What is or is not a Product Within the Meaning of Section 402A

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put a product into circulation and it was involved in the (injury producing) event. 13

It is still necessary for the plaintiff to prove that the product was in a "defective" condition when it left the control of the manufacturer or seller. 14 This also involves the concept of the product being in a condition "unreasonably dangerous" to the user or consumer. 15 It is also necessary for the plaintiff to prove that the defect in the product was a cause of the injury.

The basic section 402A rules are not all settled. As noted, the following four comments deal with four unsettled questions. These questions are: (1) What is or is not a "product" under section 402A?; (2) Should a manufacturer be excused in a "strict liability" case because the "state of the art," at the time of sale and prior to injury, was such as to make it impossible or impractical to minimize a known or knowable risk?; (3) Should a manufacturer be excused in a "strict liability" case because the injury resulted from a danger that was a scientifically unknowable risk prior to the injury?; and (4) May an entire industry be held liable for injuries caused by its products?

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WHAT IS OR IS NOT A PRODUCT WITHIN THE MEANING OF SECTION 402A

I. INTRODUCTION

The rapid development of products liability is typified by the expansion of section 402A of the Restatement of Torts. 1 In


1. Restatement (Second) of Torts § 402A (1965) provides:
(1) One who sells any "product" in a defective condition unreasonably dangerous
1961, tentative draft Number 6 recommended adoption of a new section, section 402A, which recognized strict liability for sellers of food for human consumption. In 1962, tentative draft Number 7 expanded the coverage of the section to include "products intended for intimate bodily use." The final draft, in 1964, extended coverage still further to include "any product."

While the rule was expressly limited to a "person engaged in the business of selling products for use or consumption," the drafter's attempt to define what was meant by the "sale of any product" resulted in a mere listing of various products which were to be included. While this definition was declaratively simple it has suffered an expansive interpretation at the hands of courts faced with situations not falling within the literal language of the section.

There has been a discernible trend on the part of various courts to expand the "product" and/or "sale" definitions to include various transactions in which the policies underlying section 402A justify the imposition of strict liability, but which transactions do not fit neatly within the precise language of the section.

Therefore in order to determine whether a particular transaction comes within the definition of the "sale of any product" it becomes necessary to isolate the social policy justifications for the imposition of strict liability. These policy justifications were

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2. Restatement (Second) of Torts § 402A, Comment f (1965).
3. Restatement (Second) of Torts § 402A, Comment d provides:
The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.
4. Comment c of § 402A suggests the justification for imposing such liability:
. . . the seller, by marketing his product for use or consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; . . . public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and that the proper persons to afford it are those who market the product.
clearly enumerated by the Arizona Appellate court in *Lechuga, Inc. v. Montgomery*:

1. The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
2. The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
3. It is in the public interest to discourage the marketing of defective products.
4. It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market.
5. That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
6. That because of the complexity of the present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
7. That the consumer does not have the ability to investigate for himself the soundness of the product.
8. That the consumer's vigilance has been lulled by advertising, marketing devices and trademarks.

Ultimately both the definition of "product" and "sale" can be determined only with reference to these policy justifications. Generally, where they apply, the court will label the transaction as involving the sale of a product to which strict liability applies. Thus the social policy underlying the doctrine has become the definition of a "product" and "sale": That is, a transaction in which the burden of consequent losses are best able to be borne by those in a position to either control the risk or make an equitable distribution of the losses when they do occur.

II. Leasing Transaction

Comment f of section 402A specifically limits the applicability of section 402A to a person engaged in the business of selling products for use or consumption. The issue was quickly confronted as to whether one who leases personal property was "one who sells any product" within the meaning of section 402A. Several courts

experienced little difficulty in finding the lessor-lessee relationship sufficiently similar to the sale of a product to impose strict liability on the theory that such lessors are engaged in the "commercial" distribution of goods. These courts view the "sale" requirement of section 402A as merely requiring a "transaction" by which a product is placed or distributed in the stream of commerce.

The New Jersey court in Cintrone v. Hertz Leasing & Rental Service,\(^5\) was the first court to extend the doctrine to the lessors of goods. The court, in an effort to overcome the fact that there had been no technical sale between the parties, reasoned that:

> A bailor for hire, . . . puts motor vehicles into the stream of commerce in a fashion not unlike a manufacturer or retailer . . . . By analogy the same rule should be made applicable to the U-drive-it bailor-bailee relationship.\(^6\)

A similar result was reached by the California Court in McClain v. Bayshore Equip. Rental Co.\(^7\) The court held that:

> Lessors of personal property, like manufacturers and retailers thereof "are engaged in the business of distributing goods to the public." They are an integral part of the overall . . . marketing enterprise that should bear the costs of injuries resulting from defective products.\(^8\)

The court justified its extension of strict liability to the lessor because he may be the only member of the enterprise reasonably available to the injured person and the imposition of strict liability would serve as an incentive for safety. The court believed that maximum protection would be afforded to the injured plaintiff while working no injustice on the lessor for he could recover the cost of strict liability by charging it to his business.

Thus the courts in these cases construe the "sale" requirement to only require that the defendant be in the overall marketing enterprise through which the product moves in reaching the consumer and that he be better able to distribute the loss along the chain of distribution than the injured party.

