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A New Look at an Old Conundrum: The Determinative Test for the Hybrid Sales/Service Transaction Under Section 402A of the Restatement (Second) of Torts

by Charles E. Cantu*

I. INTRODUCTION

Historically, the concept of strict tort liability was confined to two areas: injuries resulting from dangerous activities¹ and harm inflicted by wild and/or dangerous animals.² But, in 1963, the California Supreme Court held in *Greenman*

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1. Strict liability for dangerous activities developed from an 1868 English case in which water stored in a reservoir flooded the plaintiff's coal mines. See *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). The court held that:

[t]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

Id. at 339-40.

RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965), encompasses the law of strict liability for dangerous activities essentially as it was put forth in *Rylands*. See, e.g., *Enos Coal Mining Co. v. Schuchart*, 188 N.E.2d 406, 410 (Ind. 1963) (vibrations caused by explosives in coal mining); *Healey v. Citizens' Gas & Elec. Co.*, 201 N.W. 118, 119 (Iowa 1924) (overflow and percolation of water); *Berg v. Reaction Motors Div.*, 181 A.2d 487, 489 (N.J. 1962) (testing rocket engine for supersonic airplane); *Thigpen v. Skousen & Hise*, 327 P.2d 802, 803 (N.M. 1958) (blasting operations); *Loe v. Lenhardt*, 362 P.2d 312, 314 (Or. 1961) (aerial application of chemicals).

2. It is well accepted that "one who harbors a wild animal, which by its very nature is vicious and unpredictable, does so at his peril, and liability for injuries inflicted by such animal is absolute." *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962) (en banc) (coyote bite). See, e.g., *Opelt v. Al G. Barnes Co.*, 183 P. 241, 241 (Cal. Dist. Ct. App. 1919) (vicious acts of leopard); *Copley v. Wills*, 152 S.W. 830, 831 (Tex. Civ. App. 1913) (injury from monkey). See generally Mary Coate McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181 (1939) (contrasting causes of action based on location of animals).

v. *Yuba Power Products*³ that the theory of strict liability in tort also included products. In 1965, the Restatement (Second) of Torts adopted Section 402A and endorsed the theory of *Greenman* that strict liability was available as a distinct cause of action in litigation involving injuries caused by defective products.⁴ The consequences of this innovative theory were not only an explosion in the number of resulting law suits,⁵ but also some initial confusion.⁶ The courts were not sure how to apply some of the novel provisions of Section 402A. Much of the indecision has now settled,⁷ and Section 402A continues to be a source of compensation for injured plaintiffs.⁸ There are, however, a few questions that require

3. 377 P.2d 897 (Cal. 1963) (en banc).

4. Products liability originated in contract law requiring privity between the injured party and the defendant. See *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). Eventually, the buyer's possible causes of action expanded to include the concepts of warranty and negligence. See generally Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119 (1958) (describing the emergence of strict liability regarding products). Strict liability may attach to:

conduct which does not so far depart from social standards as to fall within the traditional boundaries of negligence—usually because the advantages which it offers to the defendant and to the community outweigh even the abnormal risk; but which is still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does

.....
W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 537 (5th ed. 1984).

5. See generally Michael Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213, 220 ("The modern era of products liability has witnessed a tremendous growth of claims involving a wide diversity of products and factual circumstances."). See also John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973) (recognizing that strict liability for injury has "swept" the area of products liability).

6. "The law of product liability has become filled with uncertainties . . ." INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, BRIEFING REPORT, at iii (January 1, 1977).

7. See, e.g., *Suvada v. White Motor Co.*, 210 N.E.2d 182, 185 (Ill. 1965) (holding strict liability applicable absent privity or negligence), *aff'g* 201 N.E.2d 313 (Ill. App. Ct. 1964); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 849-51 (Tex. 1979) (defining "defect" and "unreasonably dangerous" in design defect cases), *rev'g* 567 S.W.2d 812 (Tex. Civ. App. 1978); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 870 (Tex. 1978) (recognizing strict liability involves determination of whether product is defective).

8. See, e.g., *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966) (concluding § 402A states appropriate standards of responsibility for manufacturer), *cert. denied sub nom. Yates v. Hodges*, 386 U.S. 912 (1967); *Ford Motor Co. v. Lonon*, 398 S.W.2d 240, 248-49 (Tenn. 1966) (expressing approval of and quoting § 402A);

explanation or refinement.

One issue of particular concern involves the sales/service transaction.⁹ Initially, it was clear that the scope of Section 402A¹⁰ involved the sale¹¹ of products¹² that were in a defective condition¹³ when they entered the stream of commerce.¹⁴

Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 784 (Tex. 1967) (adopting § 402A as expression of strict tort liability).

9. See, e.g., *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 145 (Cal. 1936) (holding restaurant food service amounts to sale and imposes an implied warranty to serve food fit for human consumption), *overruled on other grounds sub nom.* *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992) (en banc); *Worrell v. Barnes*, 484 P.2d 573, 576 (Nev. 1971) (finding breach of implied warranty and sale under the U.C.C. when contractor supplied defective gas fitting); *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794 (N.Y. 1954) (distinguishing blood transfusion as service and not sale). In *Perlmutter*, the court explained why the case did not involve a breach of warranty under the Sales Act: "it has long been recognized that, when service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act." *Id.* See also Steve Brook, Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 S.W. L.J. 575 (1974). The author explains that:

A limitation has been placed on the doctrine in an attempt by the courts to distinguish between sales and service transactions, limiting the doctrine to the pure sales transactions involving tangible products, normally chattels. If the "product" carrying the potential risks from defects was a service, for example, the repair of equipment or the application of hair dye in a beauty shop, the plaintiff has been forced to prove a failure by this "seller" to use reasonable care. More recently, a plaintiff has been allowed to rely on liability without fault in transactions involving tangible products—transfers such as the bailment or rental of automobiles—which could be termed "quasi-sales" or transfers less than a sale.

Id. at 575 (footnotes omitted).

10. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

11. See *id.* cmt. c (justifying rule emerged from the idea that sellers recognize a responsibility to public to sell safe products); see also S.R. Shapiro, Annotation, *Products Liability: Strict Liability in Tort*, 13 A.L.R.3d 1057 (1967), where it is specified that in a strict products liability case the plaintiff must demonstrate that the defendant was involved by manufacturing, selling, or otherwise placing the product into the stream of commerce. *Id.* at 1077.

12. See, e.g., *Flippo v. Mode O'Day Frock Shops of Hollywood*, 248 Ark. 1, 5, 449 S.W.2d 692, 694 (1970) (rejecting strict liability under § 402A where no product was defective); *Hoover v. Montgomery Ward & Co.*, 528 P.2d 76, 77 (Or. 1974) (refusing to extend scope of § 402A to include defective installation of nondefective product).

13. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965), describes a product as defective if it leaves the seller's hands "in a condition not contemplated by the ultimate consumer" and is "unreasonably dangerous to him." See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965), in which Traynor claims there is no definitive meaning assigned to "defective." See also David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 341-342 (1974) (explaining the meaning of defect under the Restatement).

It was never intended that the ramifications of Section 402A would apply to service transactions.¹⁵ While one jurisdiction strayed from this original position,¹⁶ the courts have consistently refused to extend the idea of strict liability to service agreements.¹⁷ Evidently, the prevailing thought has been that when a service is performed, the most a consumer can expect

14. See Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 212-14 (1990). The author traces the changing meaning of "sells" as it applies to § 402A. Initially, this section was concerned only with pure sales transactions. *Id.* at 212. Gradually, though, the scope of claims under § 402A grew to include lease agreements, free products, and complementary gifts. *Id.* at 212-14. See, e.g., *Price v. Shell Oil Co.*, 466 P.2d 722, 727 (Cal. 1970) (holding strict liability in tort applicable to lessors and bailors); *Ettin v. Ava Truck Leasing, Inc.*, 251 A.2d 278, 285 (N.J. 1969) (allowing strict liability in tort for defective leased truck), *aff'g* 242 A.2d 663 (N.J. Super. Ct. App. Div. 1968); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967) (holding defendant strictly liable for injuries caused by free sample of permanent hair wave solution), *rev'g* 408 S.W.2d 124 (Tex. Civ. App. 1966).

