



January 1974

Sales-Service Hybrid Transactions: A Policy Approach

Steve Brook

Recommended Citation

Steve Brook, Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw L.J. 575 (1974)
<https://scholar.smu.edu/smulr/vol28/iss2/5>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SALES-SERVICE HYBRID TRANSACTIONS: A POLICY APPROACH

by Steve Brook

The doctrine of liability without fault in consumer transactions is a complex creature. At base, it is a tort; but circumspect use of the word "tort" is demanded. "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."¹ As will be shown, liability without fault is broader still; not only does it partake of contract, but this "tort" is less concerned with wrong than with remedy.² Indeed, this creature charts a path of social re-evaluation wherein a search for a "wrong" regresses, avoiding the crucial decision: When a seller has marketed a defective product which injures a user, or even a bystander, who is, or could be, most prepared to absorb the costs?³

Simply put, liability without fault dictates that an injured consumer need not prove the seller's negligence. Rather, it is enough that the seller markets a defective product that causes injury,⁴ regardless of whether the seller was or was not negligent in his production or sale of the product.

A limitation has been placed on the doctrine in an attempt by the courts to distinguish between sales and service transactions, limiting the doctrine to the pure sales transactions involving tangible products, normally chattels. If the "product" carrying the potential risks from defects was a service, for example, the repair of equipment⁵ or the application of hair dye in a beauty shop,⁶ the plaintiff has been forced to prove a failure by this "seller" to use reasonable care. More recently, a plaintiff has been allowed to rely on liability without fault in transactions involving tangible products—transfers such as the bailment or rental of automobiles—which could be termed "quasi-sales" or transfers less than a sale.⁷ Transactions ranging from the rendering of professional opinions to these "quasi-sales" have been considered for the application of the liability without fault doctrine.

Beginning with the premise that this doctrine is more of a remedy for an injury than a redress of a wrong, this Comment will attempt to show that rather than precise characterizations of the type of transaction, emphasis should be placed upon an assessment, in each general category of transaction, of the policy basis for the application or the non-application of liability with-

1. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 2 (4th ed. 1971).

2. See Pound, *Philosophy of Law and Comparative Law*, 100 U. PA. L. REV. 1 (1951).

3. As developed in this Comment, "absorb" means a two-step process wherein the manufacturer assumes the initial costs (reallocation) and then passes them on to his other customers in the market place, ideally, the public at large (redistribution).

4. Cf. *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *RESTATEMENT (SECOND) OF TORTS*, § 402A (1965) [hereinafter cited as *RESTATEMENT*].

5. See, e.g., *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833 (Alas. 1967).

6. See, e.g., *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. Fairfax Co. 1963).

7. See cases cited notes 121-33 *infra*.

out fault. These essential policy considerations are: justified reliance of the buyer on the seller; marketing responsibility of the seller; and the seller's ability to redistribute the burden acquired.

I. DEVELOPMENT OF LIABILITY WITHOUT FAULT

A. Theories of the Doctrine

The doctrine of products liability without fault has been referred to as strict liability as well as implied warranty. It is doubtful, when properly applied, that these two theories or approaches should be treated differently.⁸ Each imposes a special duty on the seller that he bear and redistribute the costs of injuries arising from defective products, but neither requires privity of contract between the seller and the user or consumer⁹ or proof of negligence.

Implied Warranty. Both the Uniform Commercial Code¹⁰ and its predecessor, the Uniform Sales Act¹¹ have codified the theory of implied warranty on sales transactions.¹² Yet, warranties based upon express representations¹³ or implied by the sale of the product pre-date either statute.¹⁴ The Uniform Sales Act limited the warranties implied in the sale of goods to that of fitness for a particular purpose, if such purpose is made known to the seller,¹⁵ and that of merchantable quality for goods bought by description from a dealer

8. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).

9. Compare RESTATEMENT § 402A, with TEX. BUS. & COMM. CODE ANN. § 2.318 (1967), and *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927 (Tex. Civ. App.—Austin 1971). See also UNIFORM COMMERCIAL CODE § 2-318, and Comment 3.

10. UNIFORM COMMERCIAL CODE §§ 2-314 (merchantable quality), 2-315 (fitness for a particular purpose).

11. UNIFORM SALES ACT §§ 15(1), (2).

12. Under the UNIFORM COMMERCIAL CODE § 2-106(1), "[a] 'sale' consists in the passing of title from the seller to the buyer for a price" The title passed is one to goods, i.e., existing movables other than investment securities and money. *Id.* §§ 2-105, -106.

13. Recovery under liability without fault in an express warranty is a possibility. See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, *aff'd on rehearing*, 15 P.2d 1118 (1932), *aff'd on other grounds*, 179 Wash. 123, 35 P.2d 1090 (1934). But, as Dean Prosser pointed out, there are definite limitations on the scope of recovery such as proof of an assertion of a fact, the falsity of which relates to the proximate cause of the injury. See W. PROSSER, *supra* note 1, at 651-53. It would seem that in the area of personal injury, implied warranty is a more all-encompassing category.

14. UNIFORM SALES ACT § 15(2) "was copied almost verbatim from the first part of Section 14(2) of the English Sale of Goods Act of 1894 [*sic*], which was itself a restatement and codification of the common law of England as it existed at that date." Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

But cf. Note, *Product Liability and the English Implied Terms Bill: Transatlantic Variations on a Theme*, 49 NOTRE DAME LAW. 185, 186 (1973) (suggesting that in fact the existing common law was in a state of flux and the Act of 1893 was in some respects more liberal than the contemporary case law).

Originally, breach of warranty arose out of tort, was based on misrepresentation, and was similar to deceit. But, the action has since developed on its own, separate from tort, as an implication of law; the warranty exists irrespective of the seller's intent to be bound. It should not be predicated upon proof of express reliance on the seller. Prosser, *supra*, at 118, 121-22, 168.

15. UNIFORM SALES ACT § 15(1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purposes."

in such goods.¹⁶ The Uniform Commercial Code incorporated these warranties,¹⁷ but in addition, recognized the possibility of similar warranties existing outside the statute by a comment to the express warranty section: "[T]he warranty sections of [Article Two of the Uniform Commercial Code] are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to direct parties to such contracts."¹⁸ Additionally, privity of contract is usually not a requirement in products liability cases involving personal injury or property damage under implied warranty.¹⁹

While other justifications can be found,²⁰ it would appear that the strongest rationale for the application of implied warranty is simply an implied-in-law promise or obligation of the seller of any defective product to indemnify the injured plaintiff.²¹ The law would justify this obligation as a duty of society

16. *Id.* § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

And, under *id.* § 15(5), trade usage might also give rise to a warranty of fitness or quality.

17. UNIFORM COMMERCIAL CODE § 2-314 is the successor provision of the UNIFORM SALES ACT § 15(2). Section 2-314 deals with an implied warranty of merchantability.

Section 2-314(1) reads as follows: "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."

Section 2-314(2)(c) defines merchantability and includes the term "fit for the ordinary purposes for which such goods are used."

Section 2-314(3) provides for implied warranties arising out of trade usage and the course of dealings.

UNIFORM COMMERCIAL CODE § 2-315 is the successor provision of the UNIFORM SALES ACT §§ 15(1), (4), (5). Section 2-315 reads as follows: "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 [§ 2-316] an implied warranty that the goods shall be fit for such purpose."

See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 9-6, -9 (1972).

18. UNIFORM COMMERCIAL CODE § 2-313, Comment 2. This comment is a most frequently cited argument for the extension of warranties analogous to the Code provisions into non-sales transactions. See, e.g., J. WHITE & R. SUMMERS, *supra* note 17, § 9-6, at 287 n.47; Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 655 (1957); Note, *Sales and Service Warranties in Blood Transfusions*, 26 MD. L. REV. 182, 191 (1966).

19. See *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958) (a landmark case which dealt with cinder blocks). Under the Uniform Commercial Code, it is an open question how distant one may be from the sale. The Code offered three alternatives. UNIFORM COMMERCIAL CODE § 2-318, Comment 3. Texas, which adopted the Code in 1967, left the issue up to the courts:

This chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

TEX. BUS. & COMM. CODE ANN. § 2.318 (1967). See *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927, 929 (Tex. Civ. App.—Austin 1971): "Traditionally, privity of contract was a necessary prerequisite to a suit on implied warranty. However, in the products liability cases involving harm to the user or consumer or to his property, the requirement of privity has been dispensed with."

20. Prosser, *supra* note 14, at 122-25.

21. *Id.*, at 124-25; cf. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

to an individual²² and the seller is the conduit of this protection because of his marketing responsibility.

Strict Liability. Paralleling the growth of implied warranty was the development of a tortious liability for the sale of defective products.²³ At first, a products liability tort action was had for negligence,²⁴ but express and implied warranties provided sufficient analogy to allow courts to establish a tort basis for liability absent a showing of negligence, *i.e.*, strict liability.²⁵ The *Restatement (Second) of Torts*, section 402A, codified the strict liability doctrine.²⁶ The *Restatement* justified or established strict liability as a special responsibility created by the marketing of the product. This responsibility is based upon the favorable social policy of allowing the consuming public to rely on the goods. Moreover, the protection of the individual injured from the costs of such injury should be effected by the redistribution of the risk to the general public through the medium of the marketer or producer who sets the price.²⁷

22. Pound, *supra* note 2, at 8.

23. As discussed in note 14 *supra*, the concept of implied warranty may be a tort idea, but the theory of strict liability has a pure tort heritage.

24. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Thomas v. Winchester*, 6 N.Y. 396 (1852).

Privy was not at issue in a tort action for personal injury founded upon negligence: [T]he absence of 'privy' between the parties makes it difficult to found any duty to the plaintiff upon the contract itself. But by entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the [defendant]

W. PROSSER, *supra* note 1, § 93, at 622.

25. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

While warranty may arise in either tort or contract, and should need no actual contract, still, contract problems such as privy, disclaimer, and notice of breach of warranty have tended to affix themselves to the term "implied warranty." Much of this problem arose under the Uniform Sales Act. The term "strict liability" should not bear the same connotation, although the theory of a legally imposed duty without fault on the seller or the supplier remains the same. See Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960).

