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Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction

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NOTES

PRODUCTS AND THE PROFESSIONAL: STRICT LIABILITY IN THE SALE-SERVICE HYBRID TRANSACTION

In order to recover against a retailer for personal injury or property damage caused by a defective product, reliance may be placed upon several theories which require no proof of fault. Suit may be brought for breach of an implied warranty of fitness,[1] breach of an implied warranty of merchantability,[2] both, or upon strict liability in tort.[3] Although these doctrines differ in certain respects,[4] recovery under any theory traditionally has been limited to transactions involving the sale of a product rather than the performance of a service in which a defective product is either utilized by the defendant or consumed by the plaintiff.[5] When considering strict liability in tort, the

1. Implied warranties are governed by UNIFORM COMMERCIAL CODE § 2-315 which states: "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."

2. UNIFORM COMMERCIAL CODE § 2-314 states in part: "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."

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) 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 . . . ."

4. *See generally* Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort,* 19 RUTGERS L. REV. 692 (1965) for a comparison of strict liability in tort with the warranty provisions of the Uniform Commercial Code.

5. *E.g.,* Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd,* 53 N.J. 259, 250 A.2d 129 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). For the pure service contract where the injury or loss was not due to a defective product and strict liability was not imposed see, *e.g.,* La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); Allied Properties v. John A. Blume & Assoc., 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972); Gautier v.

courts express this limitation by requiring that the defendant be "engaged in the business of selling such a product . . . ."[6] The courts likewise have restricted recovery to sales in implied warranty cases[7] even though the Uniform Commercial Code contains no such restriction.[8] Despite this traditional approach, there 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[9] or a beautician's application of a defective wave solution.[10] 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.[11]

This note will examine the courts' treatment of the sale-service distinction in both the commercial and professional settings. Some alternatives to the present rules will be proposed. The Second Restate-

General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965); Lindner v. Barlow, Davis & Wood, 210 Cal. App. 2d 660, 27 Cal. Rptr. 101 (1962); Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960).

6. RESTATEMENT (SECOND) OF TORTS § 402A(a) (1965).

7. *See, e.g.*, Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 538 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968).

8. UNIFORM COMMERCIAL CODE § 2-313, Comment 2 states: "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." One major extension beyond sales is the lease or bailment of defective chattels. In this area recovery has been permitted in both strict tort liability and implied warranty. *See, e.g.*, Ettin v. Ava Truck Leasing Inc., 100 N.J. Super. 515, 242 A.2d 663 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 463, 251 A.2d 278 (1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Accelerated Trucking Corp. v. McLean Trucking Co., 53 Misc. 2d 321, 278 N.Y.S.2d 516 (N.Y. Civ. Ct. 1967).

9. Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918).

10. Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969); Carpenter v. Best's Apparel Inc., 4 Wash. App. 439, 481 P.2d 924 (1971).

11. *E.g.*, Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968).

ment of Torts justifies the imposition of liability without fault on a purveyor of goods because:

> the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods. . . .[12]

Regardless of the professional or commercial nature of the transaction and regardless of whether the transaction is a sale or a service, it will be argued that these policy considerations apply, and, as a result, recovery should be permitted whenever injury is caused by a defective product.

English Development of the Sale-Service Distinction

A description of the evolving distinction between sales and services calls for discussion of three issues: first, the *test employed* when making the distinction; second, the *purpose* for which the test is employed, and, in this regard, the appropriateness of using the same test for different purposes;[13] and third, whether or not there is any *public policy rationale* for differentiating sales from services.

The necessity for a sale-service distinction first arose in England when the courts began considering the enforceability of oral contracts.[14] The Statute of Frauds' requirement for a writing was applicable to agreements for the sale of goods, but inapplicable to contracts for rendition of services; hence a distinction between these types of contracts was required. In response to this need, the "essence test"[15] and the "English Rule"[16] were developed. The essence test criterion was whether "work is the essence of the contract, or whether it is the materials supplied."[17] When the materials were of primary importance, the contract was treated as one for the sale of goods and the Statute of Frauds required a writing. For example, in the leading case of *Clay v. Yates*,[18] the court held a contract to print 500 copies of a

12. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

13. For example, should a test used to distinguish sales from services for Statute of Frauds purposes be identical to one employed when confronting warranty or strict liability problems?

14. *E.g.*, Lee v. Griffin, 121 Eng. Rep. 716 (K.B. 1861); Clay v. Yates, 156 Eng. Rep. 1123 (Ex. 1856).

15. Clay v. Yates, 156 Eng. Rep. 1123 (Ex. 1856). For the rules governing the distinction between a sale and a service prior to *Clay* see Grafton v. Armitage, 135 Eng. Rep. 975 (C.P. 1845); Atkinson v. Bell, 108 Eng. Rep. 1046 (K.B. 1828).

16. Lee v. Griffin, 121 Eng. Rep. 716 (K.B. 1861).

17. Clay v. Yates, 156 Eng. Rep. 1123, 1125 (Ex. 1856).

18. *Id.*

treatise to be one for services because the printer's skill and labor were of greater value than the materials—paper and ink—supplied. The essence test was discarded when the English courts abandoned the sale-service distinction in products liability cases,[19] but American courts still employ it in cases involving professional transactions.[20] As developed in *Lee v. Griffin*,[21] the English Rule distinguished sales from services based on whether work and labor resulted in tangible goods which could become the subject of a sale, or, on the other hand, resulted in no tangible goods or goods which were not proper objects of a sale of goods contract.[22] In the former case, the oral contract would be for the sale of goods, thereby requiring a writing.

It is important to recall that the English tests arose in a Statute of Frauds context, and that the statute was intended to protect innocent defendants from fraudulent claims of unscrupulous plaintiffs.[23] Extension of this statute to service contracts was not imperative because nineteenth century England was not a service oriented society.[24] However reasonable the sale-service distinction may have been for Statute of Frauds purposes, the English courts quickly realized that it was valueless in the resolution of products liability cases.

