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# THE SERVICE-SALES TRANSACTION: A CITADEL UNDER ASSAULT

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## INTRODUCTION

If any general, though not absolute, rules can be extrapolated from the emerging law of strict tort liability, they are: (1) that the doctrine of strict tort liability, as fashioned in section 402A *Restatement (Second) of Torts,*[1] was formulated to apply to sellers of defective products engaged in the regular business of selling products;[2] and (2) that the doctrine of strict tort liability was neither intended nor promulgated to encompass providers of services.[3] Significantly, many transactions of a commercial nature are characterized as neither pure sale nor pure service. It is this continuum between the pure sale and the pure service transaction that has precipitated the confusion manifested by the service-sale dichotomy.

The true service-sales transaction involves the furnishing of a product in the course of performing a personal service contract. Initially, when the service predominated and a product was only incidentally involved, the courts declined to extend either the doctrines of strict tort liability or implied warranty to the transaction.[4] Recently, however, some commentators have rejected the service-

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section provides:

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

(a) the seller is engaged in the business in 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.

*Id.*

2. *Id.* § 402A(1)(a).

3. *See, e.g.,* Allied Properties v. John A. Blume & Assocs., 102 Cal. Rptr. 259, 264 (Ct. App. 1972); Magrine v Krasnica, 227 A.2d 539, 547 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam,* 250 A.2d 129 (N.J. 1969); Gagne v. Bertran, 275 P.2d 15, 20 (Cal. 1954). *See generally* Annot., 29 A.L.R.3d 1425 (1970).

4. This rule was first promulgated in the implied warranty case of Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 794 (N.Y. 1954).

sales characterization and have suggested that service providers are strictly liable in tort for defects in products that reach consumers incidental to the performance of a service.[5] This view totally ignores the valid distinction between the service provider incidentally supplying a product in the course of performing a service and a retailer engaging in the regular business of distributing products to the consuming public. The failure to distinguish between these two entities disregards the unique and legally distinct character of each. The quintessential issue, therefore, involves a determination of when a service provider assumes the legally distinct status of a seller of products within the intendment of section 402A of the *Restatement (Second) of Torts*.

A number of penumbral areas complicate the task of determining the point at which a service transaction metamorphasizes into a sales transaction.[6] As an example, does a dentist "sell" novocaine to the patient or is the novocaine merely used in performing professional services on the patient? The same question may be directed to the throw-away needle used by the physician to inject a drug into the patient.[7] Is the permanent wave lotion applied by a beauty salon operator "used" in the performance of a service, or is it "sold" in a regular business transaction?[8]

Another ill-defined area involves the legally questionable distinction between true professional service providers, such as doctors, dentists and attorneys, and nonprofessional service providers such as beauty parlor operators, plumbers and auto repairmen. There is essential unanimity that the doctrine of strict tort liability does not

5. *See generally* Newmark v. Gimbel's, Inc., 258 A.2d 697, 701 (N.J. 1969); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transactions*, 24 HASTINGS L.J. 111 (1972); Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970); Comment, *Sales-Service Hybrid Transactions, A Policy Approach*, 28 SW. L.J. 575 (1974); *see also* Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 U.C.L.A. L. REV. 401 (1974), in which the author proposes the application of strict liability to all services by means of an elaborate social engineering shift in our views of liability and insurance. *But see* J. SALES & J. PERDUE, THE LAW OF STRICT TORT LIABILITY IN TEXAS 111-19 (1977), in which the authors dispute the legitimacy of extending the doctrine.

6. *See* Phipps, *When Does a "Service" Become a "Sale"?*, 39 INS. COUN. J. 274, 276-77 (1972).

7. *See* Magrine v. Krasnica, 227 A.2d 539 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969).

8. *Compare* Epstein v. Giannattasio, 197 A.2d 342, 345 (Conn. C.P. 1963) (service not sale) *with* Carpenter v. Best's Apparel, Inc., 481 P.2d 924, 927 (Wash. Ct. App. 1971) (product a basic part of transaction).

apply to the true professional service provider simply because the professional must "use" or supply a product in performing the service for the patient or client.[9] The same policy arguments, however, seem equally applicable to the nonprofessional service provider.

In distinguishing primarily service providers from product sellers, it is imperative to examine three basic types of service transactions: (1) the pure service transaction; (2) the professional service-sales transaction; and (3) the nonprofessional service-sales transaction. This breakdown serves the useful purpose of isolating the problem areas for an in-depth analysis.

## STRICT TORT LIABILITY—POLICY CONSIDERATIONS

The doctrine of strict tort liability was originally promulgated to impose a new form of liability for defective products on selling entities participating in the marketing chain. The doctrine was predicated on a number of different policy considerations. Dean Prosser, the author of section 402A of the *Restatement (Second) of Torts,* proposed that strict tort liability would provide a means of recovery of damages for product-caused accidents against retailers and wholesalers in situations (1) where the manufacturer was not amenable to the jurisdiction of the court, and (2) the manufacturer's pockets were not deep enough.[10] This consumer oriented policy also evolved to provide a means for injured parties to recover damages against manufacturers of defective products who were otherwise insulated from direct contact with the consumer or user by the wholesalers and retailers involved in the modern marketing chain. The use of middlemen interrupted privity with the ultimate user or consumer and effectively eliminated the contractual doctrine of implied warranty as a basis of recovery against the manufacturer. These considerations under modern marketing schemes, therefore, implied a justification for imposing strict tort liability on sellers of defective products who were in the regular business of distributing products and who were insulating the manufacturer from liability. The retailer or other intermediate seller, of course, was entitled to seek indemnity against the party ultimately at fault for supplying the defective product, *i.e.*, the manufacturer. Consequently, the doc-

9. *See, e.g.*, Silverhart v. Mount Zion Hosp., 98 Cal. Rptr. 187, 191 (Ct. App. 1971); Magrine v. Krasnica, 227 A.2d 539, 546 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam,* 250 A.2d 129 (N.J. 1969); Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 795 (N.Y. 1954).

10. Prosser, *The Assault Upon the Citadel,* 69 YALE L.J. 1099, 1114-24 (1960).

trine of strict tort liability was extended not only to manufacturers and retailers,[11] but also to wholesalers and distributors,[12] suppliers in general,[13] and lessors of consumer products.[14]

Risk distribution served as an additional policy consideration for imposing strict tort liability on the supplier of a product.[15] This policy rationale presupposes that the retailer or manufacturer is better able to afford the cost of injuries than the injured consumer. The retailer and manufacturer, according to the risk distribution theoreticians, are able to proportion the loss among the purchasing public by increasing the cost of the product. Since the retailer, manufacturer and others participating in the marketing chain possess a reasonably vast marketing public, the proportionate increase in cost to the public is theoretically minimal when compared to the loss suffered by the injured consumer.