The term "strict liability" set forth in the *Greenman* decision was regarded as the more accurate of the liability without fault terms, including the implied warranty without privy of contract term, used by the New York Court of Appeals. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).

26. 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 a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT § 402A.

27. *Cf. id.* § 402A, comment c.

Sellers not normally dealing in the type of goods sold are exempt from strict liability under the *Restatement*.²⁸ It is important to note, however, that the rationale for this exemption is not that the transaction is not a sale or that the transferor is not a "seller" so much as the fact that the situation lacks any basis for justified reliance on such products.²⁹

This concept of reliance is not to be taken as a proof element for strict liability, or for the implied warranty of merchantability. It is rather an assumption made by the law, upon which the liability without fault doctrine and its theories are built. This reliance is intimately connected with the concept of marketing responsibility; the law presumes that a buyer will rely on the seller's judgment in manufacturing or stocking a product.³⁰

A Comparison. Both implied warranty and strict liability were created to deal with obvious sales transactions in which a manufacturer placed an article on the market "knowing that it is to be used without inspection for defects," and the product proved "to have a defect that causes injury to a human being."³¹ Absent the user's misuse or assumption of the risk, liability will ensue when a defective product leaves the manufacturer's hands and proximately causes an injury. While this language is adopted from a strict liability test, approximately the same standards would apply for the implied warranty of merchantability, or merchantable quality. The difference would be the substitution of the term "non-merchantable" for the word "defective,"³² and the

28. *Id.*, comment *f*.

29. *Id.*; *cf. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637, 638 (1968) (Botter, J., dissenting), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

30. *See Prosser, supra* note 14, at 122-25, 148-49; *RESTATEMENT* § 402A, comment *c*.

31. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (strict liability; the court notes however that implied warranties arise outside of a contract for sale; but, apparently, these warranties have been overburdened with the conceptualizations applicable to the implied warranty provisions of the Uniform Commercial Code; therefore, the liability without fault doctrine should be placed squarely on strict liability); *see Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 149 N.E.2d 181 (Ct. App. 1958). This decision was relied on in *Greenman*. *Markovich* was a permanent wave injury case, where the user was not in privity with the manufacturer. The court there held that implied warranty could be established on the basis of advertising practices of the defendant. *Markovich* in turn relied on a decision of the Ohio Supreme Court, which had allowed on the same basis an express warranty without privity of contract. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

32. Under the *UNIFORM COMMERCIAL CODE* § 2-314(2) "merchantable" is given several definitions; perhaps the most applicable here are the following:

Goods to be merchantable must be at least such as

- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; . . .

The *RESTATEMENT* § 402A uses the term "defective condition unreasonably dangerous" which, according to some commentators, is a narrower test than that afforded by the merchantability concept. *J. WHITE & R. SUMMERS, supra* note 17, § 9-8, at 295. Certainly, it would seem that a product which causes injuries to persons or property would not be fit for the ordinary purposes for which the product is used. But, in using this concept, the totality of the purpose must be considered. For example, a rotary lawn mower which unquestionably cuts grass can be defective if the blade is hazardously exposed. *Cf. Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972). Therefore, under an implied warranty, the purpose must be the entire operation of lawn mowing; a purpose not fulfilled if the operator is injured by the machine, absent misuse.

possibility that in some cases certain contract defenses could be interposed, especially under a specific application of the Uniform Commercial Code.³³

The Rationale. It is apparent that three factors can be isolated in the application of liability without fault: reliance on the seller; the seller's marketing responsibility; and the seller's ability to pass his cost along to his customers who compose a segment of society as a whole.

As has already been suggested, the assumption of reliance upon the safety of the product manufactured or stocked is simply a legal presumption³⁴ which seems to be premised on the notion that inherent justice dictates the assignment of the cost of injury to the person who made the profit on the sale of the product.³⁵ However, reliance may become relevant in the creation of liability where the consumer is urged through the medium of advertising to rely on a seller's or quasi-seller's skill or judgment; or conversely, to negate liability if the seller's art is only an opinion service. If by a sense of justice, reallocation can be grounded upon marketing responsibility, the seller must be in a position to redistribute the additional costs. Liability without fault is not a just vengeance upon the seller; rather, it is a social concept by which society bears the loss for an individual's injury.

The application of these policies can be readily observed in the illustrative case of *Greenman v. Yuba Power Products, Inc.*,³⁶ where the plaintiff's wife purchased a home wood-working machine as a present for the plaintiff. The machine, when put into use, kicked out a piece of wood injuring the plaintiff. Although the jury found the defendant, the manufacturer, negligent in the construction of the product, and also found a breach of an express warranty, the defendant pleaded a bar to the warranty action through the failure of the plaintiff to give notice of the injury. The California Supreme Court appeared to rest its decision for the plaintiff first on the concept of an implied warranty arising outside the contract, and then, renaming the warranty concept strict liability, resting the holding in tort³⁷ and liability without fault.

A potential liability arose when the product was placed on the market, the recognition of which being a matter of law and not of contractual agreement. Thus, privity was not at issue. Through the label of implied warranty or strict liability, the resultant processes are the same, and the true basis of the action is in tort. Since the reliance is a legal presumption from the marketing

33. Cf. *Pollard v. Saxe & Yolles Dev. Co.*, 115 Cal. Rptr. 648, 525 P.2d 88 (1974).

It may be observed that on the whole, the Uniform Commercial Code implied warranty of fitness for a particular purpose is narrower than the merchantability concept, chiefly because the seller must have been found to have known the buyer's purpose and to have been aware that the buyer was relying on the seller's judgment; additionally, the buyer must have actually relied. J. WHITE & R. SUMMERS, *supra* note 17, § 9-9, at 297. This is not to say that the particular purpose warranty will play no part, as by analogy, in the expansion of liability without fault, especially if the reliance upon the quasi-seller is found to be substantial. Cf. *Texas State Optical, Inc. v. Barbee*, 417 S.W.2d 750, 752 (Tex. Civ. App.—Beaumont 1967) (dissenting opinion).

34. See note 30 *supra* and accompanying text.

35. Pound, *The Problem of the Exploding Bottle*, 40 B.U.L. REV. 167, 185-86 (1960).

36. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

37. Cf. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (regarding the terms strict liability and implied warranty as synonymous).

of the product, the plaintiff need not prove that he even tacitly relied on any representations of the seller. As to the burden assumed, the court implied that the costs were to be borne by the manufacturer and ultimately to be redistributed to society by way of the manufacturer's customers. This policy seemed consistent with an earlier concurring opinion written by Justice Traynor in which he said: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured . . . [but] the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."³⁸

Upon these three factors—reliance, marketing responsibility, and the customer redistribution base—should be gauged the further application of liability without fault in those transactions extending beyond the pure sales type which are expressly governed by the *Restatement* or the Uniform Commercial Code; these *other* transactions are the hybrid sales-service types. In some cases the service provided is of a degree of social necessity to force the foreclosing of the strict liability or implied warranty avenues where otherwise the increased costs produced through the effects of redistribution would deny access to essential services to a large portion of the public.

B. *Basis for the Sales-Service Dichotomy*

Sales. Strict liability in tort under the *Restatement* section 402A specifically concerns those in the business of selling particular goods.³⁹ As has been suggested, the occasional seller is exempted from strict liability—because he is not in the *business* of placing goods on the market, he engenders neither marketing responsibility nor reliance on his product.⁴⁰ The view has been expressed however that the supposed limitation to a "seller" under the *Restatement* is merely the description "of the situation that has most commonly arisen rather than . . . a deliberate limitation of the principle to cases where the product has been sold, intentionally excluding instances where a manufacturer has placed a defective article in the stream of commerce by other means."⁴¹

38. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (concurring opinion of Traynor, J.) (relied upon in *Greenman*). This opinion indicated as well that the implication of strict liability should have a deterrent effect; however, it would seem that in cases where there is no reason to suppose negligence, deterrence is at best secondary to the prophylactic nature of the doctrine. See generally Pound, *supra* note 35.

39. RESTATEMENT § 402A is entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer." See *id.* comment *f*, which analogizes to the seller under the UNIFORM COMMERCIAL CODE § 2-314.

RESTATEMENT § 402A is within chapter 14 of the *Restatement*, which concerns the broader category of "supplier." The Scope Note to Topic 1 of chapter 14 states that § 402A is "[a] special rule of strict liability applicable to sellers of articles for consumption." In RESTATEMENT § 388, comment *c*, a "supplier" is defined as "any person who for any purpose or in any manner gives possession of a chattel for another's use, or who permits another to use or occupy it while it is in his own possession or control, without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used." The comment goes on to make the general rule for suppliers apply to sellers, lessors, donors, lenders, bailors, and those undertaking repair intending a subsequent redelivery. From this it would seem that § 402A is specifically applicable to a defined and narrowed class of suppliers called "sellers."

40. See notes 28-29 *supra* and accompanying text. See also RESTATEMENT § 402A, comment *f*.

41. *Delaney v. Towmotor Corp.*, 339 F.2d 4, 6 (2d Cir. 1964).