The English Abandonment of the Sale-Service Distinction in Products Liability Cases

The first English products liability case to abandon the sale-service distinction was *G.H. Meyers & Co. v. Brent Cross Service Co.*,[25] wherein an implied warranty of fitness was imposed on goods supplied by an automobile repair service company. To secure engine repairs, Meyers entrusted defendant with his automobile. After defendant installed six manufacturer supplied connecting rods, a latent defect in one of the rods caused it to break, with resultant damage to the engine.

Though finding the contract to be for services rather than the sale of goods, *Meyers* nevertheless imposed an implied warranty of fitness

19. See text accompanying note 25 *infra*.

20. See cases cited note 11 *supra*.

21. 121 Eng. Rep. 716 (K.B. 1861).

22. *Id.* at 718. The court said a deed prepared by an attorney would be an example of work and labor resulting in a product which would not be treated as proper matter in a contract for the sale of goods. When an attorney has completed his work, the only tangible goods resulting are pieces of paper with ink upon them. *Id.*

23. *See generally* J. BAKER, THE LAW OF SALES §§ 2-3 (1887).

24. The increase in the output of services as compared to tangible products is of relatively recent vintage. In the United States, for example, services as a contribution to the American economy rose by 233% between 1946 and 1963, while the economy as a whole rose only 176%. THE MCGRAW HILL DICTIONARY OF MODERN ECONOMICS, 1965, p. 466.

25. [1934] 1 K.B. 46 (1933).

upon the connecting rods supplied by the defendant.[26] The court saw no distinction between a situation where plaintiff purchases and installs a connecting rod himself and where the purchaser has the retailer perform the installation. In both situations the consumer relies on the safety of the product supplied; moreover the defendant derives financial benefit from supplying such goods. The court concluded that a breach of implied warranty exists whenever an unsound product supplied by a person providing services causes injury, even though the defect is entirely latent.[27]

Meyers has been followed in England. The result is that liability for breach of implied warranty has been imposed on a hair dresser who used a defective hair dye,[28] a roofing contractor who supplied defective roofing tiles,[29] a veterinarian who injected cattle with a poisonous toxoid,[30] and a dentist who constructed a denture unfit for its intended purpose.[31] All of these cases involve hybrid transactions, somewhere between sales and services. They differ from a pure sale because labor is expended above and beyond the mere conveyance of title to the consumer. On the other hand, these transactions are not purely for services. The injury is caused by a product or tangible goods conveyed to the plaintiff.

The English courts have thus discarded any distinction between sales and services whenever an injurious product is either consumed by or applied to the plaintiff. Although this abandonment is complete in England, only a few American decisions abolish the distinction. Even when theories of implied warranty or strict liability are found applicable, some American courts contort the nature of the plaintiff-defendant relationship to fit neatly within the provisions of either the Uniform Commercial Code or the Restatement of Torts.[32] The English courts, more realistically, do not hesitate to extend a warranty's coverage to goods furnished through a personal service contract,

26. *Id.* at 53-54.

27. *Id.* at 53.

28. Watson v. Buckley, Osborn, Garrett & Co., [1940] 1 All E.R. 174 (K.B. 1939).

29. Young & Marten, Ltd. v. McManus Childs, Ltd. [1968] 2 All E.R. 1169 (H.L.).

30. Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.).

31. Samuels v. Davis, [1943] 1 K.B. 526 (C.A.). *Samuels* was the factual equivalent of Lee v. Griffin, 121 Eng. Rep. 716 (K.B. 1861); both cases concerned the construction of a denture by a dentist. In Lee v. Griffin, however, the sale-service distinction was made for Statute of Frauds purposes rather than warranty purposes. The court in *Samuels* distinguished Lee v. Griffin by stating, "I have no doubt that, if the question had arisen for decision [in Lee v. Griffin] whether it made any difference whether the contract was described as one of sale or one of work and labor, the answer for the present purpose would have been: 'None whatever'." *Id.* at 529.

32. See text accompanying notes 50-54 *infra.*

even though the English Sales of Goods Act—covering warranties in sales cases—is not applicable.[33]

The Sale-Service Distinction in American Products Liability Cases

American courts apply the sale-service distinction inconsistently, but the decisions can be grouped into two categories. The first category, commercial transactions, includes situations such as the improper redecoration of a house,[34] a restaurant's service of tainted food[35] and the application of a defective wave solution in a beauty parlor.[36] The second class involves transactions where the defendant renders a professional service. Included within this class are cases involving the supply of impure blood by hospitals[37] and blood banks[38] and the use of defective surgical instruments by dentists and doctors.[39]

When the contract between plaintiff and defendant is commercial in character, the courts are willing to extend liability without fault to the hybrid sale-service transaction, provided that a defective product is supplied to the plaintiff or used by the defendant in the course of performing the service.[40] When, however, the service rendered by the defendant is professional in nature, the courts generally refuse to im-

33. "I cannot see any logical distinction between the obligations which ought in general to be implied with regard to quality and fitness between a sale of goods and a contract for work and materials. Indeed, for my part I think that, as a matter of common sense and justice, one who contracts to do work and supply materials ought to be under at least as high if not a higher degree of obligation with regard to the goods he supplies and the work that he does than a seller who may be a mere middleman or wholesaler." Young & Marten, Ltd. v. McManus Childs Ltd., [1968] 2 All E.R. 1169, 1176-77 (H.L.).

34. Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971).

35. *E.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936); Merrill v. Hodson, 88 Conn. 314, 91 A. 533 (1914); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924).

36. *E.g.*, Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971).

37. *E.g.*, White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App. 1968); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970).

38. *E.g.*, Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967).

39. *E.g.*, Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969); Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

40. See text accompanying notes 47-57 *infra*.

pose liability without proof of negligence or intentional misconduct.[41] In light of the policy considerations underlying implied warranty and strict liability in tort, no rational basis exists for refusing to extend these doctrines to the professional transaction.

Commercial Transactions

The first cases involving the sale-service distinction in commercial transactions arose over the serving of substandard food by a restaurant. Since these earliest decisions took the position that an implied warranty of fitness could be imposed only when there was a sale of goods,[42] the question became whether a restaurant sells food to its customers. One court reasoned that a restaurant customer did not have title to the food because he was not entitled to take it with him when he left; without an exchange of title, there was no sale.[43] Other courts simply reasoned that the characteristics of a service, not a sale, predominated in this type of transaction.[44] Arguably, the transaction did involve a sale of goods because the customer was primarily bargaining and paying for the food which he consumed.