15. From its inception, § 402A was not regarded as an avenue for holding service providers strictly liable in tort. James B. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 13 (1978). See, e.g., *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833, 839 (Alaska 1967) (recognizing strict liability not imposed on those furnishing labor or service); *Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968) (refusing to apply strict liability for prescription and fitting of contact lenses), *aff'g* Texas State Optical v. Barbee, 417 S.W.2d 750 (Tex. Civ. App. 1967); *Easterly v. Hospital of Texas*, 772 S.W.2d 211, 213 (Tex. Ct. App. 1989) (holding epidural kit sold by hospital was so closely tied to professional services it lost its distinct character as a good). See generally E.C. Cowley, Jr., Annotation, *Application of Rule of Strict Liability in Tort to Person Rendering Services*, 29 A.L.R.3d 1425 (1970).

16. New Jersey excepted from applying strict products liability only to products and found no reason to limit it in such a way. See, e.g., *Newmark v. Gimbel's Inc.*, 258 A.2d 697, 702-05 (N.J. 1969) (holding strict liability applies to hybrid sales/service transaction), *aff'g* 246 A.2d 11 (N.J. 1968); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769, 778-80 (N.J. 1965) (applying strict liability to rental of vehicle).

17. The basis for disallowing strict liability for injuries arising out of a service was articulated in the landmark case of *Gagne v. Bertran*, 275 P.2d 15 (Cal. 1954) (en banc). The California Supreme Court recognized the established rule that "those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct." *Id.* at 20. See, e.g., *Vergott v. Deseret Pharmaceutical Co.*, 463 F.2d 12, 16 (5th Cir. 1972) (finding hospital that provided services not strictly liable); *Lemley v. J & B Tire Co.*, 426 F. Supp. 1378, 1379 (W.D. Pa. 1977) (refusing to extend § 402A to supplier of service); *Stewart Warner Corp. v. Burns Int'l Sec. Serv.*, 343 F. Supp. 953, 954 (N.D. Ill. 1972) (recognizing strict liability in tort does not cover services); *Hoffman v. Simplot Aviation*, 539 P.2d 584, 587 (Idaho 1975) (acknowledging Restatement concerns only sale of products and declining to expand it to personal services); *Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1386-87 (Pa. 1991) (finding § 402A inapplicable to dispensing of prescription drugs), *aff'g* 538 A.2d 1379 (Pa. Super. Ct. 1988).

is the conduct of a reasonable prudent person.¹⁸

In cases where it has been unclear whether the bargain in question involved either the sale of a product or the rendering of a service, the courts have looked to the "predominant factor" test to determine whether strict liability as provided by Section 402A applied.¹⁹ This issue requires a determination of the true essence or thrust of the transaction.²⁰ Alternatively, when working within the confines of the Uniform Commercial Code, which is also concerned with the sale of goods and not the rendering of services, the same issue may be determined by employing the "gravamen" test.²¹ These two standards, one

18. "The very essence of a transaction involving the service provider is the performance of a particular service with reasonable care, competence, and skill. This coincides with the reasonable expectations of the customer that the contracted for services will be performed in a reasonably careful, skillful, and competent manner." Sales, *supra* note 15, at 18. The author also noted that the service provider does not deal with middlemen and, therefore, only the serviceman can be judged. *Id.* at 19. See, e.g., Roberts v. Karr, 3 Cal. Rptr. 98, 103 (Cal. Dist. Ct. App. 1960) (holding professional to standard of reasonable person); Milau Assoc. v. North Ave. Dev. Corp., 391 N.Y.S.2d 628, 629-30 (N.Y. App. Div.) (holding where services are concerned, proper method of recovery exists in negligence), *aff'd*, 398 N.Y.S.2d 882 (N.Y. 1977); Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968) (requiring counsel to possess ordinary skill and knowledge but not requiring knowledge of all the law).

19. See, e.g., Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306, 321 (Cal. Ct. App. 1968) (holding tire dealer strictly liable for injuries resulting from sale and installation of tire); Magrine v. Krasnica, 227 A.2d 539, 543 (N.J. Hudson County Ct. 1967) (finding dentist not strictly liable because he offers professional service), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969); Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 794 (N.Y. 1954) (establishing that when service predominates over product, strict liability is unavailable). See generally 2 ROBERT D. HURSH & HENRY J. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 6.17, at 80 (2d ed. 1974) (discussing strict liability in tort for one who performs services); David L. Phipps, *When Does A "Service" Become A "Sale"*, 39 INS. COUNS. J. 274, 278 (1972) (recognizing difficulty in applying § 402A to situations involving both "sale" and "service").

20. See, e.g., Stafford v. International Harvester Co., 668 F.2d 142, 147 (2d Cir. 1981) (determining underlying nature of transaction was for service and repair of truck); Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (applying "predominant factor" test to determine if thrust of agreement was for sale or installation of bowling equipment); Meeks v. Bell, 710 S.W.2d 789, 795 (Tex. Ct. App. 1986) (using "predominant purpose" or "essence of the transaction" test to evaluate whether installation of heat pump is sale or service), *rev'd on other grounds*, 725 S.W.2d 179 (Tex. 1987).

21. See 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-102:04, at 12 (1984), in which the author suggests abandoning the "predominant factor" test and instead focusing on whether the gravamen of the transaction involves products or services. Specific reference is made to the decision in Worrell v. Barnes, 484 P.2d 573, 574 (Nev. 1971), which concerned escaping gas from a leaky fitting. 1 HAWKLAND, *supra* this note, at 12. The author supports the view that if the leak resulted

employed in the area of torts and the other in the sphere of contracts, involve the same question, but often produce different results. The purpose of this article is to discuss the history and application of both standards and argue for an adoption of the gravamen test in cases arising under the Restatement (Second) of Torts.

II. THE SALES/SERVICE TRANSACTION

Before discussing the predominant factor and gravamen tests, the sales/service transaction should be defined. In its typical form, the hybrid transaction involves furnishing a product while performing some service.²² Because the bargain is not clearly delineated, some uncertainty arises as to the true nature of the agreement.²³ For example, when an optometrist fits a patient for contact lenses,²⁴ is payment made for the lenses, or for the service of being tested and fitted? When an individual purchases a residential hot water heater,²⁵ does the transaction involve the sale of the heater, or is the bargain for the service of having it delivered and installed? In a medical setting involving blood transfusions,²⁶ does the individual

from a defective product, a sale was at issue and the U.C.C. controlled. However, if the leak was due to defective installation, the case involved a service and was outside the scope of the U.C.C. 1 *id.*

22. See *Nickel v. Hyster Co.*, 412 N.Y.S.2d 273 (N.Y. Sup. Ct. 1978). The court states that "a hybrid service-sale transaction can give rise to a cause of action for breach of warranty or strict products liability if the sales aspect of the transaction predominates and the service aspect is merely incidental." *Id.* at 276 (citations omitted). See generally 63 AM. JUR. 2D *Products Liability* § 212 (1984) (describing hybrid transactions and noting that viewing the action as involving both sale and service, with sale comprising majority of the transaction, has led to an application of strict liability).

23. Compare *Epstein v. Giannattasio*, 197 A.2d 342, 345 (Conn. C.P. 1963) (finding beauty treatment was service and not sale) with *Carpenter v. Best's Apparel, Inc.*, 481 P.2d 924, 926-27 (Wash. Ct. App. 1971) (shampooing, applying permanent wave solution, and styling hair constituted sale).

24. See *Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968). The court in *Barbee* refused to extend strict liability to the fitting and sale of contact lenses because the optometry firm was considered to be in the business of providing a professional service, and not a product. *Id.* at 345-46. See generally *Cowley*, *supra* note 15, at 1426; *William C. Powers, Jr., Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 431 (1984).

25. See, e.g., *Kopet v. Klein*, 148 N.W.2d 385, 389-90 (Minn. 1967) (finding sale where transfer of heater included installation); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 326 (N.J. 1965) (holding faulty installation of hot water system could result in strict liability).

26. See generally *Jonathan M. Purver, Annotation, Liability for Injury or Death*

purchase a commodity in the form of blood, or the service of a transfusion?²⁷ Other examples of hybrid transactions could include a payment for an air conditioning,²⁸ electrical,²⁹ heating,³⁰ or plumbing system;³¹ concrete;³² steel;³³ swimming pools;³⁴ or floor coverings.³⁵ In each of these agreements, a

from *Blood Transfusion*, 45 A.L.R.3d 1364, 1389 (1972) (recognizing that courts differ as to whether strict liability applies in blood transfusion cases); Irwin H. Haut & Aaron A. Alter, *Blood Transfusions—Strict Liability?*, 43 ST. JOHN'S L. REV. 557, 562 (1969) (recognizing service-sale dichotomy in blood transfusion cases); Gary L. Boland, *Strict Liability in Tort for Transfusing Contaminated Blood*, 23 ARK. L. REV. 236, 236 (1969) (analyzing whether blood transfusion constitutes service or sale).