Under implied warranty of the Uniform Commercial Code, as has been stated, there is specific reference to the possibility of non-sales implied warranties arising outside of the Code,⁴² although the Code provisions are themselves drawn in terms of sales.⁴³ Since the Code concepts looked initially to the common law and recognized application of warranties outside express statutory law, there would seem to be little reason to restrict the concept of implied warranties to those cases arising specifically within the Code. It may also be that the Code's definition of "merchant"⁴⁴ admits of a broader meaning than the term "seller" in the *Restatement*.⁴⁵

Service. While the trend in pure sales has certainly been towards opening the liability without fault doctrine to the injured plaintiff, the basic rule in service transactions has been to deny recovery absent proof of negligence. Historically, the basis of the sales-service distinction has been found in tests created to determine whether a transaction was a sale for the application of the Statute of Frauds,⁴⁶ differentiating the pure sale from services or work done. The "essence" test of English origin is apparently the most persuasive today, and as the name implies it premises the sales or service classification upon the essential nature of the transaction.⁴⁷

The continuum from the tangible product sold on the store shelf to the opinion rendered for a fee in the doctor's or lawyer's office—the spectrum of the sales-service issue—is impossible to segment precisely. Generally, the service transaction involves the application of a professional skill, such as the opinion of a soil tester.⁴⁸ However, the skill may be entirely incidental to

42. See note 12 *supra*.

43. See note 17 *supra*.

44. UNIFORM COMMERCIAL CODE § 2-104(1): " 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

45. Compare the definition of "merchant" set out at note 44 *supra*, with the RESTATEMENT § 402A, comment *f*, which analogizes the seller under § 402A with the merchant under the Code. However, comment *f* also defines the seller as "any person engaged in the business of selling products for use or consumption."

The Code's merchant is one who *either* deals in goods, *or* holds himself out as having "knowledge or skill peculiar to the *practices* or goods involved." UNIFORM COMMERCIAL CODE § 2-104 (emphasis supplied). "The second description, having to do with occupation, knowledge, and skill, includes electricians, plumbers, carpenters, boat builders, and the like . . ." J. WHITE & R. SUMMERS, *supra* note 17, § 9-6, at 289.

46. Use of the Statute of Frauds tests for the application of the strict liability doctrine is questionable. "[W]hen the Statute of Frauds itself is not an issue, the tests used for determining whether someone has complied with its provisions should be irrelevant, the policy questions being different." Note, *supra* note 18, at 185.

47. See Farnsworth, *supra* note 18, at 662-65; Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 113-15 (1972); Note, *supra* note 18, at 183-84.

Most American courts have applied the "essence test" either to categorize the entire transaction as a sale or to deny recovery for breach of warranty. As a consequence, the implication of a warranty makes the transaction subject to sales rules generally, and it is impossible to imply a warranty as to the materials supplied without also implying strict liability for the service and labor. It is questionable whether the "essence test" is applied in the expanding area of implied warranty with the same rigor with which it is under the Statute of Frauds.

Farnsworth, *supra* note 18, at 664.

48. *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954).

the gist of the transaction, such as a bailment.⁴⁹ Between these two points, lies the more nebulous sales-service area, such as the application of permanent wave solutions to a patron in a beauty shop, a skill applied to a product.⁵⁰ A recent approach to the problem of categorization of the hybrid transactions under the "no-fault" sales rule or the negligence-only service rule has been to assess the commercial nature of the service rendered. A so-called commercial venture as, for example, the beauty shop applying a hair preparation which proves defective, may incur liability without fault, whereas a doctor applying the same treatment may not incur this liability.⁵¹ Under the so-called "stream of commerce" theory, the placing of the produce on the market or into the consumer's hands is an essentially commercial as opposed to professional capacity and such activity may result in liability.⁵² Although the commercial transaction concept has been useful in differentiating points on the sales-service continuum, it would appear that in some sense the professional is held to a lesser standard because of the inexact nature of his "product"—an opinion or judgment. Granted, more often than not, the commercial-professional dichotomy aligns the cases in an orderly pattern within the general policy considerations of liability without fault, the failure to rely specifically on these policy considerations on a case-by-case basis had led to some rather questionable results, as will be seen.

II. SERVICE AND SALES-SERVICE TRANSACTIONS

A. *A General Approach*

Concurrent with the development, chiefly in the late 1950's and 1960's, of liability without fault in the sale of defective chattels, the rule of service transactions was, and for pure service still is, that recovery for injuries to person or property is limited to proof of negligence.

Service Transactions. The California Supreme Court formulated this rule in the leading case of *Gagne v. Bertran*,⁵³ in which the defendant, a soil tester hired by the plaintiff, failed to discover the true depth of the filled soil on a lot, which resulted in greatly increased building costs for the plaintiff.⁵⁴ The court, while holding that there was sufficient evidence to establish a cause of action in negligence, denied an action in implied warranty:

49. *Cf.* *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

50. *See, e.g.*, *Karl Carpenter v. Best's Apparel, Inc.*, 481 P.2d 924 (Wash. Ct. App. 1971).

51. *Cf.* Note, *supra* note 47, at 116-17.

52. *See* Phipps, *When Does a "Service" Become a "Sale"?*, 39 INS. COUNSEL J. 274, 278 (1972). "This distinction refers . . . to the overall essence of the transaction and its effect in terms of commercial realities." *Id.* at 281.

53. 43 Cal. 2d 481, 275 P.2d 15 (1954).

54. Even had there been a strict liability approach, it may be doubtful that the plaintiff here could have recovered since there was only an economic loss and no damage to person or property. The majority rule in the strict liability area disallows recovery under that theory for pure economic loss. *See, e.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598 (Tex. Civ. App.—Eastland 1971). *Contra*, *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

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.⁵⁵

This case demonstrates the general precept "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."⁵⁶

Sales-Service Hybrid. In *Perlmutter v. Beth David Hospital*,⁵⁷ decided in the same year as *Gagne*, the New York Court of Appeals denied recovery under implied warranty provisions of the Uniform Sales Act in a hybrid transaction. The plaintiff, injured by a transfusion of blood infected with serum hepatitis, sued the hospital in which the transfusion occurred. The New York court held that the contract between the patient and the hospital was an indivisible contract for services even where a separate figure could be ascertained for the purchases of a product, in this case blood. Neither was a distinction to be drawn between the hospital's act of supplying the blood and the physician's professional service of administering the blood. The entire indivisible contract was a service. "It has long been recognized that, when service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act."⁵⁸ Recovery could be had only upon proof of negligence.

It is apparent that, although the rule applied is the same in *Gagne* and *Perlmutter*, the situations are quite dissimilar. *Gagne* involved a mere opinion rendered on the nature of the property purchased in a separate transaction. The professional opinion itself and not the property involved was defective. In *Perlmutter* an actual product was transferred, in contrast to the "productless" service function in *Gagne*. While each case did involve an element of professionalism, in *Gagne* the potential liability of the defendant was premised upon his peculiar skill, while in *Perlmutter* it was premised upon the defective product. Thus, the negligence-only rule is applied in *Perlmutter* to an actual sale with the cloak of a service-predominated surrounding.

B. *The First Exception to the General Rule*

It is not surprising that the reluctance of the courts to apply implied warranty or strict liability to hybrid transactions as illustrated by the rules of *Gagne* and *Perlmutter* was first marked by an exception in the area of food service. The growth of the liability without fault concept itself seems to be traceable to regulation of food processors and vendors.⁵⁹ Early in the twentieth century, it was established that food served in a restaurant was deemed to be the object of a sale and that there was an implied warranty

55. 275 P.2d at 21.

56. *Id.* at 20.

57. 308 N.Y. 100, 123 N.E.2d 792 (1954).

58. *Id.* at 104, 123 N.E.2d at 794.

59. See, e.g., W. PROSSER, *supra* note 1, at 650; RESTATEMENT § 402A, comment b.

of wholesomeness which was actionable without proof of negligence. The court in the leading case of *Friend v. Childs Dining Hall Co.*⁶⁰ felt that it was incongruous to give a warranty on food to be carried away, and yet, to deny the warranty for food eaten on the premises.⁶¹ In a later case⁶² the same court noted that in *Friend* the warranty arose out of the contract, but a warranty of fitness and a subsequent action on a warranty would arise whether the transaction was a sale within the terms of the Sales Act, or a service by the innkeeper of providing food to be eaten.

While most courts were willing to apply this exception,⁶³ the general rule of negligence reigned in the hybrid transactions.

III. THE MODERN HYBRID

On the continuum of sales-service problems, there would seem to be little doubt as to the applicable theories at the extremes of pure sale and pure opinion service; and the liability without fault doctrine and the negligence-only rule, respectively, will obtain. The middle region involves hybrid transactions featuring characteristics of both sale and service. In recent years there has been a marked trend toward the placement of other hybrids in the "no-fault" category. Among the valid policies for the extension of the "no-fault" category are consumer reliance, marketing responsibility, and the basis or ability for redistribution of the costs.

A. *The Current Approaches*

Pure Service Transactions. For transactions involving only the rendition of a professional skill⁶⁴ such as an opinion or a design, the courts appear uniform in upholding the rule of *Gagne* that the theories of implied warranty and strict liability should not apply, leaving liability to turn on negligence.⁶⁵ When the

60. 231 Mass. 65, 120 N.E. 407 (1918); *accord*, *Heise v. Gillette*, 83 Ind. App. 551, 149 N.E. 182 (1925); *Smith v. Carlos*, 215 Mo. App. 488, 247 S.W. 468 (1923).

61. 120 N.E. at 409-10. The warranty implied was a fitness for the particular purpose under the UNIFORM SALES ACT § 15(1). 120 N.E. at 408.

62. *Schuler v. Union News Co.*, 295 Mass. 350, 4 N.E.2d 465 (1936). *See also* *Temple v. Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924). The New York Court of Appeals in *Temple* agreed with *Friend*, saying that the implied warranty of fitness arose out of the reliance of the buyer on the seller in the context of a restaurant transaction. The Uniform Commercial Code has picked up the *Friend* line of decisions in § 2-314(1). *See* note 17 *supra*.

63. *But see* *McCarley v. Wood Drugs, Inc.*, 228 Ala. 226, 153 So. 446 (1934).

64. "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). This writer goes on to note that a professional's skill involves both mechanical and judgmental ability; the former includes a "mastery of routine procedures," but the latter is the essential and distinctive quality of professionalism. *Id.* at 633-45. *See* Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221 (1973) (this Note dissects the types of functions and duties of designers).