Regardless of whether the "uttering of food" by a restaurant is labeled a sale or a service, the distinction becomes irrelevant in light of the policy considerations underlying warranty. The basis for imposing liability is:

> because one party to the transaction is in a better position than another (1) "to know the antecedents that affect . . . the quality of the thing . . ." dealt with; (2) to control those antecedents; (3) and to distribute losses which occur because the thing has a dangerous quality; (4) when that danger is not ordinarily to be expected; (5) so that other parties will be likely to assume its absence and therefore refrain from taking self-protective care.[45]

A restaurant is clearly in a better position than the plaintiff to know the quality of the food served and to guard against spoiled food by local inspection or by limiting purchases to reputable distributors. Furthermore, imposition of liability upon the restaurant poses no hardship because it can implead the distributor or obtain indemnification from the distributor or processor.[46]

41. See text accompanying notes 65-82 *infra*.

42. *See e.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936); Lynch v. Hotel Bond Co., 117 Conn. 128, 167 A. 99 (1933); Merrill v. Hodson, 88 Conn. 314, 91 A. 533 (1914); Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924).

43. Merrill v. Hodson, 88 Conn. 314, 91 A. 533 (1914).

44. *E.g.*, Lynch v. Hotel Bond Co., 117 Conn. 128, 167 A. 99 (1933).

45. 2 F. HARPER AND F. JAMES, THE LAW OF TORTS § 28.19 at 1576 (1956).

46. Indemnification is often based on the ground that the manufacturer's negligence was primary or active while the retailer's was only secondary or passive. Amantia v. General Motors Corp., 155 N.Y.S.2d 294 (Sup. Ct. 1956); Ruping v. Great Atlantic & Pacific Tea Co., 283 App. Div. 204, 126 N.Y.S.2d 687 (1953). Indem-

The earliest American case to abandon the sale-service distinction in the case of a restaurant was *Friend v. Childs Dining Hall Co.*[47] The court did not contort the nature of the plaintiff-defendant relationship into a sale, thus allowing coverage by the Uniform Sales Act. Instead, the court stated that an action for breach of implied warranty would lie regardless of whether the serving of food was called a sale of goods or a rendition of services.[48] Unfortunately, many of the decisions subsequent to *Friend* treat the serving of food as a sale, thus perpetuating the sale-service dichotomy in this type of case.[49]

In order to reach the conclusion that an implied warranty should attach in the hybrid sale-service case, often those courts which refuse to abandon the distinction are forced to redefine the nature of the transaction beyond its logical limits. A good illustration of this is the recent decision of the Nevada Supreme Court in *Worrell v. Barnes.*[50] The plaintiff contracted with the defendant building contractor to remodel her home. The contract required carpentry work and the attachment of some household appliances to an existing gas system. During the course of the work, defendant installed defective fittings which allowed gas to escape; the gas ignited, and plaintiff's house caught fire.

The plaintiff brought suit in actions for negligence, breach of implied warranty and strict liability in tort.[51] Regarding the action for breach of implied warranty, application of the essence test would find a contract for services because the goods supplied—nails and small pipe fittings—were of little value when compared with the skill of the contractor. The same result would be reached if the court applied the English Rule.[52] The court, however, found that an action for breach

nification may also be obtained when there is a breach of implied waranty by the person from whom the realler obtained the product. Hessler v. Hillwood Mfg. Co., 302 F.2d 61 (6th Cir. 1962); Grummons v. Zollinger, 189 F. Supp. 64 (N.D. Ind. 1960). *See generally* Note, *The Right to Indemnity in Products Liability Cases*, 1964 U. ILL. L.F. 614.

47. 231 Mass. 65, 120 N.E. 407 (1918).

48. *Id.* at 75, 120 N.E. at 411.

49. *E.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936); Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465 (1936); Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924); Yochem v. Gloria, Inc., 134 Ohio St. 427, 17 N.E.2d 731 (1938); *accord,* Brevoort Hotel Co. v. Ames, 360 Ill. 485, 196 N.E. 461 (1935).

50. 87 Nev. 204, 484 P.2d 573 (1971).

51. The trial court dismissed the causes of action based upon strict liability and breach of warranty, after which there was a jury verdict for defendant on the issue of negligence. *Id.* at —, 484 P.2d at 575. The cause of action for strict liability in tort was upheld on appeal on the rather dubious basis that the defendant had "manufactured" a defective system. *Id.* at —, 484 P.2d at 576.

52. For a discussion of the essence test and the English Rule, see text accompanying notes 15, 16, *supra.*

of implied warranty did lie. Instead of attacking as meaningless any distinction between sale and service when defective products are used, *Worrell* held that supplying a defective gas fitting constituted a sale of goods for purposes of the Uniform Commercial Code.[53] No explanation was given for this determination. This suggests that there may have been no justification other than the plaintiff's reliance on the contractor's skill.[54]

Even though the court reached an equitable solution, the rationale underlying it only blurs the distinction between sales and services. The growth of liability without fault reveals that frequently before courts extend protection to a new group of plaintiffs by adopting changes in the bases of recovery, there is a tendency to stretch the meaning of existing words and phrases thus affording such persons relief.[55] Though this stretching and the result reached in *Worrell* are laudable, it is difficult to define adequately the limits of terms such as "user" or "sale." A logical approach is to allow an action based on implied warranty even though the contract is not strictly for the sale of goods.

Such an approach was taken by the New Jersey Supreme Court in *Newmark v. Gimbel's Inc.*[56] Mrs. Newmark suffered injuries to her hair and scalp following application of a defective wave solution in defendant's beauty salon. The court, in permitting recovery for breach of implied warranty, stated that the transaction contained elements of both a service and a sale, but there was no reason to limit the application of implied warranty to "the intricacies of the law of sales."[57] The court refused to distinguish between a situation where a person purchases and applies a wave solution herself and one in which it is applied by a beautician in the course of giving a wave treatment. In either case, the beauty parlor is in a better position than the innocent customer to take precautions against this type of injury.

