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Francis Scott Baldwin

PRODUCTS LIABILITY AS IT APPLIES TO SERVICE TRANSACTIONS

FRANCIS SCOTT BALDWIN*

INTRODUCTION

In 1960 the Supreme Court of New Jersey decided the famous case of *Henningsen v. Bloomfield Motors*,[1] which ushered into being the body of law referred to today variously as strict liability, liability without fault, or the law of products liability. Most states apply the concept of strict liability, in some form, when a defective product causes injury. The basis for this doctrine is section 402A of the Restatement of Torts.[2]

The obvious question arises: Should this doctrine apply to one who sells a service as well as to one who sells a product? For example, does the theory of strict liability apply to one who furnishes a service such as the Jefferson Chart Service to pilots? Does it apply, for instance, to one who overhauls an airplane engine and does so improperly, though none of the parts are defective? What

* LL.B., 1953, Univ. of Texas School of Law; B.A., 1949, North Texas State Univ.; President, Texas Trial Lawyers Ass'n, 1965-66; Governor, Ass'n of Trial Lawyers of America, 1973-76; Chairman, Railroad Section, Ass'n of Trial Lawyers of America, 1973-74.

[1] 32 N.J. 358, 161 A.2d 69 (1960).

[2] RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of the product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

about one who improperly repairs a TV set, hot water heater, or other similar appliance? This whole area involving services rendered and hybrid transactions that do not involve the sale of a product as such poses a question that is not easily determined. The law in this area is far from settled; however, certain trends are emerging.

The purpose of this paper is to explore this gray area involving liability for services rendered and kindred transactions in view of the law as it exists today and to comment on the courses that courts in the future may follow. Basically there are two types of services: professional services and non-professional services.

PROFESSIONAL SERVICES

With one notable exception,[3] the courts have almost unanimously refused to extend the doctrine of strict liability, or liability without fault, to one who renders a professional service. Most certainly the courts have refused to extend the doctrine of strict liability to doctors and dentists.

Doctors-Dentists

The Supreme Court of Texas, in *Barbee v. Rogers*,[4] refused to extend the concept of strict liaiblity to services rendered by an optometrist in prescribing and fitting contact lenses. In *Barbee* there were jury findings that contact lenses were not reasonably fit for the use on the surface of the plaintiff's eyes;[5] that they caused injury to the tissues of the plaintiff's eyes;[6] and that the failure of the contact lens to reasonably fit was the proximate cause of the plaintiff's injuries.[7] The court declined to apply the theory of strict liability in tort. Although the court recognized that it had adopted section 402A of the Restatement of Torts, it refused to hold the optometrist strictly liable for the injuries when the injuries were not due to the product itself.[8] The court noted that this was not the act of one selling a "product in a defective

[3] *See* text accompanying notes 18 & 19 *infra*.

[4] 425 S.W.2d 342 (Tex. 1968).

[5] *Id.* at 343.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 346.

condition unreasonably dangerous to the user" and that the policy considerations supporting the rule of strict liability were not present. It said, instead, that the activities of the defendant fell between those ordinarily associated with the practice of a profession and those characteristics of a merchandising concern. In refusing to extend this doctrine to the services of an optometrist the court said that the miscarriage, if one existed, was in the professional acts of the optometrist and not in a defective commodity that was sold.[9]

At about the same time, the New Jersey Supreme Court refused to extend the doctrine of strict liability to the services of a dentist. In *Margrine v. Krasnica*[10] the plaintiff sought to invoke the doctrine of strict liability against the dentist in an action to recover for personal injuries caused by the breaking of a hypodermic needle used to inject a local anesthetic into the plaintiff's jaw. The plaintiff argued that all of the basic policy considerations for applying the doctrine of strict liability were present. The New Jersey court rejected this argument for several reasons. First, it said that the dentist was in no better position than the plaintiff to discover the defect in the needle.[11] Second, the court said that the dentist did not put the article into the stream of commerce nor did he promote its purchase by the public.[12] Third, the Court rejected the plaintiff's contention that the dentist was in a position to spread the risk by obtaining liability insurance. It pointed out that the "risk distribution" theory is a relevant consideration only where the party that put the goods in the stream of commerce may fairly be assumed to have substantial assets.[13] Fourth, the court rejected the plaintiff's argument that the dentist should be held liable because he could implead the manufacturer, finding that the dentist was not and could not be certain who the manufacturer was.[14] Finally, the court added that the relevant policy considerations would not justify imposition of strict liability upon a dentist in this instance, concluding that to do so would be to add an irrational consequence

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[9] *Id.*

[10] 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968).