65. In many of the professional service cases, the purchaser and the seller of the service stand in privity. The absence of privity may raise some additional issues where, for example, the plaintiff is an unforeseeable victim of the defendant's negligence. *See* *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (liability for injury to intangible interests absent privity of contract is not allowed if the plaintiff's advantage was only a collateral consideration); *cf.* *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (plaintiff was a foreseeable beneficiary of the transaction). This "end and

language of warranty has been applied, it has only been to develop a warranty to use due care.

[I]n the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised his skill according to a certain standard of care, that he has acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the "implied warranty" are the same. The use of the terms "implied warranty" in these circumstances merely introduces further confusion into an area of law where confusion abounds.⁶⁶

Installation, Repair, and Construction. Nearest on the continuum to the professional skills (opinion) cases are the instances of application of that skill to a product in its installation or repair. In *La Rossa v. Scientific Design Co.*,⁶⁷ the Third Circuit, construing New Jersey law, denied recovery based upon implied warranty when the plaintiff's decedent died of a latent cancerous condition. The malignancy was allegedly triggered by dust which the decedent inhaled while loading valadium pellets into a reactor which decedent's employer had hired the defendant, Scientific Design, to install. There was no absolute requirement, express or implied, for safe performance. In addition to supervising the installation and the loading of the reactor, the defendant had made and supplied the pellets. Neither strict liability nor implied warranty was imposed since, as the court pointed out, the pellets were dangerous, but apparently not defective.⁶⁸ More importantly, the court utilized a policy approach to the nature of the defendant's liability, finding that this was a contract to render professional services which did not usually lend itself to the usual factors familiar in the application of strict liability: disparity of bargaining positions, including the necessary dependence upon a manufacturer; difficulty of tracing back to an act of negligence somewhere in the marketing chain; and a public policy of responsibility to consumers applied against mass producers of goods.

aim" of the contract test was one of the factors considered by the California Supreme Court in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958), where a notary negligently drew up a will for the testator. The principle beneficiary recovered the difference between the amount he would have taken under the will and his intestate share when the will failed for improper attestation. Moral blame and deterrence figured into this case-by-case approach to the privity issue since, by his actions, the notary was also guilty of practicing law without a license. See Note, *supra* note 64, at 1223.

66. *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc.*, 168 So. 2d 333, 335 (Fla. Ct. App. 1964). See also *Allied Properties v. John A. Blume & Associates*, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972).

The professional service area is further highlighted by a comparison of two New York cases involving the tort and contract statutes of limitations. In *Carr v. Lipshie*, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1959), *aff'd*, 9 N.Y.2d 983, 218 N.Y.S.2d 62 (1961), an auditing firm failed to discover false entries made by the plaintiff's own bookkeeper. It was held that the action was in tort (a three-year statute of limitations) and not in contract (a six-year statute of limitations) in the absence of an express guarantee of results. No duty attached to defendant's services beyond the duty of performance using due care. The New York Court of Appeals in *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953), where the action was brought in implied warranty for a suit sold by the defendant, which suit had caught fire, held that the longer contract statute of limitations applied.

67. 402 F.2d 937 (3d Cir. 1968); *accord*, *Conway v. Marsh & McLennon, Inc.*, 34 App. Div. 2d 762, 310 N.Y.S.2d 455 (1970).

68. 402 F.2d at 941-42.

It may be argued, however, that the installation contractor, especially one creating some of the equipment installed, is in a better position to be familiar with the particular hazards of his product, than is, for example, the retailer dealing in pre-packaged goods. Additionally, the decedent in *La Rossa* did not have any opportunity to choose his defendant;⁶⁹ the reliance was forced through the decedent's employment with the company contracting with the defendant,⁷⁰ and the decedent was at a disadvantage with respect to the superior knowledge of the product possessed by the defendant.

Significantly, the defendant in *La Rossa* was engaged in a highly technical area and the factual setting involved an element of professionalism. Also, while the defendant's handling of a specific product may be questioned, the product itself was non-defective. Installation of defective materials causing injuries may lead to a liability without fault recovery.⁷¹ Certainly, it would appear that liability is more readily based on a tangible product, and under the normal strict liability rules, a defective product.⁷² A contractor, hired for his skill or expertise, not placing a defective product in the chain of commerce is, at base, perhaps liable only for any negligence of his supervision. This could be proven, if present.

Although the care involved in the installation of a product is a separate consideration from the quality of the product itself, there is an apparently separate area of repair service in which, at least arguably, the actions of a repair agency in placing back into the hands of the consumer a product rendered defective by the repair would be tantamount to the creation of a defective product. It would appear, at least superficially, that the defendant is in the business of repairing products, and should be held to the standard of the original manufacturer in the application of a similar skill to the product. The repairman's skill generates a reliance by the public which is similar to that created by the manufacturer. Likewise, by placing the defective product on the market after repair he should arguably be responsible for injuries caused by the product. Nevertheless, the majority rule would appear contrary to such an analysis.⁷³ Although an action may exist on the breach of the

69. That the injured person is not the buyer or even the ultimate consumer, but a mere bystander, should make no difference in the outcome. See *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). But see RESTATEMENT § 402A, comment *o*.

70. The case may also be examined in the context of improper supervision and workmen's compensation laws. See Note, *supra* note 64, at 1238-44.

71. *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961). In this case, the buyer of a house with a faulty heating system had recovered against the plaintiff in this action, the builder. The defendant was a subcontractor who had laid defective pipe in the concrete floor, which had caused damage. The builder sought to recover against the subcontractor. The transaction did not qualify as a sale under the UNIFORM SALES ACT § 15, because the job and the materials were specially contracted for. However, the California Supreme Court, referring to the *Gagne* case (notes 53-56 *supra* and accompanying text) held that a warranty for workmanlike quality or for the materials existed by analogy. See also Farnsworth, *supra* note 18, at 667, suggesting that analogous reasoning is preferable to a strained attempt to find a sale in many transactions.

72. See RESTATEMENT § 402A; *cf.* *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The *Greenman* test is similar to but not identical with the strict liability test enunciated by the *Restatement*. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

73. See *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833, 840 (Alas. 1967), where the court said "where a person undertakes to render personal serv-

contract to repair or for negligence, an additional action in implied warranty would add nothing, in that the standard would appear to be a function of reasonable care or negligence.⁷⁴ An act of commission in the repair of a product pursuant to the sale and installation has in one case generated a strict liability treatment, but the proximity of the repair and the sale and the identity of the seller and the repair agent may have been determinative.⁷⁵ It would not be unjustified if a repair in the nature of a continuation of the overall sale transaction incurred the higher responsibility of the status of marketer, especially where the actor is the same.

Perhaps more realistically, the approach should be taken that, in the usual case, the repair agent repairs only a part of the product and exercises control as to that product only over his singular function. In contrast, the seller either controls the design, components, and the total construction, or may have indemnity against the one who does exercise such control. In other words, as compared to the repair agent, the seller controls the entire product. By the time the repairer enters the scene the product may be somewhat used or deteriorated. In addition, since the consumer rather than the repairman has chosen the product it follows that the repair agent has no option as to the product he will replace on the market if he chooses to do the requested repair. In all, the repair agent may be less of a target for the application of liability without fault because the reliance on the product replaced into a consumer's hands is lessened by virtue of the tenuous relationship of the actor and the product; consequently, the marketing responsibility will have a lesser foundation in such a repair transaction.

In *Worrell v. Barnes*⁷⁶ the Supreme Court of Nevada held that a contractor hired to remodel an existing house was liable under strict liability and implied warranty for his installation of a water heater and connecting gas lines where a leak in the lines caused a fire.⁷⁷ The court seemed to treat the remodeled section of the house as a product within the strict liability rule or as "goods" within the warranty for fitness for a particular purpose of the

ices he has the duty to perform such services in a workman-like manner." *But see* *Dodd v. Wilson*, [1946] 2 All E.R. 691 (K.B.), where a veterinarian inoculated the plaintiff's cattle with an impure drug. It was held that the plaintiff had an action against the veterinarian for the breach of a warranty, or condition, of fitness. The court continued, that the action arose outside of the English Sale of Goods Act, but where an action was not within the Act, the common law warranties, from which the Act was drawn, applied.

74. *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833, 840 & n.23 (Alas. 1967). The court cited the RESTATEMENT § 404: "One who as an independent contractor negligently makes, rebuilds or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattel." *Id.* at 840 n.22. Yet, the negligent manufacturer could easily be brought under the strict liability of RESTATEMENT § 402A; the court refused to continue the analogy.

75. *Woodrick v. Smith Gas Serv., Inc.*, 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967); *see* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][b][vi] (rev. ed. 1973), in which it is recognized that the strict liability and implied warranty applications may have stemmed from the additional position of the defendant as a retailer of the device. However, the *Woodrick* court interpreted special interrogatories returned by the jury to mean that the product was not itself dangerous, but rather that it was made dangerous by either the installation or the repair.

76. 87 Nev. 204, 484 P.2d 573 (1971).

77. The court did not indicate whether the gas leak was caused by faulty materials (some grounds for severance and a sales analogy) or by faulty workmanship (analogous to the production of a product in place).