27. Compare *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105, 108 (D. Colo. 1964) (reasoning character of blood transfusion is service and not sale) and *Whitehurst v. American Nat'l Red Cross*, 402 P.2d 584, 586 (Ariz. Ct. App. 1965) (furnishing of blood was not sale) and *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 795-96 (N.Y. 1954) (concluding that blood transfusion constituted "service") with *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897, 899 (Ill. 1970) (holding blood was product and sale occurred).

28. Compare *Mingledorff's, Inc. v. Hicks*, 209 S.E.2d 661, 662 (Ga. Ct. App. 1974) (installation of air conditioning system was service) with *Howard Dodge & Sons, Inc. v. Finn*, 391 N.E.2d 638, 641 (Ind. Ct. App. 1979) (installation of air conditioning system was sale).

29. Compare *J & R Elec. Div. of J.O. Mory Stores v. Skoog Constr. Co.*, 348 N.E.2d 474, 477 (Ill. App. Ct. 1976) (finding subcontract for electrical work was not for sale of goods) with *Helvey v. Wabash County REMC*, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972) (supplying electricity was analogous to supplying product). See also Gary D. Spivey, Annotation, *Electricity, Gas, or Water Furnished by Public Utility as "Goods" Within Provisions of Uniform Commercial Code, Article 2 on Sales*, 48 A.L.R.3d 1060, 1061 (1973) (discussing whether electricity constitutes goods as applied to U.C.C.).

30. See *Pineau v. White*, 135 A.2d 716, 718 (N.H. 1957); *Air Heaters v. Johnson Elec.*, 258 N.W.2d 649, 653 (N.D. 1977).

31. Compare *United States Fidelity & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18, 21 (Fla. Dist. Ct. App. 1976) (furnishing, fabricating, and delivering piping constituted sale) with *Meyn v. Ross*, 9 U.C.C. Rep. Serv. (Callaghan) 1357 (Pa. 1971) (providing for material and installation of plumbing system was service). See generally *Sonja A. Soehnel*, Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R.4th 501, 508-10 (1981).

32. See, e.g., *Bevard v. Howat Concrete Co.*, 433 F.2d 1202, 1203 (D.C. Cir. 1970) (supplying concrete amounted to sale); *Wilson v. Daniel Int'l Corp.*, 197 S.E.2d 686, 688 (S.C. 1973) (furnishing and delivering ready-mixed concrete constituted sale). But see *Freeman v. Shannon Constr.*, 560 S.W.2d 732, 737 (Tex. Civ. App. 1977) (finding concrete transaction involved services).

33. Compare *Standard Structural Steel Co. v. Debron Corp.*, 515 F. Supp. 803, 810 (D. Conn. 1980) (intending transfer of steel to predominate agreement and result in sale), *aff'd*, 657 F.2d 265 (2d Cir. 1981) with *Wehr Constr. v. Steel Fabricators*, 769 S.W.2d 51, 54 (Ky. Ct. App. 1988) (concluding steel incorporated into construction contract did not create sale).

34. Compare *Riffe v. Black*, 548 S.W.2d 175, 177 (Ky. Ct. App. 1977) (installing swimming pool amounted to sale) with *Ben Constr. Corp. v. Ventre*, 257 N.Y.S.2d 988, 989 (N.Y. App. Div. 1965) (installing swimming pool amounted to service).

product has been sold in conjunction with the rendering of a service, and as a consequence, the true character of the bargain becomes somewhat ambiguous. In light of the available causes of action for an injured plaintiff, it becomes necessary to determine the nature of the transaction.³⁶

As previously mentioned, the courts have accepted strict liability as an available cause of action when a defective product has caused an injury,³⁷ except in cases in which services were rendered.³⁸ The generally accepted reasons for this position are quite varied. First, individuals who provide services usually do so on a one-on-one basis without the presence of a

35. Compare *Robertson v. Ceola*, 255 Ark. 703, 704, 501 S.W.2d 764, 766 (1973) (finding agreement centered around installation of floor tile was for service) with *Snyder v. Herbert Greenbaum & Assoc.*, 380 A.2d 618, 621 (Md. Ct. Spec. App. 1977) (concluding primary aspect of agreement to provide carpet was for sale).

36. A transaction may involve a pure sale, pure service, or sales/service hybrid variation. See Dana Shelhimer, Comment, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 Sw. L.J. 785, 787-89 (1989) (analyzing application of § 402A in terms of pure sale, pure service, and sales/service transactions). A pure sales transaction occurs when the primary reason for entering into a transaction is for the purchase of a product; therefore, strict liability applies. See *Clary v. Fifth Ave. Chrysler Ctr.*, 454 P.2d 244, 248 (Alaska 1969); *Tuscon Indus. v. Schwartz*, 501 P.2d 936, 940 (Ariz. 1972) (en banc); *Greenman v. Yuba Power Prod.*, 377 P.2d 897, 900 (Cal. 1963) (en banc); *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960). Generally, a plaintiff who is injured by a product will plead a claim not only for strict products liability, but also for breach of warranty under the U.C.C. and negligence. See WILLIAM KIMBLE & ROBERT O. LESHER, *PRODUCTS LIABILITY* § 11, at 17 (1979).

Pure service transactions focus on the service provided rather than the incidental products used while performing the service. See generally John C. Wunsch, *The Definition of a Product for the Purposes of Section 402A*, 50 INS. COUNS. J. 344, 354-57 (1983) (differentiating services and products). All jurisdictions limit the applicability of § 402A to situations involving a product, see cases cited *supra* note 15. See also *Winans v. Rockwell Int'l Corp.*, 705 F.2d 1449, 1452-53 (5th Cir. 1983); *Raritan Trucking Corp. v. Aero Commander, Inc.*, 458 F.2d 1106, 1113 (3d Cir. 1972); *Lemley v. J & B Tire Co.*, 426 F. Supp. 1378, 1379 (W.D. Pa. 1977); Sales, *supra* note 15, at 13. However, New Jersey is the sole exception, see *supra* note 16.

Sales/service hybrid transactions concern furnishing a product in conjunction with performing a corresponding service related to that product. See Sales, *supra* note 15, at 13. Courts are inconsistent when applying strict liability to cases involving sales/service hybrid transactions. Compare *B & B Refrigeration & Air Conditioning Serv. v. Haifley*, 25 U.C.C. Rep. Serv. (Callaghan) 635, 637 (D.C. 1978) (installing air conditioning system constituted sale of goods) with *Mingledorff's, Inc. v. Hicks*, 209 S.E.2d 661, 662 (Ga. Ct. App. 1974) (installing air conditioning system was service). See also *supra* notes 23, 27-29, 31, 33-35.

37. See *supra* note 7.

38. See *supra* note 17.

middle man.³⁹ The service is tailor-made for the person receiving it, and as a result, the provider's skill, knowledge and expertise come into play.⁴⁰ Consequently, all that can be expected from these individuals is that they conduct themselves as reasonable prudent persons. By holding the provider to this standard, the only proper cause of action must, by necessity, be negligence.⁴¹ Second, since the transaction is one-on-one, there is little or no difficulty in locating the cause of an injury.⁴² The injured plaintiff can usually identify not only the provider but the substandard conduct as well.⁴³ Therefore, a cause of action based on negligence is the proper vehicle for recovery. Third, individuals do not conduct themselves with the same exactness and precision of machines.⁴⁴ As a result, persons are expected to perform services with reasonable care, which implicates negligence.⁴⁵ Finally, in a service transac-

39. See *Shelhimer*, *supra* note 36, at 793 (face-to-face relationship between service provider and consumer); *Sales*, *supra* note 15, at 18 (service provider deals face-to-face with consumer). In a service transaction, there is no distributive chain for spreading the risk of injury, and risk distribution represents one of the fundamental underpinnings for imposing strict liability against sellers. *Id.* at 19. See also *Greenman*, 377 P.2d at 901; *Suvada v. White Motor Co.*, 201 N.E.2d 313, 317 (Ill. App. Ct. 1964), *aff'd*, 210 N.E.2d 182 (Ill. 1965).