It is important to note that the concept of strict tort liability totally disregards the conduct of the supplier and instead, focuses only on the condition of the product. Neither the legal status nor the conduct of the retailer of a product is relevant. Unfortunately, the imposition of strict tort liability subjects the retailer to a loss highly disproportionate to either the retailer's fault or its role in marketing the product. Consequently, the scope of strict tort liability should not have been extended to include retailers.[16]

Some commentators have urged the extension of strict tort liability to the service-sales transaction. Collectively, these proponents of a total and all pervasive strict liability seem to argue that there

11. Greenman v. Yuba Power Prods. Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962); Coca-Cola Bottling Co. v. Hobart, 423 S.W.2d 118, 124 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

12. Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 548 (Tex. 1969); Dunham v. Vaughan & Bushnell Mfg. Co., 229 N.E.2d 684, 689 (Ill. Ct. App. 1967). In Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306 (Ct. App. 1968), strict tort liability was applied even though the defendant wholesaler never had possession of the product. *Id.* at 321.

13. Texaco, Inc. v. McGrew Lumber Co., 254 N.E.2d 584, 588 (Ill. App. Ct. 1969).

14. *E.g.*, McClafin v. Bayshore Equip. Rental Co., 79 Cal. Rptr. 337, 339 (Ct. App. 1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 778 (N.J. 1965); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975).

15. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Suvada v. White Motor Co., 201 N.E.2d 313, 317 (Ill. Ct. App. 1965). *See generally* Keeton, *Products Liability—Some Observations About Allocation of Risks,* 64 MICH. L. REV. 1329, 1333 (1966); Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791, 799 (1966). The enterprise liability rationale is also incorporated in the *Restatement. See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

16. *See* Batiste v. American Home Prods. Corp., 231 S.E.2d 269, 275-76 (N.C. Ct. App. 1977) (retail druggist not strictly liable for injuries suffered by user of oral contraceptive drug sold in strict compliance with physician's orders).

is no reason *not* to extend strict tort liability even though, in actuality, there exists no compelling reason to extend the doctrine. Rather than argue generalities, it would seem more appropriate to explore the policy considerations, the basis and the need for a product oriented cause of action in a service dominated marketing system. The basic argument supporting extension of strict tort liability to the service dominated marketing system relates to an earlier time when liability was governed by *ex contractu* implied warranties with the concomitant limitations and disclaimers of potential liability.[17] The value of disclaimers and the other limitations inherent in a contractually based cause of action has diminished substantially, if it has not become totally extinct, under the present strict tort liability system.[18]

Any attempt to extend strict tort liability to the service dominated marketing system, of necessity, must equate the service provider who incidentally uses a product in the performance of the service with a retailer or manufacturer engaged in the regular business of manufacturing and selling products to the consuming public. A retailer is defined as anyone supplying a product directly to a consumer. Disregarding obvious exceptions,[19] commentators who suggest extending strict tort liability conclude that the service provider who incidentally supplies a product to a consumer must constitute a seller of products under section 402A. Once the service provider is characterized as a seller regularly engaged in the business of supplying products, the doctrine of strict tort liability automatically applies.[20] This superficial analysis and characterization, unfortunately, totally skirts the vital policy reasons against applying a doc-

17. *See* Farnsworth, *Implied Warranties of Quality in Non-Sale Cases*, 57 COLUM. L. REV. 653, 674 (1957).

18. *See* McNichols, *Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494 (1975). *See generally* Vandermark v. Ford Motor Co., 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964); McCarty v. E.J. Korvette, Inc., 347 A.2d 253, 261 (Md. Ct. Spec. App. 1975).

19. The exception listed in RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965) provides in part:

> The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware the dealer plans to resell it.

20. RESTATEMENT (SECOND) OF TORTS § 402A (1965) specifically provides, "One who sells any product in a defective condition . . . is subject to liability . . . if (a) the seller is engaged in the business of selling such a product. . . ."

trine conceived for business entities involved in the marketing of products to the service oriented environment.

## PURE SERVICE TRANSACTIONS

Any analysis of the applicability of strict tort liability to the service oriented marketing scheme must necessarily distinguish between a pure service transaction and a transaction involving primarily the sale of a product. 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. Service, not the product, epitomizes the transaction. The expectations of the consumer focus *not* on the product which may incidentally be utilized in performing the service, but rather focus on the conduct of the service supplier. Conversely strict tort liability focuses only on the condition of the product and totally disregards the conduct of the product supplier.[21]

Virtually all efforts to extend strict tort liability to the pure service transactions have been rebuffed.[22] Unlike the mass production of products for distribution to the consuming public, there exists no mass production of services. Services are custom-tailored to meet the particular problem of the individual customer or user. Consequently there exists no vast body of distant consumers who are confronted with the difficult burden of tracing and proving unreliable and incompetent workmanship by the service performer. The service transaction emanates from a face-to-face contractual relationship in which the service user seeks a skilled, knowledgeable, and experienced service provider. If a consumer is injured as a result of faulty service, an action for negligence based on the absence of the requisite skill, knowledge, and competence of the serviceman provides both an effective and a reasonable remedy. After all, if the conduct of the service provider fails to meet and satisfy the reasonable expectations of the consumer, then it is that conduct which must

21. As noted in Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973), "[t]he plaintiff is no longer required to impugn the maker, but he is required to impugn the product." The Texas Supreme Court in Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975) emphasized that the conduct of the supplier is a totally irrelevant consideration in a strict tort liability action.

22. *See* Annot., 29 A.L.R.3d 1425, 1426 (1970). *Contra*, Garcia v. Halsett, 82 Cal. Rptr. 420, 423 (Ct. App. 1970) (laundromat owner held strictly liable when plaintiff-patron injured by defective washing machine).

be judged. Whether the conduct was substandard may be judged only by the negligence standard.

Service represents nothing more or less than the skill, knowledge, and experience of the service provider. It represents neither a phase nor the end product of a marketing scheme.[23] There are neither middlemen nor members of a distributive chain to spread the risk. The service provider is precluded from obtaining indemnity from other members of a marketing scheme since there are no other members. Thus, the service provider possesses a greatly circumscribed capability for spreading the risk of loss among the customers of the service facility. A service provider utilizing skill and time to solve customer problems is limited in the amount of work that can be performed and the number of customers that may be serviced. Effective risk distribution of losses among a relatively small number of service customers obviously is unrealistic. Since risk distribution constitutes the fundamental underpinning for imposing strict tort liability on sellers in the distributive chain, this policy consideration is essentially unavailable in a service marketing scheme. The service provider ultimately must absorb the loss or endeavor to spread the loss among a limited number of customers. This limited capability of risk distribution would jeopardize the continued vitality of service providers.