[11] 227 A.2d at 543.

[12] *Id.*

[13] *Id.* at 544.

[14] *Id.* at 545.

to a laudable progress achieved in the field of tort law.[15]

The New Jersey Supreme Court again addressed the question of whether to apply the doctrine of strict liability to professional services in *Magna v. Beth Israel Hospital.*[16] The plaintiff in *Magna* was injured by a plastic surgeon and sought to bring an action against him based on the theory of breach of warranty and strict liability. The court held that the doctrines of breach of warranty and strict liability were not applicable to the medical or dental professions[17] and hence dismissed the allegations of malpractice based on these theories. It simply refused to extend the doctrine of strict liability to these type services.

Engineering Services

The Alabama Supreme Court has extended the doctrine of strict liability to engineering services, but other courts have declined to do so. In *Broyles v. Brown Engineering,*[18] a civil engineering firm had contracted to supply the plaintiff with a drainage survey. The Alabama court held that in doing so, the engineering firm implicitly warranted the sufficiency and adequacy of the plans and specifications. It distinguished the engineering profession from the professions of medicine, law, and architecture, finding that the latter professions involved uncontrollable factors. An engineering survey of drainage requirements of a tract of land did not entail unknown and uncontrollable factors. The court said that a contracting party had the right to expect that such a survey be done with reasonable accuracy and should not be dependent in his effort to recover damages on the burdensome allegation of negligence.[19]

The Third Circuit, in *La Rossa v. Scientific Design Co., Inc.,*[20] however, refused to extend the concept of strict liability to services rendered by an engineering company. *La Rossa* involved wrongful death and survival actions under New Jersey law. The defendant had contracted to design, engineer, and supervise the construction and initial operation of a plant for the manufacture of phthalic

[15] *Id.* at 547.

[16] 120 N.J. Super. 529, 295 A.2d 363 (1972).

[17] 295 A.2d at 366.

[18] 275 Ala. 35, 151 So. 2d 767 (1963).

[19] 151 So. 2d at 772.

[20] 402 F.2d 937 (3d Cir. 1968).

anhydride. The operations created a dust which caused a toxic reaction. After exposure to the dust, the plaintiff's decedent was found to have a cancerous growth in his throat. The plaintiff sought to hold the engineering company liable on two grounds, negligence, and the express and implied warranties that the process of installation would be reasonably safe. The trial court dismissed the count based on an express warranty, and the jury found in favor of the defendant on the negligence count.[21] In affirming the verdict for the defendant, the court of appeals concluded that the concept of strict liability should not be extended to one rendering professional services. The court said that professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lacked the elements which would give rise to the doctrine.[22] Neither mass production of goods nor large body of distant consumers whom it would be unfair to require to trace the article back to its original source of manufacture and who might have no knowledge or ability to inquire about a possible defect were present here. The court pointed out that the engineering services involved were highly specialized and affected only a small group.[23]

Similarly, the California court declined to extend the doctrine of strict liability to engineering services in *Stuart v. Crestview Mutual Water Co.*[24] In *Stuart* the engineering company had designed, engineered, and constructed a water system. The plaintiffs were property owners seeking substantial damages because they were unable to protect their property from fire due to an inadequate supply and flow of water. The court refused to hold the engineering firm strictly liable finding that it had rendered a professional service and was in no sense analagous to manufacturers who placed products on the market and are in the best position to spread cost of injuries resulting from the defective product.[25]

The California court also refused to extend the concept of strict liability to an engineering firm that tested the soil prior to construction of the plaintiff's house. In *Swett v. Gribaldo, Jones & Asso-*

[21] *Id.* at 939.
[22] *Id.* at 942-43.
[23] *Id.* at 943.
[24] 34 Cal. App. 3d 573, 110 Cal. Rptr. 543 (1973).
[25] 110 Cal. Rpt. at 549.

ciates,[26] the plaintiffs had sought damages for cracks in the house resulting from soil instability. The appellate court reversed a judgment for the plaintiff, saying that the doctrine of strict liability would not apply where the defendant was employed solely in an advisory capacity, was paid by the hour, had no interest in the property tested, and did not participate in the sale.[27]

A Florida court would not apply the doctrine of implied warranty of fitness in an action involving engineering services connected to the design of a chattel.[28] The court did hold, however, that the engineering firm could be held liable on theories of negligence.