Other courts have declined to extend section 402A to a lease transaction by a precise reading of the language of the section. In Speyer Inc. v. Humble Oil & Refining Co.,\(^9\) an action was brought

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5. 45 N.J. 434, 212 A.2d 769 (1965).
6. Id. at —, 212 A.2d at 777.
8. Id. at —, 79 Cal. Rptr. at 340.
by the owners of fire damaged property against a lessor of gasoline pump equipment who had leased the equipment to the plaintiff. The court, in refusing to extend strict liability to the transaction, held that:

§402A is applicable by its terms to SELLERS. Since the Restatement provides rules for lessors of chattels at Section 407 and 408 and makes no mention of lessors in Section 402A, it is apparent that this section is not intended to be applied to any but sellers. While it has been suggested that the view of the Speyer court was based on the isolated nature of the lease transaction within the defendant's business, the unequivocal language of the court negates the application of section 402A to any lease transaction whether isolated or not.

Apparently in order to apply section 402A and its policy justifications, courts willing to extend its rule to lessors will require that the lessor be engaged in the "business" of leasing. In Price v. Shell Oil Co., the California court noted that for the doctrine to apply to a lessor of personal property the lessor must be found to be in the business of leasing in the same general sense as the seller of personalty is found to be in the business of manufacturing or retailing. Thus, as in the case of sellers, the rule is inapplicable to the occasional lessor.

In Cintrone and McClaflin, courts seeing no essential difference between sellers and lessors employed the same policy considerations to justify imposition of strict liability in tort upon manufacturers and sellers. In addition, it should be noted that the leases involved in these cases were made in the course of active, full time marketing as part of an on-going business of leasing, not on a casual basis.

Katz v. Slade graphically demonstrates the requirement of "mass leasing" before strict liability will be extended. Plaintiff's companion rented a golf cart from a municipal golf course; due to a failure of the brakes plaintiff was injured and brought suit against the municipality alleging strict liability. The court noted that in other jurisdictions where the rule had been extended to lessors they

10. Id. at 868.
13. 460 S.W.2d 608 (Mo. 1970).
have been "mass" lessors "placing their products in the stream of commerce as an integral part of the overall marketing enterprise." The Missouri court contrasted these cases to the non-commercial, non-profit, non-advertised amusement facility of a golf course. Because the carts were supplied to patrons who desired to use them as a casual operation and strictly incidental to the operation of the course, the court held strict liability inapplicable to the lessor.

Therefore, where the lease transaction is of such a nature that the policy reasons for strict liability are applicable, the courts have shown a willingness to abandon a strict interpretation of the "sale" definition in section 402A and have imposed liability. While the term "sale" has been given a broad definition stretching beyond the ordinarily understood concept of what constitutes a sale, the courts still require that there be a transaction which is essentially commercial in nature by which the product is transmitted into the stream of commerce.

III. LICENSORS, INVITORS AND LANDOWNERS SUPPLYING A PRODUCT

The California Appellate Court recently extended strict liability to licensors of personal property. An eleven-year-old boy sustained an injury to his arm when a washing machine in a laundromat started to operate as he was removing clothes from the machine. The evidence established that the machine was defective. Plaintiff alleged strict liability against the owner of the laundromat.

In holding strict liability applicable the court stated:

Although respondent is not engaged in the distribution of the product, in the same manner as a retailer or lessor, he does provide the product to the public for use by the public and consequently does play more than a random role in the overall marketing enterprise of the product in question. Thus the rationale of Greenman . . . applies as logically to licensors of a chattel as to the manufacturer, retailer or lessors thereof.

In constrast to Garcia v. Halsett, the Arizona Appellate Court refused to extend section 402A by classifying the defendant

14. Id. at 613.
16. Id. at —, 82 Cal. Rptr. at 423.
as an invitor rather than a seller. In *Wagner v. Coronet Hotel*, plaintiff, a guest of defendant's hotel, slipped on an allegedly defective bath mat provided for the use of the patrons. The court found that the relationship between the hotel and guest was that of invitor-invitee and that consequently the hotel owed only the duty of keeping the premises reasonably safe. This duty, the court held, was premised on defendant's status as a landowner rather than as a supplier of goods on the premises.

Factually there seems little difference warranting a distinction between a licensor of washing machines and an invitor to the hotel premises. However there is a substantial difference between the cases which justifies application of strict liability in *Garcia* and the denial of strict liability in *Wagner*. In *Garcia*, the owner of the laundromat was supplying a product as his sole commercial endeavor. In *Wagner*, the hotel owner was merely making the product available incidental to his business as an innkeeper.

In *Freitas v. Twin City Fisherman's Coop. Ass'n.*, the court refused to extend strict liability to the owner of a tank and ladder. The ladder, constructed by an independent contractor on defendant's land, collapsed while plaintiff was using it. The decision indicates that there is a fundamental difference between supplying a product for another's use and merely having a product on one's land. There must be a transaction by which the product is placed in the stream of commerce. Plaintiff in this case was merely a licensee on the defendant's premises.

Courts confronted with licensors of chattels will most likely extend strict liability in the same situations in which strict liability has been extended to the lessors of chattels. That is, if the transaction of license is the means by which the product is expected to reach the consumer in the stream of commerce and forms a substantial part of the defendant's business, the licensor's role in the commercial chain of distribution will be sufficient to make the policy justifications of strict liability applicable to transaction and thus section 402A will be applied. Where, however, the license is non-commercial in nature or merely incidental to defendants' principle business, liability will revolve around the common law classifications of enterants as licensees, invitees or trespassers, and the corresponding duties owed by the land owner with respect to such enterants.