40. See *Sales*, *supra* note 15, at 25 (consumer bargains for skill, knowledge, and experience of service provider); *Shelhimer*, *supra* note 36, at 793 (consumer expects reasonable care, skill, and expertise from service provider).

41. See, e.g., *Gagne v. Bertran*, 275 P.2d 15, 21 (Cal. 1954) (en banc) (stating that experts are not infallible, therefore, one can only expect reasonable care and competence, not insurance); *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (determining that attorney should exercise best judgment); *Burns v. Forsyth County Hosp. Auth.*, 344 S.E.2d 839, 846 (N.C. Ct. App. 1986) (holding health care provider to reasonable standard of care). This rule of reasonableness with respect to professional services has been consistently followed. See *Allied Properties v. John A. Blume & Assoc., Eng'r*, 102 Cal. Rptr. 259, 264 (Cal. Ct. App. 1972) (listing numerous cases where courts held professionals to reasonableness standard); see generally *Sales*, *supra* note 15, at 18 (essence of service provider transaction is performance of service with reasonable care); *John W. Wade, The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959) (supporting proposition that attorney is liable only for negligence).

42. The same is not true in the case of a defective product. See *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942 (3d Cir. 1968); *Wright v. Creative Corp.*, 498 P.2d 1179, 1183 (Colo. Ct. App. 1972).

43. See *Hoffman v. Simplot Aviation, Inc.*, 539 P.2d 584, 588 (Idaho 1975).

44. See *Newmark v. Gimbel's Inc.*, 258 A.2d 697 (N.J. 1969). The court stated that a doctor's "performance is not mechanical or routine because each patient requires individual study and formulation of an informed judgment as to the physical or mental disability or condition presented, and the course of treatment needed." *Id.* at 703.

45. See *supra* note 41.

tion, the focus is placed on the conduct of the individual,⁴⁶ not on the condition of any product. It follows, therefore, that the proper cause of action should be negligence.⁴⁷

Based on these considerations, it is apparent that strict liability as offered by Section 402A should not be considered in pure service transactions. For this reason, it is necessary to analyze the hybrid bargain. Is it one where a product has been introduced to the market place and as a result any injury may be compensated under the three generally accepted theories of recovery: negligence,⁴⁸ strict liability,⁴⁹ or warranty?⁵⁰ Or is it a pure service transaction where generally the plain-

46. See *Bennett v. Span Indus.*, 628 S.W.2d 470, 473 (Tex. Ct. App. 1981).

47. See *Sales*, *supra* note 15, at 18 (stating that negligence is appropriate remedy for injury caused by defective service); *Shelhimer*, *supra* note 36, at 788 (arguing that pure service transactions are better remedied by negligence).

48. RESTATEMENT (SECOND) OF TORTS § 282 (1965), provides that: "In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others."

49. RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides that:

(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.

50. UNIF. COMM. CODE § 2-313, 1A U.L.A. 101 (1989):

Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express Warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of

tiff's only vehicle for relief is actionable negligence?⁵¹

III. THE PREDOMINANT FACTOR TEST

In the area of tort,⁵² when deciding whether a bargain is for the sale of goods or the rendering of a service, the courts have traditionally applied the predominant factor test.⁵³ This

the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

UNIF. COMM. CODE § 2-314, 1A U.L.A. 212 (1989):

Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variation permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

UNIF. COMM. CODE § 2-315, 1A U.L.A. 380 (1989):

Implied Warranty: Fitness for Particular Purpose.

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.

51. The essential elements of actionable negligence are: (1) the existence of a duty on the part of one party to another; (2) a breach of that duty; and (3) an injury to the person to whom that duty is owed as a proximate result of the breach. *Sedar v. Knowlton Constr. Co.*, 551 N.E.2d 938, 943 (Ohio 1990); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 531 (Tex. Civ. App. 1979); *MacKrell v. Bell H₂S Safety*, 795 P.2d 776, 779 (Wyo. 1990).

52. See *Sicard v. Kremer*, 13 N.E.2d 250, 252 (Ohio St. 1938) (holding that tort may be created from contractual breach and still be independent from that breach).

53. See *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (stating that essence of contract, whether for service or sale of goods, is determined by predominate factor for entering contract); *Hector v. Cedars-Sinai Medical Ctr.*, 225 Cal. Rptr. 595, 597 (Cal. Ct. App. 1986) (ruling that essence of transaction determines when strict liability attaches); *Trujillo v. Berry*, 738 P.2d 1331, 1334 (N.M. Ct. App.) (holding strict liability applicable because product predominated over service), *cert. denied sub nom. H & P Equip. Co. v. Berry*, 738 P.2d 518 (N.M. 1987); see also *Cantu*, *supra* note 14, at 214

test, which is generally a question of fact for the jury,⁵⁴ delves into the true essence or thrust of the hybrid bargain.⁵⁵ Normally, if the defendant's skill,⁵⁶ knowledge,⁵⁷ and/or expertise influence the plaintiff's decision to enter into the agreement, the transaction is likely for the rendition of a service.⁵⁸ If, however, such experience⁵⁹ or training⁶⁰ is not controlling and the plaintiff enters into the agreement because of the product, the bargain is considered a sale.⁶¹ This emphasis on skill and expertise, however, does not imply that only professionals are capable of rendering services. The test applies to *any* situation where the person's experience or skill comes into play.⁶² Regardless of how menial,⁶³ if the person's proficiency induced the plaintiff to enter into the bargain, the agreement will be deemed as one for services.

Oddly enough, the predominant factor test predated Section 402A.⁶⁴ In fact, under the Uniform Sales Act,⁶⁵ which

(arguing that courts have devised predominate factor test to determine main thrust of transaction).

54. *Stillwell v. Cincinnati Inc.*, 336 N.W.2d 618, 618 (N.D. 1983) (stating that whether manufacturer is within scope of strict liability is factual question).

55. *See supra* note 53.

56. *La Jolla Village Homeowners' Ass'n v. Superior Court*, 261 Cal. Rptr. 146, 156 (Cal. Ct. App. 1989); *Roberts v. Suburban Hosp. Ass'n*, 532 A.2d 1081, 1086 (Md. Ct. Spec. App. 1987).

57. *See Dove v. Ruff*, 558 N.E.2d 836, 838 (Ind. Ct. App. 1990).

58. *La Jolla*, 261 Cal. Rptr. at 149; *Roberts*, 532 A.2d at 1086.

59. *See Dove*, 558 N.E.2d at 839; *Air Heaters v. Johnson Elec.*, 258 N.W.2d 649, 654 (N.D. 1977).

60. *See Bittler v. White and Co.*, 560 N.E.2d 979, 982 (Ill. App. Ct. 1990).

61. *See id.* at 982.

62. *See Boddie v. Litton Unit Handling Systems*, 455 N.E.2d 142, 150 (Ill. App. Ct. 1983) (concluding that contracts encompassing erection of building were for service); *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 315 (Minn. 1987) (finding that restoration of creamery's artesian well was service).

63. *See Grossman v. Aerial Farm Serv.*, 384 N.W.2d 488, 490 (Minn. Ct. App. 1986) (aerial application of herbicide); *Boyle v. King County*, 282 P.2d 261, 264 (Wash. 1955) (garbage collection contract).

64. *See Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794 (N.Y. 1954) (finding contract's predominant factor to be rendering of service). In addition, English courts began distinguishing sales from service contracts to determine whether the Statute of Frauds applied. *Clay v. Yates*, 156 Eng. Rep. 1123 (Ex. 1856) (holding that printing contract was for services because materials were incidental to labor); William R. Russell, Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 113-16 (1972).