NON-PROFESSIONAL SERVICES

The courts are likewise reluctant to apply the doctrine of strict liability to cases involving non-professional services, although few of the policy considerations alluded to in professional services cases exist in the cases involving non-professional services. The strict liability concept was applied, however, in the New Jersey case of *Newmark v. Gimbel's, Inc.*[29] The rule of strict liability was held to apply to a beauty parlor operator for injury to a customer's hair and scalp allegedly resulting from use of a permanent wave solution since the operator of the beauty parlor sold or applied the product in the regular course of its business. It is important to note that the court did not specifically hold the beauty parlor operator strictly liable for mistakes in her application of the solution but rather the liability was predicated on defects in the solution itself. The Supreme Court of New Jersey did not consider whether it would have found the doctrine applicable in *Newmark* had the injuries been caused, not by a defective solution, but rather by improper application by the operator. Certainly the policy arguments for applying the concept of strict liability would have been the same in both situations.

The servicer of an airplane was not held strictly liable under

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[26] 40 Cal. App. 3d 802, 115 Cal. Rptr. 99 (1974).

[27] 115 Cal. Rptr. at 101.

[28] Audlane Lumber & Builder Supply v. D.E. Britt Assocs., Inc., 168 So. 2d 233 (Fla. Dist. Ct. App. 1964). *See* text accompanying note 72 *infra*.

[29] 102 N.J. Super. 279, 246 A.2d 11 (1968), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969).

New Jersey law in the recent case of *Raritan Trucking Corp. v. Aero Commander, Inc.*[30] This case involved an action by the owner of an airplane against an airplane servicer to recover property damage resulting from a plane crash. There was an alleged failure of the landing gear precipitating the crash, and the plaintiff sought to hold the servicer strictly liable as he had done extensive work on the landing gear immediately before the fatal flight. The Third Circuit refused to extend the concept of strict liability to cover the servicer. It noted that from its origin in the *Henningsen* case, the strict liability theory has grown to be a strong one in New Jersey, however, no New Jersey case had extended the strict liability theory to a case in which there have been no goods or other property supplied.[31] The court distinguished *Newmark v. Gimbel's, Inc.*, by saying that the court in *Newmark* did not hold that the beauty parlor operator would have been strictly liable for non-negligent mistakes in her own application of the solution, but only for the defects in the solution itself.[32] The court further said that although *Raritan* might be distinguishable from the professional services of a doctor or dentist, such distinction would not be sufficient to cause the New Jersey Supreme Court to apply strict liability in such a case.[33]

Defective Blood Cases

A series of cases has evolved relating to services of a hospital or other institution supplying blood containing the disease of serum hepatitis. In *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*,[34] the plaintiff sought to recover damages for personal injuries sustained when she contracted serum hepatitis from a transfusion of impure blood supplied by the defendant blood bank, a non-profit corporation. In *Balkowitsch* the plaintiff's claim was based on breach of implied warranty. The court affirmed a summary judgment for the defendant, saying that the providing of blood constituted a service rather than a sale and thus the concept of implied warranty would not apply.[35] The court evidenced the

[30] 458 F.2d 1106 (3d Cir. 1972).

[31] *Id.* at 1114.

[32] *Id.* at 1115.

[33] *Id.*

[34] 270 Minn. 151, 132 N.W.2d 805 (1965).

[35] *Id.* at 810.

tendency to rely heavily upon policy considerations in cases of this sort and said that it found it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose.[36]

The New Jersey court in *Brody v. Overlook Hospital*[37] refused to apply strict liability to a blood transfusion case. The action was for the death of a patient caused by serum hepatitis secondary to a blood transfusion. The court said that due to the scientific inability to test for the presence of viral hepatitis, blood should be placed within the category of "unavoidably unsafe products," and therefore it was not an "unreasonably dangerous" product to which strict liability could apply.[38] On appeal the court left open, however, the question whether the strict liability doctrine might be applied to other cases involving services.[39]

A federal court applying the Tennessee law in *Sawyer v. Methodist Hospital of Memphis*,[40] declined to extend the doctrine to blood transfusions. The court said that a blood transfusion from which the plaintiff may have contracted hepatitis was not a sale to which implied warranties of merchantibility or fitness or strict liability could apply.[41] The California court in *Shepard v. Alexian Bros. Hospital, Inc.*,[42] also refused to apply the concept of strict liability in a blood transfusion case. The court in *Shepard* held that the furnishing of blood by a hospital to a patient was a service and not a sale under a statute providing that the transfusion of blood shall be construed for all purposes to be the rendition of a service.[43] A similar holding was reached in New York in *Simone v. Long*

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[36] *Id.*

[37] 127 N.J. Super. 331, 317 A.2d 392 (1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975). *See also* Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075, *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974).

