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Sales-Service Hybrid Transactions and the Strict Liability Dilemma

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SALES-SERVICE HYBRID TRANSACTIONS
AND THE STRICT LIABILITY DILEMMA

by Dana Shelhimer

The doctrine of products liability without fault refers to both strict tort liability and implied warranties. Strict liability protects injured consumer plaintiffs by allowing them to recover damages without having to prove the defendant’s negligence. Implied warranties provide relief to purchasers of products when the goods purchased are not of the average quality that would pass without objection in the trade or when the goods purchased fail to meet the buyer’s specifications. Both strict tort liability and implied warranty impose a special duty on sellers of consumer products to bear and redistribute the costs of injuries caused by defective products.

This Comment addresses the protections afforded to consumers who purchase defective products and services. First, the Comment provides a brief introduction to implied warranties. Second, the Comment presents an in-depth discussion of strict tort liability under the Restatement (Second) of Torts section 402A and its applicability to sales transactions, service trans-

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5. Section 2.315 embodies the implied warranty of fitness for a particular purpose. Id. § 2.315.
7. Restatement (Second) of Torts § 402A (1965).
8. Sales transactions, as used in this Comment, refers to commercial transactions in which a merchant sells a product to a consumer. Webster’s Third New International Dictionary 1810 (3d ed. 1981) defines a product as “a result or outcome.”
actions,9 and sales-service hybrid transactions.10 Third, the Comment presents possible methods for analyzing sales-service hybrid transactions under section 402A and determines that courts must decide each transaction on a case-by-case basis in light of the policy justifications underlying strict liability. This policy analysis includes giving careful consideration to the public necessity of having affordable access to the particular type of transaction.

I. IMPLIED WARRANTY

Implied warranty11 reflects a strict liability concept.12 Implied warranties impose a duty on sellers of goods, as a matter of public policy, to produce and distribute safe products.13 Consequently, injured consumer plaintiffs may recover regardless of whether or not they prove that the seller acted negligently.14

Texas adopted the implied warranty theory in Jacob E. Decker & Sons, Inc. v. Capps.15 The plaintiff in Decker became seriously ill as a result of eating sausage manufactured by the defendant. Although the court found that the defendant had not been negligent in any step of the manufacturing process, it held the defendant strictly liable under an implied warranty theory.16 The court imposed the implied warranty, which requires neither a showing of privity of contract between the seller or manufacturer and the consumer nor proof of negligence,17 as a matter of public policy.18 The court justified its creation of an implied warranty by explaining the difficulties associated with bringing either a contract claim or a negligence claim.19 The court found that if it limited the plaintiff to a contract cause of action, the plaintiff would face the problems associated with proving privity.20 By the same reasoning, if the court limited the plaintiff to a negligence cause of

9. In a service transaction the consumer purchases a service rather than a product. For instance, one purchases the service of transportation when one hires a taxi driver. See generally Wunsch, The Definition of a Product for the Purposes of Section 402A, 50 INS. COUNS. J. 344, 354-57 (1983) (distinction between pure commercial services and pure professional services).

10. Hybrid transactions involve both the sale of a product and the rendition of a service. In most instances, a service provider uses a product incidentally to providing the consumer with a service. For instance, a beautician incidentally uses a permanent wave solution while providing a consumer with skilled service. See Wunsch, supra note 9, at 357-62.


13. The policy justifications underlying strict liability also justify the application of implied warranties. For a discussion of the public policy rationales underlying strict liability, see Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970). See also infra notes 51-57 and accompanying text.

14. Prosser, supra note 11, at 1126.

15. 139 Tex. 609, 164 S.W.2d 828 (1942).

16. Id. at 611, 164 S.W.2d at 829.

17. Id.

18. Id.

19. Id. at 618-20, 164 S.W.2d at 832-34.

20. Id.
action, the court would in essence be denying the plaintiff recovery because of the near impossibility of proving negligence.21

Texas codified the judicially created implied warranty recognized in Decker when it adopted its own version of the Uniform Commercial Code (UCC).22 The Texas Business and Commerce Code provisions provide consumers with two types of strict liability protection: implied warranty of merchantability23 and implied warranty of fitness for a particular purpose.24 The implied warranty of merchantability protects consumers by allowing them to recover damages25 when the good sold is not fit for the ordinary purpose for which it was sold.26 Under the UCC implied warranty of merchantability, the plaintiff must show that the good was not of fair average quality and that it would not pass without objection in the trade.27 In addition, an implied warranty of merchantability arises only when the seller acts as a merchant with respect to goods of that kind28 and when the good is defective at the time it leaves the seller's control.29

21. Id. at 621-22, 164 S.W.2d at 834.
23. TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968) provides:
   (a) Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
   (b) Goods to be merchantable must be at least such as
      (1) pass without objection in the trade under the contract description; and
      (2) in the case of fungible goods, are of fair average quality within the description; and
      (3) are fit for the ordinary purpose for which such goods are used; and
      (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
      (5) are adequately contained, packaged, and labeled as the agreement may require; and
      (6) conform to the promises or affirmations of fact made on the container or label if any.
   (c) Unless excluded or modified (Section 2.316) other implied warranties may arise from course of dealing or usage of trade.
24. Id. § 2.315 provides:
   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 under the next section an implied warranty that the goods shall be fit for such purpose.
25. The legislature designed the remedy for breach of implied warranty to provide the injured consumer with the equivalent of the average good he would have received had the good been as warranted. This recovery includes consequential damages from loss of use of the product, direct economic losses, and loss for personal injury. See Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 327 (Tex. 1978), Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977).
27. Id. § 2.314(b)(1)-(2).
28. Id. § 2.314(a).
The implied warranty of fitness for a particular purpose provides relief to injured product consumers when the purchased goods fail to meet a buyer's specific requirements. To recover under an implied warranty of fitness for a particular purpose, the plaintiff must prove two facts. First, the plaintiff must establish that the seller knew or had reason to know of the particular purpose for which the goods were purchased. Second, the buyer must prove that he relied on the seller's skill or judgment to select the proper goods for his needs. The strictness of these requirements generally prevents plaintiffs from recovering under the implied warranty of fitness for a particular purpose.

The implied warranty provisions of the Business and Commerce Code apply in situations that involve the sale of goods by a merchant. They do not apply to service transactions. As a result, Texas courts generally apply the Code's implied warranties only to sales transactions and apply negligence standards to service transactions. In some instances, however, the courts have applied a judicially created implied warranty of good and workmanlike performance to service contracts that otherwise would fall outside of the UCC. Similarly, some courts have applied the warranty of

31. Id.
32. Id.
33. The Texas Business and Commerce Code expressly states that its provisions apply to transactions in goods sold by merchants. Id. § 2.102.
34. An implied warranty does not exist in service contracts unless some body of law other than the Code so provides. Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); see G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982) (building contracts are hybrid transactions involving both services and materials, and are governed by article 2 of UCC only if essence of contract is sale of materials).
35. See, e.g., Dennis v. Allison, 698 S.W.2d 94, 96 (Tex. 1985) (implied warranty not applied to psychiatrist); Barbee v. Rogers, 425 S.W.2d, 342, 346 (Tex. 1968) (strict liability not applied to optometrist); Beck, Advertising, Specialization and Warranty Liability, 44 Tex. B.J. 595, 598-600 (1981) (warranty theory not applied to attorneys); Note, Breach of Implied Warranty Under the DTPA as Applied to Service Contracts: Diversified Human Resources Group, Inc. v. PB-KBB, 37 BAYLOR L. REV. 549, 556 (1985) (unnecessarily harsh liability need not be placed on service contractors because both tort and contract law provide adequate relief to injured consumers). The refusal of Texas courts to apply an implied warranty theory to professional service contracts, however, does not prevent the extension of an implied warranty of workmanlike performance to nonprofessional service contracts. For cases in which the Texas courts have applied an implied warranty of good and workmanlike performance to service contracts, see infra note 36.
merchantsability to sales-service hybrid transactions.37

The different remedies available under strict liability and implied war-

ranty illustrate the need for the two causes of action. When a defective or
substandard product causes personal injury, the remedies under strict liabil-
ity and implied warranty overlap. Both section 402A and the UCC’s im-
plied warranties prohibit a seller from disclaiming liability for personal
injuries resulting from inadequate products.38 An implied warranty action,
which allows recovery for economic loss, however, offers a broader scope of
recovery than does a section 402A action. If a plaintiff suffers only economic
loss and does not suffer property damage or personal injury, the plaintiff
may recover under an implied warranty theory but not under strict liabil-
ity.39 Nevertheless, when a defective product has caused only property dam-
age, strict liability may be the plaintiff’s only means of recovery because
implied warranty law, although it does not allow sellers to disclaim damages
for personal injuries, does allow sellers to limit or disclaim property loss
damages.40 Thus, although a plaintiff may recover more under an implied
warranty cause of action, strict liability often is the only cause of action
available to the plaintiff.