In *Lemley v. J & B Tire Co.*[24] the plaintiff was injured as a result of a brake failure in his automobile. The plaintiff instituted suit against the repairman who repaired the brakes on the vehicle previously. In rejecting efforts to impose strict tort liability on the service provider, the court observed:

> With respect to 402A liability, the Court concludes that J & B Tire Company, like the Morrisons, cannot be held liable under those theories. Section 402A, by its own terms, applies only to sellers. While "sellers" has been interpreted by courts to include retailers and manufacturers, as well as wholesalers, distributors and suppliers in general, *there has been no judicial expansion of this provision to include persons who supply a service.*[25]

In concluding that only "sellers" and not "repairers" come within

23. In Endicott v. Nissan Motor Corp., 141 Cal. Rptr. 95 (Ct. App. 1977) the court specifically recognized that an installer of a seat belt in a vehicle was not part of the overall marketing enterprise and, "[a]s a mere provider of services installer is not liable for defects in the product." *Id.* at 103.

24. 426 F. Supp. 1378 (W.D. Pa. 1977).

25. *Id.* at 1379 (emphasis added).

the scope of strict liability the court relied upon the *Restatement.*[26] Section 404 provides that "[o]ne who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels."[27]

> That section provides for the liability of a repairer, like a manufacturer, but only upon a negligence standard. If the drafters wanted to make a repairman strictly liable for his defective work, they could well have said so.
>
> . . . .
>
> While the burden of proof to show negligence by a manufacturer is a difficult one where products are standardized and mass produced, the burden of showing negligence against a repairman, who must repair one car at a time, is easier. It was the social policy of protection of the consumer against the mass producer or distributor that induced the adoption of the strict liability doctrine. See Comment F to Sec. 402A. That policy is not applicable to the present factual situation of an individual repair and an isolated sale.[28]

Similarly, in *Raritan Trucking Corp. v. Aero Commander, Inc.*,[29] the plaintiff's airplane crashed as a result of a wing separation that occurred as the pilot attempted an aerobatic maneuver in an effort to lower a malfunctioning landing gear. The plaintiff contended that the malfunction was due to an improper repair of the landing gear. Concluding that strict tort liability did not apply in the action against the repair facility, the Third Circuit noted:

> From its origin in the *Henningsen* case cited in the text quoted above, the strict liability theory has grown to be a strong one in New Jersey. But to date no New Jersey case has extended the strict liability theory to a case in which there have been no goods or other property supplied. Nor do we think that the New Jersey courts would extend strict liability to this case.[30]

The rationale of implied warranty likewise fails to furnish any impetus for supporting the existing time tested negligence standard with the yet time untested strict tort doctrine. In *Milau Associates,*

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26. *Id.* at 1379 (quoting RESTATEMENT (SECOND) OF TORTS § 404 (1965)).

27. RESTATEMENT (SECOND) OF TORTS § 404 (1965).

28. Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1379-80 (W.D. Pa. 1977).

29. 458 F.2d 1106 (3d Cir. 1972).

30. *Id.* at 1113; *accord,* Hillas v. Westinghouse Elec. Corp., 293 A.2d 419, 424-25 (N.J. Super. Ct. App. Div. 1972) (elevator repair service held not strictly liable for injuries resulting from collapse of elevator). Reference is made to Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

*Inc. v. North Avenue Development Corp.*[31] the plaintiff sued the defendant contractors on the theories of negligence and breach of warranty when a sprinkler system which the defendants installed burst, causing substantial water damage. The court concluded that the warranty with respect to the performance of services is not implied by common law. The court stated that "where services have been performed in a faulty or slipshod manner, the law provides for recovery on the theory of negligence."[32]

Likewise, in *Pepsi Cola Bottling Co. v. Superior Burner Service Co.*,[33] the plaintiff instituted suit to recover damages for losses precipitated by defendant's failure to properly repair a boiler in its processing plant. The plaintiff predicated its causes of action on both negligence and breach of implied warranty. The court summarily observed that strict liability was inapplicable to individuals agreeing to furnish labor and services.[34]

The rationale of *Pepsi Cola* was adopted in *Hoffman v. Simplot Aviation, Inc.*[35] The court concluded that strict tort liability would not apply to the performance of repairs on an aircraft. After an extensive review of other pure service cases, the Uniform Commercial Code, and the *Restatement (Second) of Torts,* the court declared:

> It would serve no purpose herein to extensively review the policy considerations which militate against the extension of the strict liability rule to cases involving personal service. The rationale has been thoroughly explored in the authorities and commentators set forth above and reiteration herein would serve no purpose. It is sufficient to say that as contrasted with the sale of products, personal services do not involve mass production with the difficulty, if not inability, of the obtention of proof of negligence. The consumer in the personal service context usually comes into direct contact with the one offering service and is aware or can determine what work was performed and who performed it.[36]

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31. 391 N.Y.S.2d 628 (App. Div. 1977).

32. *Id.* at 630. *See also* Lewis v. Big Powderhorn Mountain Ski Corp., 245 N.W.2d 81, 82 (Mich. Ct. App. 1976).

33. 427 P.2d 833 (Alaska 1967).

34. *Id.* at 839.

35. 539 P.2d 584 (Idaho 1975).

36. *Id.* at 588. In Hoover v. Montgomery Ward & Co., 528 P.2d 76 (Ore. 1974), the court determined that the store's allegedly negligent mounting of a nondefective tire could not subject the store to strict liability in tort. *Id.* at 78.