65. The Uniform Sales Act was drafted in 1906 and contained provisions for both express and implied warranties. UNIF. SALES ACT §§ 12-16, 1 U.L.A. 173 (1950).

preceded the U.C.C.,⁶⁶ many courts were forced to distinguish sales and services.⁶⁷ The obvious reason was the applicability of implied warranties, which arose in sales agreements but not in services.⁶⁸ During that time, the leading cases espoused the idea of the predominant factor of the transaction⁶⁹ to determine the type of bargain that was involved. If an injured plaintiff wished to rely upon the theories furnished by the Sales Act, it was crucial for that person to prove that a product was purchased, and not a service.⁷⁰ Warranties,⁷¹ and particularly implied warranties,⁷² arose only when goods rather than services entered the stream of commerce. Thus, it was

66. In 1952, the U.C.C. was adopted by the commissioners on uniform state laws. UNIF. COMM. CODE, 1 U.L.A. iii (1989).

67. See *Napoli v. St. Peter's Hosp. of Brooklyn*, 213 N.Y.S.2d 6, 9 (N.Y. Sup. Ct. 1961) (ruling that blood products supplied by hospital were secondary to services for restoring health); *Krom v. Sharp & Dohme, Inc.*, 180 N.Y.S.2d 99, 101 (N.Y. App. Div. 1958) (finding transaction not sale because hospital services predominated over incidental personalty transfer); *Kasey v. Suburban Gas Heat of Kennewick*, 374 P.2d 549, 551 (Wash. 1962) (applying warranty provisions of Sales Act because purchase of propane from dealer considered sale); *Gile v. Kennewick Pub. Hosp. Dist.*, 296 P.2d 662 (Wash. 1956) (holding patient's contract with hospital was for services and indivisible).

68. UNIF. SALES ACT § 15, 1 U.L.A. 215 (1950). The pertinent portion referring to the implied warranties of a sale reads:

§ 15. Implied warranties of quality.

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

69. See generally *Rowe v. Oscar Ewing Distrib. Co.*, 357 S.W.2d 882, 884 (Ky. 1962) (lending defective glass bottle was incidental service to milk sale); *Betehia v. Cape Cod Corp.*, 103 N.W.2d 64, 66 (Wis. 1960) (finding both food preparation and service in restaurant are incidental to dominant purpose of sale).

70. See *Krom*, 180 N.Y.S.2d at 101; *Kasey*, 374 P.2d at 551.

71. See *supra* note 65.

72. See *supra* note 68.

likewise necessary to define the nature of the transaction under the U.C.C. as well as the Restatement.⁷³

For example, the comments to Section 402A state, in part that:

[t]he rule stated in this Section applies to any person engaged in the business of selling *products* for use or consumption. . . .

. . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with *products* which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such *goods*.⁷⁴

In short, the provisions of Section 402A⁷⁵ were to apply only to the sale of goods. In adhering to that position, the courts dealt with hybrid transactions by applying the predominant factor test in tort cases in much the same way they had in contract cases.⁷⁶ What was not foreseen at the time Section 402A came into existence,⁷⁷ however, was that the courts, eager to adopt this new tort,⁷⁸ would arrive at some very un-

73. See *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974); *Silverhart v. Mount Zion Hosp.*, 98 Cal. Rptr. 187, 191 (Cal. Ct. App. 1971) (medical services); *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977) (installation of swimming pool); *Worrell v. Barnes*, 484 P.2d 573, 573 (Nev. 1971) (contractor supplied defective gas fitting); *Trujillo v. Berry*, 738 P.2d 1331, 1334 (N.M. Ct. App.) (car wash supplier), *cert. denied sub nom. H & P Equip. Co. v. Berry*, 738 P.2d 518 (N.M. 1987).

74. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965) (emphasis added).

75. *Supra* note 49.

76. See, e.g., *Stafford v. International Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981) (concluding that predominant factor of transaction was for service and repair of truck); *Hector v. Cedars-Sinai Medical Ctr.*, 225 Cal. Rptr. 595, 597 (Cal. Ct. App. 1986) (citing *Silverhart v. Mount Zion Hosp.*, 98 Cal. Rptr. 187 (Cal. Ct. App. 1971)) (explaining that essence of relationship while hospital installs pacemaker is professional service).

77. See *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964). The Fifth Circuit, fully aware that the final version of § 402A was moving toward adoption, concluded that since 1958 practically every court that had considered applying strict liability had taken positions indicating a favorable response to the new section as it was ultimately written. *Id.* at 919.

78. See, e.g., *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966) (concluding § 402A states appropriate standards of responsibility for manufacturer of a product), *cert. denied sub nom. Yates v. Hodges*, 386 U.S. 912 (1967); *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966) (declaring approval and quoting § 402A provisions); *McKisson v. Sales Affiliates Inc.*, 416 S.W.2d 787, 789-90 (Tex. 1967) (adopting

sual decisions.

IV. UNUSUAL DECISIONS RESULTING UNDER SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS

From the beginning, it was conceded that Section 402A was weighted in favor of the plaintiff.⁷⁹ It was primarily adopted so that an individual who was injured by a defective product would find it easier to recover under the theory of strict liability rather than the traditional negligence action.⁸⁰ Under the Restatement,⁸¹ once a plaintiff overcame the hurdle of establishing a defect, recovery was almost certain.⁸² Viewed from a different perspective, under Section 402A it was no longer a defense for a defendant to prove that he or she did all that a reasonable prudent person⁸³ could or would have done under similar circumstances.⁸⁴ The emphasis that was once placed on the conduct of the defendant shifted, so that

§ 402A as the expression of strict tort liability), *rev'g* 408 S.W.2d 124 (Tex. Civ. App. 1967).

79. *Pierce v. Pacific Gas & Elec. Co.*, 212 Cal. Rptr. 283, 291 (Cal. Ct. App. 1985). According to the court, one of the main policy grounds for applying strict liability to electricity is to provide a "short-cut to liability where negligence may be present but is difficult to prove." *Id.* The court further stated:

Proof of negligence in cases such as this requires a plaintiff to present to a jury evidence of the inner workings of an electrical power system of vast and complex proportions. The technical operation of such systems and of electricity itself is far beyond the knowledge of the average juror. The expert witnesses who can explain such systems to the jury are concentrated within the industry itself and may be reluctant to serve as expert witnesses in plaintiff's cases.

Id.

80. *Id.*

81. The argument is founded on a literal reading of RESTATEMENT (SECOND) OF TORTS § 402A (1965), which states, in part: "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 . . ."

82. *See Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 798 (Wis. 1975) (finding that unreasonably dangerous defective product is requisite element to strict liability); RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (stating that among other elements, defective condition is defined as condition not contemplated by user and is unreasonably dangerous to user).

83. *See Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975).

84. *Bennett v. Span Indus.*, 628 S.W.2d 470, 473 (Tex. Ct. App. 1981); RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

under Section 402A the courts began looking at the product.⁸⁵ Therefore, in some cases, it soon became evident that to grant relief under the Restatement,⁸⁶ the courts were going to have to stretch its provisions. As a result, there was more of an interest in adopting strict liability in tort rather than following the content of Section 402A.⁸⁷

This interest in adopting strict liability was particularly popular in those situations in which it was necessary to define the term *product*.⁸⁸ But, in defining product, the courts were not explicitly dealing with the question of whether the bargain was for the rendering of a service or the sale of goods. Thus, the cases discussed below were not hybrid transactions per se. Nevertheless, there was a definite momentum⁸⁹ toward adopting Section 402A, and by necessity this required the courts to determine that a product was in fact the subject of the agreement between the parties. This particular maneuver caused many unusual results.

This phenomenon is best illustrated in transactions involving real estate. In layman's terms, land is the antithesis of goods.⁹⁰ Nonetheless, *Schipper v. Levitt & Sons, Inc.*⁹¹ had little difficulty in determining that an agreement for the sale of a

85. See *Ault v. International Harvester Co.*, 528 P.2d 1148, 1150 (Cal. 1974); *Sutkowski v. Universal Marion Corp.*, 281 N.E.2d 749, 753 (Ill. App. Ct. 1972).

86. See *supra* note 49 for full text of RESTATEMENT (SECOND) OF TORTS § 402A (1965).

87. See, e.g., *Delaney v. Towmotor Corp.*, 339 F.2d 4, 6 (2d Cir. 1964) (finding strict liability for injury caused by demonstrator model of forklift); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769, 777 (N.J. 1965) (applying rule to lease agreements).

88. See *Vincent v. Jim Walter Homes, Inc.*, 1978 Prod. Liab. Rep. (CCH) ¶ 8278 (Tenn. Ct. App. 1978) (holding that when parties contract to build and purchase home, completed structure constitutes product within § 402A); *Hovenden v. Tenbush*, 529 S.W.2d 302, 306 (Tex. Civ. App. 1975) (noting that neither § 402A nor its comments indicate that rule is inapplicable to merchants of used products). See generally Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635 (1991).

89. See *Kopet v. Klein*, 148 N.W.2d 385, 390 (Minn. 1967) (ruling that sale and installation of chattel constitutes sale of product); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 123 (Miss. 1966) (finding sale of product when home builder defectively installed water heater), *cert. denied sub nom. Yates v. Hodges*, 386 U.S. 912 (1967).