II. STRICT LIABILITY

The Restatement (Second) of Torts section 402A enunciates the doctrine
of strict products liability.41 Section 402A imposes strict liability on sellers
of unreasonably dangerous products that cause physical harm to the prod-
uct’s ultimate user or to the user’s property.42 By focusing solely on the
condition of the product, this doctrine allows plaintiffs to recover damages

defective gown); Providence Hosp. v. Truly, 611 S.W.2d 127, 131 (Tex. Civ. App.—Waco
1980, writ dism’d) (implied warranty applied to service of providing medication).
38. Sellers of defective products cannot disclaim liability for personal injury under § 402A
or under implied warranties. RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965)
(strict products liability is not affected by disclaimer); TEX. BUS. & COM. CODE ANN.
§ 2.719(c) (Tex. UCC) (Vernon 1968) (limitation of consequential damages for personal injury
is prima facie unconscionable).
40. TEX. BUS. & COM. CODE ANN. § 2.316 comment 7 (Tex. UCC) (Vernon 1968) states
that when goods are sold “as is,” the buyer takes the entire risk as to the quality of the goods.
41. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

Special Liability of Seller of Product for Physical Harm to User or Consumer:

(1) One who sells any product in a defective condition unreasonably dangerous
to the user or consumer or to his property is subject to liability for physical
harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such product, and
(b) it is expected to and does reach the user or consumer without substan-
tial change in the condition in which it was sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of
his product, and
(b) the user or consumer has not bought the product from or entered into
any contractual relation with the seller.
42. Id. § 402A(1).
without having to prove the defendant's negligence. In other words, if a merchant sells an unreasonably dangerous product, the merchant will be liable for physical harm to persons or property despite the fact that the manufacturer used reasonable care in manufacturing the product.

The growth of strict liability in Texas paralleled the development of implied warranties. In *McKisson v. Sales Affiliates, Inc.* the Supreme Court of Texas adopted section 402A of the *Restatement (Second) of Torts* and thereby extended the implied warranty recognized in *Decker* to defective products causing physical harm to persons or property. Thus, an injured consumer could recover monetary damages either under an implied warranty contract cause of action or under a strict liability tort cause of action.

### A. Application of Section 402A

#### 1. Pure Sale Transaction

Section 402A, by its own terms, applies only to sellers of unreasonably dangerous products who engage in the regular business of selling products. Consequently, courts face little or no difficulty when applying the doctrine to pure sale transactions. A pure sale transaction occurs when the sole purpose of the transaction is to purchase a product. This type of transaction does not involve the purchase of a service.

The policy reasons behind strict products liability justify the application of the doctrine to pure sale transactions. Courts have recognized four basic policy justifications for strict liability. First, supporters of strict products liability argue that the doctrine is necessary to protect consumers from the dangers associated with unreasonably dangerous products. Second, the doctrine is intended to encourage manufacturers to take precautions to ensure the safety of their products. Third, the doctrine is seen as a means of deterring reckless or negligent behavior by manufacturers. Finally, the doctrine is viewed as a means of promoting efficiency in the marketplace by eliminating the need for complex and time-consuming litigation. These policy justifications are supported by numerous legal precedents and judicial opinions.

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43. See Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975) (Texas Supreme Court emphasized that the supplier's conduct was irrelevant and was not to be considered in strict tort liability causes of action); Sales, The Service-Sales Transaction: A Citadel Under Assault, 10 St. Mary's L.J. 13, 16 (1978); cf. Powers, supra note 3, at 777-82, 791-94 (argument that the distinction between defectiveness in strict products liability and negligence is at times illusory).

44. To recover under a theory of strict liability a plaintiff must establish "(1) the defective and unreasonably dangerous condition of the defendant's product and (2) a causal connection between such condition and the plaintiff's injuries or damages." Armstrong Rubber Co. v. Urquidez, 570 S.W.2d 374, 376 (Tex. 1978). Although courts originally applied the doctrine only in pure sale transactions, today, courts have at times sporadically expanded the doctrine to cover certain sales-service hybrid transactions. See cases cited infra note 77.

45. 416 S.W.2d 787 (Tex. 1967) (strict liability applied to beauty supply distributor for sale of permanent wave solution not reasonably fit for use).

46. 139 Tex. 609, 621, 164 S.W.2d 828, 834 (1942).

47. 416 S.W.2d at 789.

48. *Restatement (Second) of Torts* § 402A(1)(a) (1965). Some commentators have argued that because § 402A appears in a chapter entitled "Suppliers of Chattels," and because all of the examples used in the comments refer to tangible chattels, the drafters of § 402A clearly intended to exclude service transactions from the section's scope.


50. For instance, when a person goes into a store, purchases a product, and leaves, the transaction constitutes a pure sale transaction because the customer purchased a product without a service being involved. For a discussion of sales transactions, see supra note 8 and accompanying text.

liability allege that imposing liability upon those who place products into the marketplace, or stream of commerce, internalizes accident costs within the overall cost of the product.\(^52\) Because the company can raise prices and thus spread the costs of liability among all of a product’s consumers, strict liability functions as a risk distributor in that neither the victim nor the manufacturer alone must directly absorb the costs of liability.\(^53\) Second, because of the complexity and secretiveness of the manufacturing process, proof of an act of negligence that occurred during the manufacturing process would be overly burdensome, if not impossible, to show.\(^54\) Supporters of strict products liability therefore advocate that courts should hold those who place the defective product into the market strictly liable. Third, supporters of strict liability as applied to pure sale transactions allege that liability should be placed upon those who possess the means and ability to discover and prevent defects, rather than upon the innocent consumer who cannot investigate the manufacturing process or determine a product’s safety.\(^55\) Lastly, some courts urge that because consumers reasonably expect manufacturers to produce safe products, those in the marketing chain should bear the cost when consumers’ expectations prove unfounded.\(^56\) According to this view, when manufacturers falsely create expectations of safety and quality, they should bear the costs of liability when those expectations fail.\(^57\)

2. Pure Service Transaction

Courts rarely apply section 402A strict liability to pure service transactions.\(^58\) A pure service transaction occurs when the consumer focuses solely

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56. See Escola, 150 P.2d at 443 (Traynor, J., concurring); Hoven v. Kelble, 79 Wis. 2d 444, 468, 256 N.W.2d 379, 390-91 (1977); Restatement (Second) of Torts § 402A comment c (1965).
on the service provided rather than on products the service provider incidentally uses in performing the service.\textsuperscript{59} For example, a pure service transaction occurs when a repairperson goes to a home and reattaches a loose wire in an air conditioner. In this instance, the repairperson does not add a new product or good to an air conditioning unit, but simply reattaches an already existing wire. Consequently, the consumer focuses solely on the service provided, and pays for a service rather than a product.\textsuperscript{60}

Courts often state two justifications for refusing to extend section 402A liability to pure service transactions. First, they allege that by its own terms the doctrine applies only to those who sell products, and not to those who sell or provide a service.\textsuperscript{61} Secondly, the courts assert that the application of strict liability to pure service transactions does not further the policy reasons underlying strict tort liability.\textsuperscript{62}

Specifically, courts and commentators state four policy reasons to support the well-established standard that strict liability does not apply to pure service transactions. First, producers of services, unlike producers of products, often lack the large customer pool necessary to spread their losses effectively,\textsuperscript{63} primarily because service providers, unlike mass products producers, custom tailor their services to meet the specific needs of individual customers.\textsuperscript{64} In addition, since a service consists primarily of the skill, knowledge, and competence of the service provider, the servicer, in most instances, does not employ the elements of a marketing chain. As a result, the servicer, unlike the product seller, cannot spread the costs of liability among retailers or other members of the marketing chain. Consequently, the imposition of strict liability upon service providers fails to further the fundamental purposes of the doctrine.\textsuperscript{65}


\textsuperscript{59} See Sales, supra note 43, at 18.

\textsuperscript{60} See Lemley v. J. & B. Tire Co., 426 F. Supp. 1378, 1379 (W.D. Pa. 1977) (§ 402A not applied to brakeman who repaired plaintiff’s brakes because § 402A does not apply to persons who supply a service).

\textsuperscript{61} See id. Section 402A applies only to sellers. Although “sellers” has been expanded to include retailers, manufacturers, wholesalers, distributors, and suppliers, this provision does not include suppliers of services. \textit{Id}.

\textsuperscript{62} See \textit{generally} Note, \textit{Strict Liability in Hybrid Cases}, 32 STAN. L. REV. 391, 396-98 (1980) (application of strict liability to service providers does not further the goals underlying the theory).

\textsuperscript{63} See La Rossa v. Scientific Design Co., 402 F.2d 937, 942 (3d Cir. 1968); Sales, \textit{supra} note 43, at 18.