IV. Real Estate Sales

Until the last few years the doctrine of caveat emptor was a well established rule in the sale of real estate. Under this doctrine there were no warranties in the sale of a house. Any obligation to survive the transfer of title would have to be included in the deed of title as a covenant. Thus liability for defective products was restricted to the sale of chattels and not real estate. In real estate all obligations or warranties were merged in the deed of title.

Upon first consideration of the issue whether strict liability should be extended to the builders and vendors of homes, the California court refused to hold the builder strictly liable. In *Halliday v. Greene* the court found what it believed to be important differences between products liability and construction cases: (1) the builder or contractor is seldom in a position to limit his liability by disclaimers and thereby defeat recovery; (2) it is considerably less difficult for the occupant of a building to trace the source of a defect to the builder or contractor than it is for the consumer to trace the source of defect through the modern complex system of manufacturers; and (3) there is a reasonable opportunity for inspection of a building before accepting it contrasted with the absence of any opportunity to make a meaningful inspection of the retailed product.

This case, while followed in 1968 in *Connolley v. Bull*, was overruled by *Kreigler v. Eichler Homes, Inc.* However other jurisdictions have followed *Halliday's* refusal to extend 402A to the vendor of a home. The Colorado court recently refused to extend strict liability against a home builder who originally installed a sliding door which a five-year-old boy ran into and was injured. The Colorado court justified its refusal to extend strict liability to the builder upon the belief that there is a greater opportunity for inspection than in the ordinary consumer product cases and that it is less difficult to trace the source of the defect to the builder than to a manufacturer.

A few courts have held the builder or other vendors of a new dwelling strictly liable for defective construction causing injury or loss to the vendee or other persons. Generally strict liability has been applied where (1) the builder or vendor is in the business of

selling new homes on a mass scale; (2) where the home was expected to and did reach the vendee without substantial change in condition; and (3) the policy justifications underlying strict liability are applicable.

The New Jersey court was the first one to extend strict liability to the home developer. In Schipper v. Levitt & Sons, Inc.,\(^{24}\) plaintiff's home was constructed by defendants. A child of the vendee's tenant was scalded by hot water drawn from the faucet of the bathroom sink. The injury was caused by the builder-vendor's failure to install a mixing valve to reduce the temperature after the water left the heating boiler.

The court held the defendant strictly liable stating:

> When a vendee buys a development home from an advertised model as in a Levitt or in a comparable project, he clearly relies on the skill of the developer and on the implied representations that his house will be reasonably fit for habitation. He has no architect or other professional advice of his own; he has no real competency to inspect on his own; his actual examination is in the nature of things superficial . . . . The public interest dictates that if such injuries do result from the defective construction its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than the injured party who justifiably relied on the developer's skill and implied representations.\(^{25}\)

The court believed that the purchasers of homes sold on a massive scale are no more able to protect themselves in the deed than consumers of retailed products are able to protect themselves in a bill of sale.

Upon reconsideration of Halliday v. Greene\(^{26}\) and Connolley v. Bull,\(^{27}\) the California court adopted the reasoning of the New Jersey court. In Kreigler v. Eichler Homes, Inc.\(^{28}\) the California Appellate Court held that the 402A doctrine may be applied in a suit by a homeowner based on defective construction against one engaged in the mass production and sale of tract homes. In Kreigler,\(^{29}\) defendant had constructed over 4,000 homes in which steel tube radiant systems had been installed in the concrete floor. Kreigler's

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\(^{24}\) 44 N.J. 70, 207 A.2d 314 (1965).
\(^{25}\) Id. at ----, 207 A.2d at 325.
\(^{29}\) Id.
predecessor had purchased one of the homes in 1952 and plaintiff purchased it in 1957. In 1959, due to corrosion the steel tubing failed causing damage to the plaintiff. The trial court found, regardless of negligence, that defendant was liable under strict liability because the system as installed was defective. In affirming, the Court of Appeals held:

We think, in terms of today's society there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same.30

The California court has taken the application of strict liability in real estate sales beyond mere defects in the structure on the land and has applied it to the real property itself. In Anver v. Longridge Estates31 the purchasers of a lot and house located on a hillside brought an action against the firm that "constructed the lot" from fill. The lot was "made" from fill which was not properly compacted and as a consequence, after plaintiff's home was built on it, the lot settled. The court in applying strict liability assumed that the defendant had "manufactured" the real estate lot:

We conclude that the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process.32

To the contrary, in Cox v. Shaffer33 the Pennsylvania court refused to hold the manufacturer of a silo on plaintiff's land strictly liable. The decedent entered a silo manufactured by the defendant and was asphyxiated by lethal fumes therein. Plaintiff alleged that under section 402A the silo was defective in that defendant failed to provide for ventilation of air. The court held that:

A silo constructed in place on the employer's land is not the sale of a 'product.' 402A applies only to one who sells a product. A building so constructed on the site is not a product within the meaning of §402A.34

The opinion in Cox v. Shaffer35 indicates that before applying strict liability to the construction of buildings, the builder must be

30. Id. at —, 74 Cal. Rptr. at 752.
32. Id. at —, 77 Cal. Rptr. at 639.
34. Id. at —, 302 A.2d at 457.
engaged in mass production or development. The court there held that a silo constructed on land was not a "product." Realistically the silo was not a "product" because the policy justifications for strict liability did not apply to the transaction. There was no indication that the builder was mass producing the silos or that the landowner was denied a reasonable opportunity to inspect. Nor was there any indication that the builder was in a better economic position to distribute the risk of loss. Therefore the silo was "not a product within the meaning of §402A."