It has been suggested that *Newmark* extends the applicability of implied warranty or strict liability in tort to any situation in which a

53. 87 Nev. at —, 484 P.2d at 576.

54. *See id.*

55. *E.g.*, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633, 639 (1969) (defendant land developer held strictly liable for defective subsurface soil conditions because he was a "manufacturer" of lots); Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963) (extension of implied warranty to anyone who could be anticipated to use, occupy or service the defective product); *see* Gutierrez v. Superior Court, 243 Cal. App. 2d 710, 52 Cal. Rptr. 592 (1966) (dictum).

56. 54 N.J. 585, 258 A.2d 697 (1969).

57. *Id.* at 594, 258 A.2d at 701. This language was originally used to strike down the privity requirement in an action by an injured party against the defective product's manufacturer. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 311-12 (1965).

substandard product is supplied in conjunction with the rendering of a service.[58] The court, however, was careful to limit its holding to commercial transactions. It specifically rejected the proposition that professionals, such as doctors or dentists, could be held liable should the products they use while performing their services prove unsound.[59]

The number of cases dealing with the hybrid sales-service problem in terms of implied warranty and strict liability in tort are few. When the transaction is commercial in nature, however, there seems to be a trend toward imposing liability without fault. Some courts, as in *Newmark* and *Friend*, argue for the abandonment of the distinction between sale and service where a defective product has been supplied. Other decisions, such as *Worrell*, prefer characterization of the transaction as a sale in order to employ the provisions of the Uniform Commercial Code. Regardless of the approach adopted, whenever the transaction is professional in nature, no similar trend in favor of liability without fault is evident.

The Professional Transaction

There are two reasons why the courts refuse to permit strict liability recovery against the professional. The first is that professional transactions are primarily for services and traditionally there has been no liability without fault absent a sale. In this regard, the courts have refused to follow *Newmark* and *Friend* to abandon the distinction between sale and service.[60] The second reason given by the courts is that the community need for the services of professionals, such as doctors and dentists, greatly outweighs the policy considerations favoring the imposition of liability without fault upon professionals.[61] Thus, the courts have created a special class of persons to whom liability without

58. Note, *A New Principle of Products Liability in Service Transactions*, 30 U. PITT. L. REV. 508, 511 (1969). This suggestion was based in part on the court's statement that "[o]ne, who in the regular course of 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." 54 N.J. at 595, 258 A.2d at 702.

59. 54 N.J. at 595-96, 258 A.2d at 702-03.

60. *See, e.g.*, Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971).

61. *See* Carmichael v. Reitz, 17 Cal. App. 3d 958, 979, 95 Cal. Rptr. 381, 393, *quoting* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 107, 123 N.E.2d 792, 795 (1954). This proposition was expressly stated in Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969) as the basis for distinguishing a commercial from a professional transaction. "In our judgment, the nature of the services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort." *Id.* at 597, 258 A.2d at 703.

fault is not applicable. This is based merely on the nature of work performed by such persons. The wisdom of this classification will be examined both in terms of the actual hardships which would be imposed on the professional should an extension of liability without fault be made[62] and in terms of the professional's treatment in the field of tort liability.[63]

Blood Transfusions

The leading decision wherein a court refused to impose liability without fault on the professional was *Perlmutter v. Beth David Hospital.*[64] Perlmutter contracted homologous serum jaundice after being administered a blood transfusion by a staff member of Beth David Hospital. The plaintiff alleged that the administration of defective blood for which a separate charge was made constituted a sale of goods by the hospital and that he was entitled to recover for breach of implied warranty of fitness and of merchantability.[65] The court denied plaintiff recovery, arguing that since the transaction was primarily for services implied warranty was inapplicable.[66] Holding that the service element predominated, the court relied on the plaintiff's subjective bargaining intent:

> It was not for blood—or iodine or bandages—for which the plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities to provide whatever medical treatment was considered advisable.[67]

Realistically, any person involved in this type of hybrid transaction is bargaining for and relying on both the skill of the hospital staff and the safety of the products which the staff chooses to use. Both implied warranty and strict liability in tort are predicated on the concept that a person injured by a defective product upon which he is forced to rely and against which he is powerless to protect himself is entitled to re-

62. See text accompanying note 107 *infra.*

63. See text accompanying note 108 *infra.*

64. 308 N.Y. 100, 123 N.E.2d 792 (1954).

65. *Id.* at 103, 123 N.E.2d at 793.

66. *Id.* at 106, 123 N.E.2d at 796. In holding that the sale-service distinction had continued validity, *Perlmutter* relied on several cases where the essence test was employed to make the distinction. None of the cases cited, however, concerned warranty or strict liability in tort; rather, these cases included activities such as the imposition of a retailer's occupation tax upon an optometrist who sold and fitted lenses in Babcock v. Nudelman, 367 Ill. 626, 12 N.E.2d 635 (1937); or the application of a zoning ordinance prohibiting the removal of sand and gravel for sale in Town of Saugus v. B. Perini & Sons, Inc., 305 Mass. 403, 26 N.E.2d 1 (1940). In these cases the distinction between sales and services had to be made because the provisions of the statutes in question were inapplicable to sales; *Perlmutter* however was not required by any existing statute to distinguish between sales and services.

67. 308 N.Y. at 106, 123 N.E.2d at 795.

cover against the supplier of the product.[68] In the case of a patient in a hospital, there can be no question that reliance exists. Furthermore, the patient has no opportunity to inspect such products. Even if an opportunity were afforded, the patient would lack the training necessary to discover an existing defect. Assuming a patient's primary reliance on the hospital's *services* could be established, there is still no reason to deny recovery merely because reliance on the products supplied is less than the reliance on the services rendered by the hospital.