Uniform Commercial Code.⁷⁸ Perhaps, the approach of this court was that the contractor simply created and sold the "goods" or product in place.⁷⁹ Certainly, the leading cases seem to include the builders of mass housing developments within the strict liability or implied warranty rule.⁸⁰ Mass construction would seem to be the factor making the construction of dwellings more analogous to the production and sale of chattel. It might seem to be questionable to except the remodeler from the general rule for service contracts and place him into the liability without fault category, unless it is realized that this contractor is in the business of creating a particular product. Is it any less fair to hold the remodeler to his defects than to hold a consumer to a proof of negligence when it is obvious that the house has burned?⁸¹ On the whole, a contract for construction is apparently more of a sale than a mere contract for wages and labors.⁸²

Medical and Related Services and Transfers. *Perlmutter*⁸³ states the general rule of disallowance of strict liability and implied warranty for medical treatments and related services.⁸⁴ Transfusions of impure blood (regarding the transfer of blood from either the hospital or the blood bank), the use of de-

78. *But cf.* UNIFORM COMMERCIAL CODE § 2-105(1), which reads in part: "'Goods' mean all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale"

79. It would seem, however, that unless the court merely considers a particular system installed within a house, and does not continue in other cases to apply the same reasoning to the house itself, the implied warranty is an analogy—although a perfectly valid one—under the Uniform Commercial Code. This is apparent from the argument of the court in *Pollard v. Saxe & Yolles Dev. Co.*, 32 Cal. App. 3d 341, 108 Cal. Rptr. 174, 178 (1973), that UNIFORM COMMERCIAL CODE § 2-607 regarding notice of breach "should not be applied to transactions not involving goods." And, "the sale of immovable improvements on real property" is not the sale of goods.

The warranty approach might avoid a shorter tort statute of limitations under strict liability. The *Pollard* court noted that there was a close relationship between strict liability and implied warranty. "[T]he warranty formulation adds nothing except the commercial relationship between the vendor and the injured. . . . Where that commercial relationship in fact exists, it would seem that the benefit of a contract theory of recovery should not be denied without an impelling reason." 108 Cal. Rptr. at 176. The court of appeals opinion was vacated by the California Supreme Court. *Pollard v. Saxe & Yolles Dev. Co.*, 115 Cal. Rptr. 648, 525 P.2d 88 (1974). Although the supreme court agreed that the common law implied warranties for the sale of new homes, there was also to be a reasonable time in which the buyer must give notice as a counterpart to UNIFORM COMMERCIAL CODE § 2-607(3). The plaintiffs delayed four years.

80. *See Shipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *cf. Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969). *Avner* involved a defective lot on which defendant, a developer, had built. The defendants, soil engineer and developer, were held to have manufactured the lot. A distinction can be drawn with the leading California case of *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954), discussed in notes 53-56 *supra* and accompanying text, because in *Avner* the labor and skill were placed into the lot prior to the sale to the plaintiff, indeed, during the manufacturing of the entire product. By comparison, in *Gagne* the buyer (plaintiff) himself hired the soil engineer to discover the quality of and render an opinion on the product.

81. The nature of the product may be an important factor. A home seems to have a close connection to the person, an aura of necessity and perhaps, a greater likelihood of a more significant personal loss. *Cf. Cox v. Shaffer*, 223 Pa. Super. 432, 302 A.2d 456 (1973) (a silo).

82. *See Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970).

83. *See* notes 32-33 *supra* and accompanying text. Recovery for negligence is, of course, allowed if the negligence exists and can be proven.

84. *See also Magner v. Beth Israel Hosp.*, 120 N.J. Super. 529, 295 A.2d 363 (1973); *Fogal v. Genesee Hosp.*, 41 App. Div. 2d 468, 344 N.Y.S.2d 552 (1973) (recovery may be had on the grounds of lack of informed consent).

fective products in medical treatments, and the daily functions performed by hospitals, have been considered essentially services or have been placed under the heading of professional transactions; thus, such "services" were exempted from strict liability recovery. Two trends away from this simplistic classification are discernable. First, some transactions are regarded as sales, imposing sales liability. Second, courts have begun to look to the reasons for asserting strict liability, without regard to the mechanical tests for sales. The latter policy approach would seem to be the sounder of the two.

Blood Transfusions and Impure Drugs. The blood transfusion cases involve the basic fact situation of impure blood, frequently contaminated by the largely undetectable and unpreventable serum hepatitis virus, transfused into the patient, causing added illness or death. Liability may be sought against either the hospital or the bloodbank. The court in *Perlmutter*, a case involving a hospital's liability, applied the essence or main object test to the transaction, holding it not to be a sale within the Uniform Sales Act; rather, the transaction was a transfer incidental to the treatment of the patient.⁸⁵ More recently, statutes have been passed removing any transfer of blood from implied warranties.⁸⁶ Prior to and in the absence of such statutes, some courts have become more precise in their reasoning for the inclusion or exclusion of blood transfers under the liability without fault doctrine. In contrast, a New Jersey court in *Brody v. Overlook Hospital*,⁸⁷ held blood to be a "good," subject to the implied warranties of the Uniform Commercial Code and to the rule of strict liability under the *Restatement*, section 402A. The court reasoned that the application of strict liability against the hospital would encourage hospitals generally to improve the blood collection process in the blood banks and to step up research toward tests to eliminate the impurities. Moreover, the hospital, as opposed to the patient, was in the better position to bear the cost of injury.⁸⁸ In reversing the lower court,⁸⁹ the appellate division relied on the distinction between a commercial and a medical-professional activity, and upon the "unavoidably unsafe product" exception to the *Restatement*.⁹⁰ The court made it clear, however, that the decision was not

85. The dissent pointed out that *Perlmutter* did not involve an act by a member of the staff which would be specifically a service; rather, it was a sale "for a specific consideration [of] blood containing 'injurious substances, agents and impurities.'" *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 110, 123 N.E.2d 792, 797 (1954).

86. See, e.g., CAL. HEALTH & SAFETY CODE § 1606 (West 1970); TENN. CODE ANN. § 47-2-316(5) (Supp. 1973). See also *McDaniel v. Baptist Memorial Hosp.*, 469 F.2d 230 (6th Cir. 1972); *Shepard v. Alexian Bros. Hosp., Inc.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973). But see *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973) (case law prior to FLA. STAT. ANN. § 672.2-316(5) (Supp. 1974)); *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (case law prior to ILL. REV. STAT. tit. 91, §§ 181-83 (Supp. 1974)). See also TEX. BUS. & COMM. CODE ANN. art. 2.316(e) (1968).

In a specific response to the possible application of one of the doctrines of liability without fault, the Texas Legislature exempted hospitals, doctors and the like from liability, except for negligence, in the transfusion, transplantation, and transfer of blood, organs, and tissues. Blood banks receive this preferred status unless they make cash payments to the donors. TEX. REV. CIV. STAT. ANN. art. 4590-3 (Supp. 1974).

87. 121 N.J. Super. 299, 296 A.2d 668 (1972).

88. 296 A.2d at 672-73.

89. *Brody v. Overlook Hosp.*, 127 N.J. Super. 331, 317 A.2d 392 (1974).

90. 317 A.2d at 395-97. See RESTATEMENT § 402A, comment k.

In arguing for the unavoidably unsafe category, the court looked to the facts that, at the time of the trial, there were no known tests to detect the virus; that there was a

to turn on a characterization of blood transfers as a sale or service.⁹¹ Furthermore, the court took the view that the application of strict liability is better suited to the situation involving the mass-produced product which is placed in the stream of commerce and promoted to the public through commercial advertising,⁹² than to the limited and necessitous professional relationship that existed in *Brody*.

Even though reliance, marketing and the possible redistribution basis may be present, other courts have hesitated to apply liability without fault because "a hospital is not engaged in the business of distributing blood to the public and does not put the blood as a product on the market in order to profit therefrom."⁹³ The profit principle has been stressed as a part and parcel of the risk distribution and ultimate responsibility of the profit maker in the application of strict liability. Upon this basis it has been concluded that a hospital is not in the business for the purpose of making a profit, but rather, of helping the sick; accordingly, the application of strict liability is improper.⁹⁴

In contrast, the social utility argument has sometimes failed with respect to commercial blood banks because they do engage in the business of placing a commodity on the market for a profit. Perhaps, the profit or non-profit nature of the business should be controlling.⁹⁵ In *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*⁹⁶ the Minnesota Supreme Court applied the logic of *Perlmutter* while appearing to regard two other factors with equal importance. First, since serum hepatitis was an inherent and, by all scientific means, unpreventable risk, the situation was a "matter of medical judgment to determine whether in a particular case the benefits outweigh the risk."⁹⁷ Therefore, blood must be available when a competent physician deems its application necessary.⁹⁸ Second, the court, in denying recovery against the

very low incidence of the disease in blood; and that the medical necessity of use made the blood not unreasonably dangerous. 317 A.2d at 397.

From another viewpoint, blood contaminated with the virus might not be considered to fit the category of unavoidably unsafe products, which category is exempted from the strict liability rule of the *Restatement*. A primary example of the unavoidably unsafe product is the Pasteur treatment for rabies. This treatment has *inherent* dangers which cannot be avoided. The Florida Supreme Court has so interpreted comment *k*, holding impure blood to be defective even if the impurity is undetectable. *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973); see *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115, 118 (Fla. 1967) (special concurring opinion of Roberts, J.—cited for support in *Rostocki*); *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963). *But see Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965). See also Comment, *Serum Hepatitis Through Blood Transfusions: A Wrong without a Remedy?*, 24 Sw. L.J. 305, 322-24 (1970).

91. 317 A.2d at 394. *Accord*, *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970). "It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision." 267 A.2d at 870.

92. 317 A.2d at 394.

93. *Shepard v. Alexian Bros. Hosp., Inc.*, 109 Cal. Rptr. 132, 135 (1973) (disallowing recovery under either strict liability or implied warranty) (emphasis by the court).

94. *Schuchman v. Johns Hopkins Hosp.*, 9 UCC Rep. Serv. 637, 647 (Super. Ct., Balt. Co., Md., 1971).

95. *But see Note, supra* note 18, at 189. "It is just as easy for a non-profit blood bank to insure against the risk as it is for a profit-making organization, and the fact that the injury is unpreventable but foreseeable by the blood bank should be all the more reason to require it to insure." *Id.*

96. 270 Minn. 151, 132 N.W.2d 805 (1965).