From the foregoing cases, it is seen that several courts faced with the sale of real estate will extend the definition of "product" under 402A to include the sale of a home. The sale of a home or real estate does not technically fit within the language of 402A. Section 402A in its strict construction applies only to the supplier of a chattel. While real estate is not actually a "product" in the strict sense of a chattel, the policy justifications for strict liability have become applicable to the mass developer of homes. Consequently the definition of product has been expanded to include real estate in those instances where (1) the builder is engaged in the mass production and construction of real estate tracts, analogous to the mass marketing of retailed consumer goods; (2) where the vendee because of such mass production, has been afforded no meaningful opportunity to inspect and the developer is in a better position to control and discover the defect; and (3) where the developer who created the danger is in a better economic position to bear the loss than the injured party who relied on the skill of the developer.

V. PRODUCT—SERVICE DISTINCTION—THE HYBRID TRANSACTION

As in prior warranty cases, courts have experienced some difficulty where both the sale of a product and the performance of a service are involved in the same transaction. However, in these hybrid sales—service transactions under section 402A, a workable distinction in the cases has evolved which divergent courts have shown remarkable consistency in applying. Generally where the transaction is "commercial" in nature courts will find the sale of a "product" within 402A because the policy justifications of strict liability are applicable to the commercial transaction. Where the transaction is "professional" in nature the courts have found that "services" predominate and that no product was sold. The reason for the distinction is that in the ordinary professional transaction
the justifications for strict liability are inapplicable. Thus what is
defined as the "sale of a product" is determined by the underlying
social philosophy of section 402A.

A. Commercial Transaction

Under warranty law the first cases distinguishing between the
rendering of services and the sale of goods were cases involving the
sale of food in a restaurant. The authorities were split over whether
the operator of a restaurant sells a patron the food he serves or
whether he merely renders a service.\textsuperscript{36} Generally by the time sec-
tion 402A had been adopted a majority of the courts had held that
the food furnished in the restaurant was paramount and the prepa-
ration and serving of it only incidental to the transaction.\textsuperscript{37}

In Watchel \textit{v. Roso}\textsuperscript{38} plaintiff entered defendant's restaurant
and ordered an egg salad sandwich for his immediate consumption.
The sandwich was served and upon eating it plaintiff became vio-
lently ill. The court held that strict liability should apply to this
type of transaction because: "the sandwich in this case falls within
the meaning of 'any product.'"\textsuperscript{39}

The justification for imposing strict liability on the restaurant
owner is that he is in a better position than the patron to control
the quality of food or discover a defect. In addition, the restaurant
owner is in a better position to distribute the loss to one better able
to bear it by passing the loss up the chain of distribution to the
person ultimately responsible. In designating the sandwich "a
product" the Connecticut court was merely stating that the res-
taurant owner was in a better position to control the risk and to
distribute losses when they do occur.

In commercial transactions other than the sale of food, courts
have similarly experienced no difficulty in applying strict liability
to the hybrid service-sale transaction. In \textit{Worrell v. Barnes}\textsuperscript{40} defendant
contracted with the plaintiff to remodel her home. Part of the
contract provided for the installation of a water heater by running
a gas line to the existing gas system. A leaky fitting which was part

\textsuperscript{36.} Lynch \textit{v. Hotel Bond Co.}, 117 Conn. 128, 167 A. 99 (1933); Betehia \textit{v. Cape Code
Corp.}, 10 Wis. 2d 323, 103 N.W.2d 64 (1959) (services held to predominate); Friend \textit{v.
Childs Dining Hall Co.}, 231 Mass. 63, 120 N.E. 407 (1918).

\textsuperscript{37.} Betehia \textit{v. Cape Code Corp.}, 10 Wis. 2d 323, 103 N.W. 2d 64 (1959) (services held
to predominate).

\textsuperscript{38.} 159 Conn. 496, 271 A.2d 84 (1970).

\textsuperscript{39.} \textit{Id.} at ----, 271 A.2d at 86.

\textsuperscript{40.} 87 Nev. 204, 484 P.2d 573 (1971).
of the work caused gas to escape as a result of which plaintiff's home burned. The court, holding the contractor strictly liable, stated that "the leaky fitting comes within the definition of a defective product." Clearly this case did not fit within the definition of a sale of a product as distinguished from the rendering of services. However, because the transaction was commercial in nature the policy justifications of section 402A may be said to apply.

The leading case dealing with applicability of section 402A in the hybrid sale and service transaction within a commercial setting is Newmark v. Gimbel's Inc. Plaintiff went to defendant's beauty salon to have her hair washed and set. Defendant used a permanent wave solution manufactured by Helene Curtis. As a result of the treatment plaintiff developed acute dermatitis. The court held that strict liability was properly applicable to the operator of the beauty salon because the policy reasons for applying such liability in the case of ordinary sales are equally applicable to "a commercial transaction such as that existing in this case between a beauty parlor operator and a patron."