After concluding that the transaction was primarily for services, the court in *Perlmutter* stated that the plaintiff was not entitled to split the transaction in order to treat the supplying of blood as a sale for purposes of warranty while treating as services the other care received from the hospital. The court, in short, insisted that the transaction be treated as a single entity.[69]

Although *Perlmutter* has been widely followed,[70] some courts have imposed liability without fault on both hospitals[71] and blood banks[72] for supplying defective blood. In one of these cases an action

68. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 15, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965); Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

69. 308 N.Y. at 104, 123 N.E.2d at 795. This was the position of the New York court in Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967). Cheshire was injured when a surgical pin broke after being inserted in her body, and the court held that the hospital could not be held strictly liable unless the plaintiff could demonstrate the existence of a sale. However, the court refused to permit the plaintiff to split the transaction into its several parts in order to find such a sale. "A transaction involving the medical care and treatment of a patient at a hospital is regarded in its entirety, and may not be broken down so as to label some parts of it as sales and other as contracts for services. . . ." *Id.* at 356, 278 N.Y.S.2d at 532. In Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968), the Texas Supreme Court refused to hold an optometrist strictly liable for selling allegedly defective lenses. The optometrist, in addition to measuring vision, maintained 84 offices throughout Texas for the promotion and sale of eye glasses and contact lenses. While admitting that the defendant's business was a hybrid between a profession and a merchandising concern the court nevertheless held that the professional aspect of the plaintiff-defendant relationship precluded recovery. 425 S.W.2d at 346.

70. *See, e.g.*, Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Fischer v. Wilmington Gen. Hosp., 51 Del. 554, 149 A.2d 749 (1959); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956).

71. Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970).

72. Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967). The *Russell* decision was not favorably received by the Florida legislators. FLA. STAT. ANN. § 672.2-316(5) (Supp. 1972) in effect overruled the *Russell* decision by defining the procurement of blood as a service and not a sale. Florida has also refused to extend the *Russell* reasoning to a case in which suit was filed against a hospital. White v. Sarasota County Pub. Hosp. Bd., 200 So. 2d 19 (Fla. Dist. Ct. App.), *cert. denied*, 211 So. 2d 215 (Fla. 1968).

against the hospital was founded upon strict liability in tort. *Cunningham v. MacNeal Memorial Hospital*[73] states that a hospital may be held strictly liable for administering defective blood. The decision initially seems to imply that the sale-service distinction is of limited value:

> It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision.[74]

The entire *Cunningham* decision, however, makes it apparent that the holding is based on traditional concepts of sales law. The court permitted plaintiff to split the transaction into its component parts and treat the blood transfusion separately from the hospital's other services. A separate charge was made for the blood, and the court concluded that the transaction involved a sale, opening the door for imposition of strict liability.[75] Thus, *Cunningham,* despite its plaintiff-oriented results, does little to pierce the fog clouding the distinction between sales and services.[76] For example, should the existence of a separate charge be the crucial test, or is the exchange of title, suggested by the restaurant cases, a sale's most important element? May a transaction be split into component parts in order to treat part as a sale and part as a service or must the whole transaction, as *Perlmutter* argues, be taken in its entirety? Finally, what happens in those hybrid transactions, such as the use of defective surgical instruments by a doctor, where there is not "at least arguably, a sale"?

Defective Surgical Instruments

In *Magrine v. Krasnica*[77] and *Silverhart v. Mt. Zion Hospital,*[78] the plaintiffs attempted to recover against a dentist and a hospital respec-

73. 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

74. *Id.* at 450, 266 N.E.2d at 901, *quoting* Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 752 (Fla. Dist. Ct. App. 1966).

75. 47 Ill. 2d at 450, 266 N.E.2d at 901.

76. This was because *Cunningham* restricted the application of strict liability to the confines of the Torts Restatement. The Restatement limits recovery to sales transactions; see note 3 *supra.* Hence *Cunningham* had to find a sale before permitting recovery. However, in Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970), the action against the hospital was for breach of implied warranty. Because the Uniform Commercial Code provision covering warranties is not restricted to sales, see note 8 *supra, Hoffman,* in permitting recovery, held that it made no difference whether the transaction was a service or a sale. 439 Pa. at 508, 267 A.2d at 870. Since the courts in cases of torts liability seem reluctant to extend recovery beyond the principles enumerated in the Restatement, it appears that the Uniform Commercial Code offers a more hopeful basis upon which to argue for the extension of liability beyond sales.

77. 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. L. Div. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd,* 53 N.J. 259, 250 A.2d 129 (1969).

78. 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971). The sale-service distinction, as a means of insulating from liability persons such as doctors and dentists, made its

tively for injuries suffered when hypodermic needles broke during medical treatment. In *Magrine*, the action against the dentist was based on both implied warranty and strict liability in tort, while in *Silverhart* the action was founded solely upon strict liability in tort. On a theoretical level, at least, these cases differ from those previously discussed. Defective needles are not similar to a wave solution because the needle has no independent value to the consumer other than as a tool utilized by the dentist. On the other hand, the *Newmark* wave solution had independent value because Mrs. Newmark could have easily purchased the product and applied it herself. Thus, while in cases such as *Newmark* the transaction was sufficiently analogous to a standard sale to justify an extension of warranty to the transaction, the facts in *Magrine* and *Silverhart* do not suggest the elements of a sale. Imposition of strict liability upon the dentist or the hospital requires complete abandonment of the sale-service distinction.

The *Magrine* court, after carefully examining the history of warranty and tort liability in New Jersey, concluded that strict liability had been imposed only upon those who either,

> were in "a better position" in the sense that they *created* the danger (in making the article . . .) or possessed a better capacity or expertise to control, inspect and discover the defect . . . .[79]

In this regard, the court concluded, the dentist was in no better position than the plaintiff. The court, however, acknowledged one exception to the above criteria: liability attaches where retailers have sold goods in sealed containers.[80] Even though the retailer had no opportunity to inspect for defects—without destroying his product's marketability—he has still been held strictly liable.[81]

Holding this exception to be inapplicable, the court distinguished the retailer from the dentist because the essence of the retailer-customer relationship related to the product sold, while the essence of the patient-dentist relationship focused on the dentist's services. *Magrine*, in short, applied the essence test and denied recovery based on

first California appearance in Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971). In *Carmichael* plaintiff developed pulmonary embolisms from ingesting the drug known as Enovid, which defendant doctor had prescribed for the plaintiff. In concluding that the doctor could not be held strictly liable in tort the court said: "[T]he distinction between a transaction where the primary objective is the acquisition of ownership or use of a product and one where the dominant purpose is to obtain services has not been obliterated. Where the services sought are professional in character, the distinction applies *a fortiori*." *Id.* at 978, 95 Cal. Rptr. at 392. The *Carmichael* court's discussion of the distinction, however, was probably dictum because the drug itself was not defective. *Id.* at 977, 95 Cal. Rptr. at 392.