97. 132 N.W.2d at 809.

98. See Comment, *supra* note 90, at 320-21. The author discusses the liability of a physician for improper prescription, a liability based upon negligence.

blood bank, seemed to take account of the fact that *this* blood bank was a non-profit business.⁹⁹

Indeed, one New York court appeared to have distinguished *Balkowitsch* as applicable to non-commercial rather than commercial blood banks;¹⁰⁰ in denying summary judgment for the blood bank the court regarded the blood bank as a merchant dealing in goods sold for a price and, thus, raising the possibility of an implied warranty under the Uniform Commercial Code. If the blood bank's liability may be construed more broadly than a hospital's, based on the closer analogy of a blood bank to a seller or manufacturer, then at the least, the arguments applicable to a hospital in favor of the application of liability without fault are applicable to a blood bank.¹⁰¹

Interesting dicta of a federal court interpreting and predicting Vermont law would seem to go one step farther in the area of products supplied in the course of hospital treatments, indicating that defective drugs supplied incidentally to the overall treatment would carry an implied warranty of fitness. By the separation of the transactions, the general rule could be maintained that negligence or intentional misconduct is the proper grounds where the incorrect (but non-defective) drug is administered by the hospital staff.¹⁰²

Defective Products. The courts have been less willing to apply strict liability against professional medical services where defective products other than drugs or blood have been employed. These cases often involve surgical pins and hypodermic needles and the like which have broken while in the patient.¹⁰³ Tenuous distinctions can be drawn between blood sales and products such as needles which are used by the physician as his tools, and not sold. The validity of the transaction-type distinction invites questioning.

99. "We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose." 132 N.W.2d at 811. "But we cannot concede that defendant, which is a nonprofit corporation, should be treated differently than a hospital or that it should be characterized as a commercial business which offers its products for sale in the market place in competition with others for the sole motive of making a profit." *Id.* at 810. See generally Note, *supra* note 18.

100. *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct., Queens Co., 1969). This court, bound by the *Perlmutter* decision, distinguished the liability of a hospital which was exempted from implied warranty, from that of the commercial blood bank, not necessarily so exempted according to this court.

101. See, e.g., *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115, 119 (Fla. 1967) (special concurring opinion of Roberts, J.).

102. *Mauran v. Mary Fletcher Hosp.*, 318 F. Supp. 297 (D. Vt. 1970). *Contra*, *Shivers v. Good Shepherd Hosp., Inc.*, 427 S.W.2d 104 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.* (a contaminated drug incurred neither strict liability nor implied warranty).

A federal district court in Wisconsin felt that strict liability might be applied on a case-by-case basis to mechanical and administrative services of a hospital since such services were not of the same inexact nature as the skills of professional physicians and medical science, the patient had little control over the routine services of the hospital, and the hospital was in the better position to spread the loss. *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973). *But see* *Baptista v. Saint Barnabas Medical Center*, 109 N.J. Super. 217, 262 A.2d 902, *aff'd*, 57 N.J. 167, 270 A.2d 409 (1970); *Goelz v J.K. & Susie L. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App.—Dallas 1961), *error ref. n.r.e.* (employee's negligence).

103. See, e.g., *Silverhart v. Mount Zion Hosp.*, 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971) (policy of the RESTATEMENT § 402A not forwarded by application to a surgical needle which broke off in the plaintiff's hip); *Dorfman v. Austenal, Inc.*, 3 UCC Rep. Serv. 856 (Sup. Ct., Bronx Co., N.Y., 1966) (surgical pin). *But cf.* *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967). See also *Cutler v. General Electric Co.*, 4 UCC Rep. Serv. 300 (Sup. Ct., Kings Co., N.Y., 1967) (pacemaker).

Obviously a surgical pin inserted in the patient for which a charge is made resembles a sales transaction; the liability, however, seems to rest with the manufacturer.¹⁰⁴ The general tendency is to deny the application of liability without fault for the use or the transfer of defective instruments by the medical professional in the course of treatment.

Thus, when a dentist's hypodermic needle broke off in the plaintiff's jaw, the lower court in *Magrine v. Krasnica*¹⁰⁵ refused to extend the rule of strict liability to the dentist, partially because the dentist himself and not the patient was more similar to the user or consumer of the product. The court did in fact characterize the transaction as the using of a tool upon, and not the supplying of a product to, the patient.¹⁰⁶ Perhaps a more solid logic was formulated by the court in discussing the strict liability implication derived from the blood transfusion cases. The court felt that in such cases the controlling factor exempting the hospitals from strict liability would not be the sales-service distinction; rather, it would be simply that the assurance of the purity of the blood was impossible.¹⁰⁷ Even if a true seller in the market place might be burdened with this risk marketing responsibility, the greater need for the services and continued existence of a hospital, or doctor, as contrasted with the utility of the proverbial widget maker, would be a countervailing policy consideration. Also, because a large corporation, in contradistinction to a single dentist, might spread its risks over thousands of customers, the lone dentist has a much narrower risk distribution basis for the application of a strict liability rule.¹⁰⁸ The court in *Magrine* felt that it would be inconsistent to hold that for his *skill* a doctor or dentist would be liable only for "negligent deviation from the standards of his profession," but that for employing a *tool*, not obviously defective, the dentist would be liable without such negligence.¹⁰⁹

In a thorough dissent to the per curiam affirmance of *Magrine* at the intermediate appellate level,¹¹⁰ it was noted that a patient desiring to recover against the manufacturer for such an injury would be placed at a disadvantage by having to demonstrate that the care and use of the instrument while under the control of the dentist *was not* the proximate cause of the injury, and conversely, that a defect existing at the time the product left the manufacturer *was* the cause of the injury. In addition, the appellate dissent pointed out that the occasional seller and the non-seller were exempted from strict liability not so much because the transaction backed the nature of a tech-

104. See *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960).

While the plaintiff may be able to recover against the manufacturer of the pin or the rod, it may be left to the jury to decide whether the pin was actually defective, or the physician used, perhaps, too small a pin, or the plaintiff put too great a stress on the pin. See *McKasson v. Zimmer Mfg. Co.*, 12 Ill. App. 3d 429, 299 N.E.2d 38 (1973).

105. 94 N.J. Super. 228, 227 A.2d 539 (L. Div. 1967), *aff'd per curiam sub nom. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

106. 227 A.2d at 543-44.

107. *Id.* at 544-45.

108. *Id.* at 545-46. Could he not insure? But, *ought* he be so obliged?

109. *Id.* at 546.

110. 100 N.J. Super. 223, 241 A.2d 637, 638 (App. Div. 1968) (dissenting opinion of Bottler, J.).

nical "sale," but rather, because the "buyer" or the user had no reason to rely on the "seller."¹¹¹ Yet, would one not rely on a physician or dentist more than on the seller at the modern supermarket?¹¹²

A necessary concomitant of the application of strict liability concepts to the medical area is an increase in the cost of medical services. Accordingly, two questions would appear to be decisive: first, can the doctor, hospital, or blood bank pass along the costs, that is redistribute? Second, does the acceptance of the redistribution theory by society at large render the increased costs of such services beyond the reach of a needful minority? It was the necessity for medical treatment that in the first instance distinguished blood and medical tools from goods, countervailing the policy of protection of the consumer from the defective product by reallocation of the risk to the marketer.

Commercial Services. If the defendant is not engaged in a profession but is, rather, engaged in a more commercial service such as the operation of a beauty shop, the courts have recently been more apt to hold that proof of negligence is not required.¹¹³ The leading case is *Newmark v. Gimbel's, Inc.*,¹¹⁴ in which the plaintiff received a permanent wave from one of defendant's operators. The solution used caused this particular customer's hair to fall out and her scalp to blister. The plaintiff had relied on the skills of the beautician in choosing the solution to be used; the solution, a name brand product, was applied as part of the commercial skill; hence, the solution entered into the stream of commerce as surely as if the plaintiff had purchased it from a store's shelf. An argument of no-technical-sale should not apply.

Beyond this simple sales-service dichotomy, the element of professionalism distinguishes, for example, the dentist or doctor from the non-professional because the essence of the professional's function should be regarded as the furnishing of opinions and services.¹¹⁵ The court continued the contrast of professional and non-professional services emphasizing social utility: "The nature of the [medical-professional] services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules for strict liability in tort."¹¹⁶ For commercial services, however, not involving such countervailing policy arguments, strict liability or implied warranty under the Uni-

111. 241 A.2d at 642 n.9.

112. It does not offend our sense of justice to place the loss on the one responsible for the instrument. The law has done this very thing throughout its history. Justice requires only that we apply the rule in appropriate cases. A retailer who sells a can of beans containing a latent defect is no more culpable than a dentist who uses an instrument with a latent defect. The patient probably places more reliance upon the dentist than he does on the retailer. . . . It is not unjust to hold a dentist to the same responsibility.

Id. at 644.

113. See *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965). *But see* *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. Fairfax Co. 1963) (stating an older rule which denied liability without fault in beauty shop—service—transactions).

114. 54 N.J. 585, 258 A.2d 697 (1969).

115. 258 A.2d at 703.

116. *Id.*

form Commercial Code is applicable to the furnisher of such services who takes a product from the chain of commerce and applies it to a patron. Although this result should be the case with or without a technical sale of the product, such a provider of services can be said to occupy the position of a retailer.¹¹⁷ The present state of the law seems to lend itself to rather anomalous results. For example, if a scalp conditioner were applied by a dermatologist as a treatment, absent negligence, his *patient* would have no cause of action against him. But, if a skilled beautician, with long experience, were to apply the same solution to his *client*, he would be strictly liable for an injury proximately caused by such application (although the beautician might have an indemnity action against the manufacturer).¹¹⁸ To say that the doctor is charged only with the rendering of an opinion, which carries a public awareness of its limitations, may be an insufficient answer. Assuming a defective product, it is the product that causes the injury and not the opinion or skill of the individual. The public access to the service decreases as the costs of the service increase. This can be said for any service or product, where the redistributed costs under the liability without fault theory are reflected in the price of the product. But, as the *Newmark* court pointed out, the commercial transactions do not occupy the same degree of necessity as do the medical and some related professional transactions.