Such services as elevator repair,[37] automobile tire mounting,[38] surveying,[39] and water systems engineering,[40] likewise have been deemed to be beyond the scope and intendment of strict tort liability. Rejection of the doctrine of strict tort liability has occurred not only where the allegations involved inadequate performance of service apart from defects in products incidentally utilized or provided,[41] but also where the basis of liability was alleged to be a defect in a product furnished or used in the performance and accomplishment of the service transaction.[42]

Perhaps the purest form of service involves the service provided by the attorney. It is well recognized that an attorney is neither an insurer nor a guarantor of the soundness of legal opinions, the validity of drafted instruments, or the outcomes of litigation.[43] There are no implied warranties arising from the attorney-client relationship,[44] although an express warranty may be established by the parties. Similarly, the attorney is not strictly liable in tort. The attorney is liable only for negligence,[45] and not for every mistake made.[46] The standard for negligence is articulated in terms of the attorney's duty to use reasonable skill and judgment, rather than unassailable judgment.[47] Because many cases involve the production of a tangible product, such as deeds, loan agreements, and contracts, these transactions may be analogized to the sale of a

37. *See* Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480, 485 (W.D. Mo. 1953); Otis Elevator Co. v. Embert, 84 A.2d 876, 881 (Md. 1951); *cf.* Aegis Prod., Inc. v. Arriflex Corp., 268 N.Y.S.2d 185, 187 (App. Div. 1966) (per curiam) (camera repair).

38. Spillers v. Montgomery Ward & Co., 282 So. 2d 546, 552 (La. Ct. of App. 1973).

39. *See* Roberts v. Karr, 3 Cal. Rptr. 98, 103 (Dist. Ct. App. 1960). *See also* Annot., 35 A.L.R.2d 504 (1971).

40. Stuart v. Crestview Mut. Water Co., 110 Cal. Rptr. 543, 549 ( Ct. App. 1973).

41. Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1379 (W.D. Pa. 1977); Endicott v. Nissan Motor Corp., 141 Cal. Rptr. 95, 103 (Ct. App. 1977).

42. Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968) (defective contact lenses supplied in connection with prescription and fitting of contact lenses); *see* Parker v. Warren, 503 S.W.2d 938, 945 (Tenn. Ct. App. 1973) (construction of bleacher seats with defective lumber).

43. *See* Lucas v. Hamm, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962) (possible liability to intended beneficiaries under instrument, but no breach of standard of care in failing to take proper account of rule against perpetuities); Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968) (attorney using ordinary standards of professional competence not required to advise clients to appeal when it appeared unnecessary).

44. Sullivan v. Stout, 199 A. 1, 3 (N.J. 1938).

45. *See* Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959).

46. *Id.* at 755; *see* Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970) (recognized that attorney was not held to standard of infallible judgment).

47. Eadon v. Reuler, 361 P.2d 445, 450 (Colo. 1961).

product.[48] These attorney "products" are produced to individual specifications. There is no element of mass production and no onerous burden on the "consumer" to trace the product to its maker for the purpose of establishing negligence. The absurdity of making an attorney strictly liable for the performance of legal service is self-evident. Yet these same policy considerations apply with equal vitality to doctors, mechanics, and other service providers.

The doctrine of strict tort liability likewise does not extend to the endorser, certifier, or tester of another's product.[49] Certifiers and endorsers neither manufacture nor distribute products to the consumer and, therefore, do not participate in the marketing scheme. These service providers do not possess the ability to distribute the risk of loss to others in the marketing chain. The liability of a tester or certifier is potentially more encompassing than that of a single manufacturer because the tester or certifier stands behind multiple lines of product. Obviously the extension of strict tort liability to the tester or certifier would have the effect of eliminating certifiers and testers as viable business entities.[50]

The landmark case analyzing strict tort liability in the context of the certifier is *Hanberry v. Hearst Corp.*[51] The plaintiff sustained injuries when she slipped and fell on a vinyl floor as a result of a defectively designed shoe. Rejecting the imposition of strict tort liability on the certifier of the shoe, the court noted:

> Application of either warranty or strict liability in tort would subject [the defendant] to liability even if the general design and material used in making this brand of shoe were good, but the particular pair became defective through some mishap in the manufacturing process. We believe this kind of liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process . . . .[52]

Because the testing is generally performed on samples, the certification normally involves the design of the product line and the construction of the particular sample. Testing and certification does

48. Reynolds, *Strict Liability for Commercial Services—Will Another Citadel Crumble?*, 30 OKLA. L. REV. 298, 303 (1977).

49. *See generally* Note, *Liability of Certifiers of Products for Personal Injuries to the User or Consumer*, 56 CORNELL L. REV. 132 (1970).

50. *See id.* at 141-44.

51. 81 Cal. Rptr. 519 (Ct. App. 1969).

52. *Id.* at 524; *cf.* Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109, 118 (D. Del. 1967) (endorser held liable only under negligence).

not extend to the construction or manufacture of the specific injury-causing product.[53]

As a general principle, strict tort liability is inapplicable to landowners but "applies only to those who are engaged in the business of *selling* products for use or consumption, such as manufacturer, wholesaler, retailer, or distributor."[54] In *Wagner v. Coronet Hotel*[55] the hotel was sued for damages resulting from injuries sustained when the plaintiff slipped and fell due to an allegedly defective bath mat provided by the hotel. The court determined that the relationship of a paying guest in a hotel created an invitor-invitee status and the only duty owed by the hotel to the invitee was to keep its premises reasonably safe. The hotel was deemed to be in the business of providing a service and not to be in the business of promoting and supplying products to users of the hotel services. The court emphasized that the various rationales employed to justify the imposition of strict tort liability under section 402A were completely inapplicable to the provider of lodging services even though the administration of these services necessarily involve the incidental supply of products to patrons of the hotel.[56]

Similarly, in *Freitas v. Twin City Fisherman's Cooperative Association*,[57] the plaintiff was injured when the ladder on the defendant's tank collapsed. The court observed that strict tort liability was inapplicable to an individual merely providing a product for another's use.[58]

Analysis of the pure service transaction reveals a number of countervailing policy considerations against extending strict tort liability to the service provider. The service provider cannot effectively distribute the risk of loss to consumers. In addition the service transaction is generally a personal encounter between individuals

53. *See* Hanberry v. Hearst Corp., 81 Cal. Rptr. 519 (Ct. App. 1969). *See generally* Note, *Liability of Certifier of Products for Personal Injuries to the User or Consumer,* 56 CORNELL L. REV. 132 (1970).

54. Wagner v. Coronet Hotel, 458 P.2d 390, 394 (Ariz. Ct. App. 1969); *see* Luna v. Rossville Packing Co., 369 N.E.2d 612, 614 (Ill. App. Ct. 1977); *cf.* Endicott v. Nissan Motor Corp., 141 Cal. Rptr. 95, 103 (Ct. App. 1977) (installer not liable for defect).

55. 458 P.2d 390 (Ariz. Ct. App. 1969).

56. *Id.* at 395. *See also* Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975), in which the Texas Supreme Court recognized the distinction inherent in the duties owed by a landowner vis-à-vis a regular supplier of products.