79. 94 N.J. Super. at 234, 227 A.2d at 543.

80. *Id.* at 235, 227 A.2d at 543.

81. *E.g.*, Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

strict liability because the transaction was predominantly for services.[82] As previoisly discussed, English courts employed the essence test to differentiate sales from services in problems concerning the Statute of Frauds. The same courts abandoned both the essence test and the sale-service distinction when they began to consider implied warranty.[83] Despite this precedent, American decisions, such as *Magrine* and *Silverhart*, still approve the essence test in cases concerning strict liability.

Contrary to the arguments in *Magrine* and *Silverhart*, the retailer's and dentist's situations are similar, at least when considering the policy considerations underlying strict liability. The first reason for holding retailers liable is that "[t]hey are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[84] The underlying logic appears to be that since the retailer has derived financial benefit from sale of his wares, he should bear the risk of loss as incident to doing business.[85] Although the dentist receives no financial benefit from a sale of goods, the use of products such as needles is an indispensable element of the service for which the plaintiff has been charged. Thus, in the financial gain theory of liability, the only difference between the retailer and the dentist is that the retailer benefits directly from a product sale, while the dentist benefits indirectly through the use of certain products in performance of his professional service.[86]

82. 94 N.J. Super. at 235, 227 A.2d at 543.

83. See text accompanying note 25 *supra*.

84. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964). *See* Price v. Shell Oil Co., 2 Cal. 3d 245, 250, 466 P.2d 722, 725, 85 Cal. Rptr. 178, 181 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 587, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969).

85. *See* James, *Products Liability*, 34 TEXAS L. REV. 192, 222 (1955). As a corollary to this theory it has been suggested that liability should be borne by those who are best able to withstand it. Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914). In view of the economic benefits which dentists and doctors enjoy relative to the rest of the community, this consideration seems to apply. In 1969, for example, the median income of doctors was $25,000, while the median family income was $9,433. STATISTICAL ABSTRACT OF THE UNITED STATES, 229, 331 (1971).

86. The financial gain theory has been used in other areas of the law as a basis for strict liability. Under the doctrine of respondeat superior, an employer may be held strictly liable for his employee's tortious acts committed within the scope of his employment. *E.g.*, Son v. Hartford Ice Cream Co., 102 Conn. 696, 129 A. 778 (1925); Annis v. Postal Tel. Co., 114 Ind. App. 543, 52 N.E.2d 373 (1944). It has been argued that the basis for imposing strict liability in such a case is because the employer has reaped financial gain from his employee's efforts; as a result the employer should bear the losses which result from his employee's acts. *See e.g.*, Hamlyn v. John Houston & Co., [1903] 1 K.B. 81; Duncan v. Findlater, G Cl. & Fin. 894, 7 Eng. Rep. 934 (H.L. 1839). The same rationale applies to the strict liability imposed on employers in workmen's compensation cases. *See generally*, W. PROSSER, LAW OF

Regardless of the manner in which the financial benefit is derived, the policy considerations underlying liability should not change. For example, a plaintiff's reliance on products with which he comes in contact does not vary merely because the defendant has been enriched through the use, instead of the sale, of the products in question. In fact, because of a professional's greater expertise and because of the nature of medical services, greater reliance is probably placed on the tools which the doctor or dentist uses than on goods supplied by the ordinary retailer. The nature of defendant's enrichment, moreover, alters neither plaintiff's opportunity to inspect for possible defects nor his opportunity to take self-protective care. Thus, regardless of the mode of defendant's enrichment, the policy arguments attach with equal force.

The second reason for holding the retailer liable is that he may be the only party amenable to suit[87] because the manufacturer may be either unknown[88] or beyond the court's jurisdiction.[89] In *Magrine*, for example, the dentist was uncertain concerning the identities of both the manufacturer and salesman.[90] Thus, denying the patient recovery against the dentist could easily result in denying the patient any judicial relief.

In reaching its conclusion that liability should not be imposed on dentists in the absence of either negligence or intentional misconduct, the *Magrine* court took judicial notice of two English cases. In the first case an implied warranty was imposed on a beautician's defective wave solution.[91] In the second case an implied warranty was applied to a veterinarian's injection of poisonous toxoids into cattle.[92] Distinguishing these cases from the facts before it, the court in *Magrine* argued that at the very least defendants in the English cases "supplied" the products to the plaintiffs, while the dentist was a user, rather than a supplier, of the defective product.[93] Arguably, a beautician who treats a plaintiff's hair with a wave solution is a user as well as a sup-

TORTS § 80, 525-37 (4th ed. 1971). There does not seem to be any meaningful distinction between the economic gain derived from sales of goods or an employee's labors on the one hand, and the gain derived through the use of certain products on the other; nevertheless, the courts have refused to impose liability in the latter situation.

87. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

88. *See, e.g.*, Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945).

89. *See generally* Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions*, 63 MICH. L. REV. 1028, 1035-43 (1965) for a discussion of how the various state long-arm statutes affect the problem.

90. 94 N.J. Super. at 240, 227 A.2d at 546.

91. Watson v. Buckley, Osborne, Garrett & Co., [1940] 1 All. E.R. 174 (K.B. 1939).

92. Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.).

93. 94 N.J. Super. at 236-37, 227 A.2d at 544.

plier. By analogy, the dentist "supplied" the defective needle because he was the means by which the plaintiff contacted it. Any distinction between supplier and user, however, is purely one of semantics[94] and registers no real impact on the crux of the matter: the policy arguments underlying warranty and strict liability. Thus, defendant's position as either supplier or user does not affect plaintiff's reliance on the defective product or his opportunity to take protective measures. The supplier-user dichotomy does not take into account the realities of the injured plaintiff's situation any more than the mode by which the defendant is enriched takes the plaintiff's situation into account.