\textsuperscript{64} See \textit{La Rossa, 402 F.2d at 942; Sales, supra note 43, at 19; Comment, Guidelines for Extending Implied Warranties to Service Markets, 125 U. PA. L. REV. 365, 369 (1976).}

\textsuperscript{65} See Sales, \textit{supra} note 43, at 19; Note, \textit{supra} note 62, at 396; Comment \textit{supra} note 64, at 369.
Second, unlike purchasers of defective products, purchasers of defective services face little or no difficulty in locating the source of the defect. The service transaction represents a face-to-face relationship in which the consumer seeks the skills, knowledge, and expertise of the service provider. Because consumers injured by defective services can typically point to both the specific service provider and the defective conduct, a negligence standard more appropriately governs pure service transactions.

Third, product manufacturers exercise substantial control over the mechanized production process because the process consists of a single set of operations applicable to each element of the manufactured product. This control affords manufacturers the ability to detect, prevent, and eliminate defects that may occur throughout the process. Producers of services, to the contrary, cannot be expected to act with the exactness of machines. With each new consumer, a service provider faces a new and different set of circumstances. Consequently, the servicer, unlike the manufacturer, cannot develop and perfect a single set of operations applicable to each and every situation.

Finally, consumer expectations differ according to whether the transaction constitutes a sale or a service. When purchasing a product, a consumer reasonably expects the product to be free from all defects. When purchasing a service, on the other hand, a consumer expects that the service will be performed using reasonable care, skill, and expertise. In a service transaction, therefore, unlike a sales transaction, the consumer focuses on the conduct of the service provider and the quality of the work, rather than on the

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67. See Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179, 1182-83 (1972) (strict liability not applied to builder because plaintiff would not be overly burdened by having to establish builder’s negligence); Hoffman v. Simplot Aviation, Inc., 97 Idaho 23, 539 P.2d 584, 588 (1975). The court in Hoffman explained that unlike the sale of products, personal services do not result in the mass production of goods. Id. As a result, the difficulty or inability of obtaining proof does not exist in the personal services transaction. Id. Furthermore, the plaintiff in the personal service context can determine exactly what was done and by whom because the plaintiff usually comes into direct contact with the service provider. Id.
68. For an illustration of safety checks integrated into the manufacturing process, see Saglimbeni v. West End Brewing Co., 274 A.D. 201, 213, 80 N.Y.S.2d 635, 637 (1948), aff’d, 298 N.Y.875, 84 N.E.2d 638 (1949).
69. In distinguishing service transactions from the mechanical manufacturing of products, the New Jersey Supreme Court in Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, 246 A.2d 11 (Super. Ct. App. Div. 1968), aff’d, 54 N.J. 585, 258 A.2d 697 (1969), stated, a doctor's "performance is not mechanical or routine because each patient requires individual study and formulation of an informed judgment as to the physical or mental disability or condition presented, and the course of treatment needed." Id. at 596, 258 A.2d at 703.
70. Sales, supra note 43, at 18. But see Greenfield, supra note 55, at 697-98 (author argues that consumer expectations for services are the same as for products).
71. Sales, supra note 43, at 29 states:
The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.
Id. (quoting Gagne v. Bertran, 43 Cal. 2d 481, 489, 275 P.2d 15, 21 (1954)).
condition of a product that the servicer may incidentally use in performing the transaction. In sum, transactions that focus on a person's conduct do not logically fall under a doctrine that focuses solely on the condition of a product.  

3. Sales-Service Hybrid Transactions

The typical sales-service hybrid transaction involves furnishing a product in conjunction with the performance of a personal service contract. Hybrid transactions confuse the courts because the applicable standard of conduct rests somewhere between strict liability and negligence. If a court determines that the transaction involves the provision of a service rather than the sale of a product, then the plaintiff must recover under a negligence theory rather than a strict liability theory. In applying a negligence standard, the court focuses on the conduct of the service provider rather than on the condition of the product. When a case involves the sale of a defective product, however, the court applies strict tort liability. In doing so, the court focuses solely on the condition of the product and ignores the defendant's actions. The question arises, therefore, of where to focus when a transaction involves both a sale and a service. Should the court apply strict tort liability or negligence?

The majority of jurisdictions, including Texas, have acted inconsistently when dealing with sales-service hybrid transactions. Texas case law serves as an example of the ad hoc approach taken by many courts to the sales-service hybrid transaction issue. Furthermore, Texas case law demon-

72. *Restatement (Second) of Torts* § 402A (1965). The wording of § 402A clearly indicates that the section concerns defective products. It does not mention the conduct that makes these products defective. Therefore, if one interprets § 402A literally, it should only apply to the condition of a product, and courts should use negligence to govern peoples' conduct. Furthermore, comment f to § 402A limits application to "any person engaged in the business of selling products." *Restatement (Second) of Torts* § 402A comment f (1965) (emphasis added). This definition necessarily excludes service agencies, which sell primarily services and not products.


74. *Id.* at 18.

75. In a negligence suit, the plaintiff must prove that the defendant failed to use reasonable care. Reasonable care is determined by what a reasonably prudent person would do in the same or similar situation. *Bennet v. Span Indus.*, 628 S.W.2d 470, 473 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.).

76. *See supra* note 44 and accompanying text for a discussion of the elements for a strict liability cause of action.


strates the need to develop a comprehensive analysis for distinguishing sales from services so that one may determine in the future when a provider of a service becomes a seller of a product so as to come within the scope of section 402A.

B. Texas Case Law

1. Professional Sales-Service Transactions

a. Medical Professionals

Texas, along with the majority of jurisdictions, generally refuses to apply strict tort liability to medical professionals who inadequately provide services to their patients. Courts hold to this course despite the fact that the medical professional may use or provide defective products while performing or administering medical treatment. Nevertheless, because medical professionals primarily provide services rather than sell products, the usual policy justifications for strict liability appear inapplicable to medical sales-service transactions. In addition, the availability of affordable medical services may override such policy reasons in some cases.

Although no Texas court has specifically articulated the policy rationale for refusing to apply strict liability to medical professionals, other courts have stated several policy reasons for refusing to hold medical professionals strictly liable. In Magrine v. Krasnica, for example, the New Jersey Supreme Court refused to hold a dentist strictly liable when a defective hypodermic needle broke off in the plaintiff's jaw. The court recognized that unlike product manufacturers, distributors, and retailers, medical professionals occupy no better position than their patients in terms of discovering gown); Moody v. City of Galveston, 524 S.W.2d 583, 587-89 (Tex. Civ. App.—Houston [1st Dist. 1975, writ ref’d n.r.e.) (strict liability applied to provider of contaminated water); Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 353 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.) (strict liability inapplicable to transmitter of electricity).


82. In Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379, 392-93 (1977), the Wisconsin Supreme Court, emphasizing that application of the doctrine of strict liability would interfere with the availability of essential medical services, held that strict liability does not apply to the provision of medical services.


84. Magrine, 227 A.2d at 540.
and preventing defects in products used during medical treatment.\textsuperscript{85} The patient focuses on the skills, knowledge, and expertise of the physician rather than on the condition of the instruments and medicines incidental to the medical treatment.\textsuperscript{86}

Similarly, the risk distribution and loss spreading justification for strict liability appears counterproductive when applied to medical professionals.\textsuperscript{87} When courts hold a product manufacturer strictly liable, the manufacturer simply spreads the costs throughout all of the product's consumers by raising prices.\textsuperscript{88} Unlike many products, however, affordable medical treatment is a public necessity. Consequently, public policy mandates that costs of medical care remain reasonable.\textsuperscript{89} Despite the existence of liability insurance, medical costs rise when courts hold medical professionals strictly liable.\textsuperscript{90} The application of strict liability to medical professionals therefore defeats the goal of keeping medical costs to a minimum. As a result, the usual policy justifications of loss or risk distribution do not apply in the medical professional context.

The Texas Supreme Court first considered the applicability of strict liability to medical professionals in \textit{Barbee v. Rogers}.\textsuperscript{91} The plaintiff, who suffered eye injuries as the result of improperly fitted contact lenses, sued both the optometrist and the manufacturer of the lenses. The court refused to impose strict tort liability on the lens manufacturer because it found that the lenses did not constitute a defective product.\textsuperscript{92} The court determined that the defect, if it existed, resulted from the professional services of the optometrist rather than from the contact lenses he fitted and sold.\textsuperscript{93}

Although the court recognized that the transaction constituted a hybrid between a professional service and a sale, the court nevertheless did not feel justified in holding the optometrist strictly liable.\textsuperscript{94} The court based its decision in part on the distinction between a licensed optometrist and a "mere merchant."\textsuperscript{95} A merchant sells prefitted spectacles without a prescription, whereas a licensed optometrist fits and prescribes lenses according to each


\textsuperscript{86} \textit{Magrine}, 227 A.2d at 545.