57. 452 S.W.2d 931 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.).

58. *Id.* at 937-38; *see* Keen v. Dominick's Finer Foods, Inc., 364 N.E.2d 502, 504 (Ill. App. Ct. 1977); Parker v. Warren, 503 S.W.2d 938, 945 (Tenn. Ct. App. 1973); Freitas v. Twin City Fisherman's Coop Ass'n, 452 S.W.2d 931, 937 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

dealing face-to-face for the performance of particular services and workmanship. Most importantly, the consumer reasonably contemplates and bargains for the skill, knowledge, and experience of the service provider. The consumer focuses on the conduct of the service provider, not the condition of any product incidentally utilized in the performance of the service.

## PROFESSIONALS IN THE SERVICE-SALES TRANSACTION

### *Medical Professionals*

It is well established in most jurisdictions, including Texas, that strict tort liability will not be imposed on the medical professional who provides inadequate service to his patients.[59] This limitation extends to a medical professional utilizing or providing defective products in performing the service of administering treatment to the patient.[60]

The rationale for refusing to extend strict tort liability to medical professionals was analyzed by a New Jersey Court in *Magrine v. Krasnica.*[61] The court recognized that the medical professional generally is in no better position than the patient to discover defects in the products employed in administering treatment. The patient's reasonable expectation does not contemplate a guarantee by the treating physician of nondefective instrumentalities. The medical profession is not in the regular business of supplying products in the stream of commerce or in promoting their purchase. Additionally the medical profession is limited in its ability to protect against liability for defective products used in the treatment of a patient. Even if liability insurance is available, at ever-increasing rates, the medical professional necessarily is required to distribute the risk by raising fees which are already high.[62] Unlike products, the availabil-

59. *See* Barbee v. Rogers, 425 S.W.2d 342, 345-46 (Tex. 1968); Hoven v. Kelble, 256 N.W.2d 379, 385 (Wis. 1977). A discussion of medical professionals is contained in J. SALES & J. PERDUE, THE LAW OF STRICT TORT LIABILITY IN TEXAS § 4.03B, at 113-16 (1977).

60. Vergott v. Deseret Pharm. Co., 463 F.2d 12, 16 (5th Cir. 1972); Shivers v. Good Shepherd Hosp., Inc., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); *accord,* Silverhart v. Mt. Zion Hosp., 98 Cal. Rptr. 187, 191 (Ct. App. 1971); Magrine v. Krasnica, 227 A.2d 539, 546 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam,* 250 A.2d 129 (N.J. 1969).

61. 227 A.2d 539 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam,* 250 A.2d 129 (N.J. 1969).

62. *Id.* at 545. In Hoven v. Kelble, 256 N.W.2d 379 (Wis. 1977) the Wisconsin Supreme Court in holding that strict tort liability did not apply to the delivery of medical services,

ity of which may not be critical to the public welfare, the availability of affordable medical services under any criteria is of the utmost public concern. Since the public must have, and demands access to *affordable* medical services, which are already approaching a dangerously high level of cost, the usual policy of risk distribution is absent. In *Magrine* the court held that a dentist was not strictly liable for personal injuries caused by the breaking of a defective hypodermic needle in the patient's jaw.[63] The court noted that a professional essentially offers a service rather than supplies a product to the consumer. To supply or make use of a product in the performance of a service is merely incidental and not the true essence of the service transaction.[64] The court observed:

> We must consider, also, the consequences if we were to adopt the rule of strict liability here. The same liability, in principle, should then apply to any user of a tool, other equipment or any article which, through no fault of the user, breaks due to a latent defect and injures another. It would apply to any physician, artisan or mechanic and to any user of a defective article—even to a driver of a defective automobile. In our view, no policy consideration positing strict liability justifies application of the doctrine in such cases. No more should it here.[65]

Under similar reasoning the doctrine of strict tort liability has been held inapplicable to a hospital for administration of a defective drug,[66] to a doctor for prescribing a drug that subsequently proved to be defective,[67] and to a hospital for using a defective needle in an operative procedure.[68]

The Texas Supreme Court considered the professional service-sales transaction in *Barbee v. Rogers*,[69] involving the prescription, fitting, and sale of contact lenses. The plaintiff suffered injuries as the result of improperly fitted contact lenses. The court stated that

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emphasized that use of the doctrine would unduly interfere with the availability of essential medical services. *Id.* at 392.

63. Magrine v. Krasnica, 227 A.2d 539, 547 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super Ct. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969).

64. *See id.* at 546.

65. *Id.* at 547.

66. Shivers v. Good Shepherd Hosp., Inc., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

67. Carmichael v. Reitz, 95 Cal. Rptr. 381, 393 (Ct. App. 1971). A similar rule applies to the pharmacist dispensing a prescriptive drug. Bichler v. Willing, 397 N.Y.S.2d 57, 59 (App. Div. 1977).

68. Silverhart v. Mt. Zion Hosp., 98 Cal. Rptr. 187, 191 (Ct. App. 1971).

69. 425 S.W.2d 342 (Tex. 1968).

"the miscarriage, if such there was, [rested] in the professional acts of [the defendants] and not in the commodity they prescribed, fitted, and sold."[70] Although the court characterized the transaction as something between the technical categories of professional service and merchandising, such characterization did not, in any event, justify the imposition of strict tort liability on the optometrist.[71]

In *Vergott v. Deseret Pharmaceutical Co.*[72] the plaintiff was injured, during the course of medical treatment, due to the breakage of a needle in her vein. The court noted that section 402A was inapplicable since the hospital did not qualify as a seller engaged in the business of selling needles.[73] The hospital is in the business of providing services and not touting and merchandising products.

Similarly, in *Shivers v. Good Shepherd Hospital, Inc.*,[74] the plaintiff instituted a suit against a hospital based on strict tort liability for an illness sustained when he was administered a contaminated anticoagulant used for the treatment of phlebitis. Although the court recognized that strict tort liability in Texas applies to manufacturers and distributors of medical products, the court emphasized that the doctrine does not extend to hospital suppliers.[75]

An area of considerable controversy in the medical professional area involves blood transfusions.[76] In 1954, the New York Court of Appeals in *Perlmutter v. Beth David Hospital,*[77] determined that a patient was not entitled to recover under breach of warranty for injuries caused by an impure blood transfusion administered in defendant's hospital.[78] Emphasizing the absence of a true sale, *i.e.*,

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70. *Id.* at 346.

71. *Id.* at 346.

72. 463 F.2d 12 (5th Cir. 1972).

73. *Id.* at 16 n.5.