[38] 317 A.2d at 397.

[39] 332 A.2d at 597: "There are indications that subsequent to 1966 tests may have become available for discovering the viral infection but for present purposes we need not consider . . . whether their present availability would hereafter result in accountability under the theory of strict liability in tort."

[40] 383 F. Supp. 563 (W.D. Tenn. 1974), 522 F.2d 1102 (6th Cir. 1975).

[41] *Id.* at 568.

[42] 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

[43] CAL. HEALTH & SAFETY CODE § 1606 (West 1970).

Island Jewish Hillside Medical Center,[44] where it was held that the furnishing of blood to a patient was a service and not a sale, and therefore the hospital could not be strictly liable for the patient's hepatitis. In contrast to these, however, the Pennsylvania court held in *Hoffman v. Misericordia Hospital*,[45] that a complaint for damages for death allegedly caused by a transfusion of impure blood stated a cause of action against a hospital which "sold" blood to a patient under the theory of implied warranty of merchantability and for implied warranty of fitness for the particular purpose.[46]

Electric Service

There have been several cases from Michigan holding that the sale of electricity is the performance of a service rather than the sale of a product and that the doctrine of strict liability applies. In *Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*,[47] the Michigan court held that implied warranties of fitness and merchantability applied to the sale of electric services, but it found that there was no proof of defect. In so holding the court said: "We are of the opinion that the implied warranties, as defined by the courts of this state, should apply to the sale of services as well as to the sale of goods."[48] The court went on to say that certainly the doctrine should be applied in the instance of the service of electricity which was an inherently dangerous product and that the courts should proceed in this area on a case by case basis for the present.[49]

Thereafter, in the case of *Insurance Company of North America v. Radiant Electric Co.*[50] a similar result was reached, with the court citing the *Buckeye* case. In *Radiant* the loss was the result of an electric current, and the Michigan court held that the law of implied warranty would apply to "the sale of services as well as to the sale of goods."[51] Finally, the Michigan Court of Appeals in

[44] 81 Misc. 2d 163, 364 N.Y.S.2d 714 (1975).

[45] 439 Pa. 501, 267 A.2d 867 (1970).

[46] 267 A.2d at 870.

[47] 38 Mich. App. 325, 196 N.W.2d 316 (1972).

[48] 196 N.W.2d at 317.

[49] *Id.* at 318.

[50] 55 Mich. App. 410, 222 N.W.2d 323 (1974).

[51] 222 N.W.2d at 324.

the case of *Williams v. Detroit Edison Co.*,[52] in which leave to appeal was denied, reaffirmed these holdings. Again electric power was involved, and the court said: "Electricity is a service rather than a 'good,' but the doctrine of implied warranty has been applied to its sale."[53] It is seen, therefore, that the Michigan courts have left little doubt but that they will apply the law of implied warranty in the instance of services, particularly electric power.

Repairer's Services to Tools and Machinery

The California court in *Young v. Aro Corp.*[54] held the manufacturer-seller-repairer of a portable grinder liable for repairs to the grinding wheel. The plaintiffs had alleged liability under the theory of strict liability, and the court said that whatever might have been defendant's strict liability exposure as a repairer, its acceptance of the grinder for repair with instructions made it the manufacturer of the repaired grinder. The California court thus sidestepped the question of whether one who merely repairs a product may be held strictly liable for the service.[55]

Nor has the doctrine of strict liability been extended to one who rendered boiler repair services. In *Pepsi Cola Bottling Co. v. Superior Burner Service Co.*,[56] the Pepsi Cola company sought to recover damages for losses which resulted from the defendant's alleged failure to properly repair a boiler. The complaint was based on separate causes of action sounding in negligence and in breach of implied warranty. The court said that in this area of the law, strict liability has not been imposed on those who furnish labor and services.[57]

It is evident that very few courts have applied the concept of strict liability to services rendered, whether professional or non-professional. The courts reject this concept much more readily in professional cases dealing with doctors and dentists where the

[52] 63 Mich. App. 559, 234 N.W.2d 702 (1975).