B. Professional Transaction

In sale-service hybrid transactions involving a professional, courts will refuse to apply section 402A. The basis of the distinction between the commercial and professional transaction was enunciated in Newmark v. Gimbel's Inc., wherein the court extended strict liability to the commercial service-sale hybrid transaction. The court stated:

The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession . . . . The dentist or doctor does not and cannot advertise for patients; the demand for his services stems for a felt necessity of the patient . . . . His performance is not mechanical or routine because each patient requires individual study and formulation of an informed judgment . . . . Such men are not producers or sellers of property in any reasonably acceptable sense of the term . . . . Thus their paramount function - the essence of their function - ought to be regarded as the furnishing of opinions and services . . . . In our judgment, the nature of the services, the utility and need for them . . . are so important to the general welfare as to outweigh in the policy

41. Id. at ____, 484 P.2d at 576.
42. 54 N.J. 585, 258 A.2d 697 (1966).
43. Id. at ____, 258 A.2d at 702.
44. 54 N.J. 585, 258 A.2d 697 (1966).
scale any need for the imposition on dentists and doctors of the rules of strict liability in tort.\textsuperscript{45}

Based on the above distinction between professional and commercial hybrid transactions, various courts have refused to extend section 402A to doctors,\textsuperscript{46} hospitals,\textsuperscript{47} optometrists,\textsuperscript{48} dentists,\textsuperscript{49} architects,\textsuperscript{50} and surveyors.\textsuperscript{51}

In a suit against a hospital where plaintiff was injured when a surgical needle broke in the course of an operation, the court refused to apply strict liability.\textsuperscript{52} The court found that a hospital is not ordinarily engaged in the business of selling any of the products or equipment it uses in providing services. The essence of the relationship between a hospital and its patients does not relate to any product or piece of equipment it uses but to the professional services it applies. The court noted that:

A significant common element running through the cases which have extended strict liability is that each defendant against whom the standard has been applied played an integral and vital role in the overall production and marketing enterprise. Each defendant was a link in getting the product to the consumer.\textsuperscript{53}

The social policy distinctions between the commercial and professional transaction were clearly delineated in \textit{Magrine v. Krasnica}.\textsuperscript{54} Plaintiff, a patient of defendant dentist was injured when a hypodermic needle being used with due care to administer a local anesthetic broke off in plaintiff's jaw. The break resulted from a latent defect in the needle. It was held that strict liability did not apply because the essence of the relationship with the patient was the furnishing of professional services and therefore the doctor's action could only be tested by negligence principles.

Noting that strict liability is not restricted to transactions fall-

\begin{itemize}
\item \textsuperscript{45} Id. at _, 258 A.2d at 702.
\item \textsuperscript{46} Carmichael v. Rietz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971).
\item \textsuperscript{48} Barbee v. Rodgers, 425 S.W.2d 342 (1968).
\item \textsuperscript{50} La Rossa v. Scientific Design Co., 402 F.2d 137 (3d Cir. 1968); Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).
\item \textsuperscript{51} Rozny v. Marnul, 43 Ill.. 2d 54, 250 N.E.2d 656 (1969).
\item \textsuperscript{52} Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971).
\item \textsuperscript{53} Id. at _, 98 Cal. Rptr. at 190.
\end{itemize}
ing within the technical definition of a sale, the court observed that:
(1) the dentist was in no better position to control, inspect and
discover the defect in the needle; (2) the dentist did not put the
article in the stream of commerce nor promote its purchase by the
general public but was merely a user of it; and (3) the dentist was
not in a position to better spread the risk through insurance.

In La Rossa v. Scientific Design Co. the court again distin-
guished the professional versus commercial transaction. Here a
workman was allegedly exposed to carcinogenic dust and upon his
death his widow brought an action against the company hired by
the employer to design, engineer and supervise the initial operation
of the plant. In refusing to apply strict liability the court clearly
differentiated between "professional services" and sale of "con-
sumer products":

Professional services do not lend themselves to the doctrine of
tort liability without fault because they lack the elements which
gave rise to the doctrine. There is no mass production of goods
or a large body of distant customers whom it would be unfair to
require to trace the article they used along the channels of trade
to the original manufacturer and there to pinpoint an act of
negligence remote from their knowledge or even from their abil-
ity to inquire. Thus, professional services form a marked contrast
to consumer product cases and even in those jurisdictions which
have adopted a rule of strict liability, a majority of decisions have
declined to apply it to professional services.

Barbee v. Rodgers demonstrates the lengths to which courts
are willing to go to decline application of section 402A where a
professional is involved. Plaintiff who suffered injuries to his eyes
as a result of improperly fitting contact lenses argued that the
optometrists were liable under section 402A. The Texas court
stated that this was not the act of one selling a product within the
meaning of section 402A. The court noted that the lenses were not
a product generally offered to the public in the regular channels
of trade and that the considerations supporting strict liability were
not present. However it should be noted that the defendant in this
case was engaged in a substantial "commercial" enterprise. Defen-
dant owned an entire chain of eighty-four offices throughout Texas
and yet the court still refused to apply strict liability because defen-

55. 402 F.2d 937 (3d Cir. 1968).
56. Id. at 942.
57. 425 S.W.2d 342 (1968).
dant was engaged in rendering professional services.