90. See Cantu, *supra* note 88, at 645.

91. 207 A.2d 314 (N.J. 1965); see also *Avner v. Longridge Estates*, 77 Cal. Rptr. 633 (Cal. Ct. App. 1969) (applying strict liability to house lots that subsided due to defective subsurface conditions).

house is in fact a transaction for the sale of a product. In *Schipper*, the court reasoned that an individual buying a mass produced home was no different from one buying an automobile.⁹² Both the home and automobile were results of assembly line techniques.⁹³ The court also employed several policy considerations in arriving at its conclusion.⁹⁴ What is important, however, is the decision that a house is a product, and if defective and unreasonably dangerous, that product mandates strict liability for injuries sustained.⁹⁵ It must be mentioned, though, that *Schipper* does not represent a general consensus.⁹⁶

In like manner, electricity has been deemed a product.⁹⁷ The courts in these instances have been very creative in their reasoning. One court concluded that not only is electricity capable of being produced, stored, measured, and transported, but it can likewise be sold by a definite and well understood standard; therefore, it constitutes a good like any other commodity.⁹⁸ In arriving at the same conclusion, another court

92. "Buyers of mass produced development homes are not on equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale." *Schipper*, 207 A.2d at 326.

93. *Id.* at 325.

94. The court specifically referred to the unequal bargaining positions of the parties; the buyer's reliance upon the skill, knowledge, and expertise of the contractor; the builder's ability to spread the cost of liability; and the corresponding inability of the buyers to protect themselves from the risk of probable loss. *Id.* at 325-26.

95. *Id.* at 329-30.

96. *E.g.*, *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334, 1348 (D. Colo. 1980); *K-Mart Corp. v. Midcon Realty Group*, 489 F. Supp. 813, 817 (D. Conn. 1980); *Greene v. Green Acres Constr. Co.*, 543 P.2d 108, 110 (Colo. Ct. App. 1975); *Wright v. Creative Corp.*, 498 P.2d 1179, 1182-83 (Colo. Ct. App. 1972); *Coburn v. Lenox Homes*, 378 A.2d 599, 602 (Conn. 1977); *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977); *Cree Coaches, Inc. v. Panel Suppliers*, 186 N.W.2d 335, 336 (Mich. 1971); *Queensbury Union Free School Dist. v. Jim Walter Corp.*, 442 N.Y.S.2d 650, 651 (N.Y. App. Div. 1981), *appeal dismissed*, 431 N.E.2d 642 (N.Y. 1981); *Van Ornum v. Otter Tail Power Co.*, 210 N.W.2d 188, 201 (N.D. 1973); *Cook v. Salishan Properties*, 569 P.2d 1033, 1035-36 (Or. 1977) (en banc); *Cox v. Shaffer*, 302 A.2d 456, 457 (Pa. Super. Ct. 1973).

97. *See, e.g.*, *Aversa v. Public Serv. Elec. & Gas Co.*, 451 A.2d 976, 980 (N.J. Super. Ct. 1982) (arguing that where electricity is placed in stream of commerce, strict liability principles apply); *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1133 (Pa. Super. Ct. 1985) (explaining that electricity is product for purposes of § 402A); *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 648 (Wis. 1979) (finding electricity is product for purpose of strict liability).

98. *See State v. Interstate Power Co.*, 226 N.W. 427, 433 (Neb. 1929). In *Inter-*

adopted the reasons for employing strict liability.⁹⁹ Once again, however, what is of concern is that each court arrived at the unusual decision that electricity, which was defined as "a force, like the wind,"¹⁰⁰ is a product.¹⁰¹ This liberal approach has also been employed in fact situations concerning water,¹⁰² component parts,¹⁰³ and computer software.¹⁰⁴ It

state Power Co., the court refused to recognize "raw products" and "manufactured products" as mutually exclusive terms. *Id.* at 433. The defendants proposed that by distinguishing the two terms, electricity in its "raw" form should not be deemed a product. *Id.* The court, however, stated that a "[p]roduct" is defined by authoritative lexicographers as "a thing produced by nature or the natural processes; that which is produced by an action, operation or work; a production; the results; that which results from operation of a cause, consequence, or effect." *Id.* The court continued by establishing electricity as a commodity.

[I]n the language of everyday life and in the strictly commercial sense of the term, "electricity" is "produced," "stored," "measured," "bought and sold." It is moved or transported from place to place in containers or by cable. It is something that one trades or deals in. We buy it and pay for it and determine the amount of our purchases by [a] definite and well-understood "standard." Brought into being as a product, it exists in modern life as a commodity.

Id. Electricity has been defined as "a form of energy that can be made or produced by men, confined, controlled, transmitted and distributed to be used as an energy source for heat, power, and light and is distributed in the stream of commerce." *Ransome*, 275 N.W.2d at 643. See also *Terrace Water Co. v. San Antonio Light & Power Co.*, 82 P. 562, 563 (Cal. Ct. App. 1905) (illustrating that defendant contracted to sell energy in which it had ownership as personal property); *Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Springs Inv. Co.*, 111 P. 834, 835 (Colo. 1910) (describing heating agents such as water and steam as merchantable products).

99. *Pierce v. Pacific Gas & Elec. Co.*, 212 Cal. Rptr. 283 (Cal. Ct. App. 1985). One of the main policy grounds for applying strict liability to electricity is "to provide a 'short-cut' to liability where negligence may be present but is difficult to prove . . ." *Id.* at 291. The court also looked to three other strict liability policy considerations in making its decision. First, defendants are in a much better position than plaintiffs to detect and correct electrical supply problems. *Id.* Second, defendants will have an incentive to avoid accidents by creating safer products. *Id.* at 292. Finally, defendants are able to spread the associated costs among millions of consumers. *Id.*

100. *Id.* at 288 n.3.

101. In *Pierce*, a home consumer of electricity was injured due to the mechanical failure of a transformer that sent 7000 volts of electricity into her home. *Id.* at 285. The court noted: "Electricity alone cannot perform work. Electricity alone is useless from a consumer's point of view. Electricity is a stream of electrons that is created, transmitted, distributed, and converted to energy all within milliseconds. No California court has ever held that electricity is a product." *Id.* at 288 n.3. In this case, however, the court held that a commercial supplier of electricity could be strictly liable for personal injuries. *Id.* at 291.

102. *Moody v. City of Galveston*, 524 S.W.2d 583, 588 (Tex. Civ. App. 1975).

103. Scott Gordon Night, Comment, *Products Liability: Component Part Manufacturer's Liability for Design and Warning Defects*, 54 J. AIR L. & COM. 215, 226 (1988).

104. See Diane B. Lawrence, *Strict Liability, Computer Software and Medicine:*

was also extended to a case involving an incorrect pilot's landing chart, which can best be described as a "defective idea."¹⁰⁵

On the other hand, innovative plaintiffs have tried, but failed to apply the definition of product to erroneous credit reports,¹⁰⁶ a magazine article involving autoerotic asphyxiation that allegedly caused a death,¹⁰⁷ a science experiment in a text book which went awry,¹⁰⁸ recipes,¹⁰⁹ and lyrics of a song that supposedly induced a teenager to commit suicide.¹¹⁰ Oddly enough, blood has escaped the trend of becoming classified as a product.¹¹¹ This is primarily because the legislatures in forty-nine states have enacted what can be collectively designated as "blood shield" statutes,¹¹² which expressly or

Public Policy at the Crossroads, 23 TORT & INS. L.J. 1, 9 (1987); see also Peter G. Neuman, *Risks to the Public in Computers and Related Systems*, SOFTWARE ENGINEERING NOTES, July 1987, at 2; Ed Joyce, *Software Bugs: A Matter of Life and Liability*, DATAMATION, May 15, 1987, at 88.

105. *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 342 (9th Cir. 1981). *But see* *Sears, Roebuck & Co. v. Employers Ins. of Wausau*, 585 F. Supp. 739, 745 (N.D. Ill. 1983) (implicating that products liability action for defective ideas within manual may have been inappropriate). See also Andrew T. Bayman, Comment, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557 (1989).

106. *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1430 (D. Conn. 1986); see also Bayman, *supra* note 105, at 569.