74. 427 S.W.2d 104 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

75. *Id.* at 107. The court stated:

> It will . . . be noted that the two cases . . . [*Jacob E. Decker & Sons v. Capps* and *McKisson v. Sales Affiliates, Inc.*] apply the rule of strict liability and implied warranty to the manufacturer and distributor of a product. If this is to be the extent of the rule, then the appellee [hospital] will not be liable under the strict liability and implied warranty rule applied in those cases.

*Id.* at 107.

76. *See generally* Boland, *Strict Liability in Tort for Transfusing Contaminated Blood,* 23 ARK. L. REV. 236 (1969); Garibaldi, *A New Look at Hospitals' Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability,* 48 CHI. B.J. 204 (1967); Haut & Alter, *Blood Transfusions—Strict Liability?,* 43 ST. JOHN'S L. REV. 557 (1969).

77. 123 N.E.2d 792 (N.Y. 1954).

78. *Id.* at 796.

merchandising of blood between the patient and the hospital, the court observed:

> The essence of the contractual relationship between hospital and patient is readily apparent; the patient bargains for, and the hospital agrees to make available, the human skill and physical materiel of medical science to the end that the patient's health be restored.
>
> Such a contract is clearly one for services, and, just as clearly, it is not divisible. Concepts of purchase and sale cannot separately be attached to the healing materials—such as medicines, drugs or, indeed, blood—supplied by the hospital for a price as part of the medical services it offers. That the property or title to certain items of medical material may be transferred, so to speak, from the hospital to the patient during the course of medical treatment does not serve to make each such transaction a sale. . . . 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 . . . .[79]

The *Perlmutter* dichotomy was rejected in *Cunningham v. MacNeal Memorial Hospital.*[80] The Supreme Court of Illinois held that strict tort liability applied to a hospital that provided defective blood to its patient.[81] The court concluded:

> [W]e fail to see any real distinction to be drawn between, for example, a blood bank, which provides hospitals with blood, and a hospital, which . . . in turn provides blood for immediate transfusion into its patients, insofar as the theory of strict liability is concerned. Although it may be conceded that a blood bank's *principal function* is to stockpile blood for dispensation to various institutions, whereas a hospital ordinarily provides blood for transfusion purposes only ancillarily and as a part of its total services, both entities are clearly within the distribution chain of the product involved.[82]

As a result of *Cunningham,* most jurisdictions have adopted statutory limitations of liability for transfusion-associated hepatitis.[83] Texas likewise has enacted a legislative limitation on liability.[84]

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79. *Id.* at 794.

80. 266 N.E.2d 897, 901 (Ill. 1970). *See generally* 3 ST. MARY'S L.J. 152 (1971).

81. Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897, 901 (Ill. 1970).

82. *Id.* at 901 (emphasis supplied).

83. *See* Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 STAN. L. REV. 439, 474-79 (1972) (41 states as of 1972).

84. TEX. REV. CIV. STAT. ANN. art. 4590-3 (Vernon 1976). The statute provides in part:

> No physician, surgeon, hospital, blood bank . . . or other person or entity who donates, obtains, prepares . . . transfuses or otherwise transfers, or who assists or

*NonMedical Professionals*

Professional, as distinguished from nonprofessional, service providers are not subject to strict tort liability in either the pure service or the service-sales transaction. The basis for refusing to extend strict liability to professional service providers was articulated in the landmark case of *Gagne v. Bertran.*[85] The California Supreme Court in *Gagne* held that strict liability and warranty did not apply to a soil tester because he provided a service rather than a sale. The court noted the general 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."[86] The court used the following policy analysis:

> The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.[87]

It was recognized that the soil testing consultant was a provider of a service and not a seller of products.[88] This policy continues to represent the predominant basis for rejecting strict tort liability in the service oriented area.[89]

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participates in obtaining, preparing . . . transfusing . . . blood . . . from one or more human beings . . . to another human being, shall be liable as the result of any such activity, save and except that each such person or entity shall remain liable for his or its own negligence.

*Id.* § 2. The legislature stated the following policy reason for limiting liability:

> The availability of scientific knowledge, skills and materials for the . . . transfusion . . . of human . . . blood . . . is important to the health and welfare of the people of this state. The imposition of legal liability without fault upon the persons and organizations engaged in such scientific procedures inhibits the exercise of sound medical judgment and restricts the availability of important scientific knowledge, skills and materials. It is therefore the public policy of this State to promote the health and welfare of the people by limiting the legal liability arising out of such scientific procedures to instances of negligence.

*Id.* § 1.

85. 275 P.2d 15 (Cal. 1954) (en banc).

86. *Id.* at 20.

87. *Id.* at 21.

88. *Id.* at 20.

89. La Rossa v. Scientific Design Co., 402 F.2d 937, 943 (3d Cir. 1968) (engineer not liable for defective design of industrial plant); Swett v. Gribaldo, Jones & Assocs., 115 Cal. Rptr. 99, 101 (Ct. App. 1974) (soil engineer not liable for defective analysis); Stuart v. Crestview Mut. Water Co., 110 Cal. Rptr. 543, 549 (Ct. App. 1973) (design engineer not liable for defective design of water works system).

In 1968 the Third Circuit in *La Rossa v. Scientific Design Co.*,[90] considered the applicability of strict tort liability to an engineering company that designed, engineered, and supervised the construction of a chemical plant.[91] The plaintiff contended that her husband died as a result of throat cancer caused or activated by the inhalation of chemical dust that he handled as an employee of the plant. The court refused to include engineering services within the ambit of strict tort liability.[92] The court stated:

> Professional services do not ordinarily 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 consumers 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 and even from their ability to inquire. Thus, professional services form a marked contrast to consumer products cases . . . .[93]

The court concluded that users of professional service purchase a service, not insurance. The reasonable expectation of the customer is that the service provider will exercise a reasonable degree of care, skill, and competence.[94]

In *La Rossa* it was apparent that the particular engineering services had no impact upon the public as a whole since there was neither mass production nor mass distribution of the services.[95] This decision implicitly recognized the "occasional sales" exception contained in 402A.[96] It also suggested that strict tort liability should not be extended beyond the parameters of the policy which originally sired the doctrine. Since risk distribution represents the real theoretical basis for strict tort liability, and since a professional service provider commanding a greatly circumscribed market possesses little opportunity to distribute the risk effectively, strict tort liability is an alien and unsupportable doctrine.

In *Laukkanen v. Jewel Tea Co.*[97] the Illinois Court of Appeals

90. 402 F.2d 937 (3d Cir. 1968).