Therefore courts have refused to extend strict liability to the professional hybrid transaction on the ground that the policy justifications of section 402A are inapplicable. Finding the policy reasons inapplicable professional services do not qualify as a product within the meaning of section 402A.

VI. "Pure Service" Transactions

Generally where pure services are involved a court will find that such services are not a product and will refuse to apply strict liability regardless of whether the services are commercial or professional.\(^5\)

In *Raritian Trucking Corp. v. Aero Commander, Inc.*\(^5\) an airplane owner brought an action against an airplane servicer to recover damages to his plane. The plane had crashed when a wing separated during aerobatic maneuvers. The court refused to extend strict liability to a case where no goods or other property, but only a service were supplied - even though the court admitted that many of the policy considerations were present. The court applying New Jersey law discussed numerous authorities for its conclusion that New Jersey would restrict application of strict liability to cases involving "the sale of goods or other property and to those involving transactions analogous to sales."\(^6\)

Likewise in *Hillas v. Westinghouse Elec. Corp.*\(^6\) plaintiff brought an action against an elevator maintenance company which immediately prior to the accident serviced the elevator in which plaintiff was injured. Plaintiff alleged strict liability claiming that the contractor should be held to the same standard as a manufacturer. The court disagreed, holding that the liability of a service company which merely services articles supplied by another does not extend beyond negligence. The court specifically distinguished *Newmark v. Gimbel's Inc.*\(^6\) on the ground that the strict liability applied there was based upon the hybrid service-sale transaction as contrasted to the pure service function performed by the elevator company. Therefore, regardless of the fact that the policy justifications may be applicable, the court will require that some product

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59. 458 F.2d 1106 (3d Cir. 1972).
60. *Id.* at 1114.
61. 120 N.J. Super. 105, 293 A.2d 419 (1972).
be furnished giving the transaction a character at least analogous to a sale.

VII. BLOOD TRANSFUSIONS

This area is actually in the nature of the product-service hybrid transaction involving a professional service. However because of the substantial body of case law and the existence of problems peculiar to blood, separate consideration is merited.

The leading case in this area is *Perlmutter v. Beth David Hospital*. Until recently it has been considered the definitive treatment of the subject and has stood for the proposition that a paying patient at a hospital who receives impure blood is the recipient of a “service” and not the sale of a “good”. Therefore the patient was held to be unable to recover under breach of implied warranty. The court in reaching its conclusion noted that:

... when one enters a hospital as a patient; he goes there not to buy medicine or pills, not to purchase bandages or iodine or serum or blood but to obtain a course of treatment in the hope of being cured of what ails him.

Recently several courts have abandoned *Perlmutter* and its progeny and applied strict liability to the furnishing of contaminated blood.

The Illinois Court in *Cunningham v. McNeal Mem. Hospital* was one of the first courts to break from *Perlmutter*. Defendant argued that whole human blood was not a “product” as that term is used in the Restatement. The court found that the hospital was engaged in the business of “selling” blood for transfusion into patients and that the blood was a “product” within the meaning of section 402A. The court noted in *Cunningham* that in modern

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63. 308 N.Y. 100, 123 N.E.2d 792 (1954).
64. Id. at ____, 123 N.E.2d at 796.
65. 96 N.J. Super. 314, 232 A.2d 879 (1967) rev. 249 A.2d 65 (N.J. 1969). In *Jackson v. Muhlenberg Hosp.*, the New Jersey Superior Court found that § 402A did apply to the hospital supplying blood, but imposed no liability because blood was found not to be "unreasonably dangerous" because of the inability to discover the presence of hepatitis. The Court indicated that:
... the nature of the transaction in which the product is transferred for a consideration is not determinative. It makes no difference whether the transaction was a sale or a service if the basic policy considerations which lead to strict liability are applicable.

The court pointed out that strict liability is not conditioned upon advertising to promote sale, but that it arises from the mere presence of the product on the market. The decision however was later reversed and remanded for a further development of the record.
66. 47 Ill. 2d 443, 266 N.E.2d 897 (Ill. 1970).
times the operation of hospitals has become one of the biggest businesses in the country and therefore there was no need for protecting its funds.

The Superior Court of New Jersey, faced with an action for death caused by hepatitis infection, extended 402A to the transaction upon pure policy grounds. The court began its analysis by stating that Perlmutter dealt only with what the New Jersey court believed to be a semantical question of whether the transaction was a "sale" or a "service," and that Cunningham dealt only with the verbal formula of section 402A. The court, rejecting this approach, addressed itself solely to the policy justifications for the imposition of strict liability.

The court believed the policy reasons to be: (1) adoption of strict liability will force hospitals to deal only with blood banks with good safety records, thus decreasing the risk; (2) strict liability will spur hospitals to take a more active role in influencing the blood banks collection process by requiring more careful screening of donors; (3) it will encourage medical research to develop a test for hepatitis; and (4) strict liability will have an allocative effect for the hospital may allocate its hepatitis costs as a charge on each unit of blood.

