavone* the hoist "could not be used at all" for the purpose intended.[104] The *Schiavone* court indicated that far more was at stake in *Schiavone* than mere loss of the bargain represented in *Santor*[105] by stating that "[a] piece of complicated equipment which will not work is far different than a rug with a defect in design."[106] The *Schiavone* court stressed "that a truck and hoist assembly which will not work is more nearly akin to a crane which collapses" as occurred in *Dudley*.[107] Although *Santor* and *Knitwear* provided ample support for *Schiavone*, the New York Court of Appeals inexplicably cast them aside.[108] Rather than relying on *Codling*, it would appear that the court in *Schiavone* would have benefitted from a close alignment with *Santor* and *Knitwear*.[109]

Although it might appear that *Schiavone* presents a far-reaching extension of the theory of strict liability to an instance involving economic loss only, it is imperative to view *Schiavone* in the context of its factual setting.[110] Although the *Schiavone* case is one of the first decisions to determine that recovery for economic losses can be premised solely on strict liability,[111] prior cases have allowed recovery for such losses under various tort theories.[112] The *Schiavone* decision presents a just determination when viewed with the understanding of the commitment which the defendant manufacturer made when contracting to custom manufacture a piece of equipment to specifically meet the consumer's needs. It is appropriate and reasonable to assume that the manufacturer contemplated that the equipment would be used for the purpose for which it was intended.[113] To hold such a manufacturer liable under a theory of strict liability would seem to be in keeping with current trends in a time of growing concern for the protection of the consumer.

Patricia Bowles Beaty

---

103. *Id.*
104. *Id.*
105. *See* text accompanying notes 95-97 *supra.*
106. 81 A.D.2d at _, 439 N.Y.S.2d at 936.
107. *Id. See* text accompanying notes 28-29 *supra.*
108. 81 A.D.2d at _, 439 N.Y.S.2d at 936.
109. *See* text accompanying notes 88-91 and 96-101 *supra.*
110. *See* text accompanying notes 14-15 *supra.*
111. *See* City of La Crosse v. Schubert, Schroeder & Assoc., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).
112. *See* note 21 *supra.*
113. Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d at _, 439 N.Y.S.2d at 936.