[53] 234 N.W.2d at 705.

[54] 36 Cal. App. 3d 240, 111 Cal. Rptr. 535 (1974).

[55] 111 Cal. Rptr. at 538. *But see* Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974), in which the Oregon Supreme Court held that strict liability did not extend to an alleged failure to tighten lug nuts on an automobile wheel in an action against one who installed the tire.

[56] 427 P.2d 833 (Alas. 1967). *See also* Samuelson v. Chutich, 187 Colo. 155, 529 P.2d 631 (1974).

[57] 427 P.2d at 839.

policy considerations for not applying the doctrine appear strongest. There is a greater tendency to apply the concept of strict liability to engineers who perform services and to non-professional people who perform services, as the policy considerations appear less compelling and at times quite indistinguishable from those that are relied upon to apply the doctrine of strict liability to products manufactured.

Perhaps the underlying justification for the courts' reluctance to apply the concept of strict liability to services rendered is that the basis for the doctrine of strict liability is found in section 402A of the Restatement of Torts.[58] The Restatement addresses itself quite specifically to products sold. A strong argument can be made that this section of the Restatement was not meant to apply to services rendered. This especially becomes apparent in light of section 324A of the Restatement which deals specifically with services.[59]

RESPONSIBILITY FOR SERVICES NEGLIGENTLY RENDERED WITHOUT REGARD TO PRIVITY

Although the present trend is for the courts not to extend the doctrine of strict liability to those persons who render services, there exists an equal indication of a trend toward holding such persons liable to third persons on the basis of negligence without regard to privity. This concept of liability stems from the established principle that one who is negligent in the manufacture of an imminently dangerous product is responsible to those who are injured by the product. This rule was born of necessity as an exception to the rule of *Winterbottom v. Wright*,[60] which required

[58] *See* note 2 *supra.*

[59] RESTATEMENT (SECOND) OF TORTS § 324A (1965):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
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> (b) he has undertaken to perform a duty owed by the other to the third person, or
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> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

[60] 152 Eng. Rep. 402 (1842).

privity before liability would exist in a tort action. It was embraced and somewhat relaxed in the famous case of *MacPherson v. Buick Motor Co.*[61] As stated by Dean Prosser, the *MacPherson* rule has swept the country, and "with the barely possible but highly unlikely exceptions of Mississippi and Virginia, no American jurisdiction now refuses to accept it."[62] There remains little doubt that practically all courts would impose liability, without regard to privity, where one is injured by an imminently or inherently dangerous product that was negligently manufactured. The question then becomes, will the courts impose liability upon a manufacturer who negligently produces a product that is not imminently or inherently dangerous without regard to privity. All indications are that they would.

Certainly the text writers support this view. The American and English Encyclopedia of Law states:

> Where there has been negligence in the construction or preparation of the article sold or supplied—that is, where, under the circumstances, injuries to the other contracting party or third persons might reasonably have been anticipated as a result of defects or errors therein—the question of privity of contract seems wholly immaterial. The liability depends upon the rule of natural and proximate cause and contemplation of consequences.[63]

This principle had likewise been expressed as early as 1957 in an article in Virginia Law Review: "However the requirement of privity for a tort action has gradually disappeared until today the manufacturer's duty of care generally extends to any injury or damage which foreseeably may result from defects in his product."[64]

The question of whether a product is inherently dangerous has become increasingly less significant. *MacPherson* itself effectively eliminated the requirement of an inherently or imminently dangerous product, as the court defined such a product as follows: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of

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[61] 217 N.Y. 382, 111 N.E. 1050 (1916).

[62] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960). Both states have since adopted this rule. *See* Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962); Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967).

[63] 21 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 461-62 (1896).

[64] Note, 43 VA. L. REV. 273 (1957).

danger."[65] Since this holding in *MacPherson*, the necessity of determining in a suit for negligence which products are inherently dangerous and which are not has been rendered largely academic.[66]

It is seen that the Restatement of Torts addresses the question of potential liability for one who renders a service. Section 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm . . . .[67]

Although section 324A does not specifically address the question of privity, it is significant that it makes no reference to an imminently dangerous service.