In Brody v. Overlook Hospital the New Jersey court did not begin with the question of whether the transfer of blood was a "service" or "sale" or whether the blood was a "product", but rather it looked to the policy reasons for extending strict liability. Because it believed that public policy justified imposition of strict liability, the transaction became a sale, not a service, and the blood became a product in order to fit the blood transfusion within section 402A. Therefore, the ultimate question, as viewed by the New Jersey court, is not what is or is not a product within the meaning of section 402A, but rather do the policy justifications of strict liability apply to the transaction under consideration.

However Brody is not the last word in the area of blood transfusions. Recently the California court, a leader in the extension of strict liability to various different transactions, refused to extend strict liability to the furnishing of blood. In Shepard v. Alexian Bros. Hosp. Inc. plaintiff attempted to recover in strict liability and warranty against a hospital for hepatitis contracted from a

68. Id.
blood transfusion. A California statute declared that a blood transfusion is the “rendition of a service . . . and shall not be construed to be . . . a sale.” Plaintiff asked the court to extend the strict liability doctrine to include services, and to support this request, plaintiff pointed out that the doctrine had already been extended to a number of non-sale transactions including home builders, bailors and of personal property and licensors of chattels.

In refusing plaintiff’s request the court pointed out that none of the reasons normally given by courts for extending strict liability to manufacturers such as the ability to spread the loss, or profiting from the transaction, apply to a hospital administering blood. The California court, perhaps adopting Perlmutter, stated:

It needs no extended discussion to perceive that a hospital is primarily devoted to the care and healing of the sick. The supplying of blood by the hospital is entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore the patient’s health. Providing medicine or supplying blood is simply a chemical aid or instrument utilized to accomplish the object of cure or treatment.70

The court continued stating that the hospital played “no vital part in the overall marketing enterprise” and that imposition of strict liability would not achieve the policy goal of an added incentive for safety because of the present impossibility of detecting the presence of hepatitis.

It should also be noted that 43 states have enacted statutes similar to the California statute in Shepard.71 This indicates the extent to which the area of blood transfusions is tied up in public policy arguments. Apparently the vast majority of legislatures do not share the view of the Brody court as to the better means of serving public policy.

VIII. Used Products

Section 402A does not expressly state whether the rule of strict liability applied to the seller of a defective used product. However section 402A is made applicable to “any person engaged in the business of selling products for use or consumption.” This would appear to include the seller of a used defective product, but as of yet no court has definitively applied 402A to the seller of a used product.

70. Id. at —, 109 Cal Rptr. at 134.
71. CCH Products Liability Reporter ¶ 1187.
In Pridgett v. Jackson Iron & Metal Co., defendant sold a used drum to plaintiff’s employer. While plaintiff was attempting to cut the drum in half with a torch, the fumes from the paint which was originally stored in the drum, exploded. The court noted the absence of cases applying strict liability to the seller of a used product. The court did not however rest its holding on the basis of non-applicability of section 402A, but rather found that the drum was not in “a defective condition unreasonably dangerous” to the user or consumer because at the time of the accident the drum was not being used in the manner or purpose for which it had been originally manufactured. By implication it may be said that the court approved the applicability of 402A to the sellers of defective used products.

Likewise the Oregon court in Cornelius v. Bay Motors Inc. implied that the doctrine was applicable to the seller of used cars. A bystander sought to hold the used car dealer strictly liable when he was struck by the used car when its brakes failed. There was no evidence of negligence on the part of the used car dealer. The court stated that:

We may assume without deciding that sellers of used cars are subject to §402A . . . . By its terms of §402A is binding upon one who sells any product in a defective condition.

Section 402A applies to the seller of any product in a defective condition. The drafters of the Restatement made no distinction between used and new products. The words “any product” would apparently apply to either. Reasoned prediction evolved from the case law in other areas commands a belief that the dealer in used products will be held strictly liable so long as the other elements of 402A are satisfied and the policy justification for strict liability is applicable. The courts in this area, as in the case of new products, will require that the defendant be in the business of selling used products. Strict liability will be denied where the defendant merely sells used products on a casual basis.

IX. Component Parts

Comment p of section 402A points out that the rule has not gone beyond “products” which are used in the condition, or in substantially the same condition in which they are expected to

72. 253 So. 2d 837 (Miss. 1971).
73. 258 Ore. 564, 484 P.2d 299 (1971).
74. Id. at ____, 484 P.2d at 303.
reach the hands of the ultimate user or consumer. This problem arises where there has been the sale of a component part of a product to be assembled by another.

The question is essentially whether the responsibility for discovery and prevention of the defect is shifted to the intermediate party who is to make the changes. In comment q to section 402A the Institute expresses no opinion on the matter but states:

> It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer.\(^7\)

A leading case involving the applicability of strict liability to the maker of component parts is *Burbage v. Boiler Engineering & Supply Co.*\(^7\) The court held the component manufacturer strictly liable and adopted the language of comment q. Defendant argued that its valve was only a component part and not a product. The court held that the very product sold was a valve - a unit, despite the fact that it would be ultimately installed in some assembly and that only a substantial change made by another in the original defective condition would relieve the component manufacturer and that a mere change not affecting the original defective condition would not. It is only where there has been a substantial change in the component part itself or where the cause of the injury is not directly attributable to the component that the maker of the component can escape strict liability.\(^7\)

There are strong arguments against imposing strict liability on the makers of component parts. If the doctrine is not applied to the seller of a component part the purpose of strict liability will not be frustrated since the ultimate manufacturer or assembler will remain subject to it. The seller of the component part will be relieved of the onerous burden of insuring the use to which his product is put in the design, fabrication and assembly of other products while remaining liable under ordinary concepts of negligence and breach of warranty. The courts should be reluctant to abrogate common law and statutory concepts of negligence and warranty where the social policy is otherwise served. Since the user or consumer is adequately protected by imposition of strict liability

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75. *RESTATEMENT (SECOND) TORTS* § 402 Comment q.
77. City of Franklin v. Badger Ford Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973).
upon the manufacturer or seller of the finished product it is unnecessary to enlarge its scope to the sellers of component parts.