107. *Herceg v. Hustler Magazine*, 565 F. Supp. 802, 803 (S.D. Tex. 1983), *modified on other grounds*, 814 F.2d 1017 (5th Cir. 1987), and *cert. denied*, 485 U.S. 959 (1988). In *Herceg*, the plaintiffs brought a wrongful death suit against *Hustler* magazine alleging that an article on autoerotic asphyxiation was an unreasonably dangerous and defective product that caused the deaths of the plaintiff's son and brother. The decedents attempted to duplicate the sexual technique in the magazine, which was intended to increase erotic pleasure during masturbation.

108. *Walter v. Bauer*, 439 N.Y.S.2d 821, 822 (N.Y. Sup. Ct. 1981), *modified on other grounds*, 451 N.Y.S.2d 533 (N.Y. App. Div. 1982). In *Walter*, a child suffered injuries after attempting to duplicate an experiment involving a ruler and rubber bands. The court rejected the strict liability claim on the basis that the "plaintiff was not injured by use of the book for the purpose for which it was designed, i.e., to be read." *Id.* at 822.

109. See *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App.) (ruling that cook book recipes were not subject to strict liability), *cert. denied*, 353 So. 2d 674 (Fla. 1977).

110. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 189 (Cal. Ct. App. 1988).

111. See *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105, 108 (D. Colo. 1964) (holding that blood transfusion is service); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 132 N.W.2d 805, 810-11 (Minn. 1965) (interpreting statute as blood supplier provides service and not product); see generally *Roberts v. Suburban Hosp. Ass'n*, 532 A.2d 1081, 1086 (Md. Ct. Spec. App. 1987) (stating that blood transfusion uses defendant's skill to restore health, therefore, blood is not product).

112. See ALA. CODE § 7-2-314(4) (1984) (providing blood is service); ALASKA

impliedly provide that strict liability shall not apply to trans-

STAT. § 45.02.316(e) (1986) (hospital provides blood as service); ARIZ. REV. STAT. ANN. § 32-1481(B) (1992) (nonprofit blood bank cannot be strictly liable); ARK. CODE ANN. § 20-9-802 (Michie 1991) (blood provider liable only for negligence or willful misconduct); CAL. HEALTH & SAFETY CODE § 1606 (West 1990) (blood transfusion is service not sale); COLÓ. REV. STAT. ANN. § 13-22-104(2) (1989) (blood transfusion constitutes service); CONN. GEN. STAT. ANN. § 19a-280 (West 1986) (providing blood is service); DEL. CODE ANN. tit. 6 § 2-316(5) (1975) (blood transfusion is service); D.C. CODE ANN. § 28-2-314 (1991) (against public policy to hold blood bank strictly liable); FLA. STAT. ANN. § 672.316(5) (West Supp. 1992) (blood transfusion is rendition of medical service); GA. CODE ANN. § 11-2-316(5) (Michie 1982) (providing blood is medical service); HAW. REV. STAT. § 325-91 (Repl. 1985) (no implied warranty that blood is pure where scientific test to detect disease is unavailable); IDAHO CODE § 39-3702 (Supp. 1992) (blood transfusion is service); ILL. ANN. STAT. ch. 111½ para. 5102 § 2 (Smith-Hurd 1988) (strict tort liability not applicable to blood providers); IND. CODE ANN. § 16-8-7-2(a) (Burns Supp. 1992) (procurement of blood is a service which does not give rise to strict liability); IOWA CODE ANN. § 142A.8 (West 1989) (providing blood is service); KAN. STAT. ANN. § 65-3701 (1985) (providing blood is rendition of service and no liability absent negligence); KY. REV. STAT. ANN. § 139.125 (Michie/Bobbs-Merrill Repl. 1991) (processing and distribution of blood deemed service); LA. CIV. CODE ANN. art. 2322.1 (West Supp. 1992) (strict liability not applicable to blood providers); ME. REV. STAT. ANN. tit. 11, § 2-108 (West Supp. 1991) (providing blood is service regardless of any remuneration); MD. CTS. & JUD. PROC. CODE ANN. § 5-373 (Supp. 1992) (supplier of blood performs service); MASS. ANN. LAWS ch. 106, § 2-316(5) (Law. Co-op. 1984) (blood is a service and not subject to implied warranties); MICH. COMP. LAWS ANN. § 333.9121 (West 1992) (providing blood is service regardless of profit); MINN. STAT. ANN. § 336.2-315 (West 1966) (interpreted to mean blood supplier provides service); MISS. CODE ANN. § 75-2-314 (1981) (may be cited for holding that blood transfusion is service); MO. ANN. STAT. § 431.069 (1992) (procurement of blood is rendition of medical service); MONT. CODE ANN. § 50-33-102 (1991) (furnishing blood not sale of product); NEB. REV. STAT. § 71-4001 (1990) (procuring blood is rendition of service); NEV. REV. STAT. § 460.010 (1991) (no liability for providing blood other than negligence or willful misconduct); N.H. REV. STAT. ANN. § 507:8-b (1983) (no strict liability regarding blood products); N.M. STAT. ANN. § 24-10-5 (Michie Repl. 1991) (no liability for blood processing other than negligence or willful misconduct); N.Y. PUB. HEALTH LAW § 580(4) (McKinney 1990) (procuring blood is service); N.C. GEN. STAT. § 130A-410 (1989) (blood transfusion is service); N.D. CENT. CODE § 43-17-40 (Repl. 1978) (no liability for blood except negligence or willful misconduct); OHIO REV. CODE ANN. § 2108.11 (Anderson Supp. 1991) (sale of blood constitutes service); OKLA. STAT. ANN. tit. 63 § 2151 (West 1984); OR. REV. STAT. § 97.300 (Repl. 1990) (sale of blood not sales transaction); PA. CONS. STAT. ANN. tit. 42, § 8333 (Purdon 1982) (no strict liability for blood transfusion); R.I. GEN. LAWS § 23-17-30 (1989) (no liability for blood transfusion other than negligence or willful misconduct); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985) (sale of blood is medical service); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1988) (sale of blood is medical service); TENN. CODE ANN. § 47-2-316(5) (Repl. 1979) (implied warranties inapplicable to sale of blood); TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (Vernon Supp. 1992) (no liability for blood transfusion except for negligence, gross negligence or intentional tort); UTAH CODE ANN. § 26-31-1 (Repl. 1989) (sale of blood participant provides service); VT. STAT. ANN. tit. 9A, § 2-108 (Supp. 1992) (procurement of blood is service); VA. CODE ANN. § 32.1-297 (Repl. 1992) (no action for implied warranty in connection

actions involving blood. New Jersey's legislature is the sole dissenter in this area; however, it was judicially decided that strict liability may not apply to blood transfusions.¹¹³

Although the issue of a hybrid transaction was not patently presented by some of these cases, the decisions illustrate how far some courts have gone in their zeal to apply strict liability under Section 402A. If there had been a service issue, the courts would have unquestionably applied the predominant factor test. The following discussion illustrates, however, that it may be unnecessary to align a product against a service when applying the provisions of the Restatement. An alternative method that is more direct and logical will permit the courts to deal with fact situations of this kind.

V. THE GRAVAMEN TEST

Unlike the predominant factor test, which focuses on the nature of the transaction, the gravamen test concentrates on the cause of the injury. Application of this test is simple and direct. More importantly, there is no need to stretch the meaning of any particular term. The theory first arose in 1982,¹¹⁴ apparently in response to the Nevada Supreme Court's decision in *Worrell v. Barnes*.¹¹⁵ The plaintiff hired the defendant contractor to do carpentry work in his home and to connect various appliances to an existing liquefied pe-

with transfer of blood or human tissue); WASH. REV. CODE ANN. § 70.54.120 (West 1992) (no implied warranty for blood service unless donor received compensation); W. VA. CODE § 16-23-1 (Repl. 1991) (procurement of blood declared not to be sale); WIS. STAT. ANN. § 146.31 (West 1989) (blood transfer constitutes service and subject to liability only for negligence or willful misconduct); WYO. STAT. § 34.1-2-316(c)(iv) (1991) (dispensing blood constitutes medical service).

113. *Brody v. Overlook Hosp.*, 317 A.2d 392, 394 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 332 A.2d 596 (N.J. 1975). The reluctance by the legislature to enact a New Jersey blood shield statute may be due, in part, to the courts' willingness to apply strict liability to pure service transactions. *See, e.g.*, *Michalko v. Cooke Color & Chem. Corp.*, 451 A.2d 179, 186-87 (N.J. 1982) (imposing strict liability on service providers); *Newmark v. Gimbel's Inc.*, 258 A.2d 697, 702 (N.J. 1969), *aff'g* 247 A.2d 886 (N.J. 1968), where the court held:

One, who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transaction involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm.