\textsuperscript{87} \textit{See Hoven v. Kelbie}, 79 Wis. 2d 444, 256 N.W.2d 379, 392 (1977), for a discussion of why courts should not apply strict liability to providers of medical services.

\textsuperscript{88} For a discussion of the risk distribution policy underlying strict liability, see \textit{supra} notes 52-53 and accompanying text.

\textsuperscript{89} In \textit{Newmark v. Gimbel's}, Inc., 54 N.J. 585, 258 A.2d 697, 703 (1969), the New Jersey Supreme Court contrasted professional and nonprofessional services by emphasizing social utility. The court determined that the utility and the need for medical-professional services, which necessarily involve the health and survival of many people, outweighs the policy justifications for imposing strict liability on medical professionals. \textit{Id}

\textsuperscript{90} \textit{Magrine}, 227 A.2d at 543-46.

\textsuperscript{91} 425 S.W.2d 342 (Tex. 1968).

\textsuperscript{92} \textit{Id.} at 346.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.} at 345-46.

\textsuperscript{95} \textit{Id.} (citing TEX. REV. CIV. STAT. ANN. art. 4552, 4565d (Vernon 1976)).
person's individual needs.\textsuperscript{96} As a result, a licensed optometrist does not place finished products into the regular channels of trade as does a merchant.\textsuperscript{97} The court therefore determined that the transaction between the optometrist and patient constituted a professional service rather than a commercial sale.\textsuperscript{98}

Two months later, in \textit{Shivers v. Good Shepherd Hospital, Inc.}, the Tyler court of appeals addressed the issue of whether or not strict liability under section 402A applies to a hospital when a patient suffers injuries during the course of medical treatment. The plaintiff suffered injuries when the hospital administered a bacteria-contaminated anti-coagulant in connection with the treatment of phlebitis. The bacteria entered the plaintiff's bloodstream, which caused her to go into extreme shock and remain close to death for five days. The court, despite its recognition that Texas applies strict liability to both manufacturers and distributors of medical products, refused to hold the defendant hospital strictly liable.\textsuperscript{100} In reaching its conclusion, the court relied heavily on the \textit{Barbee} decision.\textsuperscript{101}

The court in \textit{Vergott v. Deseret Pharmaceutical Co.}\textsuperscript{102} reaffirmed that section 402A strict liability does not apply to hospitals or medical professionals. In this case the plaintiff received injuries as a result of a needle breaking in her vein during medical treatment. Emphasizing that the hospital did not engage in the business of selling needles, the court held that strict liability could not attach to the hospital.\textsuperscript{103}

Until the early 1980s it appeared that Texas courts would not extend strict liability concepts to medical professionals. In 1980 and 1981, however, two different courts of appeals departed from case precedent and held hospitals strictly liable.\textsuperscript{104} In \textit{Thomas v. St. Joseph's Hospital} the plaintiff filed a strict liability suit against the hospital when her husband, a patient in the hospital, died as a result of sustaining burns over a substantial portion of his body. The deceased received the burns when he dropped a lighted match in an oxygenated room, which caused his hospital gown to ignite. The court refused to grant the hospital immunity under the accepted medical professional exception to strict tort liability.\textsuperscript{106} Although the court acknowledged that the hospital provided the gown only incidentally to the medical services, the court nevertheless held that strict liability applied because the hospital

\begin{thebibliography}{9}
\bibitem{96} Id. at 345.
\bibitem{97} Id. at 346.
\bibitem{98} Id.
\bibitem{99} 427 S.W.2d 104, 104-07 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).
\bibitem{100} Id. at 107.
\bibitem{101} Id.; see \textit{Barbee}, 425 S.W.2d at 346.
\bibitem{102} 463 F.2d 12, 14 (5th Cir. 1972).
\bibitem{103} Id. at 16 n.5; see Ethicon v. Parten, 520 S.W.2d 527, 534 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (doctor not strictly liable for defective needle that broke in patient's body during surgery).
\bibitem{105} 618 S.W.2d 791 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).
\bibitem{106} Id. at 797.
\end{thebibliography}
placed the gown, an unreasonably dangerous product, into the stream of commerce.\textsuperscript{107}

Similarly, the Waco court of appeals held a hospital strictly liable in \textit{Providence Hospital v. Truly}.\textsuperscript{108} The plaintiff, who sustained injuries as a result of a defective medicine administered during surgery, brought suit against the hospital under the Deceptive Trade Practices Act,\textsuperscript{109} alleging that administration of the defective drug constituted a breach of the implied warranty of fitness for a particular purpose.\textsuperscript{110} The court, in direct contradiction of \textit{Barbee}\textsuperscript{111} and its progeny, held that strict liability applied to the hospital because it had sold the defective drug to the plaintiff.\textsuperscript{112} Thus, the court allowed the plaintiff to recover under an implied warranty of fitness for a particular purpose.\textsuperscript{113} The court determined that the hospital sold the defective medication to the plaintiff because the itemized hospital bill contained a separate charge for the drug.\textsuperscript{114} Although the patient paid only one lump sum for the services and medications she received, the total bill consisted of several individual charges, one of which was the charge for the drug administered during surgery.

Despite \textit{Providence Hospital}, Texas courts appear to have returned to refusing to apply strict liability to medical professionals who incidentally use defective products during the rendition of medical services. In \textit{Nevaux v. Park Place Hospital}\textsuperscript{115} the plaintiff brought suit against the hospital and treating physicians for injuries she sustained while receiving cobalt therapy. Basing its decision on two separate grounds, the court refused to hold either the hospital or the physician strictly liable.\textsuperscript{116} First, the court found that the radiation treatment supplied by the defendants constituted the sale of a service rather than the sale of a product.\textsuperscript{117} The court explained that strict liability applies to defective products, not to defective services.\textsuperscript{118} Second,
the court determined that the Thomas holding did not apply to the facts of the case at hand. Unlike Thomas, where the hospital gown was unrelated to the medical treatment, the cobalt therapy at issue, even if considered a product, constituted an inseparable part of the professional services rendered.

b. Nonmedical Professionals and the Sales-Service Hybrid Transaction

The majority of jurisdictions, including Texas, do not apply strict tort liability to nonmedical professionals involved in hybrid transactions. The policy rationales for refusing to do so parallel those for refusing to hold medical professionals liable in hybrid transactions. Like the consumer in a medical professional transaction, the consumer in a nonmedical professional transaction focuses on the skill and competence with which the service provider renders the service rather than on the condition of products incidentally used in performing the service. In addition, the nonmedical professional, unlike the mass product producer, does not have a large body of consumers among which to distribute the costs of liability.

In Langford v. Kraft, the plaintiffs sued a professional engineer for damages to their land caused by the diversion of surface waters onto the property. The defendant designed and developed a drainage system for a new subdivision in which the plaintiffs purchased real estate. The defendant's

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119. 618 S.W.2d 791 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.)
120. 656 S.W.2d at 926.
121. Id.
122. "A professional is one who continually must exercise intellectual judgment, predicated upon high educational achievement, in the performance of his duties, and whose clients rely upon that judgment." Comment, Professional Negligence, 121 U. PA. L. REV. 627, 631 (1973). A professional's skill involves both mechanical and judgmental ability; the former includes a "mastery of routine procedures," but the latter constitutes the essential and distinctive quality of professionalism. Id. at 633-45.
124. See supra notes 82-97 and accompanying text for a discussion of the policy rationales for strict liability and their application to medical professionals. See generally W. PROSSER, LAW OF TORTS § 97, at 674 (3d ed. 1964) (discussion of policy rationales underlying strict liability).
125. As the California Supreme Court said in Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (en banc): The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.
design, however, proved faulty in that it diverted the natural flow of surface water onto the plaintiff’s land.

Although the plaintiffs purchased the defendant’s services, they also purchased a product, the finished designs and plans. The Texas Supreme Court, however, viewed the transaction solely as one involving the rendition of professional services. The court determined that unlike Barbee, where a sale took place incidentally to the performance of professional services, the case at hand involved a purely professional service transaction because the engineer planned an economic venture for the plaintiffs for which he charged a fee. Consequently, the court concluded that section 402A did not apply to the professional services the engineer rendered. The court, however, did hold the defendant strictly liable for trespass to plaintiffs’ land caused by the diversion of surface waters. Thus, according to this holding, while professional status may protect against strict product liability, it will not protect against other types of tort liability.

Similarly, the Fifth Circuit Court of Appeals, applying Texas law, refused to apply section 402A to the defendant in Texsun Feed Yards, Inc. v. Ralston Purina Co. The plaintiff, a feed lot operator, purchased a diet supplement from the defendant in order to increase the weight of its cattle. The supplement nevertheless failed to make the cattle gain weight as expected. The plaintiff, urging that strict liability applied to the defendant because it sold a defective product, sued under both section 402A and breach of implied warranty.