In *Silverhart v. Mt. Zion Hospital*,[95] a 1971 California appellate case, the court demonstrated the potential arbitrary qualities of the sale-service distinction, stating that the hospital would be subject to strict liability if the product supplied was "not integrally related to its primary function of providing medical services . . . ."[96] To illustrate, the court noted that had the patient been injured by a product purchased from the hospital gift shop, recovery based on strict tort liability would be possible.[97] This distinction ignores the fact that reliance on gifts from the hospital's shops is far less and the opportunity to inspect for defects far greater than the reliance and opportunity for inspection afforded a party injured by defective surgical instruments used in the course of the hospital's normal operation.

In holding that strict liability should not be imposed upon transactions which are predominantly for services, *Silverhart* relied upon *Gagne* v. *Bertran*,[98] a California Supreme Court decision written by former Chief Justice Traynor. An implied warranty did not attach to work done by a test driller. The court in *Gagne* found applicable:

> 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.[99]

94. Those who may conceivably be injured should be the ones entitled to protection. "[I]n this situation the dentist is not a 'consumer' of the hypodermic needle. The patient must be viewed as the 'ultimate consumer'. The dentist purchased the needle for use on his patients; it is they who are exposed to the risk of the instrument." Magrine v. Spector, 100 N.J. Super. 223, 232, 241 A.2d 637, 642 (1968) (dissenting opinion).

95. 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971).

96. *Id.* at 1027 n.4, 98 Cal. Rptr. at 191 n.4.

97. *Id.*

98. 43 Cal. 2d 481, 275 P.2d 15 (1954).

99. *Id.* at 487, 275 P.2d at 20. The rationale of *Gagne* has been followed with the result that, in California, those who offer their services for hire will not be liable under either a theory of implied warranty or strict liability in tort whenever the plaintiff's injury is not caused by a defective product supplied by the defendant. *E.g.*, Allied Properties v. John A. Blume & Assoc., 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972) (marine engineer); Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal.

Although Justice Traynor stated that implied warranties traditionally were associated with sales, he recognized that warranties have been extended beyond the sales transaction in certain cases, such as a restaurant's serving of spoiled food and the lease or bailment of defective chattels.[100] *Silverhart* presented a factual situation closer to these cases than to the facts of *Gagne*. In these cases, an extension of liability without fault was allowed because the damage was caused by a defective product, while in *Gagne* itself no defective product existed. Thus, *Silverhart*'s reliance upon *Gagne* seems misplaced; and the true precedent would seem to be the product-related cases cited in *Gagne*.

One of the reasons for holding the supplier of a defective product strictly liable is that the supplier can spread his loss by either impleading the manufacturer or obtaining indemnification from him.[101] There was no defective product in *Gagne*, and hence, had the defendant been liable, he would have been unable to spread his loss. Yet in *Silverhart* and the cases cited in *Gagne*, the supplier could spread the loss by obtaining indemnification from the manufacturer of the defective product.

After the *Gagne* decision, the California Supreme Court considered a case involving damage caused by a defective product used during a service and imposed an implied warranty on the transaction. In *Aced v. Hobbs-Sesack Plumbing Co.*,[102] suit was brought by a construction contractor against a sub-contractor who had agreed to supply the labor and materials necessary for the proper installation of a radiant heating system. After installation of the system had been completed, it began to leak. The plaintiff-homeowner sued the contractor, who cross-complained against the sub-contractor for breach of warranty. Through application of the Massachusetts Test,[103] the court determined that the agreement between the contractor and the sub-contractor was for services rather than the sale of goods. Nevertheless, *Aced* held that an implied warranty of merchantability attached to the transaction, and relied, in part, on *Gagne* as authority for the proposition that a warranty's strict liability need not be confined to sales transactions. The difference between *Aced* and *Gagne* was that in the former case the damage was due to a defective product, whereas a de-

Rptr. 404 (1965) (communications service); Lindner v. Barlow, Davis & Wood, 210 Cal. App. 2d 660, 27 Cal. Rptr. 101 (1962) (accountant); Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960) (surveyor).

100. 43 Cal. 2d at 486 n.2, 275 P.2d at 19 n.2.

101. See cases cited note 46 *supra*.

102. 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961).

103. This test was used by several American courts to distinguish sales from services in cases concerning the Statute of Frauds. *See generally* S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 55 (rev. ed. 1948).

fective product was not related to plaintiff's injury in the latter. Thus, as previously suggested, *Aced* presents a factual situation closer to *Silverhart* than *Gagne*. If the court refused to extend liability in *Gagne* because there was no defective product, then the court in *Silverhart*, where such a product existed, should have permitted the action.

Part of the reluctance to extend liability without fault to the professional transaction undoubtedly is predicated upon the fear that such extension would effectively destroy negligence as a cause of action. In *Magrine*, for example, the court states that application of strict liability to the dentist would imply that anyone using a defective product could be held strictly liable should injury to another person result.[104] This is not persuasive, however, because realistically liability would be imposed only in those situations where defective products are used by a defendant in the business of providing a service.[105] Liability should not be extended to anyone using a defective product any more than strict liability would be imposed when a product is sold by someone not engaged in the business of selling such products. For example, the women who sells or gives her neighbor a jar of preserves is not held strictly liable for injury resulting from their consumption.[106] Nor should a nonprofessional who administers first aid be held strictly liable when an instrument he is using proves defective, causing injury. In these examples, no business exists to absorb the loss, and there is no genuine financial gain to serve as the basis for imposing liability.

Implicit in the courts' denial of recovery in this area is the notion that because of the community need for dentists, doctors and hospitals and because of the beneficial services they render, no justification exists for imposing strict liability upon them.[107] To the extent that the courts have based their decisions upon this ground, a new policy consideration has entered the field of strict liability: the more essential a person's services are to the community, the less likely the possibility that he will be held strictly liable for the supply or use of defective products. Actually, no justification exists for insulating certain persons from liability merely because of their occupation. What should be considered is not the work a person does, but the benefits which he

104. 94 N.J. Super. 228, 241, 227 A.2d 539, 547 (1967).