These policy reasons for not extending strict liability were clearly indicated in *Walker v. Stauffer Chem. Corp.*. Plaintiff was injured as a result of the explosion of a drain cleaner. The drain cleaner was manufactured by Fazio and contained sulfuric acid manufactured by Stauffer. It was contemplated by Stauffer that the acid would be compounded into a drain cleaner. The ultimate product was not that manufactured by defendant. The court seeing no compelling reason for extension of strict liability to the present case stated that:

> We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer of a standard chemical ingredient... not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer to bear the responsibility of that injury. The manufacturer of the product causing the injury is so situated as to afford the necessary protection.

Whether a component part is a "product" within Section 402A should be determined by the applicability of the policy underlying the doctrine. Where such policy is applicable a court may feel justified in extending 402A. However a court should not without such justification abandon common law principles of negligence.

**X. Various Other Transactions**

The plaintiff in *Hanberry v. Hearst Corp.* presented a novel approach in seeking to establish the defendant’s liability under strict liability for endorsing another party’s product with the use of its “Good Housekeeping” seal and advertisement. The court held that the doctrine did not apply to one not directly involved in manufacturing products for or supplying products to the consuming public. The theory therefore was held not to apply to a general endorser who made no representation of having examined or tested the particular article which caused the injury. Thus while the endorser may play some role in the marketing of products, he is not such an integral part of the system to justify the application of strict liability.

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79. *Id.* at __, 96 Cal. Rptr. at 806.
In *Carter v. Joseph Bancroft & Sons Co.*, plaintiff was injured when a dress she was wearing ignited at a dinner party. The defendant was the owner of a trademark identifying garments, fabrics and articles made according to specification and quality standards prescribed and controlled by the defendant. The defendant allowed the manufacturer of the dress to use the trademark and thus was a "licensor" or the trademark.

Defendants contended that they could not be held strictly liable because they were not a "seller" within the meaning of section 402A. The court in holding the defendant liable stated that:

... the defendants were sufficiently involved in the manufacturing process to be a "seller" ... One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

**XI. THE WISCONSIN LAW**

Although having adopted section 402A, the Wisconsin court has not been presented with a situation requiring it to consider the extension of section 402A to various transactions outside the literal language of a "sale of a product." However, the decision of *Dippel v. Sciano* gives some indication of the approach which the court would likely take if the situation presented itself.

The court in *Dippel*, justifying its adoption of strict liability, stated:

... the seller is in a paramount position to distribute the costs of the risks created by the defective product he is selling. He may pass the costs on to the consumer via increased prices. He may protect himself either by purchasing insurance or by a form of self-insurance. In justification of making the seller pay for the risk, it is argued that the consumer or user has the right to rely on the apparent safety of the product and that it is the seller in the first instance who creates the risk by placing the defective product on the market. A correlative consideration where the

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82. Id. at 1106-1107.
84. In *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973), the Wisconsin District Court considered the applicability of strict liability to "mechanical and administrative services" provided by a hospital. The District Court, in an attempt to decide the matter as the Wisconsin Court would, denied the hospital's motion to dismiss, stating that "a conclusion that it is in the public interest to hold a hospital strictly liable for supplying a particular defective service cannot be ruled out as a matter of law."
85. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
manufacturer is concerned is that the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer.86

Although the court was isolating the policy justifications for imposing strict liability on a manufacturer or retailer of a defective product, it is apparent from the case law in other jurisdictions, that the Wisconsin court would experience little difficulty in extending section 402A to various transactions in which the social policy expressed in Dippel would be served.

XII. Conclusion

Before it can be decided whether a "product" was in a defective condition at the time it left the defendant's hands it must be decided whether the "product" and the defendant are proper subjects for the application of section 402A. This requires a finding that there has been a sale of a product within the meaning of section 402A.

In extending strict liability to transactions which do not fall within the literal definition of a "sale" or a "product", courts stress that their purpose is to insure that the costs of injuries resulting from defective products is borne by the persons who put such products on the market rather than the injured person. As additional reason for imposing strict liability, it is also said that the defendant profits from such transactions and is in a superior position to protect himself by proper inspection and tests. Also imposition of such liability will promote safety by inducing a party with potential strict liability to pressure his supplier for better products. It is further suggested that the risk of injury can be insured or distributed among the public as a cost of doing business.

These policy justifications will normally apply only to a commercial transaction where defendants have played an integral and vital part in the overall production and marketing enterprise.

Where these policies would be served by imposition of strict liability in a particular case, the transaction under consideration is the sale of a product. Thus, the policy justifications of section 402A have become the definition of a "product" and a "sale" within the meaning of section 402A.

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86. Id. at 450, 155 N.W.2d at 58.