In an effort to avoid strict liability under section 402A and the implied warranty theories, the defendant argued that it could not be held strictly liable because it provided a professional service to Texsun. Ralston alleged that it provided the plaintiff with professional consultation services and that its manufacture and sale of the diet supplement was only incidental to its professional services. According to Ralston, therefore, the court should analyze the transaction as a professional service rather than as a sale of a prod-

128. 551 S.W.2d at 396.
129. 425 S.W.2d 342 (Tex. 1968).
130. 551 S.W.2d at 396. “The general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct.” Id. (quoting Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 20 (1954)).
131. Id.
132. Id. at 395. The court relied on the theory of trespass embodied in Restatement of Torts § 822 (1939).
133. 447 F.2d 660 (5th Cir. 1971).
134. In an effort to prepare cattle for market as rapidly as possible, feed lot operators often feed dietary supplements to their cattle. The dietary supplement enhances the cattle’s appetite, which causes them to eat more and gain weight more rapidly. Id. at 662.
135. Although the cattle did gain weight, the weight gain did not progress as rapidly as Ralston had indicated it would. Id. at 663. The additional time the cattle had to remain in Texsun’s feed yard to achieve the desired weight resulted in higher costs per pound of weight gain. Thus, Texsun suffered economic losses.
136. Id. at 660.
137. For a distinction of the implied warranties, see supra notes 11-37 and accompanying text.
uct. Although the court rejected Ralston’s attempt to bring the case within the rule announced in *Barbee*, the court refused to apply section 402A because it found that while the supplement did not produce the expected results, it did not constitute an unreasonably dangerous product. Thus, the transaction did not fall within the ambit of strict tort liability.

In analyzing the implied warranty claim, the court found that Ralston primarily engaged in the business of selling ration supplements rather than in the business of providing professional services. The court explained that the company offered the nutrition consultant’s services in order to promote increased sales of the diet supplement rather than to give expert advice to consumers who purchased the ration supplement. The court concluded that it would be unrealistic to treat the sale of the ration supplement separately from the rendition of the professional advice and assistance when in essence Ralston’s advice and assistance merely constituted part of the sales package. Consequently, the court allowed Texsun to recover damages from Ralston under an implied warranty theory.

2. Nonprofessional Sales-Service Hybrid Transactions

Although the majority of jurisdictions agree that strict tort liability applies neither to pure service transactions nor to professional sales-service hybrid transactions, the various jurisdictions have not unanimously decided the issue of whether section 402A applies to nonprofessionals involved in hybrid transactions. Because Texas courts have not yet decided a case involving nonprofessionals and the doctrine of strict tort liability in the sales-service context, this section focuses on case law from other jurisdictions that has addressed the issue. These decisions provide a framework for assessing how Texas courts would react in similar fact situations.

In *Newmark v. Gimbel’s, Inc.*, the New Jersey Supreme Court extended strict tort liability to a beautician. The plaintiff in *Newmark* sustained per-

138. 425 S.W.2d 342, 346 (Tex. 1968).
139. 447 F.2d at 666.
140. *Id.* at 667-68.
141. *Id.* at 668.
142. *Id.*
143. *Id.*
144. See supra note 9 and accompanying text for more information concerning a pure service transaction.
145. See supra note 10 and accompanying text for more information concerning sales-service hybrid transactions.
sonal injuries when the beautician applied a defective permanent wave solution to her hair. The court determined that the transaction constituted a sales-service hybrid transaction because it contained aspects of both a sale and a service.\textsuperscript{148} The transaction resembled a service in that the beautician applied the solution to the plaintiff’s hair.\textsuperscript{149} On the other hand, the transaction resembled the sale of a product because the beautician’s fee included the price of the permanent wave solution.\textsuperscript{150} Thus, the beautician supplied a good to the plaintiff for consideration.\textsuperscript{151} In justification for its decision, the court explained that because the beautician regularly engaged herself in a commercial enterprise, she occupied the legal status of a retailer.\textsuperscript{152} As a retailer, the beautician could bring an indemnity action against the manufacturer of the permanent wave solution, and thereby place the ultimate responsibility on the party responsible for creating the defective product.\textsuperscript{153} The court therefore held the beautician strictly liable under section 402A.\textsuperscript{154}

In \textit{Gobhai v. KLM Royal Dutch Airlines}\textsuperscript{155} the New York Court of Appeals refused to hold an airline strictly liable when it provided defective slippers to its first class passengers.\textsuperscript{156} The court based its decision on a determination that the airline provided passengers with a service and that the slippers provided to first class passengers were wholly incidental to the service.\textsuperscript{157} The dissent argued that the court should not have granted summary judgment to the defendant because a question existed as to whether or not the airline sold the slippers to the passengers.\textsuperscript{158} Although the dissent agreed that the airline provided a service, it argued that the airline also sold the slippers to the passengers.\textsuperscript{159} The dissent reasoned that by incorporating the price of the slippers into the higher fare the airline charged to first class passengers, the airline in effect sold the slippers.\textsuperscript{160} Therefore, the dissent’s reasoning ran, because the airline distributed the slippers to its passengers, thereby placing them into the stream of commerce, strict liability should apply to the airline when the slippers ended up being defective.\textsuperscript{161}

In contrasting \textit{Gobhai} to \textit{Perlmutter v. Beth David Hospital},\textsuperscript{162} a blood transfusion case in which the court refused to hold a hospital strictly liable for the transfusion of impure blood, the dissent emphasized the difference in the necessity of using the defective product while rendering the service.\textsuperscript{163}

\textsuperscript{148} 258 A.2d at 701.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 704.
\textsuperscript{153} Id. at 705.
\textsuperscript{154} Id.
\textsuperscript{156} 442 N.E.2d at 62, 445 N.Y.S.2d at 765.
\textsuperscript{157} Id. at 64, 445 N.Y.S.2d at 767.
\textsuperscript{158} Id. at 62, 445 N.Y.S.2d at 765 (Fuchsberg, J., dissenting).
\textsuperscript{159} Id. at 62-63, 445 N.Y.S.2d at 765-66.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 64, 445 N.Y.S.2d at 767.
\textsuperscript{162} 308 N.Y. 100, 123 N.E.2d 792 (1954).
\textsuperscript{163} 442 N.E.2d at 64, 455 N.Y.S.2d at 767 (Fuchsberg, J., dissenting).
Whereas the blood transfusion was an essential part of the transaction, the slippers in _Gobhai_ were not a necessary element in the rendition of the air transportation.\(^1\) Furthermore, in contrast to _Perlmutter_,\(^1\) no public policy supported a refusal to apply strict liability to service providers who placed defective products into commerce when the product was not essential to the service provided.\(^1\) In essence, the dissent determined that strict liability should apply to service providers who incidentally use unnecessary products during the rendition of a service, but strict liability should not apply to service providers who incidentally use a product that is an essential element of the service.\(^1\)

Although Texas courts have not decided a case involving a nonprofessional sales-service hybrid transaction, _Challoner v. Day & Zimmerman, Inc._\(^1\) foreshadows how Texas courts will most likely handle hybrid nonprofessional, commercial transactions.\(^1\) In _Challoner_ the premature explosion of a 105 millimeter howitzer shell seriously injured the plaintiff. The court held the defendant, who manufactured the ammunition for the United States Government according to the Government's designs and specifications, strictly liable.\(^1\) The court found the defendant liable despite the fact that the Government supplied both the components and the designs for the ammunition and the defendant, in essence, merely provided the service of assembling the shells.\(^1\) The court determined that section 402A applied to the defendant because the transaction in question was entirely commercial in nature.\(^1\) The defendant placed the defective ammunition into the stream of commerce via a commercial transaction.\(^1\)

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164. Id.
165. 308 N.Y. 100, 123 N.E.2d 792 (1954).
166. 442 N.E.2d at 64, 445 N.Y.S.2d at 767.
167. Id. Apparently no subsequent case has followed the dissent's opinion.
168. 512 F.2d 77 (5th Cir. 1975). The court applied Texas substantive law in deciding the case.
169. Generally, when the transaction is commercial in nature courts will find the sale of a product within § 402A because the policy justifications of strict liability apply to the commercial transactions. When the transaction is professional in nature the courts have found that services predominate, that the service provider did not sell a product, and thus, that § 402A does not apply. See, e.g., Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 20 (1954) (test hole driller not liable in absence of negligence or intentional misconduct); Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968) (optometrist not held strictly liable for improperly fitted contact lenses); Shivers v. Good Shepherd Hosp., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (hospital not held strictly liable for injection of contaminated drug).
170. 512 F.2d at 80. As a result of Boyle v. United Technologies, 108 S. Ct. 2510, 101 L. Ed. 2d 442, cert. denied, 109 S. Ct. 559, 102 L. Ed. 2d 585 (1988), the court would decide the case differently today. The Supreme Court established the government contractor defense in _Boyle_. 108 S. Ct. at 2575, 101 L. Ed. 2d at 458. This defense immunizes government contractors who follow government specifications from strict tort liability. _Id._
171. 512 F.2d at 82. The defendant in _Challoner_ merely provided a service for the Government in that it only assembled the ammunition. The defendant did not provide the parts, make the parts, or design the parts or finished product. Just as an electrician who reconnects an already existing loose wire, the defendant in _Challoner_ provided a service by assembling already existing parts. Furthermore, the Government gave the parts to the defendant, the defendant did not sell the parts or the finished ammunition to the Government, it merely charged the Government for its services in assembling the ammunition.
172. _Id._
173. _Id._ The court stated that while a literal sale of a product is not required to impose
3. Restaurateurs