91. *Id.* at 943; *see* J. SALES & J. PERDUE, THE LAW OF STRICT TORT LIABILITY IN TEXAS § 4.03, at 117-18 (1977).

92. La Rossa v. Scientific Design Co., 402 F.2d 937, 943 (3d Cir. 1968).

93. *Id.* at 942-43.

94. *Id.* at 943.

95. *See id.* at 943.

96. RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

97. 222 N.E.2d 584 (Ill. App. Ct. 1966). *See also* Allied Properties v. John A. Blume & Assocs., 102 Cal. Rptr. 259 (Ct. App. 1972).

denied the applicability of strict tort liability to a design engineer, observing:

> The recent doctrine of strict liability for defects in manufactured products announced in *Suvada v. White Motor Co.* [cite omitted] does not apply here. A designing engineer cannot be held to the liability of a manufacturer. If the fact that the defendants did not supervise the construction of their design has legal significance, that is where such significance lies.[98]

Exemption of the professional service provider from strict tort liability under section 402A was acknowledged in the recent case of *Langford v. Kraft.*[99] The defendant, a professional engineer, designed the drainage system for a newly developed subdivision. The system resulted in the diversion of the natural flow of surface waters from the area under development onto plaintiff's property. Relying on the theory of trespass as articulated under section 822 of the *Restatement of Torts,*[100] the court concluded that having acted in the capacity of an independent contractor for the developer, the engineer was strictly liable for the trespass to another's property caused by diversion of surface waters.[101] In distinguishing this theory of liability from the theory of strict tort liability under section 402A, the court noted, "In our case, we do not have a sale incident to the performance of professional services as in *Barbee*. . . . We do not find *Barbee* helpful in the disposition of the question before us."[102]

98. Laukkanen v. Jewel Tea Co., 222 N.E.2d 584, 589 (Ill. Ct. App. 1966).

99. 551 S.W.2d 392, 396 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 565 S.W.2d 223 (Tex. 1978). In affirming the decision of the court of civil appeals, the Texas Supreme Court specifically observed that the status of Langford as a professional engineer did not preclude the plaintiff from pursuing other remedies against him as a matter of law. This is extremely vague language which does not necessarily acknowledge the validity of the court of appeals' holding that strict tort liability under section 402A did not extend to the supplier of a professional service even though the service was manifested by a tangible product. If the supreme court suggests the possibility that strict tort liability under section 402A might be applicable, then the supreme court must initially overrule its prior opinion in Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968).

100. RESTATEMENT OF TORTS § 822 (1939). The court extended the provision of section 822 to the defendant engineer based on RESTATEMENT OF TORTS § 834, Comment d (1939) which provides that an individual "participates in . . . an activity that either directly or through the creation of a physical condition causes an invasion . . . not only when he acts for his own benefit, but also when he acts in the capacity of . . . independent contractor." *Id., construed in* Langford v. Kraft, 551 S.W.2d 392, 395 (Tex. Civ. App.—Beaumont 1977), *affd*, 565 S.W. 2d 223 (Tex. 1978).

101. Langford v. Kraft, 551 S.W.2d 392, 395 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 565 S.W.2d 223 (Tex. 1978).

102. *Id.* at 396. The court further noted that the landmark case of La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968) was distinguishable since it did not involve the theory

The imposition of strict liability for conceiving and formulating plans that result in a trespass seems, at the optimum, a questionable doctrine. Professional services performed for another historically have been evaluated and ultimately judged by the standard of negligence. It is rather incongruous to extend the trespass doctrine to an engineer involved in rendering a professional service. Although the court correctly recognized that the doctrine of strict tort liability articulated under section 402A did not encompass a provider of professional services, the ultimate outcome represents a Pyrrhic victory for the professional service provider.

*Challoner v. Day & Zimmerman, Inc.*[103] appears to contradict the general rule. A shell assembler was held strictly liable when a 105 millimeter shell exploded prematurely, injuring a soldier in Cambodia. The assembler was held strictly liable though the components were supplied and the shells designed by the United States Government. The defendant contended that it merely furnished a service and did not supply products. *Challoner* is distinguishable from the typical "service" case since in reality the "service" provided by the defendant was manufacturing. The entire transaction with the government was commercial in nature.[104]

### NONPROFESSIONALS AND THE SERVICE-SALES TRANSACTION

Considerable controversy exists among the jurisdictions on whether strict tort liability extends to the nonprofessional service provider who supplies a product as an incident to the performance of a service.

In *Newmark v. Gimbel's, Inc.*[105] the New Jersey Supreme Court extended strict tort liability to a nonprofessional who was performing a service while also supplying a product.[106] The plaintiff was injured when a beauty parlor employee applied a defective permanent wave solution to her hair. The trial court concluded that no sale had occurred.[107] The Supreme Court of New Jersey disregarded the service-sales distinction, observing that if the defendant had

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of trespass. Langford v. Kraft, 551 S.W.2d 392, 397 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 565 S.W.2d 223 (Tex. 1978).

103. 512 F.2d 77 (5th Cir.), *vacated*, 423 U.S. 3 (1975), *on remand*, 546 F.2d 26 (5th Cir. 1977).

104. *Id.* at 82.

105. 258 A.2d 697 (N.J. 1969).

106. *Id.* at 701; *see* J. SALES & J. PERDUE, THE LAW OF STRICT TORT LIABILITY IN TEXAS § 4.03, at 118-19 (1977).

107. Newmark v. Gimbel's, Inc., 258 A.2d 697, 698, 700 (N.J. 1969).

sold the lotion to the plaintiff for a home application an implied warranty would have arisen.[108] The court noted that "[t]he transaction, in our judgment, is a hybrid partaking of incidents of a sale and a service. It is really partly the rendering of service, and partly the supplying of goods for a consideration."[109] Although the plaintiff sued on implied warranty, the court asserted that strict liability in tort represented a better theory on which to decide the case: "One, who in the regular course of a business sells or applies a product . . . which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm."[110] The court concluded that the beautician was regularly engaged in a commercial enterprise in which she catered publicly to "a form of aesthetic convenience or luxury, involving the rendition of nonprofessional services in the application of products for which a charge is made."[111] Significantly the court determined that the beautician should seek indemnification from the manufacturer and thereby place responsibility on the party creating the defective product.[112]

Although *Newmark* has been followed in other jurisdictions,[113] it is noteworthy that some jurisdictions have refused to further extend strict tort liability to service providers.[114] It has been suggested that *Newmark* extends the applicability of implied warranty or strict tort liability to any situation in which a substandard product is incidentally supplied in conjunction with the performance of a service.[115] The court specifically rejected extension of strict tort liability to doctors, dentists, and other professionals for substandard products utilized in the performance of their services.[116]