Hempstead v. General Fire Extinguisher Corp.[68] held that one who supplies a service such as approving the design of a fire extinguisher may be responsible in negligence without regard to privity. In *Hempstead* one of the defendants, Underwriters Testing Company, was charged, among other things, with negligently approving the design of a fire extinguisher. The court squarely posed the question for determination to be whether Underwriters, a testing corporation, could be held liable under Virginia law for plaintiff's injuries based upon Underwriters' alleged negligence when no relationship of privity existed between the parties.[69] The court pointed out that Underwriters neither manufactured nor sold the extinguisher and that no privity of contract or other legal relationship existed between Underwriters and the plaintiffs. The court held that under these circumstances, Underwriters could be responsible under negligence principles without regard to privity.[70] Although the court found the product involved to be imminently dangerous, it left little doubt that the same result would have been

[65] 111 N.E. at 1053.

[66] *See, e.g.*, Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971).

[67] RESTATEMENT (SECOND) OF TORTS § 324A (1965).

[68] 269 F. Supp. 109 (D. Del. 1967).

[69] *Id.* at 111.

[70] *Id.* at 112.

reached had the product not been deemed to be imminently dangerous.[71]

A similar result was reached in *Audlane Lumber & Building Supply, Inc. v. D. E. Britt Associates, Inc.*[72] In *Audlane*, it was held that one who prepares a design and specifications to be used by a manufacturer in constructing a chattel may be liable in negligence to a third person. This principle of liability was adhered to in *Johnson v. Aetna Casualty & Surety Co.*,[73] in which it was held that a cause of action was stated against an insurer who contracted to provide safety engineering services by making periodic inspections of the insured's premises to detect hazardous conditions. In this case the decedent was a fireman who was killed while fighting a fire on the insured's premises. The court, relying upon section 324A, held that a cause of action was stated.[74]

SUMMARY

Thus far the courts have not extended the doctrine of strict liability to doctors, dentists, lawyers, or related professional people who perform services. Some courts have applied strict liability principles to engineers, and at least one state, Michigan, has applied this doctrine to one who furnishes the service of electricity, with the indication that it might be extended in the future. A majority of the courts, however, have not applied this doctrine to professional or non-professional people who render services. It must be remembered that the majority of jurisdictions in the country have not had an opportunity to address the question.

The question of liability for supplying blood seems to fall in a category by itself. Most courts refuse to apply the doctrine of strict liability to these cases, although the results are reached through different means. In fact, some states, such as California and Ohio,[75] have enacted statutes to insure that strict liability principles not be applied to these cases.

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[71] *Id.* at 118.

[72] 168 So. 2d 333 (Fla. Dist. Ct. App. 1964).

[73] 348 F. Supp. 627 (M.D. Fla. 1972).

[74] *Id.* at 628-29.

[75] *E.g.*, OHIO REV. CODE ANN. § 2108.11 (Page 1976):

> The procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, corneas, bones, organs, or other human tissue except hair, for the purpose of injecting, transfusing, or transplanting any of them in the human

The hybrid transaction, which contains elements of both a sale and a service rendered, has likewise been considered by the courts. A notable example is the situation involving the application of a beauty solution with an unfavorable result.[76] Here, strict liability is usually applied with the justification that the transaction actually contained more of the characteristics of the sale of a product than the rendition of a service.

The trend is evident that courts will hold one who renders a service liable on principles of negligence, and this is true without regard to whether privity exists.

Since its inception, the doctrine of strict liability has virtually exploded in all directions. We have seen it applied in many areas beyond that of a strict sale of a product. For example, it has been applied to people engaged in commercial leasing, rental, or bailment of chattels for hire.[77] It has been applied to gifts of defective products.[78] Strict liability has also been applied to occupiers who license invitees to use defective machines on their premises.[79] Likewise, certifiers and endorsers have been held liable for testing and certifying defective products supplied by others.[80]

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body, is declared for all purposes to be the rendition of a service by every person, firm, or corporation participating therein, whether or not any remuneration is paid therefor, is declared not to be a sale of such items, and no warranties of any kind or description are applicable thereto.

[76] It is submitted that one who furnishes an approach chart service to pilots may well fall within this category. One state district court in Arizona has so held. Sylvia Jeanette Sisk v. The Times Mirror Co., No. 139,351 (Ariz. Sup. Ct.) (not reported).

[77] Smith v. Alexandria Arena, Inc., 294 F. Supp. 695 (E.D. Va. 1969); McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); Cintrone v. Hertz Truck Leasing & Rental Serv. Co., 45 N.J. 434, 212 A.2d 769 (1965). *See also* 19 DRAKE L. REV. 235 (1969); 11 VILL. L. REV. 404 (1965).