If this approach is applied to blood banks,¹¹⁹ the justification for strict liability or implied warranty treatment, even with regard to commercial banks, would seem to disappear. Yet, in a sense the blood bank is a manufacturer or producer of a product, and especially the banks operating for a profit are in the business of that particular product. One rationalization, although it may be no more than that, is that some courts feel that it is possible to use the increased potentiality of liability as an impetus to encourage a better blood bank product. In comparison, the sole physician, dealing with a pre-packaged tool is as surprised as his patient at resultant injuries from hidden defects, and so a greater liability potential could not serve to increase his care.¹²⁰ The additional factor of a larger redistribution basis in a marketing or manufacturing concern as compared to the sole practitioner needs also to be stressed. Clearly, no single factor distinguishes the professional and commercial cases where the defendants' skills and judgments are applied to the product in the immediate transfer to the consumer.

Bailments and Other Quasi-Sales. Within the commercial transaction category, and perhaps more nearly a sale than the other hybrids, are the bailments and similar "quasi-sales" such as licensing. In the bailment situation, as will be observed, the chattel bailed is placed into the stream of commerce

117. *Id.* at 704.

118. Although the doctor's patient might have a cause against the manufacturer, proof problems such as the continued purity of the product and the method of application of the product might arise. See note 104 *supra*. See also *McKasson v. Zimmer Mfg. Co.*, 12 Ill. App. 3d 429, 299 N.E.2d 38 (1973).

119. See notes 95-101 *supra* and accompanying text.

120. *Cf. Brody v. Overlook Hosp.*, 121 N.J. Super. 299, 296 A.2d 668, 674 (L. Div. 1972), *rev'd*, 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974).

and into the consumer's possession just as certainly as if there had been a technical sale.¹²¹

In *Cintrone v. Hertz Truck Leasing & Rental Service*¹²² the New Jersey Supreme Court held that a bailor for hire (lessor) who transferred the possession of a truck in exchange for the payment of rental was liable for subsequent injuries resulting from a defect in the braking system. The liability was in implied warranty and strict liability, analogous, respectively, to the Uniform Commercial Code and the *Restatement*, section 402A.¹²³ In *Cintrone*, when the plaintiff's employer rented the truck from Hertz and placed plaintiff in the passenger's seat, the rental agreement contemplated continuing and comprehensive servicing and maintenance. The bailee, its employee, and apparently, the public at large, all bearing the initial risk of foreseeable injury through a breach of the bailor's duty to keep his product fit for operation, may rely upon a responsibility assumed by the bailor for hire when he placed his product in the chain of commerce.¹²⁴ Interestingly, the court noted that the warranty is "not dependent upon existence of Hertz' additional undertaking to service and maintain the trucks while they were leased. [However,] [t]hat undertaking serves particularly to instill reliance in [plaintiff's employer] upon mechanical operability of the trucks throughout the rental period."¹²⁵ The warranty in *Cintrone* arose from the rental agreement itself, and not from the service arrangement. Yet, the continuing service features of the contract loomed large to induce and justify the reliance upon the defendant and his position in the commercial chain. As the court noted, this reliance, in turn, is elemental in the creation of the seller's marketing responsibility.¹²⁶

In *Cintrone* it would appear that the type of transaction did not control as much as the reality of the situation in terms of induced reliance and the marketing responsibility generated by Hertz' advertising messages, and, of course, by the marketing of its product. This approach is borne out by other courts which disregarded the transactions' forms, looking rather to responsibility for placing the product on the market, and to the reliance by the purchasing public. For example, a bailment need not be for hire, but need only involve the loan of equipment for the purposes of acquainting the plaintiff or his employer with a newer model of a particular machine in the bailor's hopes of generating future sales.¹²⁷ Similarly, a bailment of roller skates at a state-owned roller-rink which charged admission has given rise to an implied

121. See Phipps, *supra* note 52, at 278.

122. 45 N.J. 434, 212 A.2d 769 (1965); *accord*, *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); *McClafin v. Bayshore Equip. Rental Co.*, 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969) (commercial bailment of a defective ladder); *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972).

123. By analogous reasoning, the strictures of the no-technical-sale argument can be avoided.

124. *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769, 777-78, 781 (1965).

125. 212 A.2d at 778.

126. *Id.* at 776 n.1.

127. *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

warranty standard without the necessity of proof of negligence;¹²⁸ the court here termed it a "bailor-bailee relationship for mutual benefit."¹²⁹

Differing from the bailment is the license, which grants permission to do a particular thing or to exercise a certain privilege.¹³⁰ When a customer entered a self-service launderette and was injured when a washing machine malfunctioned, it was held that although the customer was a licensee and *not* a bailee,¹³¹ the licensor was in the same position as a bailor and was responsible for a defective product placed by him before the public.¹³² The rules of strict liability applied to such a responsibility. Courts are in conflict, and another jurisdiction has applied only the standard of the exercise of due care where injuries were received in a situation involving "an abstract right to occupy" a space on defendant's malfunctioning ferris wheel. The right was, in that case, distinguished from a sale or transfer of possession.¹³³

B. *An Analysis*

As a preliminary summary, one may readily conclude that courts appear willing to allow recovery under liability without fault for transfers of defective chattels, with a marked tendency to place homes within the same general rule. In contrast, the purchaser of an opinion relies merely on the fact that he bargained for no more than the "seller's" best efforts and judgment. From this, a professional dealing in merchandise need not be excluded from strict liability or implied warranty merely because of his professional status; but, especially as in the case of doctors and other medical professionals of a hospital staff, the public need for access to medical treatment outweighs the societal commitment to protect the individual through reallocation and redistribution of the risk. The benchmarks upon which decisions should be premised are reliance, marketing responsibility, and ability to reallocate the burden without colliding with the public interest. The courts, in their search for a *ratio decidendi*, should look beyond mere word categorizations such as "commercial" or "professional."

In *Barbee v. Rogers*¹³⁴ the Texas Supreme Court refused to apply a liability without fault doctrine in the prescription and sale of contact lenses, hold-

128. *Covello v. State*, 17 Misc. 2d 637, 187 N.Y.S.2d 396, 402-03 (Ct. Cl. 1959). Such warranties have sometimes been limited to the standard of reasonable care. See, e.g., 2 L. FRUMER & M. FRIEDMAN, *supra* note 75, at § 19.02[2]; W. PROSSER, *supra* note 1, § 95, at 638. After *Newmark* and *Cintrone*, there would appear to be little room to argue for a different treatment of bailments for hire or "mutual benefit" than of sales. Cf. Farnsworth, *supra* note 18, at 655-60.

129. 187 N.Y.S.2d at 402. A bailment for mutual benefit may have a broader meaning than a bailment for hire. *Delaney v. Towmotor Corp.*, 339 F.2d 4, 6 n.1 (2d Cir. 1964).

130. *Garcia v. Halsett*, 3 Cal. App. 3d 319, 324, 82 Cal. Rptr. 420, 422 (1970).

131. *Id.*

132. *Id.* at 324-26, 82 Cal. Rptr. at 423. "The precise legal relationship between the parties has not played a particularly significant role in the cases imposing strict liability." *Id.* at 325, 82 Cal. Rptr. at 423.

133. *Shaw v. Fairyland at Harvey's, Inc.*, 26 App. Div. 2d 576, 271 N.Y.S.2d 70 (1966); cf. *Wagner v. Coronet Hotel*, 10 Ariz. App. 296, 458 P.2d 390 (1969), in which the manufacturer of a rubber bathmat, which slipped while plaintiff was standing on it in the co-defendant's hotel, was liable, but the innkeeper placing the mat in the tub and renting the room was held not to be a seller under the RESTATEMENT § 402A. The invitor-invitee relationship that did exist implied only a duty of reasonable care.

134. 425 S.W.2d 342 (Tex. 1968).

ing that the optometry firm was engaged in a professional service apparently requiring care, but not a skill going to the production of a defect-free product. Yet, in truth, it was a product that was delivered to the plaintiff. In *Barbee* plaintiff purchased his contact lenses from the defendants, a partnership, after being examined by one of the 125 licensed optometrists employed in one of the defendants' eighty-four state-wide offices. The lenses were manufactured by Texas State Optical, Inc.,¹³⁵ a corporation established to manufacture the lenses for the partnership after the lenses were prescribed for the partnership's clients.

The contact lenses [were] sold for the same price regardless of the difficulty or the simplicity of the eye problems and the number of subsequent examinations which [might] be required. The charge [was] made for the product and not for the time of the optometrist. [Defendants warranted] to those responding to their [newspaper, radio, and television] advertisements of contact lenses that they [would] be properly cared for and fitted¹³⁶

Although the lenses prescribed, sold, and fitted by the partnership were found to be not of the proper curvature and as a result had scratched the plaintiff's cornea, the court refused to apply strict liability. In finding the relationship to be in essence a professional service, the court based its holding partially on a statutory distinction between a licensed optometrist and a "mere merchant" who sells prepared spectacles without fitting or prescription.¹³⁷ The court, in addition, seemed to distinguish a defective product to which the *Restatement*, section 402A¹³⁸ would apply, from a product not in itself defective, yet specifically made for an individual customer, and which, when applied in the condition prescribed and sold, would injure that customer.¹³⁹

135. A take-nothing judgment in favor of the corporation in district court was not appealed. The court of civil appeals found for the partnership, reversing the trial court. The jury findings in the district court were confusing, however; the partnership was apparently found to have breached an implied warranty, such breach being the proximate cause of the injury. *Texas State Optical, Inc. v. Barbee*, 417 S.W.2d 750 (Tex. Civ. App.—Beaumont 1967).