105. Such an extension of liability will not alter the requirements of proving a products liability case. The plaintiff must still demonstrate that (1) he was injured by the product; (2) the product was defective; and (3) the defect existed when it left the hands of the defendant. *See generally* Emroch, *Pleading and Proof in a Strict Products Liability Case*, 1966 INS. L.J. 581 for a discussion of the difficulties inherent in proving a products liability case.

106. This hypothetical was suggested as a possible limitation on the application of strict liability in tort. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 664 (4th ed. 1971).

107. See note 61 *supra*.

receives from the use of certain products and the hardships which he would suffer should strict liability be imposed.

The *Magrine* case affords an excellent illustration: the dentist's tools enable him to perform the service by which he earns a living. When a particular product or tool breaks down, he will merely lose the time spent in performing the service. The plaintiff, on the other hand, receives a physical injury from the product with resulting medical expenses. If the dentist is held liable, his hardship is not extreme because he can spread his loss either through liability insurance, impleading the distributor of the product or obtaining indemnification from him. In *Magrine*, spreading of loss was not possible because the manufacturer and the distributor were unknown. This was attributable to the dentist's failure to keep adequate records of his purchases. Thus, in *Magrine* the court faced two possibilities: either allow plaintiff to recover against the dentist, in which case the dentist would be unable to spread his loss, or deny plaintiff recovery against the dentist which, since the manufacturer and distributor were unknown, would effectively be a denial of any recovery. Although the court chose the latter position, the fact that the distributor was anonymous only because the dentist failed to keep careful records would seem to imply that recovery against the dentist should have been permitted.

Another problem with the reasoning in these cases is the difficulty of determining which services are sufficiently essential to the community to justify immunity from liability without fault. In the medical field, the question arises as to whether nurses, hospital administrators and orderlies should be granted immunity. Arguably, the food-providing farmer or the shelter-providing builder should be granted such protection. The simple fact is that all of these persons, including doctors and dentists, provide the community with necessities and all of them receive compensation for their services. There seems to be no reason to grant special treatment to medical professionals merely because, at the moment, their services are in great demand by the community.

Although doctors and professionals sometimes do receive what appears to be special treatment in the law, there is usually a sound reason for it. In malpractice cases, for example, a doctor usually cannot be held liable for negligence without expert testimony.[108] It has been argued that this practice permits doctors to set their own standard of care.[109] The rationale underlying the requirement of expert testi-

108. *E.g.*, Boyce v. Brown, 51 Ariz. 416, 77 P.2d 455 (1938); Beane v. Perley, 99 N.H. 309, 109 A.2d 848 (1954).

109. James & Sigerson, *Particularizing the Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 710 (1952).

mony, however, is that only another doctor is qualified to opine whether due care was exercised. To take another example, because the opportunity to learn and practice new techniques is limited in some smaller communities, some courts have relaxed the standard of care to which a doctor will be held to that of the locale in which he practices.[110] In all of these cases the special rules are based on sound reasoning. There appears no reason, however, in terms of hardship or benefits conferred, to insulate doctors or other professionals from liability for using or supplying defective products while simultaneously imposing liability on persons engaged in commercial transactions.

Conclusion

The field of products liability has expanded rapidly over the past twenty years.[111] During this development, many of the once sacred concepts have been almost universally rejected. One of the most notable of these concepts is privity—an outgrowth of the law of contracts and sales. The requirement of privity originally prevented an injured consumer from recovering directly from a defective product's manufacturer. The privity barrier was abrogated because the courts felt there was no justification for limiting consumer recovery to the "intricacies of the law of sales."[112] Significantly, this was the same reason *Newmark* gave for extending recovery beyond the pure sales transaction to a hybrid case where defendant employed a defective product in the course of rendering a commercial service. The basis for imposing liability—economic gain—does not change merely because a defendant is enriched through the use rather than the sale of certain products.

However, as *Magrine v. Krasnica* and *Silverhart v. Mt. Zion Hospital* demonstrate, the courts have refused to apply the *Newmark* reasoning to situations where plaintiff's injury was caused by a defective product in the hands of a medical professional. This note has therefore demonstrated that the "intricacies of the law of sales" are no more applicable to the professional transaction than they are to the commercial enterprise. The controlling factors should not involve the mechanical application of sales law, but rather the policy considerations underlying strict liability. These considerations—economic gain, risk distribution and consumer protection—are as applicable to the doctor who

110. *E.g.*, Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941); Hoover v. Goss, 2 Wash. 2d 237, 97 P.2d 689 (1940).

111. *See generally*, Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

112. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 311-12 (1965).

gives medical treatment as they are to the beautician who dyes a customer's hair.

Contrary to *Magrine* and *Silverhart*'s suggestions, there is no basis for insulating medical professionals from liability merely because of the community demand and need for their services.[113] Professionals are not engaged in a charitable enterprise. They derive financial benefit from their work in the same manner as those who render commercial services. In the usual situation, these individuals can spread their losses to the defective product's manufacturer. When this is not possible because of some failing on the defendant's part, then it seems clear that the defendant, rather than the innocent consumer, should bear the loss.[114]

In summary, the trend today is toward maximum consumer protection. Pursuant to this trend, strict liability has been extended beyond retailers to manufacturers, wholesalers, lessors and, in *Newmark*,[115] to a defendant who used a defective product while rendering a commercial service. It would appear that the next logical step is an extension of strict liability to all who supply or use injury-producing products in the course of performing services. If such an extension is made, a matter of some interest will be whether the courts will continue to stop short of the professional service transaction, as in *Magrine* and *Silverhart,* or extend liability to *any* person who uses a defective product in the performance of a service. Hopefully, the latter position will prevail.

*William R. Russell**

113. See text accompanying note 107 *supra.*
114. See text accompanying note 90 *supra.*
115. See text accompanying note 56 *supra.*
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