114. 1 HAWKLAND, *supra* note 21, § 2-102:04, at 12.

115. 484 P.2d 573 (Nev. 1971).

troleum gas system.¹¹⁶ The plaintiff subsequently sued for damages that resulted from a fire caused by a defective fitting that was installed by the contractor. The causes of action were based on both strict liability under the Restatement and implied warranty as contained in the U.C.C.¹¹⁷ Although the lower court dismissed the claim, the supreme court reversed that decision because there was a finding that the contractor had sold a product, therefore, allowing the plaintiff to invoke strict liability.¹¹⁸ Additionally, the court determined that the case involved goods that were subject to implied warranties.¹¹⁹

As a consequence of the *Worrell* decision, Chancellor William D. Hawkland suggested an idea that has since become known as the gravamen test. In his most quoted segment, he wrote:

Unless uniformity would be impaired thereby, it might be more sensible and facilitate administration, at least in [the hybrid transaction], to abandon the "predominant factor" test and focus instead on whether the gravamen of the action involves goods or services. For example, in *Worrell v. Barnes*, if the gas escaped because of a defective fitting or connector, the case might be characterized as one involving the sale of goods. On the other hand, if the gas escaped because of poor work by [the contractor] the case might be characterized as one involving services, outside the scope of the U.C.C.¹²⁰

Since then, the test has been adopted by a respectable number of courts in sales/service fact situations that involved the U.C.C.¹²¹ These courts have for the most part abandoned the predominant factor test, which was applied to this issue long before the U.C.C. existed.¹²² The most obvious advantage to

116. *Id.* at 574.

117. *Id.* at 576.

118. *Id.* at 575.

119. *Id.*

120. 1 HAWKLAND, *supra* note 21, § 2-102:04, at 12.

121. *E.g.*, *Skelton v. Druid City Hosp. Bd.*, 459 So. 2d 818 (Ala. 1984); *Anthony Pools v. Sheehan*, 455 A.2d 434, 441 (Md. 1983); *see also In re Trailer and Plumbing Supplies*, 578 A.2d 343, 345 (N.H. 1990) (dictum) (stating that case must allege either defective product or service to require gravamen analysis).

122. *See Anthony Pools*, 455 A.2d at 439-41 (expressing that if predominant factor test were applied, there would be no implied warranties for defective diving boards); *In re Trailer*, 578 A.2d at 345 (ruling that gravamen test, rather than predominant factor test, applies to future cases alleging defective product or service).

injured plaintiffs under this new idea is that even though the transaction is predominantly for the rendering of consumer services, the warranty provisions of the U.C.C. continue to apply to any product involved in the agreement.¹²³ By focusing on the cause of the injury rather than the nature of the transaction, the courts are able to afford an injured plaintiff remedies that would otherwise be lost. These courts have moved away from what has been described as the mechanical approach¹²⁴ of the predominant factor test, and as a result have reached more equitable and logical decisions.

Although the gravamen test arose in cases where the theory was contractual, its rational approach is likewise applicable in the area of tort. Under U.C.C. provisions, the issue is whether or not a product is present so as to permit a cause of action based on a warranty. Under the Restatement, the issue is the same, but only because we seek to apply the theory of strict liability. It is not difficult to see that in hybrid transactions the problem of the applicable theory is more easily solved under the gravamen test as opposed to the predominant factor test. For example, although an agreement is for the fitting of contact lenses,¹²⁵ the question under the gravamen test no longer depends upon the skill or expertise of the defendant or the reason the plaintiff entered into the transaction. Instead, the court focuses on the cause of the injury. If the plaintiff receives an injury as a result of defective lenses, the appropriate causes of action may now be strict liability under Section 402A, breach of warranty under the U.C.C., and/or the common law theory of actionable negligence. If, on the other hand, the injury results from unreasonable conduct while the lenses are being fitted, the plaintiff may pursue only a claim for actionable negligence. The same logic should be followed in any agreement involving the sale of a product with

123. *Miles Laboratories, Inc. v. Doe*, 556 A.2d 1107, 1117 (Md. 1989); *Anthony Pools*, 455 A.2d at 441.

124. GEORGE I. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE*, ¶ 11.05[3], at 11-28 (1981), states that: "If the service aspect predominated, no warranties of quality were imposed in the transaction, not even if the defect or complaint related to the goods that were involved rather than to the services. This mechanical approach remains the most popular method of resolving the issue."

125. *See supra* note 24.

an attending service.¹²⁶

In addition to simplifying the approach to hybrid transactions, the gravamen test will prevent an illogical extension of some terms in Section 402A. It will no longer be necessary, for example, to include houses,¹²⁷ electricity,¹²⁸ water,¹²⁹ component parts,¹³⁰ computer software,¹³¹ or defective ideas¹³² under the designation of product. Moreover, injured plaintiffs will not be led to mischaracterize other similar subject matter.¹³³ Instead, by focusing on the cause of the injury and not the nature of the transaction, the injured plaintiffs will be entitled to the remedies available under strict liability in any situation where the injury was caused by the defendant placing a defective product into the stream of commerce.¹³⁴ In so doing, the true intent of Section 402A will be given effect.

VI. CONCLUSION

When confronted with a hybrid transaction, a court has several tests that determine whether an individual is entitled to the relief provided by the U.C.C. as well as the Restatement. Some have delineated the nature of the bargain based on the distinction of a commercial versus a professional basis,¹³⁵ the "English Rule,"¹³⁶ a principle of policy,¹³⁷ or some

126. See cases cited *supra* notes 25-35 for other examples of hybrid transactions. In the absence of the legislatively enacted blood shield laws, *supra* note 112 and accompanying text, the same would be true in cases involving blood transfusions.

127. See *supra* note 91.

128. See *supra* note 97.

129. See *supra* note 102.

130. See *supra* note 103.

131. See *supra* note 104.

132. See *supra* note 105.

133. See *supra* notes 106-10 and accompanying text.

134. *Phipps v. General Motors Corp.*, 363 A.2d 955, 963 (Md. 1976).

135. [T]here has been judicial willingness to abandon the sale-service distinction in determining whether to impose liability without fault. This has been true, however, only when the relationship between plaintiff and defendant arises from a *commercial* transaction, such as a restaurant's service of spoiled food or a beautician's application of a defective wave solution. On the other hand, when a defective product is supplied in conjunction with a *professional* service, such as dentistry or medicine, the distinction between sales and services continues.

Russell, *supra* note 64, at 112 (emphasis in original) (footnotes omitted).

136. In England, the Statute of Frauds' writing requirement was applicable for "sale of goods" contracts, but was inapplicable for "performance of services" contracts;

other norm. However, the basis that has become the most widely used, and the one which appears to incorporate all of the elements under one heading, is the predominant factor test.¹³⁸ This standard was first used under the Uniform Sales Act and subsequently incorporated into cases arising under the U.C.C. and Section 402A. It concentrates on the nature of the transaction and by so doing determines whether an injured plaintiff is entitled to the remedies of warranty and/or strict liability.

In contrast, the gravamen test, which is relatively new, virtually ignores the nature of the agreement and instead focuses on the cause of the plaintiff's injury. This test is not only more direct and logical, but it also achieves more equitable results. There is no need to stretch terms beyond their traditional meanings, and even in those transactions that are primarily service-oriented, an individual may still recover under the warranty provisions of the U.C.C. If the product is proven to be defective, the remedy of strict liability under the Restatement should be utilized as well. Up to now, this test has been employed exclusively in the area of contract, but as shown, it would operate equally as well in the sphere of tort. Because there is no apparent reason for rejecting the gravamen test, it should be adopted as the determinative test in the hybrid sales/service transaction under Section 402A of the Restatement (Second) of Torts.

therefore, the English Rule was adopted to distinguish sales from services. See *Lee v. Griffin*, 121 Eng. Rep. 716 (K.B. 1861). The English Rule was based on determining whether work and labor produced tangible goods which were the basis of a sale; if so, the "sale of goods" contract was required to be in writing. *Id.* at 718.

137. Based on equity and public policy, courts use a "policy" test on an ad hoc basis to examine the particular case facts and determine if the U.C.C. principles apply. Crystal L. Miller, Note, *The Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web*, 59 NOTRE DAME L. REV. 717, 718 (1984).

138. See *supra* note 53.