136. *Barbee v. Rogers*, 425 S.W.2d 342, 344 (Tex. 1968).

137. *Id.* at 345. The court referred to TEX. REV. CIV. STAT. ANN. arts. 4552, 4565d, e, 4566 (1960), which define optometry as a professional calling to be distinguished from a mere merchant. These statutes have been recodified as *id.* arts. 4552-1.01 to -6.04 (1974). Note that these articles are under title 71 regarding public health and including the requirements for nurses, chiropractors, dentists, and those who sell hearing aids. This is *not* a sales statute. *Id.* art. 4552-5.09 prohibits an optometrist from using misleading advertising.

138. Texas adopted RESTATEMENT § 402A in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967), which case did not involve a technical sale; rather, the defective product was a free sample distributed to induce future sales. Yet, in *Barbee* the same court refused to extend strict liability because the lenses "were not a finished product offered to the general public in regular channels of trade." *Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968). See Hill, *How Strict is Strict?*, 32 TEX. B.J. 759, 767 (1969). But cf. Keeton, *Torts, Annual Survey of Texas Law*, 23 SW. L.J. 1, 8-9 (1969).

139. The court of appeals decision, *Texas State Optical, Inc. v. Barbee*, 417 S.W.2d 750 (Tex. Civ. App.—Beaumont 1967), did not distinguish between the partnership and the corporation, the former fitting, prescribing and selling, the latter manufacturing from the prescription. The defect, if it existed, was in the service (by the partnership) and not in the technique or the materials of the manufacturing. The dissent argued that all elements for implied warranty were present: vendor's knowledge of the proposed use, the vendee's reliance on the vendor's superior skill, the vendor's position as both the manufacturer and seller, and the privity of contract. "The need for skill and judgment

This distinction was linked with the professional nature of the partnership's operation and the concomitant responsibility to exercise merely the standard of care of the profession. In *Barbee* the best argument must be that of professional standing; yet, applying the essence test and considering the one price, mass advertising approach of the company, one strains to approximate the policy concerns motivating the New York Court of Appeals in *Perlmutter* and the New Jersey court in *Magrine*.¹⁴⁰

In a comparison with the hair-wave and beauty shop cases, one would think the equities at least as strong in the plaintiff's favor in *Barbee*. Consider *Newmark*, where the treatment was defective for that particular plaintiff, and the service agent's "skill" contributed to the injury through the selection of the product. The beauty shop operator distributed the product to the plaintiff, the customer. In the same way, the optometrist in *Barbee* not only distributed but manufactured the lenses and was totally responsible for the product. Another consideration is that the skill applied in *Barbee* was perhaps more mechanical than judgmental.¹⁴¹ Above all, members of the legal or medical profession do not advertise in the commercial fashion of the defendants in *Barbee*. A defendant setting out to represent himself as a mass seller in a highly desirable product area, using every advertising "come-on," should be treated as such when he fails to deliver the quality product he proclaims and thereby causes physical injury to the customer.

IV. CONCLUSION

Unless the useful tools of strict liability and implied warranty are extended beyond the traditional sales transaction, the plaintiff must account for a product after it has left the manufacturer's control, or he must trace down a distant seller or supplier, bypassing, of necessity, the immediate parties who applied the defective product.¹⁴² Equally affected is the customer who relies on specially designed products, yet is excluded by the professional status of the designer from even the warranty of fitness for a particular purpose, and from strict liability recovery. But, reasoning by analogy is not a word game in which the plaintiff attempts to show that his defendant acted similarly to an actor held liable under a parallel set of rules. Rather, strict liability (in-

on the part of the vendor is an element tending to create rather than negate the existence of an implied warranty." *Id.* at 752. The essence test and the commercial versus professional status issue were apparently disregarded with the emphasis placed, perhaps, on an analogy to the UNIFORM COMMERCIAL CODE § 2-315, warranty of fitness for a particular purpose. See Keeton, *supra* note 138, at 7-8.

140. See Comment, *supra* note 64, at 636, suggesting the mechanical or routine operations of the professional be distinguished from his judgment *based on* knowledge. Thus, the doctor does not represent himself to be able to cure a patient's ills. Perhaps, however, "when the service performed is in connection with the making of a product to fit the needs of a particular individual," the professional's operation becomes less of a prognosticating service and more of a manufacturing trade. See Keeton, *supra* note 138, at 8. To be sure, Professor Keeton did not unqualifiedly support application of strict liability to the *Barbee* situation; yet, he recognized that justified reliance followed by frustrated expectations, the potential harm in the product, and the capacity of the defendants-suppliers to redistribute the losses were all present for potential application of liability without fault. *Id.* at 8-9.

141. See Comment, *supra* note 64, at 633-45.

142. See generally Farnsworth, *supra* note 18.

cluding implied warranty) is a policy decision with given and established criteria; it does nothing to further the general policies of strict liability to apply such liability to whomever is closest in space and time to the plaintiff.¹⁴³

In his landmark concurring opinion in *Escola v. Coca Cola Bottling Co.*¹⁴⁴ Justice Traynor outlined several considerations for the use of the strict liability doctrine. The defendant should be in the chain placing the product on the market or into use. This position within the chain attaches a responsibility to make the product safe. The responsibility may be discharged by guarding against known hazards of the product, by anticipation of future risks of use, and by insuring against all risks of use incurred by consumers in all but misuse of the product. The costs of such insurance or, in the alternative, the costs borne by the seller in settling with an injured consumer can be passed along to the public at large through the price of the article sold. Inherent in these principles must be the additional factor of reliance by the consuming public on the product (perhaps, merely by its presence in the marketplace) and, therefore, on the seller. This reliance factor would, of course, lend itself to the creation of the initial responsibility.¹⁴⁵

To effect either a control over the product (a deterrent theory) or a position to insure oneself against and redistribute the risk of loss among the general public (risk redistribution theory),¹⁴⁶ the defendant must usually be in the business of dealing with the supply, distribution, or sale of the product. This is important because he must be able to distribute the costs to the public by simply raising the price of the particular product.

Given these criteria, if an individual is in the business of giving his studied opinion about an unknown element, in the absence of an express warranty, the purchaser of this opinion should not be allowed to recover upon the basis of implied warranty or strict liability.¹⁴⁷ However, implied warranty should apply when an opinion or expert skill is a component part of a product marketed and used by the ultimate consumer. The purchase price is paid for the final product rather than for the opinion or skill of the professional which was utilized in its preparation.¹⁴⁸ However, when the product is applied in a medical treatment situation, substantial policy considerations must be reckoned with. Even where the product itself is defective and is applied to the plaintiff in the course of a treatment, the obvious reliance on the professional and his place in the "stream of commerce" must be weighed against

143. See *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539, 547 (1967).

144. 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (concurring opinion).

145. Reliance is not an element of proof for the warranties of merchantable quality. Prosser, *supra* note 14, at 149; cf. UNIFORM COMMERCIAL CODE § 2-315 (fitness for a particular purpose, requiring reliance). See also J. WHITE & R. SUMMERS, *supra* note 17, § 9-9, at 297. Rather, the concept of reliance for implied warranty (of merchantability) and strict liability is part of the policy basis for establishing the strict liability doctrine in the first place. See RESTATEMENT § 402A, comment f.

146. The redistribution theory is probably the better, or at least the more important, of the two. See, e.g., Prosser, *supra* note 25, at 1120; Note, *supra* note 18, at 188. See generally Pound, *supra* note 2.

147. See, e.g., *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954).

148. See *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969) (soil engineer and developer held to manufacture lot); Keeton, *supra* note 138, at 9; Phipps, *supra* note 52, at 276-77.

the overall detriment to the public in increased medical costs, resulting from liability without fault.¹⁴⁹ Should large, commercial hospitals enjoy the same benefits? Or commercial blood banks? The plaintiff in *Magrine* who was injured by the defective needle had some chance of reaching the manufacturer; yet, who can the infected hospital patient reach when the blood bank itself is immune from liability without fault? Such a patient is totally dependent on the supplier, the seller; the reliance is forced and only the supplier can redistribute the costs. Certainly, the liability without fault approach should apply to a supplier of professional services who conducts himself as a common seller by bombarding the public with his commercial message, and who does everything he can to induce complete reliance in his skills. This should be so especially where the very skill advertised makes the client (consumer) and the product incompatible.

Assuming that, with exceptions, the majority of courts are accepting the insurance or redistribution idea¹⁵⁰—making society as a whole bear the costs of injuries of each when the injured party is not himself the cause of his woe—the law may go farther and hunt out, on a case-by-case basis,¹⁵¹ this “involuntary Good Samaritan”¹⁵² who will be first in line to shoulder the costs. In each case, the courts should be careful that word-game analogies do not create a greater burden than the one they intended to alleviate. The policies to be balanced would seem to be justified reliance, marketing responsibility, and the ability to readjust the burden so acquired. An additional element, in the proper case, is the countervailing need of the public to maintain general economic access to the service or product, which access might be interrupted by the imposition of liability without fault.

149. Cf. Note, *supra* note 47, at 125-26.

In *Carmichael v. Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971), a doctor administering a pure drug that proved to be harmful to his patient was held not to be liable without fault. It was held that he was not in the business of selling drugs, but merely for his skill and opinions. The same rule apparently applied to a hospital that administered a contaminated drug. See *Shivers v. Good Shepherd Hosp., Inc.*, 427 S.W.2d 104 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.*

150. Pound, *supra* note 2, at 8.

151. See *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973). Certainly, cases may be grouped by their facts with a uniform result, but when the actors change, courts should be aware that the overall policies for the imposition of strict liability may have also changed in weight and alignment.

152. Pound, *supra* note 2, at 11-12. For a kinder view, from 10 years after, see Pound *supra* note 35, at 185: “Must not for our principle be one of repair of injuries incurred rather than inflicted?”