Texas, along with several other jurisdictions, applies strict liability to restaurateurs. Citations are needed for this. A consumer’s interaction with a restaurant constitutes a sales-service hybrid transaction. Although the restaurant provides a service to the patron when it prepares and serves the food, it also sells the food products to its patrons. In this respect, the sales-service hybrid transaction performed by restaurateurs differs from those types of sales-service transactions where the fee charged is essentially for the services provided rather than for products incidentally used in providing the service. Unlike many service transactions where the service provider furnishes a product only incidentally to furnishing a service, a restaurateur does not provide food only incidentally to its preparation. The restaurateur charges for providing the food, for preparing the food, and for serving the food. Thus, the food is a substantial part of the restaurant’s service.

Although most jurisdictions impose strict liability on the restaurateurs under an implied warranty of fitness for human consumption, they could just as easily do so under section 402A. The Restatement (Second) of Torts suggests that strict tort liability applies to restaurateurs because they act, in actuality, as sellers of food products for consumption. Several other reasons also justify the imposition of strict tort liability on restaurateurs. For instance, restaurant patrons reasonably expect that the food served by a restaurant will be wholesome, unadulterated, and appropriate for consumption. In this sense, the patron relies on the restaurateur’s skills in the selection and preparation of the food served. Furthermore, the imposition of strict liability on restaurateurs furthers the loss distribution goals underlying strict tort liability. A restaurateur who does not act negligently in serving food unsuitable for consumption may seek indemnity from the manufacturer or supplier responsible for creating the unwholesome con-
dition of the food. More importantly, the restaurateur may distribute the costs of liability through increased prices that will be paid by all of the restaurant's patrons. Lastly, restaurateurs can protect themselves by purchasing liability insurance.

The court in *Brumit v. Cokins* held a restaurant operator strictly liable when the plaintiff received injuries from drinking a milkshake containing glass fragments. The court imposed liability under an implied warranty of fitness for human consumption. In justification for its decision, the court explained that the implied warranty resulted from a public policy that food sold for immediate consumption must be wholesome and unadulterated. The court determined that the public policy behind protecting the health of the general public mandated the application of an implied warranty.

In *Herbert v. Loveless*, the plaintiffs became ill after consuming impure ice at the defendant's restaurant. The court held the restaurant strictly liable. The court, however, imposed strict liability under section 402A rather than under an implied warranty theory. Later, the defendant restaurant brought an indemnity action against the manufacturer of the ice. The Beaumont court of appeals, finding that the restaurant failed to establish the defectiveness of the ice at the time it left the defendant's control, refused to hold the ice manufacturer strictly liable.

4. Public Utilities and Sales-Service Hybrid Transactions

Companies that provide public utilities, such as gas, water, and electricity, often operate within the sphere of sales-service hybrid transactions. These companies sell a product—electricity, gas, or water—to consumers, but they also provide a service when they transmit the product to the consumer's home or business. This service often involves making repairs and installing pipes, cables, or lines. Texas courts have not unanimously agreed on how these public utilities cases should be treated.

In *Erwin v. Guadalupe Valley Electric Cooperative* the plaintiffs filed suit to recover for the death of a football coach who received fatal injuries when a football goal post, which he was helping to erect, came into contact with defendant's electrical wires. The plaintiffs claimed that strict liability

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182. Id. at 867-68.
183. Id. at 870.
184. Id. at 869-70.
185. 281 S.W.2d 154 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).
186. Id. at 156.
187. Id. at 157.
188. Id.
189. Id. As a matter of public policy implied warranties exist to protect the health of the general public. Id.
190. 474 S.W.2d 732 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).
191. Id. at 737.
192. Id. at 739.
193. Id.
194. 505 S.W.2d 353 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
applied to the electric company because the company placed the transmission lines too low to the ground, thus making the power lines defective. Although the court did not deny that the electric company sold electricity, it refused to extend strict liability to the electric company. The court determined that strict liability did not apply to the defendant because the electricity did not constitute an unreasonably dangerous product. The risk of injury did not result from the defective manufacture or assembly of the electricity itself. Nor did the injury result from a defective design. Instead, the risk of danger arose solely from the low location of the transmission wires, the service aspect of the electric company's commercial transaction.

Similarly, in Gray v. Enserch, Inc. the Fort Worth court of appeals held that strict tort liability did not apply to a gas explosion in the plaintiff's home caused by the defendant's failure to repair a leak in a gas line. As in Erwin, the court concluded that the defendant did not sell a defective product. The court therefore held that the doctrine of strict liability, which requires the sale of a defective product, did not apply to the defendant gas company because the gas did not constitute a defective product. If anything, the defendant acted negligently in failing to repair the leak in the gas line.

In Navarro City Electric Cooperative, Inc. v. Prince the plaintiff received an electric shock while adjusting a television antenna. The plaintiff filed suit under an implied warranty theory, alleging that the electric company sold and transmitted electricity through wires that were unfit for that purpose. The defendant denied that implied warranties applied because it did not sell the electricity with which the plaintiff allegedly came into contact. Instead, the electric company argued that it merely transmitted the electricity along high voltage lines to be distributed later to various outlets. The court never denied that the defendant engaged in the business of selling electricity. It did, however, deny that the electricity constituted a "good" as defined in the Texas Business and Commerce Code. The court determined that the sale

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195. Id. at 355-56.
196. Id. at 355.
197. Id. at 355-56.
198. Id.
199. Id. at 355.
200. 665 S.W.2d 601 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.).
201. Id. at 605. The court also refused to hold the defendant liable under RESTATEMENT (SECOND) OF TORTS § 520 (1977), which imposes strict liability for activities that are abnormally dangerous. 665 S.W.2d at 606.
202. Id. at 605.
203. Id. The court explained that the doctrine would not apply in the absence of a defective product. Id. The court said, "[T]he doctrine of strict product liability will not apply against a utility when the product delivered by the utility is not defective." Id. (citing Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 355-63 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.).
204. 640 S.W.2d 398 (Tex. App.—Waco 1982, no writ).
205. Id. at 399. Plaintiff relied on TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968).
206. 640 S.W.2d at 399-400. TEX. BUS. & COM. CODE ANN. § 2.105 (Tex. UCC) (Vernon 1968).
of electricity more appropriately resembled the rendition of a service and did
not fall within the scope of the Business and Commerce Code's implied war-
ranties. Consequently, the court refused to hold the defendant strictly liable under an implied warranty of merchantability.

In Moody v. City of Galveston, however, the court hinted that it would have held the city strictly liable under section 402A for selling defective water to the plaintiff if the plaintiff had properly presented a motion for judgment notwithstanding the verdict. The plaintiff in Moody sustained injuries when gas leaking from her water faucet caught fire. Finding that the city did engage itself in the business of selling water and that the water amounted to a defective product because the presence of flammable gas in the water lines created an unreasonable risk of harm to the plaintiff, the court determined that the plaintiff had met the proof requirements necessary for recovery under section 402A.

The court, however, found no Texas cases that clearly held that a munici-
pality engaged in selling water is a proper subject for the doctrine of strict tort liability. In determining that the city was a proper subject for liability without fault, the court explained that the city, while furnishing water to the plaintiff, acted in a proprietary capacity rather than in a discretionary manner. When acting in a proprietary manner, the city became, just as a private person, subject to the rules of tort liability, including strict liability under section 402A.

In Houston Lighting & Power Co. v. Reynolds the Houston court of appeals upheld a strict liability judgment against a power and lighting company for injuries the plaintiff sustained when he used an aluminum pole to

1968) provides: "(a) 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." Id.

207. 640 S.W.2d at 400. The court stated: "Had the Legislature intended to include services within the implied warranty requirements of Section 2.314 it could have done so, as it did in the Deceptive Trade Practices Act, but by specifically limiting it to goods the obvious intent was to omit services from this section." Id. (citation omitted). Other jurisdictions have also held that the sale of electricity constitutes the rendition of a service rather than the sale of goods. See Williams v. Detroit Edison Co., 63 Mich. App. 559, 234 N.W.2d 702, 707 (1975); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316, 318 (1972); Farina v. Niagara Mohawk Power Corp., 81 A.D.2d 700, 438 N.Y.S.2d 645, 647 (1981).