[78] Pease v. Sinclair Ref. Co., 104 F.2d 183 (2d Cir. 1939); Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968); Bainter v. Lamoine L.P. Gas Co., 24 Ill. App. 3d 913, 321 N.E.2d 744 (1974); Perfection Paint & Color Co. v. Kondaris, 147 Ind. App. 106, 258 N.E.2d 681 (1970); Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N.E. 235 (1929).

[79] Flippo v. Mode O'Day Frock Shops, 248 Ark. 1, 449 S.W.2d 692 (1970); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970); Le Buzz, Inc. v. Sniderman, 171 Colo. 246, 466 P.2d 457 (1970); Thompson v. Reilly, 211 So. 2d 537 (Miss. 1968).

[80] Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969); Buszta v. Souther, 102 R.I. 609, 232 A.2d 396 (1967).

It appears that although courts are expanding the doctrine of strict liability in most other areas, they are reluctant to do so in transactions involving the performance of services. In such circumstances, instead, requirements of privity have been relaxed, and liability has been imposed on theories of negligence.

CONCLUSION

Without numerating the various policy reasons that exist favoring the imposition of the strict liability doctrine, can it really be said that the reasons favoring the doctrine in cases involving products manufactured are different than those involving a service rendered? Is there any difference between a company that manufactures automobiles on the one hand and a large engineering firm on the other that sells its services, *i.e.*, preparing plans and specifications, providing supervision for work, or a score of other services? We live in the age of the computer. Many companies are in the business of furnishing to others various services through the use of the computer. Examples of these type services are companies that perform billing services for others, make payrolls, keep inventory, and provide correspondence. This business is in its infancy. The extent to which it is bound to expand is limited only by one's imagination. Is there a real difference between such a computer service rendered and a product manufactured? It is submitted that the policy reasons distinguishing the field of products manufactured from services rendered in the application of strict liability principles represent a distinction without a difference.

One question that arises is whether strict liability should be imposed on the type of case involving one who furnished blood that turns out to be defective. Suppose for sake of argument that the supplying of blood or other services rendered is such that the defect cannot be detected? If in fact the supplying of blood is a service, the submission very well could be in terms of whether it was reasonably fit for its intended use and not unreasonably dangerous. The generally accepted definition of "unreasonably dangerous" is: "The article . . . must be dangerous to an extent beyond that which would be contemplated by the ordinary user who [uses] it with the ordinary knowledge common to the community as to its characteristics."[81]

[81] Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975). *See also* W. PROSSER, HAND-

The above submission, with appropriate variations, can apply to practically any type products liability case. These definitions, if applied to services rendered, would certainly accommodate the case where the service rendered contains a defect impossible to detect. Should not the submission be, in its simplest terms, is the product made or service rendered reasonably fit for its intended use so as not to be unreasonably dangerous to users; or is it unreasonably dangerous to such users?

This test should apply to all persons who perform services, professional and non-professional. This is not to say that the physician, the supplier of blood, the lawyer, the architect, or other professional person who performs a service should be held strictly liable per se when a bad result is achieved. Rather, it should be recognized that the practice of medicine, and related services, depends on factors beyond the control of the practitioner. Likewise, the legal profession is not an exact science and depends in many instances on varying interpretations. These same considerations are evident in the field of architecture and in other fields of endeavor.

All of these factors could and should be taken into account by the triers of fact, with the aid of appropriate instructions,[82] in determining whether the service was "reasonably fit for its intended use" or "unreasonably dangerous" to users. These questions should be answered within the broad guidelines of whether the service rendered was done with reasonable accuracy chargeable to that particular profession or vocation. In other words, one who holds himself out to be competent to furnish a particular service should expect to be charged with an expectation of reasonable results, and failure to perform adequately should fall within the ambit of the doctrine variously referred to as strict liability, liability without fault, or products liability.

BOOK ON THE LAW OF TORTS 659 (4th ed. 1971). Another submission might be: "A defective product is one that is not reasonably fit for ordinary purposes for which such products are intended or may reasonably be expected to be used."

[82] In addition to the definition of "unreasonably dangerous," *see* note 81 *supra*, the following instruction in connection with the term "defective service" is suggested:

> You are instructed that in determining whether the service rendered was defective, such service must have been performed with reasonable accuracy chargeable to the profession (or business) of the defendant. If it was not so performed, then it was defective.