A professional service provider who incidentally furnishes a defective product in connection with the performance of a service is evaluated on the basis of negligence rather than on the condition or state

108. *Id.* at 701.
109. *Id.* at 701.
110. *Id.* at 702.
111. *Id.* at 702.
112. *Id.* at 705.
113. The court in Carpenter v. Best's Apparel, Inc., 481 P.2d 924, 926 (Wash. Ct. App. 1971), applied strict tort liability in considering a beauty parlor treatment, involving the use of a particular product, a "sale" of a product. *Accord*, Nowakowski v. Hoppe Tire Co., 349 N.E.2d 578, 584-85 (Ill. Ct. App. 1976).
114. Young v. Clairol, PROD. LIAB. RPTR. (CCH) ¶ 5168 (D. Pa. 1964); Epstein v. Giannattasio, 197 A.2d 342, 344 (Conn. C.P. 1963); Delta Ref. Co. v. Procon, Inc., 552 S.W.2d 387, 389 (Tenn. Ct. App. 1976).
115. Note, *A New Principle of Products Liability in Service Transactions*, 30 U. PITT. L. REV. 508, 511 (1969).
116. Newmark v. Gimbel's, Inc., 258 A.2d 697, 702-03 (N.J. 1969).

of the product.[117] It is difficult to perceive either a conceptual or legal basis for differentiating between the professional and the nonprofessional service provider. In both instances, the professional and nonprofessional are primarily engaged in the business of providing "skilled" services rather than engaging in the regular business of promoting and merchandising products.[118] Neither the professional nor the nonprofessional service provider is actively engaged in touting products; rather the emphasis focuses on furnishing competent and quality services. Moreover the reasonable expectation and contemplation of both the user of professional services where a product may incidentally be furnished and the user of nonprofessional services where a product may likewise be used are identical, *i.e.*, the user seeks and demands competent and skillful performance of the service. Repair of eyesight or teeth, just like the repair of an automobile or a television set commands identical consideration. Less than skillful and competent performance of the service subjects either the professional or the nonprofessional to liability based solely on negligence. The risk distribution capability of a nonprofessional service provider for a loss resulting from a defective product incidentally supplied during the service is no greater, and, in fact, is more limited than the risk distribution capability of a professional service provider such as a doctor, optometrist or engineer. If risk distribution is the lynchpin of strict tort liability, then the absence of that capability certainly militates against extending strict tort liability to an entity unable to distribute the risk of loss effectively.

The refusal of the courts to extend strict tort liability to professional service suppliers who incidentally supply substandard products represents judicial recognition both of the realities of the business world and the availability of an adequate remedy based on negligence. It is inappropriate then to suggest a different standard for the nonprofessional service provider when the rationale and policy considerations mirror those applicable to professional service providers. Disparate treatment of the professional and nonprofes-

117. Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968); Magrine v. Krasnica, 227 A.2d 539, 546 (N.J. Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd per curiam*, 250 A.2d 129 (N.J. 1969).

118. *Compare* Barbee v. Rogers, 425 S.W.2d 342, 345-46 (Tex. 1968) *with* Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1379 (W.D. Pa. 1977). In Delta Ref. Co. v. Procon, Inc., 552 S.W.2d 387 (Tenn. Ct. App. 1976), the court refused to extend strict tort liability to a general contractor installing a defective pump, noting that the installer, Procon, "did not sell the defective pump in the sense used in *Restatement of Torts*, 402A. It was not in the business of selling such pumps." *Id.* at 389.

sional service provider, in reality, constitutes a denial of equal protection of the law.

Two major policy arguments have emerged as justification for extending the doctrine of strict tort liability to sellers of products. The retailer initially identifies with the manufacturer's product, and actively promotes and merchandises the product. More importantly the retailer is afforded some opportunity to spread the risk of loss among the purchasing public by a proportionate increase in the cost of goods.

The initial policy consideration for the most part possesses limited applicability to service providers. The service provider is not actively involved in promoting and merchandising products in performing services.[119] For example, the plumber who replaces a valve or washer seldom bothers to convince the customer of the quality or integrity of the valve or washer the customer is "buying." This situation is remarkably analogous to the prescription of drugs by a medical professional according to the patient's need as distinguished from promoting medication as part of some marketing scheme.

The second major policy consideration possesses even less applicability to service providers who incidentally introduce products into the stream of commerce. Retailers handle many lines of products and are in business specifically to move goods into the stream of commerce. Generally only a limited number of the products marketed constitute high risk products. The cost of this risk is distributed among the entire retail inventory with proportionally limited increase in cost to the consumer. Similar risk distribution is not available to the plumber, auto mechanic, barber, appliance repairman, and beauty salon operator. Each deals with a relatively limited number of ultimate consumers. The service provider is obliged to charge a premium for the use of time and the exercise of skill. The products incidentally used in the performance of a service are relatively few in number compared to the volume of the product seller and the profit derived from such products is generally minimal in comparison to the service charge. To impose on the service

119. *See* Endicott v. Nissan Motor Corp., 141 Cal. Rptr. 95, 103 (Ct. App. 1977) (installer of equipment in vehicle not in marketing or distributive chain). It is further noteworthy that the so-called isolated supply of products does not qualify under RESTATEMENT (SECOND) OF TORTS § 402A (1965). As noted in Luna v. Rossville Packing Co., 369 N.E.2d 612 (Ill. App. Ct. 1977), unless the supply of a product is the very essence of the product supplier, then the supply of the product does not qualify as a sale under section 402A. *Id.* at 614.

provider strict tort liability for defective products will effectively destroy many service businesses. The consuming public must then bear the effects of reduced competition and a concomitant escalation in costs because the small family-owned or small corporate service providers cannot withstand the assault of strict tort liability.

## CONCLUSION

The policy considerations governing the "true" professional are essentially identical to those affecting the nonprofessional service provider. Neither policy nor logic support an extension of strict tort liability to either the professional or the nonprofessional service provider. The reasonable expectation of the customer is the performance of a service in a reasonably skillful and competent manner. In other words, the customer's expectations focus on the conduct of the service provider and not the condition of any product incidentally utilized in performing the service. Strict tort liability focuses only on the product and not on the conduct of the supplier. The standard of negligence, and not the doctrine of strict tort liability continues to furnish a viable and effective remedy for any unfulfilled expectations of the customer.