208. 640 S.W.2d at 400.

209. 524 S.W.2d 583 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

210. Id. at 589.

211. Id. at 587.

212. Id.

213. Id. at 588.

214. Id. The court cited the following cases as authority for the proposition that a city when acting in a proprietary manner is subject to tort liability just as a private person is: City of Waco v. Busby, 396 S.W.2d 469 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.); Hodges v. Lower Colorado River Auth., 163 S.W.2d 855 (Tex. Civ. App.—Austin 1942, writ dism'd by agr.); City of Wichita Falls v. Lipscomb, 50 S.W.2d 867 (Tex. Civ. App.—Fort Worth 1932, writ ref'd).

The defendant appealed the jury verdict, alleging that no strict liability cause of action exists against electric companies for injuries resulting from contact with distribution lines because electricity in a power line is not a product within the ambit of products liability. The court disagreed and stated that although the actual distribution of the electricity through the towers, poles, and wires may be considered a service, the electricity itself was a consumable product. The court also rejected the defendant’s contention that electricity, while being transmitted in high voltage lines, was not a product entered into the stream of commerce. As a result, the court held the defendant strictly liable under the theory that a product introduced into the stream of commerce may be unreasonably dangerous for purposes of section 402A if the seller failed to give an adequate warning of dangers associated with the product.

Although the electricity itself did not constitute an inherently defective product, the court determined that the defendant’s failure to give an adequate warning of the dangers associated with contacting a high voltage distribution system rendered the electricity unreasonably dangerous.219

III. ANALYSIS

A. The Professional/Nonprofessional Distinction

The majority of courts distinguish between professional sales-service hybrid transactions and nonprofessional hybrid transactions.221 These courts apply strict liability to nonprofessionals, but refuse to apply liability without

216. 712 S.W.2d at 762.
217. Id. (citing Pierce v. Pacific Gas & Elec. Co., 166 Cal. App. 3d 68, 212 Cal. Rptr. 283 (1985); Ransome v. Wisconsin Elec. Power Co., 887 Wis. 2d 605, 275 N.W.2d 641 (1979)). Reynolds appears to be indistinguishable from Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 355 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.). The court, however, gives no indication of why it refused to apply the Erwin holding to the case at hand. Perhaps the court decided this case with the intention of alerting electric companies that they must adequately warn of the dangers associated with high power voltage lines.
218. 712 S.W.2d at 766-67. The court in Reynolds made reference to Davis v. Gibson Prod. Co., 505 S.W.2d 682 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.), in which the court stated, when discussing the definition of stream of commerce: “The stream of commerce includes the manufacture of the object and its distribution, including the activities of retailers . . . . [I]t is clear that continuation of the flow of commerce does not require transfers of possession.” 712 S.W.2d at 766 (quoting Davis, 505 S.W.2d at 691). But see Hedges v. Public Serv. Co. of Ind., Inc., 72 Ind. Dec. 561, 396 N.E.2d 933, 935 (1979) (so long as electricity is being transmitted over electric wires under the exclusive control of the distributing power company, the company has not placed the electricity into the stream of commerce).
219. 712 S.W.2d at 767 (citing Lopez v. Aro Corp., 584 S.W.2d 333 (Tex. Civ. App.—San Antonio 1979, writ ref’d n.r.e.). A product may be proven defective if it is unreasonably dangerous as designed, or it is unreasonably dangerous because of inadequate warnings or lack of instructions. Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 346 n.1 (5th Cir. 1983); Miller v. Brook Laundry Mach. Co., 568 S.W.2d 648, 650 (Tex. 1977).
220. 712 S.W.2d at 767.
221. See, e.g., La Rossa v. Scientific Design Co., 402 F.2d 937, 942-43 (3d Cir. 1968) (strict liability not applied to professional engineer); Newmark v. Gimbel’s, Inc., 54 N.J. 585, 596-97, 258 A.2d 697, 702-03 (1969) (strict liability applied to beautician who applied defective permanent wave solution in commercial transaction); Sales, supra note 43, at 24-36 (strict liability not applicable to professionals).
fault to professionals. In actuality, however, neither a legal nor a conceptual basis for the distinction between the professional and the nonprofessional in the sales-service hybrid context is easy to perceive. Furthermore, the consumer's expectation in a professional service transaction where the service provider incidentally uses a product does not differ from the consumer's expectation in a nonprofessional service transaction in which the provider incidentally furnishes a product during the rendition of the service. The consumer of either type of service expects that the service provider will act in a competent and skillful manner. The expectation remains the same whether the service constitutes the repair of teeth or the repair of a television. In both instances, if the service provider does not perform the transaction in a skillful and competent manner, the injured consumer can sue the service provider for negligence. Furthermore, the risk distribution capability of a nonprofessional service provider for loss resulting from a defective product incidentally used during the rendition of the service does not differ from the risk distribution of the professional service provider. Neither the professional nor the nonprofessional engaged in sales-service hybrid transactions mass produces or sells goods to a large percentage of the public compared to a product manufacturer, and thus, neither the professional nor the nonprofessional possesses a large customer pool among which to distribute the costs of strict liability. Therefore, applying a different standard to nonprofessionals appears inappropriate when the rationale and policy considerations underlying strict liability apply with no more force to nonprofessionals than they do to professionals.

B. Problems With Current Approaches

Courts and commentators have suggested several different analyses for sales-service hybrid transaction cases. For either of two reasons, how-

222. See supra note 146 and accompanying text for a discussion of strict liability and its applicability to nonprofessionals.


225. See Sales, supra note 43, at 34.


227. For a more complete discussion of the professional, nonprofessional distinction see sources cited supra note 223.

228. Some courts have analyzed sales-service hybrid transactions by applying an essence of the transaction test. See Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Allied Properties v. John A. Blume & Assocs., 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259, 264 (1972). Other courts and commentators have based the determination as to whether strict liability applies by looking either at the burden on the plaintiff of proving negligence or at the commercial or professional nature of the transaction. See Challoner v. Day & Zimmerman, Inc., 512
ever, these approaches have failed to solve the problem of deciphering sales-service hybrid transactions. First, an approach often fails because the standard rests on faulty logic. Second, even if an approach is sound, courts often refuse to adopt and use that particular standard, or they apply the standard inconsistently. Whatever the reason, the result remains the same: courts continue to decide hybrid cases purely on an ad hoc basis.229

Some courts and commentators have argued that the determination as to whether strict liability applies to a specific cause of action rests on the essence of the transaction.230 The essence of the transaction test231 looks at the essential element of the transaction and determines if it resembles more the sale of a product or the rendition of a service.232 If the court determines that the transaction primarily consists of the sale of products, then strict liability applies.233 If the court determines that the rendition of services constitutes the essence of the transaction, then negligence rather than strict liability applies to the case.234

Although at first glance the essence of the transaction test appears logical and easy to apply, the test contains one flaw: does one determine the essence of the transaction by using a purely objective basis or by using a subjective basis? For example, suppose a doctor diagnoses a patient and tells the patient that the problem can be cured by taking medication. The patient, however, must go to the hospital to obtain the medication. The treatment consists of taking the medication once every twenty-four hours for six days. The patient must remain at the hospital for the entire six days so that nurses can monitor the effects of the drug. The drug turns out to be defective. Does strict liability apply to the hospital?

In applying the essence of the transaction test, courts may differ on the character of the patient's interaction with the hospital. A court viewing the situation objectively could well decide that the patient primarily paid for the hospital's services, because those who are sick go to hospitals so that the doctors' and hospitals' professional services will cure them. Subjectively, however, the patient may have considered the essence of the relationship to

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229. For an illustration of how courts have decided hybrid cases, see supra note 77.
230. See Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982). The Texas Supreme Court has used the essence of the transaction test when analyzing cases concerning the scope of UCC article 2. See Robichaux, 643 S.W.2d at 394. The court, however, has not applied the essence test in § 402A cases. See Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968).
231. Some courts and commentators refer to this test as the essence of the transaction test, while others refer to this test as the essence of the business test.
have been the purchase of the medication. Since the patient knew his condition and knew that the drug would cure it, his primary concern lay with obtaining the drug, which he could administer himself, rather than with having a nurse check his reaction to the drug every few hours. Clearly, the result of any particular case may vary depending upon whether the court applies the essence test objectively or subjectively.

One commentator has suggested an expanded version of the essence test, by which a court would analyze a hybrid case using a two-step process. First, the court should determine the essential or predominant nature of the transaction. Second, the court should determine whether the plaintiff’s injury resulted from a defective product or from defective service. The proponent argues that courts must apply the nature of the transaction and the source of the defect tests together in order to identify cases in which the imposition of strict liability furthers the policies underlying liability without fault. Once again, however, the problem of whether to apply a subjective or objective standard arises when applying this test.

Another commentator has stated that courts should rely on the proof rationale underlying strict products liability in determining whether specific sales-service hybrid transactions more closely resemble sales of products or more closely resemble services. The proponent of this proof test asserts that only the proof rationale underlying strict liability distinguishes defective product cases from defective service cases. He argues that strict liability governs defective product cases because of the plaintiff’s substantial inability

235. See Note, supra note 62, at 400-04.
236. Id. at 404-07.
237. Id. at 400-02.
239. Note, supra note 62, at 404. For demonstrations of the application of the combined essence of the transaction and source of defect test, see id. at 404-07.
240. In applying the first part of the essence-source test, we must determine whether the essence of the transaction was a sale or a service. For example, assume a man took his car to an automotive shop to have the motor repaired. At the shop he learned that a new $1.00 part would remedy the problem. Was the man’s main purpose in taking the car to the shop to purchase the necessary part or to have a mechanic repair his car? Most people viewing the situation objectively would assume that the man considered the predominant purpose of the transaction to be the acquisition of the mechanic’s skilled services. The man himself, however, might feel that his reason for taking his car to the repair shop was to purchase a new part. Thus, a subjective interpretation of man’s main purpose for taking the car to the shop could be that he intended to purchase merely the needed part rather than the mechanic’s services. See supra text following note 234 for another example of the problems created in applying the essence test.
241. The proof rationale is based on the premise that courts would be unduly burdening plaintiffs by requiring them to prove negligence in product cases.
243. Id. at 429. Powers argues that the proof test provides a comprehensive approach that embodies the rationales underlying strict liability. Powers, however, admits that the proof test does not answer all of the questions. Mainly, the test does not determine whether a product or a service is involved in a hybrid transaction case. Also, this test fails to resolve such issues as whether courts should treat professionals differently from nonprofessionals and whether the test applied in warranty cases should also be the test applied in tort cases. Id. at 432.
to prove the defendant's negligence.\textsuperscript{244} Negligence, on the other hand, governs service cases because the plaintiff in a service case enters into a face-to-face relationship with the service provider, which enables the plaintiff to point to the defendant's specific negligent act.\textsuperscript{245} Courts deciding hybrid transaction cases should therefore inquire whether the case is of the type that raises the proof rationale of strict products liability: would the plaintiff be unduly burdened if required to establish the defendant's negligence? Although the proof test provides courts with a workable method of analyzing hybrid cases, no court has expressly adopted this test.

Lastly, some courts and commentators have argued that strict liability applies to any defendant who places a defective product into the stream of commerce via a commercial transaction.\textsuperscript{246} The stream of commerce test, or the integral part of the distribution chain test, as one court has referred to it,\textsuperscript{247} distinguishes the sale of a product from the rendition of a service according to the context in which the transaction arises.\textsuperscript{248} If the transaction is commercial in nature, the proponents of the stream of commerce test argue that the transaction involves the sale of a product, and strict liability applies.\textsuperscript{249} They argue that strict liability applies to transactions that are commercial in nature because the policy justifications underlying strict liability apply to this type of transaction.\textsuperscript{250} If, however, the sales-service hybrid transaction is professional in nature, they argue that no product sale occurs and, instead, that a service predominates and calls for the application of a negligence standard.\textsuperscript{251} The proponents of this test justify the distinction between commercial transactions and professional transactions on the rationale that the policies behind strict liability do not apply to cases involving professionals.\textsuperscript{252}


\textsuperscript{245} Powers, supra note 54, at 425-27.


\textsuperscript{249} See, e.g., Watchel v. Rosol, 159 Conn. 496, 271 A.2d 84, 86 (1970) (sandwich sold at restaurant is commercial product and strict liability applied); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697, 702 (1966) (strict liability applied to beauty parlor operator who placed defective product into stream of commerce through commercial transaction); Held v. 7-Eleven Food Store, 108 Misc. 2d 754, 438 N.Y.S.2d 976, 978 (Sup. Ct. 1981) (strict liability not applied to store when customer fell and injured himself on store sidewalk because sidewalk not product that store placed into stream of commerce).

\textsuperscript{250} See Maloney, Murray, Byrne & Schoenfeld, supra note 250, at 635-36.


\textsuperscript{252} Reynolds, supra note 248, at 311-14. See generally Wunsch, supra note 9, at 358-59.
do not require a finding of a literal sale before holding that strict liability applies. For instance, in *Challoner v. Day & Zimmerman, Inc.*, the court held the defendant manufacturer strictly liable because the defendant placed a defective product into the stream of commerce via a "cost plus" contract, not because it sold a defective product.

Although several courts have applied a stream of commerce test, the test does not present a comprehensive method for analyzing sales-service hybrid transactions. In essence, the distinction between commercial and professional transactions does no more than attempt to separate those situations in which the application of strict liability furthers the policies underlying the theory from those situations in which the imposition of strict liability does not further the underlying goals of the theory. In this sense the classification system presents courts with a good starting point in determining which cases strict liability should govern. That, however, is all that the classification system offers.

**C. A Unifying Policy Test**

Past efforts to determine whether strict liability applies to sales-service hybrid transactions have failed to result in a uniform analysis of the sales-service problem. A step towards the solution of the problem, however, lies in a policy-need approach, which balances the justifications for strict liability, such as cost internalization, ability to detect and prevent defects, the burden of proof, and justified reliance, against the general public's need to maintain affordable economic access to the product or service. This approach requires, in addition to careful consideration of the accepted justifications for strict liability, a determination of how necessary the particular type of hybrid transaction is to the overall public welfare.

When the product or service does not constitute an essential element to the public welfare, increased prices will not unduly harm the public and thereby undermine the policies supporting strict liability. Conversely, when the product or service is a public necessity, increased prices and diminished (policies behind strict liability not furthered when applied to services); cf. Note, *supra* note 62, at 399 (policies behind strict liability furthered when applied to either sale or service transactions).

253. *See generally* Phipps, *When Does a "Service" Become a "Sale"?*, 39 INS. COUNS. J. 274, 278-79 (1972) (author discusses cases where courts have extended meaning of "sale").

254. 512 F.2d 77 (5th Cir. 1975).

255. *Id.* at 82.

256. For a discussion of a policy type approach, see Comment, *supra* note 12, at 597-601.

257. Comment c to § 402A suggests the justification for imposing such liability:

The seller, by marketing his products for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

*Restatement (Second) of Torts* § 402A comment c (1965).
access unjustifiably harms the general public, and the need for affordable public access outweighs the need for the imposition of strict liability. Courts should impose strict liability only in the former cases, when the public's need for access to the service does not outweigh the other objectives of strict liability. For instance, courts should more readily impose strict liability upon beauticians, as in Newmark v. Gimbel's, Inc., because the public as a whole would not suffer as a result of increased hair salon prices, and the imposition of liability would further the policies underlying strict liability. The imposition of strict liability in this situation would spread the risk of the loss occasioned by the injury, would ease the plaintiff's burden of proof, and would protect the consumer's justified reliance in the transaction. By contrast, as in Magrine v. Krasnica, courts should not impose strict liability upon medical professionals because the public as a whole must have access to affordable health care. The general public would suffer if health care access became limited because of the imposition of strict liability on health care professionals.

In addition to considering the policies and rationales underlying strict liability, the courts must take into account the necessity of the particular type of transaction and weigh the effect of the imposition of strict liability on the general public against the good the imposition of strict liability would do for one particular plaintiff. Thus, courts will have to decide on a case-by-case basis whether the imposition of strict liability furthers the policy justifications for the theory by taking into account all of the rationales behind the theory and the degree of public necessity for the transaction. If the court finds an absolute public necessity, as is the case with health care, then the court should not impose strict liability. On the other hand, if the court finds no public necessity for the transaction, then public policy does not foreclose the imposition of strict liability when other justifications for the theory are furthered.

IV. CONCLUSION

A single, appropriate test for determining the correctness of the imposition of strict liability in sales-service hybrid transactions appears not to exist at this time. Courts have applied a variety of ad hoc tests to this type of transaction and, as a result, have reached inconsistent results. At times the imposition of strict liability furthers the policy considerations governing the doctrine and at times it does not. When deciding hybrid transaction cases, courts should always keep in mind the policies they are attempting to further. Thus, sales-service cases must be decided not by applying one particular test but by focusing on the policies underlying the imposition of strict responsibility.


liability. In focusing on the goals behind the theory courts must also consider the necessity of the transaction. Although the sales-service case results will not always be predictable, and although courts may continue to be accused of deciding cases on an ad hoc basis, the best formula on which to base decisions in this area is that of a policy approach. Deciding hybrid transaction cases on the basis of the policy considerations underlying strict liability provides a workable, administrable, and fair framework from which courts can begin to inject consistency into an uncertain area of the law.